Case No. 83379

IN THE SUPREME COURT OF NEVADA

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

Petitioner,

vs.

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 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.

REAL PARTY IN INTEREST'S APPENDIX
VOLUME 1
PAGES 1-174

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Ian C. Estrada (SBN 12575)
Landon D. Littlefield (SBN 15268)
RICHARD HARRIS LAW FIRM, LLP
801 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Real Parties in Interest, 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

CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

CERTIFICATE OF SERVICE

I certify that on November 17, 2021, I submitted the foregoing REAL PARTY IN INTEREST'S APPENDIX for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Philip Goodhart, Esq.
Meghan M. Goodwin, Esq.
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Atlanta, GA 30305

Attorneys for Real Party in Interest, Robert Ansara

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Crystal Eller
DISTRICT COURT JUDGE – DEPT. 19
200 Lewis Avenue, Las Vegas, Nevada 89155
Respondent

NOTE - DEFENDANTS HOMECLICK, LLC; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, Individually and as BUDDS PLUMBING, have previously been dismissed from this lawsuit, but the caption has not been amended/revised to reflect this. Therefore, there has been no service on these parties.

/s/ Catherine Barnhill
An Employee of Richard Harris Law Firm

REAL PARTY IN INTEREST'S APPENDIX TAB "1"

DISTRICT COURT CIVIL COVER SHEET

A-16-731244-C

I

County, Nevada

Case No. _____
(Assigned by Clerk's Office)

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

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased	FIRST STREET FOR BOOMERS & BEYOND, INC.
MICHAEL SMITH individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased;	AITHR DEALER, INC.; HALE BENTON, HOMECLICK, LLC.
DEBORAH TAMANTINI individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased;	JACUZZI BRANDS LLC; BESTWAY BUILDING & REMODELING, INC.;
	WILLIAM BUDD, BUDDS PLUMBING
Attorney (name/address/phone):	Attorney (name/address/phone):
BENJAMIN P. CLOWARD, ESQ.	
CLOWARD HICKS & BRASIER, PLLC	
721 South 6th Street Las Vegas, NV 89101	
Telephone: (702) 628-9888	

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

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☒ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	☐ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☐ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

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

2/12/16
Date

Signature of initiating party or representative

See other side for family-related case filings.

Nevada AOC - Research Statistics Unit
Pursuant to NRS 3.275

Form PA 201
Rev 3.1

COMP
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Bcloward@chblawyers.com
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;

Plaintiffs,

vs.

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

Defendants.

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

COMPLAINT

COME NOW, Plaintiffs 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 by through their attorneys BENJAMIN P. CLOWARD, ESQ. and for their causes of action against all Defendant's, and each of them, alleges as follows:

I.

PARTIES AND JURISDICTION

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

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

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

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

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

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

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

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

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

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

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

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

II.

GENERAL FACTUAL ALLEGATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FIRST CAUSE OF ACTION
Negligence as to All Defendants

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

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

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

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

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

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

a. The negligent and improper design, testing, manufacture, installation assembly, instructions for use and warnings for the Jacuzzi walk-in tub; and

b. The failure to provide adequate, accurate, and effective warnings and instructions to owners, operators, and users of the subject Jacuzzi walk-in tub.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. For reasonable attorney's fees, pre-judgment interest and costs of incurred herein;

6. For such other and further relief as the Court may deem just and proper in the premises.

DATED this 3rd day of February 2016

CLOWARD, HICKS & BRASIER, PLLC

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Attorneys for Plaintiffs

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DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased; MICHAEL SMITH individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased; and DEBORAH TAMANTINI individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased; Plaintiffs, vs. FIRST STREET FOR BOOMERS & BEYOND, INC.; AITHR DEALER, INC.; HALE BENTON, Individually, HOMECLICK, LLC.; JACUZZI BRANDS LLC.; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, Individually and as BUDDS PLUMBING; DOES 1 through 20; ROE CORPORATIONS 1 through 20; DOE EMPLOYEES 1 through 20; DOE MANUFACTURERS 1 through 20; DOE 20 INSTALLERS I through 20; DOE CONTRACTORS 1 through 20; and DOE 21 SUBCONTRACTORS 1 through 20, inclusive Defendants.	CASE NO. DEPT. NO. **INITIAL APPEARANCE FEE DISCLOSURE**

INITIAL APPEARANCE FEE DISCLOSURE

Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for fees appearing in the above entitled action as indicated below:

ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased	$270.00
MICHAEL SMITH individually, and heir to the Estate of SHERRY LYNN CUNNISON	$30.00
DEBORAH TAMANTINI individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased	$30.00
TOTAL REMITTED:	**$330.00**

DATED this 3rd day of February, 2016

CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
721 South 6th Street
Las Vegas, NV 89101
Attorneys for Plaintiffs

REAL PARTY IN INTEREST'S
APPENDIX TAB "2"

NEOJ

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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 l 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

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an *Order Striking Defendant Jacuzzi Inc. dba Jacuzzi Luxury Bath's Answer as to Liability Only* was entered in the above entitled matter on the 18th day of November 2020, a copy of which is attached hereto as Exhibit "1."

DATED THIS 24th day of November, 2020.

RICHARD HARRIS LAW FIRM
/s/ *Benjamin P. Cloward*
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

RICHARD HARRIS LAW FIRM

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that on this 24th day of November, 2020, I caused to be served a true copy of the foregoing **NOTICE OF ENTRY OF ORDER** as follows:

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below; and/or

■ Electronic Service — By electronic means upon all eligible electronic recipients via the Clark County District Court e-filing system (Odyssey).

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Balkenbush & Eisinger
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Attorneys for Defendant/Cross-Defendant, Jacuzzi, Inc. dba Jacuzzi Luxury Bath

/s/ Catherine Barnhill
An employee of the Richard Harris Law Firm

EXHIBIT “1”

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

Defendants.

AND ALL RELATED MATTERS

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

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

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

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

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

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

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

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

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

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

I. STANDARD OF REVIEW

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

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

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

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

II. FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

From the beginning of discovery, Jacuzzi definitively and conclusively claimed there are no prior incidents. On May 1, 2017, Plaintiffs served their first set of Interrogatories[6] and Requests for Production of Documents[7] on Jacuzzi. Plaintiffs requested information on whether Jacuzzi had ever received notice of any bodily injury claims arising out of the use of a Jacuzzi walk-in tub. In its Answers to Interrogatories[8] and Responses to RFPDs,[9] Jacuzzi claimed to only be aware of two incidents nationwide. Coincidentally, the two incidents that Jacuzzi claimed to know about were the instant litigation and another case involving the Smith family (whom Plaintiffs' Counsel represents in an unrelated lawsuit against Jacuzzi). Jacuzzi did not disclose any other prior or subsequent incidents. Jacuzzi misrepresented the facts in its written discovery responses as was on full display at the evidentiary hearing when hundreds of pages of evidence was presented pertaining to a significant number of prior and subsequent incidents.[10]

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

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

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

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

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

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

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

[10] See, fn 5, *supra*.

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

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

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

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

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

E. PLAINTIFFS FIRST MOTION TO STRIKE

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

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

[12] See, fn 5, *supra*.

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

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

[15] See, fn 5, *supra*.

discovered two subsequent incidents involving persons complaining of injuries from the use of a Jacuzzi walk-in tub. Because Jacuzzi failed to disclose the two subsequent incidents via NRCP 16.1 disclosures, responses to discovery requests, or deposition testimony, Plaintiffs filed a Motion to Strike Defendant Jacuzzi's Answer on June 22, 2018.[16]

F. JACUZZI MISREPRESENTED FACTS TO THE COURT IN FILED BRIEFS

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

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

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

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

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

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

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

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

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

G. THE JULY 20, 2018, HEARING AND ORDER

The hearing on Plaintiffs' Motion to Strike Jacuzzi's Answer came on for hearing on July 20, 2018. At the hearing, Commissioner Bulla made her first ruling in this case regarding Jacuzzi's production obligations. Up until that time, Jacuzzi took the position that only prior incidents needed to be produced.[22] At the hearing, Commissioner Bulla granted Plaintiffs alternative relief and affirmatively, clearly, and unequivocally ordered Jacuzzi to produce information for all accidents or incidents involving injury or death from 2008 to present.[23] There was no limitation to "serious" or "significant" injuries. Instead, Jacuzzi was ordered to produce information related to **any** type of injury – even a "pinched finger."[24] The Order required Jacuzzi to produce such documents by August 17, 2018.[25] Additionally, there was no limitation to "claims" or incidents where a customer was demanding remuneration or demanding that something be done like a refund or removal of the tub as Jacuzzi's prior counsel Vaughn Crawford later tried to claim. Commissioner Bulla continued the hearing to August 29, 2018.

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

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

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[21] See, fn 5, *supra*.

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

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

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

[25] Id.

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

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

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

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

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

- "there were no prior incidents;"[31]
- "we ran a search based off of the parameters you had provided…and we identified nothing…;"[32]

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[27] Id.

[28] Id.

[29] Id.

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

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

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

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

- "…there's nothing related…;"[33]
- "We have searched and it's Jacuzzi's position that there are none."[34]

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

I. JACUZZI MISREPRESENTED FACTS IN THE MOTION FOR PROTECTIVE ORDER

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

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

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

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

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[33] Id. at 7:7-10 (emphasis added).

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

[35] See, fn 5, *supra*.

[36] See, fn 30, *supra*.

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

[38] See, fn 5, *supra*.

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

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

[41] Id. at 23:2-6.

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

> MR. COOLS: Can I just clarify something in regards to something like 43? All documents relating to complaints made to you about your walk-in tubs from January 1, 2012 to the present. . . .
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> MR. COOLS: **My question is obviously, you know, that could also pertain to internal communications via email about that. Are you requiring us to also do an ESI search and privilege log for all privileged communications about those claims as well?**
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> DISCOVERY COMMISSIONER: **Ordinary course of business is what I'm talking about**. . . .
>
> DISCOVERY COMMISSIONER: Okay? **To the extent that the complaint gets passed on to the lawyer and the lawyer is making opinions about it, I would say you need to do a privilege log.**
>
> MR. COOLS: That's just extremely costly and burdensome to have to go through and do –
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> DISCOVERY COMMISSIONER: Okay, but we're limiting it to the time frame, and this one is January 1st of 2012 and it deals with wrongful death or bodily injury. So it wouldn't involve any of the warranties, it wouldn't involve anything where there's no injury. How many claims could you possibly have?
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> MR. COOLS: **I'm just saying even doing the search based off of the ten or eleven claims, subsequent claims that have been produced**, having to go through and find all the custodians that may have touched that claim do a search, have counsel review for privilege, those are just very burdensome and costly endeavors. If that's part of your ruling, I understand.
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> DISCOVERY COMMISSIONER: Well, I don't want this to be overly burdensome and costly for the defendant, but you cannot hide behind a privilege not to produce

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

[43] See, Id.

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

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

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

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

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

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

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

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

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

[44] See, Id.

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

> however slight, or however dissimilar, involving *any* model of Jacuzzi® walk-in tub, regardless of how the injury occurred (i.e., if a consumer pinched a finger closing the door of a walk-in-tub, it would be subject to the Court's order), including the private identifying information of Jacuzzi's customers. [46]
>
> [T]he district court's order … requires Jacuzzi to find and disclose *any* incident involving *any* bodily injury at all, however slight, and involving any of Jacuzzi's walk-in tubs, whether containing the same alleged defect or not, and regardless of any similarity to plaintiffs' claims of defect.[47]

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

L. JACUZZI MISREPRESENTED THE FACTS TO THE NEVADA SUPREME COURT

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

M. PLAINTIFFS' RENEWED MOTION TO STRIKE

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

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

[47] Id. at 16.

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

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

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

[51] See, fn 5, *supra*.

[52] See, fn 30, *supra*.

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

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

N. JACUZZI VIOLATED THE JULY 20, 2018, ORDER

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

1. Plaintiffs' Motion for Reconsideration: the Pullen Death

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

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

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

[53] See, **Ex. 1 to Pls. Mot. for Reconsideration**.
[54] See, **Ex. 2 to Pls. Mot. for Reconsideration**.
[55] See, **Ex. 2 to Pls. Mot. for Reconsideration**.

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

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

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

> Q: So when did you receive notice? Because no emails have been produced with the salesforce documents, no emails from anybody internally have been produced in this case. So when did you receive notice that this individual thinks the tub killed his mom?
>
> A: The Pullen incident specific?
>
> Q: Yeah.
>
> A: October 30, 2018.

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

> THE COURT: Wait, hold on, hold on. How do you interpret the word claim? Does the individual calling have to actually use the word claim or do they have to say I want money? What is it that the Pullen family would have had to say for Jacuzzi or Jacuzzi's insured to believe that was a claim?
>
> MR. CRAWFORD: Your Honor, I think a claim is a demand for remediation of some sort, whether it's money, whether it's reimbursement, whether it's take my product back.
>
> THE COURT: What was the substance of the communication here?
>
> MR. CRAWFORD: With -- on the blood clot incident?
>
> THE COURT: I mean, I'm sure the person wasn't calling up just to say, hey, my dad died, just wanted you to know. Not a big deal, but just thought you might need to know that. Have a nice day. That wasn't what was going on here, right?

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

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

After this Court ordered an evidentiary hearing, Jacuzzi finally began producing hundreds of pages of documents containing evidence of both prior and subsequent incidents. On July 26, 2019, over a year after Commissioner Bulla's July 20, 2018, Order and the business day before the deposition of Jacuzzi's Director of Customer Service, Kurt Bachmeyer; two Customer Service Employees, Eda Rojas and Deborah Nuanes; and the assistant to Jacuzzi's Director of Customer Service (Mr. Bachmeyer), Mayra Lopez; and three business days before the court-ordered forensic computer search of Jacuzzi's Salesforce system, Jacuzzi served its Eighteenth Supplemental NRCP 16.1 Disclosure. Jacuzzi's Eighteenth Supplement contained evidence of up to forty-seven (47) prior and subsequent incidents[58] with forty-three (43) of those being **prior** to the Cunnison incident.[59] On August 12, 2019, Jacuzzi served its Nineteenth Supplemental NRCP 16.1 Disclosure which contained three **prior** incidents and **31** subsequent incidents. Jacuzzi also produced additional incidents on August 23, 2019, and August 27, 2019.[60]

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

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

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

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

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

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

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

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

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

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

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

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

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Evidentiary Hr'g Closing Br.

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

[63] See, **Evidentiary Hr'g Ex. 2** at JACUZZI005287.

[64] See, **Evidentiary Hr'g Ex. 8** at JACUZZI005367.

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

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

[67] Id.

[68] See, Id. at Jacuzzi005623.

the tub such that the customer "had to remove the door to get her out."[69]

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

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

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

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

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

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

[69] Id.

[70] See, fn 30, *infra*.

by Commissioner Bulla:

> **REQUEST NO. 43.**
>
> ~~All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.~~
>
> **All documents relating to complaints involving bodily injury or death made to You (directly or indirectly) about Your Walk-In Tubs. The scope of this Request is limited to incidents which occurred (or were alleged to have occurred) from 2008 to present.**
>
> **Pursuant to the Discovery Commissioner's Report and Recommendations (as approved by the trial court), other than social security numbers, Your response to this request shall not redact the names, addresses, telephone numbers, or other contact information of customers who have made complaints or claims to Jacuzzi.**[71]

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

> **AMENDED REQUEST FOR PRODUCTION NO. 43:**
>
> ~~All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.~~
>
> **All documents relating to complaints involving bodily injury or death made to You (directly or indirectly) about Your Walk-In Tubs. The scope of this Request is limited to incidents which occurred (or were alleged to have occurred) from 2008 to present.**
>
> **Pursuant to the Discovery Commissioner's Report and Recommendations (as approved by the trial court), other than social security numbers, Your response to this request shall not redact the names, addresses, telephone numbers, or other contact information of customers who have made complaints or claims to Jacuzzi.**
>
> **RESPONSE:**
>
> Jacuzzi objects to this production request because it is overbroad

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

> and unduly burdensome, because it requires production not limited in scope to the subject Walk-In Bathtub or Plaintiffs' allegations. Jacuzzi objects to this request as vague, ambiguous and seeking information that is irrelevant to the subject matter of this action and not likely to lead to the discovery of relevant or admissible evidence. Jacuzzi further objects because the production seeks information protected from disclosure by the right of privacy of third parties.
>
> Jacuzzi refers Plaintiffs to the documents regarding other incidents of personal injury or death in walk-in tubs from 2008 to present produced in compliance with Discovery-Commissioner's direction at July 20, 2018 hearing produced to Plaintiffs on August 17, 2018, bates nos. JACUZZI0029l2-002991. The production should not be regarded as a waiver to the documents and information's relevance or admissibility.
>
> Jacuzzi has provided redacted copies of the requested records, and has a writ pending regarding the personal information of third parties.[72]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. ANALYSIS OF THE YOUNG FACTORS

A. Degree of Willfulness of the Offending Party

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

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

Jacuzzi willfully and wrongfully withheld evidence of the Pullen Death in violation of multiple court orders (as discussed above). The Court rejects Jacuzzi's argument that it was not required to disclose the Pullen Death because it was not a "claim." The Salesforce documents specifically state that Robert Pullen "want[ed] to take legal action because he thinks the tub killed

[78] Jacuzzi's Notice of Waiver of Phase 2 Hr'g and Request to Have Phase 2 of Evidentiary Hr'g Vacated, filed Sept. 19, 2020.

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

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

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

> Q Well, let me ask you. Do you think it would be reasonably expected to find issues with regard to this tub, and that the customer service director would have information that's reasonably expected?
>
> A Mr. Bachmeyer wasn't the customer service director at that time, he was warranty, and at the time, again, in speaking with people, the understanding was that the information that was requested, incidents involving serious personal injury or death, should be within the KBM sales

[79] See, Rep.'s Tr. of Evidentiary Hr'g, Day 2, **Ex. 202 to Pls.' Evidentiary Hr'g Closing Br.** at 149:19-24.
[80] See, Id. at 136:22-24.

force customer service databases. [81]

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

> Q And my question, Mr. Templer, is this very specific question. You gave a limitation, you said, we did what we reasonably expected. We looked into places that we reasonably expected. And my question was simply, do you think, is it reasonably expected that the director of customer service would have information responsive to what the Commissioner was ordering?
>
> A At the time I expected it to be in the customer service databases, not in emails outside of those databases.[82]

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

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

[81] See, Id. at 137:7-14.

[82] See, Id. at 137:15-22.

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

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

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

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

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[84] Id.

[85] Id.

[86] See, Id.

> Q Well, I'm trying to get answers to questions about what Jacuzzi knew or didn't know. So the particular question is if you, Mr. Templer, don't know, then who at Jacuzzi would know?
>
> A In regard to responding to a discovery request?
>
> Q Yes.
>
> **A Nobody, it should be me.**
>
> **Q So you're the only guy?**
>
> **A I was the one that dealt with outside counsel in responding to discovery, if that's what you're asking**.

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

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

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

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

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

> A All productions and discovery in the case has been in conjunction with outside counsel, both Snell Wilmer and Weinberg Wheeler, depending on the timing.
>
> Q Okay. So as I understand your response, the decision regarding the production of documents was a jointly made decision between Jacuzzi and its retained counsel, true? . . .
>
> THE WITNESS: I can't answer any more than I said it a minute ago, is that all discovery responses were done in conjunction with outside counsel.
>
> Q Okay. Was there ever, to your knowledge, a discovery response or -- and that could be interrogatories, that could be – that could be requests for production, that could be requests for admissions, so any of the discovery responses, **was there ever a time that you recall where it was not a collective decision?**
>
> A **No**. I mean, I didn't -- or, I mean, the company, exclusively, did not serve any discovery responses. All of them were served through counsel. . . . And to my knowledge and recollection, **all discovery responses were discussed with the company before being served.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. CONCLUSIONS OF LAW

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

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

ORDER

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

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

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

IT IS HEREBY ORDERED that the Court is deferring its decision regarding Plaintiffs' additional requests for sanctions regarding various fees, motions in limine, and jury instructions until after additional briefing and the oral argument on December 7, 2020.

Dated this 18th day of November, 2020

DISTRICT COURT JUDGE

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

Prepared and Submitted by:
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/s/ *Benjamin P. Cloward*
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Robert Ansara, Plaintiff(s)	CASE NO: A-16-731244-C
vs.	DEPT. NO. Department 2
First Street for Boomers & Beyond Inc, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

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REAL PARTY IN INTEREST'S APPENDIX TAB "3"

NEOJ

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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 l 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

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an *Order Striking Defendants First Street for Boomers & Beyond, Inc. and AITHR Dealer, Inc.'s Answer as to Liability Only* was entered in the above entitled matter on the 31st day of December 2020, a copy of which is attached hereto as Exhibit "1."

DATED THIS 15th day of January, 2021.

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

RICHARD HARRIS LAW FIRM

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that on this 15th day of January, 2021, I caused to be served a true copy of the foregoing **NOTICE OF ENTRY OF ORDER** as follows:

☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or

☐ Hand Delivery—By hand-delivery to the addresses listed below; and/or

■ Electronic Service — By electronic means upon all eligible electronic recipients via the Clark County District Court e-filing system (Odyssey).

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/s/ Catherine Barnhill
An employee of the Richard Harris Law Firm

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EXHIBIT “1”

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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 l 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

RICHARD HARRIS LAW FIRM

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

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

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

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

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

The Court GRANTS Plaintiffs' Renewed Motion to Strike Defendant First Street for Boomers & Beyond, Inc. ("First Street") and AITHR Dealer, Inc.'s ("AITHR") (collectively hereafter, "First Street Defendants") Answer to Fourth Amended Complaint. First Street willfully and repeatedly concealed very relevant evidence with the intent to harm and severely prejudice the Plaintiffs' ability to pursue its claims, in violation of their 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) and NRCP 26, the Court strikes First Street and AITHR's Answer as to liability, thereby leaving damages as the remaining issues in this case to be tried. This Order is based on the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

Defendant Jacuzzi, Inc., dba Jacuzzi Luxury Bath ("Jacuzzi") was the designer and manufacturer of the model 5229 tub that is the subject of this action. 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. AITHR is fully owned by First Street. First Street and AITHR have been represented by the same counsel throughout this entire litigation and the Court finds that the discovery misconduct described herein is applicable to both First Street and AITHR and, therefore, the sanctions herein apply to both First Street and AITHR.

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, involving Defendant Jacuzzi, 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 defendants (which included First Street and AITHR) 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 Defendants concealed: (1) Plaintiff Cunnison's recordings of phone calls to Defendant First Street wherein on at least one occasion she complained about getting stuck once before she died, where she had to "dive underneath" the water to drain the tub; (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 Defendants had possession.

Throughout its opposition to the Plaintiff's Renewed Motion to Strike, First Street Defendants advance the arguments that they did not violate any Court Order, that they did not violate any Discovery Commissioner Order, and that they 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 the First Street Defendants' actions. But the First Street Defendants substantially ignore and overlook their obligations under NRCP 16.1 and NRCP 26, which triggered the duty to disclose and supplement prior discovery responses with all relevant evidence when the relevance should have been known no later than February 2018. The First Street Defendants repeatedly violated these duties.

The Cunnison Phone Call Recordings: 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 was having problems installing a part (drain handle extension) that had been sent to her as a result of a prior call where she had called and reported she had gotten stuck in the tub and had to "dive underneath" the water to get the tub to drain. Somehow the voicemails became in the possession of Nick Fawkes, AITHR's General Manager. The First Street Defendants, in their defense, argue 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 voicemails; and that First Street did not learn of the voicemail until Plaintiffs filed their Motion to Strike. The fact remains that AITHR's General Manager, Nick Fawkes did have a copy of the voicemails, and none of the Defendants ever turned the voicemails over to Plaintiffs. In 2015, Mr. Fawkes ended his employment with AITHR. Prior to ending his employment with AITHR, Mr. Fawkes retained a copy of some of the voicemails AITHR and First Street had for Ms. Cunnison's file. In late 2019, Jacuzzi produced multiple documents which included an email from AITHR employee, Mr. Fawkes, wherein his identity was made known. Prior to that time, neither First Street nor AITHR had ever identified Mr. Fawkes. In 2020, after learning Mr. Fawkes' identity, Plaintiffs contacted him to discuss an email he had authored that had been turned over by Jacuzzi. It was then that Plaintiffs learned of voicemails that had not been turned

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

The Guild Surveys: The Guild Surveys are written surveys prepared by the company Guild Quality 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 Plaintiffs to use them in the preparation for the deposition of Dave Modena, the NRCP 30(b)(6) designee of the First Street Defendants. First Street argued that it had no duty to produce them prior to Plaintiffs 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. See, Pls.' Motion, at 2:19-4:8; see also, Pls.' Reply Br., at 11:20-18:16.

The Alert 911 System: The Alert 911 was a safety system for the Jacuzzi tub described in First Street advertising material. The First Street Defendants failed to produce documents regarding the Alert 911 until about August 2019. The First Street Defendants misrepresented and concealed from Plaintiffs that it was involved with the Alert 911, until Ruth Curnutte, a non-party Jacuzzi walk-in tub customer, found and gave to Plaintiffs a First Street invoice given to her specifically listing the Alert 911 system as being provided by them. The First Street Defendants argue that Plaintiffs were directed by the Discovery Commissioner on September 19, 2018, to seek the information by a written discovery request, which Plaintiffs 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. See, Pls.' Motion, at 4:9-7:5; see also, Pls.' Reply Br., at 19:19:20-26:20.

The Anti-Slip Bathmat: Plaintiff discovered the existence of the anti-slip bathmat when it deposed Noreen Rouillard. Prior to that deposition, the First Street Defendants had never produced any evidence of the bathmat. The First Street Defendants obviously knew about the bathmat because in Jacuzzi s response to Request for Production No. 129, Exhibit 15 to Plaintiffs' Renewed Motion, 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. See, Pls.' Motion, at 7:6-9:26; see also, Pls.' Reply Br., at 26:21-31:14.

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

II. APPLICABLE STANDARDS

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

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

> **(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.**
>
> (3) **If an attorney fails to reasonably comply with any provision of this rule**, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its 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:
>
> (A) Any of the sanctions available pursuant to Rule 37(b)(2) and Rule 37(f);

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

> (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

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[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.)

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

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

> that every order of dismissal with prejudice as a discovery sanction be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors. The factors a court may properly consider include, but are not limited to, the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery 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]

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

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

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

[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

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

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

Any sanction less than the striking of the First Street Defendants' Answer would be grossly inadequate to remedy the harm that the First Street Defendants inflicted upon Plaintiffs. The First Street Defendants' discovery abuses destroyed Plaintiffs' ability to attempt to persuade the jury on its claims; on balance then, and in fairness, Plaintiffs should no longer have to prove the First Street Defendants' 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 the First Street Defendants. 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 the First Street Defendants for their discovery abuses. It is not like liability is being imposed on what would otherwise be a completely innocent party.

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

Evidence has been irreparably lost in this sense: everything concealed and untimely disclosed by the First Street Defendants has prevented Plaintiffs from being used in the deposition of the many witnesses in this case. This testimony about the concealed evidence has been lost because the First Street Defendants 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). Further, because of the untimely and late disclosure of documents, so much time has passed that potential witnesses have passed away, memories have faded, and dealers have gone out of business. This is evidence that has been lost forever.

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

There is no less feasible and fair sanction. The Plaintiffs 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 the First Street Defendants will continue to withhold relevant evidence, and that this case would continue ad nauseum to the administration of justice absent the sanction.

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

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

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

The sanction imposed here is necessary to deter the First Street Defendants, 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. The First Street Defendants interfered with this process, so a proper message must be sent.

III. CONCLUSIONS OF LAW

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

ORDER

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

IT IS SO ORDERED.

Dated this 31st day of December, 2020

DISTRICT COURT JUDGE

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

Prepared and Submitted by:
RICHARD HARRIS LAW FIRM
/s/ *Benjamin P. Cloward*
BENJAMIN P. CLOWARD, ESQ.
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Attorneys for Plaintiffs

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Robert Ansara, Plaintiff(s)	CASE NO: A-16-731244-C
vs.	DEPT. NO. Department 2
First Street for Boomers & Beyond Inc, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

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Philip Goodhart	1100 E. Bridger Ave. Las Vegas, NV, 89101

REAL PARTY IN INTEREST'S APPENDIX TAB "4"

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Petitioners,

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.

District Court No.
A-16-731244-C
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

PETITION FOR WRIT OF MANDAMUS

Philip Goodhart
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Attorneys for Petitioners, firstSTREET For Boomers & Beyond, Inc.; AITHR Dealer, Inc.;

NRAP 26.1 DISCLOSURE STATEMENT

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

firstSTREET for Boomers & Beyond, Inc. is a private company with no parent corporation.

AITHR Dealer, Inc. is a wholly owned subsidiary of firstSTREET for Boomers & Beyond, Inc.

Defendant-Petitioner is represented by THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER. Defendant-Petitioner has not been represented by any other attorneys.

DATED this 16th day of August, 2021.

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER

PHILIP GOODHART, ESQ. (#5332)
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Attorneys for Petitioners firstSTREET For
Boomers & Beyond, Inc. and AITHR Dealer, Inc.

ROUTING STATEMENT

The Nevada Supreme Court should retain this writ proceeding because this matter raises as a principal issue questions of first impression involving Nevada common law as well as questions of statewide importance. NRAP 17(a)(10)-(11).

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POINTS AND AUTHORITIES

I. INTRODUCTION

Petitioners, firstSTREET for Boomers & Beyond, Inc. ("firstSTREET"), and AITHR Dealer, Inc. ("AITHR", collectively referred to as "Petitioners"), seek relief from the District Court's Order Striking Petitioners' Answer to Plaintiffs' Fourth Amended Complaint, for liability defenses only. Since Petitioners never violated any Discovery Order, the District Court's sole reasoning was that Petitioners' violated NRCP 16.1 by ***failing to timely voluntarily disclose certain documents***. This writ proceeding arises out of a tragic accident that occurred on or around February 21, 2014. According to Plaintiffs' Fourth Amended Complaint, in October of 2013, Sherry Cunnison ("Ms. Cunnison") entered into a contract to purchase a Jacuzzi® model no. 5229 Walk-In Tub (the "tub"). The tub was marketed by Defendant/Petitioner firstSTREET for Boomers & Beyond, Inc. ("firstSTREET"), and sold by Defendant/Petitioner AITHR Dealer, Inc. ("AITHR").

The tub was installed in Ms. Cunnison's home on January 27, 2014. From the date of installation to the date of the incident, Ms. Cunnison used the tub several times. On February 21, 2014, a well-being check was performed and Ms. Cunnison was found in the tub by emergency personnel. While emergency personnel extracted her from the tub, Ms. Cunnison's left humerus was broken

and she was transported to Sunrise Hospital. On February 25, 2014, while under the treatment of her doctors, Ms. Cunnison underwent an open reduction internal fixation of left distal humeral shaft. Ms. Cunnison developed sepsis following the surgery and died at the hospital on February 27, 2014.

The tub was designed and manufactured by Defendant Jacuzzi. Defendant firstSTREET developed marketing and advertising for the tub pursuant to a contract with Jacuzzi. Defendant AITHR is a wholly owned subsidiary of firstSTREET, and sold the tub to Ms. Cunnison. AITHR then hired the subcontractors that installed the tub.

Plaintiffs' original Complaint was filed on February 3, 2016, alleging Negligence, and Strict Product Liability Defective Design, Manufacture and/or Failure to Warn. *Petitioners' Appendix*, Tab 1. The original Complaint was based on a theory of a defective drainage system and alleged that the incident occurred when Ms. Cunnison "attempted [sic] exit the Jacuzzi walk-in tub by pulling the plug to let the water drain, allowing her to open the Jacuzzi walk in tub's door and exit. The drain would not release trapping SHERRY in the tub for 48 hours." *Petitioners' Appendix*, Tab 1 (PA0007).

These allegations remained substantially the same throughout several amended Complaints until the Plaintiffs filed their Fourth Amended Complaint on June 21, 2017. *Petitioners' Appendix*, Tab 2. The Fourth Amended Complaint

added several breach of warranty causes of action and a "cause of action" for punitive damages. The Fourth Amended Complaint presented an entirely new theory that the tub was dangerous, not because of the drainage system, but because of "the inability to get back up or exit the tub if Plaintiff fell." *Petitioners' Appendix*, Tab 2 (PA0020).

A significant amount of discovery has been done since the inception of the case. Significantly, throughout the discovery process Plaintiffs engaged in several discovery disputes with Defendant Jacuzzi regarding the production of documents relating to similar prior instances, customer complaints, and preventative measures developed and utilized to address the alleged issue of the tub floor and seat being slippery when wet. Several of these discovery disputes were addressed with the Discovery Commissioner in due course and various discovery orders against Jacuzzi were recommended to and adopted by the District Court. Those orders were entered against Jacuzzi only. After filing two (2) separate Motions to Strike Jacuzzi's Answer, and after conducting a four (4) day evidentiary hearing, on November 18, 2020, the District Court (Judge Richard Scotti) signed an Order Granting Plaintiffs' Motion and struck Jacuzzi's Answer as to liability only.[1] *Petitioners' Appendix*, Tab 3.

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[1] This Order was entered ***after*** Jacuzzi waived its right to a phase 2 evidentiary hearing that would have addressed a potential "advice of counsel" defense, which

Though counsel for Plaintiffs and Petitioners engaged in a few E.D.C.R. 2.34 conferences regarding discovery issues, ***Plaintiffs never once filed a motion to compel against Petitioners***. Consequently, the Discovery Commissioner never had any opportunity to decide a single discovery dispute against Petitioners, much less recommend an order for the District Court to enter. As an obvious result, no discovery order has ever been entered against Petitioners in this case and Petitioners have not violated any discovery orders.

On October 9, 2020, Plaintiffs filed a Renewed Motion to Strike Defendant firstSTREET for Boomers & Beyond, Inc.'s & AITHR Dealer, Inc.'s Answer to Plaintiffs' Fourth Amended Complaint[2]. *Petitioners' Appendix*, Tab 4. Plaintiffs argued that Petitioners had violated NRCP 16.1's disclosure requirements by failing to voluntarily disclose relevant documents related to similar prior and subsequent incidents; documents related to a separate, unrelated product - a 911 Alert bracelet; documents related to potential remedial measures to address the alleged slipperiness of the floor; recordings of customer phone calls to Petitioners; *Lead Perfection* documents; and customer survey documents regarding the tub.

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is a prong of the factors delineated in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

[2] The District Court denied an earlier motion to strike Petitioners' Answer. *Petitioners' Appendix*, Tab 5.

Plaintiffs further argued that the alleged failure to voluntarily produce these documents without a Discovery Order was willful and that Plaintiffs were prejudiced. Plaintiffs then sought an order striking Petitioners' Answer to the Fourth Amended Complaint from the District Court. However, Plaintiffs never filed any motions to compel these documents prior to filing the Renewed Motion to Strike.

In its Opposition to the Renewed Motion to Strike, Petitioners argued that they have produced all relevant documents in their possession, pursuant to NRCP 16.1, and have responded to all of Plaintiffs' discovery requests. *Petitioners' Appendix*, Tab 6 (PA0397 to PA0399) and Tab 8 – 34 to 39 (PA0951 to PA0956). Petitioners explained that they do not have access to several of the documents that Plaintiffs sought, nor did they have the capacity to search through *Lead Perfection* documents, which were stored by a third-party. *Petitioners' Appendix*, Tab 6 (PA0422 to PA0433). Furthermore, several documents, such as those relating to an unrelated product, the 911 Alert Pendant, which was, in certain regions of the country, included with a tub sale as a gift (as were restaurant gift cards and other gifts), were not produced because they are wholly irrelevant. *Petitioners' Appendix*, Tab 6 (PA407 and PA0424). Again, Plaintiffs never filed any motion to compel the production of any of these documents, or any others that they argued should have been disclosed voluntarily pursuant to NRCP 16.1.

The oral argument related to Plaintiffs' Motion was held on November 19, 2020. *Petitioners' Appendix*, Tab 8. During the hearing, through evidence, deposition testimony and affidavits, it was made abundantly clear to the Court that Petitioners were not in possession of the documents and information that Plaintiffs claimed were required to be voluntarily disclosed. *Id*. (PA0961 to PA0966). This was NOT an evidentiary hearing.

On December 28, 2020, the Honorable Richard F. Scotti granted Plaintiffs' Renewed Motion to Strike Petitioners' Answer to the Fourth Amended Complaint, finding that Petitioners willfully concealed relevant evidence with the intent to harm and severely prejudice the Plaintiffs' ability to pursue its claims, "in violation of its discovery obligations under NRCP 16.1." *Petitioners' Appendix*, Tab 9. In doing so, the District Court ignored the overwhelming case law holding that case terminating discovery sanctions like striking a Defendant's Answer may only be imposed upon a violation of a court order, and that when such sanctions are as severe as striking a party's pleading, the party should be allowed an evidentiary hearing in accordance with principles of Due Process.

In short, the District Court clearly abused its discretion by striking Petitioners' Answer where Plaintiff had not once filed a motion to compel against Petitioners, the Discovery Commissioner had not once recommended any discovery order against Petitioners, and the District Court had not once entered

any discovery order against Petitioners. The District Court further abused its discretion by granting such severe sanctions against Petitioners without affording Petitioners an evidentiary hearing. Petitioners have no adequate remedy on appeal, which warrants the issuance of an extraordinary writ of mandamus.

II. STATEMENT OF THE ISSUES

1. Whether the District Court abused its discretion by striking Petitioners' Answer for alleged discovery abuses, in the absence of any prior motion to compel or resultant discovery order.

2. Whether the District Court abused its discretion by striking Petitioners' Answer for alleged discovery abuses without conducting an evidentiary hearing.

III. RELIEF SOUGHT

Petitioners request a Writ of Mandamus ordering the Eighth Judicial Court to Vacate its December 28, 2020, Order Striking Petitioners' Answer to the Fourth Amended Complaint. In the alternative, Petitioners request a Writ of Mandamus ordering the Eighth Judicial District Court to conduct an evidentiary hearing.

IV. STATEMENT OF THE FACTS

1. Plaintiffs' original Complaint alleged Negligence, and Strict Product Liability Defective Design, Manufacture and/or Failure to Warn, and was based on a theory of a defective drainage system. *Petitioners' Appendix*, Tab 1.

2. Plaintiffs' Fourth Amended Complaint alleges multiple claims against Petitioners based on theories of negligence and strict products liability. *Petitioners' Appendix*, Tab 2.

3. The tub was designed, manufactured, and produced exclusively by Jacuzzi. *Petitioners' Appendix*, Tab 6 (PA0395).

4. firstSTREET created advertising and marketing materials for the tub. *Petitioners' Appendix*, Tab 6 (PA0395).

5. AITHR is a wholly owned subsidiary of firstSTREET, and sold the tub to Ms. Cunnison. AITHR then hired the subcontractors that installed Ms. Cunnison's tub. *Petitioners' Appendix*, Tab 6 (PA0395).

6. Plaintiffs original Motion to Strike Defendant firstSTREET for Boomers & Beyond, Inc.'s & AITHR Dealers, Inc.'s Answer to Plaintiffs' Fourth Amended Complaint, filed on January 16, 2019, was denied by the District Court on March 12, 2019. *Petitioners' Appendix*, Tab 5.

7. Plaintiffs filed the Renewed Motion to Strike Defendant firstSTREET for Boomers & Beyond, Inc.'s & AITHR Dealers, Inc.'s Answer to Plaintiffs' Fourth Amended Complaint on October 9, 2020. *Petitioners' Appendix*, Tab 4.

8. Petitioners filed Defendants firstSTREET and AITHR's Opposition to Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's

Answer to Plaintiffs' Fourth Amended Complaint on November 6, 2020. *Petitioners' Appendix*, Tab 6.

9. The District Court conducted a hearing on Plaintiffs' Motion on November 19, 2020 and took the matter under submission. *Petitioners' Appendix*, Tab 8.

10. On December 28, 2020, the District Court issued a Minute Order Granting Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's Answers to Plaintiffs' Fourth Amended Complaint, finding that firstSTREET and AITHR "willfully and repeatedly concealed very relevant evidence with the intent to harm and severely prejudice the Plaintiffs' ability to pursue its claims, in violation of its discovery obligations under NRCP 16.1." *Petitioners' Appendix*, Tab 9.

11. The District Court based its ruling solely on its interpretation of NRCP 16.1, and did not find that Petitioners had violated any discovery order. The District Court additionally did not hold an evidentiary hearing on the issues presented. The District Court signed the submitted Order Granting Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's Answer to Plaintiffs Fourth Amended Complaint on December 31, 2020, and this extraordinary writ proceeding followed. *Petitioners' Appendix*, Tab 10.

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V. ARGUMENT

A. A Writ Of Mandamus Is The Proper Extraordinary Relief To Prevent Extreme And Irreparable Prejudice To The Petitioner.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust or station." NRS 34.160. The Supreme Court of Nevada has the authority to issue writs of mandamus to control arbitrary or capricious abuses of discretion or clear errors of law by district courts. *Marshall v. District Court*, 108 Nev. 459, 466, 836 P.2d 47, 52 (1992); *Halcrow, Inc. v. Eighth Judicial Dist. Court*, 129 Nev.Adv.Op. 42, 302 P.3d 1148, 1151 (2013) ("Mandamus relief may also be proper to control an arbitrary or capricious exercise of discretion."). "Writ relief will not be available when an adequate and speedy legal remedy exists." *Id.* "Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *Id*. The above ruling of the Respondent Court improperly interpreted NRCP 16.1 to strike Petitioners' Answer, without any violation of a discovery or other court order, and without being afforded an evidentiary hearing. There is no adequate or speedy legal remedy for this terminating sanction.

A Writ of Mandamus is therefore necessary to correct the District Court's clear error of law. Intervention by this Court will ensure that the continued

prejudicial treatment of Petitioners will be arrested, allowing Petitioners to litigate the several questions of fact as to liability before a jury.

B. The District Court's Improper Interpretation and Application of NRCP 16.1(e)(3) Are Improper Conclusions of Law Prompting De Novo Review.

Under Nevada law, a District Court's rulings on questions and conclusions of law are subject to de novo review by the appellate court. *Trustees of the Plumbers Union Local 525 Health and Welfare Plan v. Developers Surety and Indemnity Co*., 120 Nev. 56, 59, 84 P.3d 59 (2004); *State of Nevada v. Granite Construction Co*., 118 Nev. 83, 86, 40 P.3d 423 (2002); *County of Clark v. Sun State Properties, Ltd*., 119 Nev. 329, 334, 72 P.3d 954 (2003); *Bopp v. Lino*, 110 Nev. 1246, 1249, 885 P.2d 559 (1994).

The District Court's interpretation and application of NRCP 16.1(e)(3) is a question and conclusion of law, thereby triggering de novo review. *Department of Taxation v. Eighth Judicial District Court in and for County of Clark*, 136 Nev. 366, 466 P.3d 1281, 1283 (2020) (citing *Toll v. Wilson*, 135 Nev. 430, 433, 453 P.3d 1215, 1218 (2019); *New Horizon Kids Quest III, Inc. v. Eighth Judicial Dist. Court*, 133 Nev. 86, 89, 392 P.3d 166, 168 (2017)).

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C. The District Court's Interpretation of NRCP 16.1(e)(3) Conflicts with the Plain Language of the Rule.

The District Court's interpretation of NRCP 16.1(e)(3) to allow the severe sanctions imposed on Petitioners, namely striking Petitioners' Answer, conflicts with the plain language of the Rule.

NRCP 16.1(e)(3) states, in its entirety:

> (1) *Other Grounds for Sanctions*. If an ***attorney*** fails to reasonably comply with any provision of this rule, or if an ***attorney or a party*** fails to comply with an order entered under Rule 16.3, the court, on motion or on its own, should 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:
>
> > (A) any of the sanctions available under Rules 37(b) or 37(f); or
> >
> > (B) an order prohibiting the use of any witness, document, or tangible thing that should have been disclosed, produced, exhibited, or exchanged under Rule 16.1(a).

NRCP 16.1(e)(3) (emphasis added).

Thus, if the conduct complained of is done by an attorney, rather than a party, then the District Court's sanction may not necessarily be preceded by violation of a court order. However, when it is the ***party's*** conduct that is sanctioned by the District Court[3], the sanctions available under Rules 37(b) or

[3] In the case of striking a party's Answer, it is the ***party's*** conduct that is being sanctioned, not the attorney's. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

37(f) are only available if the "party fails to comply with an order entered under Rule 16.3." As this Court is no doubt aware, NRCP 16.3 governs the authority of the Discovery Commissioner and the procedure of obtaining a court order based on a report and recommendation of the Discovery Commissioner. Thus, a ***party*** must violate a court order, originating with the Discovery Commissioner, in order to warrant the discovery sanctions.

Throughout the entire course of discovery, Plaintiffs failed to file a single motion to compel against Petitioners, and consequently there is no discovery order that Petitioners could have violated. Moreover, the District Court expressly found, as a matter of law, that:

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

Petitioners' Appendix, Tab 10 (PA1020). Thus, the District Court's sanctions were expressly based on conduct of Petitioners, who are a ***party***, and the District Court expressly found that the sanctions were not a result of attorney conduct. Yet, the basis for the District Court's ruling – the violation of NRCP 16.1's disclosure requirements – is based entirely and solely on the conduct of counsel, ***not the party***. For it is counsel that selects what documents are disclosed as part of the NRCP 16.1 disclosure requirements, not the party that counsel represents.

This is a very significant distinction, as without a court order in place, the ***party*** cannot be sanctioned under Rules 37(b) or 37(f). *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). Again, NRCP 16.1(e)(3) envisions a clear distinction between an attorney's conduct (not complying with NRCP 16.1) and an attorney's or party's conduct (not complying with a court order).

Because there have been no discovery orders issued against Petitioners, and pursuant to the plain language of NRCP 16.1(e)(3), the District Court abused its discretion when it imposed the sanction of striking Petitioners' Answer for conduct attributed solely to Petitioners.

D. The District Court's Imposition of Sanctions Against Petitioners Is Not Supported by Other Legal Authority.

Nevada case law requires violation of a court order before a district court may strike a pleading. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990) (imposing sanctions where a party ignored the "court's express oral admonition to … rectify any inaccuracies in his deposition testimony"); *Nevada Power Co. v. Flour Illinois*, 108 Nev. 638, 837 P.2d 1354 (1992) (imposing sanctions against a party for destroying evidence in violation of a court order to preserve the evidence); *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 235 P.3d 592 (2010) (imposing sanctions where a corporate party failed to produce a witness for deposition, in violation of a court order); *Foster v.*

Dingwall, 126 Nev. 56, 227 P.3d 1042 (2010) (imposing sanctions on several parties in the suit for failing to attend their depositions and failing to supplement their responses to interrogatories, in violation of a court order). In each of the foregoing seminal cases issued by this Court, the sanctioned party had violated a court order.

Here, Plaintiffs never sought a discovery order from the Discovery Commissioner or the District Court against Petitioners. Petitioners could not, and did not violate any discovery order that would warrant discovery sanctions, much less that would warrant the District Court striking Petitioners' Answer.

E. The District Court Abused Its Discretion By Striking Petitioners' Answer Without Conducting an Evidentiary Hearing.

This District Court striked Petitioners' Answer pursuant to NRCP 37(b), based on its erroneous interpretation of NRCP 16.1(e)(3). In *Nevada Power Co. v. Flour Illinois*, 108 Nev. 638, 644, 837 P.2d 1354, 1359 (1992), this Court has held:

> Under NRCP 37(b)(2), a party's suit may be dismissed if the party "fails to obey an order to provide or permit discovery." Determining whether a party "fail[ed] to obey an order" may, as it does here, involve factual questions as to the meaning of the order allegedly disobeyed and questions as to whether the disobedient party did, in fact, violate the court's discovery order. The only way that these questions of fact can be properly decided is by holding an evidentiary hearing.

Id., 108 Nev. at 644, 837 P.2d at 1359 (1992). Moreover,

> when the court does not impose ultimate discovery sanctions of dismissal of a complaint with prejudice or striking an answer as to liability *and* damages, the court should, at its discretion, hold such hearing as it reasonably deems necessary to consider matters that are pertinent to the imposition of appropriate sanctions. The length and nature of the hearing for non-case concluding sanctions shall be left to the sound discretion of the district court.

Bahena v. Goodyear Tire & Rubber Co., 126 Nev. 243, 256, 235 P.3d 592, 600-01 (2010) (emphasis in the original). Thus, where there are significant questions of fact regarding the allegations of discovery abuse, as there are here, the District Court should have conducted an evidentiary hearing, and had discretion as to the length and nature of that hearing. In fact, Plaintiffs' counsel recognized that a hearing on this precise issue should be heard, and could be held in less than one day. *Petitioners' Appendix*, Tab 8 (PA0988).

The need for an evidentiary hearing on Plaintiffs' motion is perhaps best evidenced by Plaintiffs' and the Court's apparent reliance on an Affidavit submitted by Nick Fawkes. *Petitioners' Appendix*, Tab 4 (PA0077 to PA0080) and Tab 8 (PA0967 to PA0969). Mr. Fawkes was never subjected to a deposition or cross-examination to question his recollection of events. Moreover, Mr. Fawkes' affidavit is not supported by proper foundation which is essential for a Court to make a ruling on the validity of his testimony, let alone whether to strike a party's Answer. Finally, Plaintiffs' counsel submitted, and the Court considered, counsel's own affidavit in support of Mr. Fawkes when faced with the affidavit of

David Modena, Petitioners' NRCP 30(b)(6) witness who had been deposed twice. *Petitioners' Appendix*, Tab 7 (PA0914 to PA0916).

While this Court in *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 245 P.3d 1182 (2010) (*Bahena II*), clarified that while an evidentiary hearing is not mandated in every case where the imposed sanctions are less than dismissal or default with prejudice, "the district courts should be encouraged to exercise their discretion to hold evidentiary hearings regarding non-case concluding sanctions when requested and when there are disputed issues of material fact regarding the discover dispute identified by the parties." *Bahena II*, 126 Nev. at 611, 245 P.3d at 1185. Here, however, the District Court's Order Striking Petitioners' Answers is in fact a case concluding sanctions insomuch as Petitioners are now precluded from presenting any liability arguments to the jury. The only issue remaining is that of Plaintiffs' alleged damages.

Moreover, the purpose of an evidentiary hearing is to determine whether a party violated a court order. This Court has held:

> Determining whether a party "fail[ed] to obey an order" may, as it does here, involve factual questions as to the meaning of the order allegedly disobeyed and questions as to whether the disobedient party did, in fact, violate the court's discovery order. ***The only way that these questions of fact can be properly decided is by holding an evidentiary hearing.***

Nevada Power, *supra*, at 644, 837 P.2d at 1359 (emphasis added).

Prior to striking Petitioners' Answer, the District Court heard a separate motion to strike co-defendant Jacuzzi's Answer for alleged discovery abuses arising out of Jacuzzi's alleged violation of several discovery orders entered by the District Court. Prior to deciding that motion, the District Court conducted a four (4) day evidentiary hearing, wherein witnesses appeared from across the country to testify under oath and undergo cross-examination. Moreover, the District Court ordered a "second phase" of evidentiary hearing and testimony to determine if Jacuzzi (the party) was directly responsible for its own discovery misconduct. *Petitioners' Appendix*, Tab 3. This extensive hearing related to Jacuzzi further demonstrates the complexity of this case and the discovery disputes that have arisen are such that an evidentiary hearing is necessary prior to imposing sanctions against Petitioners.

However, in the case of Petitioners, the District Court did not allow ***any*** evidentiary hearing prior to imposing what amounts to case terminating sanctions against Petitioners. It is curious to note that in the case of co-defendant Jacuzzi, the District Court had issued multiple discovery orders against Jacuzzi, and then, after conducting four (4) days of evidentiary hearings, determined that Jacuzzi had violated those orders prior to striking Jacuzzi's Answer. In the case of Jacuzzi, there were actual court orders to interpret to determine whether they had been violated and whether and to what extent sanctions were warranted.

In stark contrast, in the case of Petitioners, it is understandable, though not justifiable, why the District Court may have wanted to avoid an evidentiary hearing without any discovery orders to interpret.[4] The complexity of the issues in this case required an evidentiary hearing in the case of co-Defendant Jacuzzi, and the District Court obviously felt compelled to conduct the four (4) day, two (2) phase, evidentiary hearing in that case. The discovery issues involving Petitioners are no less complex, and the District Court's failure to allow an evidentiary hearing constitutes an abuse of discretion and further illustrates the necessity for a violation of a court order to occur prior to the imposition of sanctions against a party.

VI. CONCLUSION

For the foregoing reasons, Petitioners firstSTREET For Boomers & Beyond, Inc. and AITHR Dealer, Inc. urge this Court for issuance of a Writ of Mandamus, commanding Respondents, the Eighth Judicial District Court and the

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[4] Petitioners' Answer was stricken just days before a new judge would be assigned to this case, due to Judge Scotti failing to retain the bench following the November 2020 election. Moreover, the speed at which Petitioners' Answer was stricken, compared to that of co-Defendant Jacuzzi, is staggering. Plaintiffs filed a Motion for Reconsideration on May 15, 2019; a hearing was held on July 1, 2019; the evidentiary hearing took place on September 16, 17, 18 and October 1, 2020; and the Order striking co-Defendant Jacuzzi's Answer was signed on November 18, 2020. Whereas Plaintiffs' motion against Petitioners was filed on October 9, 2020; a hearing was held on November 19, 2020; and the Order was signed by the District Court on December 31, 2020 – the day before Judge Scotti left the bench.

Honorable Crystal Eller[5] to vacate its December 28, 2020 Order granting Plaintiffs' Renewed Motion to Strike Defendants FirstSTREET For Boomers & Beyond, Inc. and AITHR Dealer, Inc.'s Answers to Plaintiffs' Fourth Amended Complaint.

DATED this 16th day of August, 2021.

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER

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

[5] The original ruling was made by the Honorable Richard F. Scotti. However, Judge Scotti lost the November 2020 election and Judge Eller is the current presiding judge over this case.

VERIFICATION

STATE OF NEVADA)
} **SS:**
COUNTY OF CLARK)

Pursuant to NRAP 21(a)(5), I, PHILIP GOODHART, ESQ., being first duly sworn on oath, deposes and states under penalty of perjury that the following is true and correct, and of my own personal knowledge:

1. I am an attorney licensed to practice in the State of Nevada, and am Partner at the law firm of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, attorneys for Petitioners firstSTREET For Boomers & Beyond, Inc. and AITHR Dealer, Inc.'s.

2. I certify that I have read this Petition, and to the best of my knowledge, information and belief, this Petition complies with the form requirements of Rule 21(d) and is not frivolous or interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FURTHER, YOUR AFFIANT SAYETH NAUGHT.

Executed on August 16th, 2021.

PHILIP GOODHART

SUBSCRIBED and SWORN to before me
this 16th day of August, 2021, by PHILIP GOODHART

KAREN M. BERK
NOTARY PUBLIC
STATE OF NEVADA
APPT. NO. 99-893-1
MY APPT. EXPIRES JULY 18, 2023

NOTARY PUBLIC in and for the County of Clark, State of Nevada

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman Font.

2. I further certify that this brief complies with the page and type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted from NRAP 32(a)(7)(C), it is proportionately spaced, has a type face of 14 points or more and contains 4,630 words.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript

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or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of August, 2021.

THORNDAL ARMSTRONG DELK
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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 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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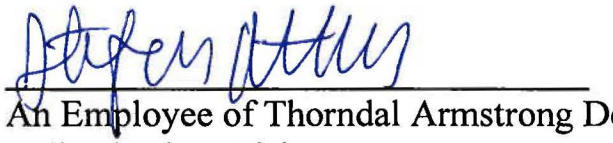
NOTE – DEFENDANTS HOMECLICK, LLC; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, Individually and as BUDDS PLUMBING have previously been dismissed from this lawsuit, but the caption has not been amended/revised to reflect this. Therefore there has been no service on these parties.



An Employee of Thorndal Armstrong Delk Balkenbush & Eisinger

REAL PARTY IN INTEREST'S APPENDIX TAB "5"

Case No. _____

In the Supreme Court of Nevada

JACUZZI, INC. doing business as JACUZZI LUXURY BATH,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; 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,

Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

With Supporting Points and Authorities

District Court Case No. A-16-731244-C

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BRITTANY M. LLEWELLYN (SBN 13,527)
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Attorneys for Petitioner

PETITION FOR WRIT OF MANDAMUS
OR, ALTERNATIVELY, PROHIBITION

1. This petition arises from district court case *Ansara, et al. v. First Street for Boomers & Beyond, Inc., et al.*, District Court No. A-16-731244-C, currently before the respondent judge, the HONORABLE CRYSTAL ELLER. (1 App. 1.)

2. In the underlying case, plaintiffs/real-parties-in-interest 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, seek to recover damages for the death of Ms. Cunnison allegedly caused by an experience in a walk-in tub designed and manufactured by defendant/petitioner JACUZZI INC. dba Jacuzzi Luxury Bath ("Jacuzzi").

3. Plaintiffs moved to strike Jacuzzi's answer, accusing Jacuzzi of various discovery abuses and of making misrepresentations to the

discovery commissioner, the district court, and to this Court in a prior writ petition.

4. The previous judge presiding over this case, THE HONORABLE RICHARD SCOTTI, entertained full briefing on plaintiffs' request for sanctions and held an evidentiary hearing.

5. On November 18, 2020, shortly before leaving the bench, Judge Scotti entered an order striking Jacuzzi's answer as to liability for compensatory damages. The sanction allows Jacuzzi to defend itself before a jury on the amount of compensatory damages and on liability for, and the amount of, any punitive damages.

6. The order states that it is "supported by substantial evidence" and that "[i]n reviewing the evidence presented and relied upon in reaching this decision, the Court applied the ***preponderance of the evidence*** standard." (29 App. 7017:21, 7018:5 (emphasis added).)

7. By applying that standard, the court rejected Jacuzzi's contention that any sanction as severe as striking an answer in whole or part must be subject to a clear-and-convincing burden of proof, and

that evidence must be compelling and not inferred from possibilities. (24 App. 5878:12–5880:22.)

8. On September 29, 2021, the court entered an order trifurcating the trial to separate the question of compensatory damages from the question of liability for punitive damages. This order ensures the sanction order's language precluding Jacuzzi "from presenting any evidence to show that it is not liable for Plaintiffs' harms as to any of Plaintiffs' causes of action against Jacuzzi", does not limit Jacuzzi's ability to defend itself against liability for punitive damages. (33 App. 8042.) Importantly, this recent ruling allows Jacuzzi to narrow the scope of this petition to the legal standard employed in the sanctions order.

Now, therefore, petitioner Jacuzzi asks this Court to exercise its discretionary jurisdiction and enter a writ of mandamus directing the district court to vacate its order striking Jacuzzi's answer as to liability and directing the district court to reevaluate the propriety of any such sanction subject to a clear-and-convincing burden of proof.[1]

[1] Alternatively, petitioner seeks a writ of prohibition to prevent the district court from enforcing the sanction order.

Dated this 5th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*

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Attorneys for Petitioner

VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK)

Under penalty of perjury, I declare that I am counsel for the petitioner in the foregoing petition and know the contents thereof; that the pleading is true of my own knowledge, except as to those matters stated on information and belief; and that as to such matters I believe them to be true. I, rather than petitioner, make this verification because the relevant facts are procedural and thus within my knowledge as petitioner's attorney. This verification is made pursuant to NRS 15.010.

Dated this 5th day of October, 2021.

/s/ Joel D. Henriod
JOEL D. HENRIOD

NRAP 26.1 DISCLOSURE

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

Petitioner Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath is a privately held corporation.

Petitioner has been represented by attorneys at Snell & Wilmer L.L.P.; Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC; and Lewis Roca Rothgerber Christie LLP.

Dated this 5th day of October, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*

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Attorneys for Petitioner

ROUTING STATEMENT

The Supreme Court should retain this petition because it raises an important issue of first impression regarding which burden of proof applies to a motion to strike a party's pleading as a discovery sanction. *See* NRAP 17(a)(11), (12).

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TABLE OF AUTHORITIES

Cases

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Other Authorities

ISSUE PRESENTED

Whether a judge may strike a party's pleading (in whole or substantial part) upon finding justification under the circumstances and in the record only by a preponderance of the evidence, as opposed to by clear and convincing evidence.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Underlying Event

This writ proceeding arises from a product liability case involving a Jacuzzi® 5229 Walk-In Tub ("the tub"). (1 App. 50.) Plaintiffs are the surviving heirs of Sherry Cunnison, who died at a hospital after allegedly becoming stuck in the tub for a prolonged period. (1 App. 51–52, 54–56.) Plaintiffs claim a physical defect in the tub's design, or a defect in the warnings Jacuzzi provided along with it, caused Ms. Cunnison's death. (1 App. 57–59.) Jacuzzi disputes most of plaintiffs' allegations, but this petition does not depend on the merits of plaintiffs' claims or Jacuzzi's defenses.

B. The Motions for Sanctions and Evidentiary Hearing

The order striking Jacuzzi's answer followed several discovery disputes about material relating to other consumers' experiences with the product. Plaintiffs twice moved to strike Jacuzzi's answer (1 App. 76, 29 App. 7016:1–7), and then moved for reconsideration of the second order denying those requests (6 App. 1319). The district court scheduled an evidentiary hearing. (8 App. 1793.) The scope of the hearing then expanded after Jacuzzi, in July and August of 2019, disclosed dozens of communications from tub users complaining about their experiences with walk-in tubs, which Jacuzzi explained had been discovered recently. (16 App. 3883.)

1. Plaintiffs' Criticisms of Jacuzzi's Disclosures

Put simply, plaintiffs contended that—until Jacuzzi's "document dump" in July and August of 2019—the company had flouted obligations under the rules of civil procedure and willfully violated court orders by withholding documents and information about other incidents, allegations, and complaints, regarding walk-in tubs. (See 19 App. 4749–20 App. 4759.) They claimed Jacuzzi had been dishonest in representing to the discovery commissioner and the district court that it

had no information about any other incidences of alleged injury or death relating to walk-in tubs (20 App. 4760–65), and had even misled this Court in a December 10, 2018 writ petition stating "[t]o date, Jacuzzi has identified and produced to Plaintiffs all of the evidence in Jacuzzi's possession of the other prior and subsequent incidents of alleged bodily injury or death related to the Jacuzzi tub in question." (20 App. 4753–54.)

Plaintiffs highlighted telephone calls that Jacuzzi received in October 2018, about a month before Jacuzzi filed its writ petition, from a man named Robert Pullen who alleged his mother fell because of a problem with a Jacuzzi walk-in tub and felt she may not have died if she had not fallen, and threatened litigation. (20 App. 4763.) They argued that the disclosures in July and August of 2019 should have been provided long before. (20 App. 4756–57.) And plaintiffs accused Jacuzzi of lying about previous search efforts when Jacuzzi previously asserted it had undertaken a complete search for other incidences, *etc.*, despite knowing that it had not searched all individual employee email accounts. (20 App. 4766–74.)

2. Jacuzzi Demonstrated its Good Faith

Jacuzzi explained itself at the evidentiary hearing and in its papers. First, all the documents upon which plaintiffs sought sanctions *were* produced by Jacuzzi, albeit later than the district court thought they should have been. Importantly, the sanction is not based on documents Jacuzzi destroyed or never provided.[2] (24 App. 5861–71; 25 App. 6054–134; 25 App. 6136–42.) Second, in Jacuzzi's view, the late productions could be explained in part because the scope of plaintiffs' claims and material deemed discoverable had continuously expanded over time—evolving from claims[3] concerning this model tub occurring before Ms. Cunnison's incident to all incidents involving any personal injury or death involving any walk-in tub occurring before or after Ms. Cunnison's incident, and eventually to any communications from any

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[2] The district court's sanction order states, "Jacuzzi's piecemeal, 'drip-drip-drip' style of production makes this Court extremely concerned that Jacuzzi has still failed to produce all relevant documents." (29 App. 7041:11].) But the court provided no reason for that uncharitable conjecture.

[3] Jacuzzi construed *claim* consistently with the definition in BLACK'S LAW DICTIONARY: "A legal assertion; a legal demand; taken by a person wanting compensation, payment, or reimbursement for a loss under a contract, or an injury due to negligence."

user expressing even dissatisfaction with slipperiness, drainage, grab bars, or the tub door, regardless of whether injury occurred or circumstances were substantially similar.[4] Jacuzzi witnesses testified that it endeavored to comply along the way. Jacuzzi said the moving target of plaintiffs' changing defect theory also had complicated identifying relevant material. (24 App. 5854.)

Third, the Jacuzzi employee leading efforts to meet discovery obligations, in-house attorney Ronald Templer,[5] explained he was not

---

[4] For further explanation regarding the expansion of plaintiffs' claims and the scope of discovery ordered by the courts, as well as Jacuzzi's attempted response to each, *see* "Defendant Jacuzzi Inc. Doing Business as Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief," filed December 2, 2019, at 8-11. (24 App. 5857–60.)

[5] As Mr. Templer verified at the evidentiary hearing:

> MR. CLOWARD: Well, I'm trying to get answers to questions about what Jacuzzi knew or didn't know. So the particular question is if you, Mr. Templer, don't know, then who at Jacuzzi would know?
>
> A: In regard to responding to a discovery request?
>
> Q: Yes.
>
> A: Nobody, it should be me.
>
> Q: So you're the only guy?
>
> A: I was the one that dealt with outside counsel in responding to discovery, if that's what you're asking.

(18 App. 4347–48.)

aware the company's disclosures were incomplete or that its representations were inaccurate when made.[6] For instance, he testified that Jacuzzi had uncovered the materials it disclosed in July and August of 2019 only shortly before it disclosed them, which was after Mr. Templer had heard the district court elucidate the forensic search the court envisioned, while in the course of preparing a Rule 30(b)(6) witness for his deposition and in response to discovery requests that were propounded by plaintiffs' in May 2019. (18 App. 4373.) Mr. Templer testified that Jacuzzi had not searched through several individual email accounts, or the company's email database as a whole, because Jacuzzi believed any potentially responsive information in any employee's email accounts also would appear in the company's

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[6] As to the representations in Jacuzzi's prior writ petition to this Court, Mr. Templer testified:

> Q: No. Did Jacuzzi actually produce what it said it had produced to the Supreme Court? Did Jacuzzi produce incidents of any alleged bodily injury related to any Jacuzzi walk-in tub, regardless of how the incident occurred or the nature or severity of the injury?
>
> A: At the time the company thought it had. It has subsequently been learned there was information that was not complete over that disclosure.

(18 App. 4365.)

"Salesforce" database[7] (18 App. 4329–30), making the email database superfluous. And Mr. Templer explained that, when Jacuzzi did attempt to search the company's entire email database, the effort proved futile because the commonality of the search terms yielded unworkably massive results. (18 App. 4317.) The word "slip," for instance, "turned up nearly a million hits because of the way that term is used throughout the company." *Id.* Mr. Templer also testified that Jacuzzi initially limited Salesforce searches to entries coded to "Jacuzzi Bath" without realizing that there were entries that had not been coded to any specific entity, which caused those entries to be excluded unintentionally from the search results. (18 App. 4329–30.)

C. The District Court Found Justification to Strike Jacuzzi's Answer Only by a "Preponderance of the Evidence"

The district court ruled in favor of the plaintiffs, "substantially adopt[ing] the factual and legal analysis presented by Plaintiffs" in their post-hearing briefs. (29 App. 7017:19.) The order states that "[a]ll findings of fact described herein are supported by substantial evidence."

[7] "Salesforce" is a widely used Customer Relationship Management (CRM) platform.

(*Id.*) The district court expressly acknowledged that "[i]n reviewing the evidence presented and relied upon in reaching the decision, the Court applied the preponderance of the evidence standard." (29 App. 7018:5.) Importantly, the district court understood the importance of the burden of proof under the facts of this case and had asked for briefing on this issue. (17 App. 4023:1–15; 19 App. 4585; 24 App. 5878–80' 25 App. 6219–20; 29 App. 7018.) The district court rejected Jacuzzi's argument that a sanction as severe as striking an answer, in whole or part, ought to be justified by clear and convincing evidence. (29 App. 7019; 24 App. 5878.)

The district court concluded that Jacuzzi should have disclosed earlier the material it provided in July and August of 2019 and that failing to do so constituted a breach of Jacuzzi's discovery obligations and a violation of orders. (29 App. 7019, 7025, 7029–30, 7033, 7036, 7040.) The court found that Jacuzzi made false statements to plaintiffs, the discovery commissioner, the district court, and to this Court, concerning the information it possessed and regarding the investigations it conducted. (29 App. 7022, 7025, 7028.) And the district court—by a mere preponderance of the evidence—rejected the

explanations that Jacuzzi provided, believing them to be pretextual. (29 App. 7018, 7038–40.)

D. The Sanction Imposes Liability for Compensatory Damages

The district court struck Jacuzzi's answer "as to liability only." (29 App. 7044:27.) Jacuzzi will receive a jury trial on the amount of compensatory damages, as well as on liability for punitive damages. (*See* 29 App. 7045:3.)

Just recently the district court provided critical definition to the sanction by establishing its parameters and operation for trial.[8] On September 29, 2021, the court entered its order trifurcating the trial to separate the question of compensatory damages from the question of liability for punitive damages, as was done in the seminal case

[8] The reasonableness of a district court's sanction often depends in large part on the severity of its application. *See Hamlett v. Reynolds*, 114 Nev. 863, 866–67, 963 P.2d 457, 458 (1998) (the trial court has discretion to tailor the procedure of a hearing or trial after striking an answer in whole or part). For example, in *Goodyear v. Bahena*, the majority opinion affirming the district court's sanction discusses at length the extent to which Goodyear was allowed an unfettered defense against punitive damages. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 255–56, 235 P.3d 592, 600 (2010). For all intents and purposes, a sanction is defined both by its technical effect and the manner of its application.

regarding non-case-ending sanctions *Bahena v. Goodyear Tire & Rubber Co.*.[9] (33 App. 8042.) This will ensure the sanction order's language precluding Jacuzzi "from presenting any evidence to show that it is not liable for Plaintiffs' harms[10] as to any of Plaintiffs' causes of action against Jacuzzi" does not limit Jacuzzi's ability to defend itself against liability for punitive damages, including disputation that Ms. Cunnison's death did not even result from a defect in the tub.[11] (33 App. 8042.)

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[9] *See Valley Health Sys., LLC v. Estate of Doe*, 134 Nev. 634, 639, 427 P.3d 1021, 1027 (2018), *citing Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 249, 235 P.3d at 596, for the proposition that "sanctions are not considered case ending when, as here, the district court strikes a party's answer thereby establishing liability, but allows the party to defend on the amount of damages."

[10] The term "plaintiffs' harms" denotes compensatory damages. *C.f. Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006) ("Punitive damages are designed not to compensate the plaintiff for *harm* suffered but, instead, to punish and deter the defendant's culpable conduct."); *Ace Truck & Equip. Rentals, Inc. v. Kahn*, 103 Nev. 503, 506, 746 P.2d 132, 134 (1987), *abrogated on other grounds by Bongiovi v. Sullivan*, 122 Nev. 556, 138 P.3d 433 (2006) ("punitive damages are not, as in the case of compensatory damages, awarded to compensate the plaintiff for *harm* incurred").

[11] *C.f., Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 259 n. 1, 235 P.3d at 603 n. 1 (Pickering, J., dissenting) (noting "Goodyear avoided punitive damages in this case by arguing that a road hazard, rather than design or manufacturing defect, caused the tire failure from which this accident resulted").

E. Subsequent Discovery and the Trial Setting

Soon after the district court entered the sanction order, it also reopened discovery to ameliorate any prejudice that may have resulted from the timing of Jacuzzi's disclosures. (29 App. 7183.) The parties were free to "conduct discovery on all issues that remain in the case" at least through June 30, 2021. (29 App. 7183.) This was the full extension requested by plaintiffs. Extensive discovery continued partly because of the burden of proof that plaintiffs still face to justify punitive damages[12] and to enable plaintiffs to respond to Jacuzzi's unfettered defense during the punitive phase(s). As Jacuzzi acknowledged at the September 22, 2020 hearing:

> MR. ROBERTS: And the other thing the Court would need to address is the scope of discovery and some of the issues that were deferred by the Court as moot after the last hearing. . .
>
> I think Mr. Cloward's made it clear to us that the fact that our answer is struck, and he gets to go to the compensative -- compensatory phase on damages doesn't mean he's done with discovery on liability, causation, and other facts that may support his

[12] Plaintiffs still must prove relevant malice by clear and convincing evidence (NRS 42.005(1)), including (1) "despicable conduct" (2) "engaged in with a conscious disregard of the rights or safety of others" (NRS 42.001) that (3) has a causal nexus to the harm suffered by the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409–10, 123 S. Ct. 1513, 1516 (2003) (the "conduct must have a nexus to the specific harm suffered by the plaintiff").

> punitive claim. So I think we do still have discovery left. But there are issues regarding the scope of that discovery and who pays for it. (27 App. 6586:7.)

And discovery has continued in earnest. Since the district court announced its decision to strike Jacuzzi's answer, plaintiffs had an opportunity to depose every single person they sought to depose. They noticed depositions of 28 people as ("OSI") witnesses to other similar incidents. (32 App. 7798.) Jacuzzi did not object to any. Ultimately, plaintiffs elected to depose six of them. In addition to those depositions, plaintiffs were also granted additional depositions of Rule 30(b)(6) representatives of the defendants and granted additional time well beyond the presumptive seven hour limit.

The trial is set to commence on November 29, 2021. (31 App. 7624.)

WHY WRIT RELIEF IS APPROPRIATE

The relief Jacuzzi seeks is appropriate for interlocutory intervention. Mandamus is available "to compel the performance of an

act that the law requires as a duty resulting from an office, trust, or station." *See* NRS 34.160.[13] That is what we have here.

As the Court recently explained, "the chief requisites" for a petition of traditional writ of mandamus are:

> (1) The petitioner must show a legal right to have the act done which is sought by the writ; (2) it must appear that the act which is to be enforced by the mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse; (3) that the writ will be availing as a remedy, and that the petitioner has no other plain, speedy, and adequate remedy.

Walker v. Second Jud. Dist. Ct., 136 Nev. Adv. Op. 80, 476 P.3d 1194, 1196 (2020). To determine whether a subsequent appeal would provide an effective remedy, each case must be individually examined, and extraordinary relief may be granted "where circumstances reveal urgency or strong necessity." *Jeep Corp. v. Second Jud. Dist. Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982).

[13] Alternatively, prohibition arrests the proceedings of a tribunal when such proceedings are in excess of the tribunal's jurisdiction. NRS 34.320.

A. This Petition Concerns the Deprivation of a Legal Right the District Court Had No Discretion to Deny

For the reasons set out below, Jacuzzi has a legal right to have any sanction striking its pleading (even if in part) imposed only upon clear and convincing evidence of the alleged conduct purportedly justifying the sanction. Every litigant is entitled to application of the correct burden of proof, and application of an incorrect level of proof may cause structural error. *C.f., Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 2082 (1993) (criminal) (application of erroneous burden of proof constituted structural error).

The district court does not have discretion to employ a lower standard of proof than is legally required. It is true that the ultimate decision whether to impose discovery sanctions rests within the district court's discretion. *See Valley Health System, LLC v. Estate of Doe*, 134 Nev. at 638-39, 427 P.3d at 1026-27 (2018); *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). Yet, any exercise of discretion requires the trial court to follow the correct, applicable legal framework, which is a matter of law. *Petit v. Adrianzen*, 133 Nev. 91, 92, 392 P.3d 630, 631 (2017) ("Whether a district court used the proper standard of proof is a legal question we review de novo."); *In re J.D.N.*, 128 Nev.

462, 471, 283 P.3d 842, 848 (2012) (although decisions to terminate parental rights are reviewed deferentially for sufficiency of the evidence, "Determining the appropriate burden of proof to rebut NRS 128.109's presumptions [was] a question of law subject to de novo review."); *Matter of Halverson*, 123 Nev. 493, 509, 169 P.3d 1161, 1172 (2007). Thus, while a decision on a motion for discovery sanctions is discretionary, applying the correct burden of proof in the process of making that decision is a legal duty the district court must perform "without discretion on his part either to do or refuse" (*see Walker*, 476 P.3d at 1196).

B. This Case Warrants Advisory Mandamus

As to the third *Walker* prong, while the sanction certainly is reviewable on appeal from the final judgment[14] and Jacuzzi therefore has an "other plain, speedy, and adequate remedy,"[15] this is a

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[14] *See generally Valley Health System, LLC v. Estate of Doe*, 134 Nev. at 634; *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 249, 235 P.3d at 596; *Foster v. Dingwall*, 126 Nev. at 65, 227 P.3d at 1048.

[15] Walker, 476 P.3d at 1198-99; *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) ("Under NRS 34.170, a writ of mandamus is proper only when there is no plain, adequate and speedy legal remedy.").

compelling circumstance warranting advisory mandamus. "[W]hen a writ petition presents an opportunity to clarify an important issue of law and doing so serves judicial economy, [this Court] may elect to consider the petition." *Dekker/Perich/Sabatini Ltd., et al. v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 53, 2021 WL 4347015, *2 (Sep. 23, 2021); *see Walker*, 476 P.3d at 1198-99 (advisory mandamus appropriate for "legal issues of statewide importance requiring clarification" and where it would "promote judicial economy and administration by assisting other jurists, parties, and lawyers"). "Similarly, writ relief may be appropriate where the petition presents a matter of first impression and considerations of judicial economy support its review." *Dekker*, 137 Nev. Adv. Op. 53, 2021 WL 4347015 at *2; *see Walker*, 476 P.3d at 1198-99 (advisory mandamus appropriate where it would "promote judicial economy and administration by assisting other jurists, parties, and lawyers").

1. This Petition Presents an Opportunity to Clarify an Important Issue

Across the state, on a regular basis, litigants ask Nevada trial judges to strike pleadings in whole or part—either because the conduct genuinely warrants it, because a minor sanction may be appropriate but

the moving party asks for the worst sanction to anchor the judge toward the harsh end of the spectrum, or simply out of "litigation by sanction" opportunism. In every case, the judge should be aware of the appropriate burden of proof. That determination must not be *ad hoc*, varying between districts, departments, or parties. Thus, the precedential value of hearing this petition would be significant.

2. Mandamus Would Promote Judicial Economy

Mandamus also would increase judicial economy. *See Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997) ("The interests of judicial economy ... will remain the primary standard by which this court exercises its discretion").

First, the district court's erroneous application of the preponderance-of-the-evidence standard will be a significant issue on appeal. Mandamus compelling reevaluation of the sanction in light of the proper burden of proof now would eliminate that question on appeal, as well as the need for remand and potentially a new trial. And if the district court were to determine on reconsideration that no

sanction is appropriate, this Court likely would not have to address *any* sanction-related issue on appeal.[16]

Second, reevaluation of the sanction before trial would not be unduly inconvenient. The district court need only review the existing record, hearing transcripts, and exhibits, to determine that the sanction cannot stand under the appropriate burden of proof. There is plenty of time before trial to accomplish that.

3. Plaintiffs Should Be Prepared to Try this Case on the Merits

This Court's intervention would be relatively undisruptive. Even if the district court were to reverse the sanction and require plaintiffs to prove liability and causation for compensatory damages, it should not affect unduly plaintiffs' trial readiness. Plaintiffs possess the information that Jacuzzi was faulted for not disclosing earlier. Discovery also continued in earnest after the court imposed its sanction, enabling plaintiffs to follow up on those disclosures as much as they

[16] If this Court were to issue mandamus and the district court were to sanction Jacuzzi under the higher burden of proof, Jacuzzi still would contest on appeal the sufficiency of the record to justify that sanction.

desired. This ameliorated any harm the timing of Jacuzzi's disclosures may have caused.[17]

As a practical matter, moreover, plaintiffs will have to be prepared to prove the merits of their case at trial anyway in order to justify punitive damages. As the district court clarified:

> . . . because the sanction does not establish any aspect of plaintiff's showing to justify punitive damages—plaintiffs still must prove implied malice by clear and convincing evidence (NRS 42.005(1)), including (1) "despicable conduct" (2) "engaged in with a conscious disregard of the rights or safety of others" (NRS 42.001) that (3) has a causal nexus to the harm suffered by the plaintiff. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 409–10, 123 S. Ct. 1513, 1516 (2003) (the "conduct must have a nexus to the specific harm suffered by the plaintiff").

(33 App. 8041.) The purported "despicable conduct" would have to be that Jacuzzi manufactured a product it knew was allegedly dangerous

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[17] An essential factor in evaluating the propriety of a sanction is the extent of any harm or prejudice that the sanctionable conduct caused the non-offending party. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 780 (1990). "Sanctions interfering with a litigant's claim or defenses violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case." *Rubin v. Belo Broadcasting Corp.,* 769 F.2d 611, 618 (9th Cir. 1985). And in certain instances, an ultimate sanction such as dismissal or default is necessary only because any less of a sanction would prejudice the non-offending party. *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 914 (1987); *Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 314, 810 P.2d 785, 788 (1991).

in some particular way that is causally relevant to Ms. Cunnison's death. That entails the same body of evidence regarding defectiveness and causation in the punitive phases of trial that would be used to warrant compensatory damages. Thus, plaintiffs already are prepared—as much as they can be and ever would have been—to prove that a defect in this tub somehow caused Ms. Cunnison's death.

ARGUMENT ON THE MERITS

Clear and convincing evidence should be required to impose significant sanctions, especially one that removes or devastates a person's ability to defend itself in Court. Such sanctions should not rest on distrustful assumptions, as this one does.

I.
SIGNIFICANT SANCTIONS SHOULD BE JUSTIFIED BY CLEAR AND CONVINCING EVIDENCE

A. This is an Important Issue of First Impression

This Court has never determined the burden of proof the district court must employ when considering evidence to decide whether to strike a pleading or impose other severe sanctions for litigation conduct. The standard of *appellate review* is established for oversight of the

district court's decision.[18] But the Court has given no clear instruction regarding the level of proof the district court should require in the first instance.

B. The Clear-and Convincing Standard is Consistent with Nevada Case Law

The Court previously has alluded that clear and convincing evidence is appropriate. In *Valley Health System, LLC v. Estate of Doe*, the Court reviewed a sanction similar to that imposed on Jacuzzi and noted thrice in its published opinion that Judge Scotti—the same district court judge who issued the sanctions order against Jacuzzi here—had justified that sanction by "clear and convincing" evidence. 134 Nev. 634, 637-41, 427 P.3d at 1026-28. The heightened burden of

[18] "Non-case-concluding sanctions" are reviewed for an abuse of discretion and "will be upheld if the district court's sanction order is supported by substantial evidence." *Valley Health Sys., LLC v. Peterson*, 134 Nev. at 639, 427 P.3d at 1027; *citing Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. at 254, 235 P.3d at 599. "A somewhat heightened standard of review applies where the sanction strikes the pleadings, resulting in dismissal with prejudice." *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P. 3d 1042, 1048 (2010), citing *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). "Under this somewhat heightened standard, the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated." *Id.*

proof in the district court also would be harmonious with the "somewhat heightened" standard of review that Nevada appellate courts employ when reviewing a district court's imposition of ultimate sanctions. *Foster v. Dingwall*, 126 Nev. at 65, 227 P.3d at 1048. And petitioner finds no opinion in which the Court has embraced the lower preponderance-of-the-evidence standard.

This Court would not be alone in holding that clear and convincing evidence is necessary. Several courts have required that modicum of proof to impose severe sanctions. *See, e.g., Shepherd v. Am. Broad. Companies, Inc.*, 62 F.3d 1469, 1472 (D.C. Cir. 1995) ("a district court may use its inherent power to enter a default judgment only if it finds, first, by clear and convincing evidence—a preponderance is not sufficient—that the abusive behavior occurred; and second, that a lesser sanction would not sufficiently punish and deter the abusive conduct while allowing a full and fair trial on the merits"); *Qantum Comms. Corp. v. Star Broadcasting, Inc.*, 473 F.Supp.2d 1249, 1277 (S.D.Fla.2007) (finding by clear and convincing evidence that defendant engaged in abusive conduct, including lying under oath, and that no sanction less than default judgment and fees would sufficiently deter

and punish such conduct); *Chemtall, Inc. v. Citi–Chem, Inc.*, 992 F.Supp. 1390, 1408 (S.D.Ga.1998) (observing that district court may use its inherent power to enter a default judgment only if it finds by clear and convincing evidence that the abusive behavior occurred and that lesser sanction would not suffice).

C. Analogous Contexts Point to a Burden of Proof Higher than Mere Preponderance of the Evidence

The law in general also calls for a standard of proof higher than mere preponderance of the evidence, at least clear and convincing evidence.

1. The State Constitution's Guarantee of a Trial By Jury Should Not be Disregarded Lightly

The Nevada Constitution provides that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever" although parties may waive it "in the manner to be prescribed by law[.]" NEV. CONST. art. I, § 3. "Courts must indulge every reasonable presumption against the loss of constitutional rights." *Collins v. State*, 133 Nev. 717, 720, 405 P.3d 657, 661 (2017), *quoting Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060 (1970). Depriving a litigant of that constitutional right, whether completely or in substantial part, should not be taken

lightly. By employing a preponderance-of-the-evidence standard, the district court deprived Jacuzzi of its constitutional right to a full jury trial on liability based on a conclusion that as little as *50.1%* of the evidence, record, and legal factors, established Jacuzzi's necessary culpability of missteps in discovery.

2. The Gravamen of Plaintiff's Request for Sanctions was an Accusation of Intentional Misrepresentation and Litigation Misconduct

The nature of the allegation also calls for the higher standard of proof. Plaintiffs' request for sanctions accused Jacuzzi of intentional misrepresentation, which must be proven by clear and convincing evidence. "To prevail on an intentional misrepresentation claim, a plaintiff must prove by clear and convincing evidence the following four elements: (1) the defendant asserts a false representation with the knowledge or belief that it is false or without sufficient foundation, (2) the defendant intended to induce the plaintiff to act or refrain from acting, (3) the plaintiff justifiably relies on the misrepresentation, and (4) the plaintiff suffers damages as a result." *Pro-Brokers, Inc. v. Muhlenberg*, 124 Nev. 1501, 238 P.3d 847 (2008). Depriving a party of their ability to defend themselves also is punitive in nature, which calls

for the clear and convincing standard. C.f., NRS 42.005(1) (punitive damages must be proven by clear and convincing evidence). And, generally, the key to unlocking a court's inherent power to sanction is a finding of bad faith (*see Bahena*, 126 Nev. at 615, 245 P.3d at 1188 (propriety of sanctions are based on "criteria of willfulness, bad faith, and prejudice")), which Nevada generally requires be proven by clear and convincing evidence. *See, e.g, In re Discipline of Drakulich*, 111 Nev. 1556, 1566–67, 908 P.2d 709, 715 (1995)) (bad faith in context of attorney discipline); *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1260, 969 P.2d 949, 957 (1998), as amended (Feb. 19, 1999) (insurance bad faith).

II.
THE ERRONEOUS BURDEN OF PROOF PROBABLY MADE A DIFFERENCE IN THIS CASE

The erroneous application of the preponderance-of-the-evidence standard was prejudicial.

A. The Judge's Deliberate Choice of the Standard Implies the Ruling May Have Been Different

The district court did not employ the low burden of proof by happenstance. The court specifically asked the parties to address which

burden of proof would apply to the sanction analysis. (17 App. 4023.) Jacuzzi argued that the clear-and-convincing evidence standard was most appropriate. (24 App. 5878.) Plaintiffs argued that level of proof was not necessary. (19 App. 4585; 25 App. 6219.) The court then deliberately avoided the higher burden, expressly opting to determine the propriety of any sanction by only a preponderance of the evidence. (29 App. 7018:5–7.)

That choice of standards is striking because the Honorable Richard Scotti also was the trial court judge in *Valley Health System, LLC v. Estate of Doe*, 134 Nev. at 634, 427 P.3d at 1021. There, he expressly justified his sanctions with findings by clear and convincing evidence, which this Court noted repeatedly in the opinion affirming his ruling. Put simply, the district court was cognizant of the difference between the burdens of proof. He candidly employed the lower standard. That considered choice suggests the outcome may have been different under the higher standard.

B. The Sanction Relies on Cynical Assumptions

The higher burden of proof is important because it carries over to the application of evidentiary inferences. Although bad-faith intent can

be inferred from indirect and circumstantial evidence, "such evidence must still be clear and convincing, and inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement." *Star Sci., Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1366–67 (Fed. Cir. 2008). Moreover, "the inference must not only be based on sufficient evidence and be reasonable in light of that evidence, but it must also be the single most reasonable inference able to be drawn from the evidence to meet the clear and convincing standard." *Id.* At each level of inference, any indirect evidence relied upon to justify sanctions also should clear and convincing.

Here, the district's court's sanction rests on critical assumptions pertaining to the element of willfulness. Jacuzzi explained the timing of the evidentiary disclosures at the evidentiary hearing and in its papers. The Jacuzzi employee overseeing responses to discovery, in-house attorney Ronald Templer, explained he was not aware the company's disclosures were incomplete or that its representations were inaccurate when made. (See above at pp. 5–7.) For instance, he testified that Jacuzzi had uncovered the materials it disclosed in July and August of 2019 only shortly before it disclosed them. He explained

that Jacuzzi had not searched through several individual email accounts, or the company's email database as a whole, previously because Jacuzzi believed any potentially responsive information in any employee's email accounts also would appear in the company's "Salesforce" database (18 App. 4329–30), making the email database superfluous. And Mr. Templer explained that, when Jacuzzi did attempt to search the company's entire email database, the effort proved futile because the commonality of the search terms yielded unworkably massive results. (18 App. 4317.)

The district court heard that testimony but chose to disbelieve Jacuzzi's explanations, drawing inferences from circumstantial evidence against Jacuzzi to conclude that its explanations were pretextual. (29 App. 7018, 7038–40.) Even assuming that circumstantial evidence could possibly be sufficient to support a finding of willfulness by a preponderance of the evidence—which it cannot[19]—it should not be

[19] Jacuzzi maintains that the sanction was an abuse of discretion even if it was legally appropriate to apply the preponderance-of-the-evidence standard. That abuse of discretion will be an issue on appeal if the sanction is not reconsidered before trial. For the moment, however, that fact-intensive, discretionary decision is beyond the scope of advisory mandamus. *See Walker v. Second Jud. Dist. Ct.*, 476 P.3d at 1196 ("it must appear that the act which is to be enforced by the

deemed sufficient under the appropriate burden of proof requiring clear and convincing evidence. At very least, the fact-finder should weigh the direct testimony from Jacuzzi's witnesses against that circumstantial evidence in light of the appropriate burden of proof.

CONCLUSION

For the forgoing reasons, the Court should issue a writ of mandamus instructing the district court to vacate the order striking Jacuzzi's answer in part and compelling the district court to reevaluate any sanction in light of the correct evidentiary standard.

Dated this 5th day of October, 2021.

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mandate is that which it is the plain legal duty of the respondent to perform, without discretion on his part either to do or refuse").

CERTIFICATE OF COMPLIANCE

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

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 5,887 words.

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

Dated this 5th day of October, 2021.

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CERTIFICATE OF SERVICE

I certify that on October 5, 2021, I submitted the foregoing PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

Benjamin P. Cloward
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Real Parties in Interest

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

The Honorable Crystal Eller
DISTRICT COURT JUDGE – DEPT. 19
200 Lewis Avenue
Las Vegas, Nevada 89155

Respondent

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

REAL PARTY IN INTEREST'S APPENDIX TAB "6"

MSTY
PHILIP GOODHART, ESQ.
Nevada Bar No. 5332
MEGHAN M. GOODWIN, ESQ.
Nevada Bar No. 11974
THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER
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Attorneys for Defendants/Cross-Defendants, FIRSTSTREET FOR BOOMERS AND BEYOND, INC., AITHR DEALER, INC., and HALE BENTON

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

CASE NO. A-16-731244-C
DEPT. NO. 19

FIRSTSTREET FOR BOOMERS AND BEYOND, INC. AND AITHR DEALER, INC.'S, MOTION FOR STAY OF TRIAL ONLY ON ORDER SHORTENING TIME

Hearing Date: November 2, 2021

Hearing Time: 9:00 a.m.

HOMECLICK, LLC,

Cross-Plaintiff,

vs.

FIRST STREET FOR BOOMERS & BEYOND, INC.; AITHR DEALER, INC.; HOMECLICK, LLC; JACUZZI LUXURY BATH, doing business as JACUZZI INC.; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, individually, and as BUDDS PLUMBING,

Cross-Defendants.

HOMECLICK, LLC, a New Jersey limited liability company,

Third-Party Plaintiff,

vs.

CHICAGO FAUCETS, an unknown entity,

Third-Party Defendant.

BESTWAY BUILDING & REMODELING, INC.,

Cross-Claimant,

vs.

FIRST STREET FOR BOOMERS & BEYOND, INC.; AITHER DEALER, INC.; HALE BENTON, individually; HOMECLICK, LLC; JACUZZI LUXURY BATH, dba JACUZZI INC.; WILLIAM BUDD, individually and as BUDD'S PLUMBING; ROES I through X,

Cross-Defendants.

WILLIAM BUDD, individually and as BUDDS PLUMBING,

Cross-Claimants,

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.; 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,

Cross-Defendants.

FIRSTSTREET FOR BOOMERS AND BEYOND, INC. AND AITHR DEALER, INC.'S, MOTION FOR STAY OF TRIAL ONLY ON ORDER SHORTENING TIME

COMES NOW, Defendants FIRSTTSTREET FOR BOOMERS AND BEYOND, INC. and AITHR DEALER, INC., by and through their attorneys of records, the law firm of Thorndal, Armstrong, Delk, Balkenbush & Eisinger, and hereby moves this Honorable Court for an Order granting its Motion to Stay Trial Only on Order Shortening Time.

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This Motion is based upon the pleadings and papers on file with the Court, the attached Memorandum of Points and Authorities, and any oral argument that this Court may entertain at the time of the hearing of this matter.

DATED this 29th day of October, 2021.

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER

/s/ Philip Goodhart

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

ORDER SHORTENING TIME

Upon application and the supporting Affidavit of Philip Goodhart, Esq. for Defendants, FIRSTTSTREET FOR BOOMERS AND BEYOND, INC. and AITHR DEALER, INC. pursuant to E.D.C.R. 2.26 on Application of Order Shortening Time and good cause appearing therefore, IT IS HEREBY ORDERED that hearing on FIRSTTSTREET FOR BOOMERS AND BEYOND, INC., AITHR DEALER, INC. MOTION TO STAY TRIAL ONLY shall be shortened to the 2nd day of _____, November, 2021 at 9:00 a.m. A.M./P.M., or as soon thereafter as counsel may be heard, this Motion will be brought on for hearing before Department XIX of the above Captioned Court, with any Oppositions to be filed on n/a, and any Replies to be filed on n/a.

IT IS SO ORDERED this _____ day of _____, 2021.

Dated this 1st day of November, 2021

Crystal Eller

DISTRICT COURT JUDGE

93A 921 E6AB B287
Crystal Eller
District Court Judge

Respectfully submitted,

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER

/s/ Philip Goodhart

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

DECLARATION OF PHILIP GOODHART IN SUPPORT OF FIRSTTSTREET FOR BOOMERS AND BEYOND, INC. and AITHR DEALER, INC.'S MOTION TO STAY TRIAL ONLY ON ORDER SHORTENING TIME

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, PHILIP GOODHART, ESQ., being duly sworn, hereby deposes and says:

1. That declarant is an attorney licensed to practice law in the State of Nevada and is a partner with the law firm of THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, with offices located at 1100 East Bridger Avenue, Las Vegas, Nevada, 89101, attorneys for the Defendants, FIRSTSTREET FOR BOOMERS AND BEYOND, INC. (firstSTREET), and AITHR DEALER, INC. (AITHR), in the above matter.

2. That Plaintiffs' first Motion To Strike Defendants firstSTREET and AITHR's Answers For Discovery Abuses was denied by this Court on March 12, 2019. That on October 9, 2020 Plaintiffs filed a Renewed Motion to Strike Defendants firstSTREET and AITHR's Answer to Plaintiffs' Fourth Amended Complaint. This Renewed Motion was based on Plaintiffs' arguments that Defendants had violated NRCP 16.1's disclosure requirements by failing to voluntarily disclosed certain documents and information. Significantly, Plaintiffs' motion did not allege that Defendants firstSTREET and AITHR had violated a single discovery order.

3. That on December 28, 2020, just days before Judge Scotti left the bench, this Court granted Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's Answers Regarding Liability only.

4. That Defendants firstSTREET and AITHR believe that this Court's granting of Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's Answers was made in error and that an appeal was necessary to resolve this issue. As such, on August 17, 2021 Defendants firstSTREET and AITHR filed a Writ regarding this Court's decision, and requests a stay of the trial only, pending the result of said Writ.

5. That up until just recently, Plaintiffs were completing discovery against Defendants firstSTREET and AITHR, to wit, an NRCP 30(b)(6) witness deposition of a corporate designee of firstSTREET and AITHR, and Defendants did not want a possible stay of this litigation to interfere with this discovery, or a Mediation that took place on Saturday, October 23, 2021. Defendants also wanted to provide the Nevada Supreme Court with sufficient time to review the validity of the Writ that was filed, and possibly make a ruling on the Writ prior to the trial of this matter.

6. Declarant requests that this matter be heard on shortened time in light of the fact that trial in this matter is set for a firm start on November 29, 2021.

7. That this Motion and Request is made in good faith and not for any improper purpose or to protract litigation.

FURTHER, DECLARANT SAYETH NAUGHT.

PHILIP GOODHART, ESQ.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

This is a product liability action involving claims that a Jacuzzi Walk-In Tub was defectively designed or that the warnings related to the tub were insufficient. Plaintiffs Fourth Amended Complaint, at ¶ 42. In October 2013, Decedent Sherry Lynn Cunnison ("Cunnison") purchased the Tub from Defendant AITHR Dealer, Inc. The Tub was installed in her home on January 27, 2014. Plaintiffs allege that about a month after installation, Cunnison was using the bathtub and somehow became stuck in the tub, unable to exit. See, Plaintiffs' Fourth Amended Complaint at ¶¶ 27-29.

Jacuzzi and firstStreet entered into a manufacturing agreement (the "Agreement") on October 1, 2011. Under the terms of the Agreement, Jacuzzi was obligated to design and manufacture a walk-in tub. firstSTREET was granted exclusive advertising and marketing rights to the tub, along with the exclusive rights to sell the tub within the United States. *Id*. at 2(A)-(B). The design for the tub was developed exclusively by Jacuzzi.

AITHR, Inc. ("AITHR"), a subsidiary of firstSTREET, was a dealer that sold and arranged the installation of the Jacuzzi tub. Hale Benton was an independent contractor/salesperson for AITHR, located in Las Vegas, Nevada, when Ms. Cunnison contacted AITHR regarding the Jacuzzi tub. A potential customer interested in purchasing a Jacuzzi tub would call the dealer and set up an appointment. The dealer then gave the appointment to a salesperson who would go to the customer's house, inspect the bathroom, take measurements, and sit down with the customer to answer any questions.

Defendants firstSTREET and AITHR were not involved in the design, testing, or manufacture of the subject tub, nor with the instructions for use or warnings that accompanied the tub. ***Defendants firstSTREET advertised, marketed, and sold the Jacuzzi tub***.

Plaintiffs' first Motion To Strike Defendants firstSTREET and AITHR's Answers For Discovery Abuses was denied by this Court on March 12, 2019. Then, on October 9, 2020 (the very last day that the Court provided for Plaintiffs to file another Motion to Strike) Plaintiffs filed a Renewed Motion to Strike Defendants firstSTREET and AITHR's Answer to Plaintiffs'

Fourth Amended Complaint. This Renewed Motion was based entirely on Plaintiffs' arguments that Defendants had violated NRCP 16.1's disclosure requirements by failing to voluntarily disclosed certain documents and information. Significantly, Plaintiffs' Renewed Motion did not allege that Defendants firstSTREET and AITHR had violated a single discovery order, because there had never been a discovery order issued against firstSTREET or AITHR. In fact, at no point in time during this litigation did Plaintiffs file a Motion to Compel against firstSTREET or AITHR.

On December 28, 2020, just days before leaving the bench, Judge Scotti issued a minute order granting Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's Answers Regarding Liability only. Judge Scott ordered Plaintiffs to submit an Order by 4 p.m., December 30, 2020, so that he could sign it before leaving the bench. Defendants firstSTREET and AITHR believe that this Court's granting of Plaintiffs' Renewed Motion to Strike Defendants firstSTREET and AITHR's Answers was made in error. As such, on August 17, 2021 Defendants firstSTREET and AITHR filed a Writ regarding this Court's decision, and now request a stay of the trial only, pending the result of said Writ. Therefore, firstSTREET and AITHR file the instant Motion and seeks to stay the trial only in the current litigation pending the resolution of said Petition pursuant to Nevada Rule of Appellate Procedure 8.

II. LEGAL ARGUMENT

A. Legal Standard

This Court has the power and discretion to stay this case to promote judicial efficiency and prevent the unnecessary waste of resources by the Court and the parties. As the United States Supreme Court has observed, "the power to stay any proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants."[1] Nevada Rule of Appellate

[1] *Landis v. North Am. Co*., 299 U.S, 248, 254 (1936); *see also Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting *Landis*, 299 U.S. at 254); *Eagle SPE NV 1, Inc. v. S. Highlands Dev. Corp*., No. 2:12-cv-00550-MMD-PAL, 2013 WL 595821, at *2 (D. Nev. Feb. 15, 2013).

Procedure 8 provides the procedure for staying litigation pending appeals and petitions for writs of mandamus. "A party must ordinarily move first in the district court for... a stay of the... proceedings in a district court pending appeal or resolution of a petition to the Supreme Court for an extraordinary writ... ." Thus, the rule requiring a party to first "seek a stay in the district court before seeking a stay in the Nevada Supreme Court... is a sound one that should also apply to writ petitions when the order the petition seeks to challenge is one issued by a district court."[2]

In considering whether to grant the requested stay, this Court should weigh the following four factors:

(1) whether the object of the appeal or writ petition will be defeated if the stay or injunction is denied;
(2) whether appellant/petitioner will suffer irreparable or serious injury if the stay or injunction is denied;
(3) whether respondent/real party in interest will suffer irreparable or serious injury if the stay or injunction is granted; and
(4) whether appellant/petitioner is likely to prevail on the merits in the appeal or writ petition.[3]

As discussed thoroughly below, each of the aforementioned four factors indicate this Court should grant firstSTREET and AITHR's requested stay.

B. As Each of the Foregoing Factors Weighs in Favor of Staying the Present Case, This Case Should Be Stayed Pending the Resolution of firstSTREET and AITHR's Petition for Writ of Mandamus

1. The Object of firstSTREET and AITHR's Appeal Will Be Defeated if the Requested Stay Is Denied

If this Court refuses to stay the present litigation, the entire object of firstSTREET and AITHR's anticipated appeal regarding this Court's interpretation and application of NRS 16.1 and its striking of an Answer with no violation of any Court Order will be defeated. In the impending appeal, firstSTREET and AITHR seek a determination as to whether the District

[2] *Hansen v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000).

[3] Nevada Rule of Appellate Procedure 8; *Hansen*, 116 Nev. at 657, 6 P.3d at 986.

Court abused its discretion by striking Defendants Answers for alleged discovery abuses, in the absence of any prior motion to compel or resultant discovery order. Defendants firstSTREET and AITHR further seek a determination of whether the District Court abused its discretion by striking Defendants Answers for alleged discovery abuses without conducting an evidentiary hearing.

firstSTREET and AITHR's petition raises serious questions regarding the applicability of NRS 16.1 and a parties disclosure requirements absent a Motion to Compel Discovery or an Order compelling a party to respond to discovery. If this Court does not grant firstSTREET and AITHR's requested stay, this matter will proceed through trial and firstSTREET and AITHR will be required to go through an entire trial without the benefit of being able to defend themselves on liability, notwithstanding their belief that they have no liability to Plaintiffs. Therefore, failure to grant firstSTREET and AITHR's request for a stay would wholly defeat the purpose of the Petition for Writ of Mandamus.

2. firstSTREET and AITHR Will Suffer Irreparable Injury if their Request for Stay Is Denied

Absent a stay of the proceedings pending the outcome of the anticipated appeal, firstSTREET and AITHR will suffer irreparable and serious harm. Through its petition, firstSTREET and AITHR seek to renew their ability to defend themselves in the liability portion of this litigation. The Court's erroneous ruling currently prevents them from defending themselves from Plaintiffs claims, and are now limited to trying to reduce Plaintiffs' claimed damages. If firstSTREET and AITHR are successful on their Writ, then a trial on damages only will be a waste of the parties' and this Court's time, as the case will have to be re-tried, causing unnecessary delay and costs for all parties involved. This factor, therefore, weighs heavily in favor of this Court granting a stay of the current proceeding.

3. Plaintiffs Will Suffer No Irreparable Injury if the Stay Is Granted

Any harm the Plaintiffs might incur is minimal in light of the harm that would be suffered by firstSTREET and AITHR if they were forced to proceed to trial under the instant circumstances. Plaintiffs already have a ruling in their favor on liability regarding the product

defect, manufacturing and design claims against Jacuzzi. This "win" will remain in effect throughout the stay of the pending litigation. Further, Plaintiffs could actually benefit from a stay as it will gain more time, to prepare for trial in this matter and they will not have to be concerned with taking the case to trial prior to the expiration of the 5 year rule. In fact, Plaintiffs are continuing to complete their discovery against Jacuzzi even at this late hour – there are still NRCP 30(b)(6) depositions that this Court ordered to complete, as well as the inspection and production of SalesForce records that has not been completed. Moreover, as recently as two (2) weeks ago, Jacuzzi produced over 2,500 pages of emails. Thus, any harm suffered by Plaintiffs (if any) would certainly be minor, starkly contrasted with the nature of harm that firstSTREET and AITHR would suffer if this matter proceeds forward. This factor supports staying the present litigation pending the resolution of firstSTREET and AITHR's petition.

4. firstSTREET and AITHR Are Likely to Prevail on the Merits of its Appeal

The District Court's interpretation of NRCP 16.1(e)(3) to allow the severe sanctions imposed on firstSTREET and AITHR, namely striking their Answers, conflicts with the plain language of the Rule. Significantly, under the express language of the rule, if the conduct complained of is done by an attorney, rather than a party, then the District Court's sanction may not necessarily be preceded by violation of a court order. However, when it is the ***party's*** conduct that is sanctioned by the District Court, the sanctions available under Rules 37(b) or 37(f) are only available if the "party fails to comply with an order entered under Rule 16.3." Thus, a ***party*** must violate a court order, originating with the Discovery Commissioner, in order to warrant the discovery sanctions.

Throughout the entire course of discovery, Plaintiffs failed to file a single motion to compel against firstSTREET or AITHR, and consequently there is no discovery order that firstSTREET or AITHR – the party - could have violated. Nevertheless, the District Court's sanctions were expressly based on conduct of firstSTREET and AITHR, who are a ***party***, and the District Court expressly found that the sanctions were not a result of attorney conduct. Yet,

the basis for the District Court's ruling – the violation of NRCP 16.1's disclosure requirements – is based entirely and solely on the conduct of counsel, ***not the party***. For it is counsel that selects what documents are disclosed as part of the NRCP 16.1 disclosure requirements, not the party that counsel represents.

This is a very significant distinction, as without a court order in place, the ***party*** cannot be sanctioned under Rules 37(b) or 37(f). *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990). Again, NRCP 16.1(e)(3) envisions a clear distinction between an attorney's conduct (not complying with NRCP 16.1) and an attorney's or party's conduct (not complying with a court order). Since there have been no discovery orders issued against firstSTREET or AITHR the District Court abused its discretion when it imposed the sanction of striking fristSTREET and AITHR's Answers.

firstSTREET and AITHR proffer that an attorney is solely responsible for the production of documents and information in NRCP 16.1 disclosures. That it is not the "party" that bears this burden, or has this obligation. On the other hand, when the Court issues a discovery order against the party, then this responsibility shifts to the party and the party must comply with the order or face the sanctions available under Rules 37(b) or 37(f). If this was not the case, then there would be no need for discovery – interrogatories, requests for production or requests for admission – as a "party" would be obligated to produce everything they had in order to be in compliance with this Court's overly broad interpretation of NRCP 16.1.

Therefore, it seems likely the Nevada Supreme Court will entertain firstSTREET and AITHR's petition and rule on its merits to clear up any ambiguity in the disclosure requirements of NRCP 16.1 when there has been no Motion to Compel filed, nor any discovery Order violated. Based on the prior motions and exhibits submitted by firstSTREET and AITHR, and in conjunction with the arguments made herein, firstSTREET and AITHR respectfully submit that they have a likelihood of success on the merits of their impending appeal.

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III. CONCLUSION

Based on the foregoing, FIRSTSTREET FOR BOOMERS AND BEYOND, INC. AND AITHR DEALER, INC. respectfully requests that its Motion to Stay the trial only be GRANTED.

DATED this 29th day of October, 2021.

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER

/s/ Philip Goodhart

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of October, 2021, service of the above and foregoing **FIRSTSTREET FOR BOOMERS AND BEYOND, INC. AND AITHR DEALER, INC.'S, MOTION FOR STAY OF TRIAL ONLY ON ORDER SHORTENING TIME** was made upon each of the parties via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

/s/ Stefanie Mitchell

An employee of THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Robert Ansara, Plaintiff(s)	CASE NO: A-16-731244-C
vs.	DEPT. NO. Department 19
First Street for Boomers & Beyond Inc, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 11/1/2021

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REAL PARTY IN INTEREST'S APPENDIX TAB "7"

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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 l 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.: XIX

ORDER DENYING FIRSTSTREET FOR BOOMERS AND BEYOND, INC. AND AITHR DEALER, INC.'S MOTION FOR STAY OF TRIAL ONLY ON ORDER SHORTENING TIME AND DEFENDANT JACUZZI INC. DBA JACUZZI LUXURY BATH'S JOINDER THERETO

Hearing Date: 11/2/21

Hearing Time: 9:00 a.m.

Defendant Firststreet for Boomers and Beyond, Inc. and AITHR Dealer, Inc.'s Motion for Stay of Trial Only on Order Shortening Time and Defendant Jacuzzi Inc. dba Jacuzzi Luxury Bath's Joinder thereto, having come on regularly for hearing on the 2nd day of November, 2021, in Department XIX, the Honorable Crystal Eller, presiding, BENJAMIN P. CLOWARD, ESQ., IAN C. ESTRADA, ESQ., and LANDON LITTLEFIELD, ESQ., appearing on behalf of the Plaintiffs; PHILIP GOODHART, ESQ. appearing on behalf of Defendants, Firststreet for Boomers and Beyond, Inc., AITHR Dealer, Inc., and Hale Benton; BRITTANY M. LLEWELLYN, ESQ., JOEL D. HENRIOD, ESQ., and JOHNATHAN T. KRAWCHECK, ESQ. appearing on behalf of Defendant Jacuzzi, Inc.; the Court being fully advised in the premises and good cause appearing therefore.

Both Motions to Stay are denied without prejudice after considering the factors set forth in NRAP 8(c) for the following reasons:

First [NRAP 8(c)(1)]: Whether the object of the appeal will be defeated in the absence of a stay.

If the case proceeds to trial, Jacuzzi[1] and firstSTREET/AITHR (collectively "firstSTREET") will be precluded from presenting evidence that could absolve themselves of all liability in this matter, and could result in a defense verdict which would obviate the need for a compensatory damages or punitive damages phase of the trial. Furthermore, even though Jacuzzi and firstSTREET would be allowed to mount a full defense in the punitive damages phase of the trial if this Motion for Stay is denied, the liability defenses could potentially reduce the amount of compensatory damages a jury may be inclined to award Plaintiffs. Therefore, even though the object of the appeal will only be defeated in one portion of the case, i.e. the liability phase, it could have an impact on other portions of the trial as well. As such, this factor weighs in favor of supporting Jacuzzi and firstSTREET's request for stay.

[1] Because Jacuzzi joined in the arguments advanced by firstSTREET, the Court addresses both Defendants herein. For the separate issue advanced by Jacuzzi regarding its challenge to the standard used by Judge Scotti, i.e., preponderance versus clear and convincing—that is addressed separately below.

Second [NRAP 8(c)(2)]: Whether the appellant will suffer irreparable or substantial harm in the absence of a stay.

This factor does not weigh in favor of firstSTREET or Jacuzzi who argue that tremendous money, time, and energy will be expended if this matter must be re-tried after a successful appeal. The Nevada Supreme Court has specifically addressed ***and rejected*** this very argument and therefore it cannot be said that this factor weighs in favor of either firstSTREET or Jacuzzi. Specifically, the Nevada Supreme Court has stated that "litigation expenses, while potentially substantial, are neither irreparable nor serious." Hansen v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 116 Nev. 650, 658, 6 P.3d 982, 986 (2000). Further, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay **are not enough**" to show irreparable harm. Id. (quoting Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 674 (D.C.Cir.1985)(internal quotations omitted)(emphasis added).

Third: [NRAP 8(c)(3)]: whether the respondent will suffer irreparable or substantial harm if a stay is granted.

This factor weighs heavily in favor of Plaintiffs. For many years Plaintiffs have attempted to obtain relevant evidence necessary to prove the claims asserted against firstSTREET and Jacuzzi. Plaintiffs' attempts have been thwarted and neither firstSTREET nor Jacuzzi have acted in good faith in the discovery process, resulting in their Answers regarding liability being stricken.

As a result Plaintiffs have lost their fundamental right to have their case heard expeditiously. Here, the Court weighed moving this case to the Court's trial stack beginning February 7, 2022, but determined that this would not assist the parties if the Nevada Supreme Court has not ruled on the Writs by then. Moreover, the Court notes that this case has been going on for quite some time and tends to agree the Plaintiffs that that given the target demographic of the Jacuzzi Walk-in Bathtub, some of the people involved in other incidents have since passed away, thereby forever depriving Plaintiffs of the testimony and evidence related to those incidents.

This Court has already found that Jacuzzi and firstSTREET withheld relevant information and failed to disclose relevant incidents. By granting a stay, additional delay will further deprive Plaintiffs of testimony and evidence. This harm is real, not just illusory. For instance, Donald Raidt, was someone who complained about the slipperiness of the tub and who slipped and fell leading to an injury. Mr. Raidt's incident was not turned over to Plaintiffs until July 26, 2019. Unfortunately, Mr. Raidt passed away on February 9, 2019. His relative, Karen Raidt Lee, died in June of 2019. His brother, Richard Arthur Raidt, died in May of 2019, and unfortunately, his son Richard Raidt, Jr. had no knowledge regarding Donald's injuries or the circumstances surrounding his fall or use of the Jacuzzi tub.

Another example is a husband and wife that complained to the Defendants about the tub floor and seat being too slippery which caused the couple to be fearful of using the tub for fear that Mrs. Arnouville would fall. The emails establish that the Arnouville complaint was known by Defendants in 2012. The Arnouville incident was not turned over to Plaintiffs until July 26, 2019. Unfortunately, Mrs. Arnouville passed away on May 15, 2019. Her death has caused Mr. Arnouville to be too distraught to discuss the matter. Their son Jamey has no knowledge of his mother's use of the tub.

Important evidence was forever lost to Plaintiffs. Because of the uncertainty of how long a stay would last, any further delay will likely lead to additional evidence being lost, further prejudicing Plaintiffs. Furthermore, this Court believes that the Nevada Supreme Court is in a better position to determine when a ruling on Jacuzzi and firstSTREET's respective Writs will be ruled upon.

<u>Fourth</u> [NRAP 8(c)(4)]: Whether the appellant is likely to prevail on the merits of the appeal.

District courts have broad discretion under NRCP 16.1, NRCP 26, NRCP 37. Additional power given to the District Courts have been discussed by the Nevada Supreme Court in cases like <u>Young v. Johnny Ribeiro Bldg., Inc.</u>, 106 Nev. 88, 787 P.2d 777 (1990). In <u>Young,</u> the Supreme Court of Nevada held that courts have "inherent equitable powers to dismiss actions or

enter default judgments for ... abusive litigation practices. Litigants and attorneys alike should be aware that these powers may permit sanctions for discovery and other litigation abuses ***not specifically proscribed by statute***."[2] The Court further stated, "while dismissal need not be preceded by other less severe sanctions, it should be imposed only after thoughtful consideration of all the factors involved in a particular case." Id. at 92, 787 P.2d at 780. Additionally, the Young court "require[d] that every order of dismissal with prejudice as a discovery sanction be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors.[3]

Additionally, this Court notes that the Nevada Supreme Court reviews discovery sanctions for an abuse of discretion. Thus, this Court's Orders striking each of the Defendants' respective Answers will reviewed for an abuse of discretion, the Orders will **not** be reviewed de novo.

Here, in accordance with Young, this Court's Orders were imposed only after thoughtful consideration of all the factors involved in [this] particular case and are supported by an express, careful and …written explanation of the court's analysis of the Young factors. Cognizant of this standard, this Court finds that firstSTREET and AITHR have a fair to good likelihood of success on the merits because they were not included in Judge Scott's order and, therefore, potentially did not violate a court order. However, the Court notes that violation of an order is only one of the two separate and independent ways a party may run afoul of NRCP 16.1(c)(3). As such, this factor does not weigh heavily in favor of firstSTREET.

With respect to Jacuzzi, since its Writ is based on other grounds, this Court finds that no mandatory standard of review has been outlined by the Nevada Supreme Court, so there is little basis for this Court to conclude that Jacuzzi's Writ will succeed under current Nevada law. The Nevada Supreme Court clearly distinguished between case-ending and non case-ending sanctions, and when case-ending sanctions were at issue the Court would apply a "heightened

[2] 106 Nev. at 92, 787 P.2d at 779. (Internal quotation and citation omitted) (emphasis added).

[3] Id. at 93, 787 P.2d at 780.

standard" of review.[4] Because the sanction ordered against Jacuzzi was non case-ending, a "heightened standard" of review is not required. Although, this Court is careful to not confuse a "heightened standard of review," with a "heightened standard" (i.e., preponderance versus clear and convincing), it does provide insight indicating that if our Supreme Court were to require proof by clear and convincing evidence as the standard of review for an evidentiary hearing, such as this, they would do so only for motions involving case-ending sanctions.

ORDER

IT IS HEREBY ORDERED that both Motions to Stay are denied without prejudice.

Dated this 9th day of November, 2021

568 D3E FA0B 9940
Crystal Eller
District Court Judge

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[4] Valley Health Sys., LLC v. Est. of Doe by & through Peterson, 134 Nev. 634, 638-39 (2018), as corrected (Oct. 1, 2018) (citing Foster v. Dingwall, 126 Nev. 56, 65 (2010)).

[5] The Court received this document from Plaintiffs' counsel, "redlined" by opposing counsel. The Court, having reviewed the documents and proposed edits, has made its own necessary revisions and executes this document without further review by Plaintiffs' or Defendants' counsel.

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Robert Ansara, Plaintiff(s)	CASE NO: A-16-731244-C
vs.	DEPT. NO. Department 19
First Street for Boomers & Beyond Inc, Defendant(s)	

AUTOMATED CERTIFICATE OF SERVICE

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

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