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.

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CERTIFICATE OF SERVICE

I certify that on October 5, 2021, I submitted the foregoing "Petitioner's Appendix" 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
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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

recently they provided the unredacted names, but, prior to that, they were in violation of a Court Order for four or five months. Commissioner Bulla ordered that that be done back in, you know, September and that was never done. They never filed a motion seeking a stay of discovery and it's clear that the -- by unredacting those documents and providing them, we learned additional details about these individuals. But we also learned specific facts about First Street's knowledge and e-mails that were sent to First Street. So, they were relevant for a number of reasons.

If the Court has anything it would like me to address, I'm happy to address. I hate to go over the details of the Motions again though because they're very lengthy and I can tell that the Court's spent a considerable amount of time preparing and absorbing the information.

THE COURT: Okay. Just give me a moment.

MR. CLOWARD: Sure.

[Pause in proceedings]

THE COURT: Now have you had a settlement conference in this case yet?

MR. CLOWARD: No, we haven't, because our position is until we fully understand the scope of Jacuzzi's knowledge -- and so that we can make the proper assessment

as to the punitive conduct and the punitive aspect of this case, you know, it really would -- we're not in a position to even advise our clients.

THE COURT: What agreement do the parties have now as to any remaining discovery?

MR. CLOWARD: Well, that's -- there is none.

THE COURT: I know it depends a lot on what I do here.

MR. CLOWARD: Yeah. There is none, but, you know, our position would be that we would seek a lengthy extension because there are a lot of people that we need to depose in a lot of different states and, quite frankly, I think that the forensic examination is going to unearth a significant amount of information.

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Now, Jacuzzi claimed in their Writ of Mandamus that the entire universe of documents has been turned over. That's not true. Just yesterday -- you know, I had to drive up to Utah over the weekend. So, I had five hours of sitting there in the car captive and I spent more time looking and found another incident. And, so, -- and that's not even before the Court. I'm still working to try to gather those documents with that individual so that I can, you know, potentially do a supplement.

But the fact that it keeps happening when they over, and over, and over represent to the Court that we've

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in good faith turned everything over and then we find more information, we've turned everything over, and then we find more information, we've turned everything over, and then we find more information. It's disheartening. It's disheartening to the plaintiffs. It's disheartening to me as a lawyer.

You know, a plaintiff gets their case struck if they don't supplement their computation of damages. You know, their case is tossed.

THE COURT: Well, --

MR. CLOWARD: You know, and yet here we have filed numerous motions, over, and over, and over to try and gather this information and they have known the information that we want. But it's not turned over and then we're the ones that find it. How fair is that? How fair is it for me to be lucky enough that I luck into finding these very critical, very relevant documents? And, now, you know, Jacuzzi apparently brings in, you know, another firm to potentially clean up this mess and it's not fair. So, --

THE COURT: Yeah, what happened to former counsel?

MR. CLOWARD: I don't know.

THE COURT: Did his departure have anything to do with his improper handling of the case?

MR. CLOWARD: I don't know. He's here.

THE COURT: Because that's one of the things that

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I have to consider --

MR. CLOWARD: Yeah.

THE COURT: -- in determining appropriate sanction whether this -- whether perhaps there's a risk that the client might be punished for the misconduct of the lawyer.

MR. CLOWARD: Yeah. He's here. He can address his departure.

THE COURT: Just one of the -- one of the factors. I'm not saying there is. It's one of the factors I have to consider.

MR. CLOWARD: Yeah. And I don't know the facts of that departure.

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THE COURT: Okay.

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MR. CLOWARD: I was not notified in this particular case that he was departing. I had another case that he was actively litigating involving a different client of mine and he sent an e-mail in that saying my last day at Snell Wilmer is December 31.

THE COURT: Okay. I go into this with the position that the lawyers represented their client ethically, admirably, with utmost zeal, and in compliance with all of the rules and professional responsibility unless there's some -- something to indicate otherwise. Or sometimes -- I've had a couple of these motions on requests to strike Answers and I've had attorneys come in here and

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say: Judge, don't punish my client. I --

MR. CLOWARD: Sure.

THE COURT: -- made a mistake. I misunderstood something. I misled the client. I've had that happen.

MR. CLOWARD: Well and, you know, Mr. Cools would have to address the Court as to --

THE COURT: Yeah. Here --

MR. CLOWARD: -- his departure, but --

THE COURT: -- it doesn't seem that the attorneys acknowledged any kind of mistake. So, --

MR. CLOWARD: Yeah.

THE COURT: -- anyway, anything else?

MR. CLOWARD: I would just argue, I guess, that regardless of the conduct of Snell Wilmer, I think that Jacuzzi's in-house counsel, Ron Templer, has been actively involved in the production.

THE COURT: Right. I saw that.

MR. CLOWARD: I mean, when Bill Demeritt testified that, you know, the search was performed, voluminous documents were returned, and those were given to Ron Templer who apparently then, through -- with the assistance of litigation counsel, determined that they weren't -- that none of those were relevant. And that right there should be a concern because that's the fox guarding the henhouse. Here you have Jacuzzi and its in-house counsel. They're

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the ones making the determination as to what is relevant, but then it's -- and we're told three different times on three different occasions in discovery responses, amended discovery responses, and a letter saying we found nothing. You don't need to worry about it. You know, there's nothing there. And then we find a whole bunch of stuff and we find out that all of those subsequent documents that the Commissioner had compelled contains search terms --

THE COURT: I understand.

MR. CLOWARD: -- that were relevant. I mean, --

THE COURT: And I get all that. Is Mr. Templer a licensed attorney here in Nevada?

MR. CLOWARD: I'm not sure if he's licensed here.

THE COURT: Okay.

MR. CLOWARD: I believe he's an attorney, but whether -- where he's licensed, I'm not sure.

THE COURT: Yeah. All right. Thank you.

MR. CLOWARD: Thank you.

THE COURT: All right. Mr. Roberts, are you the one that's going to address this?

MR. ROBERTS: I am, Your Honor.

THE COURT: TO me, it's -- I'll let you make your fine argument. It seems like you inherited a pretty difficult case here, --

MR. ROBERTS: Well, --

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THE COURT: -- but I'll let you try to convince me. I've read all of your papers and I'm anxious to hear your further elaboration on those.

MR. ROBERTS: Thank you, Your Honor.

Lee Roberts and Brittany Llewellyn, Weinberg, Wheeler, Hudgins, Gunn, and Dial for Jacuzzi.

THE COURT: Very good.

MR. ROBERTS: And I would like to say, just as a threshold matter, that I haven't really inherited, in the sense that I've taken over. I was just brought --

THE COURT: Oh.

MR. ROBERTS: -- in to supplement the team. Mr. Cools is here --

THE COURT: I see. Okay.

MR. ROBERTS: Joshua Cools. Snell and Wilmer is still counsel of record.

THE COURT: Okay.

MR. ROBERTS: Joshua Cools came because he was the one primarily involved on behalf of Snell and Wilmer in these discovery disputes and he agreed to come in case the Court had any questions that I was not in the position to answer based simply on my review of the papers.

THE COURT: Very good. Thanks for clarifying that.

MR. ROBERTS: Morgan -- thanks.

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THE COURT: That's helpful.

MR. ROBERTS: Morgan Petrelli was here during this morning's session and sitting with me to the side. She is also with Snell and Wilmer and has taken Mr. Cools's place. She had an arbitration hearing this afternoon and was unable to come back. Also still involved for Snell and Wilmer is Vaughn Crawford, --

THE COURT: Okay.

MR. ROBERTS: -- who is the lead partner for Snell and Wilmer.

THE COURT: All right.

MR. ROBERTS: But he had trial today starting in El Centro, California.

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THE COURT: Okay.

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MR. ROBERTS: So, he and I did discuss that and that it would be best, with him in California, that I take the argument.

THE COURT: Very good.

MR. ROBERTS: Okay. And, to answer a question, and Mr. Cools can correct me if I get it wrong, but Mr. Cools left effective January 1st of 2019. He was an associate at Snell and Wilmer and he was offered a partnership at Evans Fears and left to become a partner and receive a promotion.

THE COURT: Oh, congratulations.

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MR. ROBERTS: So --

THE COURT: Okay.

MR. ROBERTS: So there certainly was nothing about his departure --

THE COURT: Nothing to do with this case.

MR. ROBERTS: -- that had to do with this case.

THE COURT: All right. That's helpful.

MR. ROBERTS: So, to -- I'd like to go back and frame the dispute before I address some of the specifics of the actual disputed discovery between the parties.

Mr. Cloward did not mention it again in his introduction to this argument, but this morning he was focused on 37(a)(3) and the Court may recall that. And, under 37(a)(3), the quote is:

> For purposes of this subdivision and evasive or incomplete disclosure, answer, or responses to be treated as a failure to disclose, answer, or respond for the purpose of this subdivision.

So, you look up at this subdivision, subsection (2):

> If a party fails to make a disclosure required by 16.1(a) or 16.2(a), any other party may move to compel disclosure and for appropriate sanctions.

So, I think that's a different situation than what we have here. This is not a Motion to Compel Information

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and give sanctions to. There's no Motion to Compel before the Court. They're just simply seeking sanctions.

If the Court will review the *Bahena* case, which they've cited as the legal authority in support of their Motion for Sanctions, the Court will see that 37(a) isn't quoted a single time by the *Bahena* Court. The only section quoted by the *Bahena* Court is 37(b) which includes (b)(2), Sanctions to a Party.

And, under that section, if a party -- and I'm going to skip a few words, but quote it other than that:

> Fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under 16, 16.1, and 16.2, the court in which the action is pending may make such orders with regard to the failure as are just, among the following things --

Including the striking of the Answer, as the *Bahena* Court did.

THE COURT: Right. Right. Right.

MR. ROBERTS: So, if the Court will look at the rule and the procedural posture that we're in, the only thing they can do to justify striking our Answer as to liability, as to liability and damages, is demonstrate that we failed to comply or obey an order, a discovery order or

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an order entered under 16.1, 16.2. And that's the posture that the Court is in. They need to demonstrate that we failed to obey an order.

And once the Court finds that we filed to obey an order, the Court will then have to analyze and examine the *Young* factors in the context of that failure to obey the order to determine the willfulness and whether or not the sanction they're seeking is justified.

THE COURT: So, Mr. Roberts, are you saying that there can never be sanctions for merely failure -- repeated failure to comply with the discovery rules? That there -- that the ability for the Court to award sanctions only can be triggered if there is a court order that's been violated?

MR. ROBERTS: Your Honor, I'm -- I don't want to speculate as to whether or not there could be a situation so egregious that that would be justified. But, frankly, if you just look at the literal language of the rules, and --

THE COURT: Yeah.

MR. ROBERTS: -- you look at the language of *Bahena*, I -- there has to be a violation of a discovery order as a first step before you can get to a case terminating sanction. And, assuming that *Bahena*, piled on with some other things that wasn't just court orders, but

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was --

THE COURT: Right.

MR. ROBERTS: -- also other violations of discovery, --

THE COURT: Doesn't really say which was controlling in the decision. I mean, absent the orders, it's difficult what that Court would have done, difficult to see what that Court would have done.

MR. ROBERTS: So, the Court did find that:

Goodyear's responses to plaintiff's interrogatories are nothing short of appalling.

They found that the discovery had not -- violations and abuses had not only been willful, but that Goodyear was recalcitrant. Recalcitrant is over and over refusing to do what was right.

Now, certainly, the record in this case does reflect that it has been very contentious between the parties.

THE COURT: Right.

MR. ROBERTS: Very contentious. I think five times before the Discovery Commissioner. And the record demonstrates that we won some of those and our position was accepted and validated by the Commissioner and the plaintiff won some of those. And over and over again in this case, even though preserving their objections, Jacuzzi

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has complied with the Discovery Commissioner's recommendations, even when they disagreed with them. Certainly, they zealously advocated for their position, but, ultimately, I would submit there's only one thing, and Mr. Cloward mentioned it, where they can argue that we did not comply with an order of the Discovery Commissioner.

And, frankly, it -- this Motion to Strike was filed once before the Commissioner who did not refer it up at that time. She continued that hearing several times and continued to work with the parties and, ultimately, she did deny that and said there's no basis here to refer this to the District Court.

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Since the time that that happened and the Discovery Commissioner said, hey, there's no basis to come -- to send this up. We quoted a quote from her along the lines of, you know, supposition that there may be more out there isn't proof that there's more out there. After all that happened, what is there? There really two things and one is the failure to provide the names, redacting the names from the subsequent incidents that were provided pursuant to order, and there's this whole issue of the forensic search that the Discovery Commissioner ordered. And I think because of the prior findings of the Discovery Commissioner and those being the only things new and the Discovery Commissioner's previous finding that there wasn't

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enough there to even refer it up to this Honorable Court, that that's where the Court needs to focus.

And, under the *Bahena* case, once the Discovery Commissioner said, no, you've got to unredact the names, we probably should have sought a stay from this Court or from the Discovery Commissioner. That order was entered in September, but the -- it was served on counsel October 17th. An objection was filed to this Court on October 29th. It wasn't until November 5th that this Court adopted the DCRR and, a month later, a Writ of Prohibition was filed with the Supreme Court. And, a month later, Jacuzzi did seek a stay.

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So, this was not a complete and willful thumbing their nose at the Commissioner and just saying we're not going to do it, we don't care that you argued it. Jacuzzi felt that there was personal, private information involved in those records that -- and they sought to appeal it through each step available to them to appeal. And when the Supreme Court denied the Writ, Jacuzzi immediately withdrew the notion -- the Motion to Stay the very next day. And, within five days of the withdrawal of the Writ, Jacuzzi produced the unredacted documents.

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So, as we sit here today, they have the documents that's subject to this dispute. They've got the unredacted documents.

So, assuming that there's the discovery violation, a degree of reprehensiveness and willfulness is not involved to the extent of *Bahena*. Jacuzzi was willfully and zealously advocating their position that the names should not be provided, especially given the factual situation, the description of the event was provided, and the names were redacted, and it's still Jacuzzi's position that none of that information was discoverable in this case and would not be admissible or lead to the discovery of admissible information.

And I think this is a very important point for Jacuzzi's argument. So, I do want to talk about what is discoverable and what is relevant under the facts, as alleged in the Complaint.

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Under 16.1(a)(1)(B), and this is the things we're supposed to voluntarily produce, we're supposed to produce a copy of any documents that are discoverable under Rule 26(b) and that are in our possession, custody, and control. So, you go to 26B. What's discoverable?

> 26(b)(1), In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.

So, the only thing that has to be voluntarily produced are relevant documents, documents relevant to the

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subject matter in this case. And, really, that's a decision that is made by the parties representing -- the counsel representing the party in every case. I mean, the -- there's nothing nefarious about the fact that there's a universe of documents and the lawyers and the party work together to try to figure out what they believe is arguably relevant in the case, what do they believe is relevant. And that's all that has to voluntarily be produced.

In this case, there are also discovery propounded on Jacuzzi. And Jacuzzi made clear its objections. They objected, we don't think subsequent incidents are relevant, and we're only going to produce this model of tub, and we're only going to produce substantially similar incidents. The Discovery Commissioner hears that. She disagrees. Subsequent incidents do have to be produced. So, Jacuzzi --

THE COURT: Suppose that there are several objections that, if they had been presented to me, as Discovery Commissioner, I would have overruled and ordered the parties to produce. Suppose that were the case, but that instead of those issues coming to the Discovery Commissioner, they're coming to me now. If I am to determine that many of the objections lack merit and you should have produced documents earlier, right, should I not take that into consideration on the Motion to Strike

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because it should have gone to the Discovery Commissioner initially? Is that kind of what you're suggesting? That ordinarily it should go to the Discovery Commissioner and she could have overruled the objections and then ordered you to produce the documents, but that didn't happen. So should I do that now?

MR. ROBERTS: No. And I believe that's the exact reason why the rules say that you have to violate a discovery order because the parties can't just gamble and take guesses in the dark about what this Court's ruling would be and parties are entitled to object to discovery on the grounds of relevancy and overly -- unduly burdensome. And these -- there's a mechanism for these matters to come to the Court.

If the Discovery Commissioner said you don't have to produce something, plaintiff could have appealed that, come to this Court, and gotten an order, and then Jacuzzi would comply with the order or not comply with it subject to sanctions. We disagreed with the Commissioner on the redaction of the names. We appealed to this Court. It came to the Court. The Court said you've got to do it. We tried the big guys. They said go away. And we did it. And that's the way it's supposed to work.

I believe that the Court's view as to whether or not the Discovery Commissioner should have ordered more

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than she did should not be considered by the Court in ruling on sanctions.

If you want to tell me today I disagree with the Commissioner, this is what you need to do, you need to produce these things, we're going to produce these things. And that's one of the reasons -- you know, that's one of the things I'm tasked with is to make sure that we comply with any of the rulings of the Court and Rules of Civil Procedure.

THE COURT: So, a similar question. Suppose --

MR. ROBERTS: Okay.

THE COURT: -- I look at deposition testimony of 30(b)(6) witnesses of Jacuzzi, which seemed to state, we don't know of any other claims of injuries involving the same type of tub and I see that response a couple of different times. And yet I find out now that perhaps that wasn't accurate. That couldn't have been an issue to go to the Discovery Commissioner until the plaintiff discovers that there was a potential mistake in the deposition. Can't I look at that issue now rather than forcing the plaintiff to go back to the Discovery Commissioner?

MR. ROBERTS: I -- if the Court is asking, can I sanction Jacuzzi because the person they produced for 30(b)(6) didn't know about some incidents --

THE COURT: Well, not that far. Should I consider

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whether there was a discovery violation because if, at point A, there's a representation there are no documents and, at point B, later on, there are documents, if I find out that those were the facts, should I consider those in determining an appropriate sanction? Or was it incumbent upon the plaintiff upon learning of the discrepancy to go to the Discovery Commissioner and ask for some appropriate relief and an order first?

MR. ROBERTS: Your Honor, I believe they should have gone to the Discovery Commissioner first and I think that the Court also needs to look closely at the notice to the 30(b)(6), whether at the time of the 30(b)(6) the witness was being prepared on both subsequent and prior incidents, whether or not any of the incidents even before the Court now involve the same model or substantially similar, or any of the other things -- positions that Jacuzzi was taking at the time and upon which they were under a duty to prepare their witness.

And to the extent that they're --

THE COURT: Well, of course, --

MR. ROBERTS: -- asking about --

THE COURT: If consumer is getting copied on consumer product safety data, shouldn't he know about it when his depo is being taken?

MR. ROBERTS: Okay. Let's --

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THE COURT: I'm just -- I'm going around --

MR. ROBERTS: Let's assume, hypothetically, we're talking about the Jerre Chopper incident.

THE COURT: Okay.

MR. ROBERTS: It is Jacuzzi's position, which was accepted by the Discovery Commissioner, that Jacuzzi only had to produce claims of personal injury or death.

Deposition of Jerre Chopper, page 132, line 10, 11, and 12.

Question: You were never injured in this tub, were you?

Answer: No.

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So, the Jerre Chopper incident was not within the scope of what was ordered by the Commissioner, cannot be used as evidence that we've refused to produce in bad faith a prior claim for injury or wrongful death. She used the tub twice with the jets on. Other than that, just filled it a little bit. And I believe from other documents she had the tub and she slipped down and her head was under water. Right? But she says: I wasn't injured. But I could have been injured. That's not what was ordered by the Discovery Commissioner that we comply with.

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And, by the way, if her head was under water and she got up, that means she was able to -- using the grab bars or otherwise, get herself back up above the water.

Their claim in this case is that the tub was defective because once she fell in the well, the plaintiff/decedent fell in the well, she was unable to get back up maybe because the grab bars are in the wrong places and the design of the inward opening door. None of that has anything to do with Jerre Chopper. She was able to use the grab bars or otherwise utilize the design of the tub to get up out of the water.

So, it's not substantially similar and it doesn't involve personal injury or wrongful death, which leads me to talk about -- okay. What is discoverable? What is relevant in a defective product case?

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So, as the Court knows, the Supreme Court reaffirmed the test for product defect in Ford Motor Company v. Trejo, 402 P.3d 649 in 2017 saying: We reject the risk benefit test. We adopt the consumer expectations test. A product is defective if it's more dangerous than would be contemplated by the reasonable consumer.

That leads us back to -- probably the first test -- first case in Nevada to adopt the consumer expectations test, which is *Ginnis v. Mapes Hotel Corporation*, 806 Nevada 408, 1970. And in this -- this was the case where they said: Hey, you know, we are going to adopt strict liability. The jury should have been instructed on that as a theory and they also addressed subsequent incidents. And

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they said:

> But a subsequent accident at the same or similar place under the same or similar conditions is just as relevant as a prior accident to show that the condition was in fact dangerous or defective or that the injury was caused by the condition.

So, that's why subsequent accidents -- subsequent things -- people getting hurt are potentially relevant and potentially admissible. They have to be in the same or similar place, which I would say is the same or similar product, under the same or similar conditions or circumstances, and then the Court would have to say: Okay, does this accident and the way it happened tend to show that the product was unreasonably dangerous in the way that it's alleged to have hurt decedent?

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And both the parties and the Discovery Commissioner and this Court can look at an incident and say, okay, that -- yeah, that -- you know, that's discoverable or, ultimately, this Court says that's admissible. But if it's clear that the circumstances or the product or the way it happened don't go to show that this product is unreasonably dangerous in the way that it's alleged to have harmed the plaintiff, then it doesn't get produced. It's not discoverable.

And, in this case, we copied plaintiff at the

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Discovery Commissioner's direction, with her are the circumstances. We've redacted the names, but here's a description of what happened, where's the date it happened, and she ruled, okay, you don't have to produce any of this. I agree with you it's not relevant. Someone slipped, but it's different. It doesn't have to be produced. Mr. Cools sent the Discovery Commissioner the description of the 1,600 or so hits that came up in the original broad search that included the word fall and ultimately parts falling off and waterfalls in spas and all of this is produced. And she looked at the description, had several follow-up calls and conferences, and ultimately said: No, this stuff isn't relevant. It doesn't have to be produced.

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So, let's then look at the prejudice. What -- which prejudice from our failure to disclose the -- Jerry Chopper's name? Her incident doesn't come in under *Ginnis*. There's no good faith argument it does. She said she could have drowned in the pool. She doesn't say she had trouble getting up from the grab bars. She doesn't say she had trouble getting up from the well. She doesn't say she tried to open the inward opening door and couldn't and she was trapped. It has nothing to do with what they've alleged is the defect at this time in this case.

They talk about [indiscernible] and that someone died in that case, but we've attached some relevant pages

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of the deposition of his son who was there when the sale was made, and who was there when the tub was being used, and described in his deposition exactly what happened. Unlike this case, where they say that Ms. Cunnison could not open the door because of its design once she was in the well, in that case, the door was open and the gentleman tried to pull himself up by the handle on the door, slipped into the well, and became trapped in the tub with the door open and his knee against it.

There's a picture. I think it's Exhibit 6 to the deposition which shows when someone asked what happened, the son took pictures of the gentleman who died down in the tub. I think it's him. It could be someone else. Demonstrating what happened. The door is opened and his leg is wedged in -- against the opened door.

So, again, nothing to do with grab bars. Nothing to do with his inability to get the door open. Completely different circumstances --

THE COURT: So, but the plaintiff didn't want to leave it up to Jacuzzi to unilaterally decide what's relevant or not relevant, so they had broad discovery requests to try to capture something like that so they could look it over to decide whether to make the argument to me that it should be admissible at trial. But don't you take that out of their hands so they can't even make the

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argument if they don't even know what's there?

MR. ROBERTS: Your Honor, I think that they know what's being taken out of their hands when we say we're not going to produce anything with a different model or anything that's not a similar incident or anything that's -- that is subsequent.

THE COURT: Okay.

MR. ROBERTS: Now they went to the Discovery Commissioner --

THE COURT: That was the objections.

MR. ROBERTS: -- and --

THE COURT: Right.

MR. ROBERTS: -- they said: Hey, you -- Jacuzzi shouldn't be able to decide. And, ultimately, Jacuzzi is not the one to decide because we produced all of these things for in-camera review to the Discovery Commissioner. Because one thing that this should not turn into is a mechanism for plaintiffs' counsel to use discovery in this case to go on a fishing expedition for other people who have gotten hurt, regardless of how, so that he can go file a suit on their behalf against Jacuzzi. And he's already done that over in California, Your Honor. This is not speculation. After this case, the *Smith* case, which he talks about, he's the attorney of record. He sued Jacuzzi for that, too.

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THE COURT: Well, he says they contacted him. Not the other way around, but --

MR. ROBERTS: Well, --

THE COURT: -- whatever.

MR. CLOWARD: That's how it took place.

THE COURT: No. I understand the argument. I --

MR. ROBERTS: So, regardless of whether it's happened yet, the -- and we cited this case, Your Honor, and it's older, but it's still good law, and that's the case of *Schlatter versus Eight Judicial District Court* where the Supreme Court reversed the Trial Court's discovery order because it permitted cart blanche discovery of all information without regard to relevancy. The Court exceeded its jurisdiction by arguing disclosure of information either relevant to the tendered issue or leading to discovery of admissible evidence.

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And they cited Rule 26(b) for that, which is still there in substantially the same form. They don't get to see everything in our file. They don't get to see stuff about hot tubs.

Now, the Discovery Commissioner said: No, you can't limit it to your model. It's any walk-in tub, which we've complied with.

THE COURT: Right.

MR. ROBERTS: And, at this point, they wanted

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prior incidents of any walk-in tub involving injury or death. We said there weren't any. There's nothing but supposition that there might be and, frankly, if there is, there -- they've hired a forensic IT guy who is going to go in and perform his own searches on our databases and if they find something, they find something, but if they don't --

THE COURT: Kind of looks --

MR. ROBERTS: -- it turns out we're right.

THE COURT: It kind of looks bad when their IT people are told to get in touch with your IT people and the Discovery Commissioner says you guys meet and confer in good faith and then your IT people say: Guess what? We're not going to give you any of this information that's customarily used by IT people in doing a forensic analysis. And, so, that doesn't go anywhere. I mean, doesn't that look kind of bad?

MR. ROBERTS: No, Your Honor. If it's --

THE COURT: Okay.

MR. ROBERTS: I would suggest that instead of reading plaintiffs' summary of what happened in that call --

THE COURT: I read your summary.

MR. ROBERTS: Well, the Court -- and you can read mine, too, but read the actual transcript.

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THE COURT: Okay.

MR. ROBERTS: There is a transcript of that phone call. And someone had the good foresight to record it. We have the transcript. There aren't lawyers involved, but -- now the Court's brought this up. Pardon -- Court's indulgence for just --

THE COURT: Oh, please. Go ahead. I want to hear it.

[Pause in proceedings]

THE COURT: It just seems that this case has been very contentious on both sides and there's not been a lot of progress in getting ready for trial. How old is this case? This is --

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MR. ROBERTS: Your Honor, it was only filed in 2016. So, we've still got a couple of years left.

THE COURT: 2016. Do you know when in 2016?

MR. ROBERTS: I believe that the initial disclosures were in November of 2016.

THE COURT: Okay. Because I really don't like the cases to get over three years. Sometimes they have to, but --

MR. ROBERTS: The initial disclosures --

THE COURT: No. But, go ahead. Let me know what you wanted to show me from the transcript.

MR. ROBERTS: September 27, 2016 were initial

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disclosures.

THE COURT: All right. Perfect.

MR. ROBERTS: So this is a conversation, December 8th of 2018, and I'm going to go down to the bottom of page 4.

THE COURT: All right.

MR. ROBERTS: Mark Allen talking and this is our Vice President of IT.

THE COURT: Right. No, I remember.

MR. ROBERTS: And what he says is: You guys are going way outside of what was agreed upon and what I believe was agreed upon by the Court and what this call was supposed to be discussed -- what was supposed to be discussed on this call. So, I'm going to keep referring you back to legal counsel unless you want to talk about the actual technical of how to do this search.

So, again, if you want to discuss the technical part of the AS 400 or the technical part of sales force or how we can actually execute these searches, I'm okay wit that. But if you want to go outside that and talk about the rest of my infrastructure and how we run business, I'm going to keep referring you back to legal counsel.

And then they continue talking for a while, Your Honor.

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Where Mark Allen says, page 7: I was told this call was discuss how you guys were going to execute your searching of the two databases and to discuss that, the technical side of stuff. It was not supposed to be legal discovery. Did I lose you?

THE COURT: Yeah. And he's probably right about that.

MR. ROBERTS: I believe he was, Your Honor.

THE COURT: Yeah.

MR. ROBERTS: And then we get to Ira Victor:

Okay. All right, Mark. I think this is it for now. We will -- all right. If we are -- if we need to do another call, I will speak with the lawyers first and you will get work through the lawyer if we need to, you know, what the next steps are, what the next steps are, when, what, how.

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THE COURT: Okay. So the affidavit of their IT person, do -- I guess it would be your position that it goes pretty far away from what the transcript would reflect?

MR. ROBERTS: That is our position, Your Honor, and that there's no need for the Court to rely on his affidavit as to what was said when the Court has a verbatim transcript of what was said.

And, then, if we look at his affidavit and what he

says he needs, I believe, again, it's beyond he scope of what the purpose of hat call was for the Discovery Commissioners, what technical processor used to preserve data by the adverse party prior to e-discovery meet and confer.

So, they're fishing to seeing if there's an exploitation. They're not talking about how do we search the systems. Tell me what you did to preserve datas prior to the first meet and confer.

If searches had been conducted, what search queries did the adverse party use and what results were indicated? All right. Well, the Discovery Commissioner had already ruled that the search terms that we used to come up with the documents that were provided to her in-camera were attorney-client work product and were privileged. She was provided those terms --

THE COURT: Right.

MR. ROBERTS: -- but she had specifically ruled that we did not have to provide those terms.

And if he wants to do his own searches of our database, why does it matter to him what terms the attorneys used to do their searches?

I -- what systems were used in defendants' regular course of business to store and process data? Inventory of information assets -- and, again, it was not limited to

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this division of Jacuzzi and documents which could possibly be responsive. He wants to know the entire infrastructure of all of the related Jacuzzi companies. And my guy thinks: Okay, that's beyond what I was supposed to talk about. I'm here to talk about the two databases, which everyone has been told that any responsive documents --

THE COURT: All right.

MR. ROBERTS: -- would be in.

And I think --

THE COURT: All right.

MR. ROBERTS: -- that's the problem with this area, Your Honor, is after this phone call, the next thing we got was the Motion to Strike our Answer. There was no call from plaintiffs' counsel saying: Hey, you know, my guy doesn't think he got the information. Let's meet and confer. Let's talk about it. Let's go see the Discovery Commissioner. They completely abandon all efforts to do their forensic search and move to strike our Answer instead.

And I -- one, I think that for the most part, the IT Director for Jacuzzi was right, that these were beyond the scope of what he had been asked to do. But there are no attorneys on the phone call and I don't know --

THE COURT: Right.

MR. ROBERTS: -- if we can strike Jacuzzi's Answer

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for a conference that the attorneys weren't even involved in and that there's been no meet and confer on.

THE COURT: No -- while you're talking, I'm just reviewing some excerpts from that transcript that I highlighted. But -- just to make sure there's nothing inconsistent with what you're saying.

MR. ROBERTS: Okay.

THE COURT: I'm just doublechecking a few things here.

MR. ROBERTS: And with regard to the forensic search, Your Honor, Ms. Llewllyn is here. She's already been looking into the issues and this affidavit, trying to come up with answers to anything that could be relevant to their actual --

THE COURT: Okay.

MR. ROBERTS: -- forensic search. We're prepared to meet and confer with Mr. Cloward to move forward on this. As far as the subsequent incidents, we're -- Mr. Cloward now has the names, which we produced as soon as the Court denied the Writ. We agree he's entitled to do discovery on those additional names to try to come up with something that makes those incidents admissible at trial. We don't believe that they're going to be admissible at trial, but we believe he's entitled to discovery on that. We're still willing to meet with him on the forensic search

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and agree to discovery on anything that is reasonably -- arises out of any additional information that he can come up with in his forensic search. We've got plenty of time before the Five-Year Rule.

And, while Jacuzzi believes that it has -- while it has zealously opposed what it believes to be overboard and unduly burdensome discovery, they also believe that they have complied with the Court's orders in good faith and that, if the Court believes that plaintiffs are entitled to additional information, the proper thing to do is to direct us to work with him or order us to produce things by certain deadline and we're more than happy to move forward and comply with those orders, but we believe that this simply doesn't rise to a level of *Bahena* where there's been repeated and recalcitrant and unreasonable refusals to comply with discovery.

THE COURT: Great. One more moment here. Is -- in the transcript of the telephone call among the IT gentlemen -- this is what I was remembering. There's this discussion about whether documents were stored on this thing called the AS 400 Server. And I'm not a technical person, but I'm just looking at that and assuming that means some part of the computer system where they're -- where the plaintiff was worried, hey, some of these records of customer complaints might be stored there, and then they

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wanted to know if this is something that's partitioned. I don't know what that partition means. But, then, that's when your IT says, basically, I'm not going to answer that. And, so, it seems like he's not answering questions about substance. He's asking -- answering questions about the logistics of doing the search. Am I wrong there?

MR. ROBERTS: I believe so, Your Honor, at least --

THE COURT: Okay.

MR. ROBERTS: -- mostly wrong. I think if you read the transcript, you'll see that our IT guy did affirmatively say that actual images of documents are not on the server. So, what they'd be looking for is whenever anything comes in, it's entered into this system. So, this is where everything goes in. And, you know, someone gets a call or an e-mail, they make notes, they type it into the system, they throw away the notes, and now it's all in the system. And if there's a document somewhere in Jacuzzi that's not on the server, there is a reference to what that document is on the server. And I think those questions were all answered.

And where you get to partitions, it's -- you've got one big server, the AS 400 and later the Sales Force System, after 2014, where the -- Jacuzzi has multiple divisions. So, there's a division that makes these walk-in

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tubs. Another division that makes spas. So, it's all on one system, but there are partitions in the system where spa data is in this side of the partition --

THE COURT: Okay.

MR. ROBERTS: -- and walk-in tubs are on this side and --

THE COURT: Okay.

MR. ROBERTS: -- the Discovery Commissioner said you don't have to give them what's on the spa side. That's not potentially relevant. So you don't have to talk about what's on that side of the partition, only what's on the walk-in tub side of the partition. And that's what he's referring to about the partitions because the Discovery Commissioner's already said we don't have to tell them what's in other affiliated companies who make other products that are not walk-in tubs.

THE COURT: That was a very helpful explanation. Thank you.

MR. ROBERTS: Thank you, Your Honor.

I --

THE COURT: What --

MR. ROBERTS: In looking --

THE COURT: Oh, I didn't know if you were done, so I wondered -- I did have a question when you let me know you're done.

MR. ROBERTS: Okay. I just looked at my notes and --

THE COURT: Yes.

MR. ROBERTS: -- there was one other thing that I think is important to both in analyzing Jacuzzi's conduct and why things came out when they did, and that is that in light of the consumer expectations test, in light of the *Ginnis v. Mapes*, Jacuzzi is entitled to say: Okay, this is a similar incident in a similar product. And maybe, you know, the Court's right that at some point in time it's not just Jacuzzi that gets to make that decision, but I think everyone would agree that if this incident happened the way it did and someone was electrocuted in a Jacuzzi walk-in tub, we wouldn't have to produce it -- the incident where someone was electrocuted because it obviously cannot be used under general law to prove notice, if it was subsequent, and it can't be used to prove a defect of the type that hurt her because she wasn't electrocuted.

So, at some point in time, the allegations of the plaintiff as to what is the defect in this tub have to be considered in determining whether Jacuzzi is acting in good faith and disclosing other incidents.

The plaintiffs argue that, you know, they amended their Complaint to allege punitive damages but their theories of defect haven't really changed.

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I would ask the Court to go back and look at two documents, the Second Amended Complaint, paragraph 24. This paragraph was substantially, in the original Complaint, the First Amended Complaint, and the Second Amended Complaint:

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

That's the defect. The drain would not release, trapping her in the tub.

So, under 16.1, under discovery, that's the similar incidents that we're looking for: Someone that's trapped in the tub because the drain --

THE COURT: Right.

MR. ROBERTS: -- won't open. And, then, we look at the Third Amended Complaint and the allegations have morphed considerably. Paragraph 39:

> 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, mainly the inability to get back up or exit the tub if

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plaintiff fell.

That's the current defect alleged in the most current copy of the Complaint. It's restated similarly in paragraph 54. I'm -- similar, I mean generically. In accordance now with the *Ford Moto Company*, the *Trejo* case, the Jacuzzi walk-in tub failed to perform in the manner reasonably expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user, having ordinary knowledge in the community, which rendered the product unreasonably dangerous. And the only unreasonably dangerous condition is the inability to get back up or exit the tub if plaintiff fell.

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So, now, you know, there's a new dispute. We should have known that slipperiness was the issue and they want documents on slipperiness. And the Court, if it looks at these allegations, looks at the new subsequent incidents that have been produced, looks at the Smith case, looks at the Jerre Chopper case, even the stuff that we've now produced under protest as ordered by the Commissioner, nothing is admissible to show that the tub is unreasonably dangerous because you can't get back up or exit if you fall.

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Finally, Your Honor, I just want to address a procedural point.

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THE COURT: Yeah.

MR. ROBERTS: And that is the evidentiary hearing.

THE COURT: You what? I'm sorry.

MR. ROBERTS: The evidentiary hearing requirement.

THE COURT: Oh, right.

MR. ROBERTS: And --

THE COURT: Right.

MR. ROBERTS: So I think it is clear that if the Court were to strike the Answer as to liability and damages and issue a prove-up hearing, we'd be entitled to an evidentiary hearing on these issues.

But the question then becomes: Is plaintiff right when he says that the Court -- *Bahena* says the Court doesn't have to hold an evidentiary hearing? And I think that may go a little bit further than what *Bahena* said. If you look at page 600 to 601, the Court said:

> We conclude that when the Court does not impose ultimate discovery sanctions of dismissal of a Complaint with prejudice or strike an Answer as to liability and damages, the Court should, at its discretion, hold such hearing as it reasonably deems necessary to consider the matters that are pertinent to the imposition of the appropriate sanctions. The length and nature of the hearing, for non-case concluding sanctions, is left to the sound discretion

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of the Court.

So, I think what the *Bahena* Court said is it's not an abuse of discretion and the *Bahena* Court said:

> We do not consider whether as an original matter we would have imposed the sanctions the Court ordered. It's limited to abuse of discretion.

And if the Court exercising its discretion reasonably holds that it doesn't need a hearing and that's not an abuse of discretion, that's fine, but this Court should look at the papers and think, if I'm inclined to enter a sanction, do I really need to know everything I should know about the willfulness of these violations, about what Jacuzzi really knew. What did the 30(b)(6) guy really know when he gave those depositions.

THE COURT: Yeah.

MR. ROBERTS: Was he not prepared properly? What did Jacuzzi believe they had been instructed to prepare on?

And I think that the papers are an insufficient record --

THE COURT: That would be a pretty long hearing, wouldn't it?

MR. ROBERTS: -- for -- it would be a very long hearing, Your Honor, but you -- there are, I'm sure, going to be tens of millions of dollars asked in damages on this case and if the Court is even considering entering

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sanctions --

THE COURT: Yeah. All right.

MR. ROBERTS: -- striking liability when we hotly contest liability, that that hearing and the length of it would be time well spent.

THE COURT: Well, it's a very serious matter. And, so, I --

MR. ROBERTS: Yes.

THE COURT: If I were going to go that far, there's some issues that need more attention, certainly. So, all right. I'm not sure yet.

And let's hear reply. Thank you.

MR. ROBERTS: Thank you, Your Honor.

MR. CLOWARD: Thank you, Judge.

There are a lot of things that were brought up that need to be addressed. So, --

THE COURT: Okay.

MR. CLOWARD: -- my apologies.

THE COURT: All right.

MR. CLOWARD: First off, Jerre Chopper, there's an affirmative statement that the reason that we didn't turn over Jerre Chopper was because it didn't involve, you know, an injury. But, then, the explain, you know, had it involved an injury, we would have turned it over. And, then, there's discussion about somebody being under water.

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Well, the problem is is that -- and the ultimate consideration was: Why didn't Bill Demeritt have information regarding the CPSC report? That's what the question that promoted or prompted the whole dialogue. The Court asked: Well, why didn't Bill Demeritt have information about CPSC? And there was a whole discussion explaining away why he didn't know about Jerre Chopper.

Well, guess what. There were three CPSC events. Three of them. They only explained away Jerre Chopper's with, you know, the confusing of a subsequent incident where the woman could not get back up. That was the 911 alert and that's Jacuzzi 2965. So, the 2965, that's when the woman's head was under water and she couldn't -- you know, she couldn't get out for a moment. She was fearful that she was going to drown. She called it a death trap.

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Jerre Chopper's incident -- I don't have the specific date range on that, but I know it's a -- it's definitely an exhibit. That's the second one that we're talking about. And, then, the third one is 2968, JACUZZI002968. And this one in particular:

> Coller's [phonetic] wife was going to stand, used the bar to brace herself, but her feet slid out, causing her to fall. The bar should give her leverage and floor is supposed to be slip free. The bar held but the floor was not slip free. Collar's wife

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sustained minor injuries, including left foot and left knee bruising and back and tailbone bruising and pain.

So, you know, they don't explain that. They don't explain why they didn't produce that, but the Court really honed in on the issue and the issue in this case is: Why is it that Jacuzzi feels that it has the right to filter every incident through its lens of admissibility and determine through its lens of admissibility whether all -- any or all of the documents should be turned over?

I mean, you know, the thing that I think upset the Commissioner so much was Mr. Cools had affirmatively represented to me on three occasions: We've gone through everything. There's nothing there. And then she compels the additional discovery and he turns over an additional, you know, nine, 10, 11 incidents and she's reading through them and she's like: This seems like this is relevant. You know, an individual that is stuck in the tub. But they want to be able to control the admission of all documents in this case.

THE COURT: Yeah. But you ultimately got that material.

MR. CLOWARD: I'm sorry? What?

THE COURT: Right? You ultimately got that material. There's some dispute over it and you eventually got it.

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MR. CLOWARD: We got it but the problem is that I still don't believe that we have everything as evidenced by the fact that we got documents -- or that I spoke to a person yesterday. Yesterday. I found an incident yesterday.

And counsel five minutes ago stands up here ands says: You know, in the Second Amended Complaint, this says that the drain plug -- the drain plug didn't work and, you know, that's what we were operating on. We would have turned over documents.

Well, this individual had her tub removed because she couldn't get her plug undrained, not once but twice. That -- and those are the -- you know, the statements that she made to me on the phone, I'll have to -- I need to get an affidavit --

THE COURT: So what does that got to do with this case though? I'm not --

MR. CLOWARD: I think the only thing the Court can do is to for -- in fairness for the plaintiffs is to strike the Answer because --

THE COURT: No, no. This incident that you said that just came up. What -- would that even be admissible in trial?

MR. CLOWARD: Absolutely. Because she couldn't get out of the tub. She was stuck in the tub for two or

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three hours.

THE COURT: All right. Oh, okay. The -- that plus the drain plug. Is that --

MR. CLOWARD: Yeah.

THE COURT: -- plus the drain plug? Is that what you're saying?

MR. CLOWARD: Yeah. She could not --

THE COURT: It was in the same tub and -- same type of Jacuzzi walk-in -- I mean, --

MR. CLOWARD: I'm --

THE COURT: -- you know, the -- inside opening door. I forget --

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MR. CLOWARD: Sure.

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THE COURT: -- what you call that.

MR. CLOWARD: Those are the details that I'm trying to find out.

THE COURT: Oh, you're trying to find these out? All right.

MR. CLOWARD: I literally found this yesterday. Was able to find her number. Called her on my way home from Utah --

THE COURT: Okay.

MR. CLOWARD: -- and had a conversation with her, about a 25-minute conversation with her about --

THE COURT: Well, so, I mean, it's --

MR. CLOWARD: -- this.

THE COURT: -- just kind of speculative right now whether that's something that should have been turned over and whether they should have known about it. Right?

MR. CLOWARD: It was a lawsuit filed against them.

THE COURT: Okay.

MR. CLOWARD: She went to the extent of filing a lawsuit. And that's the big concern that I have is, you know, you have folks out there -- I am finding these documents and these incidents. I am the one going through their systems or going through -- you know, finding these incidents based on my hard work. And when they should just turn this stuff over.

So, that's the issue with regard to the Jerre Chopper.

I think the Court hit the nail on the head. Why is it fair for Jacuzzi, you and your lawyers, to sterilize all of the documents and determine all of the documents that are turned over? They should be turned over and the parties should fight over that through motions in limine as to whether or not they're relevant.

Additionally, counsel acknowledged -- Jacuzzi acknowledged that the parties can't gamble on certain things and that they need to just comply with the orders of the Court. Well, they did gamble with the Commissioner's

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Report and Recommendation because she ordered that these documents be turned over in September. That was her order. Like, turn this over to the plaintiffs. Instead, they don't do that. They don't seek a stay. They don't properly, you know, -- I mean, they objected but the Court signed off on it. They didn't seek for a Motion for Reconsideration. They didn't do any of those things. And counsel acknowledges -- he says, you know, maybe we should have turned those things over. You know, we were only about a month late.

So, it -- there's an acknowledgement that, yeah, we violated the order of the Court, but we were only -- we only kind of violated it. I mean, that's the position that Jacuzzi is taking and that's just not -- that's not fair because we have diligently tried to obtain this information. It would be one thing if we sat around and weren't trying, but I'm doing everything possible to obtain this information and they're sitting there the entire time, saying, well, we're not going to turn it over because it's not -- it doesn't have an injury. Well, we're not going to turn it over because it's not prior. Ah, we're not going to turn it over believe it's not subsequent. Ah, we're not going to turn it over because, you know, we think the Commissioner is wrong on this issue. I'm not going to allow my forensic expert to -- or my forensic folks to have

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a thoughtful conversation with you because I'm going to file a Writ of Mandamus four days after you have the conversation.

That's the timeline. And that's why we didn't go back and do it because it was going to be futile. They filed the Writ of Mandamus on those issues.

And regarding the affidavit of the transcript --

THE COURT: Well, at least that's -- I mean, that's better than just ignoring the order. They're taking affirmative action to test the reasonableness of that decision, which is just great advocacy. Right? It's --

MR. CLOWARD: And it would be --

THE COURT: That doesn't show any wrongful intent to do that.

MR. CLOWARD: Where the wrong intent comes in is when they come in and they try and justify the behavior, indicating that it was actually plaintiffs' fault for exceeding the scope of what the Discovery Commissioner, --

THE COURT: No. I understand.

MR. CLOWARD: -- instead of just --

THE COURT: I understand. I understand.

MR. CLOWARD: -- coming in and saying: You know what, Judge? We wanted to test that out. They were asking some questions and we filed the Writ. But, instead, they come in and they try and throw me on the petard, to accuse

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me of exceeding the scope.

And, by the way, the affidavit versus the transcript, I was the one that personally requested hat this conversation be recorded.

THE COURT: Okay.

MR. CLOWARD: And the interesting thing, which didn't make its way into the Motion, was I said to Jacuzzi, I said: I would like to have your folks produce your copy of the transcript -- or, I mean, recording, and my folks will give -- so there's basically joint disclosure. We'll turn over ours, you turn over yours. They refused to do that.

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So, we said -- I told the forensic folks -- examiner, I said, go ahead and record it anyway. We'll have it transcribed. We'll turn it over. At least we know we can do that on our side. We'll do that.

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And the affidavit versus the transcript, that was a very -- you know, I don't want to cast any aspersions because I respect all of the attorneys in the case, especially Lee and, you know, I don't want to say that he's misrepresenting anything on this partition, but the Court's analysis, the Court's gut feeling on that exact issue on the partition was correct. This doesn't have to do with a partition of other business and a creative way of explaining away what the partition is.

The partition issue, which is why we had Ira Victor set it out in his affidavit like why are you even asking these questions? And he's asking the questions because on a very technical basis, these computer systems can create ghost type images. So, if an entry is made, it is created on one partition. And, then, if a certain -- specifically with regard to the AS400, if a certain journaling function is turned on, it creates an entirely different record. So there are two sources of information and he explained to me the reason that's important for him to know is so that he knows that he can search and he can compare those up. If you have apple, apple, then you know there are no issues. But if you have apple, banana, then you know, okay, somebody somewhere along the line has deleted information or there's potentially another database where apple and apple can be compared.

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So, it's not him -- it's not -- you know, one partition belongs to Jacuzzi Walk-In and one partition belongs to, you know, a different part of the company. That's not the analysis.

And, you know, as the affidavit of Mr. Spector set forth, these are basic questions that any forensic expert would ask in any case.

THE COURT: So, pretty drastic remedy to seek to strike an Answer where you might be seeking, you know,

multi millions of dollars.

MR. CLOWARD: Your Honor, it is very drastic.

THE COURT: Is this --

MR. CLOWARD: It is.

THE COURT: Yeah.

MR. CLOWARD: It is very drastic and I've never seen the conduct that I have in this case.

THE COURT: Okay.

MR. CLOWARD: I mean, it's -- when I have had representations by counsel on countless times saying that we've turned everything over and then I find some more. And, then, you know, we have to seek more information from the Court. I mean, they didn't even address the advertising issue. They didn't even address the dealer issue. I mean, there are so many other small issues that the Court hasn't even -- you know, I had 30 pages and I had to file a Motion to Exceed the Page Limit.

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THE COURT: Yeah.

MR. CLOWARD: Had I addressed all of the issues, it would have been 100 pages.

For instance, I sent out discovery requests for admission of, you know, authenticity, genuineness, and so forth of documents, keeping in mind that many of the documents were documents that Jacuzzi had produced to me. So, I'm using RFA's property to say: Are these genuine?

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Are they authentic? Can we use them for trial?

They objected. Every single one of them. Every single one of them. That's not even an issue that I brought before the Court and that's probably 40 requests for admission that I sought to just -- you know, pare down the issues, like, are we going to be fighting over, at the time of trial, whether this diagram that you produced to me is authentic and genuine? You know, and that's just a --

THE COURT: Yeah.

MR. CLOWARD: That's one other issue that has come before the Court.

THE COURT: We're going to have to wrap it up.

MR. CLOWARD: Okay. I'm sorry.

THE COURT: No, that's okay.

MR. CLOWARD: One other thing that I wanted to point out that I think is a significant issue, Your Honor, is requests for injury incidents versus requests for customer complaints. They have continually -- Jacuzzi has continually over and over stated: Well, we didn't turn over that injury incident or that incident because it didn't involve a, you know, a specific enough injury. Or we didn't turn over that incident because of X, Y, Z. You know, insert all of the excuses they've used.

What about the customer complaints? We have two avenues of requesting information. We're saying here we

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want incidents, here we want customer complaints. So, for them to say, hey, look, we -- you know, we didn't these turn this over because this didn't involve an injury, well what about the request for customer complaints that also sought similar information? Why didn't you turn that over?

Finally, Your Honor, it is true that in my opening oral argument I did focus on 37(a)(3), however, that's not the only operative statute. I mean, we have 37 -- NRCP 37(c)(1), which is Faults or Misleading Disclosure. We have NRCP 37(c)(2), which is failure to admit genuineness. Now that wasn't raised in the Motion, but that -- it has been an ongoing issue. NRCP 26(b)(1), which specifically states that it is, quote:

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> Not ground for objection that the information sought will be inadmissible at trial.

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So, they have stonewalled me throughout the entire case saying, well, it's -- you know, it's not even admissible and that was the basis of Mr. Roberts's whole argument as he stands up and essentially argues, in limine, why these documents shouldn't be used at the time of trial. Well, for discovery purposes, quote:

> It is not ground for objection if the information sought will be inadmissible at trial.

Further, there's 26(e), they're under a duty to supplement. And, then, NRCP 16.1(a)(1), which requires

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initial disclosures and without awaiting a discovery request.

So, there are a lot of ways that this Court can strike the Answer. If the Court feels that it needs to have an evidentiary hearing on why these things have not been turned over, we agree with counsel that that would be time well spent. If the Court is, you know, not inclined to grant these issues, I think there's a multitude of alternative relief that really have to be granted to make this fair for the plaintiffs.

THE COURT: Well, I'll consider all that. I can consider lesser sanctions on my own, if any sanctions are warranted, after I look at this more carefully.

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And I also have within my discretion to set an evidentiary hearing if -- even if I want to do something less than striking an Answer and there might be particular areas where I need some additional information --

MR. CLOWARD: Sure.

THE COURT: -- from some of the [indiscernible] or some of the other individuals implicated here and if I do request an evidentiary hearing as to some limited issues, that shouldn't be viewed as any indication of --

MR. CLOWARD: Sure.

THE COURT: -- what I'm -- which way I'm leaning here.

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MR. CLOWARD: Absolutely.

THE COURT: So, I'm going to have to take this under advisement. To be honest with you, the volume of material that you have all provided to me greatly exceeds that which I've received in connection with any other motion in my four years on the bench. So, you guys -- like I said, it means you guys have done a very good job of making sure that all of the facts are in front of me. I appreciate that.

MR. CLOWARD: Your Honor, may we have --

THE COURT: Anything else?

MR. CLOWARD: May we have a stay pursuant to NRCP 37 in the interim --

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THE COURT: A stay of what and for how long?

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MR. CLOWARD: I would say in the entre proceeding until we can have the Court's ruling because, you know, discovery is closed. We have a lot of additional --

THE COURT: It's closed.

MR. CLOWARD: -- things that we need to do.

THE COURT: Like what? Like what?

MR. CLOWARD: Depose the folks in the instant report, conduct a forensic examination --

THE COURT: Oh.

MR. CLOWARD: You know, identify the dealers, you know, that -- there are a lot of things that would need to

be done. You know, they --

THE COURT: Yeah.

MR. CLOWARD: Jacuzzi needs to supplement the discovery on a lot of issues for us to even determine the additional steps.

THE COURT: Is there anything anticipated within the next week? Suppose it's going to take me --

MR. ROBERTS: There is.

THE COURT: -- a full -- yes?

MR. ROBERTS: There's a --

THE COURT: Let me hear from --

MR. ROBERTS: -- deposition on Friday scheduled in Atlanta. One of our experts, our human factors expert. Already got nonrefundable tickets to it. The --

THE COURT: What else?

MR. GOODHART: There's the deposition of plaintiffs' expert, Ron Bonecutter, which we have agreed to take, I think, sometime in March -- no, not March.

MS. GOODWIN: March 13th.

MR. GOODHART: March 13th?

I'm just wondering whether a better tactic at this point in time may be to vacate the trial date that we currently have --

THE COURT: Well, I wouldn't do that unless everybody agreed.

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MR. CLOWARD: Well, I mean, --

THE COURT: Sounds like whatever happens, you're going to need more time. I mean, if I were to strike an Answer, they would go to the Supreme Court and ask for an emergency stay. I don't know what would happen there. If I don't grant it, you're going to ask me for more time.

MR. CLOWARD: Correct.

THE COURT: Maybe what we should do is just have this one depo go forward on Friday and have a stay temporarily until I make my decision. That might be the best thing to do. What do you guys think of that?

MR. GOODHART: I don't disagree with that, Your Honor. From first perspective in my --

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THE COURT: I don't know that I want to --

MR. GOODHART: In my perspective, I would have no objection to additional discovery. If you do deny Plaintiffs' Motion, I'm not going to object to additional discovery and stuff like that that Mr. Cloward may want to do.

THE COURT: Well, what were you thinking, Mr. Cloward?

MR. CLOWARD: I mean, we would agree to -- I mean, I guess you're exactly correct. If the Court does deny the Motion, I would seek additional discovery. So, --

THE COURT: And I would -- I would probably give

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that to you.

MR. CLOWARD: So to the extent that -- you know, I mean, it -- if the Court does strike it and it ends up being a prove-up, you know, they're going to -- like you said, they're going to file a motion -- or, I mean, an appeal anyway. So, I think it's safe to take the trial date off or set it down the road or something and we can do a status check in two weeks and try --

THE COURT: Well, --

MR. CLOWARD: -- and find out what the Court ultimately would do.

THE COURT: I don't want to quite move it right now. All right? I do --

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MR. CLOWARD: Yeah. I mean, we --

THE COURT: I do want the depo --

MR. ROBERTS: Your Honor, just to throw it into the mix, we had all discussed this and agreed that --

THE COURT: Okay.

MR. ROBERTS: -- we would, at the trial setting conference, be asking the Court for a firm setting, given the length of the trial and the number of witnesses. And it could be that there is not a firm setting available on the stack that we're currently assigned to, which might have required the Court to move it anyway.

But from Jacuzzi's standpoint, I already

represented that we agree to additional discovery on these incidents and anything else discovered under the forensic search. I see no reason why we can't proceed with the forensic search, proceed with these depositions. There may be even something in there that would be informative for the Court to know with regard to these incidents.

THE COURT: Mr. Cloward, can you at least go forward with this human factor deposition --

MR. CLOWARD: Oh, absolutely.

THE COURT: -- because it sounds like there's nonrefundable tickets already there.

MR. CLOWARD: We're happy --

THE COURT: Let's do this.

MR. CLOWARD: We're happy to do that. And one thing I wanted to, --

THE COURT: Okay.

MR. CLOWARD: -- I guess, say for the record is we don't want the trial date to be moved, but I feel like there's no way we could put on a fair trial as it currently stands. It would be impossible to do that without discovery.

THE COURT: I understand. Of course.

MR. CLOWARD: So, my hand is somewhat forced on that issue.

But, as far as the depositions that are currently

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noticed, we are more than happy to -- you know, have those go forward. Not a problem.

MR. ROBERTS: And, Your Honor, since the plaintiff is asking for it, and we don't oppose it, maybe we can at least give the plaintiff some assurance by vacating the trial date --

THE COURT: I'm not going to vacate the trial date today, guys.

MR. ROBERTS: Okay.

THE COURT: But keep trying, but I'm not going to do it. All right?

What I am going to do is I am going to order that the deposition of the human factors expert this Friday go forward. Today is what? Monday. Monday, what?

MR. CLOWARD: February 4th.

MR. ROBERTS: February 4th, Your Honor.

MR. CLOWARD: February 4th.

THE COURT: All right. So, I'm going to -- we're just going to have a temporary stay of all other activity through the 13th, Wednesday, February 13th. All right?

MR. GOODHART: One other thing, Your Honor. We have circulated amongst counsel a stipulation to extend the deadline for motions in limine, which are currently February the 10th.

THE COURT: Yeah. I have no problem with that.

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MR. GOODHART: Okay.

THE COURT: All right. Go ahead. As long as I get, you know, two weeks before trial to read everything, that would be great.

MR. GOODHART: Yeah, I think the date is about 30 days before the currently scheduled trial.

THE COURT: Yeah. That's fine. Go ahead and get that to me and I'll sign that. Not a problem.

MR. GOODHART: Thank you.

THE COURT: So, on the 13th, if not before, I will issue my order in this matter also indicating whether we need to have an evidentiary hearing on any issues and also indicating whether the trial is going to go forward or get moved. And if I need any advice or consent from the parties, we'll have a conference call.

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MR. ROBERTS: Thank you, Your Honor.

MR. CLOWARD: Thank you.

THE COURT: So, on the 13th, you'll know a lot more.

MR. CLOWARD: Thank you.

THE COURT: But right now, you stand at the current trial date, pretrial conference date, calendar call date, stay until the 13th except for this deposition.

MR. CLOWARD: Thank you.

MR. ROBERTS: And if I could just throw in one --

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maybe it's a correction, maybe it's not.

THE COURT: Okay.

MR. ROBERTS: Mr. Cloward said I argued that evidence was not discoverable on the grounds that it wasn't admissible. If I said that, I misspoke. The *Schlatter* case at 561 P.2 at 1344 is what I was attempting to quote. I may have misread. And that case says that it's not discoverable if it's neither relevant to the tendered issues nor leading to discovery of admissible evidence. That's what I meant to say, if I didn't.

THE COURT: No. I understood that. Thank you.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Thank you, counsel.

MR. CLOWARD: Thank you.

THE COURT: All right. Court is adjourned. Thank you all for your helpful argument.

[Went off the record for 15 seconds]

THE COURT: You want a two-week extension?

MS. LLEWLELYN: I just wanted to know if that was part of the stay or what --

THE COURT: Yeah, yeah, yeah. No further activity. So, you get a stay on those. The 13th, I'll give you a date for dispositive motions.

MS. LLEWELLYN: All right. Thank you.

THE COURT: All right? Stay on that.

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MR. ROBERTS: Thank you.

MR. CLOWARD: Thank you, Your Honor.

MR. ROBERTS: Thank you, Judge.

PROCEEDING CONCLUDED AT 2:50 P.M.

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CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

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A-16-731244-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Product Liability	COURT MINUTES	March 04, 2019

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

March 04, 2019 10:00 AM **Minute Order**

HEARD BY: Scotti, Richard F. **COURTROOM:** Chambers

COURT CLERK: Garcia, Louisa

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

Order RE: Pending Motions

The Court sets down an Evidentiary Hearing on the issue of sanctions for March 28, 2019, 10:30 AM (3 hours). The Court hereby lifts any Stay that existed in this case.

The parties should proceed with any further discovery until and unless the Court Orders otherwise. In the upcoming sanctions order the Court is inclined to impose some monetary sanctions, at the very least, and re-allocate the fees and costs related to discovery. A tentative new Discovery Deadline is March 21. The Court shortens Notice for any further Depositions that either side needs to take to one week. Protective orders, if really necessary, may be sought on one day notice and heard by telephone conference. Plaintiff is permitted to take a further deposition of the corporate representatives of Jacuzzi and First Street, regarding Chopper, marketing and advertising, and the First Street dealers that existed between 2008 and the date of the incident. Plaintiff is entitled to locate and depose Chopper if that has not been done already. Plaintiff is entitled to take the depositions of the First Streets Dealers. The parties are directed to again cooperate in good faith to conduct the forensic review previously ordered by the Discovery Commissioner-if it still has not been complete-and, of course, the scope shall be all incidents involving a Jacuzzi walk-in tub with inward opening doors, for the time period of January 1, 2008, through the date of filing of the complaint, where a person slipped and fell, whether or not there was an injury, whether or not there was any warranty claim, and whether or not there was a lawsuit.
This case is still set to be tried on the Court's April 22 five-week stack. The Court will entertain a Stipulation to continue if the parties collectively want a continuance.

The Court requests the parties to identify, by filed brief (no more than two (2) pages); (1) What discovery has been conducted in this case since February 4, 2019; (2) The names of any relevant customers of Jacuzzi/First Street that have died; (3) What additional discovery Plaintiff would need to conduct if the Court were not to strike Defendants Answers; and (4) any new developments that the Court should know about. Please provide this by Thursday March 8, 2019.
At this time the Court believes that an Evidentiary Hearing is necessary to determine whether, and the extent to which, sanctions might be assessed against Jacuzzi and/or First Street for failure to timely disclose the Chopper incident. The Court will elaborate on this more in the upcoming sanctions Order.

CLERK'S NOTE: This Minute Order has been electronically served to all registered parties for Odyssey File & Serve. /lg

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A-16-731244-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Product Liability	**COURT MINUTES**	**March 12, 2019**

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

March 12, 2019 **10:00 AM** **Minute Order**

HEARD BY: Scotti, Richard F. **COURTROOM:** Chambers

COURT CLERK: Elizabeth Vargas

PARTIES PRESENT: Minute Order- No parties present.

JOURNAL ENTRIES

- The Court is continuing to plod through the voluminous materials the parties provided on the Motion to Strike. The Court appreciates the preparation that the parties may have undertaken for the upcoming Evidentiary Hearing. Now that the Court has further and very arduously studied all of the Exhibits, the Court has reached the ultimate conclusion at this time 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. This is not to say that there are not other serious issues that the Court is considering - as stated by the Court in the prior Minute Order. Nevertheless, there is no longer any need to conduct an Evidentiary Hearing, and the same is hereby VACATED.

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The Court continues to prepare its detailed analysis of the discovery issues in this case.

Incidentally, the Court's prior reference to the "Chopper incident" should read "Chopper communications."

The Court appreciates the parties' patience as this work proceeds.

Please continue trial preparations.

CLERK'S NOTE: A copy of this Minute Order has been emailed to the following: Benjamin Cloward, Esq. (bcloward@richardlawfirm.com), Christopher Curtis, Esq. (ccurtis@thorndal.com), Philip Goodhart, Esq. (png@thorndal.com), Michael Stoberski (mstoberski@ocgas.com) and Vaughn

Crawford, Esq. (vcrawford@swlaw.com). //ev 3/12/19

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Steven D. Grierson
CLERK OF THE COURT

MOT

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E-Mail: Benjamin@RichardHarrisLaw.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiff,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

*****HEARING REQUESTED*****

PLAINTIFFS' MOTION FOR RECONSIDERATION RE: PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC.'S ANSWER

and

MOTION FOR CLARIFICATION REGARDING THE SCOPE OF THE FORENSIC COMPUTER SEARCH

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Case Number: A-16-731244-C

PLAINTIFFS' MOTION FOR RECONSIDERATION RE: PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC.'S ANSWER and MOTION FOR CLARIFICATION REGARDING THE SCOPE OF THE FORENSIC COMPUTER SEARCH

Plaintiffs, by and through their attorney of record, BENJAMIN P. CLOWARD, ESQ., of RICHARD HARRIS LAW FIRM, hereby submit Plaintiffs' Motion for Reconsideration re: Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s Answer and Motion for Clarification Regarding the Scope of the Forensic Computer Search (hereinafter "**Plaintiffs' Motion**").

This Motion is made and based on the papers and pleadings on file herein, the Affidavit of Ian C. Estrada, Esq., the following Memorandum of Points and Authorities, and the oral argument of counsel at any hearing on this Motion.

DATED THIS 15th day of May, 2019.

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

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AFFIDAVIT OF IAN C. ESTRADA, ESQ. IN SUPPORT OF PLAINTIFFS' MOTION FOR RECONSIDERATION RE: PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC.'S ANSWER and MOTION FOR CLARIFICATION REGARDING THE SCOPE OF THE FORENSIC COMPUTER SEARCH

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

IAN C. ESTRADA, ESQ., being first duly sworn, deposes and says:

1. That I am an attorney at law duly licensed to practice in the State of Nevada.
2. That I am counsel for Plaintiffs in the above-entitled matter.
3. That on February 4, 2019, Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s Answer came on for hearing before this Court.
4. That on March 4, 2019, this Honorable Court issued a ***first*** Minute Order setting an evidentiary hearing and requesting certain information.[1]
5. The evidentiary hearing was originally Ordered to be conducted on March 28, 2019.[2]
6. On March 8, 2019, via Stipulation and Order, the parties requested the evidentiary hearing to be moved to April 9, 2019.
7. That on March 12, 2019, this Honorable Court issued a ***second*** Minute Order altogether vacating the evidentiary hearing determining 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."[3]
8. That recent developments since the ***first*** Minute Order prove unequivocally that Jacuzzi did in fact engage in bad faith conduct and have willfully and intentionally violated at least two discovery Orders and an evidentiary hearing is necessary.

[1] *See*, **Ex. 1**, Min. Order, Mar. 4, 2019.

[2] *Id.*

[3] *See*, **Ex. 2**, Min. Order, Mar. 12, 2019.

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9. Specifically, in the ***first,*** March 4, 2019, Minute Order, this Court requested the parties to identify, by Thursday, March 7, 2019, "[t]he names of any relevant customers of Jacuzzi/First Street that have died . . ."[4]

10. In response to the March 4, 2019, Minute Order, Jacuzzi filed its Brief on March 7, 2019.

A. Recent Admission by Jacuzzi of a Third Person Who Died from Walk-In Tub Use

11. That on Thursday, March 7, 2019, ***for the first time,*** Jacuzzi indicated that **in October 2018**, it was made aware "by the family of an individual who passed away that the decedent allegedly developed blood clots and died shortly after 'getting stuck' in a Jacuzzi® walk-in tub."[5] (hereinafter "New Incident" or "Third Person").

12. That between October 2018 and March 7, 2019, Jacuzzi affirmatively stated on no less than **seven** occasions that all relevant information had been turned over, including the following:

    a. **On October 30, 2018**, in Jacuzzi's Reply in support of its Motion for Protective Order, Jacuzzi stated, "In fact, the first time Plaintiffs made issue of this was with Plaintiffs' motion for sanctions, accusing Jacuzzi of hiding subsequent incidents, all without even a meet and confer conference. Upon the Court's determination that the subsequent incidents were discoverable, Jacuzzi followed the Court's instructions and disclosed such incidents."[6] Jacuzzi acknowledged that the Court determined that subsequent incidents were discoverable but did not disclose the new incident.

    b. **On November 2, 2018**, at the hearing on Jacuzzi's Motion for Protective Order, Jacuzzi stated in open court, "we have already provided to the Court

[4] *See*, **Ex. 1**. [There is a typographical error; it should have read Thursday, Mar. 7, 2019, instead of Mar. 8, 2019.]

[5] *See*, **Ex. 3**, Jacuzzi's. Br. pursuant to Mar. 4, 2019, Min. Order, filed Mar. 7, 2019, at 2:21-23.

[6] *See*, **Ex. 4**, Jacuzzi's Reply in Supp. of Mot. for Protective Order, filed Oct. 30, 2018, at 3:10-14.

and most of which -- in terms of relevant -- any claims of personal injury or wrongful death for the subsequent injuries, we've already provided those to plaintiff."[7]

i. Jacuzzi Corporate Counsel, Ron Templer was present in the Courtroom.[8]

ii. Neither Mr. Templer nor Mr. Cools mentioned anything about the recently-discovered death that was alleged to have occurred ***just days or weeks*** before due to a person "getting stuck" in a Jacuzzi brand walk-in tub.[9]

c. **<u>On December 10, 2018</u>**, in Jacuzzi's Writ of Prohibition filed with the Nevada Supreme Court, Jacuzzi stated that it had, "already produced the universe of possibly relevant other incidents involving the tub in question," and that, "In this case, the incident at issue is an alleged wrongful death alleged to have occurred following entrapment in a specific model of Jacuzzi® walk-in tub. Thus, the universe of possibly relevant other incidents would be incidents of alleged serious bodily injury or death involving the same model of walk-in tub, under substantially similar facts. The district court already ordered, and **Jacuzzi already produced**, **<u>all</u>** such prior **<u>and</u> subsequent incidents** of alleged serious bodily injury **<u>or death</u>** incidents involving the walk-in tub at issue."[10]

d. **<u>On December 28, 2018</u>**, in response to Plaintiffs' Request that Jacuzzi supplement its discovery answers with regard to prior and subsequent incidents, Jacuzzi served Supplemental Discovery Responses to Plaintiff

[7] *See*, **Ex. 5**, Tr. of Hr'g, Nov. 2, 2018, at 6:21-24.

[8] *See*, *Id*. at 2:11-20.

[9] *See generally*, *Id*.

[10] *See*, **Ex. 6**, Jacuzzi's Writ of Prohibition, filed Dec. 10, 2018, at 8, 13, & 15 (emphasis added).

Tamantini's Interrogatories. The relevant questions and answers are as follows:

> **INTERROGATORY NO. 11:**
> Please state whether the Defendant has ever received notice, either verbal or written, from or on behalf of any person claiming injury or damage from his use of a Jacuzzi Walk-In Tub which is the subject
> of the litigation.
>
> If so, please state:
> (a) the date of each such notice;
> (b) the name and last known address of each person giving such
> notice; and
> (c) the substance of the allegations of such notice
>
> **SUPPLEMENTAL RESPONSE:**
> **Defendant is unaware of any persons claiming injury from his or her use of the Jacuzzi 5229 Walk-In Tub, or any other Jacuzzi Walk-In Tub, prior to the subject incident. Pursuant to NRCP 33(d), Jacuzzi refers Plaintiffs to the previously produced subsequent incidents, identified as JACUZZI002912-002991, which relate to any Jacuzzi Walk-In Tub. Jacuzzi further refers Plaintiffs to the Smith and Baize matters, although the Baize matter does not arise out of a personal injury claim, but rather a Deceptive Trade Practices Act/ Breach of Contract/Fraud claim in regard to the sale of a tub. <u>After reasonable inquiry, Jacuzzi is unaware of any other claims</u>.**[11]
>
> **INTERROGATORY NO. 19:**
> State if at any time any employee, agent, customer or end user complained of or objected to the design of the subject Jacuzzi walk in tub or similar model with respect to the means used to provide safety. If so, provide copies of all relevant documents in your possession.
>
> **SUPPLEMENTAL RESPONSE:**
> **Limiting its response to the scope set by the Discovery Commissioner for claims of personal injury or death for any Jacuzzi® Walk-In Tub, pursuant to NRCP 33(d),**

[11] *See*, **Ex. 7**, Jacuzzi's Suppl. Disc. Resp. to Pl. Tamantini's Interrog., served Dec. 28, 2018 (<u>underlined</u> emphasis added, **bold** in original to denote supplemental response).

> **Jacuzzi refers Plaintiffs to the previously produced subsequent incidents, identified as JACUZZI002912-002991, and the *Smith* matter. Further, while not arising out of a personal injury claim or relating to product safety, Defendant refers Plaintiffs to *Baize v. R.G. Galls et al.*, which involves a Deceptive Trade Practices Act/Breach of Contract/Fraud claim in regard to the sale of a tub. Jacuzzi further states that it is not aware of any *employee or agent* that complained of or objected to the design of the subject Jacuzzi® Walk-In Tub.** [12]

e. **On January 9, 2019**, in Jacuzzi's Motion to Stay, it again stated that it had, "already produce[d] the universe of possibly relevant other incidents involving the tub in question."[13]

f. **On January 24, 2019**, in Jacuzzi's Opposition to Plaintiffs' Renewed Motion to Strike Jacuzzi's Answer, Jacuzzi stated, "Despite Plaintiffs' angry rhetoric and finger-pointing, Jacuzzi did not, and has not, hid anything and has acted in good faith throughout discovery in this matter. **Importantly, Jacuzzi has produced all personal injury or death claims from 2008 to present** pursuant to the Discovery Commissioner's rulings."[14]

g. **On February 4, 2019**, at the hearing for Plaintiffs' Renewed Motion to Strike, Jacuzzi stated in open court that, "It is Jacuzzi's position, . . . that Jacuzzi only had to produce claims of personal injury **or death**."[15] Jacuzzi excused its behavior for not producing Jerre Chopper's incident by stating that it was justified because "it doesn't involve personal injury or wrongful death."[16]

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[12] *See*, *Id.*

[13] *See*, **Ex. 8**, Jacuzzi's Mot. to Stay, filed Jan. 9, 2019, at 7.

[14] *See*, **Ex. 9**, Jacuzzi's Opp'n to Pls.' Renewed Mot. to Strike, filed Jan. 24, 2019, at 2 (emphasis added).

[15] *See*, **Ex. 10**, Tr. of Hr'g, Feb. 4, 2019, at 57:5-7 (emphasis added).

[16] *See*, *Id.* at 58:9-10.

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13. The foregoing **seven** representations made by Jacuzzi **were not true** and were made to:
    a. Plaintiffs;
    b. The former Discovery Commissioner – now Judge Bonnie Bulla;
    c. This Honorable Court, Judge Richard Scotti; and,
    d. The Nevada Supreme Court.
14. In light of Jacuzzi's recent "disclosure" of the New Incident – despite knowing about it for at least four months – Plaintiffs now request that the Court reconsider its March 12, 2019, Minute Order which found that Jacuzzi did not engage "in any egregious bad faith conduct, or intentional violation of any discovery Order, or conduct intended to harm Plaintiff."[17]
15. Plaintiffs also request that the Court reconsider its Minute Order vacating the evidentiary hearing because Plaintiffs believe that an evidentiary hearing on the New Incident and the Jerre Chopper communications is necessary to determine why Jacuzzi failed to disclose crucial information.
16. Plaintiffs also believe that Plaintiffs should be permitted to conduct discovery regarding the New Incident, the Chopper communications, and Jacuzzi's discovery conduct related thereto.
17. Discovery should also include communications between Jacuzzi and Counsel to adequately determine the level of involvement of both, which is a factor set forth in *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).
18. Specifically, regarding the "Chopper incident," Plaintiffs believe and are requesting additional discovery to determine the level of involvement of the Jacuzzi's counsel along with the attorneys employed as "corporate counsel" to provide the Court with all information pursuant to the sixth factor of *Young*.

[17] *See*, **Ex. 2**.

19. Regarding the recent New Incident disclosure, Plaintiffs believe that additional discovery must be had to determine why Jacuzzi actively concealed this information and more importantly what role, if any, both the law firms of Snell & Wilmer, LLP and/or Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC played in that concealment – as this information is important pursuant to the sixth factor of *Young*.

b. The Scope of the Forensic Computer Search

20. Further, this Court's March 4, 2019, Minute Order limited the forensic computer search to "January 1, 2008, through ***the date of the filing of the complaint***."[18] Originally, Discovery Commissioner Bulla ordered (and this Honorable Court adopted) that the search include the time from January 1, 2008 to ***present***.[19] Further, the scope as contained in Jacuzzi's Petition for Writ of Mandamus was for January 1, 2008, to present. Plaintiffs believe that the scope of the Forensic Search that has been ordered since November 2, 2018, must include the time from the filing of the complaint until the present day because Jacuzzi has repeatedly demonstrated that it simply will not participate in discovery in good faith and an independent computer forensic expert must be allowed to search for incidents up to the present day as they are relevant pursuant to *Ginnis v. Mapes* and *Reingold v. Wet-n-Wild* to prove the "dangerousness" of the product at issue.

. . .

. . .

. . .

[18] *See*, **Ex. 1** (***emphasis*** added)

[19] *See*, **Ex. 11**, Disc. Comm'rs R. & R., Oct. 16, 2018, and adopted as an Order of this Court on Nov. 5, 2018, filed Nov. 6, 2018 (emphasis added).

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Plaintiffs are unsure why this Court limited the scope and seek clarification as to why it was limited or whether it was a clerical error.

FURTHER AFFIANT SAYETH NAUGHT.

RICHARD HARRIS LAW FIRM

IAN C. ESTRADA, ESQ.

Subscribed and sworn to before me
this 15th day of May, 2019.

NOTARY PUBLIC, ~~in and~~ for
said County and State

CATHERINE BARNHILL
Notary Public State of Nevada
No. 12-8167-1
My Appt. Exp. July 5, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Plaintiffs' Request that the Court Reconsider its March 12, 2019, Minute Order

On February 4, 2019, Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s Answer came on for hearing before this Court. The proceedings lasted approximately two and a half hours, and the Court took the matter under advisement. 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 . . ."[20]

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."[21] Therefore, the Court vacated the previously scheduled Evidentiary Hearing.

Plaintiffs now respectfully move this Court to reconsider its March 12, 2019, Minute Order because of newly discovered evidence which was revealed ***after*** the hearing on Plaintiffs' Renewed Motion to Dismiss. On March 7, 2019, just five days before the March 12, 2019, Minute Order, Jacuzzi filed its "Brief Pursuant to the March 4, 2019 Minute Order," which revealed that Jacuzzi has been aware ***since October 2018*** of a third death involving a person "getting stuck" in a Jacuzzi walk-in tub (hereinafter, "**New Incident**" or "**Third Person**").

Jacuzzi's failure to disclose the New Incident until March 7, 2019, is highly relevant to the issues this Court considered in Plaintiffs' Renewed Motion to Strike. It is relevant to this Court's finding that Jacuzzi did not egregiously and intentionally in concealing and withholding relevant information throughout this litigation. Therefore, because this new information was not available at the time the Court made its decision on Plaintiffs' Renewed Motion to Strike, it is necessary for this Court to reconsider its March 12, 2019, Minute Order and order that the Evidentiary

[20] *See*, **Ex. 1**.

[21] *See*, **Ex. 2**.

Hearing go forward.

1. Jacuzzi's Failure to Disclose the New Incident Requires Reconsideration

Throughout this litigation, Jacuzzi has acknowledged in various papers, statements in open court, and discovery responses that subsequent incidents are relevant in this case to show the presence of an ongoing dangerous condition. Jacuzzi has also acknowledged that former Discovery Commissioner Bulla had specifically ruled that Jacuzzi must disclose any evidence of incidents involving injury or death arising from the use of a Jacuzzi walk-in tub. In fact, Jacuzzi's entire justification for not producing the Chopper communications was because no injury or death occurred. Yet, on March 7, 2019, Jacuzzi admitted that since October 2018, it has been withholding information regarding a subsequent incident ***in direct violation of Commissioner Bulla's ruling***.

Not only does the New Incident involve a person "getting stuck" in a Jacuzzi walk-in tub,[22] but the decedent's family has informed Jacuzzi that it believes **the death** was related to the Jacuzzi walk-in tub.[23] Therefore, pursuant to Jacuzzi's own acknowledgments in this case, Jacuzzi knew, or should have known, that the New Incident is relevant to this case. Yet, once again, Jacuzzi chose to continue its discovery abuse and withheld this information for four months (potentially five months, depending exact date in October that Jacuzzi learned of the New Incident) until this Court's March 4, 2019, Minute Order specifically ordered the parties to identify customers who have died.

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This is the "cat and mouse" game that Plaintiffs have been forced to play for years on nearly every single important issue. When Plaintiffs asked for information regarding similar incidents, Jacuzzi self-limited the scope of its responses to prior incidents only.[24] When Plaintiffs asked for the identities of all dealers, Jacuzzi self-limited its response to only reveal AITHR (and then unilaterally conclude that the other independent dealers were irrelevant to this case).[25] When

[22] *See, Id.*

[23] *See, Id.*

[24] *See generally*, Pls.' Renewed Mot. to Strike, filed Jan. 10, 2019.

[25] *See, Id.*

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Plaintiffs asked for customer complaints, Jacuzzi self-limited its response to only complaints involving injury or death and withheld the Jerre Chopper complaints and the Leonard Baize lawsuit filed in Texas by claiming that these cases did not result in injury or death.[26] Despite being ordered by the Discovery Commissioner to produce all subsequent incidents that involved an injury or death – Jacuzzi concealed this information. Even when this Honorable Court asked for information on customers who have died, Jacuzzi defiantly self-limited its response by offering only vague information about the family of a decedent but no names or contact information. Jacuzzi is in violation of **two** court orders in this regard.

In light of the New Incident, this Court should reconsider its March 12, 2019, Minute Order and re-order an evidentiary hearing.

B. An Evidentiary Hearing is Necessary to Preserve the Record

Plaintiffs recognize and understand that the Court has gone to great lengths to analyze and consider the extensive briefing, exhibits binders, and oral argument of counsel prior to entering the March 12, 2019, Minute Order. However, without an evidentiary hearing regarding Jacuzzi's discovery conduct, Plaintiffs and this Court remain in the dark. Plaintiffs will suffer severe prejudice if they are forced to go to trial without ***all*** relevant and admissible evidence. Therefore, Plaintiffs request that the Court reconsider its March 12, 2019, Minute Order and re-order an evidentiary hearing so that the Court can determine the extent of Jacuzzi's misconduct (or lack thereof).

Plaintiffs respect this Court's decision but are required to preserve the record for appeal. An evidentiary hearing is necessary so that there is a clear record regarding Jacuzzi's discovery conduct. A hearing is necessary to determine why Jacuzzi did not disclose Jerre Chopper or her letters, despite specific discovery requests seeking not only prior incidents but also prior complaints. A hearing is necessary to determine why Jacuzzi cleverly crafted its discovery responses to requests for dealer information by only disclosing AITHR even though Jacuzzi knew that, at the time of the subject incident, there were approximately 13 dealers who sold Jacuzzi

[26] *See, Id.*

walk-in tubs. Jacuzzi surely knew that 13 dealers were relevant to this case because dealers are the main point-of-contact for customers. Yet, Jacuzzi only disclosed AITHR. A hearing is necessary to determine why Jacuzzi failed to disclose the New Incident while also making numerous representations to Plaintiffs, this Court, and the Nevada Supreme Court that all relevant documents have been produced. A hearing is necessary to determine why Jacuzzi failed to disclose any information regarding customer complaints about the slipperiness of their tubs. Without an evidentiary hearing, an appellate court will be unable to determine whether sanctions were necessary.

The Nevada Supreme Court has stated that in order to conduct a meaningful review, the record must be specific such that the appellate court is not forced to speculate. In *Boonsong Jitnan v. Oliver*, the Court explained:

> Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation. *See, e.g., Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (specific on-the-record findings "enable[ ] our review of [the district court's] exercise of discretion"); *Rosky v. State*, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (requiring findings "facilitate[s] proper appellate review" and fosters "synergy between the trial and reviewing courts [so] that appellate courts can develop a uniform body of precedent" (internal quotation omitted)); *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990) (requirement that a district court state reasons for permanent injunction is "intended primarily to facilitate appellate review").[27]

It is incumbent on Plaintiffs to preserve the record.[28] Therefore, in order to preserve the record for appeal, Plaintiffs request that the Court order that the evidentiary hearing go forward.

Additionally, an evidentiary hearing is the only way that the Court can meaningfully consider the *Young* factors.[29] Specifically, the sixth Young factor requires that the Court consider

[27] *Khoury v. Seastrand*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011).

[28] *See BMW v. Roth*, 127 Nev. 122, 137, 252 P.3d 649, 659 (2011)("The courts cannot adopt a rule that would permit counsel to sit silently when an error is committed at trial with the hope that they will get a new trial because of that error if they lose.").

[29] *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990).

"whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney." Without an evidentiary hearing, the Court cannot know the extent of Jacuzzi's involvement in Jacuzzi's discovery conduct.

C. The Court Should Reconsider its March 4, 2019, Minute Order Regarding the Scope of the Forensic Computer Search

As a separate issue, Plaintiffs also request that the Court reconsider its March 4, 2019, Minute Order with respect to the scope of the forensic computer search. This Court's March 4, 2019, Minute Order limited the forensic computer search to "January 1, 2008, through the date of the filing of the complaint."[30] Originally, former Discovery Commissioner Bulla ordered (and this Honorable Court adopted) that the search include the time from January 1, 2008 to ***present***.[31] Further, Jacuzzi filed a Petition for Writ of Prohibition with the Nevada Supreme Court and argued that a search from January 1, 2008 to present was improper. The Nevada Supreme Court, in denying Jacuzzi's Petition for Writ of Mandamus, considered the scope of the search and determined that the January 1, 2008, to present time period was proper. Plaintiffs believe that the scope of the Forensic Search that has been ordered since November 2, 2018, must include the time from the filing of the complaint until the present day because Jacuzzi has repeatedly demonstrated that it simply will not participate in discovery in good faith; an independent computer forensic expert must be allowed to search for incidents up to the present day as they are relevant pursuant to *Ginnis v. Mapes* and *Reingold v. Wet-n-Wild* to prove the "dangerousness" of the product at issue.

II. STATEMENT OF FACTS

Jacuzzi's conduct is egregious because (1) Jacuzzi withheld the information for months until this Court specifically requested information about customer deaths, and (2) Jacuzzi affirmatively stated on numerous occasions that all subsequent incidents had been disclosed. Taken as a whole, Jacuzzi's recent "disclosure" of the New Incident, requires that the Court reconsider its March 12, 2019, Minute Order because Jacuzzi clearly withheld the information

[30] *See*, **Ex. 1**.

[31] *See*, **Ex. 11**.

intentionally in order to harm Plaintiffs' ability to prove that the subject tub is dangerous.

A. Jacuzzi Has Been Aware of the New Incident Since October 2018

On March 4, 2019, this Honorable Court issued a Minute Order, which ordered the parties to file a brief providing the following:

> (1) What discovery has been conducted in this case since February 4, 2019; (2) the names of any relevant customers of Jacuzzi/First Street that have died; (3) What additional discovery Plaintiff would need to conduct if the Court were not to Strike Defendants Answers; and (4) any new developments that the Court should know about.[32]

On March 7, 2019, at 4:38 p.m., Jacuzzi filed its "Brief Pursuant to the March 4, 2019, Minute Order" and revealed, ***for the first time***, that it has been aware of another, similar incident ***since October of 2018***.[33] Jacuzzi's Brief states, in pertinent part:

> Jacuzzi was also made aware in October 2018 by the family of an individual who passed away that the decedent allegedly developed blood clots and died shortly after "getting stuck" in a Jacuzzi® walk-in tub. The family stated that they did not know whether the person's passing away was related to the tub or something else, but felt it was related to the tub. Jacuzzi has no further information as to the facts and circumstances of her death or whether it was related in any way to the use of a Jacuzzi® tub, and no claim has been made against Jacuzzi for personal injury or death.[34]

Per Jacuzzi's own limited description of the New Incident, an end-user died in a Jacuzzi walk-in tub after "getting stuck." The decedent's family feels the death was related to the Jacuzzi tub. Nonetheless, Jacuzzi did not provide any information regarding the decedent or the decedent's family. While Jacuzzi claims it has no further information, one thing is clear: Jacuzzi was required to disclose this incident months ago.[35]

As this Court is aware, by October 2018, Plaintiffs and Jacuzzi were already in the middle of a string of discovery disputes, which centered around Jacuzzi's failure to disclose similar incident evidence. By October 2018, Plaintiffs had already served written discovery requests

[32] *See*, **Ex. 1**.

[33] *See*, **Ex. 3**.

[34] *See*, *Id.*

[35] Depending on the exact date in October 2018 that Jacuzzi became aware of this incident, Jacuzzi withheld this information somewhere between 127 to 158 days.

seeking similar incidents evidence, and Plaintiffs had already deposed Jacuzzi's corporate witnesses in which Plaintiffs specifically sought testimony regarding other similar incidents. Moreover, Plaintiffs had already filed their first Motion to Strike Jacuzzi's Answer, and former Discovery Commissioner Bulla ordered Jacuzzi to perform another search. Then came Jacuzzi's Motion for Protective Order (filed Sept. 11, 2018) regarding Plaintiffs' discovery requests (which sought other similar incidents evidence) and Jacuzzi's Motion for Protective Order (filed Oct. 12, 2018) regarding Plaintiffs' Salesforce Subpoena. Each of these motions for protective orders related to Plaintiffs' search for other similar incidents evidence where Plaintiffs were documenting Jacuzzi's misconduct – and Jacuzzi, on the other hand, was busy accusing Plaintiffs of making unfounded and unfair accusations, apparently to divert attention away from the issues and its own misbehavior. In other words, by the time Jacuzzi learned of this New Incident in October 2018, Jacuzzi was well aware of the importance of this information to Plaintiffs' case. Yet, as Jacuzzi has done consistently and continuously in this case, it failed to disclose the information.

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B. Jacuzzi Untruthfully Claimed to Have Disclosed All Relevant Incidents

Since October 2018, Jacuzzi affirmatively stated on no less than **seven** occasions that all relevant information has been disclosed. Jacuzzi made these statements to Plaintiffs, former Discovery Commissioner Bulla, this Court, and the Supreme Court of Nevada.

First, on October 30, 2018, Jacuzzi stated in its Reply in Support of its Motion for Protective Order: "In fact, the first time Plaintiffs made issue of this was with Plaintiffs' motion for sanctions, accusing Jacuzzi of hiding subsequent incidents, all without even a meet and confer conference. Upon the Court's determination that the subsequent incidents were discoverable, Jacuzzi followed the Court's instructions and disclosed such documents."[36] Jacuzzi acknowledged that it was required to disclose all subsequent incidents, yet it failed to disclose the New Incident.

Second, on November 2, 2018, at the hearing on Jacuzzi's Motion for Protective Order,

[36] *See*, **Ex. 4** at 3:10-14.

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Jacuzzi's counsel, Joshua Cools, Esq., stated: "we have already provided to the Court and most of which -- in terms of relevant -- any claims of personal injury or wrongful death for the subsequent injuries, we've already provided those to plaintiff."[37] Notably, Jacuzzi's Corporate Counsel, Ron Templer, was present at this hearing.[38] By this time, Jacuzzi had already been made aware of the new incident, yet neither Mr. Templer nor Mr. Cools mentioned it.[39] Therefore, Mr. Cools' statement that Jacuzzi had already provided all subsequent incidents was false.

Third, on December 10, 2018, Jacuzzi filed a Petition for Writ of Prohibition, seeking relief from this Court's Order affirming the November 6, 2018, former Discovery Commissioner's Report and Recommendations. Jacuzzi's Petition stated ***to the Nevada Supreme Court*** that Jacuzzi had "already produced the universe of possibly relevant other incidents involving the tub in question" and that:

> "In this case, the incident at issue is an alleged wrongful death alleged to have occurred following entrapment in a specific model of Jacuzzi® walk-in tub. Thus, the universe of possibly relevant other incidents would be incidents of alleged serious bodily injury or death involving the same model of walk-in tub, under substantially similar facts. The district court already ordered, and **Jacuzzi already produced**, **all** such prior and **subsequent incidents** of alleged serious bodily injury or death incidents involving the walk-in tub at issue."[40]

It is now clear that Jacuzzi's statements to the Nevada Supreme Court were false.

Fourth, on December 28, 2018, in response to Plaintiffs' Request that Jacuzzi supplement its discovery answers with regard to prior and subsequent incidents, Jacuzzi served Supplemental Discovery Responses to Plaintiff Tamantini's Interrogatories. In Jacuzzi's supplemental response to Interrogatory No. 11, Jacuzzi once again falsely stated that, other than the already known Smith and Baize incidents, Jacuzzi was "unaware of any other claims."

> **INTERROGATORY NO. 11:**
> Please state whether the Defendant has ever received notice, either verbal or written, from or on behalf of any person claiming injury or damage from

[37] *See*, **Ex. 5** at 6:21-24.

[38] *See*, *Id.* at 2:11-20.

[39] *See generally Id.*

[40] *See*, **Ex. 6** at 8, 13, 15 (emphasis added).

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his use of a Jacuzzi Walk-In Tub which is the subject of the litigation.

If so, please state:
(a) the date of each such notice;
(b) the name and last known address of each person giving such notice; and
(c) the substance of the allegations of such notice

SUPPLEMENTAL RESPONSE:
Defendant is unaware of any persons claiming injury from his or her use of the Jacuzzi 5229 Walk-In Tub, or any other Jacuzzi Walk-In Tub, prior to the subject incident. Pursuant to NRCP 33(d), Jacuzzi refers Plaintiffs to the previously produced subsequent incidents, identified as JACUZZI002912-002991, which relate to any Jacuzzi Walk-In Tub. Jacuzzi further refers Plaintiffs to the Smith and Baize matters, although the Baize matter does not arise out of a personal injury claim, but rather a Deceptive Trade Practices Act/ Breach of Contract/Fraud claim in regard to the sale of a tub. After reasonable inquiry, Jacuzzi is unaware of any other claims.

Defendant objects because the interrogatory is overly broad without reasonable limitation in scope because it was not limited to substantially similar bathtubs, was not limited by any sort of timeframe, and employs overly broad terms such as "damage." Further, it is unduly burdensome because it seeks to have Jacuzzi review thousands of records to look for any "injury" or "damage," both of which are overly broad terms, especially when considering the relevance to the case at hand. Furthermore, the interrogatory seeks information irrelevant to the subject matter of this action and that is not likely to lead to the discovery of relevant or admissible evidence because subsequent incidents are not relevant to Defendants' notice and Defendants contend subsequent incidents are at most only relevant to show the presence of an ongoing dangerous condition.[41]

Jacuzzi's statement that "Jacuzzi is unaware of any other claims" was false. Additionally, Jacuzzi acknowledges that subsequent incidents are relevant to show the presence of an ongoing dangerous condition. Here, the New Incident involves the death of a person who died after "getting stuck" in a Jacuzzi walk-in tub. Whether or not the family of the decedent has made a claim against Jacuzzi, the New Incident is, without question, "relevant to show the presence of

[41] *See*, **Ex. 7**.

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an ongoing dangerous condition."

Jacuzzi's supplemental response to Interrogatory No. 19 is equally misleading. Interrogatory No. 19 sought information regarding complaints from employees, agents, customers or end users. Jacuzzi offered a response as to employees and agents, but conveniently failed to mention customers or end users:

> **INTERROGATORY NO. 19:**
> State if at any time any employee, agent, customer or end user complained of or objected to the design of the subject Jacuzzi walk in tub or similar model with respect to the means used to provide safety. If so, provide copies of all relevant documents in your possession.
>
> **SUPPLEMENTAL RESPONSE:**
> **Limiting its response to the scope set by the Discovery Commissioner for claims of personal injury or death for any Jacuzzi® Walk-In Tub, pursuant to NRCP 33(d), Jacuzzi refers Plaintiffs to the previously produced subsequent incidents, identified as JACUZZI002912-002991, and the *Smith* matter. Further, while not arising out of a personal injury claim or relating to product safety, Defendant refers Plaintiffs to *Baize v. R.G. Galls et al.*, which involves a Deceptive Trade Practices Act/Breach of Contract/Fraud claim in regard to the sale of a tub. Jacuzzi further states that it is not aware of any *employee or agent* that complained of or objected to the design of the subject Jacuzzi® Walk-In Tub.**[42]

In light of the New Incident, Jacuzzi's Supplemental Response to Interrogatory No. 19 is extremely suspicious. The Interrogatory asks about complaints from any employee, agent, customer or end user." Jacuzzi responded as to employees and agents only. Jacuzzi stated that it was not aware of any "employee or agent" that complained of or objected to the design of the tub. Interestingly, Jacuzzi chose to remain silent as to customer or end user complaints. Jacuzzi's misleading supplemental response is a lie by omission.[43] Mr. Demeritt has been central to Plaintiffs' claims of misbehavior against Jacuzzi because he was the deponent who repeatedly claimed that Jacuzzi was not aware of any prior or subsequent incidents ***other than*** the two claimants who are represented by Mr. Cloward.

[42] *See, Id.*

[43] *See,* **Ex. 7**.

Fifth, on January 9, 2019, Jacuzzi falsely stated in its Motion to Stay that Jacuzzi had "already produce[d] the universe of possibly relevant other incidents involving the tub in question."[44]

Sixth, on January 24, 2019, in Jacuzzi's Opposition to Plaintiffs' Renewed Motion to Strike Jacuzzi's Answer, Jacuzzi stated, "Despite Plaintiffs' angry rhetoric and finger-pointing, Jacuzzi did not, and has not, hid anything and has acted in good faith throughout discovery in this matter. **Importantly, Jacuzzi has produced all personal injury or death claims from 2008 to present** pursuant to the [former] Discovery Commissioner's rulings."[45]

Seventh, on February 4, 2019, at the hearing on Plaintiffs' Renewed Motion to Strike, Jacuzzi stated in open court that, "It is Jacuzzi's position, . . . that Jacuzzi only had to produce claims of personal injury **or death**."[46] As the Court may recall, Jacuzzi tried to excuse its failure to identify Jerre Chopper or produce the Jerre Chopper letters by claiming that it did not disclose Jerre Chopper (or her letters) because "it doesn't involve personal injury or wrongful death."[47] Applying Jacuzzi's own analysis now, Jacuzzi should have disclosed the New Incident in October 2018.

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III. LEGAL ARGUMENT

A. This Court has the Authority to Amend, Alter and Reconsider its Prior Orders.

A Court has inherent authority to reconsider it prior orders.[48] "A court may, for sufficient cause shown, amend, correct, resettle, modify or vacate, as the case may be, an order previously made and entered on the motion in the progress of the cause or proceeding."[49] A motion for reconsideration is controlled by NRCP 60, which states in pertinent part:

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[44] *See*, **Ex. 8** at 7.

[45] *See*, **Ex. 9**.

[46] *See*, **Ex. 10** at 57:5-7 (**emphasis** added).

[47] *See, Id.* at 58:9-10.

[48] *Trial v. Faretto*, 91 Nev. 401 (1975).

[49] *Id.*

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> (b) Grounds for Relief From a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

Nev. R. Civ. P. 60.

Here, there is newly discovered evidence which necessitates reconsideration. This new evidence shows that Jacuzzi has engaged in egregious, bad faith conduct. Jacuzzi has never disputed that subsequent incidents are relevant to show the presence of a dangerous condition. Moreover, Jacuzzi has previously been ordered to search for and produce subsequent incidents. Therefore, Jacuzzi knew that the New Incident was discoverable but chose to withhold the New Incident. In light of Jacuzzi's recent "disclosure," the Court should find that an evidentiary hearing is necessary. In fact, Jacuzzi's failure to disclose a claimed death arising out of a person "getting stuck" in a Jacuzzi Walk-In Tub until the eve of trial, in and of itself, warrants an evidentiary hearing because Jacuzzi's failure was intentional.

Jacuzzi learned of the New Incident in October 2018, when the close of discovery was fast approaching. Yet, Jacuzzi knowingly, and in bad faith, decided not to disclose the New Incident until this Court specifically ordered the parties to inform the Court of all customers who have died. In fact, in October 2018, Jacuzzi opposed Plaintiffs' Motion to Extend Discovery while it remained silent as to the New Incident. The hearing on Plaintiffs' Motion to Extend Discovery went forward on October 31, 2018, and Jacuzzi argued against extending discovery. Thus, though Jacuzzi knew of the New Incident but had not yet revealed it, Jacuzzi was against extending discovery. Now, with the threat of severe sanctions, Jacuzzi is more than willing to allow

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additional discovery apparently in an effort to cure the prejudice.

The Court should not permit Jacuzzi to benefit from its discovery abuses. Jacuzzi remained silent even though it knew or should have known that the New Incident was discoverable.[50] Jacuzzi intentionally and purposefully withheld the New Incident and, therefore, an evidentiary hearing is necessary.

B. The Scope of the Evidentiary Hearing

Should the Court determine that an evidentiary hearing is necessary, Plaintiffs request that the scope of the hearing include the facts and circumstances of the New Incident, the Chopper communications (as originally ordered), and the facts and circumstances regarding Jacuzzi's discovery conduct on those issues. To that end, Plaintiffs also request that if the Court proceeds with the evidentiary hearing, Plaintiffs should be permitted to conduct discovery on these issues, including discovery regarding any documents and communications between the Defendants and their in-house or retained corporate counsel so that the Court can ascertain the level of involvement Jacuzzi's Counsel has played in these willful and deliberate efforts to thwart legitimate discovery.

1. Plaintiffs Should be Permitted to Conduct Discovery of Jacuzzi's Internal Documents and Communications

Should the Court re-order an evidentiary hearing, Plaintiffs request permission to conduct discovery regarding the facts of the New Incident, the Chopper Incident, and Jacuzzi's knowledge of prior and subsequent incidents and the disclosure or non-disclosure of this information. This should include discovery of Jacuzzi's internal documents and communications which may have been made in anticipation of litigation. Similarly, this includes documents and communications that may have otherwise been protected by the attorney-client privilege. Therefore, for the limited purpose of discovering the facts surrounding Jacuzzi's discovery efforts in this case, Plaintiffs request that the Court find that the attorney-client privilege between Jacuzzi and its defense and corporate counsel is waived with respect to communications relating to Jacuzzi's discovery conduct in this case. Pursuant to the *Young* factors, this discovery is necessary so that the Court

[50] Unlike the Chopper communications, Jacuzzi cannot argue that the New Incident did not involve an injury or death.

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can analyze whether sanctions would unfairly act to punish Defendants for the conduct of their counsel. To illustrate the scope of Plaintiffs' requested discovery, Plaintiffs have attached copies of proposed written discovery which Plaintiffs would like to serve on Defendants prior to the evidentiary hearing.[51]

Recently, in *Anastasi v. PHW Las Vegas, LLC* (A-13-691375-C), the Honorable Judge Israel struck a defendant's Answer due to discovery abuses.[52] In *Anastasi*, the plaintiffs filed a Motion to Strike, and Judge Israel ordered an evidentiary hearing. In order to allow plaintiffs to fully prepare for the evidentiary hearing, Judge Israel permitted limited discovery regarding the issues set forth in Plaintiffs' Motion to Strike.[53] Additionally, Judge Israel ordered that the attorney-client privilege between defendant and defense counsel was waived as to communications pertaining to the defendant's discovery efforts during the litigation. Ultimately, Judge Israel struck the defendant's Answer.[54] The Nevada Supreme Court affirmed Judge Israel's order.[55] While Judge Israel's orders are not binding upon this Court, Plaintiffs request that this Court also permit Plaintiffs to conduct discovery in this case to determine all facts and circumstances surrounding Jacuzzi's discovery efforts in this case. Plaintiffs also request that this Court also order that the attorney-client privilege between Jacuzzi and its defense and corporate counsel is waived as to any communications pertaining to discovery conduct in this case.

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C. The Scope of the Forensic Examination Should Include 2008 to the Present

As a separate issue, Plaintiffs also respectfully request that the Court reconsider the portion of its March 4, 2019, Minute Order regarding the time scope of the previously ordered forensic computer search. Originally, former Discovery Commissioner Bulla recommended (and

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[51] *See*, **Ex. 12**; Plaintiffs request an abbreviated period of time for which Jacuzzi must respond to such discovery.

[52] *See*, **Ex. 13**, July 21, 2017, Decision & Order (Striking Def.'s Answer) in *Anastasi v. PHW Las Vegas, LLC* (Case No. A-13-691375-C), at 16.

[53] *See*, **Ex. 14**, Dec. 21, 2016, Order (Setting Evidentiary Hr'g) in *Anastasi v. PHW Las Vegas, LLC* (Case No. A-13-691375-C).

[54] *See*, **Ex. 13**.

[55] *See*, **Ex. 15**, Nev. Sup. Ct.'s Jan. 31, 2019, Order Den. Pet. for Writ of Mandamus (and aff'g. Order Striking Def.'s Answer) in *Anastasi v. PHW Las Vegas, LLC* (Case No. A-13-691375-C).

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this court subsequently affirmed and adopted) a forensic search from 2008 ***to present***. This Court's March 4, 2019, Minute Order limited the time scope of the search stating that the scope "shall be … for the time period of January 1, 2008, to the date of the filing of the complaint."[56] **Plaintiffs request that the Court order a search for the time period of January 1, 2008 to present**.

1. Discovery Commissioner Bulla Granted a Search from 2008 to Present

Originally, after extensive motion work, the former Discovery Commissioner recommended (and this Court subsequently affirmed and adopted) that Jacuzzi produce all subsequent similar incidents. As a result of that order, Jacuzzi produced the additional 11 incidents that have been discussed. Even after Jacuzzi produced the 11 incidents, former Discovery Commissioner Bulla still ordered a search from 2008 to present.

At the September 19, 2018, hearing on Jacuzzi's Motion for Protective Order, former Discovery Commissioner Bulla discussed the time frame for the forensic search:

> DISCOVERY COMMISSIONER: We have to somehow define the parameters of the search to the tub at issue or a similar type of tub, but really the products liability case, I guess the design is one of the issues. **But it's not just what happened before this event, it's actually, you know, what is relevant to the design of the product that it could also be what occurs after the event**.
>
> MR. COOLS: Certainly. But the admissibility of those is on a different basis.
>
> DISCOVERY COMMISSIONER: Absolutely. I agree with that.
>
> ***
>
> DISCOVERY COMMISSIONER: So that seems to me a logical place to start if we have to figure out which computers to look at. And it seems to me in the ordinary course of business we're looking at the call-in center computers or whoever is taking the initial claim as part of the ordinary course of business before it gets to the lawyer. The lawyer is a different issue and we'll have to talk about that in a minute. But I think that for now we have to have some way of searching the initial claims that were made or reported to Jacuzzi that were documented in the computer system. Now, it's

[56] *See*, **Ex. 1**.

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> possible if you go back to that computer system, you, without the assistance of an I.T. person, although I would probably have one do it, just search and find out what's on there. **And I think we need to put them in a particular time frame and I think I had actually done that at the last hearing**.
>
> MR. COOLS: **2008 to the present is what you previously indicated**.
>
> DISCOVERY COMMISSIONER: **Okay**. [57]

Accordingly, the Report & Recommendation (DCRR) states:

> IT IS ORDERED that a third-party vendor may be permitted to perform a forensic analysis of the computer systems that contain the data/information relating to initial customer complaints provided that the cost is within a reasonable range. Jacuzzi and Plaintiffs shall meet and confer to determine mutually agreeable search parameters. **The time frame for the search will be from 2008 to present**.[58]

Plaintiffs request that the Court permit the forensic search to proceed with the time frame originally ordered by former Discovery Commissioner Bulla. Evidence of subsequent, similar incidents involving the same condition are relevant to the issues of causation and whether there is a defective and dangerous condition.[59] A subsequent accident at the same or a similar place, under the same or similar conditions, is just as relevant as a prior accident to show the condition was in fact dangerous or defective or that the injury was caused by the condition.[60] Therefore, as former Discovery Commissioner Bulla found, subsequent incidents are equally as important as prior incidents and the time frame of the search must be from 2008 to present.

Additionally, Jacuzzi filed a Petition for Writ of Prohibition in the Nevada Supreme Court, who reviewed former Discovery Commissioner Bulla's Report and Recommendations and this Court's Order affirming the same. In denying Jacuzzi's Petition, the Nevada Supreme Court found that Plaintiffs are entitled to conduct the search within the scope originally ordered by former Discovery Commissioner Bulla and this Court.

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[57] *See*, **Ex. 16**, Tr. of Hr'g, Sept. 19, 2018, at 6:23-7:6 and 8:10-22.

[58] *See*, **Ex. 11**.

[59] *See Reingold v. Wet N' Wild Nevada, Inc.*, at 113 Nev. 967, 969, 944 P.2d 800, 802 (citing *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 415, 470 P.2d 135, 139 (1970)).

[60] *See*, *Ginnis* at 86 Nev. 415, 470 P.2d 139 (citing B.E. Witkin, California Evidence §353 (2d ed. 1966); see also B.E. Witkin, California Evidence §389 (3d ed. 1986)).

Further, this recent discovery reveals that Jacuzzi has willfully violated a discovery order to produce documents. The majority in *Foster v. Dingwall* concluded that NRCP 37(b)(2)(C) and 37(d) specifically and independently provide that a court may strike a party's pleadings if that party fails to obey a discovery order or fails to attend his or her own deposition.[61] Further, sanctions against Jacuzzi are "necessary to demonstrate to future litigants that they are not free to act with wayward disregard of a court's orders," and that the conduct of Jacuzzi has evidenced "their willful and recalcitrant disregard of the judicial process."[62]

Reconsideration is necessary because the Court did not know of the New Incident at the time that it entered the March 4, 2019, Minute Order. In light of the New Incident and Jacuzzi's failure to timely disclose the same, Plaintiffs request that the Court allow them to conduct the search as originally contemplated by Discovery Commissioner Bulla. Given Jacuzzi's continued to failure to timely disclose subsequent incident evidence, it is necessary for the forensic search to include the time period after the filing of the Complaint in this case and through the present date.

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IV. CONCLUSION

Plaintiffs request that the Court re-order an evidentiary hearing in light of Jacuzzi's intentional failure to disclose the New Incident. Plaintiffs request that the scope of the hearing include the facts and circumstances of the New Incident, the Chopper communications, and the facts and circumstances regarding the discovery conduct regarding the same. Plaintiffs should be permitted to conduct discovery on these issues, including discovery regarding any documents and communications between the Defendants and their defense or corporate counsel so that the Court can truly determine the extent of the Defendants' involvement in the discovery efforts in this case.

. . .

. . .

. . .

[61] 126 Nev. __, 227 P.3d 1042 (2010).

[62] *Id.*, 126 Nev. at ___, 227 P.3d at 1049.

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Finally, regardless of the Court's decision regarding the evidentiary hearing, Plaintiffs request that the Court expand the scope of the Forensic Search to include the time frame from 2008 to the present date.

DATED THIS 15th day of May, 2019.

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

001346

001346

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the amendment to EDCR 7.26, and Administrative Order 14-2, I hereby certify that on this 15th day of May, 2019, I caused to be served a true copy of the foregoing **PLAINTIFFS' MOTION FOR RECONSIDERATION RE: PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC.'S ANSWER and MOTION FOR CLARIFICATION REGARDING THE SCOPE OF THE FORENSIC COMPUTER SEARCH** as follows:

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

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below; and/or

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

■ Electronic Service — in accordance with Administrative Order 14-2 and Rule 9 of the Nevada Electronic Filing and Conversion Rules (N.E.F.C.R.).

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

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

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5/15/2019 4:50 PM
Steven D. Grierson
CLERK OF THE COURT

APEN
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ANSARA, as Special Adminstrator of the Estate of SHERRY LYNN CUNNISON, Deceased; MICHAEL SMITH, individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased; and DEBORAH TAMANTINI, Individually; and heir to the Estate of SHERRY LYNN CUNNISON, Deceased, Plaintiff, vs. FIRST STREET FOR BOOMERS & BEYOND, INC.; AITHR DEALER, INC.; HALE BENTON, Individually; HOMECLICK, LLC; JACUZZI INC., doing business as JACUZZI LUXURY BATH; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, Individually and as BUDDS PLUMBING; DOES 1 through 20; ROE CORPORATIONS 1 through 20; DOE EMPLOYEES 1 through 20; DOE MANUFACTURERS 1 through 20; DOE 20 INSTALLERS 1 through 20; DOE CONTRACTORS 1 through 20; and DOE 21 SUBCONTRACTORS 1 through 20, inclusive, Defendants. AND ALL RELATED MATTERS	CASE NO.: A-16-731244-C DEPT NO.: II

001348

001348

APPENDIX TO PLAINTIFFS' MOTION FOR RECONSIDERATION RE: PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC.'S ANSWER and MOTION FOR CLARIFICATION REGARDING THE SCOPE OF THE FORENSIC COMPUTER SEARCH

COME NOW, the Plaintiffs, by and through their attorney, BENJAMIN P. CLOWARD, ESQ., of RICHARD HARRIS LAW FIRM, pursuant to EDCR 2.27, and hereby submit their **APPENDIX TO PLAINTIFFS' MOTION FOR RECONSIDERATION RE: PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC.'S ANSWER and MOTION FOR CLARIFICATION REGARDING THE SCOPE OF THE FORENSIC COMPUTER SEARCH** filed on May 15, 2019.

Exhibit No.	Brief Description of Exhibit	No. of Pages	Appendix Pg. Range
1	Min. Order, Mar. 4, 2019 ("First Minute Order")	3	001 - 003
2	Min. Order, Mar. 12, 2019 ("Second Minute Order")	2	004 – 005
3	Jacuzzi's Suppl. Br. pursuant to Mar. 4, 2019, Min. Order, filed Mar. 7, 2019	4	006 - 009
4	Jacuzzi's Reply in Supp. of Mot. for Protective Order, filed Oct. 30, 2018	6	010 - 015
5	Tr. of Hr'g, Nov. 2, 2018	29	016 - 044
6	Jacuzzi's Writ of Prohibition, filed Dec. 10, 2018	36	045 - 080
7	Jacuzzi's Suppl. Disc. Resp. to Pl. Tamantini's Interrog., served Dec. 28, 2018	14	081 - 094
8	Jacuzzi's Mot. to Stay, filed Jan. 9, 2019	9	095 - 103
9	Jacuzzi's Opp'n to Pls.' Renewed Mot. to Strike, filed Jan. 24, 2019	31	104 - 134
10	Tr. of Hr'g, Feb. 4, 2019	5	135 - 139
11	Disc. Comm'rs R. & R., Oct. 16, 2018, and adopted as an Order of this Court on Nov. 5, 2018, filed Nov. 6, 2018	10	140 - 149
12	Plaintiffs' Proposed Discovery Requests	42	150 - 191
13	July 21, 2017, Decision & Order (Striking Def.'s Answer) in *Anastasi v. PHW Las Vegas, LLC* (A-13-691375-C)	18	192 - 209
14	Dec. 21, 2016, Order (Setting Evidentiary Hr'g) in *Anastasi v. PHW Las Vegas, LLC* (Case No. A-13-691375-C)	3	210 - 212

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Exhibit No.	Brief Description of Exhibit	No. of Pages	Appendix Pg. Range
15	Nev. Sup. Ct.'s Jan. 31, 2019, Order Den. Pet. for Writ of Mandamus (and aff'g. Order Striking Def.'s Answer) in *Anastasi v. PHW Las Vegas, LLC* (Case No. A-13-691375-C)	4	213 - 216
16	Tr. of Hr'g, Sept. 19, 2018	9	217 - 225

DATED THIS 15th day of May, 2019.

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

001350

001350

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the amendment to EDCR 7.26, and Administrative Order 14-2, I hereby certify that on this 15th day of May, 2019, I served a copy of the foregoing **APPENDIX TO PLAINTIFFS' MOTION FOR RECONSIDERATION RE: PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC.'S ANSWER and MOTION FOR CLARIFICATION REGARDING THE SCOPE OF THE FORENSIC COMPUTER SEARCH** as follows:

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

☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below; and/or

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

■ Electronic Service — in accordance with Administrative Order 14-2 and Rule 9 of the Nevada Electronic Filing and Conversion Rules (N.E.F.C.R.).

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

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

001351

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EXHIBIT “1”

Register of Actions
Case No. A-16-731244-C

Robert Ansara, Plaintiff(s) vs. First Street for Boomers & Beyond Inc, Defendant(s)

Case Type: **Product Liability**
Date Filed: **02/03/2016**
Location: **Department 2**
Cross-Reference Case Number: **A731244**

Party Information

Lead Attorneys

001353

Defendant **Aithr Dealter Inc**

Christopher John Curtis
Retained
7023660622(W)

Defendant **Benton, Hale**

Philip Goodhart
Retained
7023660622(W)

Defendant **First Street for Boomers & Beyond Inc**

Christopher John Curtis
Retained
7023660622(W)

Defendant	**Homeclick LLC**	**Michael E Stoberski** *Retained* 7023844012(W)
Defendant	**Jacuzzi Inc *Doing Business As* Jacuzzi Luxury Bath**	**Vaughn A. Crawford** *Retained* 7027845200(W)
Plaintiff	**Ansara, Robert *Now Known As* Robert Ansara Personal Rep of the Estate of Michael Smith**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)
Plaintiff	**Estate of Sherry Lynn Cunnison**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)
Plaintiff	**Tamantini, Deborah**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)
Trust	**Estate of Sherry Lynn Cunnison**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)

001354

Events & Orders of the Court

001354

03/04/2019 **Minute Order** (10:00 AM) (Judicial Officer Scotti, Richard F.)

Minutes

03/04/2019 10:00 AM

- Order RE: Pending Motions The Court sets down an Evidentiary Hearing on the issue of sanctions for March 28, 2019, 10:30 AM (3 hours). The Court hereby lifts any Stay that existed in this case. The parties should proceed with any further discovery until and unless the Court Orders otherwise. In the upcoming sanctions order the Court is inclined to impose some monetary sanctions, at the very least, and re-allocate the fees and costs related to discovery. A tentative new Discovery Deadline is March 21. The Court shortens Notice for any further Depositions that either side needs to take to one week. Protective orders, if really necessary, may be sought on one day notice and heard by telephone conference. Plaintiff is permitted to take a further deposition of the corporate representatives of Jacuzzi and First Street, regarding Chopper, marketing and advertising, and the First Street dealers that existed between 2008 and the date of the incident. Plaintiff is entitled to locate and depose Chopper if that has not been done already. Plaintiff is entitled to take the depositions of the First Streets Dealers. The parties are directed to again cooperate in good faith to conduct the forensic review previously ordered by the Discovery Commissioner-if it still has not been complete-and, of course, the scope shall be all incidents involving a Jacuzzi walk-in tub with inward opening doors, for the time period of January 1, 2008, through the date of filing of the complaint, where a person slipped and fell, whether or not there was an injury, whether or not there was any warranty claim, and whether or not there was a lawsuit. This case is still set to be tried on the Court's April 22 five-week stack. The Court will entertain a Stipulation to continue if the parties collectively want a continuance. The Court requests the parties to identify, by filed brief (no more than two (2) pages); (1) What discovery has been conducted in this case since February 4, 2019; (2) The names of any relevant customers of Jacuzzi/First Street that have died; (3) What additional discovery Plaintiff would need to conduct if the Court were not to strike Defendants Answers; and (4) any new developments that the Court should know about. Please provide this by Thursday March 8, 2019. At this time the Court believes that an Evidentiary Hearing is necessary to determine whether, and the extent to which, sanctions might be assessed against Jacuzzi and/or First Street for failure to timely

disclose the Chopper incident. The Court will elaborate on this more in the upcoming sanctions Order. CLERK'S NOTE: This Minute Order has been electronically served to all registered parties for Odyssey File & Serve. /lg

Return to Register of Actions

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EXHIBIT “2”

001356

Register of Actions

Case No. A-16-731244-C

Robert Ansara, Plaintiff(s) vs. First Street for Boomers & Beyond Inc, Defendant(s)

Case Type: **Product Liability**
Date Filed: **02/03/2016**
Location: **Department 2**
Cross-Reference Case Number: **A731244**

Party Information

Lead Attorneys

001357

Defendant **Aithr Dealter Inc**

Christopher John Curtis
Retained
7023660622(W)

Defendant **Benton, Hale**

Philip Goodhart
Retained
7023660622(W)

Defendant **First Street for Boomers & Beyond Inc**

Christopher John Curtis
Retained
7023660622(W)

Defendant	**Homeclick LLC**	**Michael E Stoberski** *Retained* 7023844012(W)
Defendant	**Jacuzzi Inc *Doing Business As* Jacuzzi Luxury Bath**	**Vaughn A. Crawford** *Retained* 7027845200(W)
Plaintiff	**Ansara, Robert *Now Known As* Robert Ansara Personal Rep of the Estate of Michael Smith**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)
Plaintiff	**Estate of Sherry Lynn Cunnison**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)
Plaintiff	**Tamantini, Deborah**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)
Trust	**Estate of Sherry Lynn Cunnison**	**Benjamin P. Cloward** *Retained* 702-385-1400(W)

001358

Events & Orders of the Court

001358

03/12/2019 **Minute Order** (10:00 AM) (Judicial Officer Scotti, Richard F.)

Minutes

03/12/2019 10:00 AM

- The Court is continuing to plod through the voluminous materials the parties provided on the Motion to Strike. The Court appreciates the preparation that the parties may have undertaken for the upcoming Evidentiary Hearing. Now that the Court has further and very arduously studied all of the Exhibits, the Court has reached the ultimate conclusion at this time 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. This is not to say that there are not other serious issues that the Court is considering - as stated by the Court in the prior Minute Order. Nevertheless, there is no longer any need to conduct an Evidentiary Hearing, and the same is hereby VACATED. The Court continues to prepare its detailed analysis of the discovery issues in this case. Incidentally, the Court's prior reference to the "Chopper incident" should read "Chopper communications." The Court appreciates the parties' patience as this work proceeds. Please continue trial preparations. CLERK'S NOTE: A copy of this Minute Order has been emailed to the following: Benjamin Cloward, Esq. (bcloward@richardlawfirm.com), Christopher Curtis, Esq. (ccurtis@thorndal.com), Philip Goodhart, Esq. (png@thorndal.com), Michael Stoberski (mstoberski@ocgas.com) and Vaughn Crawford, Esq. (vcrawford@swlaw.com). //ev 3/12/19

Return to Register of Actions

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EXHIBIT “3”

001359

Electronically Filed
3/7/2019 4:38 PM
Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Defendant
Jacuzzi Inc. doing business as Jacuzzi Luxury Bath

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

DEFENDANT JACUZZI INC. DOING BUSINESS AS JACUZZI LUXURY BATH'S BRIEF PURSUANT TO THE MARCH 4, 2019 MINUTE ORDER

001360

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

Defendants.

AND ALL RELATED CLAIMS.

Pursuant to the Court's Minute Order date March 4, 2019, Defendant Jacuzzi Inc. doing business as Jacuzzi Luxury Bath ("Jacuzzi") submits this brief regarding the status of discovery and other relevant issues:

1. Discovery Conducted Since February 4, 2019

On February 8, 2019, Plaintiff conducted the deposition of Jacuzzi's expert, Dr. Nathan Dorris, in Atlanta, Georgia. Based on Jacuzzi's understanding of the stay entered by the Court, no other discovery has been conducted since the hearing on February 4, 2019.

2. Deceased Customers

Jacuzzi is aware of two lawsuits involving customers who have allegedly died related to use of a Jacuzzi® walk-in tub: Sherry Lynn Cunnison (the decedent in this lawsuit) and Mack Smith (whom Plaintiffs' counsel has filed a wrongful death lawsuit on behalf of in California).

Jacuzzi has also been made aware, during the course of this litigation, that Charles Wharff, Sr. (who was allegedly injured in 2015 while using a Jacuzzi® walk-in Tub) has passed away. Jacuzzi has no further information as to the facts and circumstances of Mr. Wharff's subsequent death, and no claim has been made against Jacuzzi for personal injury or death.

Jacuzzi was also recently made aware in October 2018 by the family of an individual who passed away that the decedent allegedly developed blood clots and died shortly after "getting stuck" in a Jacuzzi® walk-in tub. The family stated they did not know whether the person's passing away was related to the tub or something else, but felt it was related to the tub. Jacuzzi has no further information as to the facts and circumstances of her death or whether it was related in any way to the use of a Jacuzzi® tub, and no claim has been made against Jacuzzi for personal injury or death.

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

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3. Additional Discovery Required

Plaintiff's expert, Rhonda Bonecutter, is scheduled to be deposed on March 11, 2019. Based on the lifting of the stay, Defendants have requested to proceed with this deposition even though a second deposition may need to be taken after the completion of additional fact discovery allowed by the Court.

4. Other New Developments

Jacuzzi and Plaintiffs are working to coordinate the forensic search.

Defendants have agreed to continue the trial; however, Plaintiffs' counsel has not yet communicated whether they will agree. If the parties are ultimately unable to stipulate, Jacuzzi intends to file a motion to continue the trial and to request a firm trial setting given defense counsel's trial conflicts and the number of parties and out of state witnesses involved in this case.

DATED this 7th day of March, 2019.

SNELL & WILMER L.L.P.

By: */s/ Morgan T. Petrelli*
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Morgan T. Petrelli, Nevada Bar No. 13221
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Las Vegas, NV 89169

D. Lee Roberts, Jr., Nevada Bar No. 8877
Brittany M. Llewelyn, Nevada Bar No. 13527
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
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Attorneys for Defendant Jacuzzi Inc. doing business as Jacuzzi Luxury Bath

Snell & Wilmer L.L.P.
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Las Vegas, Nevada 89169
702.784.5200

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001362

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT JACUZZI INC. DOING BUSINESS AS JACUZZI LUXURY BATH'S BRIEF PURSUANT TO THE MARCH 4, 2019 MINUTE ORDER** by the method indicated below, addressed to the following:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

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

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

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Attorneys for Plaintiffs

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mmg@thorndal.com
Attorneys for Defendants/Cross-Defendants First Street for Boomers & Beyond, Inc. and AITHR Dealer, Inc. and Hale Benton

DATED this 7th day of March, 2019.

/s/ Julia M. Diaz
An Employee of Snell & Wilmer L.L.P.

4813-9632-3721

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EXHIBIT “4”

001364

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10/30/2018 3:08 PM
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CLERK OF THE COURT

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Attorneys for Defendant
Jacuzzi Inc. doing business as Jacuzzi Luxury Bath

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED CLAIMS.

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

DEFENDANT JACUZZI INC. DOING BUSINESS AS JACUZZI LUXURY BATH'S REPLY IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER ON AN ORDER SHORTENING TIME

Hearing Date: November 2, 2018
Time: 9:00 a.m.

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4834-4458-2521

Defendant Jacuzzi Inc. doing business as Jacuzzi Luxury Bath ("Jacuzzi") hereby files its reply in support of its Motion for Protective Order on an Order Shortening Time.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The crux of Plaintiffs' Opposition is a series of false and personal attacks, arguing that they should be able to subpoena Salesforce for Jacuzzi's and its customers' confidential and largely irrelevant records in order to confirm that Jacuzzi is being forthright in its representations to the Court. This specious claim is predicated on Jacuzzi's production of other incident records. In fact, Plaintiffs' opposition evidences that the court should grant Jacuzzi's motion, as counsel admits that Jacuzzi has produced what it said would be produced, properly responding to discovery. As acknowledged in Plaintiffs' own brief, Jacuzzi has been transparent in its document productions throughout discovery—including its earlier decisions to only produce prior incidents because any subsequent incidents were irrelevant. Significantly, the decision to produce only prior incidents was discussed with Plaintiffs' counsel, and documented in writing, a fact counsel omits. Further, there is not even a final order regarding the production of other incident materials that Plaintiffs claim it needs to "verify." Moreover, the Discovery Commissioner is doing this very thing by reviewing, *in camera*, Jacuzzi's work product created in its search for prior incidents. In sum, Plaintiffs' reasons for this unnecessary discovery are insufficient to overcome the duplicative, invasive, and prejudicial discovery sought. Accordingly, the Court should grant Jacuzzi's Motion for Protective Order.

II. ARGUMENT

A. Plaintiffs' Opposition confirms that Jacuzzi has consistently been forthright about what it was disclosing.

Plaintiffs are correct that Jacuzzi repeatedly represented to Plaintiffs that it was disclosing prior incidents only. In fact, Plaintiffs' Opposition finally admits the point Jacuzzi has been making in various discovery disputes over the last few months: Jacuzzi was forthright in

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discovery responses, objections to Plaintiffs' 30(b)(6) notices, letters, and conferences with counsel. Jacuzzi repeatedly laid out objections to Plaintiffs' discovery requests, stating its position that subsequent incidents were irrelevant to Plaintiffs' claims.

Plaintiffs belabor the fact that Jacuzzi's discovery responses were narrowly tailored to produce what Jacuzzi believed was discoverable in this case. This is correct—that is exactly what Jacuzzi properly did. But unlike Plaintiffs' repeated false allegations, this was not done in bad faith. Rather, Jacuzzi's responses were based on its understanding of Plaintiffs' claims, and Jacuzzi's good faith stance that other subsequent incidents were not relevant to these claims, *a position that Jacuzzi disclosed to Plaintiffs' counsel at the time*. *See* Letter from J. Cools to B. Cloward (Feb. 5, 2018), attached as **Exhibit A**. In fact, the first time Plaintiffs made issue of this was with Plaintiffs' motion for sanctions, accusing Jacuzzi of hiding subsequent incidents, all without even a meet and confer conference.

Upon the Court's determination that the subsequent incidents were discoverable, Jacuzzi followed the Court's instructions and disclosed such incidents. None of this is evidence of Jacuzzi having some nefarious intent.

Plaintiffs are correct in their emphasis that this production included 11 subsequent incidents. Plaintiffs even provide their own summary table of six incidents, purporting to show that Jacuzzi was deceptive by withholding this information. Opposition at 10:8-26. But, an actual review of the claims shows that even these complaints *are not actually similar* to Ms. Cunnison's incident—the table, and the other incidents, are devoid of any complaints of a consumer becoming wedged between the seat and the front of the tub. *Id.* The mere fact that someone slipped in a tub does not automatically make the incident "similar," and thus responsive to any of Plaintiffs' requests. This is further underscored by the fact that the relevance of subsequent incidents, if any, only applies to *substantially similar* incidents and only to demonstrate a dangerous condition—for instance, it can have no legal bearing on the issue of notice. *See, e.g., Andrews v. Harley Davidson, Inc.,* 106 Nev. 533, 538, 796 P.2d 1092, 1096 (1990) (evidence of other incidents admissible because the incidents "were substantially similar"); *see also* NRS 48.025 ("Evidence which is not relevant is not admissible."); *Ginnis v. Mapes Hotel Corp.,*

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86 Nev. 408, 415, 470 P.2d 135, 139 (1970)(discussing admissibility of subsequent incidents "at the same or similar place, under the same or similar conditions"); *White v. Ford Motor Co.,* 312 F.3d 998, 1009 (9th Cir. 2002) (applying Nevada law) ("A 'showing of substantial similarity is required when a plaintiff attempts to introduce evidence of other accidents as direct proof of negligence, a design defect, or notice of defect.'"). Jacuzzi's compliance with the court order is not evidence of nefarious intent.

Plaintiffs and this Court are correct that parties in litigation must rely on each other to give up information and documents. Opposition at 16:26-28; 27:1-2. That is what Jacuzzi has done, and yet Plaintiffs continue to assert that they cannot rely on Jacuzzi's representations and that Jacuzzi and its attorneys are not trustworthy. This spurious accusation does not provide a adequate basis for the discovery being sought from Salesforce.

B. The Salesforce subpoena seeks duplicative and private information of Jacuzzi and its customers.

As outlined in Jacuzzi's Motion, obtaining these records from Salesforce constitutes duplicative discovery, as this Court has already ordered Jacuzzi to produce Salesforce documents to Plaintiffs. *See* NRCP 26(b)(2): The Court may, for good cause, issue an order to protect a party from discovery when: "(i) *the discovery sought is unreasonably cumulative or duplicative*, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation," including limiting or forbidding the scope of discovery" (emphasis added); *see also* FRCP26(c)(l).

Furthermore, Jacuzzi is harmed by this discovery due to the invasion into Jacuzzi's business relationship with Salesforce and Jacuzzi's customers. As outlined in Jacuzzi's Motion, production of the database documents would include the name and contact information for *every* person who purchased a product of any of the companies and registered the warranty, regardless of whether the person ever made a claim or had a complaint with the product. Not only are these

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already irrelevant products, but they are irrelevant companies, and the information includes customer *who have not even lodged any warranty complaints.* This is thousands of customers who likely trusted that Jacuzzi would keep their information private. Additionally, Jacuzzi has already born the burden and cost of sifting through customer complaints and review, and the continuous, overzealous requests from Plaintiffs continue to needlessly drive up discovery costs.

III. CONCLUSION

Jacuzzi respectfully requests that the Court issue a protective order absolving Salesforce of complying with the subpoena, quashing the subpoena, and ordering Plaintiffs to immediately withdraw the Subpoena. Jacuzzi also requests an award of fees associated with bringing this motion and any proceedings regarding the subpoena.

DATED this 30th day of October, 2018.

SNELL & WILMER L.L.P.

By: _____

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT JACUZZI INC. DOING BUSINESS AS JACUZZI LUXURY BATH'S REPLY IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER ON AN ORDER SHORTENING TIME** by the method indicated below, addressed to the following:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

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

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

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DATED this 30th day of October, 2018.

/s/ Julia M. Diaz
An Employee of Snell & Wilmer L.L.P,

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EXHIBIT “5”

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11/16/2018 11:44 AM
Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ANSARA, ET AL., Plaintiffs, vs. FIRST STREET FOR BOOMERS & BEYOND INC, ET AL., Defendants.	CASE NO.: A-16-731244 DEPT. II

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BEFORE THE HON. BONNIE A. BULLA, DISCOVERY COMMISSIONER

FRIDAY, NOVEMBER 2, 2018

RECORDER'S TRANSCRIPT OF HEARING
STATUS CHECK: DISCOVERY; DEFENDANT JACUZZI INC. D/B/A JACUZZI LUXURY BATH'S MOTION FOR PROTECTIVE ORDER ON OST

APPEARANCES:

For the Plaintiffs:	BENJAMIN P. CLOWARD, ESQ.
For the Defendant Jacuzzi:	JOSHUA D. COOLS, ESQ. RON TEMPLER, ESQ.
For the Defendant Aithr/First St:	PHILIP GOODHART, ESQ.

RECORDED BY: FRANCESCA HAAK, COURT RECORDER

Las Vegas, Nevada, Friday, November 2, 2018

* * *

[Case called at 8:56 a.m.]

DISCOVERY COMMISSIONER: Can I have the Ansara people? I guess you call it Cunnison.

MR. CLOWARD: Yes, Your Honor.

MR. COOLS: Good morning, Your Honor.

DISCOVERY COMMISSIONER: Good morning. Could everyone state their appearances, please?

MR. CLOWARD: Ben Cloward, for the plaintiffs.

MR. COOLS: Joshua Cools, on behalf of Jacuzzi Inc., and I also have with me Jacuzzi's senior corporate counsel, Ron Templer, so he's --

DISCOVERY COMMISSIONER: Where is Mr. --

MR. COOLS: -- in the gallery.

DISCOVERY COMMISSIONER: -- Templer?

MR. COOLS: If --

DISCOVERY COMMISSIONER: Mr. Templer, you're welcome to come on up and take a seat.

MR. TEMPLER: Thank you, Your Honor.

MR. GOODHART: Good morning, Your Honor. Philip Goodhart, on behalf of First Street and Aithr Dealers.

DISCOVERY COMMISSIONER: Good morning. So yesterday we had a conference call on the in camera, and I did ask Mr. Cools to go through and double-check some of the documents that I had

curiosity about, and were you able to do that?

MR. COOLS: I did, Your Honor. I have -- of all the ones that you identified, there was only one that was a walk-in tub, and the issue was someone not being able to close the door. I have a copy of the rest of those -- the information from those incidents, if you would like to review that. But we did go through all of those, and most of them were related to -- well, all of them are related to other products, except for that one.

DISCOVERY COMMISSIONER: Okay.

MR. COOLS: Would you like me to --

DISCOVERY COMMISSIONER: Yes.

MR. COOLS: -- provide --

DISCOVERY COMMISSIONER: Please.

[Mr. Cools handing to the Marshal]

DISCOVERY COMMISSIONER: I would like to review that information. Thank you. And then, of course, I'll -- we'll probably set this for a status check so that we can address the issue.

So I'm not going to spend any more time on the in camera now. I will go ahead and review what has been produced in open court to me in camera.

For now then, as long as these are not related to the walk-in tub, which is critical in this case -- now, I do want to say something though. I know that there might be different generations of the walk-in tub, so I want to be careful that we're not excluding data that might be helpful or beneficial because it's not the exact same tub.

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MR. COOLS: Sure, Your Honor, and when I say it is not a walk-in tub, I'm saying not any walk-in tub.

DISCOVERY COMMISSIONER: Okay.

MR. COOLS: Jacuzzi started producing the walk-in tubs around 2008, which is around the timeframe that you had ordered us to search. But we have -- in our search we're not limiting it to just the 5229 walk-in tub that's at issue in this case.

DISCOVERY COMMISSIONER: Okay.

MR. COOLS: We have looked at the other walk-in tub products as well pursuant to your order.

DISCOVERY COMMISSIONER: Well, I appreciate that. So why don't we just not worry about the rest of the in camera for today. I didn't look through every single entry pertaining to the doors. Did you go back and do that?

MR. COOLS: In terms of -- I looked at the ones that you identified and went through some of the others. All of the ones that you identified were regarding an inner lock system in a hot tub products going back to the '80s. So I did not, in my review of the rest of the door entries, I didn't see anything else that was pertinent to this case, but --

DISCOVERY COMMISSIONER: Is there a product number that I could go back and look at all those door entries and just focus on a walk-in tub; is there any way for me to know that by looking at the information you put together?

MR. COOLS: I think that part of the issue is that it's not necessarily always entered consistently in terms of what that product

code is. We can certainly attempt to provide those to you, if that would be helpful to your review.

DISCOVERY COMMISSIONER: Well, I don't -- I just want to make sure we've completely reviewed all of those entries and that there's nothing there that pertains to a walk-in tub. Can you go back and double-check that?

MR. COOLS: Yes, we can do that.

DISCOVERY COMMISSIONER: I don't recall seeing anything terribly exciting, but a lot of the problems with these types of products are not just with the walk-in tubs, but they're with the Jacuzzi hot tubs and, you know, so it's -- we have to make sure though it's causally related to this case.

Now I have defendant's motion for protective order, and I think I have a better understanding at least of the mechanism of the injury in this case. But I think really the question is what Jacuzzi knew or should have known for the negligence part of the claim, and then the strict liability is a different issue. But if I look at the negligence part of the claim, it's what Jacuzzi knew about the tub, and if some of the complaints are coming through its retailers, for lack of a better term, then that concerns me, and presumably they were passed along to Jacuzzi, but I also need to know, you know, what you all knew about this particular walk-in tub.

So clearly we're talking in the 2008 range, and we're talking about walk-in tubs. Now, I don't know, you know, how anxious the nonparty's going to be to go search its records.

MR. COOLS: Well, Your Honor, as to -- I assume you're talking about the motion regarding the Salesforce subpoena --

DISCOVERY COMMISSIONER: Yes.

MR. COOLS: -- in particular?

DISCOVERY COMMISSIONER: Yes.

MR. COOLS: So the issue there is that the Salesforce -- their relationship is with Jacuzzi directly, so these are entries that Jacuzzi would have made into their database, and it's just -- it's essentially just housed a third party that is, you know, storing the customer information that Jacuzzi inputs. Now, Jacuzzi has access to all of that. That's the -- those are part of the searches that Jacuzzi's performed. That second spreadsheet that was provided to you, that's what that is, is a -- using those search terms on the Salesforce database.

So the point of our motion is that the subpoena itself is overbroad and is seeking information that is duplicative of the same things that are subject to your order to produce in this case, whatever that may be ultimately in terms of there being a final order on the scope of that production or whether that production includes all, you know, customer information, things like that.

So one of the main points there is that it is duplicative of the exact same information that we have already provided to the Court and most of which -- in terms of relevant -- any claims of personal injury or wrongful death for the subsequent injuries, we've already provided those to plaintiff. So we haven't done so in an unredacted form yet 'cause there's not a final order, and we did object to disclosing what we deem

private information, but if the Court -- District Court, you know, confirms your Report and Recommendation as to that issue, then we will produce the unredacted copies of those records as well.

DISCOVERY COMMISSIONER: So my thought would be to modify the subpoena just to include the time range from 2008 to the present and only related to walk-in tubs.

The fact that the documents are duplicative may be an issue for admissibility at trial, but in Discovery we face duplicative documents all the time. When the plaintiffs get their healthcare records, then the defendants subpoena the healthcare records, and, unfortunately, there are times where even though the records should match and be identical, they are not. Now, I'm not saying that's the case here because I have no reason to believe one way or the other. But I also think that it's important that we do, in fact, figure out a way to let this nonparty entity that has relationship with Jacuzzi produce what it does have.

MR. COOLS: If I may, Your Honor, one issue though is that, as I've mentioned, you know, we have objected on the basis of disclosure of private information, so this would be, in essence, going around the District Court making --

DISCOVERY COMMISSIONER: Whose --

MR. COOLS: -- that determination.

DISCOVERY COMMISSIONER: -- private information -- the people reporting it? Do you think when you call up and make a complaint you have an expectation that your information is private?

MR. COOLS: Yes, that the --

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DISCOVERY COMMISSIONER: Really?

MR. COOLS: -- that we believe that our customers have a expectation that, when they're making a -- when they're contacting Jacuzzi, that Jacuzzi's not going to disseminate that information.

DISCOVERY COMMISSIONER: Oh.

MR. COOLS: And I understand --

DISCOVERY COMMISSIONER: I think that has limitations, but I also think -- didn't I put this under a protective order under 26C?

MR. CLOWARD: Yes.

MR. COOLS: You did, but this is specifically --

DISCOVERY COMMISSIONER: Okay.

MR. COOLS: -- under consideration by the District Court Judge. So --

DISCOVERY COMMISSIONER: Okay.

MR. COOLS: -- by ordering, you know, them to comply and produce records that would disclose all that information, that's currently subject to the District Court's determination.

DISCOVERY COMMISSIONER: Well, then I guess I better couch my order very carefully.

When is the Court hearing the objection?

MR. COOLS: I don't believe that that's been noticed yet.

DISCOVERY COMMISSIONER: You only have a limited time to object.

MR. COOLS: Well, we served the objection. I don't know what the hearing date is on that. I think it was served on Tuesday.

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DISCOVERY COMMISSIONER: Did you provide us with a courtesy --

MR. COOLS: Yes, Your Honor.

DISCOVERY COMMISSIONER: -- copy? Okay.

MR. CLOWARD: We're in the process of responding.

DISCOVERY COMMISSIONER: Okay. I don't necessarily think it'll be an issue, but I'll make sure that you have the 2.34E relief so that it won't conflict with anything the District Court might do.

What I would like to do is just modify the subpoena to walk-in tubs and from 2008 to the present. Now, I recognize we're going to get duplicative data. I recognize we're going to get a number of records that probably do not pertain. But what I would do is, you know, say this. We'll put it under a protective order under 26C. We'll let everybody go through the records and determine what may or may not be applicable, and then the other records can be returned to the defendant for proper shredding.

I don't have a better solution right now because I think that the plaintiff is entitled to see what was being held, and by Salesforce, and hopefully there won't be any surprises.

MR. COOLS: If I can just say one additional thing, Your Honor. I think that this has all been predicated on this idea that Jacuzzi's withholding things, and I think that, from your own in camera review, that would be clear that we've disclosed --

DISCOVERY COMMISSIONER: I --

MR. COOLS: -- everything that --

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DISCOVERY COMMISSIONER: It's not predicated on that. It's predicated on the fact that it's relevant to the claims and defenses in the case, and the fact that it may be duplicative, you've chosen to store information in two separate places arguably, so I think that it's fair to say let's see what both places have. If it's duplicative, it can be identified as such, and that will certainly affect admissibility at trial. You're not going to put duplicative records into evidence.

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: But that's for a determination at a later date. This is the discovery process, and while I don't want it to be overly burdensome on a nonparty, there is a relationship between this holding company of information, if you will, and Jacuzzi, and I don't know.

I mean, Mr. Cloward, what are -- what is your position on this?

MR. CLOWARD: We're more than happy to actually pay for the expense. We went out and we sought the -- we got the estimate. We actually obtained the gentleman up north, Ira Spector. His estimate was a little bit high, and because it was a little bit high, we have offered to pay for the entire cost. And he had a solution to prevent any disclosure of potentially relevant -- and, I'm sorry, Your Honor, may I remain seated?

DISCOVERY COMMISSIONER: Yes, absolutely.

MR. CLOWARD: Okay. He had a way to prevent any potential work product issues, and that was to have counsel's IT present along with counsel when he's going through the review, and if there's

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any -- if there was any time where counsel felt like there was something that was proprietary, that the search would cease, we would seek relief from the Court, and he had a very, very logical way of doing things, and that was why I think the bid was a little bit higher.

The very first thing that he suggested was to secure, you know, some sort of a protocol that the parties could agree to preserve the database in its original format. That way, you know, there could be no argument that we're modifying it, or they're modifying it, or anything along those lines, and he was more than willing to work with counsel's IT to create the protocol that they felt comfortable with, and part of that estimate was to search that Salesforce database.

Interestingly enough, Mr. Spector was familiar with Salesforce. I believe he's worked with them because they're actually a very large company that deals with many, many, many other products, not just Jacuzzi, but thousands and thousands of other products, so he's familiar with their system, familiar with their processes, and believes that he could accomplish the goals of doing this very easily.

DISCOVERY COMMISSIONER: So, again, is he going to be able to limit it just to --

MR. CLOWARD: Absolutely.

DISCOVERY COMMISSIONER: -- those dates at issue, as well as to walk-in tubs --

MR. CLOWARD: Absolutely.

DISCOVERY COMMISSIONER: -- manufactured by Jacuzzi?

MR. CLOWARD: Yes, he could.

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DISCOVERY COMMISSIONER: Okay.

MR. COOLS: Your Honor, there seems to be two issues here though. Mr. Cloward's talking about the forensic analysis of databases, and what we were talking about in the motion for protective order, and in our discussion was the Salesforce subpoena where plaintiffs are seeking to obtain information directly from Salesforce. So, I mean, it seems like they're trying to get this information three different ways at least, you know, through what we've produced, and then they want to do a forensic analysis of our hard drives based on the allegation that we've not produced everything.

DISCOVERY COMMISSIONER: So --

MR. COOLS: And then there's the subpoena to Salesforce directly.

DISCOVERY COMMISSIONER: All right. So we're dealing with the subpoena --

MR. CLOWARD: Yeah, and I was --

DISCOVERY COMMISSIONER: -- today.

MR. CLOWARD: I thought that the Court's concern and Mr. Cools' concern was that, hey, this is a third party, and this might be burdensome on the third party. What I was proposing was that Mr. Spector, as part of his analysis, he's already given the estimate for the forensic analysis. He could perform the search so that there's zero burden on Salesforce.

DISCOVERY COMMISSIONER: So can I quash the --

MR. CLOWARD: We would --

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DISCOVERY COMMISSIONER: -- subpoena then, because otherwise it's, you know -- I don't mind picking a, you know --

MR. CLOWARD: A method, sure.

DISCOVERY COMMISSIONER: -- a method.

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: But I don't want production of documents, searching Salesforce's computers. I mean, if you're searching the computer, he can then designate the documents, and they can pull up and print them.

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: Right?

MR. CLOWARD: Yeah.

DISCOVERY COMMISSIONER: Or download them on a disk, and then I can quash the subpoena, and you all can work together to have the inspection of the computer system and production of the documents from that inspection.

MR. CLOWARD: We have no problem with that. We're not trying to seek duplicative ways of obtaining --

DISCOVERY COMMISSIONER: Right.

MR. CLOWARD: -- the documents.

DISCOVERY COMMISSIONER: That's what bothers me. So I --

MR. CLOWARD: Yeah.

DISCOVERY COMMISSIONER: -- think what I should do maybe is grant the defendant's motion to quash the subpoena and let's

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find an alternative method by which to retrieve the relevant information from Salesforce. So I'll quash the subpoena without prejudice to the plaintiff to working with defendant in order to obtain the relevant records from Salesforce via an electronic search. Does that work for everyone?

MR. CLOWARD: Yes, Your Honor.

DISCOVERY COMMISSIONER: I mean, I --

MR. COOLS: Yeah.

DISCOVERY COMMISSIONER: -- understand what your issues are, Mr. Cools, and, of course, I'll, you know --

MR. COOLS: I mean, I think that generally our position is that the -- you know, we produced -- initially this all started over concern as to whether or not Jacuzzi had produced what we said we did, and that's --

DISCOVERY COMMISSIONER: Mr. Cools, it's not about you or your client saying what they said they did. I completely understand that. But I've also been doing this long enough to know that sometimes not all information is in one spot, so that's going to be my recommendation today. I'll grant your motion for protective order on the subpoena and I'll quash it.

MR. CLOWARD: Okay.

DISCOVERY COMMISSIONER: But without prejudice to the plaintiff to retaining the proper expert to analyze the computer available at Salesforce and to retrieve the information pertaining to the walk-in tub.

MR. CLOWARD: Fair enough, Your Honor.

DISCOVERY COMMISSIONER: All right. So --

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MR. CLOWARD: Thank you.

DISCOVERY COMMISSIONER: -- defense counsel, can you prepare the Report and Recommendation, please --

MR. COOLS: Yes.

DISCOVERY COMMISSIONER: -- from today's hearing, and run it by your colleagues to approve as to form and content.

MR. COOLS: While we're here, Your Honor, I don't know if you have any questions regarding the in camera review, but that is partially why Mr. Templer is here, in case you did have questions about how we went about doing that search.

DISCOVERY COMMISSIONER: Well, I think if you provide the letter that you provided to me, with the in camera, to --

MR. COOLS: I've done so.

DISCOVERY COMMISSIONER: -- Mr. Cloward, that would be helpful. I know a lot of time and effort went into that production of that information and the spreadsheets. I'm confident that you did what you needed to do. I actually was able to follow it fairly well.

The only thing I couldn't distinguish was, you know, if it was actually a walk-in tub or some -- I mean, sometimes I could find the description. I'm, like, that doesn't sound like a tub. But there were other times I could not, so I don't know if you want to maybe explain how you were able to identify that it was a walk-in tub or not a walk-in tub.

MR. COOLS: Sure. So, you know, I -- as you requested yesterday, I circulated that memo to the other counsel --

DISCOVERY COMMISSIONER: Counsel. Sorry, Mr.

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Goodhart. I'm --

MR. COOLS: -- so they could understand.

DISCOVERY COMMISSIONER: -- tending to forget about you over there.

MR. COOLS: And in terms of going back and looking at the entries that you identified, we reviewed those in the warranty database system, and I provided you with the rest of the, you know, information field regarding those particular claims. Some of them have a date on them, so, you know, it was clear if it was a date from the '80s, that it has nothing to do with it, but the other ones we were able to confirm based either on the information provided about the claim or other product information in those fields that they were not walk-in tubs. And, like I said, there was the one entry that was under the search term "elderly," the one entry did involve a walk-in tub, but it was -- had to do with having to get the door closed.

DISCOVERY COMMISSIONER: And that's the information you provided to me.

MR. COOLS: Right.

DISCOVERY COMMISSIONER: Okay.

MR. COOLS: Oh, just the one other thing is you'll notice on the spreadsheet it doesn't have text wrap, so it'll just go line to line, so it's just kind of a solid block of text cells, and you'll be able to see that it kind of -- they're all related to the same claim, and then it starts with the next one, so we did -- we included all --

DISCOVERY COMMISSIONER: Some of them --

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MR. COOLS: -- of the information for those.

DISCOVERY COMMISSIONER: -- had the same number, so if it had the --

MR. COOLS: Sure.

DISCOVERY COMMISSIONER: -- same A number, I could tell it was all the same client.

MR. COOLS: And you'll see that, you know, in -- even more with what we just provided to you 'cause that includes all of the text field there.

DISCOVERY COMMISSIONER: Okay. So why don't I go ahead today then and say this with respect to the in camera spreadsheets. It's clearly work product. It was done as a result of this litigation. I'll protect the spreadsheets from being disclosed. I will, however, review the additional documents pertaining to the one Jacuzzi tub that's a walk-in tub like the one at issue here.

If I decide that additional information needs to be provided, I will simply do a clerk's note and then we'll distribute -- you can distribute it, or I'll protect it. I haven't made that decision yet because I'm going to take time to look at it.

I will go ahead and place the in camera in the vault so that in case additional information is obtained after the subpoena -- well, the subpoena's quashed, but after the --

MR. CLOWARD: Forensic analysis?

DISCOVERY COMMISSIONER: -- forensic analysis --

MR. CLOWARD: Okay.

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DISCOVERY COMMISSIONER: -- and the documents that are retrieved from Salesforce, and I don't see any reason why during the forensic analysis they can't download what's relevant on a flash drive or a disk or whatever.

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: Then I can address the issue again. I'll pull the in camera, and I'll go through any of the other entries. But I -- except for all the door entries, I pretty much went through all the other documents and picked out yesterday on the telephone what I wanted Mr. Cools to look at.

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: So I'm going to go ahead and review the additional documents provided for -- to me this morning. I'll do a subsequent clerk's note letting you know what to do with those. But for now I'll go ahead and protect the in camera as it is clearly work product, but I used it to enable me to see what other claims might be potentially relevant.

MR. COOLS: Thank you, Your Honor.

DISCOVERY COMMISSIONER: And I'll protect it. I'll place it in the vault, and I will do that after I review the Report and Recommendations so I make sure I address it properly.

Is there anything else we need to address today?

MR. GOODHART: We were -- Your Honor, Philip Goodhart, on behalf of First Street.

DISCOVERY COMMISSIONER: Yes, Mr. Goodhart.

MR. GOODHART: We were in front of Judge Scotti yesterday.

DISCOVERY COMMISSIONER: Okay.

MR. GOODHART: He vacated the March trial date and put us on the April 22nd trial stack I believe.

DISCOVERY COMMISSIONER: Okay.

MR. GOODHART: He gave us a date for dispositive motions and motions in limine but indicated there was a little bit of wiggle room there perhaps. He vacated the discovery deadlines that were in place and recommended that we come to you. He wanted us to come to you since you've been involved in this matter and have shepherded all the discovery in this matter to get new discovery deadlines for you with respect to the discovery cutoff date.

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DISCOVERY COMMISSIONER: Okay.

MR. COOLS: And I believe the -- was it February 6th was the --

MR. GOODHART: What --

MR. COOLS: -- what he set for the --

MR. GOODHART: Yeah, February 6th was the motion -- the last day to file motions in limine and dispositive motions, and I think we're on the April 22nd stack.

He indicated to us -- and please correct me if I'm wrong, gentlemen -- that he did have some wiggle room for that motion deadline depending upon what Your Honor will allow us for discovery. He --

DISCOVERY COMMISSIONER: So what were you thinking?

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Do we just need the two deadlines, the close of discovery and dispositive motions?

MR. COOLS: There is a little bit of a dispute there, Your Honor, in that plaintiff's motion, which was what was before Judge Scotti, sought to have, you know, extend all deadlines, and including the rebuttal expert deadline, which had passed. Jacuzzi opposed that in the limited sense in that we were willing to stipulate to extending as to the outstanding discovery issues. We have a couple -- a few expert depositions and party depositions still to take place but did not believe that a open-ended discovery extensions was warranted.

DISCOVERY COMMISSIONER: So what did Judge Scotti do on the motion -- send it back to me?

MR. COOLS: Yes.

DISCOVERY COMMISSIONER: All right. What rebuttal expert did we need that we didn't disclose when the initial deadline was --

MR. CLOWARD: Well --

DISCOVERY COMMISSIONER: -- available?

MR. CLOWARD: -- we wanted to -- and I guess I might be mistaken on this, but it was my understanding at the time we filed the motion there was still four or five days before the deadline.

MR. GOODHART: Right.

MR. COOLS: I could have -- I misspoke. I did not intend to.

DISCOVERY COMMISSIONER: Okay. So --

MR. CLOWARD: But --

DISCOVERY COMMISSIONER: -- is it just a rebuttal deadline that you need --

MR. CLOWARD: Yes.

DISCOVERY COMMISSIONER: -- in addition to the close of discovery? And what rebuttal expert were you envisioning?

MR. CLOWARD: Sure. So all of our experts have been unable to be provided with some of the information we've been working on trying to depose the 30(b)(6) for the two major other parties in the case, First Street and Aithr. We've had scheduling conflicts, and we've been trying to find days to do that, so we're trying to get all of the information to the experts to have them formulate the, you know, a final kind of rebuttal opinion.

Additionally, with this information influx of how many priors, how many subsequent, that type of stuff, we still haven't been able to provide that to our expert in Houston, and so we wanted just an opportunity to provide, once the discovery was done, once we conducted the depos, here's everything, you have everything that we have in this case. Do you have any other opinions or do -- you know, are there --

DISCOVERY COMMISSIONER: Well, you can always --

MR. CLOWARD: -- any opinions --

DISCOVERY COMMISSIONER: -- supplement their opinions up to 30 days prior to trial, so my only concern is there's some new expert. Were you thinking --

MR. CLOWARD: No.

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DISCOVERY COMMISSIONER: -- of IT expert? Were you -- or just your original experts just having the opportunity to supplement, because I have no problem with that. You don't have the information yet. Once you receive it, they can supplement.

MR. CLOWARD: Sure. The only thing that we might do -- it's showing my hand a little bit on this.

DISCOVERY COMMISSIONER: That's okay. Now's the time.

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: If you want the deadline.

MR. CLOWARD: Sure. We may amend the complaint to add a claim for deceptive trade practices, but we need to take the deposition of First Street and Aithr to determine whether that's appropriate.

DISCOVERY COMMISSIONER: Okay. So I think that would actually be an initial expert if you wanted a new claim, and we'll have to address that if the amendment is permitted by the Court.

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: And I would be happy to do that. I'm just trying to determine right now if we really need a rebuttal expert. I'm not sure we do, with the understanding that of course your experts can supplement under 26E --

MR. CLOWARD: Sure.

DISCOVERY COMMISSIONER: -- in conjunction with 16.1A(3), which is 30 days prior to trial.

So I'm fine not reopening the rebuttal deadline if you -- unless you envision some new rebuttal expert; that's a different issue. But if it's

a new claim, then that would probably require reopening the initial expert disclosure deadlines because you'd have the burden of proof on that.

MR. CLOWARD: Okay.

DISCOVERY COMMISSIONER: All right. So for today why don't I give you two dates. Let me give you a close of discovery deadline and a dispositive motion deadline.

Did Judge Scotti indicate that he would hear dispositive motions on an OST, or did he --

MR. CLOWARD: No. He --

MR. GOODHART: He wasn't thrilled -- but he wasn't thrilled about an OST, but --

DISCOVERY COMMISSIONER: No. I'm sure he wouldn't be.

MR. GOODHART: -- the impression --

DISCOVERY COMMISSIONER: No.

MR. GOODHART: -- I got from him -- and I could be wrong -- was he would be willing to extend the deadline for maybe two weeks because if you extend it two weeks, then you're still 30-plus days before trial.

MR. COOLS: But he did explicitly say he did not want it on an OST basis.

MR. GOODHART: He does not want it on an OST basis.

MR. COOLS: Because he's setting the motion in limine and dispositive motion date as the same.

DISCOVERY COMMISSIONER: So what dispositive motion date did he give you to?

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MR. COOLS: February 6th I believe.

DISCOVERY COMMISSIONER: Okay. Okay. So for motions in limine he controls that.

MR. COOLS: Right.

MR. GOODHART: Yeah.

DISCOVERY COMMISSIONER: That is not my call, so use whatever deadline he gave you for that. But I see no reason why we can't pick March 1st, 2019, for dispositive motions. That should have them set and heard before trial.

Do you think he might not be happy with that date? I'm just trying to figure out when do you think you can complete your discovery by?

MR. COOLS: He indicated that he --

DISCOVERY COMMISSIONER: A couple --

MR. COOLS: I mean --

DISCOVERY COMMISSIONER: -- of weeks is what he said?

MR. COOLS: Yeah, he was very reticent to -- I mean, he gave us the date of February 6th for dispositive motions explicitly.

DISCOVERY COMMISSIONER: But did he say I could modify that date, or is that his date?

MR. COOLS: He didn't say.

MR. GOODHART: He was silent --

DISCOVERY COMMISSIONER: Are you guys going to get me in trouble with Judge Scotti?

MR. CLOWARD: I wasn't there, so --

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MR. COOLS: I'm trying to not get you --
MR. CLOWARD: -- I can't speak to --
MR. COOLS: -- in trouble.
MR. CLOWARD: -- the issue.
DISCOVERY COMMISSIONER: What now?
MR. CLOWARD: I wasn't there. I just only heard from my associate, so.
DISCOVERY COMMISSIONER: Okay. So what --
MR. CLOWARD: Don't believe anything that I say.
MR. GOODHART: Maybe he would -- we are scheduled to come back for a status check in early February, and perhaps --
DISCOVERY COMMISSIONER: Okay.
MR. GOODHART: -- if you set a March 1, 2019, dispositive and motion in limine deadline, we can discuss that with you at that time as well.
DISCOVERY COMMISSIONER: Okay. Well, I'm not moving his deadline unless he gave me permission.
MR. GOODHART: Okay.
DISCOVERY COMMISSIONER: My concern is he apparently seems to have sent it back to me for some of the deadlines to be adjusted.
MR. GOODHART: Right.
DISCOVERY COMMISSIONER: But what deadline was that -- the close of discovery?
MR. GOODHART: Close of discovery would be the deadline

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to be adjusted. He felt you were in the best position to gauge that given your involvement in this case.

MR. COOLS: And the scope of discovery.

DISCOVERY COMMISSIONER: Okay.

MR. GOODHART: The only thing that he --

DISCOVERY COMMISSIONER: Let's do this.

MR. GOODHART: -- did say was he was okay with anything even 60 days for the discovery deadline.

DISCOVERY COMMISSIONER: Okay. I'm not moving his dispositive motion deadline. You can ask him when you go before him if you still have trouble, but I'm leaving that deadline in place on February 6 of 2019, but I see no reason why we can't extend your discovery to January 18th of 2019, so it gives you approximately two weeks or so to file dispositives after close of discovery, so that gives you at least a little bit of time to get some of those expert depositions set and hopefully will allow the examination of the computers of Salesforce.

But, Mr. Cloward, you need to get on that right away.

MR. CLOWARD: The only -- I guess the -- we have. We're ready to rock 'n roll, but they've objected to the Court's -- to yours --

DISCOVERY COMMISSIONER: Right.

MR. CLOWARD: -- so we're just waiting --

DISCOVERY COMMISSIONER: So we'll have to let the Court --

MR. CLOWARD: -- for that.

DISCOVERY COMMISSIONER: And that is something that

you could bring to the attention of the Court as well.

MR. CLOWARD: Sure. But we're ready to go on that, and we will do that in a timely manner. We'll work with counsel to make sure that's accomplished.

DISCOVERY COMMISSIONER: Okay. Very good.

MR. GOODHART: Rather than trying to come back here again, I'm wondering if January 25th might be a possible close of discovery date with the holidays coming up and things like that.

DISCOVERY COMMISSIONER: I have no problem with January 25th.

MR. GOODHART: Counsel, do you?

MR. CLOWARD: No. I prefer the time.

DISCOVERY COMMISSIONER: So we'll close your discovery January 25th, 2019, but I have to leave the dispositive --

MR. GOODHART: Right.

DISCOVERY COMMISSIONER: -- motion deadline date alone of 2/6 of '19; that will be up to the Court.

MR. GOODHART: Yeah. I'm envisioning we go back to Judge Scotti and say we have up until January 25th and we have another week on the dispositive motions.

DISCOVERY COMMISSIONER: And you can let him know that the Commissioner thinks that would be okay --

MR. GOODHART: Okay.

DISCOVERY COMMISSIONER: -- in terms of having them set and heard before trial.

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MR. GOODHART: Okay.
DISCOVERY COMMISSIONER: Okay?
MR. GOODHART: All right.
DISCOVERY COMMISSIONER: Anything further?
MR. CLOWARD: No.
DISCOVERY COMMISSIONER: Mr. Cools, can you add all of that information in the Report and Recommendation?
MR. COOLS: Yes.
DISCOVERY COMMISSIONER: The close of discovery date as well as the dispositives, and you can put in there that the parties are to request additional time for dispositive motion filing with the Court, and that a one-week extension would probably still be acceptable, or phrase it artfully.
MR. COOLS: Okay.
MR. CLOWARD: Thank you, Commissioner.
MR. COOLS: I'll do my best.
DISCOVERY COMMISSIONER: I'm sure you will.
MR. COOLS: Thank you, Your Honor.
DISCOVERY COMMISSIONER: Thank you all.
MR. CLOWARD: Thank you, Your Honor.
DISCOVERY COMMISSIONER: I'll need that Report and Recommendation in ten days. Have a nice weekend everyone.
MR. CLOWARD: You too, Commissioner.
MR. COOLS: You too.
THE CLERK: Status check?

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DISCOVERY COMMISSIONER: I'm not going to set this for a status check unless you all want me to. Do you need one? I will just update my clerk's note on the in camera that was submitted, unless you want to make a record.

MR. CLOWARD: I think I don't believe --

MR. COOLS: I don't think that's necessary, Your Honor.

MR. GOODHART: Okay. Yeah.

DISCOVERY COMMISSIONER: Okay. So I can just add it by clerk's note?

Then that's what I'll do. And, again, once I receive that Report and Recommendation, I'll send the in camera to the vault.

MR. CLOWARD: Thank you, Commissioner.

MR. GOODHART: Thank you.

MR. COOLS: Thank you, Your Honor.

DISCOVERY COMMISSIONER: Thank you.

[Hearing concluded at 9:31 a.m.]

* * * * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-video recording of this proceeding in the above-entitled case.

FRANCESCA HAAK
Court Recorder/Transcriber

001401

EXHIBIT “6”

001401

001401

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACUZZI INC., doing business as JACUZZI LUXURY BATH,

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT, IN AND FOR THE COUNTY OF CLARK, STATE OF NEVADA, AND THE HONORABLE RICHARD SCOTTI, 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; FIRST STREET FOR BOOMERS & BEYOND, INC.; AITHR DEALER, INC.; HALE BENTON, individually; HOMECLICK, LLC; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, individually and as BUDDS PLUMBING; DOES 1 through 20; ROE CORPORATIONS 1 through 20; DOE EMPLOYEES 1 through 20; DOE MANUFACTURERS 1 through 20; DOE 20 INSTALLERS 1 through 20;

Case No.

District Court No.
A-16-731244-C
Dept. No. II

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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 Richard Scotti District Judge

PETITION FOR WRIT OF PROHIBITION

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NRAP 26.1 Disclosure Statement

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 so the Justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- Jacuzzi Inc., doing business as Jacuzzi Luxury Bath;

There are no other known interested parties.

Snell & Wilmer L.L.P. has represented Jacuzzi Inc., doing business as Jacuzzi Luxury Bath since the inception of this matter.

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Introduction

Petitioner, Jacuzzi Inc. ("Jacuzzi"), seeks relief from an impermissibly broad discovery order requiring it to produce irrelevant evidence, as well as private information of consumers, that has no probative value or bearing on the facts of this action. These writ proceedings arise from a product liability case involving a Jacuzzi® walk-in tub. Plaintiffs are the surviving heirs of Sherry Cunnison, who died at a hospital after allegedly becoming stuck in the tub for a prolonged period. Plaintiffs allege that the tub's defective design, or Jacuzzi's failure to provide sufficient warnings, ultimately caused Cunnison's death, Petitioner's Appendix ("PA") 006–7. Jacuzzi denies these allegations, but this Petition has little to do with the merits of Plaintiffs' claims. Rather, the Petition is a narrow one challenging the district court's extremely and impermissibly broad discovery order.

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To 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. Notwithstanding that broad disclosure, Plaintiffs sought and obtained an order compelling Jacuzzi to also produce all prior or subsequent incidents

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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. Additionally, the order compels Jacuzzi to produce the private identifying information of its customers involved in any of these events, no matter how dissimilar and unrelated. However, evidence of other incidents in a product liability case is only relevant if the other incidents are substantially similar to the incident at issue, which in this case is an alleged entrapment in a tub that resulted in a wrongful death. Consequently, the district court's order requires Jacuzzi to produce irrelevant information – incidents that are not substantially similar along with Jacuzzi's customers' private information. This is a manifest abuse of discretion, and one this Court can readily and easily correct by issuing a writ of prohibition and requiring the district court to vacate the overbroad discovery order.

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Relief Sought

Jacuzzi requests a writ of prohibition ordering the district court to vacate its order requiring Jacuzzi to disclose every bodily injury incident related to any Jacuzzi® walk-in tub, as opposed to only incidents regarding seriously bodily injury or death related to the walk-in tub at

issue in this case and involving incidents that are not substantially similar to the subject incident, which Jacuzzi has already produced.[1]

Issue Presented

Plaintiffs allege that a Jacuzzi® model 5229 walk-in tub caused Sherry Cunnison's wrongful death when she became entrapped in the tub. Despite these facts, Plaintiffs have requested and the district court ordered Jacuzzi to disclose *all* incidents of *any* bodily injury, 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. Did the district court err, leaving Jacuzzi without an adequate remedy by appeal, when it ordered disclosure of such irrelevant incidents?

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[1] A writ of prohibition "is the remedy which is generally employed to prevent improper discovery." *Wardleigh v. Second Judicial Dist. Court in and for Cty. of Washoe*, 111 Nev. 345, 350, 891 P.3d 1180, 1183 (1995) (quoting *State ex rel. Tidvall v. Dist. Court*, 91 Nev. 520, 524, 539 P.2d 456, 458 (1975)).

Routing Statement

Because this writ proceeding challenges a pretrial discovery order, this case is "presumptively assigned to the Court of Appeals." NRAP 17(b)(13); *see also* NRAP 21(a)(3)(A) (requiring writ petitions to include whether the case "falls within one of the categories of cases … presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)").

Statement of Facts

I. The Parties Conduct Lengthy Discovery of "Other Incidents."

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The product at issue is a Jacuzzi® Model 5229 Walk-In Tub that was installed in 2013. PA032. Plaintiffs filed suit in 2016, and the parties have since engaged in extensive discovery, including 16 depositions and many sets of written discovery requests, leading to Jacuzzi's producing thousands of pages of documents. PA033. One core area of dispute, and the dispute raised here, has been the scope of discovery into "other incidents." PA031–33.

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In early 2018, counsel for the parties conferred regarding the scope of such discovery, after which Jacuzzi agreed to search its records for *prior* incidents using Plaintiffs' chosen search terms. PA030–31, PA061.

Jacuzzi reviewed the search results and found only "false positives"—in other words, none of the results contained a prior incident even remotely related to Plaintiffs' allegations. PA030–33. After this search and review, Jacuzzi informed Plaintiffs that it found no prior similar incidents involving walk-in tubs. PA061.

Plaintiffs then took the Rule 30(b)(6) deposition of Bill Demeritt, the Jacuzzi corporate representative designated to testify regarding prior incidents and Jacuzzi's search for such incidents. PA087–90. Mr. Demeritt testified that there were no similar prior incidents and he identified the individuals involved and described the scope of the inquiry leading to that conclusion. PA094, PA100–09. Plaintiffs' counsel then departed from their focus on *prior* incidents, which was the scope of search upon which Mr. Demeritt's testimony was based, and instead asked Mr. Demeritt if there were any *subsequent* incidents. PA112–13. Mr. Demeritt testified that he was unaware of similar subsequent incidents. *Id.*

Following Mr. Demeritt's deposition, the court ordered Jacuzzi to do another search and produce personal injury or death claims involving walk-in tubs (regardless of model) from 2008 to the present. PA119.

Although disputing the scope of the order, Jacuzzi complied and produced the few post-incident matters (none of which were claims for compensation for personal injury presented to Jacuzzi) claims. PA119–20. The post incident claims were not substantially similar to the subject claim, and Jacuzzi redacted the private personal information of consumers from the reports.

II. Plaintiffs Serve Additional Discovery Seeking More Than Just Other Similar Incidents, to Which Jacuzzi Objects.

After Jacuzzi produced the incident reports for the handful of responsive subsequent incidents it found, Plaintiffs served the discovery requests at issue in this Petition:

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REQUEST NO. 24.

All documents containing information pertaining to any other lawsuit to which you were a named party regarding a consumer's use of one of your walk-in tubs.

REQUEST NO. 25.

All documents containing information pertaining to any other insurance claim to which you were a named party regarding a consumer's use of one of your walk-in tubs.

REQUEST NO. 41.

All reports, logs, etc. memorializing any incident involving consumer use of any of your Walk-in Tubs, for the period from January 1, 2012 to the present.

REQUEST NO. 42.

All reports that you received from the U.S. Consumer Product Safety Commission regarding your Walk-in Tubs from January 1, 2012 to the present.

REQUEST NO. 43.

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

PA041.[2]

By their terms, these requests seek more than just other incidents of personal injury or death—they seek information about any other incident or complaint involving any use of a Jacuzzi® walk-in tub, regardless of model, injury or similarity to the claim asserted by plaintiffs. *Id.* This includes not only complaints involving no injury at all, but even complaints for which there is no potential for injury. Jacuzzi would have to produce, for example, customer complaints about the color of Jacuzzi's tubs, because those would be "complaints made to [Jacuzzi] about [its] Walk-In Tubs." Request No. 43.

Based on the all-encompassing nature of these overbroad discovery requests, Jacuzzi moved for a protective order that would relieve Jacuzzi

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[2] For simplicity, this petition will cite to these requests by number, *e.g.* "Request No. 25."

from having to answer these requests. PA027–45. Plaintiffs opposed, and following a hearing, the Discovery Commissioner's Report and Recommendation ordered Jacuzzi to respond to Plaintiffs requests, only slightly revising the scope of Plaintiffs' requests from any complaint or incident imaginable to "all bodily injury (as opposed to serious bodily injury) and wrongful death claims." PA240–42. This would include, according to the Commissioner, incidents like "somebody broke a toe or something." PA159. The Commissioner also ordered Jacuzzi to produce documents regarding not just the model of walk-in tub at issue in this case, but every Jacuzzi® walk-in tub, even those with very different designs, and even those with characteristics very different from those that allegedly contributed to Ms. Cunnison's injury. PA242.

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Over Jacuzzi's objection, PA178–87, the district court adopted and affirmed the Commissioner's Report and Recommendation, PA261. This Petition followed.

Summary of the Argument

This petition presents a narrow issue, but one that merits prompt review and correction. Jacuzzi has already produced the universe of possibly relevant other incidents involving the tub in question. But the

district court's order requires Jacuzzi also to produce *irrelevant* other incidents it may have, and to disclose personal and private information of consumers that have purchased a Jacuzzi® walk-in tub. By definition, the district court's order is a manifest abuse of discretion because it requires *only* the production of *irrelevant* information—that is, incidents that are not substantially similar to the one here. This Court should therefore issue the writ and grant Jacuzzi the relief it seeks.

First, Jacuzzi has no adequate remedy other than a writ of prohibition. This Court has made clear that when a district court orders the discovery of irrelevant information, waiting to challenge that order later on appeal is not an adequate remedy, because once a party has to find and disclose irrelevant information, such disclosure cannot be undone. Writ relief is therefore appropriate.

Second, the district court's order constitutes a manifest abuse of discretion, because it requires the disclosure of only *dissimilar* other incidents, and other incidents are only relevant if they are substantially similar. Thus, the district court's order requires the disclosure of *irrelevant* information, and the Nevada Rules of Civil Procedure allow

parties to discover only relevant information. The district court therefore abused its discretion.

Third, even if the other, dissimilar incidents were even a little relevant, such relevance must be balanced against the burden on and prejudice to Jacuzzi and the needs of the case. Plaintiffs have no need at all for marginally relevant, other incidents, or customers' personal information, when Jacuzzi has already produced all of the relevant other incidents. And the burden on Jacuzzi to search for and produce evidence of such slight relevance (at best), as well as completely irrelevant evidence, does not justify the district court's order. The further production of specific customer information prejudices Jacuzzi because Plaintiffs contact these unsuspecting customers, seek to depose them, and are using the information as both a fishing expedition for other potential plaintiffs as well as to disparage Jacuzzi.

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The Court should therefore issue the writ and order the district court to vacate its order.

Standard of Review

In the writ-relief context, "discovery rulings are reviewed for an abuse of discretion." *Cotter v. Eighth Judicial Dist. Court in and for Cty. of Clark*, 134 Nev. Adv. Op. 32, 416 P.3d 228, 231–32 (2018).

Argument

I. The Writ Should Issue Because the Order Demonstrates a Manifest Abuse of Discretion, and Because Jacuzzi Has Both a Clear Right to Relief and No Adequate Remedy Absent Immediate Review.

This Court has broad discretion in deciding whether "to entertain an extraordinary writ petition." *State v. Eighth Judicial Dist. Court in and for Cty. of Clark*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). Writ relief is appropriate when (1) review is necessary "to control a manifest abuse of discretion," and (2) "when the petitioner has a clear right to the relief requested and there is no plain, speedy, and adequate remedy in the ordinary course of the law." *Halverson v. Sec'y of State*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2011). And although this Court "rarely entertains writ petitions challenging pretrial discovery," *Cotter*, 416 P.3d at 231, this Court has granted writ relief to prevent "the disclosure of irrelevant

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matter." *Schlatter v. Eighth Judicial Dist. Court in and for Clark Cty.*, 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977).[3]

Much like the disclosure of attorney-client privileged information, *Cotter*, 416 P.3d at 231, the disclosure of irrelevant information is a bell that cannot be un-rung, *see Schlatter*, 561 P.2d at 1344. Thus, this Court has granted writ relief to vacate a discovery order that required disclosure of irrelevant information, because being forced to comply with such an order and challenge it later on appeal is not an adequate remedy. *Id.* And the reason is obvious: "the disclosure of irrelevant matter is irretrievable once made." *Id.*

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Here, just like the petitioner in *Schlatter*, Jacuzzi has no adequate remedy in the ordinary course of the law, because under the district court's discovery order, Jacuzzi must suffer the severe prejudice of having the disclose irrelevant and information private to its customers *now* that "is irretrievable once made," and thus cannot be later corrected on appeal.

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[3] This Court has since reaffirmed *Schlatter* except to the extent that *Schlatter* describes the relief the Court granted as "mandamus" relief, when the proper relief should have been "prohibition." *Wardleigh*, 891 P.2d at 350 ("We reaffirm, without the necessity of overruling either *Clark* or *Schlatter,* that prohibition is a more appropriate remedy for the prevention of improper discovery than mandamus.").

Id. Moreover, Jacuzzi is challenging a manifest abuse of the district court's discretion, and Jacuzzi is clearly entitled to relief under the discovery rules, because the district court's order undoubtedly calls for the disclosure of irrelevant information, as discussed more thoroughly below. This Court should therefore issue the writ and reach the merits.

II. The District Court's Discovery Order Is a Manifest Abuse of Discretion Because It Calls for Disclosure of Wholly Irrelevant Information.

The product at issue in this product liability case is a Jacuzzi® Model 5229 Walk-In Tub installed in 2013. PA032. Jacuzzi has searched for and disclosed prior and subsequent incidents of alleged serious bodily injury or death involving this model walk-in tub.[4] That is all that is relevant in this case, and that is all Jacuzzi should be required to disclose. Instead, the district court has ordered Jacuzzi to disclose irrelevant incidents about *any* alleged bodily injury at all involving *any* Jacuzzi® walk-in tub. Because these incidents are not substantially similar, and thus irrelevant, it was a manifest abuse of discretion for the district court to order such disclosure. Indeed, even if these incidents have some sliver

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[4] Jacuzzi is unaware of any prior incidents of serious bodily injury or death involving the walk-in tub at issue or other walk-in tubs. PA061.

of relevance, the prejudice to Jacuzzi and its customers for having to disclose all such incidents, no matter how minor or dissimilar, outweighs any marginal utility they'd provide to Plaintiffs.

A. The Information Plaintiffs Seek Is Irrelevant.

Plaintiffs are only entitled to discover matter "relevant to the subject matter involved in the pending action." Nev. R. Civ. P. 26(a)(1). In the products liability context, evidence of other incidents might be relevant if they involve "similar accidents involving the same condition" as the incident giving rise to the plaintiff's claim. *See Reingold v. Wet 'N Wild Nev., Inc.*, 113 Nev. 967, 969, 944 P.2d 800, 802 (1997), *overruled on other grounds by Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006). Courts usually call this the "substantial similarity" requirement. *Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991) ("A showing of substantial similarity is required when a plaintiff attempts to introduce evidence of other accidents as direct proof of negligence, a design defect, or notice of the defect.").

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The law generally treats evidence of other incidents (or lack thereof) differently depending on whether the incidents occurred before or after the incident at issue in a case. This is because, for example, evidence of

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prior similar incidents can show a defendant had notice of a defect or dangerous condition before the incident the plaintiff alleges, whereas evidence of subsequent incidents cannot possibly show prior notice. *See* 1 McCormick On Evid., *Other accidents and injuries*, § 200 (7th ed.). Regardless, such evidence is not relevant unless the other incidents are substantially similar. *Id.* And, notably, the rule of "substantial similarity is strictly applied" when a plaintiff seeks evidence of subsequent incidents. *Id.* (collecting cases). The burden of proving substantial similarity of other incidents rests on the party seeking such evidence—here, Plaintiffs. *Id.*

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In this case, the incident at issue is an alleged wrongful death alleged to have occurred following entrapment in a specific model of Jacuzzi® walk-in tub. Thus, the universe of possibly relevant other incidents would be incidents of alleged serious bodily injury or death involving the same model of walk-in tub, under substantially similar facts. The district court already ordered, and Jacuzzi already produced, all such prior and subsequent incidents of alleged serious bodily injury or death incidents involving the walk-in tub at issue. PA119–20. Plaintiffs therefore have all the arguably relevant evidence of other incidents in

Jacuzzi's possession to which they are entitled. *See Reingold*, 113 Nev. at 969; *Cooper*, 945 F.2d at 1105; *see also* 1 McCormick On Evid. But the district court's order goes much further and 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. PA240–42. But what other possible incidents would be covered by this order that Jacuzzi has not already produced? According to the district court, an incident involving a broken toe would be covered, PA159, but it is facially obvious that an incident involving a broken toe is not similar in any way to the incident at issue in this case, let alone substantially similar. Likewise, the Discovery Commissioner stated that even an incident involving a pinched finger in a bathtub door involving a different model tub should be disclosed. PA185. However, such examples are in no way even arguably similar to a person's getting stuck in the subject bathtub. Indeed, in light of what Jacuzzi has already produced (incidents of alleged serious bodily injury or death), it is difficult to imagine any possible incident that could be substantially similar to the

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incident Plaintiffs allege—a customer becoming stuck in the tub for a prolonged period.

In short, there is likely no possible incident of a non-serious bodily injury that could be substantially similar to what Plaintiffs allege. Thus, the district court's order, by definition, compels disclosure of other incidents that are not substantially related to what Plaintiffs allege, and accordingly compels disclosure of only irrelevant matters. The district court's order is thus a per se manifest abuse of discretion, and this Court should enter a writ of prohibition compelling the district court to vacate the order requiring the disclosure of irrelevant incidents. *Schlatter*, 561 P.2d at 1344.

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B. Even If the Information Plaintiffs Seek Was Marginally Relevant, the Prejudice to Jacuzzi and its Customers from Disclosing the Information Outweighs Its Marginal Relevance.

Even if evidence of other non-serious bodily injury incidents possessed some slight relevance (they don't), such minuscule relevance does not justify the prejudice to Jacuzzi and its customers from having to produce the incidents and related private information that would be, at best, of little value to Plaintiffs in this case. Thus, even if this Court were to affirm the district court's order for Jacuzzi to disclose the other

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irrelevant incidents, as it already has, the district court erred by ordering that Jacuzzi also be required to produce unredacted personal information of any individuals reporting complaints. When Jacuzzi's customers have an issue that is covered by their bathtub warranty, they call Jacuzzi's customer service department. The calls are transcribed into a database. Jacuzzi produced redacted versions of these complaints, redacting only the customer names, emails, phone numbers, and any other personal information of these non-party customers. An excerpt from one of the records is below:

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Case: 00277125

Case Number	00277125	Date/Time Opened	2/2/2015 6:33 AM
Contact Name	[redacted]	Case Owner	[redacted]
Account Name	Jacuzzi Consumers Master Account	Case Record Type	Extended
Warranty	LW45 BDKPJK	Contact Email	[redacted]
Model Description	FS 5229 C RH SLN HTR SKT WHT	Contact Phone	[redacted]
Part Number		Case Age	(1)
Case Origin	Phone	Early Warning	
Sub-Origin		Serial # (Text)	
Email Origin		Part Number (Text)	
Brand	JB	Type	Product

Case Summary

Case Title	[redacted] - Jacuzzi Consumers Master Account - General Inquiry - Pre-delivery/installation/operation - Educate caller/NMDF - 2015-02-02
Priority	High
Status	Closed
Case Reason	
Subject	COMPLAINT OF SLIPPERY FLOOR - WANTS JLB TO DO SOMETHING OR TUB BE REMOVED
Description	

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As the excerpt shows, the records include the date of the call, description of the product, and the customer complaint. However, the court has ordered Jacuzzi produce all personal information of the

customers who called in warranty issues, stating at the hearing that there is no expectation of privacy when someone calls in a warranty claim or mentions an injury issue to a company.

These complaints, however, were not publicly made, for instance on a Jacuzzi review page, on the CPSC website, nor in any other public forum. Instead, these customers called Jacuzzi directly. These customers did not file lawsuits against Jacuzzi from their issues, but instead chose to deal directly with the company to resolve their complaints. Jacuzzi was not on notice, and subsequently did not inform their customers in these customer service calls, that the customers' personal information could be disseminated in a lawsuit in which they had no involvement. The only conceivable reason Plaintiffs would need this personal information would be to contact these unwitting bathtub owners. Not only is this disproportionate to the needs of this case—which is not a class action—but it would require Jacuzzi to disclose its own customers' personal information.

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Nevada's Rules of Civil Procedure allow courts protect a party from "annoyance, embarrassment, oppression, or undue burden" that would result from responding to a discovery request. Nev. R. Civ. P. 26(c). The

Federal Rule is nearly the same, Fed. R. Civ. P. 26(c), and the rule generally protects a party from having to respond to discovery if "prejudice … will result from the discovery." *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063–64 (9th Cir. 2004) (citing Fed. R. Civ. P. 26(c)). Relevant here, a party's concerns about the "privacy rights of another … are grounds for" protection under Rule 26(c). *Holley v. Carey*, No. Civ S-04-2708 LKK EFB P, 2006 WL 3300467, at *2 (E.D. Cal. Nov. 14, 2006). And if the prejudice resulting from the discovery outweighs the need for such discovery, then a protective order preventing the discovery is appropriate. *Rivera*, 364 F.3d at 1066.

Here, Plaintiffs' need regarding evidence of other incidents is directly related to the similarity of those other incidents to what Plaintiffs allege—the less similar the incident, the less Plaintiffs need to discover it. *See Cooper*, 945 F.2d at 1105 ("The rule [of substantial similarity] rests on the concern that evidence of dissimilar accidents lacks … relevance …."). Thus, to the extent that other incidents of non-serious bodily injuries involving different Jacuzzi® products are relevant to Plaintiffs' claims, that relevance could be at best minimal. For example, evidence that another Jacuzzi customer stubbed his toe on a

different walk-in tub, if relevant, is at best only slightly relevant to any issue in this case, if at all.

Under Rule 26(c), such slight relevance must be weighed against the prejudice resulting from the disclosure. There are at least two specific harms that flow from the discovery the district court ordered. First, Jacuzzi's customers will experience at least inconvenience, and more likely a serious invasion of their privacy. As discussed in more detail below, Jacuzzi's customers often choose to work with Jacuzzi directly and privately when experiencing any issues with a product. These customers have not sought any external recourse and have had no reason to think that Jacuzzi would share this information with anyone else. As such, it is both harmful and unfair to Jacuzzi's customers to have such information divulged. This is especially true when the result of this disclosure will likely be exactly what they sought to avoid by working with Jacuzzi directly—counsel for Plaintiffs contacting them without warning, and having to deal with or share their incident with others when they initially chose not to.

Second, and relatedly, Jacuzzi's general reputation and customer relationships will inevitably be harmed by the disclosure of its customers'

private information. Jacuzzi's customers legitimately expected the private information they shared with Jacuzzi to stay with Jacuzzi—at most, they might have expected *Jacuzzi* to do some follow up contacts. But they certainly would not have expected that, by resolving an issue with Jacuzzi privately and directly, Jacuzzi would share that information with attorneys without their permission, who will contact them to discuss the incident they chose to keep private. This will likely cause Jacuzzi's current customers to feel ill will toward Jacuzzi both generally and regarding Jacuzzi's ability to keep their information private, thereby irreparably harming Jacuzzi's relationship with these customers. This will likewise harm Jacuzzi's general reputation, as these customers with dissimilar incidents (and others with whom they speak), will get the false impression that their incident is somehow part of a larger problem, when the incidents in reality are so dissimilar that they are not even relevant, as explained above.

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In sum, Plaintiffs already have from Jacuzzi the only arguably relevant other incident(s)—the incidents alleging serious bodily harm or death relating to the walk-in tub at issue arising under substantially similar circumstances. Plaintiffs therefore have little need for other

incidents of alleged non-serious bodily harm that, at best, are only barely relevant. *See id.* That small need is dwarfed by prejudice to Jacuzzi and its customers from Jacuzzi having to produce all of the potential incidents covered by the district court's order. Thus, even assuming the other incidents covered by the district court's order are marginally relevant, the district court still abused its discretion by compelling disclosure of them in light of the prejudice to Jacuzzi and its customers.

The discovery request and recommended production seeks irrelevant information, and the requests themselves are overly burdensome and harassing. Plaintiffs are seeking information regarding products other than the product at issue in this action, and completely unrelated and dissimilar claims, and seek to then reach out to Jacuzzi's customers to try and permanently damage the relationship and reputation of Jacuzzi.

Additionally, as discussed above, these "other incidents" are already of extremely limited relevance, if any, to Plaintiffs' case. The complaints all occurred *after* the subject incident in this case; many of the incidents involved different bathtubs in different homes, and all of them involved different people and different fact patterns. Subsequent

incidents are not relevant to establish notice to a product manufacturer, and are only sometimes relevant to show the existence of a **permanent** dangerous condition. *See, e.g., Reingold*, 113 Nev. at 969–70; *Caballero v. Bodega Latina Corp.*, No. 2:17-cv-00236-JAD-VCF, 2017 WL 3174931, at *7 (D. Nev. July 25, 2017); *Lologo v. Wal–Mart Stores, Inc.*, No. 2:13-cv-1493-GMN-PAL, 2016 WL 4084035, at *9 (D. Nev. July 29, 2016) (Navarro, C.J.) (granting Wal-Mart's request to exclude all evidence of other slip-and-fall incidents or reports of incidents involving the temporary presence of debris or a foreign substance at the Wal-Mart store and noting that "the majority of evidence of other falls, incidents, or reports of incidents is irrelevant … ."). In light of the specious relevancy of these other claims, the privacy concerns and unfair prejudice to Jacuzzi outweigh the relative scant "need" for the personal information.

Conclusion

Jacuzzi has produced all the evidence of other incidents that are possibly relevant to Plaintiffs' claims. The district court's order therefore necessarily compels disclosure of largely, and likely only, irrelevant information, combined with sensitive information about private

customers. This Court should therefore issue the writ and order the district court to vacate its order to the extent it calls for Jacuzzi to produce all other incidents alleging any bodily injury related to any Jacuzzi walk-in tub. At the very least, this Court should order the district court to vacate its order to the extent it calls for Jacuzzi to disclose its customers' personal and private information.

DATED: December 7, 2018

SNELL & WILMER L.L.P.

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/s/ Kelly H. Dove

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CERTIFICATE OF COMPLIANCE

I hereby certify that the PETITION FOR WRIT OF PROHIBITION complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style.

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Finally, I hereby certify that I have read the PETITION FOR WRIT OF PROHIBITION, 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 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.

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DATED: December 7, 2018

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

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VERIFICATION

On December 7, 2018, the affiant, Kelly H. Dove, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

"I am counsel for Petitioner, I have read the foregoing petition for writ of mandamus or prohibition and all factual statements in the petition are within the affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition.

"The exhibits in the appendix are true and correct copies of the original documents."

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Kelly H Dove
Kelly H. Dove

SUBSCRIBED AND SWORN to before me
this 7 day of December, 2018.

Deborah L Dove
NOTARY PUBLIC in and for Clark
County and the State of Nevada

D'ANDREA LARAY DUNN
NOTARY PUBLIC
STATE OF NEVADA
APPT. No 11-4604-1
My APPT. Expires January 19, 2022

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 December 7, 2018, I caused to be served a true and correct copy of the foregoing **PETITION FOR WRIT OF PROHIBITION** upon the following by the method indicated:

☒ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

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☒ **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 Richard Scotti
Eighth Judicial District Court, Dept. II
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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EXHIBIT “7”

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ELECTRONICALLY SERVED
12/28/2018 8:57 AM

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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 1 through 20; DOE 20 INSTALLERS 1 through 20; DOE CONTRACTORS 1 through 20; and DOE 21 SUBCONTRACTORS 1 through 20, inclusive, Defendants. AND ALL RELATED CLAIMS.	CASE NO.: A-16-731244-C DEPT. NO.: II **DEFENDANT JACUZZI INC. dba JACUZZI LUXURY BATH'S SUPPLEMENTAL RESPONSE TO PLAINTIFF DEBORAH TAMANTINI'S FIRST SET OF INTERROGATORIES** **(Originally served June 19, 2017)**

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Case Number: A-16-731244-C

Defendant Jacuzzi Inc. doing business as Jacuzzi Luxury Bath ("Defendant" or "Jacuzzi"), by and through its attorneys of record, Snell & Wilmer L.L.P., provides this supplement its responses to Plaintiff Robert Ansara, as Special Administrator of the Estate of Sherry Lynn Cunnison's ("Plaintiff") Second Set of Interrogatories, as follows:

Supplementary responses are bold.

GENERAL OBJECTIONS

Defendant objects to each interrogatory to the extent they require the identification of documents already produced in this matter. Such documents are as accessible to Plaintiff as they are to Defendant.

Defendant responds to interrogatories, subject to the following additional reservations:

(a) The right to object on any ground whatsoever to the admission into evidence or other use of any of these responses at the trial of this action or any other proceeding in this action or any other action;

(b) The right to object on any ground whatsoever at any time to any demand for further responses to interrogatories, or any other discovery procedures involving or relating to the subject matter of the interrogatories;

(c) The right at any time to revise, correct, add to or clarify, any of the responses set forth herein; and

(d) The responses contained herein are based upon information presently known and ascertained by Defendant. The responses herein are without prejudice to utilizing subsequently discovered documents or information; and Defendant reserves the right to amend, add to, delete from, or in any other manner modify these responses after it has completed its discovery and investigation efforts and ascertained all relevant facts.

Defendant specifically objects to the timeframe listed in Plaintiffs' Interrogatories. Plaintiffs note that "**UNLESS OTHERWISE NOTED, THE DOCUMENTS, RECORDS, AND DATA REQUESTED ARE THOSE THAT APPLY TO AND/OR COVER ANY PART OF THE TIME PERIOD FROM JANUARY 1, 2008 TO THE PRESENT."** This timeframe is arbitrary and extends years prior to Ms. Cunnison's purchase and installation of the subject bathtub.

Snell & Wilmer L.L.P.
LAW OFFICES
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169
702.784.5200

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RESPONSES TO INTERROGATORIES

Please state the name, address, telephone number, and position of any and all individuals preparing these answers and all individuals with whom you conferred in preparing answers to these interrogatories.

INTERROGATORY NO. 3:

Identify when the subject Jacuzzi Walk-In Bathub was originally designed and developed, specifying the dates of each modification thereto and the nature of the modifications.

SUPPLEMENTAL RESPONSE

Pursuant to NRCP 33(d), Defendant refers Plaintiff to the following previously-produced design documents that were disclosed after entry, and subject to, the protective order: JACUZZI001349-1375. Defendant further states that Defendant first made the subject Jacuzzi® Walk-In Bathtub in or about the year 2012. Between 2012 and the present, there have been some minor changes to the tub, but there were no modifications to the subject Jacuzzi® Walk-In Bathtub related to the vague defect claims asserted in this case, which have materially changed over time, as Jacuzzi understands them. While Jacuzzi is unaware of any relevant revisions, if Plaintiff identifies specific components or design characteristics of the tub at issue, Defendant can confirm that there were no revisions.

Defendant objects to this Interrogatory as overbroad, unduly burdensome, and without reasonable limitation in scope because it is seeking information unrelated to the subject incident and claims because the Subject Incident occurred in 2014, and there were no subsequent developments or modifications done after the Subject Incident.

INTERROGATORY NO. 5:

Did any other company or individuals, who are not employees of Defendant design or develop the subject Jacuzzi Walk-In-Tub or components thereof for the Defendant? If so, please identify the name and address of each such company or individual.

SUPPLEMENTAL RESPONSE:

Pursuant to NRCP 33(d), Defendant refers Plaintiffs to the following previously-produced design documents that were disclosed after entry, and subject to, the protective

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order: JACUZZI001349-1375. Defendant further states that there are some third-parties that manufacture specific components of the subject Jacuzzi® Walk-In Bathtub, and were involved in their development. However, Defendant is unaware of any third party who "designed or developed the subject Jacuzzi Walk-In-Tub or components thereof for the Defendant" that are relevant to Plaintiffs' vague defect claims, which have materially changed over time. Some components, like the grab bar and plumbing components were not designed by or for Jacuzzi, but are utilized in the Jacuzzi® Walk-In Bathtub.

Defendant objects to this interrogatory because it is overly broad without reasonable limitation in scope, because it seeks information that is wholly unrelated to Plaintiffs' claims is not likely to lead to the discovery of relevant or admissible evidence. The interrogatory is vague and ambiguous as to the phrase "for the Defendant," because it is unclear if Plaintiffs are referring to components developed at the direction of Jacuzzi or simply utilized by Jacuzzi.

INTERROGATORY NO. 6:

Please identify all documents concerning the design and development of the subject Jacuzzi Walk-In-Tub.

SUPPLEMENTAL RESPONSE:

Defendant identifies the documents previously disclosed in Jacuzzi's initial disclosures and supplements, including:

Installation and Operation Instructions Manual, Jacuzzi® 5229 Walk-In Bathtub Series, 2013	JACUZZI 000001-20
DWO Geberit Installation Manual, 2012.	JACUZZI 000021-22
DWO Geberit Pin Drawing for Fitting No. 241.789.21.1. Subject to Protective Order. Will be produced upon entry of appropriate Protective Order.	JACUZZI 000023
MT31 Geberit Installation Instructions	JACUZZI 000024-27

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Produced subject to protective order:

Drawing LW19000_Shell FS5229 RH Walk In	JACUZZI001349
Drawing LW32827_Grab Bar Assembly	JACUZZI001350
Drawing LW47000RevD_SHL T&D FS 5229 RH SLN	JACUZZI001351-1352
Drawing LW48000RevB_SHL Bond FS 5229 RH	JACUZZI001353-1354
Drawing LX22000_Piping Suction	JACUZZI001355
Drawing LX24000B_Piping Discharge	JACUZZI001356-1357
Drawing LX25000_Piping Airline	JACUZZI001358
Drawing LX26000A_Piping Blower	JACUZZI001359-1360
Drawing LX27000_Two Pt Quarter Turn Door Latch	JACUZZI001361-1368
Drawing LX62000_Door Assembly	JACUZZI001369
Drawing LX82000_Skirt Access Panel	JACUZZI001370
Drawing LX91827A_Handle_Sub	JACUZZI001371

Defendant objects to the Interrogatory as overbroad in that it is not limited to any particular aspects of the design of the subject tub. Accordingly, Defendant has limited its responses to design aspects criticized by Plaintiffs, which include the size of the tub, the inward swinging door, the placement of grab bars and controls, the seat, and the drain.

INTERROGATORY NO. 8:

Please identify all tests or studies performed by the Defendant or by any independent laboratory relating to the subject Jacuzzi Walk-In-Tub's safety and design. For each such test or study, state:

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(a) the date it was performed;

(b) the name, company position, and present address of the person responsible for the test or study;

(c) the method used;

(d) the purpose of the test or study; and

(e) the results of the test or study

SUPPLEMENTAL RESPONSE:

(a) IAPMO Compliance Test: IAPMO Certification Listing.pdf

1. September 2012
2. IAPMO R&T Lab, 5001 East Philadelphia Street, Ontario, California 91761
3. Test Standards
   i. ASME A112.15-2012
   ii. CSA B45 Series-2002 (R2013)
4. Complied with test standard

(b) ETL Compliance Test: ETL Certification Listing.pdf

1. September 2012
2. Intertek, 25800 Commercentre Dr, Lake Forest, CA 92630 (Kathryn Jones)
3. Test Standards
   i. UL 1795 UL Standard for Safety Hydromassage Bathtubs
   ii. CSA C22.2 No. 218.2:2015 Hydromassage Bathtub Appliances

(c) Co-efficiency of Friction Test: ASTM F 462-79 (R2007).pdf

a. June 2013
b. IAPMO R&T Lab, 5001 East Philadelphia Street, Ontario, California 91761
c. Test protocol ASTM F 462-79 (R2007)
d. Complied with test standard

(d) Door Mechanism Life Cycle Test: Door Life Cycle.pdf

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1. December 2012
2. SCO Monte Vista Ave, Chino, CA 91710
3. Test Protocol: Force Failure Analysis/Life Cycle Testing
4. First Article Accepted

Defendant refers Plaintiff to the following previously-produced design documents that were disclosed after entry of the protective order:

Door Life Cycle	JACUZZI001372-1375
ETL Certification Listing	JACUZZI001376-1441
IAPMO Certification Listing	JACUZZI001442-1446
IAMPO Lab Test Report_ASTM F 462-79	JACUZZI001447-1449

Defendant's experts have also evaluated the subject bathtub, and will provide their opinions.

Defendant objects to this Interrogatory as overbroad because it is seeking information beyond the implication of the subject incident and claims outside the scope of NRCP 26(b) because it requests "<u>all</u> tests or studies performed by the Defendant or by any independent laboratory," and some tests are not related to Plaintiffs' claims, which Defendants' believe to be related to the size of the tub, the inward swinging door, the placement of grab bars and controls, the seat, and the drain. Defendant has limited its response to those tests it believes are relevant to Plaintiffs' claims. If Plaintiff seeks additional responses, they must clarify design elements or a scope of tests at issue, which are relevant to the subject incident and claims.

<u>INTERROGATORY NO. 9:</u>

If the tests or studies identified in your answer to the foregoing interrogatory resulted in any change or modifications to the subject Jacuzzi Walk-In-Tub's, please state the nature of the change or modification and the reason for such change or modification.

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SUPPLEMENTAL RESPONSE:

No changes or modifications were needed.

Defendant objects to this Interrogatory as overbroad because it is seeking information beyond the implication of the subject incident and claims and outside the scope of NRCP 26(b) **because Interrogatory No. 8 requests "all tests or studies performed by the Defendant or by any independent laboratory," and some tests are not related to Plaintiffs' claims, which Defendants' believe to be related to the size of the tub, the inward swinging door, the placement of grab bars and controls, the seat, and the drain.** Defendant has limited its response to those modifications it believes are relevant to Plaintiffs' claims. If Plaintiff seeks additional responses, they must clarify design elements or a scope of modifications at issue, which are relevant to the subject incident and claims.

INTERROGATORY NO. 10:

State verbatim the content of any warnings or instructions on all written material that is included in the packaging of a new Jacuzzi Walk-In-Tub which is the subject of this litigation. Alternatively, provide a copy of such written material.

SUPPLEMENTAL RESPONSE:

Pursuant to NRCP 33(d), Defendant directs Plaintiff to Installation and Operation Instructions Manual, Jacuzzi 5229 Walk-In Bathtub Series, 2013, produced in Defendant's Initial Disclosure Statement as JACUZZI 000001-20. Additional warnings are posted on the bathtub, **and Plaintiffs continue to be in possession of the bathtub**, but are not related to the vague defect claims that have been asserted.

INTERROGATORY NO. 11:

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

If so, please state:

(a) the date of each such notice;

(b) the name and last known address of each person giving such notice; and

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(c) the substance of the allegations of such notice

SUPPLEMENTAL RESPONSE:

Defendant is unaware of any persons claiming injury from his or her use of the Jacuzzi® 5229 Walk-In Tub, or any other Jacuzzi® Walk-In Tub, prior to the subject incident. Pursuant to NRCP 33(d), Jacuzzi refers Plaintiffs to the previously produced subsequent incidents, identified as JACUZZI002912-002991, which relate to any Jacuzzi® Walk-In Tub. Jacuzzi further refers Plaintiffs to the Smith and Baize matters, although the Baize matter does not arise out of a personal injury claim, but rather a Deceptive Trade Practices Act/Breach of Contract/Fraud claim in regard to the sale of a tub. After reasonable inquiry, Jacuzzi is unaware of any other claims.

Defendant objects because the interrogatory is overly broad without reasonable limitation in scope because it was not limited to substantially similar bathtubs, was not limited by any sort of timeframe, and employs overly broad terms such as "damage." Further, it is unduly burdensome because it seeks to have Jacuzzi review thousands of records to look for any "injury" or "damage," both of which are overly broad terms, especially when considering the relevance to the case at hand. Furthermore, the interrogatory seeks information irrelevant to the subject matter of this action and that is not likely to lead to the discovery of relevant or admissible evidence because subsequent incidents are not relevant to Defendants' notice and Defendants contend subsequent incidents are at most only relevant to show the presence of an ongoing dangerous condition. The interrogatory is vague and ambiguous in its use of the word "damage," because "damage" is not limited to personal injury and could be construed to include property damage, which is not relevant to the claims at issue. The interrogatory seeks information protected from disclosure by the right of privacy of third parties because it would require Jacuzzi to produce the address of its customers, without its customers' consent. Further, Jacuzzi states that subsequent incident documents it has produced are not substantially similar to Plaintiffs' incident and are inadmissible at trial.

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INTERROGATORY NO. 12:

Has the Defendant ever been named as a defendant, respondent or other involuntary participant in a lawsuit or other proceeding arising out of personal injuries or damage in connection with a Jacuzzi Walk-In-Tub?

If so, please state as to each:

(a) the court or other forum in which it was filed;

(b) the names of all parties or named participants;

(c) the case number or other identifying number, letters or name assigned to the action or other proceeding;

(d) the name and last known address of each person claiming injury or damage therein;

(e) the names and last known address of all known counsel of record participating in such action or proceeding; and

(f) the date of the alleged injury or damage

RESPONSE:

Defendant refers Plaintiffs' to the Smith matter, which was filed after this case. Plaintiffs' counsel already has all relevant information about this matter. Further, while not arising out of a personal injury claim, Defendant refers Plaintiffs' to *Baize v. R.G. Galls et al.*, which involves a Deceptive Trade Practices Act/Breach of Contract/Fraud claim in regard to the sale of a tub. Plaintiffs' counsel already has all relevant information about this matter. Jacuzzi does not concede that either are similar to the subject incident, relevant, or admissible.

Defendant objects to this interrogatory because it is overly broad without reasonable limitation in scope, unduly burdensome, and seeks information irrelevant to the subject matter of this action and is not likely to lead to the discovery of relevant or admissible evidence. The interrogatory is vague and ambiguous. Furthermore, the interrogatory seeks information irrelevant to the subject matter of this action and that is not likely to lead to the discovery of relevant or admissible evidence because subsequent incidents are not relevant to

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Defendants' notice and Defendants contend subsequent incidents are at most only relevant to show the presence of an ongoing dangerous condition. The interrogatory is vague and ambiguous in its use of the word "damage," because "damage" is not limited to personal injury and could be construed to include property damage, which is not relevant to the claims at issue. Defendant objects to this request as overbroad to the extent it would include unrelated claims, such as property damage claims or claims unrelated to the vague defects claimed to have caused plaintiffs' injuries, or dissimilar products. Such claims are outside the scope of Rule 26(b) and not included in Defendant's response.

INTERROGATORY NO. 19:

State if at any time any employee, agent, customer or end user complained of or objected to the design of the subject Jacuzzi walk in tub or similar model with respect to the means used to provide safety. If so, provide copies of all relevant documents in your possession.

SUPPLEMENTAL RESPONSE:

Limiting its response to the scope set by the Discovery Commissioner for claims of personal injury or death for any Jacuzzi® Walk-In Tub, pursuant to NRCP 33(d), Jacuzzi refers Plaintiffs to the previously produced subsequent incidents, identified as JACUZZI002912-002991, and the *Smith* matter. Further, while not arising out of a personal injury claim or relating to product safety, Defendant refers Plaintiffs to *Baize v. R.G. Galls et al.*, which involves a Deceptive Trade Practices Act/Breach of Contract/Fraud claim in regard to the sale of a tub. Jacuzzi further states that it is not aware of any employee or agent that complained of or objected to the design of the subject Jacuzzi® Walk-In Tub.

Defendant objects because the interrogatory is overly broad without reasonable limitation in scope because it was not limited to substantially similar bathtubs, and was not limited by any sort of timeframe. Further, it is unduly burdensome because it requires Jacuzzi to review thousands of records for any complaints regarding "the means used to provide safety," which is vague and nonsensical. Further, it seeks information irrelevant to the subject matter of this action and is not likely to lead to the discovery of relevant or admissible evidence because it seeks records related to irrelevant aspects of the tub and

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dissimilar incidents. The Interrogatory is also vague and ambiguous because "the means used to provide safety" is undefined and nonsensical. Further, the interrogatory seeks information protected from disclosure by the right of privacy of third parties, because it would require Jacuzzi to produce the its customers' personal information without their consent. Further, the interrogatory improperly requests the production of documents.

INTERROGATORY NO. 22:

Do you contend that the Plaintiff misused or abused the subject Jacuzzi Walk-In-Tub and/or applied a use that was neither intended nor reasonably foreseeable by you, or was otherwise contributorily negligent? If so, please state the particulars therefor.

SUPPLEMENTAL RESPONSE:

Jacuzzi contends that Ms. Cunnison would not have gotten stuck in the subject Jacuzzi Walk-In Tub if she was using it properly. Jacuzzi contends that if Plaintiff was physically unable to use the bathtub safely, she should not have used it. Discovery is ongoing, and the extent to which Ms. Cunnison's misuse, abuse, medical condition, or otherwise contributory negligence may have caused or contributed to the subject incident is still under investigation, and the issues are anticipated to be addressed in part by Defendant's designated experts. Jacuzzi will supplement this response consistent with its obligation under NRCP 26(e).

INTERROGATORY NO. 26:

Please identify each of your employees and/or agents who has conducted any analysis or investigation of subject Jacuzzi Walk-In-Tub or conducted any interviews with other persons who claim to have knowledge of facts in connection with the subject incident.

SUPPLEMENTAL RESPONSE:

Plaintiffs' counsel or representatives have been present for all of Jacuzzi's inspections of the subject Walk-In Bathtub. In its response to Interrogatory No. 2, Defendant identified the individuals who were present for the inspections. **Defendant also refers Plaintiffs to Defendants' expert disclosures and reports.** Defendant has no other non-privileged information responsive to Plaintiff's Interrogatory.

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Defendant objects to the Interrogatory to the extent that it requests any information protected by the attorney work product doctrine or materials protected by attorney-client privilege.

DATED this 28th day of December, 2018.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT JACUZZI INC. dba JACUZZI LUXURY BATH'S SUPPLEMENTAL RESPONSE TO PLAINTIFF DEBORAH TAMANTINI'S FIRST SET OF INTERROGATORIES** by the method indicated below, addressed to the following:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

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

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

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Defendant Pro Per

DATED this 28th day of December, 2018.

/s/ Julia M. Diaz
An Employee of Snell & Wilmer L.L.P.

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EXHIBIT “8”

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Steven D. Grierson
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Attorneys for Defendant
Jacuzzi Inc. doing business as Jacuzzi Luxury Bath

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

DEFENDANT JACUZZI INC. DBA JACUZZI LUXURY BATH'S MOTION TO STAY

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SUBCONTRACTORS 1 through 20, inclusive,

Defendants.

AND ALL RELATED CLAIMS.

Defendant Jazuzzi, Inc. doing business as Jacuzzi Luxury Bath ("Jacuzzi" or "Defendant") by and through its counsel at the law firm of Snell & Wilmer L.L.P., hereby file this Motion to Stay (the "Motion"). This Motion is based on the Memorandum of Points and Authorities herein, all papers on file with this Court, the exhibit(s) submitted herewith, and any oral argument this Court may entertain at the time of hearing.

DATED this 9th day of January, 2019.

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NOTICE OF MOTION

TO: ALL PARTIES AND THEIR RESPECTIVE COUNSEL:

PLEASE TAKE NOTICE that the undersigned will bring **DEFENDANT JACUZZI INC. DBA JACUZZI LUXRY BATH'S MOTION TO STAY** on for hearing on the 11 day of February, 2019, at the hour of In Chambers a.m./p.m., in Department 2, or as soon thereafter as counsel may be heard.

DATED this 9th day of January, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

Jacuzzi filed a Petition for Writ of Prohibition on December 7, 2018, and which was accepted by the Nevada Supreme Court on December 10, 2018, seeking relief from a broad discovery order[1] requiring it to produce the private information of its consumers, where the information ordered to be produced has no probative value or bearing on the facts of this action. *See* Exhibit 1. For the reasons described below, Jacuzzi seeks a stay of the requirement that it produce that information until the Nevada Supreme Court or Court of Appeals adjudicates the Petition.

I. A BRIEF STAY OF PROCEEDINGS IS WARRANTED

Under Nevada Rule of Appellate Procedure 8(c), Nevada courts consider the following four factors when evaluating whether to grant a stay pending the resolution of a writ petition:[2] "(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." NRAP 8(c); *see also Hansen v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 650, 657 (2000). All four factors weigh in favor of staying the order requiring Jacuzzi to produce unredacted customer information relating to not just the model of walk-in tub at issue in this case, but every Jacuzzi® walk-in tub, even those with very different designs, and even those with characteristics very different from those that allegedly contributed to Ms. Cunnison's injury until after the Nevada Supreme Court indicates if it will consider Defendant's Petition and in further staying this case pending resolution of the Petition if the Nevada Supreme Court decides to consider it.

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[1] The district court adopted the discovery commissioner's report and recommendation on November 5, 2018.

[2] Although this rule specifically addresses a stay of proceedings pending an appeal, the Nevada Supreme Court has recognized that this rule also applies to writ petitions challenging orders issued by a district court. *See Hansen*, 116 Nev. at 657.

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A. The Object of Defendant's Petition Will Be Defeated Absent A Stay.

Defendant's Petition seeks a writ of prohibition ordering the district court to vacate its order requiring Jacuzzi to disclose unredacted customer information related to every bodily injury incident related to any Jacuzzi® walk-in tub, as opposed to only incidents regarding seriously bodily injury or death related to the walk-in tub at issue in this case and involving incidents that are not substantially similar to the subject incident, which Jacuzzi has already produced. Should this Court not stay any requirement that Jacuzzi produce such information, the Petition's purpose will be defeated.

Much like the disclosure of attorney-client privileged information, *Cotter v. Eighth Judicial Dist. Court*, 134 Nev. Adv. Op. 32, 416 P.3d 228, 231–32 (2018), the disclosure of irrelevant information is a bell that cannot be un-rung, *Schlatter v. Eighth Judicial Dist. Court in and for Clark Cty.*, 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977). Indeed, the Nevada Supreme Court has granted writ relief to vacate a discovery order that required disclosure of irrelevant information, because being forced to comply with such an order and challenge it later on appeal is not an adequate remedy. *Id.* And the reason is obvious: "the disclosure of irrelevant matter is irretrievable once made." *Id.* Granting the stay is the only way to ensure that the first object of Defendants' Petition.

B. Defendant Will Suffer Irreparable Harm Without a Stay.

This Court should order a stay to avoid the irreparable harm that would otherwise result. First, Jacuzzi's customers will experience a serious invasion of their privacy. Jacuzzi's customers often choose to work with Jacuzzi directly and privately when experiencing any issues with a product. These customers had no reason to think that Jacuzzi would share this information with anyone else, and it is both harmful and unfair to Jacuzzi's customers to have such information divulged. This is especially true when the result of this disclosure will likely be exactly what they sought to avoid by working with Jacuzzi directly—counsel for Plaintiffs contacting them without warning, and having to deal with or share their incident with others when they initially chose not to.

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Second, and relatedly, Jacuzzi's general reputation and customer relationships will inevitably be harmed by the disclosure of its customers' private information. Jacuzzi's customers legitimately expected the private information they shared with Jacuzzi to stay with Jacuzzi—at most, they might have expected Jacuzzi to do some follow up contacts. But they certainly would not have expected that, by resolving an issue with Jacuzzi privately and directly, Jacuzzi would share that information with attorneys without their permission, who will contact them to discuss the incident they chose to keep private. This will undoubtedly cause Jacuzzi's current customers to mistrust Jacuzzi both generally and regarding Jacuzzi's ability to keep their information private, thereby irreparably harming Jacuzzi's relationship with these customers. This will likewise harm Jacuzzi's general reputation, as these customers with dissimilar incidents (and others with whom they speak), will get the false impression that their incident is somehow part of a larger problem, when the incidents in reality are so dissimilar that they are not even relevant, as explained above.

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C. Plaintiffs Will Not be Prejudiced by a Stay.

Plaintiffs will suffer no prejudice if this stay is granted. As a preliminary matter, delay by itself does not constitute prejudice sufficient to warrant denial of a stay. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 253, 89 P.3d 36, 39 (2004) ("a mere delay in pursuing discovery and litigation normally does not constitute irreparable harm").

Moreover, Plaintiffs already have from Jacuzzi the only arguably relevant other incident(s)—the incidents alleging serious bodily harm or death relating to the walk-in tub at issue arising under substantially similar circumstances. Plaintiffs therefore have little need for other incidents of alleged non-serious bodily harm that, at best, are only barely relevant. *See id.* That small need is dwarfed by prejudice to Jacuzzi and its customers from Jacuzzi having to produce all of the potential incidents covered by the district court's order. Thus, even assuming the other incidents covered by the district court's order are marginally relevant, the district court still abused its discretion by compelling disclosure of them in light of the prejudice to Jacuzzi and its customers.

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D. Defendant is Likely to Prevail on the Merits.

The substantial merits of Defendant's Petition are set forth in the Petition and in prior briefing to this Court. Jacuzzi has already produced the universe of possibly relevant other incidents involving the tub in question. But this Court's order also requires Jacuzzi to produce irrelevant other incidents it may have, and to disclose personal and private information of consumers that have purchased a Jacuzzi® walk-in tub. By definition, the Court's order requires only the production of irrelevant information—that is, incidents that are not substantially similar to the one here. Jacuzzi is therefore likely to prevail on the merits.

First, Jacuzzi has no adequate remedy other than a writ of prohibition. This Court has made clear that when a district court orders the discovery of irrelevant information, waiting to challenge that order later on appeal is not an adequate remedy, because once a party has to find and disclose irrelevant information, such disclosure cannot be undone. Writ relief is therefore appropriate. Second, this Court's order requires the disclosure of irrelevant information, and the Nevada Rules of Civil Procedure allow parties to discover only relevant information. Third, even if the other, dissimilar incidents were even a little relevant, such relevance must be balanced against the burden on Jacuzzi and the needs of the case. But Plaintiffs have no need at all for marginally relevant, other incidents, when Jacuzzi has already produced all of the relevant (and now irrelevant) other incidents, particularly not at the cost of customer privacy and reputational harm to Jacuzzi.

Of course, Defendant recognizes that this Court has rejected these arguments. Nevertheless, Defendant respectfully suggests that the most prudent course of action would be to give the Nevada Supreme Court an opportunity to determine if it will order briefing on Defendant's Petition before proceeding.

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II. CONCLUSION

For these reasons, the court should stay any requirement that Jacuzzi disclose unredacted customer information concerning the unrelated events.

DATED this 9th day of January, 2019.

SNELL & WILMER L.L.P.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT JACUZZI INC. DBA JACUZZI LUXRY BATH'S MOTION TO STAY** by the method indicated below, addressed to the following:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

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

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

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DATED this 9th day of January, 2019.

/s/ Julia M. Diaz
An Employee of Snell & Wilmer L.L.P.

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EXHIBIT “9”

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Jacuzzi Inc. doing business as Jacuzzi Luxury Bath

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

OPPOSITION TO PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC. d/b/a JACUZZI LUXURY BATH'S ANSWER FOR REPEATED, CONTINUOUS AND BLATANT DISCOVERY ABUSES ON ORDER SHORTENING TIME

DATE: February 4, 2019
TIME: 10:30 a.m.

SUBCONTRACTORS 1 through 20, inclusive,

Defendants.

AND ALL RELATED CLAIMS.

Defendant Jacuzzi, Inc. dba Jacuzzi Luxury Bath ("Jacuzzi") hereby files its Opposition to Plaintiffs' Renewed Motion to Strike Jacuzzi's Answer for Repeated, Continuous and Blatant Discovery Abuses on Order Shortening Time. This Opposition is based on the following Memorandum of Points and Authorities, the exhibits attached hereto, the pleadings and papers on file herein, and any oral argument this Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, perhaps recognizing the frailty of their case, filed this procedural ruse for terminating sanctions, on an unnecessary order shortening time, in a contrived effort to avoid addressing the merits, or lack thereof, of their case. Plaintiffs' half-baked concoction that Jacuzzi has engaged in "repeated discovery abuses" or is withholding innocuous, non-responsive and irrelevant information only serves to underscore the weakness of their case. Despite Plaintiffs' angry rhetoric and finger-pointing, Jacuzzi did not, and has not, hid anything and has acted in good faith throughout discovery in this matter. Importantly, Jacuzzi has produced all personal injury or death claims from 2008 to present pursuant to the Discovery Commissioner's rulings.

In addition to demonstrating the weakness in their case, Plaintiffs' Motion also reveals that they fail to grasp the elements necessary to prevail on their product liability and negligence claims. Plaintiffs argue that irrelevant letters and opinions from Jerre Chopper—a disgruntled customer who was never injured—are the "smoking gun" evidence that Jacuzzi was on "notice" that the subject Tub was dangerous and defective. But Plaintiffs cannot explain how the documents are responsive, relevant, or least of all admissible. Nor can Plaintiffs provide an explanation as to how documents related to slipperiness would advance the preparation of their case, or in the alternative, how such absence has prejudiced the preparation of their case. Simply put, Plaintiffs' case has not been prejudiced in any way.

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Contrary to Plaintiffs' gross misstatement of the history of this case, throughout discovery Plaintiffs have engaged in harassing litigation tactics and sought discovery that is overbroad, unrelated to the specific claims in this action, irrelevant, and protected by various privileges. Plaintiffs are simply unhappy with the Discovery Commissioner's treatment of their prior motion to strike Jacuzzi's answer and inappropriate sanctions motion. And now, Plaintiffs are further trying to harass Jacuzzi with the instant Motion. But Jacuzzi has complied with Court orders and produced records showing all incidents from 2008 to the present involving claims for personal injury or claims of death, regardless of similarity to Plaintiffs' claims. This is not good enough for Plaintiffs who continue to falsely accuse Jacuzzi of hiding information. Plaintiffs' harassing litigation practices must stop.

Ultimately, the claims against Jacuzzi are about whether a specific product—a Jacuzzi® model no. 5229 Walk-In Tub installed in 2013—was defective. Plaintiffs' litigation of this case has not been about this—rather, it has been about the litigation itself and Plaintiffs' frustration that they cannot find a "smoking gun" that does not exist. Despite Plaintiffs' assiduous efforts to camouflage the patent insufficiency of their contrived claims with page-after-page of purple prose, an examination of the facts makes it apparent that their allegations have no merit. Therefore, this Court should deny Plaintiffs' Motion.

II. BACKGROUND FACTS

This is a product liability action involving vague claims (which have materially changed throughout the litigation) that a Jacuzzi® model no. 5229 Walk-In Tub (the "Tub") was defectively designed or that the warnings related to the Tub were insufficient. In October 2013, Decedent Sherry Cunnison ("Decedent") purchased the Tub from Defendant AITHR Dealer, Inc. ("AITHR") and was warned that she would be a "very tight fit" in the Tub. Nonetheless, she selected the Tub and it was installed in her home on January 27, 2014. Plaintiffs allege that about a month after installation, Decedent was using the Tub and somehow became stuck and unable to exit.[1] On February 21, 2014, a well-being check was performed and Decedent was found in the

[1] *See* Plaintiffs' Fourth Amended Complaint, ¶ 27-29.

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Tub.[2] She died at the hospital on February 27, 2014.[3]

Notably, Plaintiffs have not specifically identified any alleged defect and their vague claims have materially changed since this action was filed. First, Plaintiffs claimed the incident was due to the Tub not draining, trapping Decedent in the Tub. Specifically, the original Complaint filed February 3, 2016 alleged that the incident occurred when Decedent "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."[4] Plaintiffs maintained that theory of liability in the First and Second Amended Complaints. When testing unequivocally proved that claim meritless, Plaintiffs changed their theory of liability to vague references regarding the grab bars and inward opening door. It wasn't until recently that Plaintiffs now apparently are pursuing the theory that the Tub is too slippery. But nowhere in any of Plaintiffs' four amended complaints are there any allegations that the Tub is defective in that it's too slippery, despite Plaintiffs now claiming for the first time that slipperiness is "critical" to their allegations.[5]

The Tub was manufactured by Jacuzzi under a Manufacturing Agreement with Defendant firstSTREET for Boomers & Beyond, Inc. ("firstSTREET").[6] firstSTREET and its affiliates had the exclusive right to sell and market the Tub. Decedent purchased the Tub from firstSTREET's affiliate, AITHR.

Plaintiffs are Decedent's estranged daughter (who had no contact with her mother for 18 years prior to Decedent's death), Decedent's estate, and Decedent's deceased son's estate. Plaintiffs allege causes of action against all defendants for negligence and strict product liability for defective design, manufacture, or failure to warn, claiming that defendants' actions were the cause of Decedent's death. They also seek punitive damages.

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[2] Plaintiffs' Fourth Amended Complaint, ¶ 31.
[3] *Id.* at ¶ 35.
[4] See Plaintiffs' Complaint, ¶ 24.
[5] Contrary to Plaintiffs' statement in FN 16 suggesting Decedent told multiple police officers and paramedics that she "slipped when she was reaching for controls," only one police officer testified to this.
[6] *See* Manufacturing Agreement (October 1, 2011)("Manufacturing Agreement"), attached at Exhibit 1, submitted to this Court in-camera.

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III. DISCOVERY HISTORY

This case has been pending since 2016 and the parties have engaged in significant discovery. The parties have taken 26 depositions and served several sets of written discovery. Pursuant to Plaintiffs' written requests and its own discovery obligations, Jacuzzi has identified and produced over 4500 pages of documents. Discovery, however, has been contentious and the Discovery Commissioner has been actively involved in the parties' discovery disputes.

A. Discovery Regarding "Other Incidents"

To date, Jacuzzi has identified all prior and subsequent claims for alleged bodily injury or death related to the Tub in question (as well as all other models of walk-in tubs regardless of differences in design, as ordered by the Discovery Commissioner). At the outset of discovery, Jacuzzi did not hide the fact that its disclosures were limited to *prior* incidents, and Plaintiffs had full knowledge of this. Jacuzzi disclosed this at least three times. First, Jacuzzi stated in its responses to Plaintiffs' written discovery *explicitly* that it limited its response to *prior incidents.*

> **Interrogatory No. 11:**
> Please state whether the Defendant has ever received notice, either verbal or written, from or on behalf of any person claiming injury or damage from his use of a Jacuzzi Walk-In Tub which is the subject of the litigation.
>
> If so, please state:
> (a) the date of each such notice;
> (b) the name and last known address of each person giving such notice; and
> (c) the substance of the allegations of such notice
>
> **Response:**
> Defendant is only aware of the claims of injury brought by Plaintiffs' attorney. This response is limited to injury claims made ***prior to the subject incident*** and to the subject Jacuzzi®Walk-In Bathtub model that are similar to the vague claims that have been asserted in this action.
>
> Defendant objects because the interrogatory is overly broad without reasonable limitation in scope, unduly burdensome, and seeks information irrelevant to the subject matter of this action and is not likely to lead to the discovery of relevant or admissible evidence. The interrogatory is vague and ambiguous. The interrogatory seeks information protected from disclosure by the right of privacy of third parties.[7]

[7] See Jacuzzi's Responses to Plaintiffs' First Set of Interrogatories, 9:21-28; 10:1-9 (emphasis added)("Jacuzzi's

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Similarly, in response to Plaintiffs' Requests for Production, Jacuzzi specifically noted that its responses were limited to materials (e.g., test reports, design documents, etc.) from *prior* to the incident.[8]

Second, after several meet and confer conferences, Jacuzzi's counsel even agreed to search for other prior incidents using Plaintiffs' grossly overbroad proposed search terms.[9] Plaintiffs were specifically informed that Jacuzzi searched for "*prior incidents* related to the claims asserted in this case," and still had nothing to disclose.[10] Third, Plaintiffs' deposition notice of Jacuzzi's 30(b)(6) designee had five topics requesting substantive knowledge of *prior* incidents: topics 48, 50, 51, and 52.[11] Jacuzzi served a response to Plaintiffs' deposition notice, and in response to each of these topics, stated that it would produce a witness to testify regarding incidents *prior* to the subject incident, if any.[12] Jacuzzi's NRCP 30(b)(6) designee, William Demeritt, offered that testimony.

On May 24, 2018, Mr. Demeritt, Jacuzzi's Vice President and Director of Risk Management, testified as one of Jacuzzi's NRCP 30(b)(6) designees. As discussed, he was only designated to testify regarding prior incidents and Jacuzzi's search of its records regarding prior incidents, if any.[13] He testified that there were no such incidents and identified the individuals that assisted him and counsel in searching Jacuzzi's records.[14] Plaintiffs' counsel then expanded the scope of inquiry and asked Mr. Demeritt if there were any *subsequent* incidents and Mr. Demeritt testified that he was not aware of any.[15] Despite knowing the proper scope of

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Responses to First Interrogatories)(June 19, 2017), attached as Exhibit 2.

[8] *See* Jacuzzi's Responses to Plaintiffs' First Set of Requests for Production ("Jacuzzi's Responses to First RFPs")(June 19, 2017), 13:1-12; 16:18-28; 17:1-3; 18:8-20, attached as Exhibit 3.

[9] Declaration of Joshua Cools in Support of Opposition to Plaintiffs' Motion to Strike ("Cools Decl. in Support of Opp. to Pltf. Motion to Strike")(July 12, 2018) at ¶ 5, attached as Exhibit 4.

[10] *Id.* at ¶ 3; April 23, 2018 letter from J. Cools to B. Cloward ("April 23, 2018 Letter"), attached as Exhibit 5.

[11] *See* Plaintiffs' Fifth Amended Notice to Take Videotaped Deposition of 30(b)(6) for Jacuzzi ("Plaintiff's 5th Amended Deposition Notice") at 13:9-28; 14:1-7, attached as Exhibit 6, wherein Plaintiffs specifically note that they "seeks [sic] to obtain information regarding prior incidents involving slips and falls while using or while exiting or entering any Jacuzzi products including but not only the fall itself but also the inability of an end user to remove themselves after having had [sic] fallen inside the tub" for topics 48 and 50.

[12] *See* Jacuzzi's Objection to Plaintiffs' Fifth Amended Notice to Take Videotaped Depositions of 30(b)(6) for Jacuzzi ("Obj. to Pltf.'s 5th 30(b)(6) Notice") at 26:13-28; 27:1-27; 29:1-28; 30:1-3, attached as Exhibit 7.

[13] *Id.* at 26:13-28; 27:1-27; 29:1-28; 30:1-3.

[14] Deposition of Bill Demeritt ("Demeritt Depo.")(May 24, 2018) at 16:1-25:25, excerpts attached as Exhibit 8.

[15] *Id.* at 76:1-77:2.

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testimony, Plaintiffs attempted to trick Mr. Demeritt by then inquiring about any other incidents, not just prior incidents. Any statements by Mr. Demeritt regarding his knowledge of the entire universe of "other incidents" that included any subsequent incidents were outside the scope of the deposition. The fact that Mr. Demeritt was not prepared to discuss subsequent claims or forgot they existed does nothing to show that Jacuzzi was willfully hiding evidence.

i. CPSC Documents

Plaintiffs' statement that Jacuzzi "never produced or identified any claims from the CPSC" is simply untrue. Pltf Mtn. at 33:16. Jacuzzi did produce CPSC complaints.[16] And the CPSC claim Plaintiffs disclosed for the first time during Mr. Demeritt's deposition involved an incident that allegedly occurred more than two years after Decedent's death. The unnamed complainant in the post on the CPSC website was allegedly pushed off the seat of the tub by the tub's jets on July 18, 2016 (a claim substantially different than Plaintiffs' most recent claim that Decedent slipped off the seat while reaching for the tub controls; *see* Motion at 4:5-7).[17] The complainant made the report on August 24, 2016, and the report was sent to the manufacturer on October 3, 2016. Significantly, while the complainant was unhappy with the listed product, **there was no personal injury alleged**.

ii. The Baize incident consists of claims related to misrepresentations during the sales process.

Leonard Baize's ("Baize") incident that Plaintiffs disclosed for the first time during Mr. Demeritt's deposition occurred months after Decedent's incident.[18] The complaint was filed on June 17, 2016, and is based on alleged misrepresentations made during the sales process by a third party. Specifically, the complaint alleges that Baize weighed approximately 500 pounds and was concerned about fitting into the tub.[19] The third party allegedly measured Baize due to the concerns, and Baize was thereafter persuaded to purchase the tub based on the sales presentation by the third party. After installation, due to the seat being too narrow for Baize, he allegedly got

[16] *See* August 17, 2018 Letter from J. Cools to B. Cloward ("August 17, 2018 Letter"), attached as Exhibit 9.
[17] *Id.*
[18] Baize Petition at 7-8, attached as Exhibit 10.
[19] *Id.*

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stuck in the tub causing "bruising to his stomach area and scrapes." Nevertheless, the *Baize* action is based on misrepresentations made during the sale process by a third party, and is not a complaint for personal injury, and is not a complaint alleging the tub was in any way defective. The complaint alleged three causes of action: (1) breach of the Texas Deceptive Trade Practices-Consumer Protection Act; (2) breach of contract; and (3) common law fraud.[20] Baize's actual claim for damages in the complaint is limited strictly to economic damages and "mental anguish and suffering," not personal injury.[21] Just as the CPSC complaint, this was an irrelevant subsequent claim and was not making any claim for personal injury.

B. Plaintiffs' First Motion to Strike

Despite that Jacuzzi produced all documents related to personal injury claims prior to the subject incident (and consistently represented this to Plaintiffs), on June 22, 2018, Plaintiffs filed their first baseless Motion to Strike Jacuzzi's Answer[22]—not a motion to compel which would have been the proper course of action—asserting largely the same allegations Plaintiffs make in the instant Motion. Plaintiffs also filed a Motion for Sanctions against Jacuzzi for "failure to produce evidence,"[23] claiming they were entitled to sanctions, including, again, striking Jacuzzi's answer, because Jacuzzi did not produce photos taken by counsel. At the July 20, 2018 hearing, the Discovery Commissioner denied Plaintiffs' motion for sanctions, stating:

> DISCOVERY COMMISSIONER: The last motion I have is plaintiff's motion for sanctions for failure to produce evidence. I thought I was back in law school as I was preparing for this one.
> I'm just going to tell you right up front I'm denying the motion.
> The issue is work product. It's qualified privilege. Everybody was out there inspecting. Everyone can take photographs.[24]

Plaintiffs' Motion to Strike Jacuzzi's Answer was continued to August 29, 2018, and Jacuzzi was ordered to produce any ***personal injury or death*** claims involving a Jacuzzi walk-in tub with an

[20] *Id.*
[21] *Id.* at 11-12.
[22] *See* Plaintiffs' Motion to Strike Defendant Jacuzzi, Inc.'s Answer, attached to Plaintiffs' Motion as Exhibit 16.
[23] *See* Plaintiffs' Motion for Sanctions Against Defendant Jacuzzi, Inc., attached to Plaintiffs' Motion as Exhibit 17.
[24] *See* July 20, 2018 Hearing Transcript, attached hereto as Exhibit 11.

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inward opening door from 2008 to August 17, 2018.[25] The Discovery Commissioner explained that:

> DISCOVERY COMMISSIONER: I agree with you that I think your discovery for the most part talked about prior incidents, but there were discovery requests that were not specific to just before, but all -- included all types of incidents or notice of, and there was no specific timeframe….Whether or not every incident is going to be admissible or not will not be determined by myself, but I think in terms of looking at the injuries overall, and even trying to place them -- I can't think of the word I'm looking for -- a continuum, you know, from less serious to more serious, I think understanding what kind of problems this Jacuzzi tub has had over time is relevant.
> And before a decision is made whether or not an answer should be stricken -- and I will tell you I'm going to continue the motion on my calendar. I want to see what is produced. **If it appears that there is a sufficient concern that evidence wasn't timely produced, or there's a problem with the production, I may end up having to defer it to the District Court Judge** because it's a dispositive sanction under Rule 37, one that I am not going to hear…
> ***
> MR. COOLS:… I just have to say -- or the last motion -- it troubles me that plaintiffs are using a motion to strike in place of doing a meet and confer over the subsequent incidents when that has been clear from our discovery responses throughout this case. They've had this --
> DISCOVERY COMMISSIONER: Which is --
>
> MR. COOLS: -- for eight months.
>
> DISCOVERY COMMISSIONER: -- why I provided the alternative relief that I did, and I'm not -- I'm probably not -- I want to see what you turn over, what the extent of it is, and give the plaintiffs' counsel a chance to look at it. I may just end up denying the motion when you come back to see me on the 29th. **I can pretty much guarantee you I will not be hearing it if I think that there's a sufficient reason to hear it. I would defer it to the District Court Judge** because it's case terminating sanction. But I want to provide the alternative relief.[26]

Following the Court's direction at the July 20, 2018 hearing, Jacuzzi performed a subsequent incident search for any claims for injury or death. Jacuzzi then promptly produced the

[25] *See* Discovery Commissioner Report and Recommendations (signed August 21, 2018), attached hereto as Exhibit 12.
[26] *See* July 20, 2018 Hearing Transcript at 9:10-3; 10:15-11-16; 20:1-16.

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database entry for each relevant hit to Plaintiffs' counsel.[27] Jacuzzi's search included a search of its customer and warranty databases, and notifications to Jacuzzi's legal department and risk management department.[28] At the August 29, 2018 hearing, based on Jacuzzi's good faith and proper discovery responses, the Discovery Commissioner ultimately denied Plaintiffs' Motion to Strike the Answer and did not defer it to this Court, despite repeated suppositions from Plaintiffs' counsel.[29]

C. Plaintiffs Served Additional Discovery Seeking More Than Just Other Similar Incidents

After Jacuzzi produced the incident reports for the handful of responsive (but irrelevant) subsequent incidents it found in response to the Discovery Commissioner's order, Plaintiffs served additional discovery requests that sought more than just other incidents of personal injury or death, but information about any other incident or complaint involving any use of a walk-in tub, regardless of injury:

> **REQUEST NO. 24.**
> All documents containing information pertaining to any other lawsuit to which you were a named party regarding a consumer's use of one of your walk-in tubs.
>
> **REQUEST NO. 25.**
> All documents containing information pertaining to any other insurance claim to which you were a named party regarding a consumer's use of one of your walk-in tubs.
>
> **REQUEST NO. 41.**
> All reports, logs, etc. memorializing any incident involving consumer use of any of your Walk-in Tubs, for the period from January 1, 2012 to the present.
>
> **REQUEST NO. 42.**
> All reports that you received from the U.S. Consumer Product Safety Commission regarding your Walk-in Tubs from January 1, 2012 to the present.
>
> **REQUEST NO. 43.**
> All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.[30]

[27] August 17, 2018 Letter from J. Cools to B. Cloward.
[28] *Id.*
[29] *See* July 20, 2018 Hearing Transcript at 4:8-15.
[30] *See* Plaintiffs' Second Request for Production of Documents to Jacuzzi, Inc. (August 27, 2018), attached hereto as Exhibit 13.

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By their terms, these requests included not only complaints involving no injury at all, but even complaints for which there is no potential for injury—even though the Discovery Commissioner had already limited Jacuzzi's other incident disclosures to claims for injury or death. Jacuzzi would have had to produce, for example, customer complaints about the color of Jacuzzi's tubs, because those would be "complaints made to [Jacuzzi] about [its] Walk-In Tubs."

Based on the all-encompassing nature of these overbroad discovery requests, Jacuzzi moved for a protective order that would relieve Jacuzzi from having to answer these abusive requests.[31] Plaintiffs opposed, and following a hearing, the Discovery Commissioner ordered Plaintiffs' to revise the scope of the requests from any complaint or incident imaginable to all bodily injury and wrongful death claims.[32] Though Jacuzzi objected to that broad order, it nonetheless complied, producing evidence of all prior and subsequent claims for injury, even if minor, and even if dissimilar. As ordered, Jacuzzi also produced a spreadsheet of results of its search for similar incidents and information regarding its prior search based on Plaintiffs grossly overbroad search terms from the Spring 2018, along with an explanation of Jacuzzi's search to the Discovery Commissioner for in camera inspection. At the hearing on November 2, 2018 regarding the Discovery Commissioner's in-camera review of Jacuzzi's documents, the Commissioner determined that the additional documents submitted to her were protected from disclosure.[33]

Simply put, contrary to Plaintiffs' patently false statement that they have only attempted to discover similar incidents involving the Tub and substantially similar models (Pltf. Mtn. at 1:18-19), Plaintiffs have engaged in a scorched earth discovery campaign seeking information regarding every product Jacuzzi sold or licensed to firstSTREET, information regarding complaints of all Jacuzzi products (not limited to walk-in tubs), every model of walk-in tub (regardless of similarity to the subject Tub), and every "complaint" involving a walk-in tub

[31] *See* Jacuzzi's Motion for Protective Order (September 13, 2018).
[32] Discovery Commissioner Report and Recommendations (signed October 16, 2018)("October 16, 2018 DCRR"), attached as Exhibit 14.
[33] *See* Discovery Commissioner's Report and Recommendation (signed January 3, 2019)("January 3, 2019 DCRR"), attached as Exhibit 15.

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regardless of the similarity to the subject incident, as well as information on other unrelated Jacuzzi® products, such as a shower seat.

D. Jerre Chopper's Communications Do Not Relate to Injury

Contrary to Plaintiffs' inflammatory and baseless assertion that Jacuzzi must have accidentally produced the Jerre Chopper documents, Jacuzzi voluntarily produced the documents identifying Jerre Chopper, even though her contact with Jacuzzi indisputably does not fall within the scope of discovery regarding other incidents that was ordered by the Discovery Commissioner, nor are they relevant.[34] The documents were produced as part of the production of emails exchanged between Jacuzzi and firstSTREET, even though the emails were not directly requested.

Bottom line, the Chopper documents are not responsive to the Discovery Commissioner's order, and in no way support a claim that Jacuzzi was engaging in discovery abuse. Jerre Chopper is merely an unhappy customer who took issue with the sales tactics used by firstSTREET, and the length of time that it took her tub to fill up; she was **never injured and never made a claim for personal injury or death**:

> 1 Q. It's fair to say that you were an unhappy
> 2 customer; right?
> 3 A. Very.
> 4 Q. And you didn't think that the tub was
> 5 comfortable; correct?
> 6 A. No, I did not.
> 7 Q. You were unhappy with how long it took to
> 8 fill up; right?
> 9 A. I was.
> 10 **Q. You were never injured in this tub, were**
> 11 **you?**
> 12 **A. No.**[35]

Defendants had no duty to disclose **any** documents related to Jerre Chopper's dissatisfaction with her Tub, let alone any duty to disclose her identity. Pltf. Mtn. at 2:16-20.

To argue that the Ms. Chopper letter is the "smoking gun" only highlights the weakness of Plaintiffs' case. And the fact that Plaintiffs' flew to Montana to depose her is a testament to the

[34] *See* Jacuzzi Inc.'s Twelfth Supplemental Disclosure Statement, attached as Exhibit 16.
[35] *See* Deposition Transcript of Jerre Chopper at 132:1-12; 91:23-93:23, excerpts attached as Exhibit 17.

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true nature of their fishing expedition. Ms. Chopper's testimony and opinions are irrelevant and inadmissible.

E. Claims Related to Slipperiness of the Tub

As detailed above, Plaintiffs' theory has materially changed throughout the litigation. First, Plaintiffs claimed the incident was due to the Tub not draining, trapping Decedent in the tub. After pursuing that claim for about 18 months, testing proved the claim had no merit. Then, Plaintiffs changed the theory of defect to vague references related to the placement of grab bars and an inward opening door. Plaintiffs now apparently assert that a "critical part of Plaintiffs' allegations" deal with slipperiness of the Tub, citing to Paragraphs 75-91 of the Fourth Amended Complaint. Pltf. Mtn. at 34:5-6. It is impossible to reconcile this bold statement by Plaintiffs' in the motion with the simple fact that the allegations in the Fourth Amended Complaint do not contain a single reference to "slipperiness" or "slip".[36] In fact, Plaintiffs' own expert Lila Laux, testified during her deposition on October 30, 2018, that she was not critical of the Tub's slipperiness:

> Q. What's the significance of that document?
> A. Well, that was something that plaintiffs' counsel sent me and it's a study of the slipperiness of a tub, two kinds of surfaces. It's actually quite an excellent study -- it's old but it's good -- about what makes a tub slippery. **We all know people slip in tubs,** so what surface is better to prevent that. I have a house with 55-year-old tubs and they don't have any kind of slip resistance.
> **Q. Are you critical of the slip resistance in the Jacuzzi 5229 Walk-In Bathtub**?
> A. **I'm not going to have any criticism of that.**
> Q. What significance did this particular publication have to your report?
> A. To my report, it was just evidence that the business about slipperiness of tubs has been recognized for a long, long time.[37]

For Plaintiffs to represent to the Court that "critical" "allegations" of the Complaint deal with slipperiness is an intentionally misleading claim. Similarly, Plaintiffs' statement to this Court that

[36] *See* Plaintiffs' Fourth Amended Complaint.
[37] Deposition of Lila Laux (October 30, 2018) at 25:20-26:12, excerpts attached as Exhibit 18.

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"[e]xcept two very recently produced (likely inadvertently) communications by Jerre Chopper by Jacuzzi in late November 2018, there has been no other documentation produced by Jacuzzi that would support Plaintiffs allegations and belief that the Tubs are too slippery…" is demonstrably false. Indeed, on August 17, 2018, Jacuzzi produced several documents—that Jacuzzi maintains are irrelevant—including complaints related to the Tub's "slipperiness".[38]

Moreover, while Plaintiffs state that "Jacuzzi has failed entirely to produce any information about the slipperiness of the Tub despite valid discovery request from Plaintiffs' seeking this information," Plaintiffs have not pointed to a single discovery request seeking such information (Pltf. Mtn. at 35:12-13), and Jacuzzi has certainly not been ordered to produce any discovery on slipperiness. More importantly, the Tub's floor was independently tested and found to exceed the industry standard coefficient of friction, and Jacuzzi identified this test report on June 20, 2017, and produced it to Plaintiffs once the appropriate protective order was entered.[39]

Plaintiffs' instant Motion improperly suggests that Jacuzzi is obligated to produce every incident where a customer claims to have slipped—regardless of whether such a claim involved injury or death. It is nonsensical to assert that Jacuzzi is subject to such a disclosure requirement because it would be without regard to relevancy and create an undue burden on Jacuzzi.[40] It is axiomatic that a bathtub, water, gels, shampoos and soap can combine for slips in all bathtubs. In fact, as noted above, Plaintiffs' own expert testified that "slipperiness of tubs has been recognized for a long, long time."

Nevertheless, Plaintiffs argue that they are entitled to case terminating sanctions because "Defendants have entirely failed to produce: [a]ny internal e-mails regarding the slipperiness issues; [a]ny e-mails among Defendants regarding the slipperiness issues; [a]ny e-mails regarding the Kahuna Grip product; [a]ny internal e-mails about customer complaints about the slipperiness

[38] August 17, 2018 Letter; *see also* Exhibit 19 to Pltf. Mtn. to Strike

[39] *See* Jacuzzi Inc.'s Seventh Supplement to Initial Disclosures, and email from J. Cools to B. Cloward (January 30, 2018), collectively attached as Exhibit 19.

[40] *See Schlatter v. Eighth Judicial Dist. Court*, 93 Nev. 189, 192, 561 P.2d 1342, 1343–44 (1977)("… respondent's order went beyond this and permitted carte blanche discovery of all information contained in these materials without regard to relevancy. Our discovery rules provide no basis for such an invasion into a litigant's private affairs merely because redress is sought for personal injury. Respondent court therefore exceeded its jurisdiction by ordering disclosure of information neither relevant to the tendered issues nor leading to discovery of admissible evidence").

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of the Tub; [a]ny e-mails among Defendants regarding customer complaints about the slipperiness of the Tub; [and] [a]any customer complaints on this issue." Pltf. Mtn. at 3:9-16. Putting aside the ridiculousness of Plaintiffs' assertion, Plaintiffs have never brought a motion to compel before the Discovery Commissioner on claims related to slipperiness, let alone attempted to meet and confer with Jacuzzi over these issues—which would be the appropriate course of action. Instead of allowing the Discovery Commissioner an opportunity to hear all parties' arguments and render a ruling on this new "slipperiness issue," Plaintiffs instead improperly chose to bypass the Nevada rules and file a motion for terminating sanctions. The Court should not entertain or encourage this behavior.

In short, Jacuzzi complied with the Court's directive to identify personal injury or death claims related to Jacuzzi's walk-in tub products from 2008 to the present. Plaintiffs are now trying to get around the Discovery Commissioner's ruling by alleging to this Court that Jacuzzi was somehow required to produce all emails (privileged or not) and customer complaints related in any way to "slipperiness issues."

F. Forensic Search of Jacuzzi's Databases

Plaintiffs' representation of the conversation between Plaintiffs' consultants, Ira Victor, Bill Wilder and Yuval Brash, and Jacuzzi's Mark Allen regarding the forensic search is grossly misrepresented.

For background, on September 19, 2018, the Discovery Commissioner heard Jacuzzi's Motion for Protective Order regarding Plaintiffs' Second Requests for Production of Documents. Jacuzzi sought protection from, among other irrelevant and harassing discovery requests, Plaintiffs' RFP No. 17, seeking "mirror images" of Jacuzzi's NRCP 30(b)(6) designees' computer hard drives.[41] The Discovery Commissioner determined that Jacuzzi was protected from responding to RFP No. 17, but a third-party vendor may be permitted to perform a forensic analysis of Jacuzzi's computer systems that contain the data/information relating to customer complaints of injury or death provided that the cost was reasonable.[42] The parties were thus

[41] *See* Jacuzzi Inc.'s Motion for Protective Order (September 13, 2018).
[42] *See* October 16, 2018 DCRR.

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ordered to obtain cost estimates from a third-party vendor to submit to the Discovery Commissioner for discussion at the hearing on November 2, 2018, where she would decide whether the search would take place, and if so, the parameters of the search.[43] Jacuzzi was also directed to provide Plaintiffs with the logistical details necessary for Plaintiffs to obtain an accurate cost-estimate,[44] which it did.[45]

Counsel for Jacuzzi provided Plaintiffs' counsel with information regarding **both** relevant computer systems, Jacuzzi's warranty system and Salesforce[46]—not just the system that contained warranty claims as Plaintiffs' falsely assert in their Motion.[47]

> Ben – Sorry for the delay on getting you the information for obtaining a forensic estimate. **Jacuzzi's warranty system is on IBM Power System I (AS/400)**, located in its Chino Data Center, and consists of 128 MBs. **The Salesforce database is 3.1 GB and located in NA63 which has data centers in Dallas, USA / Phoenix, USA**. I will try to get more information regarding the database formats. **Let me know what specific details your forensic specialist needs**. – Josh[48]

Plaintiffs obtained a cost estimate based on this information, which included a cost assessment for both systems, not just the warranty system.[49]

Nevertheless, Plaintiffs also issued a subpoena *duces tecum* directly to Salesforce.[50] Jacuzzi filed a Motion for Protective Order requesting that the Court quash the subpoena because the subpoena broadly requested confidential, proprietary and irrelevant information related to Jacuzzi and third parties—and the only relevant information that Salesforce might have was documents already subject to production by Jacuzzi.[51] The Discovery Commissioner granted Jacuzzi's Motion for Protective Order regarding the Salesforce subpoena in light of the third-

[43] *Id.*
[44] *Id.*
[45] Email from J. Cools to B. Cloward (October 17, 2018), attached as Exhibit 20.
[46] Salesforce is a CRM cloud company that provides customer care management services (among other services) for its clients. *See* Declaration of Mark Allen (January 21, 2019), attached as Exhibit 21.
[47] *See* Pltf. Mtn. at 28:12-22.
[48] Email from J. Cools to B. Cloward (October 17, 2018).
[49] *See* Plaintiffs' Supplemental Brief in Response to the October 17, 2018 Discovery Commissioner's Report and Recommendation, attached as Exhibit 27 to Plaintiffs' Motion ("Given the fact that the relevant computer data systems are in two locations….").
[50] Plaintiff's Subpoena Duces Tecum for Business Records to Salesforce.com attached as Exhibit 22.
[51] Jacuzzi Inc.'s Motion for Protective Order on Order Shortening Time (October 15, 2018).

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party forensic analysis of Jacuzzi's customer relation databases.[52] Specifically, the Discovery Commissioner ordered that "Plaintiff may proceed with a third party forensic review of Jacuzzi's customer relation databases for information related to other **personal injury or death incidents** involving walk-in tubs. The parties must meet and confer to determine a stipulated protocol for the search.[53]

On November 14, 2018, Jacuzzi's counsel sought a conference with Plaintiffs' counsel regarding the forensic review.[54] Having received no response, Jacuzzi's counsel followed up with Plaintiffs' counsel about setting up a conference regarding the forensic review.[55] On December 7, 2018, Plaintiffs' forensic consultants, Ira Victor, Bill Wilder and Yuval Brash, and Mark Allen ultimately had a conference.[56] This conference was recorded by both parties.[57] The purpose of the conference was to provide basic information to Plaintiffs' consultants to facilitate a search of Jacuzzi's customer relation and warranty databases for claims related to personal injury or death incidents involving Jacuzzi® walk-in tubs.

Mr. Allen provided Plaintiffs' consultants with the relevant information they would need to conduct searches of both the relevant databases that contain warranty and customer service data related to walk-in tubs.[58] Specifically, Mr. Allen explained that Jacuzzi's customer service and warranty information is stored on **two** databases. Jacuzzi's "warranty database" is on IBM Power System I ("AS/400" or "iSeries"). While he referred to the AS/400 generically as Jacuzzi's "warranty database," this database stores not only warranty claims, but also customer service data including calls and complaints.[59] The AS/400 is a partitioned system that is partitioned by business unit—bath business vs. hot tub business—and Mr. Allen discussed the partition that contains all relevant information related to bath products, including but not limited to customer interactions.[60]

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[52] January 3, 2019 DCRR.
[53] *Id.*
[54] Email from J. Cools to B. Cloward (November 14, 2018), attached as Exhibit 23
[55] Email from J. Cools to B. Cloward (November 19, 2018), attached as Exhibit 23
[56] Allen Dec. at ¶ 3.
[57] *Id.* at ¶ 4.
[58] *Id.* at ¶ 6.
[59] *Id.* at ¶ 7.
[60] *Id.* at ¶ 8.

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Mr. Allen further explained that Jacuzzi also stores warranty and customer complaints information on its Salesforce database and explained to Plaintiffs' consultants the interaction between the two databases; Salesforce contains some duplicative data of the AS/400.[61] When Plaintiffs' consultants asked Mr. Allen questions irrelevant to conducting searches for claims of personal injury or death involving walk-in tubs—for example questions about Jacuzzi's overall system infrastructure, how Jacuzzi backs up its data, details of previous searches and what other databases Jacuzzi has—he declined to answer those questions, and specifically told Plaintiffs' consultants, "if you want to discuss the technical part of the AS/400, or the technical part of Salesforce, or how we can actually execute these searches, I'm okay with that."[62]

Contrary to Plaintiffs' false accusations, Mr. Allen discussed both the AS/400 "warranty database" and the Salesforce database; he never stated that he was "instructed only to determine a list of desired search queries."[63] At the end of the conference, Plaintiffs' consultants gave no indication that they did not have the information necessary to conduct a search for personal injury or death claims of both of Jacuzzi's relevant databases. Rather, Ira Victor stated, "I think we've got most of what we need," and Bill Wilder confirmed.[64]

Plaintiffs repeated statements that Jacuzzi is improperly limiting the search to its warranty database and is "obstructing the search" is an intentional misrepresentation. Beyond this, Plaintiffs have never had a meet and confer conference with Jacuzzi regarding their specific grievances related to the consultants' conversation, nor brought this issue before the Discovery Commissioner. Instead, Plaintiffs' improperly raise this issue for the first time in their instant Motion.

G. Jacuzzi Does Not Sell or Market to Directly to Consumer's

Ms. Cunnison purchased the subject Tub through firstSTREET, during the time at which firstSTREET had the exclusive right to sell and market this product.[65] At various times over the

[61] *Id.* at ¶ 9-11.
[62] *Id.* at ¶ 12.
[63] *Id.* at ¶ 13.
[64] *Id.* at ¶ 14.
[65] *See* Jacuzzi's Supplemental Responses to Plaintiff Robert Ansara's Second Set of Interrogatories, attached as Exhibit 24.

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year, independent dealers throughout the country have had the right to sell some other models of Jacuzzi's walk-in tubs that are different than the model Decedent purchased.[66] Jacuzzi and firstSTREET entered into the Manufacturing Agreement clearly outlined the responsibilities of each company.[67] firstSTREET developed and ran any advertisements related to the subject Tub. firstSTREET would, at times, show its advertisements to Jacuzzi, who was primarily reviewing for branding issues.[68] Jacuzzi is not in charge of firstSTREET's marketing or advertising of the Tub.[69]

i. Written Discovery Related to Advertising Materials

Plaintiffs' claim Jacuzzi is subject to sanctions based on its statements that it did not produce marketing materials because this statement is "in direct contradiction with the plain language of the Manufacturing Agreement." Pltf. Mtn. at 37:12-14. This argument is disjointed and illogical. It is undisputed that Jacuzzi did not produce any marketing materials related to the Tub, nor does it sell or market directly to consumers. Moreover, Plaintiffs' discovery requests related to marketing materials asked for materials provided to "elderly folks", "overweight folks" and "folks with mobility issues" and, again, Jacuzzi did not "provide" any marketing materials to the general public.[70] All of this aside, Plaintiffs never brought the purported issue that Jacuzzi has not produced relevant marketing materials before the Discovery Commissioner, likely because Plaintiffs realize that such a motion is baseless and would yield no documents because Jacuzzi did not market this Tub to consumers.

ii. Jacuzzi's NRCP 30(b)(6) Designee Depositions

On May 23, 2018, Jacuzzi produced two witnesses to testify as Jacuzzi's corporate representatives in response to Plaintiffs' 53-topic deposition notice.[71] The deposition of the first

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[66] *Id.*
[67] *See* Manufacturing Agreement.
[68] *See id. at* ¶ 3A.
[69] *See* First deposition transcript of Michael Dominguez (May 24, 2018)("First Dominguez Dep") at 98:21-99:3, excerpts attached as Exhibit 25.
[70] *See* Plaintiff Deborah Tamantini's First Set of Requests for Production of Documents, Nos. 27-32, attached as Exhibit 26.
[71] Plaintiff's 5th Amended Deposition Notice. Prior to the deposition, Jacuzzi served a written response and objections, and a letter identifying the topics on which the two deponents would testify. *See* Objections to 5th Amended Deposition Notice; May 18, 2018 Letter from J. Cools to B. Cloward, attached as Exhibit 27.

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deponent, William Demerritt, covered approximately ten deposition topics.[72] Michael Dominguez, Jacuzzi's director of engineering, then testified to the remaining topics for which Jacuzzi was producing a witness.[73] Plaintiffs' counsel engaged in a contentious line of questioning, which involved going line by line through the Manufacturing Agreement with repeated questions about Jacuzzi's expectations related to the agreement.[74] After Jacuzzi's representative answered several of these questions, Jacuzzi's counsel inquired as to what topic of the deposition notice these questions related to.[75] Jacuzzi agreed to produce a witness generally familiar with the contract and agreements with the other defendants, but Plaintiffs' counsel's questions were harassing and outside the notice parameters, particularly given that the Manufacturing Agreement is a contract that speaks for itself and was prepared by or with the assistance of counsel.

After some conversation about the scope of Plaintiffs' line of questioning related to the Manufacturing Agreement, Plaintiffs unilaterally suspended the deposition.[76] Contrary to Plaintiffs' false assertions, Jacuzzi's NRCP 30(b)(6) designee was never instructed not to answer. Pltf. Mtn. at 39:8-10. Significantly, Plaintiffs' do not cite anywhere in the deposition testimony that Mr. Dominguez was instructed by Jacuzzi's counsel not to answer a question—because this never happened. Indeed, this was a specific finding of the Discovery Commissioner:

> DISCOVERY COMMISSIONER: **Mr. Cloward, they did not instruct the witness not to answer the question**, so they've offered him up for a second deposition, which I am going to grant your motion. I am limiting it to four hours because you've had quite a bit of time with this witness, and I will specifically include or have you include in that Report and Recommendations that it includes the expectations of the defendant with respect to the other defendant.
> I -- please put the names in so it's a little more articulate than what I've just said. But I think that's fine. **I didn't see anything that would have raised a red flag to me that there was an instruction not to answer a question**. So I'm not sure if it's semantics or just not --[77]

[72] *See* Declaration of Joshua Cools in Support of Opposition to Plaintiff's Motion to Compel (July 12, 2018)("Cools Decl. in Support of Opp. to Mtn. to Compel"), ¶ 9, attached as Exhibit 28.
[73] *Id.* ¶ 10.
[74] *See* First Dominguez Dep at 106-132.
[75] *See* First Dominguez Dep at 131:2-25; 132:1-22; *see also* Cools Decl. in Support of Opp. to Mtn. to Compel at ¶ 14.
[76] *See* Cools Decl. in Support of Opp. to Mtn. to Compel at ¶ 18-20.
[77] July 20, 2018 Hearing Transcript, at 6:6-16.

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The Discovery Commissioner further ordered that at his continued deposition, Mr. Dominguez should be prepared for "questions related to Jacuzzi's expectations regarding the manufacturing agreement between Jacuzzi and FirstStreet."[78] He was not required to be prepared to confirm whether or not Jacuzzi had previously reviewed eleven random advertisements prepared by firstSTREET as Plaintiffs suggest. Pltf. Mtn. at 41:15-42:1. At his continued deposition, Mr. Dominguez did, however, explain Jacuzzi's role in relation to firstSTREET using its brand guidelines—such as use of Jacuzzi's trademarks, logos, fronts, colors and placements of Jacuzzi products—and its expectations that firstSTREET provide accurate advertisements.[79] Nothing about Mr. Dominguez's testimony during his continued deposition on September 21, 2018 is sanctionable, and even if it were, Plaintiffs have not brought this issue before the Discovery Commissioner.

IV. LEGAL STANDARD

A. Plaintiffs' Motion is Improperly Before the Court

Plaintiffs' Renewed Motion to Strike is, at its core, a rehash of Plaintiffs' previously filed and denied motions, with the additional arguments that Jerre Chopper should have been disclosed as a witness and that Jacuzzi should now be compelled to produce any documents related to "slipperiness issues." But discovery motions are required to be presented to the Discovery Commissioner. Plaintiffs ignored this requirement of the Nevada Rules of Civil Procedure by filing the current Motion with this Court.

NRCP 16.1(d) provides that "all discovery disputes (except those presented at the pretrial conference or trial) must first be heard by the discovery commissioner." Despite these provisions, Plaintiffs filed what is essentially a motion to compel and a motion for discovery sanctions for this Court's consideration, not the Discovery Commissioner's. This improper attempt to side-step the requirements of the Rules of Civil Procedure should not be allowed where it is the Discovery Commissioner's duty to resolve exactly these types of dispute–whether certain

[78] Discovery Commissioner's Report and Recommendations (signed August 21, 2018)("August 21, 2018 DCRR"), attached as Exhibit 29.

[79] Second deposition transcript of Michael Dominguez (September 21, 2018)("Second Dominguez Dep") at 153:5-156:5, excerpts attached as Exhibit 30.

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discovery is proper and unobjectionable and what documents, if any, should be produced. Accordingly, the Commissioner is in the best position to determine if Plaintiffs are even entitled to the discovery they now claim Jacuzzi wrongful withheld, or if the discovery Plaintiffs now seek is overly broad, irrelevant and merely another attempt to harass and place an undue burden on Jacuzzi. Moreover, Plaintiffs have not filed a single motion to compel related to their new allegations related to Jerre Chopper and "slipperiness issues," which they must do before seeking terminating sanctions because Plaintiffs do not allege that Jacuzzi is in violation of any discovery order or failed to respond to discovery.

B. Case Terminating Sanctions are Improper

Jacuzzi has properly responded to discovery throughout this action, raising objections when it deems proper, and has complied with the orders of the Discovery Commissioner, some of which have been against Jacuzzi and many of which have been against Plaintiffs. Of note, the Discovery Commissioner has held that many of Plaintiffs' discovery request have been too broad and seek information to which they are not entitled. Instead of abiding by those orders, Plaintiffs have sought to falsely portray Jacuzzi as not complying with orders to try and obtain terminating sanctions.

While NRCP 37(d) does allow for the imposition of sanctions, the Nevada Supreme Court has stated, "[g]enerally, NRCP 37 authorizes discovery sanctions only if there has been ***willful noncompliance with a discovery order of the court***." Importantly, case-ending sanctions require a heightened standard of review. *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042 (2010). Additionally, any case-terminating order requires "an express, careful and preferably written explanation of the court's analysis of the pertinent factors." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93 (1990). The *Young* factors the Court must consider include:

> 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 adjudication on the merits, whether sanctions unfairly operate to penalize a party

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> for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Id.

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

More critically, before this Court can enter case terminating sanctions, the Nevada Supreme Court requires the district court hold an evidentiary hearing on the issue of sanctions. *McDonald v. Shamrock Investments*, LLC, 127 Nev. 1158, 373 P.3d 941 (2011) ("the district court abused its discretion in striking [defendant's] answer without holding an evidentiary hearing to consider the pertinent Young factors.") (citing *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992) ("If the party against whom dismissal may be imposed raises a question of fact as to any of [the Young] factors, the court must allow the parties to address the relevant factors in an evidentiary hearing."); *Young*, 106 Nev. at 93, 787 P.2d at 780 (noting that the case concluding sanction imposed was fair because "a full evidentiary hearing" relating to the discovery abuses was conducted)). Despite these procedural protections, Plaintiffs' attempt to sandbag Jacuzzi with the instant Motion for case terminating sanctions on an unnecessary order

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shortening time—requiring Jacuzzi to oppose Plaintiffs' 50-page meritless motion with over 800 pages of exhibits on an expedited briefing schedule.

V. ARGUMENT

A. Striking Jacuzzi's Answer is Not Supported by Nevada Law

Nevada law does not support striking Jacuzzi's answer because Jacuzzi has engaged in no discovery abuse. Rather, striking Jacuzzi's answer is particularly disproportionate to any of Jacuzzi's alleged conduct in this case. "Fundamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to specific conduct at issue." *GNLV Corp. v. Service Control Corp.*, 900 P.2d 323, 111 Nev. 866 (1995). There is no basis under NRCP 16.1 or NRCP 37 for sanctions.

i. Sanctions are not warranted under the Young factors.

Jacuzzi's conduct in this case, by timely responding to discovery, providing responses and producing documents to objectionable discovery requests, engaging in good faith meet and confer conferences, complying with the Discovery Commissioner's orders and voluntarily supplementing its discovery responses, simply cannot be compared to the conduct that occurred in *Young*. Plaintiffs' cursory analysis of the *Young* factors further confirms this.

1. Degree of Willfulness

Plaintiffs' analysis of the first *Young* factor is nothing more than supposition, without any cite to actual fact in this case. The same supposition that the Discovery Commission declined to entertain in prior hearings:

> MR. ESTRADA: … Now we go from zero subsequent incidents to a dozen or about a dozen. Conveniently, all of these documents have to do with subsequent incidents. It's worrisome to us that there's been -- you know, you have a dozen subsequent and conveniently nothing from prior accidents.
>
> DISCOVERY COMMISSIONER: Well, now --
>
> MR. ESTRADA: The only way --
>
> DISCOVERY COMMISSIONER: -- now you're making a supposition. You have no factual support to suggest that they did, in fact, exist. This is a really unattractive habit the Commissioner's trying to make -- break counsel of. **Let's know the difference between a fact and a belief or a supposition. Don't make a**

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statement like that unless you have support that would suggest there were, in fact, prior incidents that no longer exist, and I don't have that information right now.[80]

Plaintiffs further state that Jacuzzi's action in initially only providing prior incidents *must* be willful because it was guided by corporate counsel. Pltf. Mtn. at 43:17-18. On the contrary, before the issue of subsequent incidents was brought before the Discovery Commissioner, Jacuzzi used every opportunity to state that it was disclosing only *prior* incidents. Indeed, Plaintiffs' own deposition notice stated in at least two topics that they were only seeking information about *prior* incidents. Further, many of Plaintiffs discovery request were expressly limited to pre-incident information. Jacuzzi did not commit any discovery violation and did not do anything in bad faith or willfully. Unlike the party in *Young* who deliberately fabricated evidence, Jacuzzi has done nothing of the sort, and Plaintiffs do not even allege that it did. The only party that has withheld evidence they believed to be relevant is Plaintiffs in their attempts to play "gotcha" at Mr. Demeritt's deposition by questioning him about the previously undisclosed subsequent incidents, and springing previously undisclosed documents on defense counsel at depositions.

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2. Plaintiff Has Not Been Prejudiced

Plaintiffs' arguments regarding the prejudice of a lesser sanction are predicated on falsities. Plaintiffs state that their "ability to litigate has been irreparably damaged." Pltf. Mtn. at 43:20-24. This is false. Jacuzzi has responded to discovery requests; supplemented its document disclosure fourteen times in large part due to Plaintiffs materially changing theories of defect throughout this action; produced two corporate representatives for depositions (and a continued deposition); and cooperated in discovery. *Even if* Jacuzzi withheld relevant documents—**which it did not**—Plaintiffs have not been irreparably damaged. Plaintiffs are not blindly heading into trial without documents central to their case.

Plaintiffs' further argue that Jacuzzi's answer should be stricken because it did not produce subsequent **dissimilar** incidents until after the direction of the Discovery Commissioner. But this argument has already been denied by the Discovery Commissioner. Importantly, prior to the discovery hearing on the issues of other incidents, Jacuzzi produced all documents related to

[80] *See* Hearing Transcript (August 29, 2018) at 5:21-6:12, attached hereto as Exhibit 31.

personal injury claims prior to the subject 2014 incident (and consistently represented this)—the only claims Plaintiffs stated were relevant at that time.[81] Despite that, while Jacuzzi still maintains the broad discovery order requiring it to produce all prior or subsequent incidents of any alleged bodily injury related to any Jacuzzi® walk-in tub, regardless of how the incident occurred, the nature or severity of the injury, or similarity to the subject model Tub, it nonetheless complied, producing evidence of all prior and subsequent incidents of injury, even if minor, and even if dissimilar. However, to protect the private identifying information of third-party consumers, Jacuzzi sought a Petition for Writ of Prohibition from the Nevada Supreme Court on whether private customer information must be unredacted, and similarly filed a motion to stay the enforcement of that order.[82] When the Nevada Supreme Court denied the Writ, Jacuzzi withdrew its motion to stay and promptly produced the unredacted records.[83]

Furthermore, Plaintiffs argue they have somehow been prejudiced because a customer named Charles Wharff (who was allegedly injured using a Jacuzzi walk-in Tub in a subsequent incident) has passed away. Plaintiffs, however, fail to reveal that they deposed Mr. Wharff's son, who lived with his father and was present at both the time of purchase of the Tub and at the time of the unrelated incident.[84] Plaintiffs have not been prejudiced.

Plaintiffs further argue that they have been unable to conduct discovery of thirteen other dealers who likely have relevant information. Pltf. Mtn. at 45:18-20. This "other dealers" argument confuses the issues and is of no avail. First, the subject Tub was sold exclusively through firstSTREET at the time of the subject incident. As such, firstSTREET has the names of those dealers, and although they are irrelevant, on January 18, 2019, firstSTREET disclosed a list of their dealers.[85] Second, the discovery response referenced in Plaintiffs' Motion is for

[81] In Plaintiffs' first Motion to Strike they argued that other prior personal injury incidents are relevant to Jacuzzi's notice and that Jacuzzi failed to disclose other personal injury incidents that occurred after Decedent's death in 2014. This is a classic non-sequitur—it is impossible for subsequent incidents to have any relevance to Jacuzzi's notice prior to Decedent's purchase of the Tub, because they happened afterwards. Accordingly, Jacuzzi produced documents, responded to interrogatories, and produced a 30(b)(6) witness all to discuss prior incidents. This is no surprise to Plaintiffs, despite their suggestions to the contrary.

[82] *See* Petition for Writ of Prohibition, attached as Exhibit 32; *see also* Jacuzzi Inc.'s Motion to Stay.

[83] *See* January 22, 2019 Letter from M. Petrelli to B. Cloward, attached as Exhibit 33.

[84] *See* Deposition Transcript of Charles Wharff, Jr. (December 20, 2018) at 9:1-13:24; 24:8-26-13, excerpts attached as Exhibit 34.

[85] FirstStreet for Boomers and Beyond, Inc.'s Fourth Supplemental Early Case Conference Production, attached as

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information related to other walk-in tubs Jacuzzi sold. There is no reason Jacuzzi should have to disclose all entities it did business with in regard to other products with no indication those companies have any relevant information. Lastly, Plaintiffs' counsels' decision to go on a fishing expedition and spend significant resources getting lost in the weeds is not a factor for this Court to consider.

3. Striking Jacuzzi's Answer is Grossly Disproportionate to Jacuzzi's Actions

Jacuzzi's actions—which were not discovery abuses—do not warrant this heavy sanction under the *Young* factors, as demonstrated by Plaintiffs' own cursory analysis. As outlined above, Nevada courts have struck a party's answer when the party has willfully violated a court order—not when a party did not disclose irrelevant documents and consistently informed the opposing party exactly what they were disclosing. Jacuzzi has complied with all Court orders, and the Discovery Commissioner has agreed with Jacuzzi in regard to what is not the proper subject of disclosure.

4. Striking the Answer is Much Too Severe a Sanction Relative to Conduct.

Without any legal support, Plaintiffs argue that "similar incident evidence goes directly to the issue of whether the tub at issue is defective." Pltf. Mtn. at 47:21-24. In the products liability context, evidence of other incidents *might* be relevant if they involve "similar accidents involving the same condition" as the incident giving rise to the plaintiff's claim. *See Reingold v. Wet 'N Wild Nev., Inc.*, 113 Nev. 967, 969, 944 P.2d 800, 802 (1997), overruled on other grounds by *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006). Courts usually call this the "substantial similarity" requirement. *Cooper v. Firestone Tire and Rubber Co.*, 945 F.2d 1103, 1105 (9th Cir. 1991) ("A showing of substantial similarity is required when a plaintiff attempts to introduce evidence of other accidents as direct proof of negligence, a design defect, or notice of the defect").

/ / /

Exhibit 35.

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The law generally treats evidence of other incidents (or lack thereof) differently depending on whether the incidents occurred before or after the incident at issue in a case. This is because, for example, evidence of prior similar incidents can show a defendant had notice of a defect or dangerous condition before the incident the plaintiff alleges, whereas evidence of subsequent incidents cannot possibly show prior notice. *See* 1 McCormick On Evid., Other accidents and injuries, § 200 (7th ed.). Regardless, such evidence is not relevant unless the other incidents are substantially similar. *Id.* Notably, the rule of "substantial similarity is strictly applied" when a plaintiff seeks evidence of subsequent incidents. *Id.*

For example, in *Ginnis*, the Nevada Supreme Court held that evidence of subsequent *similar* incidents involving the *very same* door — not just a similar model door, but the exact same door—were relevant to causation and a defective and dangerous condition under strict product liability. *Ginnis v. Mapes Hotel Corp.,* 86 Nev. 408, 416, 470 P.2d 135, 139–40 (1970). Importantly, the trial court "excluded 16 other repair orders for other doors or for repairs subsequent to the accident." *Id.* (emphasis added). The Nevada Supreme Court affirmed this exclusion, explaining that the prior or subsequent repair orders would only be admissible when the case was retried *if* they tended to prove the faulty design or manufacture or another necessary element of a cause of action for strict product liability. Accordingly, the plaintiff was required to make the threshold showing of substantial similarity between the repair orders and the subject incident before those repair order were even admissible. *Id.* (explaining "a subsequent accident at the same or a similar place, under the same or similar conditions" is relevant to show the condition was dangerous or defective)*; see also Andrews v. Harley Davidson, Inc.,* 106 Nev. 533, 538-39, 796 P.2d 1092, 1096 (1990) (evidence of other incidents admissible because the incidents "were substantially similar").

In this case, the incident at issue is a wrongful death alleged to have occurred following the Decedent's entrapment in a specific model of Jacuzzi® walk-in tub. Thus, the universe of possibly relevant other incidents would be incidents of alleged serious bodily injury or death involving the same model of walk-in tub, under substantially similar facts. The district court already ordered, and Jacuzzi already produced, all such prior and subsequent incidents which

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resulted in claims for bodily injury or death involving the walk-in tub at issue (as well as other dissimilar models of walk-in tubs as was ordered). Plaintiffs therefore have all the arguably relevant evidence of other incidents in Jacuzzi's possession to which they are entitled. *See Reingold*, 113 Nev. at 969; *Cooper*, 945 F.2d at 1105; *see also* 1 McCormick On Evid. Critically, Plaintiffs' have failed to establish how any of the "other incidents" in their motion are substantially similar, much less if any of these incidents are admissible. Plaintiffs' conclusory statements are simply not supported by Nevada law.

No sanction should be issued here based on Jacuzzi's conduct, but if the Court were inclined to issue sanctions, lesser sanctions are not only feasible, but necessarily more reasonable.

5. Nevada's Policy Favors Adjudication on the Merits

Plaintiffs entirely ignore *Young*'s acknowledgment of Nevada's policy favoring adjudication on the merits. Striking Jacuzzi's Answer would controvert that policy. This is not a case like *Young* where a party tampered with evidence or entirely destroyed it, which the courts found may warrant total dismissal. Plaintiffs give no reason why this case—which the parties have been dutifully litigating since March 2016—should not be given the opportunity to be adjudicated on its merits.

6. Punishment of a Party for Counsel's Conduct

Punishment of a party for its counsel's conduct, is inapplicable here. There have been no such abuses. Jacuzzi's attorneys, in-house and outside counsel, oversaw the searches and analysis of documents as described in counsel's correspondence to Plaintiffs.[86] Fundamentally, there were no prior similar incidents involving personal injury or death to Jacuzzi's knowledge. Neither Jacuzzi nor its attorneys withheld any evidence.

7. Sanctioning Jacuzzi Will Not Deter Other Litigants Because Jacuzzi Has Done Nothing Wrong

There is no need (or reason) to sanction Jacuzzi to deter other litigants. Discovery abuses should be sanctioned, but there is no discovery abuse here. Plaintiffs are fishing for case

[86] *See* April 23, 2018 letter from J. Cools to B. Cloward; *see also* Cools Decl. in Support of Opp. to Pltf Mtn to Strike.

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terminating sanctions because the evidence does not support their case.

VI. CONCLUSION

As explained above, Plaintiffs' Motion is a last gasp effort to breathe life into this otherwise dwindling case. The frivolity of the Motion is unmistakable where Plaintiffs base a motion for perhaps the most severe sanctions on contrived arguments that have already been declined by the Discovery Commissioner and unsupported supposition that Jacuzzi is still withholding information. Plaintiffs' Motion is meritless and a waste of the parties' and the Court's resources. Furthermore, the requested sanction is unsupported by law. Plaintiffs' requested sanctions are draconian, disproportionate and are intended to harass and prejudice Jacuzzi. Jacuzzi respectfully requests this Court deny Plaintiffs' Renewed Motion to Strike Jacuzzi's Answer, including any request for lesser sanctions.

DATED this 24th day of January, 2019.

SNELL & WILMER L.L.P.

By: */s/ Morgan T. Petrelli*
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **OPPOSITION TO PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT JACUZZI, INC. d/b/a JACUZZI LUXURY BATH'S ANSWER FOR REPEATED, CONTINUOUS AND BLATANT DISCOVERY ABUSES ON ORDER SHORTENING TIME** by the method indicated below, addressed to the following:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

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

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

and Via Hand Delivery
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DATED this 24th day of January, 2019.

/s/ Julia M. Diaz
An Employee of Snell & Wilmer L.L.P.

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EXHIBIT “10”

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DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT ANSARA, ET AL., Plaintiffs,	)	CASE NO. A-16-731244
vs.	)	DEPT. NO. II
FIRST STREET FOR BOOMERS & BEYOND, INC., ET AL., Defendants.	)	**Transcript of Proceedings**

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE

ALL PENDING MOTIONS

MONDAY, FEBRUARY 4, 2019

APPEARANCES:

For the Plaintiffs:	IAN C. ESTRADA, ESQ.
	BENJAMIN P. CLOWARD, ESQ.
For the Defendants:	PHILIP GOODHART, ESQ.
	MEGHAN M. GOODWIN, ESQ.
	MORGAN PETRELLI, ESQ.
	JOSHUA D. COOLS, ESQ.
	BRITTANY M. LLEWELLYN, ESQ.
	D. LEE ROBERTS, JR., ESQ.
RECORDED BY:	DALYNE EASLEY, DISTRICT COURT
TRANSCRIBED BY:	KRISTEN LUNKWITZ

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

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MONDAY, FEBRUARY 4, 2019 AT 11:18 A.M.

THE COURT: All right. *Ansara versus First Street for Boomers*, 731244.

MR. CLOWARD: Good morning, Your Honor. Ben Cloward for the Cunnison family. May we have a moment to set up?

THE COURT: Yes. You may.

MR. CLOWARD: Thank you.

[Pause in proceedings]

MR. GOODHART: Your Honor, do you plan to hear the motion involving Jacuzzi first or First Street? So we can -- so counsel can set up on the defense side.

THE COURT: You know what? I want to do First Street first. I think that's the easier one.

MR. GOODHART: Okay.

THE COURT: Or the less complicated one, I think. Let's put it that way.

MR. GOODHART: Thank you, Your Honor.

THE COURT: None of these were easy.

[Pause in proceedings]

THE COURT: Mr. Cloward, you're first. This is your Motion to Strike.

MR. CLOWARD: Yes, Your Honor.

THE COURT: Let's go ahead and deal with Motion to

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THE COURT: I'm just -- I'm going around --

MR. ROBERTS: Let's assume, hypothetically, we're talking about the Jerre Chopper incident.

THE COURT: Okay.

MR. ROBERTS: It is Jacuzzi's position, which was accepted by the Discovery Commissioner, that Jacuzzi only had to produce claims of personal injury or death.

Deposition of Jerre Chopper, page 132, line 10, 11, and 12.

Question: You were never injured in this tub, were you?

Answer: No.

So, the Jerre Chopper incident was not within the scope of what was ordered by the Commissioner, cannot be used as evidence that we've refused to produce in bad faith a prior claim for injury or wrongful death. She used the tub twice with the jets on. Other than that, just filled it a little bit. And I believe from other documents she had the tub and she slipped down and her head was under water. Right? But she says: I wasn't injured. But I could have been injured. That's not what was ordered by the Discovery Commissioner that we comply with.

And, by the way, if her head was under water and she got up, that means she was able to -- using the grab bars or otherwise, get herself back up above the water.

MR. ROBERTS: Thank you.

MR. CLOWARD: Thank you, Your Honor.

MR. ROBERTS: Thank you, Judge.

PROCEEDING CONCLUDED AT 2:50 P.M.

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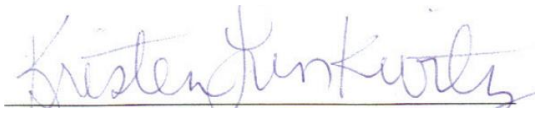
CERTIFICATION

I certify that the foregoing is a correct transcript from the audio-visual recording of the proceedings in the above-entitled matter.

AFFIRMATION

I affirm that this transcript does not contain the social security or tax identification number of any person or entity.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

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