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.

PETITIONER'S APPENDIX
VOLUME 29
PAGES 7001–7250

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

	for Clarification Regarding the Scope of the Forensic Computer Search			
14	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	05/15/19	6 7	1348–1500 1501–1592
15	Defendant Jacuzzi Inc.'s Opposition 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	05/28/19	7	1593–1612
16	Appendix of Exhibits to Defendant Jacuzzi Inc.'s Opposition 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	05/28/19	7 8	1613–1750 1751–1778
17	Plaintiffs' Reply in Support of Their 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	06/14/19	8	1779–1790
18	Minute Order Re: Pending Motions	03/04/19	8	1791
19	Court Minutes – All Pending Motions	07/01/19	8	1792–1793
20	Transcript of Proceedings – Defendant Jacuzzi, Inc.'s Request for Status Check; Plaintiffs' Motion for Reconsideration Regarding Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s Answer and Motion for Clarification Regarding the Scope of the Forensic Computer Search	07/01/19	8	1794–1886
21	Recorder's Transcript of Hearing Pursuant to Defendant Jacuzzi's Request Filed 6-13-19,	07/01/19	8	1887–1973

	Defendant Jaccuzi, Inc. d/b/a Jacuzzi Luxury Bath's Request for Status Check; 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			
22	Plaintiffs' Motion to Expand Scope of Evidentiary Hearing	08/09/19	8 9	1974–2000 2001–2045
23	Defendant Jacuzzi Inc.'s Opposition to Plaintiffs' Motion to Expand Scope of Evidentiary Hearing	08/19/19	9	2046–2062
24	Appendix of Exhibits in Support of Defendant Jacuzzi Inc.'s Opposition to Plaintiffs' Motion to Expand Scope of Evidentiary Hearing	08/19/19	9	2063–2241
25	Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing	08/20/19	9	2242–2244
26	Appendix to Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing on Order Shortening Time – Volume I of II	08/20/19	9 10 11 12	2245–2250 2251–2500 2501–2750 2751–2904
27	Appendix to Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing on Order Shortening Time – Volume I of II	08/20/19	12 13 14 15 16	2905–3000 3001–3250 3251–3500 3501–3750 3751–3882
28	Court Minutes Re: Plaintiff's Motion to Expand Scope of Evidentiary Hearing	08/21/19	16	3883
29	Plaintiffs' Reply in Support of Motion to Expand Scope of Evidentiary Hearing	08/21/19	16 17	3884–4000 4001–4010
30	Recorder's Transcript of Evidentiary Hearing – Day 1	09/16/19	17	4011–4193
31	Recorder's Transcript of Evidentiary Hearing – Day 2	09/17/19	17 18	4194–4250 4251–4436

32	Recorder's Transcript of Evidentiary Hearing – Day 3	09/18/19	18 19	4437–4500 4501–4584
33	Plaintiffs' Evidentiary Hearing Brief	09/18/19	19	4585–4592
34	Minute Order	09/26/19	19	4593–4594
35	Court Minutes Re: Evidentiary Hearing	10/01/19	19	4595
36	Recorder's Transcript of Evidentiary Hearing – Day 4	10/01/19	19	4596–4736
37	Minute Order	10/08/19	19	4737–4740
38	Plaintiffs' Evidentiary Hearing Closing Brief	11/04/19	19 20	4741–4750 4751–4805
39	Plaintiffs' Appendix to Plaintiffs' Evidentiary Hearing Closing Brief	11/04/19	20 21 22 23 24	4806–5000 5001–5250 5251–5500 5501–5750 5751–5849
40	Defendant Jacuzzi Inc. Doing Business ad Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief	12/02/19	24	5850–5893
41	Errata to Defendant Jacuzzi Inc. Doing Business ad Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief	12/06/19	24	5894–5897
42	Appendix of Exhibits in Support of Defendant Jacuzzi Inc. Doing Business ad Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief	12/06/19	24 25	5898–6000 6001–6178
43	Plaintiffs' Reply Defendant Jacuzzi Inc. Doing Business ad Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief	12/31/19	25 26	6179–6250 6251–6257
44	Minute Order	03/05/20	26	6258–6261
45	Motion to Clarify the Parameters of the Waiver of Attorney-Client Privilege that Would be Required in Order to Present Evidence that it was Acting on Advice of	05/22/20	26	6262–6266

	Counsel			
46	Objections to "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer to Liability Only" with Counter-Proposed Order	05/22/20	26	6267–6276
47	Appendix of Exhibits to: Objections to "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer to Liability Only" with Counter-Proposed Order	05/22/20	26	6277–6478
48	Minute Order	05/28/20	26	6479
49	Plaintiffs' (1) Response to Defendant Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath's Objections to Plaintiffs' Proposed "Order Striking Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only"; and (2) Opposition to Jacuzzi's Motion Clarify the Parameters of the Waiver of the Attorney Client Privilege That Would be Required to Present That It was be Acting on the Advice of Counsel	06/05/20	26	6480–6494
50	Reply to Plaintiffs' (1) response to Jacuzzi's Objections to Proposed Order, and (2) Opposition to Jacuzzi's Motion to Clarify the Parameters of Any Waiver of Attorney-Client Privilege	06/24/20	26 27	6495–6500 6501–6506
51	Court Minutes Re: All Pending Motions	06/29/20	27	6506–6508
52	Recorder's Transcript of Pending Motions	06/29/20	27	6509–6549
53	Minute Order	07/20/20	27	6550
54	Order for Evidentiary Hearing	07/22/20	27	6551–6555
55	Jacuzzi's Notice of Waiver of Phase 2 Hearing and Request to Have Phase 2 of Evidentiary Hearing Vacated	09/18/20	27	6556–6561
56	Plaintiffs' Response to Defendant Jacuzzi's Notice of Waiver of Phase 2 Hearing and	09/21/20	27	6562–6572

	Request to Have Phase 2 of Evidentiary Hearing Vacated			
57	Court Minutes – Evidentiary Hearing	09/22/20	27	6573
58	Recorder's Transcript of Evidentiary Hearing – Day 1	09/22/20	27	6574–6635
59	Minute Order	09/29/20	27	6636
60	Court Minutes Re: Competing Orders to Strike Jacuzzi's Answer	10/05/20	27	6637–6638
61	Recorder's Transcript of Pending Motions	10/05/20	27	6639–6671
62	Objections to Plaintiff's Proposed "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only" Submitted October 9, 2020	10/16/20	27	6672–6712
63	Plaintiffs' Response to Defendant Jacuzzi Inc. d/b/a Jacuzzi Luxury Bath's Objections to Plaintiff's [sic] Proposed "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only" Submitted October 9, 2020	10/20/20	27	6713–6750
64	Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions	10/20/20	28	6751–6770
65	Appendix of Exhibits to Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions	10/20/20	28	6771–6904
66	Court Minutes – Status Check: Decision on Proposed Order	10/21/20	28	6905
67	Plaintiffs' Reply to: (1) Defendant Jacuzzi, Inc. dba Jacuzzi Luxury Bath's Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions; and (2)	11/10/20	28	6906–6923

	Defendant FirstStreet For Boomers & Beyond, Inc., AITHR Dealer, Inc., and Hale Benton's Objections to Plaintiffs' Demand for Certain Jury Instructions and Rulings on Motions in Limine Based on Court Striking Jacuzzi's Answer Re: Liability			
68	Transcript of Proceedings: Motion to Strike	11/19/20	28 29	6924–7000 7001–7010
69	Notice of Entry of Order (Striking Defendant Jacuzzi, Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only)	11/24/20	29	7011–7048
70	Court Minutes: All Pending Motions	12/07/20	29	7049
71	Transcript of Proceedings: Motions in Limine: Jacuzzi's Nos. 1, 4, 13, 16, and 21/First Street's No. 4; Jury Instructions	12/07/20	29	7050–7115
72	Court Minutes – Hearing: Jury Instructions	12/21/20	29	7116–7117
73	Court Minutes – Decision	12/21/20	29	7118
74	Transcript of Proceedings: Jury Instructions	12/21/20	29	7119–7171
75	Minute Order	12/28/20	29	7172–7176
76	Minute Order	12/29/20	29	7177
77	Notice of Entry of Order Re-Opening Discovery	01/15/21	29	7178–7186
78	Notice of Entry of Order Regarding Motions in Limine	01/15/21	29	7187–7195
79	Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21	04/29/21	29	7196–7229
80	Plaintiffs' Appendix to Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's	04/29/21	29 30 31	7230–7250 7251–7500 7501–7623

	Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21			
81	Amended Order Setting Firm Civil Jury Trial, Pre-Trial Conference and Calendar Call	05/06/21	31	7624–7629
82	Minute Order	05/06/21	31	7630
83	Defendant Jacuzzi Inc. dba Jacuzzi Luxury Bath's Opposition to Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21 and Countermotion to Clarify Issues That the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial	05/13/21	31	7631–7646
84	Appendix of Exhibits in Support of Defendant Jacuzzi Inc. dba Jacuzzi Luxury Bath's Opposition to Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21	05/13/21	31 32	7647–7750 7751–7797
85	Notice of Taking Multiple Videotaped Depositions for Purposes of Trial Preservation Outside the State of Nevada	05/28/21	32	7798–7802
86	Plaintiffs' Reply in Support of Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21 and Opposition to Jacuzzi's Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial and FirstStreet	06/01/21	32	7803–7858

	for Boomers and Beyond, Inc. and AITHR Dealer, Inc.'s Joinder Thereto			
87	Minute Order	06/04/21	32	7859
88	Minute Order	06/18/21	32	7860
89	Amended Minute Order	06/18/21	32	7861
90	Reply in Support of "Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial"	06/30/21	32	7862–7888
91	Court Minutes – All Pending Motions	07/06/21	32	7889
92	Minute Order	07/13/21	32	7890
93	Court Minutes – All Pending Motions	07/14/21	32	7891–7892
94	Recorder's Transcript of Pending Motions	07/14/21	32 33	7893–8000 8001–8019
95	Minute Order Re: Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Jacuzzi's Motion to Reconsider MILs Nos. 1, 4, 13, and 21	08/17/21	33	8020–8023
96	Order Granting Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Jacuzzi's Motion to Reconsider MILs Nos. 1, 4, 13, and 21	09/29/21	33	8024–8038
97	Order Granting Jacuzzi's Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial	09/29/21	33	8039–8047

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

14	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	05/15/19	6 7	1348–1500 1501–1592
26	Appendix to Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing on Order Shortening Time – Volume I of II	08/20/19	9 10 11 12	2245–2250 2251–2500 2501–2750 2751–2904
27	Appendix to Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing on Order Shortening Time – Volume I of II	08/20/19	12 13 14 15 16	2905–3000 3001–3250 3251–3500 3501–3750 3751–3882
64	Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions	10/20/20	28	6751–6770
1	Complaint	02/03/16	1	1–13
19	Court Minutes – All Pending Motions	07/01/19	8	1792–1793
91	Court Minutes – All Pending Motions	07/06/21	32	7889
93	Court Minutes – All Pending Motions	07/14/21	32	7891–7892
73	Court Minutes – Decision	12/21/20	29	7118
57	Court Minutes – Evidentiary Hearing	09/22/20	27	6573
72	Court Minutes – Hearing: Jury Instructions	12/21/20	29	7116–7117
66	Court Minutes – Status Check: Decision on Proposed Order	10/21/20	28	6905
51	Court Minutes Re: All Pending Motions	06/29/20	27	6506–6508
60	Court Minutes Re: Competing Orders to Strike Jacuzzi's Answer	10/05/20	27	6637–6638
35	Court Minutes Re: Evidentiary Hearing	10/01/19	19	4595

28	Court Minutes Re: Plaintiff's Motion to Expand Scope of Evidentiary Hearing	08/21/19	16	3883
70	Court Minutes: All Pending Motions	12/07/20	29	7049
83	Defendant Jacuzzi Inc. dba Jacuzzi Luxury Bath's Opposition to Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21 and Countermotion to Clarify Issues That the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial	05/13/21	31	7631–7646
40	Defendant Jacuzzi Inc. Doing Business ad Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief	12/02/19	24	5850–5893
6	Defendant Jacuzzi Inc.'s Amended Answer to Plaintiffs' Fourth Amended Complaint	03/07/18	1	66–75
15	Defendant Jacuzzi Inc.'s Opposition 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	05/28/19	7	1593–1612
23	Defendant Jacuzzi Inc.'s Opposition to Plaintiffs' Motion to Expand Scope of Evidentiary Hearing	08/19/19	9	2046–2062
41	Errata to Defendant Jacuzzi Inc. Doing Business ad Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief	12/06/19	24	5894–5897
2	First Amended Complaint	03/25/16	1	14–23
5	Fourth Amended Complaint	06/21/17	1	50–65
55	Jacuzzi's Notice of Waiver of Phase 2 Hearing and Request to Have Phase 2 of Evidentiary	09/18/20	27	6556–6561

	Hearing Vacated			
12	Minute Order	03/12/19	6	1317–1318
34	Minute Order	09/26/19	19	4593–4594
37	Minute Order	10/08/19	19	4737–4740
44	Minute Order	03/05/20	26	6258–6261
48	Minute Order	05/28/20	26	6479
53	Minute Order	07/20/20	27	6550
59	Minute Order	09/29/20	27	6636
75	Minute Order	12/28/20	29	7172–7176
76	Minute Order	12/29/20	29	7177
82	Minute Order	05/06/21	31	7630
87	Minute Order	06/04/21	32	7859
88	Minute Order	06/18/21	32	7860
92	Minute Order	07/13/21	32	7890
11	Minute Order Re: Pending Motions	03/04/19	6	1316
18	Minute Order Re: Pending Motions	03/04/19	8	1791
95	Minute Order Re: Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Jacuzzi's Motion to Reconsider MILs Nos. 1, 4, 13, and 21	08/17/21	33	8020–8023
45	Motion to Clarify the Parameters of the Waiver of Attorney-Client Privilege that Would be Required in Order to Present Evidence that it was Acting on Advice of Counsel	05/22/20	26	6262–6266
69	Notice of Entry of Order (Striking Defendant Jacuzzi, Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only)	11/24/20	29	7011–7048

78	Notice of Entry of Order Regarding Motions in Limine	01/15/21	29	7187–7195
77	Notice of Entry of Order Re-Opening Discovery	01/15/21	29	7178–7186
85	Notice of Taking Multiple Videotaped Depositions for Purposes of Trial Preservation Outside the State of Nevada	05/28/21	32	7798–7802
46	Objections to "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer to Liability Only" with Counter-Proposed Order	05/22/20	26	6267–6276
62	Objections to Plaintiff's Proposed "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only" Submitted October 9, 2020	10/16/20	27	6672–6712
8	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	01/24/19	2 3 4	436–500 501–750 751–921
54	Order for Evidentiary Hearing	07/22/20	27	6551–6555
97	Order Granting Jacuzzi's Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial	09/29/21	33	8039–8047
96	Order Granting Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Jacuzzi's Motion to Reconsider MILs Nos. 1, 4, 13, and 21	09/29/21	33	8024–8038
49	Plaintiffs' (1) Response to Defendant Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath's Objections to Plaintiffs' Proposed "Order Striking Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only"; and (2) Opposition to Jacuzzi's Motion Clarify the Parameters of the Waiver	06/05/20	26	6480–6494

	of the Attorney Client Privilege That Would be Required to Present That It was be Acting on the Advice of Counsel			
39	Plaintiffs' Appendix to Plaintiffs' Evidentiary Hearing Closing Brief	11/04/19	20 21 22 23 24	4806–5000 5001–5250 5251–5500 5501–5750 5751–5849
80	Plaintiffs' Appendix to Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21	04/29/21	29 30 31	7230–7250 7251–7500 7501–7623
33	Plaintiffs' Evidentiary Hearing Brief	09/18/19	19	4585–4592
38	Plaintiffs' Evidentiary Hearing Closing Brief	11/04/19	19 20	4741–4750 4751–4805
13	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	05/15/19	6	1319–1347
22	Plaintiffs' Motion to Expand Scope of Evidentiary Hearing	08/09/19	8 9	1974–2000 2001–2045
79	Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21	04/29/21	29	7196–7229
7	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	01/10/19	1 2	76–250 251–435

43	Plaintiffs' Reply Defendant Jacuzzi Inc. Doing Business ad Jacuzzi Luxury Bath's Evidentiary Hearing Closing Brief	12/31/19	25 26	6179–6250 6251–6257
29	Plaintiffs' Reply in Support of Motion to Expand Scope of Evidentiary Hearing	08/21/19	16 17	3884–4000 4001–4010
86	Plaintiffs' Reply in Support of Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendant's Motions in Limine Nos. 1, 4, 13, and 21 and Opposition to Jacuzzi's Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial and FirstStreet for Boomers and Beyond, Inc. and AITHR Dealer, Inc.'s Joinder Thereto	06/01/21	32	7803–7858
9	Plaintiffs' Reply in Support of 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	01/29/19	4 5	922–1000 1001–1213
17	Plaintiffs' Reply in Support of Their 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	06/14/19	8	1779–1790
67	Plaintiffs' Reply to: (1) Defendant Jacuzzi, Inc. dba Jacuzzi Luxury Bath's Brief Responding to Plaintiffs' Request for Inflammatory, Irrelevant, Unsubstantiated, or Otherwise Inappropriate Jury Instructions; and (2) Defendant FirstStreet For Boomers & Beyond, Inc., AITHR Dealer, Inc., and Hale Benton's Objections to Plaintiffs' Demand for Certain Jury Instructions and Rulings on Motions in Limine Based on Court Striking Jacuzzi's	11/10/20	28	6906–6923

	Answer Re: Liability			
63	Plaintiffs' Response to Defendant Jacuzzi Inc. d/b/a Jacuzzi Luxury Bath's Objections to Plaintiff's [sic] Proposed "Order Striking Defendant Jacuzzi Inc., d/b/a Jacuzzi Luxury Bath's Answer as to Liability Only" Submitted October 9, 2020	10/20/20	27	6713–6750
56	Plaintiffs' Response to Defendant Jacuzzi's Notice of Waiver of Phase 2 Hearing and Request to Have Phase 2 of Evidentiary Hearing Vacated	09/21/20	27	6562–6572
25	Plaintiffs' Supplement to Motion to Expand Scope of Evidentiary Hearing	08/20/19	9	2242–2244
30	Recorder's Transcript of Evidentiary Hearing – Day 1	09/16/19	17	4011–4193
58	Recorder's Transcript of Evidentiary Hearing – Day 1	09/22/20	27	6574–6635
31	Recorder's Transcript of Evidentiary Hearing – Day 2	09/17/19	17 18	4194–4250 4251–4436
32	Recorder's Transcript of Evidentiary Hearing – Day 3	09/18/19	18 19	4437–4500 4501–4584
36	Recorder's Transcript of Evidentiary Hearing – Day 4	10/01/19	19	4596–4736
21	Recorder's Transcript of Hearing Pursuant to Defendant Jacuzzi's Request Filed 6-13-19, Defendant Jaccuzi, Inc. d/b/a Jacuzzi Luxury Bath's Request for Status Check; 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	07/01/19	8	1887–1973
52	Recorder's Transcript of Pending Motions	06/29/20	27	6509–6549

61	Recorder's Transcript of Pending Motions	10/05/20	27	6639–6671
94	Recorder's Transcript of Pending Motions	07/14/21	32 33	7893–8000 8001–8019
90	Reply in Support of "Countermotion to Clarify Issues that the Jury Must Determine, Applicable Burdens of Proof, and Phases of Trial"	06/30/21	32	7862–7888
50	Reply to Plaintiffs' (1) response to Jacuzzi's Objections to Proposed Order, and (2) Opposition to Jacuzzi's Motion to Clarify the Parameters of Any Waiver of Attorney-Client Privilege	06/24/20	26 27	6495–6500 6501–6506
3	Second Amended Complaint	05/09/16	1	24–33
4	Third Amended Complaint	01/31/17	1	34–49
10	Transcript of All Pending Motions	02/04/19	5 6	1214–1250 1251–1315
20	Transcript of Proceedings – Defendant Jacuzzi, Inc.'s Request for Status Check; Plaintiffs' Motion for Reconsideration Regarding Plaintiffs' Renewed Motion to Strike Defendant Jacuzzi, Inc.'s Answer and Motion for Clarification Regarding the Scope of the Forensic Computer Search	07/01/19	8	1794–1886
74	Transcript of Proceedings: Jury Instructions	12/21/20	29	7119–7171
68	Transcript of Proceedings: Motion to Strike	11/19/20	28 29	6924–7000 7001–7010
71	Transcript of Proceedings: Motions in Limine: Jacuzzi's Nos. 1, 4, 13, 16, and 21/First Street's No. 4; Jury Instructions	12/07/20	29	7050–7115

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
801 South Fourth Street
Las Vegas, Nevada 89101

Attorneys for Real Parties in Interest

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

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

Respondent

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

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

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

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

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

MR. ROBERTS: Your Honor, --

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

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

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

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

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

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

THE COURT: All right.

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

THE COURT: All right. Very good. Anything else

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Okay. Very good. Very good.

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

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

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

THE COURT: Didn't we --

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

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

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

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

MR. CLOWARD: Sure.

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

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

sufficient or not, that's concerning.

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

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

MR. CLOWARD: Okay.

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

MR. CLOWARD: Okay.

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

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

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

MR. CLOWARD: Thank you, Judge.

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

MR. CLOWARD: Understood. Will do.

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

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

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

All right?

MR. CLOWARD: Understood.

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

MR. CLOWARD: Thank you, Your Honor.

THE COURT: Thank you, counsel.

MR. GOODHART: Thank you, Your Honor.

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

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

MR. ROBERTS: Thanks. Thanks, Phil.

PROCEEDING CONCLUDED AT 11:24 A.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.

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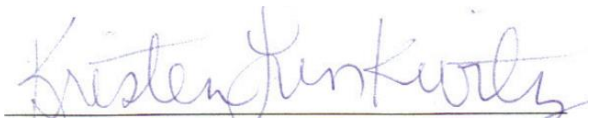

KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

NOTICE OF ENTRY OF ORDER

007011

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

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

DATED THIS 24th day of November, 2020.

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

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CERTIFICATE OF SERVICE

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

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

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

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

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

EXHIBIT “1”

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

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

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

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

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

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

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

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

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

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

I. STANDARD OF REVIEW

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

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

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

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

II. FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. PLAINTIFFS FIRST MOTION TO STRIKE

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

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

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

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

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

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

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

F. JACUZZI MISREPRESENTED FACTS TO THE COURT IN FILED BRIEFS

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

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

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

[16] See, Pls.' Mot. to Strike Def. Jacuzzi, Inc. d/b/a Jacuzzi Bath's Answer, **Evidentiary Hr'g Ex. 175**.
[17] Id. at 7:21 (emphasis added).
[18] Id. at 11:15-17 (emphasis added).
[19] Id. at 12:9-13 (emphasis added).
[20] Id. at 13:3-4 (emphasis added).

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

G. THE JULY 20, 2018, HEARING AND ORDER

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

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

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

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

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

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

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

[25] Id.

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

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

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

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

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

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

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[27] Id.

[28] Id.

[29] Id.

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

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

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

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

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

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

I. JACUZZI MISREPRESENTED FACTS IN THE MOTION FOR PROTECTIVE ORDER

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[43] <u>See</u>, <u>Id.</u>

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

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

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

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

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

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

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

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

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

[44] See, Id.

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

007027

007027

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

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

L. JACUZZI MISREPRESENTED THE FACTS TO THE NEVADA SUPREME COURT

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

M. PLAINTIFFS' RENEWED MOTION TO STRIKE

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

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

[47] Id. at 16.

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

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

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

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

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

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

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

N. JACUZZI VIOLATED THE JULY 20, 2018, ORDER

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

1. Plaintiffs' Motion for Reconsideration: the Pullen Death

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

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

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

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

007029
007029

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

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

007030

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

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

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

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

007030

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

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

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

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

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

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

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

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

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

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

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

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

007031

007031

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

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

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

007032

Evidentiary Hr'g Closing Br.

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

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

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

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

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

[67] Id.

[68] See, Id. at Jacuzzi005623.

007032

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

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

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

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

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

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

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

[69] Id.

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

007033

007033

by Commissioner Bulla:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

007036

007036

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

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

III. ANALYSIS OF THE YOUNG FACTORS

A. Degree of Willfulness of the Offending Party

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

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

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

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

007037

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

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

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

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

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

[80] See, Id. at 136:22-24.

force customer service databases. [81]

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

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

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

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

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

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

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

007039

007039

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

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

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

007040

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[84] Id.

[85] Id.

[86] See, Id.

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

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

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

007040

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

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

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

007041

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

007041

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

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

007042

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

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

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

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

007042

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

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

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

007043

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

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

007043

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

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

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

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

IV. CONCLUSIONS OF LAW

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

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

ORDER

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

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

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

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

Dated this 18th day of November, 2020

DISTRICT COURT JUDGE

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

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 11/18/2020

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70

A-16-731244-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Product Liability	COURT MINUTES	December 07, 2020

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

December 07, 2020 **09:30 AM** **All Pending Motions**

HEARD BY: Scotti, Richard F. **COURTROOM:** RJC Courtroom 03B

COURT CLERK: Tapia, Michaela

RECORDER: Amoroso, Brittany

REPORTER:

PARTIES PRESENT:

Benjamin P. Cloward	**Attorney for Plaintiff, Special Administrator, Trust**
Brittany M. Llewellyn	**Attorney for Cross Defendant, Defendant**
D Lee Roberts, Jr.	**Attorney for Cross Defendant, Defendant**
Daniel F. Polsenberg	**Attorney for Cross Defendant, Defendant**
Ian C. Estrada	**Attorney for Plaintiff, Special Administrator, Trust**
Joel D. Henriod	**Attorney for Cross Defendant, Defendant**
Johnathan T Krawcheck	**Attorney for Cross Defendant, Defendant**
Philip Goodhart	**Attorney for Cross Claimant, Cross Defendant, Defendant**

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JOURNAL ENTRIES

MOTIONS IN LIMINE: JACUZZI'S NOS. 1, 4, 13, 16 & 21 / 1ST STREET'S NO. 4 ... JURY INSTRUCTIONS

Colloquy regarding trial. Parties to conduct meet and confer by telephone as to issues raised in Lee's motion. Upon Court's inquiry, Mr. Cloward advised 3-4 weeks for trial. Request by Mr. Roberts to defer the decisions on the Motions in Limine to the trial judge. Argument by Mr. Cloward. COURT ORDERED, Mr. Roberts' request DENIED. Following arguments by counsel regarding the Motions in Limine, COURT FURTHER ORDERED, matter taken under advisement. Colloquy regarding Jury Instructions. At the request of counsel, COURT ORDERED, matter CONTINUED.

CONTINUED TO: 12/14/20 10:30 AM

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Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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ROBERT ANSARA, DEBORAH TAMANTINI, ESTATE OF SHERRY LYNN CUNNISON, Plaintiffs, vs. FIRST STREET FOR BOOMERS & BEYOND, INC., ET AL., Defendants.	CASE NO. A-16-731244-C DEPT. NO. II **Transcript of Proceedings**

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE

MOTIONS IN LIMINE: JACUZZI'S NOS. 1, 4, 13, 16, AND 21/ FIRST STREET'S NO. 4; JURY INSTRUCTIONS

MONDAY, DECEMBER 7, 2020

SEE APPEARANCES ON PAGE 2

RECORDED BY: BRITTANY AMOROSO, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

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

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APPEARANCES:
[ALL VIA VIDEO/TELEPHONE CONFERENCE]

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

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

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MONDAY, DECEMBER 7, 2020 AT 10:07 A.M.

THE COURT: Let's see. Madam Clerk, what matters do we have left, other than we have *Ansara versus First Street*? Do we have anything else left?

THE CLERK: Not for the 9 o'clock, Judge.

THE COURT: All right. So, let's go ahead and call *Ansara versus First Street*, case A731244. Who do we have for the plaintiff?

MR. CLOWARD: Good morning, Your Honor. Ben Cloward and Ian Estrada on behalf of plaintiffs.

THE COURT: All right. Who do we have for defendant, Jacuzzi?

MR. ROBERTS: Good morning, Your Honor. Lee Roberts here for defendant, Jacuzzi. I've also got a few other lawyers.

THE COURT: All right. No. You can -- you don't have to, but you can mention their names if you want them on the record.

MR. ROBERTS: I believe we've got Joel Henriod, Dan Polsenberg, Brittany Lewellyn, and Johnny Krawcheck.

THE COURT: All right. Thank you. All right. who do we have for defendant First Street and Aithr Dealer, Inc?

MR. GOODHART: Good morning, Your Honor. Philip

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Goodhart on behalf of defendants First Street and Aithr. I apologize. My video is still not working on my computer.

THE COURT: That's okay. And, who else do we have on the line? Is that everybody? Okay. I guess that's everybody. All right. So, I think, today we have Motions in Limine set. And -- at least that's what I prepared to discuss. I'm not prepared to discuss any issues regarding Jury Instructions. Was that set for today, by the way, Mr. Cloward? Jury Instructions, is that set for today?

MR. CLOWARD: I thought that it was. But if the Court's not ready to hear that, I'm sure the parties can all agree that that can be heard on a separate day. That's fine.

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THE COURT: I remember asking the parties -- and if it was received, let me know. Mr. Cloward, I remember asking the parties if they could submit briefs, short briefs for each Jury Instruction issue. And I might have said one to two pages per Proposed Jury Instruction. And I -- my Law Clerk just went on vacation. I don't know if that was submitted. Mr. Cloward?

MR. CLOWARD: Your Honor, now that you raise that, that is something that we overlooked. I recall the Court asking for that and I think that's something that we did overlook. I apologize.

THE COURT: Mr. Roberts, what was your intent on

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how to advise the Court on each of the Proposed Jury Instructions?

MR. ROBERTS: Your Honor, actually, it was Lewis and Roca, Mr. Polsenberg and Henriod, who were prepared to address the Jury Instructions today.

MR. HENRIOD: Yes, Your Honor. We did file -- let's see, what was it, on October 20th, the brief addressing those. And Mr. Cloward did respond to that.

THE COURT: Okay.

MR. HENRIOD: I have no trouble putting this off until later. Certainly, the Court does need to raise -- or, read all the points and authorities that were submitted. And I think that these determinations need to be made after the Court has decided on phasing, which follows the determination on First Street. And, then, also, the Motions in Limine, because the Jury Instructions will have to conform to the legal issues and the factual issues that are presented in any particular phase. And, so, those other decisions, I think, are preliminary.

THE COURT: So, Mr. Cloward, remind me why we're even discussing Jury Instructions now. We're, you know, in the middle of Covid, and the backlog in the court, this case, it probably won't go to trial until, my guess is the end of next year, or at least --

MR. CLOWARD: Sure.

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THE COURT: -- into the fall of next year. Why are we even dealing with Jury Instructions now?

MR. CLOWARD: I think, with the very recent Administrative Order -- or, actually, the Supreme Court Order, indicating that the District Court, I guess the Five-Year Rule would have a one-year tail to it. I think the parties were under the impression that we were going to be trying the case in -- you know, at the first of the year, February, March. And, so, I think that we were just proceeding under -- kind of operating under that.

THE COURT: Okay. Well, that -- so, that -- I can't give you any advice on that.

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MR. POLSENBERG: Can I just -- can I just jump in for a second?

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THE COURT: Yeah.

MR. POLSENBERG: We'd rather keep the --

THE COURT: Whether it actually gets to trial or doesn't get trial is not going to be up to me. So, -- or tried or not tried. It's not up to me. But, go ahead, Mr. Polsenberg.

MR. POLSENBERG: Thank you, Your Honor. Lee keeps asking me when the Supreme Court is going to amend Rule 41(e). And it did so on Friday.

THE COURT: Oh.

MR. POLSENBERG: So, the Supreme Court has put in

a provision that if circumstances keep you from getting to trial, then the Five-Year Rule is tolled during that time period.

THE COURT: Well, circumstances aren't going to keep me from doing the trial. So, how do you guys want to resolve that? Other circumstances. Sorry.

MR. GOODHART: Your Honor, --

MS. DAEHNKE: So, I think, Your Honor --

THE COURT: So, there's going to be a different judge on this. And I -- I don't know what they're schedule is going to look like. Because, I think, on -- in just like a few more days, Judge Bell is going to determine who's got what docket. All the case assignments are going to be drastically changed. And, so, I mean, how do we deal with that?

MR. GOODHART: Your Honor, this is Philip Goodhart for First Street and Aithr. I think I had started the ball rolling a little bit at our last hearing when I mentioned that I was not sure whether the District Court's extension of the Five-Year Rule was going to be a constitutional issue or not. However, with the Supreme Court coming down with its revised amended Rule 41 Order on Friday, I think that takes care of that issue.

THE COURT: Meaning that nobody's rights are impaired if this matter can't get tried by February.

Right?

MR. CLOWARD: Correct.

MR. GOODHART: That -- Your Honor, that is my understanding of the Amendment to the Rule.

THE COURT: So, Mr. Cloward, --

MR. CLOWARD: Yes, Your Honor.

THE COURT: -- what are you suggesting? I mean, I -- you've waited a long time to get this case to trial. If -- you know, if I were remaining the judge on this, I'd set aside time on my docket to have this tried beginning of next year. But, with all the changes and -- you know, there's absolutely no guarantee. In fact, there's a likelihood that this won't get tried February, March, April, May, or June of next year. Mr. Cloward, what would be your suggestion or recommendation under these circumstances?

MR. CLOWARD: Well, to be quite honest, if I had my -- I guess, if the Court said: Hey, Mr. Cloward, what would your preference be? My preference would -- has always been to try this case on the merits. I've always wanted it -- you know, we've done a significant amount of focus work and I've been excited about this case. I don't feel that we're in a position with respect to the discovery because of the depositions and the document disclosure that took place, you know, at the end of discovery last summer -

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- I mean, there are a lot of really, I would think, significant -- you know, other incidents that need to be investigated. None of the experts have been supplemented, have provided supplemental reports, including plaintiffs, defendants. You know? None of the experts are ready to go on the case. I mean, if I had my druthers, I would prefer to reopen discovery for a six period -- six-month period, allow us to do the things that we --

THE COURT: Yeah.

MR. CLOWARD: -- should have been allowed to do, had this all been produced.

THE COURT: Well, that's not going to be --

MR. CLOWARD: And set it for --

THE COURT: Yeah. No. Go ahead, go ahead. I interrupted. Sorry.

MR. CLOWARD: And set a firm trial date for, say September or, you know, August, a six month -- or, a six week. I think it'd probably take a minimum of, you know, five-to-six-week stack, set a firm setting, and, then, calendar some hearings before that to resolve the Jury Instructions, to resolve some of these things. I think it's -- there's going to be a lot of motion practice on the -- on other issues. And, so, I think, to properly get this case before the jury, and to not have a burden on whoever does take this over, I don't know how Judge Bell is going

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to do that. We've always understood that the case would be -- you know, there would -- there is some shifting when, you know, those things happen.

So, how that happens, I have no clue. I don't know whether it's going to stay in this department. I don't know if it's going to --

THE COURT: Yeah.

MR. CLOWARD: I don't know. But I think that the incoming judge, whoever that is, would probably not want to have this thrust upon them and have 30 days to get ready. So, that --

THE COURT: Yeah.

MR. CLOWARD: -- would be my suggestion. But I'm open to hear --

THE COURT: Well, I'm not getting into your -- okay. Tell me when you're done. Sorry. I cut you off again.

MR. CLOWARD: I'm sorry, Judge. I just -- I was -- I would be open to hear what the Court's recommendations are or what the Court feels.

THE COURT: Right. So, I didn't want to get into the discovery merits. I'm just trying to discuss with you the logistics. So, the issue is do we all agree to move the trial date now, which, right now, it's set for a firm jury trial March 1 of next year? Do we all agree to move

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that now or do you want to wait until this case is reassigned to whatever department it gets reassigned to? And, then, let that judge who takes over the case decide when he or she can hear it. So, that would mean we stay as a firm trial for March 1. And, then, you'll find out probably mid-January if you're really going to go to trial on March 1 or some future date. Really, and that's the first issue presented to me, Mr. Cloward.

And, then, the next issue is how quickly do you want to file a Motion to Reopen Discovery and when would you like to have that heard? That -- if you did it on an expedited basis, I suppose I could resolve that by the end of December. But I don't know if Jacuzzi is going to want more time to oppose that.

All right. So, address those two issues, Mr. Cloward.

MR. CLOWARD: As far as the trial goes, we would prefer, I guess, just to keep that on the calendar for now. And, depending on what Judge Bell does, then, at that time, we can potentially petition whoever that new judge might be if -- you know, for more time.

Regarding the discovery, the discovery matter, you know, likely because of the Court's extensive involvement in this case, we would want the Court -- this Court to hear any such motion. And we could get that on file quickly.

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We were -- I guess we -- I think all of the parties are eager for the Court's ruling on Plaintiffs' Motion regarding First Street as well.

THE COURT: Right. All right. I understand that's pending, the Motion to Strike the Answer of First Street and enter a Judgment against them on liability. That's the issue that's still pending. So, that has to be decided.

So, Mr. Polsenberg, you chimed in a few minutes ago as to trial setting. What do you want to say on this?

MR. POLSENBERG: On trial, I'm going to defer to Lee.

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THE COURT: All right. Mr. Roberts.

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MR. ROBERTS: Yes.

THE COURT: What's your preference, Mr. Roberts, as to whether we maintain the March 1 trial date and you can await further instructions from the new judge middle of January on what to do or we can all try to reach a stipulation now on whether to move that trial date?

MR. ROBERTS: Your Honor, I -- Jacuzzi is in agreement with Mr. Cloward as far as just keeping that date on calendar and, then, seeing what happens with the new judge.

The Motion to Reopen Discovery, the -- we have no objection to the Court setting that on an expedited basis.

We won't need a lengthy time to respond to that. I expect it will be a limited Opposition. I think that the Court has found that certain alleged similar incidents were disclosed later than they should have been. They came -- and that Mr. Cloward should be able to do discovery on those incidents and take people that he wants to take that he thinks he needs to develop the facts to show that they are or they are not substantially similar to what happened to Ms. Cunnison, but that we would oppose a general reopening of discovery for all purposes.

THE COURT: Thanks. Mr. Cloward, get your Motion to Reopen Discovery on file as soon as you can. Provide it to the Court on order shortening time. The Court will go ahead and set a briefing schedule when I receive that. Make sure you include in your Motion your position on how much time you're going to need and when you would like trial to be reset. Okay?

MR. CLOWARD: Okay. Thank you.

THE COURT: But the Court is also going to order the parties to conduct a meet and confer by telephone as to the issues raised in your Motion. I don’t want just something that says, hey, Lee, are you going to give me -- are you going to reopen discovery so I can get into all these incidents, and, then, he says, no, your request is too broad, and, then, you guys file something. I want a

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meaningful, a meaningful attempt to resolve the scope of additional discovery. Okay?

MR. CLOWARD: You got it, Judge.

MR. GOODHART: Your Honor, this is Philip Goodhart again. I apologize for interrupting. On behalf of First Street, I agree with Jacuzzi's positions on both the trial and on the Motion to Reopen Discovery. My concern on the Motion to Reopen Discovery is, as Mr. Roberts had indicated, that it not be overbroad and it be extended to everything.

Again, as I argued a couple weeks ago, there are two distinct claims against First Street, one based upon product liability for which we are in the chain of commerce, and the second potential claim for advertising or false advertising or misleading advertising. The delays and things like that have led to the Motions to Strike the Answers of both Jacuzzi and most recent pending one for First Street all dealt with other similar incidents. And, those issues, they did not deal with advertising issues.

THE COURT: Thank you. So, we'll go ahead and keep the trial date set on March 1 as it currently is. And we'll get into these Motions in Limine in just a moment. Are the parties still anticipating this will be about a two-week jury trial?

MR. CLOWARD: On behalf of plaintiffs, I would

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think that probably three to four weeks. I would think four weeks.

THE COURT: Even though we're just dealing with damages now as to Jacuzzi?

MR. CLOWARD: Well, if the case were as it currently sits right now, we still have an active case on liability against First Street for the product defect claims. And, so, we would still have the same, I guess, trial process against those defendants -- against, yeah, those defendants, First Street and Aging in the Home. And, so, until the Court, I guess, rules on that Motion, I would have to say I would think four weeks would be a my -- plaintiffs' estimate. I'd be curious to see what Mr. Roberts and Mr. Goodhart think.

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THE COURT: So, Mr. Roberts, what's your view of both if the Court were to enter a judgment on liability against First Street and if the Court were to deny that Motion. What's your two positions on how much time should be set aside for trial?

MR. ROBERTS: I -- Your Honor, I believe that would probably shorten the time by about two weeks, to four weeks. That would be my best guess. Because there's still going to be, you know, substantial overlap, I would think, with regard to the issues that Mr. Cloward is going to put on and that we would want to defend, based on the remaining

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claim for punitive damages against Jacuzzi.

THE COURT: Got it. Mr. Goodhart, in your view, sir?

MR. GOODHART: I agree with Mr. Cloward's view that it would be four weeks, if the Motion to Strike First Street Answer in its entirety is not denied. I think there are two components to the Motion to Strike First Street's Answer, which was addressed in the oral arguments in the briefing where, again, the Motion to Strike the Answer focused entirely and exclusively on production of documents relating to customer complaints. There's still a second component of Plaintiffs' Complaint against First Street with respect to the advertising, and false advertising, misleading advertising issues, which were discussed at the hearing, which were not a part of Plaintiffs' Motion to Strike.

So, therefore, I think, unless the Court decides to go beyond the brief in the oral argument and strike the entirety of First Street Answer, we're still going to be stuck with four weeks because there are advertising issues. And whether or not the product is defective or not will be an issue for advertising arguments and defenses.

THE COURT: All right.

MR. GOODHART: So, I still think it would be four weeks. If, however, everything is stricken, then I would

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agree with Mr. Roberts that it would be two to three weeks.

THE COURT: All right. So, for the benefit of the new judge taking over this case, we'll have the record reflect that the parties anticipate this case will need about four full weeks of jury trial in order to resolve, unless the Court enters judgment against First Street as to liability on all claims, in which case the trial will be significantly shortened.

All right. Let's go ahead and deal with the Motions in Limine. Are you all ready to discuss those?

MR. CLOWARD: Yes.

THE COURT: All right. Let's begin with Jacuzzi's Motion in Limine Number 1. And let's try to keep argument brief. We've got a lot to deal with here, counsel. We're going to go for about 15 minutes and, then, take a 15 minute recess for my staff. So, if you could each limit your arguments to just a couple minutes for each of these Motions in Limine, that would be the best way to approach this.

Mr. Roberts, you're first.

MR. ROBERTS: Thank you, Your Honor. And, before I get started, I did want to just make a request or a suggestion to you, --

THE COURT: Okay.

MR. ROBERTS: -- based on my experience in some of

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the other departments, that it might be preferable to defer the Motions in Limine to the judge who is going to be the trial judge, since Motions in Limine are typically with prejudice and they are intertwined with the conduct of the trial and the rulings of the trial judge. I think it would probably be preferable from Jacuzzi's standpoint to continue these Motion in Limine hearings. We've still got quite a ways before the March trial. There may be additional incidents that arise if discovery is reopened and additional discovery is going to be done on substantially similar incidents, facts further developed, and it would just make sense to me to have the Motions in Limine continued from today.

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I'm sensitive to the fact the Court is prepared on these and, so, I hesitated to do it, but I do think that would be preferable to have the trial judge decide these.

THE COURT: We've had three years of complicated discovery issues in this case. To be quite honest, the new judge coming in is not going to have a clue on what to do with these Motions. So, anyway, Mr. Cloward, your view on this?

MR. CLOWARD: We actually agree with you, Your Honor, with the Court, that -- normally I would agree with Mr. Roberts that we do like to have the trial judge. But, because of the complex nature of the contorted history of

this case, we think that Your Honor, with the knowledge that the Court has on the other issues and how they, I guess, are intertwined with the sanction issue, we think that it would be more appropriate for Your Honor to rule on the Motions at this point.

THE COURT: So, I'm going to go ahead hear them. In fact, this is what I want to do. A lot of these Motions in Limine are intertwined, now that I'm looking at, again, at some of the substance here. Mr. Roberts, I'll give you an opportunity to either deal with these one at a time or just deal with them all together. But these are your Motions in Limine, Mr. Roberts, so you can go first.

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MR. ROBERTS: Thank you, Your Honor.

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THE COURT: But, as to each one, keep the argument brief as to each -- you know, no more than just a couple minutes as to each Motion. But I'll let you deal with them all at this one argument or you can deal with them separately, one at a time.

MR. ROBERTS: Thank you. And I understand that these have been extensively briefed and the Court's very familiar with the issues. So, I will keep argument brief. And I think -- I do think that many of these Motions are intertwined, as you said, and deal with similar issues.

And, really, the -- I think the focus from our point boils down to the other incidents coming in, whether

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or not they are substantially similar enough to come in, and that is the burden of proof for the plaintiff to show. And, to the extent they do come in, what is going to be the scope of testimony that's allowed from people who are involved in these other incidents?

The big issue for us on plaintiff having failed to meet their burden of proof at this point on showing anything that's substantially similar is the fact that there simply is not a preponderance of evidence from which a reasonable jury could actually determine exactly how Ms. Cunnison became entrapped in the tub without speculating. The briefs that we have filed with the Court attach various deposition testimony and documents, which have conflicting claims. Yes, there is someone who says Ms. Cunnison told him that she slipped. But Ms. Cunnison told other people she fell. She told other people that she didn't remember what happened.

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While the plaintiffs had a theory that she slipped off the seat and became entrapped in the tub, a jury would have to speculate to determine that she slipped rather than fell, because there is contradictory evidence on these points. And if the jury actually doesn't know how Ms. Cunnison fell, if the plaintiffs have not met their burden of proving the exact mechanism of defects in the tub that caused her to fall and become entrapped in the footwell,

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then the Court has no basis to determine whether or not these other incidents are substantially similar. And we've talked about what we do know about the other incidents and they're not even substantially similar to each other.

Simply the fact that someone says I slipped in a tub doesn't show substantial similarity to this incident. Tubs are slippery. We've, you know, documented how many falls there are in the bathroom, most of which there are in the tub in general. So, simply saying that someone is alleging that my tub is slippery and I slipped in the tub isn't enough. There has to be something so substantially similar that it would put Jacuzzi on notice that there was a defect in the tub, that the defect could cause injury, and the specific nature of the defect to put them on notice of what they need to do.

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Because we're talking now, since Jacuzzi's Answer has been struck, we're talking about punitive damages. And we're talking about notice for the purposes of punitive damages that not only was there a defect in the tub, but that the defect was unreasonably dangerous, and that we knew that and failed to take action and conscious disregard of the safety of people using our tub. So, this evidence has got to be specific enough to put us on notice of a defect, which is likely to cause injury. And many of the incidents, which Mr. Cloward proposes to tell the jury

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about, there was not even an injury. And, certainly, an incident which does not involve an injury cannot put Jacuzzi on notice that its tub is likely to cause injury.

And the incidents would have to be such that they match the plaintiffs' at least current theory of the case, assuming they can get by the fact that the evidence does not show how Ms. Cunnison ended up in the footwell. Was she reaching down because there was a drain issue? Was she reaching forward onto the controls? Did she slip off of the seat? Did she slip on the floor of the tub? We don't know exactly how she ended up there.

THE COURT: We do --

MR. ROBERTS: And, therefore, --

THE COURT: Mr. Roberts, don't we have -- don't we have some incidents where -- are you still there? It looks like the screen froze. I don't know if you can still hear me. Okay. Good. We do have some instances where customers indicated they slipped and got stuck, even if they weren't injured. Aren't those substantially similar?

MR. ROBERTS: No, Your Honor. Because if someone simply got stuck but was not injured, then it could not serve as notice of a defect that was likely to cause injury. If no one is injured, then we're not on notice that someone could be injured by becoming entrapped. Because the only thing we're left with here, given the

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Court's ruling on the liability, is notice of a dangerous condition. That's really the only thing left that these incidents should come in for. And I believe that it's a restatement type of issue, that you have to have an injury to put someone on notice of an injury.

THE COURT: Well, you can continue.

MR. ROBERTS: Thank you, Your Honor.

And the second issue then becomes what is the scope of lay testimony to the extent that these other incidents, any of them, do come in? We've got someone like Jerre Chopper, who the Court's very familiar with. And there is no incident with her. It's simply a complaint where she advises Jacuzzi of her opinion that the tub is unreasonably dangerous and it's a death trap. Certainly, she shouldn't be able to testify that it's a death trap.

Similarly, she should not be able to testify that the tub is unreasonably dangerous because a lay witness testimony should be limited to opinions based on their percipient knowledge, things that they learned or experienced in person. And she could testify, if she had used the tub, of the problems that she had. But she should not be able to speculate as a lay person as to issues that other people might have in the tub or that the tub is unreasonably dangerous because whether a tub is unreasonably dangerous is -- calls for expert testimony,

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which Jerre Chopper is not an expert.

And, in fact, none of the people that were involved in the alleged other incidents have any type of special education, knowledge, or training with regard to walk-in tubs, and design of walk-in tubs, and what design parameters should be considered in designing a tub. Because this isn't simply someone who says: Well, it seems to me an inward opening door is dangerous. There are offsetting design issues with an inward opening door versus an outward opening door. An outward opening door can create other dangers because they can put water on a tile floor in a bathroom. An outward opening door may not be feasible in many bathrooms because of the placement of the toilet beside the tub and, then, a door might not open. They -- these are all tradeoffs with conflicting costs and conflicting benefits, which lay people are not qualified to address.

So, therefore, if these other incidents come in, we believe that the people involved in the incident should be limited to testifying what their individual experience was, what they personally felt, and experienced, and observed, and it should not include opining as to how dangerous the tub is, or what defects the tub has, or how the tub should have been designed in the alternative.

THE COURT: All right. Why don't you get to --

MR. ROBERTS: And, without --

THE COURT: Yeah. Go ahead.

MR. ROBERTS: Without waiving any of the other arguments that we've set forth in the brief, I think that those are the central issues that are involved in our Motion.

THE COURT: You didn't really address Motion in Limine Number 4, which is Evidence Regarding the Duration of Time that Ms. Cunnison Remained Stuck in Her Tub.

MR. ROBERTS: Yes, Your Honor. And that, I think, is intertwined with the issue about how she fell because there are conflicting reports in the records about how long she was in the tub. And there isn't any way for a reasonable juror to sort those out and determine which one is more likely than not. The -- she told different medical providers and first responders different things about how long she was in the tub. And the -- there's no way for the Court or for a jury to determine which one of those stories is the correct one.

THE COURT: All right. What about the other issue relating to Motion in Limine Number 16 where you're trying to preclude plaintiffs' experts from offering opinions that weren't contained in their expert reports? And plaintiffs' position is: Well, that's because a lot of new information that was withheld was produced after expert reports were

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generated. What's your -- what should we do to resolve that?

MR. ROBERTS: Well, Mr. Cloward has indicated that he's going to supplement his expert reports. And, to the extent that those supplements are proper, and, based on information that was unavailable at the time of the initial reports, then I believe that, you know, we would then -- the testimony would not be outside the scope of the reports. But you certainly either have to have an issue raised in an initial report, or in a timely supplement, or it should not come in at trial. So, perhaps the -- this is one that, you know, for separate reasons other than what I raised at the beginning, that should be deferred until we know whether we have supplemental reports and what the scope of those allowable supplemental reports are.

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THE COURT: So, what about your Motion in Limine Number 21, the issue of as to how Ms. Cunnison got stuck in the tub, don't we have the opinions of plaintiffs' expert, Swint, who did provide at least one theory? I think he had -- he had some inconsistencies. But he did at least have one theory on how she got stuck. And, then, we also have Ms. Cunnison's statements to the first responders before she expired. And wouldn't those be admissible under the exception to the hearsay rule? So, don't we have some evidence then as to -- we have sufficient evidence to allow

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the jury to reach a nonspeculative conclusion as to how she got stuck. So, shouldn't that evidence come in?

MR. ROBERTS: Your Honor, I don't believe we do. And even though there are exceptions to the hearsay rule in both the statements that she made for the purposes of receiving medical treatment and maybe present sense of impression, the problem is is the statements that come in under the hearsay rule are inconsistent. And I think that when you say Mr. Swint has a theory, that's correct. That's all he's got is a theory. And there's no basis for the jury to determine which of Ms. Cunnison's conflicting explanations for how she was trapped in the tub is more likely than not. So, it's going to cause the jury to speculate.

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And these statements are more prejudicial than probative because Mr. Swint has no basis for believing that his theory is more likely than the other theories. Yes, she could have slipped off the seat. But how do we know she slipped off the seat instead of fell? Because she also said she fell in the tub. And we know that she had medical issues, which made it more likely for her to fall. And we simply don't know and the jury doesn't know. And we can't allow the jury to speculate as to how she became entrapped in the tub, especially when we're dealing with a punitive phase where the evidence of how she fell should be clear

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and convincing in order to come in because the jury is going to have to have a sufficient basis to find clear and convincing evidence that Mr. Swint's theory of how she became entrapped was actually how she became entrapped. And none of the hearsay statements that we've got rise to the level of clear and convincing evidence.

THE COURT: All right. Thanks. So, I think --

MR. ROBERTS: Thank you.

THE COURT: -- I want my staff to have a 15-minute recess. And, then, Mr. Cloward, we'll allow you to present your opposition to these various Motions in Limine. How does that sound?

MR. GOODHART: Your Honor, this is Philip Goodhart. First Street had joined in all of those Motions in Limine. There was one other Motion in Limine as well. I just have a couple of comments I could make after the break before Mr. Cloward goes.

THE COURT: All right. Did you provide -- did you just provide a Notice of Joinder or did you actually have briefs?

MR. GOODHART: Yes.

THE COURT: I'm looking through.

MR. GOODHART: No. I just provided a Notice of Joinder. There was just one supplemental argument with respect to First Street's Motion in Limine about excluding

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the use of the word death trap --

THE COURT: Okay. Yeah.

MR. GOODHART: -- in trial, which --

THE COURT: I'll let you deal with that one issue about using the term death trap. But, other than that, we'll have to move on to Mr. Cloward. Okay?

MR. GOODHART: All right.

THE COURT: All right. So, Court --

MR. GOODHART: Do you want me to do that after the break, then?

THE COURT: Court will be in recess until 11:05. And see you back all then. Now, let me ask Brittany, Brittany, do they stay on the line?

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THE COURT RECORDER: No. They can hang up.

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THE COURT: All right. Why don't you guys all hang up? And, then, you can call back in right around 11, 11:05. Okay?

MR. CLOWARD: Thank you, Judge. Sounds good.

THE COURT: All right. Thank you.

MR. GOODHART: Okay. Thank you.

MR. ROBERTS: Thank you, Your Honor.

THE COURT: Let me know when -- make sure everyone's muted.

[Recess taken at 10:48 a.m.]

[Hearing resumed at 11:22 a.m.]

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THE COURT: All right, counsel. Sorry for the delay. We had -- I had some visitors. Okay. Mr. Goodhart, I believe you wanted to present some argument to the Court. And let me find some papers here. I know you did have -- let's see. You had your own Motion in Limine Number 4 regarding the use of the term death trap or, you said: Other similar inflammatory prejudicial language. So, let's go ahead and hear from you, Mr. Goodhart.

MR. GOODHART: Thank you, Your Honor. Yes. And I just bring that up now primarily because Mr. Roberts in his oral argument mentioned the word death trap with respect to one of the Motions in Limine. Again, with respect to Ms. Chopper, as Mr. Roberts had indicated, she never used the tub. So, we're not attempting to squelch any witnesses that the plaintiff claims that we're trying to prevent them from testifying at the trial of this matter. Ms. Chopper admitted in her deposition testimony that this was just her own personal opinion just by looking at the tub.

The second witness that Mr. Cloward's relied upon is Ms. Cranute [phonetic]. And, again, this dovetails more or less into the arguments that Mr. Roberts had on Jacuzzi's Motion in Limine Number 13 concerning substantially similar incidents. Ms. Cranute, upon examination, admitted that this would not be a similar incident. In fact, she said that she fell off of the seat

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of the tub only because the jets pushed her off the seat of the tub. And, notably, Ms. Cranute is an extremely slender and slim lady. I would say she probably weighs between maybe 100 and 110 pounds, whereas Ms. Cunnison in this case is significantly bigger. And I believe her weight was in excess of 200 pounds.

So, all we're dealing with, with both Ms. Cranute and Ms. Chopper, which is what Mr. Cloward's trying to say forms the basis of this death trap argument, is pure lay opinion of witnesses who formulated their own opinion, never talked to anybody else about any other opinion. And, again, that more or less dovetails into Jacuzzi's Motion in Limine Number 1 concerning improper lay opinions. Thank you.

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THE COURT: No. Thank you. I appreciate that argument. Thank you very much. All right. Mr. Cloward?

MR. CLOWARD: Yes, Your Honor. Thank you.

I guess, very first and most important thing that's -- and I'm getting a little bit of feedback. I apologize, Judge. I don't know why that's happening. But the most important thing to consider is why is the evidence being offered? You know, you may have a situation where evidence is not admissible under one proffer of proof but it is admissible under another. So, for instance, normally evidence of insurance is strictly not allowed. But there

are exceptions to the rule that, you know, for it -- for particular reasons, say, for instance, proof of ownership, the evidence is allowed.

And, so, I think that the very first thing that the Court needs to acknowledge is: Why is the evidence being offered? And there are a couple different reasons that the evidence would be offered. Number one would be direct proof of the product being dangerous. But another reason that the evidence would be admitted would be: What is the notice that the defendants have? And a third reason that the evidence would be admitted is: How did they act? Were their actions reasonable in light of the information that they received? And, so, in reality, there are a lot of different reasons that the evidence can be offered.

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And one thing that both Mr. Goodhart, as well as Mr. Roberts, have discussed is, you know, well, this is -- this is lay witness testimony, this is lay witness testimony. Well, just because it's lay witness testimony doesn't mean that it's prohibited. NRS 50.265 provides where lay witnesses are properly allowed to give opinion testimony. And it says, quote:

> If the witness is not testifying as an expert, the witness' testimony, in the form of opinions or inferences, is limited to those opinions or inferences, which are: One, rationally based on the perception of

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the witness; and, two, helpful to a clear understanding of the testimony of the witness, or the determination of a fact in issue.

And, so, in these circumstances, just because these individuals are lay witnesses doesn't mean that they have to somehow be qualified and somehow have to, you know, have some special expertise, or training, or education. They are allowed to give testimony based on their perception of what they encountered with this tub.

For instance, Jerre Chopper would be allowed to testify about her perception of this tub. That would be relevant to the issue of notice to First Street and Aging in the Home, as well as Jacuzzi. It would be relevant to know that -- or, I guess, to the issue of whether or not their actions were reasonable. Here, they have an individual who writes, you know, six or seven letters saying: Look, this thing is a death trap. If somebody were to fall down in this thing, they wouldn't be able to get back out. And it's very dangerous. She notifies them of that and they don't do anything.

You know? That evidence goes to their conduct, their -- their reasonableness, you know, whether a jury should punish them, should not punish them, and so forth.

THE COURT: Don't you think that -- as to that one, that's kind of a stretch, though. I -- to be honest

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with you, Mr. Cloward, on that one, I'm a little bit concerned about. There's obviously a difference between a lay witness saying, oh, the car was going 55 miles an hour, and, in a situation like this where Chopper says, you know, this is a death trap and someone other than me, under unknown conditions, could slip and fall and get stuck. There's -- you know, one's -- one would be rationally based upon your perceptions and another is kind of like drawing a conclusion of the inherent dangerousness of the tub under various conditions. So, isn't there -- wasn't the rule allowing lay witness opinion testimony designed more for circumstances where the person giving the opinion has, you know, direct knowledge of all the facts that lead to that opinion?

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MR. CLOWARD: Well, I think, you know, she did have the tub installed in her home. I think her interaction with the tub would be her reasonable perception of that product.

THE COURT: What facts do we have about the interaction of the tub? Was there -- you know, and, then, remind me in the deposition, was there discussion of Ms. Chopper using her own tub and how -- and her experience in that?

MR. CLOWARD: Yeah. So, Mr. Goodhart just referenced to the Court that she did not use the tub. I

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don't -- I can't remember, it's been a while, and I didn't -- unfortunately, I should have reviewed her deposition prior to today's hearing. I know my associate, Mr. Estrada, is on the call. I'm hoping that he'll be --

THE COURT: Okay.

MR. CLOWARD: He can shoot me a text message. But my understanding --

THE COURT: That's kind of -- that's an important thing, if she has personal knowledge of the actual use of the tub, is what I'm thinking. I'm thinking that a pretty significant --

MR. CLOWARD: But --

THE COURT: -- factor.

MR. CLOWARD: Correct. But, on the other hand, Judge, if she gets the tub, it's installed in her home, before she gets in the tub she realizes this thing is dangerous, I'm not even going to get into this tub, I -- and, so, she starts to send the letters. To, me, that's still probative, and that's still relevant, and that still should be -- that should be allowed.

One argument that defeats --

THE COURT: So, her -- can you -- I have to interrupt you. So, her opinion that it's inherently dangerous just by looking that the tub should come in, even though Jacuzzi's engineers and designers never had that

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opinion?

MR. CLOWARD: Well, clearly, Jacuzzi's engineers have tried to claim that this thing is safe and there's no issues at all, regardless of the fact that there's a whole bunch of e-mails to the contrary. But if --

THE COURT: Go ahead.

MR. CLOWARD: -- her complaint was more along the lines of the tub walls being too high, the door opening inward. She noted that if she fell, she wouldn't be able to open the door. And, so, I think, on those issues, I do think that she would -- her perception of the tub and her interaction with the tub would be relevant. And it would be relevant to the determination of a fact and issue allowed under 50.265.

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Additionally, I do believe that it's the purpose of the evidence that it is being proffered. I think that the -- what the defense wants is this broad characterization of: Hey, we think that these things should just be prohibited all together. What I'm saying is: No, Your Honor. If I'm allowed -- if I'm admitting it for a very particular reason to say, hey, look, I'm offering this evidence to show that Jacuzzi and First Street had notice that if somebody fell down in their tub, they would be unable to open the door and get themselves out, they were notified of that fact by Jerre Chopper, I

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don't need her to go on and say: It is my opinion that the tub is dangerous. I don't have to have her say that. But what I do think that she is allowed to say is: I received the tub, I looked at it before I got into it, I looked at it and saw that the tub opened in -- that the door opened inward. I looked at it and said to myself, look, I have an issue with dizziness and with falling down, and if I get in this tub and fall down, I might not be able to get back out. And, number six, I sent a letter setting all of that forth to Jacuzzi.

Now, whether or not she's allowed at that point to say -- for me to get up there and say, well, Ms. Chopper, you know, is it your opinion, do you think that this tub is dangerous, I don't necessarily -- I mean, it -- with all candor to the Court, I don't think that I would be allowed to do that. And I wouldn't try to do that. But what I do think that I should be allowed to do is talk specifically about what her perceptions were, her beliefs, why she had those beliefs, lay the foundation, and, then, talk about what she sent to Jacuzzi, the information that she sent to Jacuzzi. And, then, through another witness, you know, through like the 30(b)(6), establish, okay, when you received this letter from Ms. Chopper, what did you do, who did you notify, did you take it seriously? And, so, it's really -- all of these are dependent on the reason that I

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proffer the evidence.

And, so, moving along, one other thing that Mr. Roberts indicated that I think is incorrect, I think it's an incorrect statement of law, but that's with respect to, you know, Judge, if there's not an injury that the information is not relevant. And I think that that's simply incorrect.

And the example that I give is, you know, what if Ford had, you know, 1,000 vehicles that started on fire while the person was -- sitting there. And, but, you know, fortunately, all 1,000 of the people were able to get out of the vehicle and didn't get an injury. Is that to suggest that if on the 1,001st person, that the car started and maybe they didn't get out in time and they got significantly injured, and that Ford would have a defense to come to court and say: Well, Judge, you know, you can't consider these. The jury can't consider these 1,000 prior incidents because nobody was injured.

I don't think that that's -- I don't think that's the caselaw. I don't think that -- I do think that's a correct statement -- incorrect statement of law to say: Hey, none of these other incidents are relevant because I do think that they go to notice. I do think they go to the reasonableness of Jacuzzi and First Street and Aging in the Home in their response, how they dealt with those products,

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and what they did or didn't do.

Finally, with respect to, you know, the large underpinning of Defendants' Motion is this notion that it's confusing as to how she got into the bottom of the footwell. And, quite frankly, I respect Mr. Roberts a lot, I consider him a friend, but I think that that is -- I think the parties owe the Court candor, and to suggest that it's too confusing, I think that that's really improper. Because the way that the testimony unfolded was that there were these depositions of these first responders that were taken. And the majority of the first responders had limited involvement. You know? Maybe they broke into the house. Maybe they were the ones that opened the door for the fire department. Maybe they were -- you know, they just responded because it -- you know, they got called.

And, so, when those depositions were taken, a lot of them said: Well, yeah, I think she was stuck there for three days, or, I think this is what happened. They were giving their testimony kind of based on just being there on the scene. You contrast that with Bradley Vanpamel, who testified: When I got there, I was the one that was sitting there next to her. I was holding her hand. I was comforting her. I sat there the entire time during the process of her being extricated while the others -- individuals were coming in and out of the room trying to --

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you know, there was an attempt initially to lift her out of the tub. That resulted in breaking her arm. And, so, you know, those four paramedics were in there at one point. They probably left while someone went out to grab some tools, came back in. Well, Mr. Vanpamel -- or, Officer Vanpamel, he was there the entire time. And, so, he had the more significant and more substantive conversations with Ms. Cunnison.

And, so, to suggest that, hey, because one Clark County Firefighter, he got there, came into the room, saw what was going on, saw that other people were assisting, and, so, he turned around and left. Well, because that guy was deposed and wasn't really sure what happened, that we ought to throw the baby out with the bath water. You know? I mean, that's just -- it's not correct. It's not evidentiarily correct, it's not evidentiarily sound, and it's really quite frankly not what took place.

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Another comment that I have a problem with is the comment that she said that she didn't remember what happened. I don't know where the evidentiary support for that comment was, that Mr. Roberts indicated. I'm curious about that because I haven't seen where she just flatly said: I don't know what happened. I don't -- quite frankly, I don't think I've ever seen that. You know? Maybe -- there's a lot of information so maybe somebody

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said that along the lines and that's where he got that. But I'd be curious to find out who said that and, then, find out the basis of their testimony and how they should have known these issues.

So, I don't think that there is an issue whatsoever about this being speculative, Your Honor. Mr. Vanpamel spent significant time with her. And, all of these other issues, they go to the weight versus sufficiency of the evidence. You know? They can raise that on cross-examination of, you know, a witness that says: Well, you know, you said that she said this, or whatever. And, then, I'll be able to get up there on redirect and say: Now, sir, isn't it true you were only with her for about two minutes, is that accurate? And you were basing that on -- you know, your testimony on your recollection of this event, even though you've had 1,000 events since then. And, so, those issues are really nonimportant in this case.

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But that's the lynchpin of their argument is that: Look, this is real confusing, Judge, because there's these contradictory accounts, that the Court should just not consider any of this. And I don't think that that's accurate.

And, so, one other thing with respect to the incident without injury. So, this is kind of going back to

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something that I said a moment ago. Jacuzzi's own marketing was based on creating the fear in the elderly that folks would be injured in their bathroom. And that was a -- that was a marketing tool that they used to justify the sale of this $18,000 tub to the elderly. So, they go into the homes and say: Hey, look, you know, you're going to have this event and you're going to, you know, be injured in your bathtub unless you buy one of these tubs right now. It's going to cost you 18,000 but, you know what, the long run it's going to save you a whole bunch of money.

And, so, for the argue -- for the defense to argue: Look, we didn't know, -- I mean, if somebody slipped and, you know, -- how would we know if that would cause injury? Well, you know that that causes injury because the majority of your marketing materials are based on the fact that people get injured in slips in their bathroom. You're telling people that. You're in their living room telling people if you don't buy this tub you're going to slip in this -- you're going to slip in your bathroom, and you're going to be injured, and it's going to cost you or your children, you know, 45 to $60,000 in nursing home and hospital charges, so you need to buy this tub.

So, when they get a complaint of somebody slipping

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in one of these tubs, it's a really big deal. And, so, it goes -- the evidence, while it might not -- if there was not, you know, an injury, you know, it might not be allowed for one reason. But, for -- definitely for one reason that it should be allowed is: Did they receive notice and how did they act in response to that information? And those are different evidentiary foundational issues that the Court would need to consider in ruling.

And I think what the defense wants the Court to do is to just say: Judge, we want a blanket order that unless X, Y, and Z is admit -- you know, is checked off, and none of these things come in. And I think that there are multiple avenues for admission. And one thing that comes to mind is when looking at -- there was a court, I believe it was in Idaho, it was the Idaho Supreme Court that was looking at foreseeability. And it was talking about similarly situated types of events in a negligent security context. And the defendants were arguing: Well, look, we agree that this apartment complex had a bunch of crime, but we hadn't had any prior rapes, and this was a rape. And the Idaho Supreme Court said, well, look, if you take that view that because in this instance there was not a, quote/unquote, rape, then ultimately your ruling is that there's a free one rape rule, that until the first event of that type happens, the defendant really gets a free bite at

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that apple.

And they were looking at it with regard to -- or, not bite at that apple. But they were looking at it with respect and comparing it to the free dog bite rule. And that, you know, until an owner and -- you know, knows that their dog is dangerous, they get one free bite. And the Court was giving the reasoning. That's why that rule is now going away. It is now becoming the minority rule and is now no longer the operative analysis. The analysis is look at the totality of the circumstances and take a look at what did the defendants know, how did they act, were their actions reasonable, and so forth.

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And, finally, with respect to Mr. Goodhart's argument, I guess -- and I'm trying to think if I hit all of the issues that Mr. Roberts hit. If there was anything that the Court wanted me to address, I'm happy to address that.

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But, with respect to Mr. Goodheart's argument with the death trap, you know, Ms. Cranute, she testified that the jets pushed her off. But what was important was that she ended up on her knees in the footwell of the tub with her head submerged under the water. And the Court can find that on page 10 of her deposition, lines 1 through 10, as well as page 77, lines 7 through 17.

And, so, it's important to look at the potential

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danger that she sustained. You know, she's telling them: Look, this thing is a dearth trap, this alert 9-1-1, it wouldn't have done me any good. And, here, Sherry gets stuck in the tub and she's not able to get out and she's stuck there for multiple days. And, so, we think that it's relevant. Again, it goes to: What is the reason that the evidence is being admitted?

And, finally, I guess, the last thing that I think that they may have set forth in the Motion, I'm not sure if they argued it, but was just with respect to the number of days that she was in there. Certainly, these statements that she made to these medical professionals, they're consistent. It's three to four days. That's what it is. It's -- and it's entirely consistent. There's no -- there's no speculation. There's no conjecture there. There's no confusion. It's set forth in a multitude of places and should be allowed to be presented to the jurors because it's an important part of her damage claim.

Thank you, Your Honor. If the Court has anything else that it would have me address, I'm more than happy to address.

THE COURT: What about Nancy Jones? She was the one who -- you know, there was some statement that she slipped and she kind of took it back in a deposition. And she was a situation where she thought she was going to slip

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but she was really careful. And it had something to do with the grab bar, whether -- you know, reaching for the grab bar would make you slip. But she didn't actually slip and she was never injured. It's just -- I think it was just an opinion on what could have happened. How does that come in?

MR. CLOWARD: Again, I think that Nancy Jones, for instance, would come in under the analysis of how is -- you know, what type of notice did Jacuzzi have and First Street have of the potential -- I mean, it all goes to foreseeability. You know? When they're notified of an issue, it all goes to foreseeability. Is the harm that was complained of foreseeable to cause an injury? And, so, when they're being told of these things, hey, look, I almost fell, even though it didn't result in necessarily an injury, we think that it's admissible for other purposes.

So, for instance, did they receive notice of a complaint? And, then, also, were their actions reasonable? What did they do about it? Did they do anything at all? Did they just shovel it under the -- you know, under the desk? Did they just shred the information? Or did they actually forward it along to the engineers and say: Hey, you know what, this is the 17th complaint just like this we received, we really need to look into this. You know? So, I think that it goes to -- it goes to other issues in the

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case.

And those are the issues that I would have to prove in a punitive claim is, you know, were their actions reasonable or did they act with a conscious disregard? I mean, a conscious disregard, I have to show, you know, what was their thought process? Did they know of a danger? Did they just knowingly disregard and throw that, you know, danger out?

And, again, you know, it's a different analysis, Your Honor, if I'm coming into court and I'm saying: Judge, I think that I should be allowed to have Nancy Jones take the stand and offer opinion testimony that this tub was dangerous, that it was -- you know, that it was all of these bad things. That's in one analysis. Another analysis is: Ms. Jones, tell me about your experience in the tub. What did you report? Why did you feel that way? Why did you fell incumbent -- I mean, that it was incumbent upon you to notify whoever you did do -- to do that. And, then, through separate testimony, obviously she wouldn't have the foundational basis to address what the company's actions were, but maybe through the 30(b)(6), gets the 30(b)(6) on the stand and say: Now, Mr., you know, so-and-so, you received this letter from Ms. Jones, or from the dealer, or from whoever it came from, why did you do X, Y, and Z? Or tell us what you did? Or why didn't you do

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this? Or why didn't you do that? And, so, it's really looking at the reason, they very specific reason the evidence is produced.

And I can't express enough, I think that the -- what the defense wants to do is to just have the Court make a blanket ruling and without regard to the reason that the evidence is offered to be submitted -- or, to be -- without regard to why the evidence is proffered.

THE COURT: Okay. Thank you. Anything else?

MR. CLOWARD: No, Your Honor.

THE COURT: Okay. Let's -- Mr. Roberts, we're going to go back to you for a reply on your Motions in Limine. I don't think we can hear you yet, Mr. Roberts.

MR. ROBERTS: How about that, Your Honor?

THE COURT: Yeah. We can hear you. Thank you.

MR. ROBERTS: Very good. One of the first things Mr. Cloward mentioned in his argument was the Court needs to look at the purpose that the proof is being offered for. And he said, I think the first thing is that it's being offered to show that the product is dangerous and that Jacuzzi knew about it. But this is the exact reason why we have the rule on substantial similarity. And that is that, in order to satisfy due process, Jacuzzi can only be punished for a danger that resulted in harm to Ms. Cunnison. So, if the grab bars are sharp like a knife and

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cuts your hand but Ms. Cunnison's hand wasn't cut, and the dangerous grab bar didn't hurt her, then it doesn't come into a punitive case. We have substantial similarity to ensure that Jacuzzi is only punished for a danger in the tub that was, one, was unreasonably dangerous, that they had notice of, and that actually caused harm to Ms. Cunnison. And that's why this is so important. Is it a slippery floor or a slippery seat that caused harm to Ms. Cunnison? Was -- did she collapse due to her medications or medical condition into the footwell and the only thing that caused harm is perhaps the location of the footwell and the inward opening door? These things make a big difference. We cannot ask -- it makes a difference as to how much notice Jacuzzi had as to which of these specific dangers. And there has to be some clear and convincing evidence that would allow a jury to make a finding supported by facts in the record and not speculation.

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And the Court mentioned Mr. Swint and, on page 6 of 9, we quote from his deposition and he says, you know: One of the first things is we don't know what happened to her. She could have -- it's one of the postulations, finished her bath, was standing up to get out of the tub, and slipped and fell in the center. So, their own expert, who's had access to all of these reports from various witnesses, and doctor -- medical records that are subject

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to the hearsay exception, their own expert who's reviewed all of the evidence says: We don't know what happened to her. He's just guessing about the possibilities, the possible explanations for how she ended up stuck in the tub. And the jury would have to do that, too.

And we aren't just talking about a difference of opinion regarding various first responders and one is more credible and has better foundation than the others. We've actually got the Clark County Coroner's Report of Investigation, who, following a state investigation, noted that there's no slip, found that her cause of death was dehydration and rhabdomyolysis due to a fall, per the nurse who cared for Ms. Cunnison in the hospital, [indiscernible] fell or possibly collapsed. All of these are other explanations, which prevent the one explanation that she slipped off the seat from being sufficient for the jury to find clear and convincing evidence.

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And it's not just that a medical record said she fell or possibly collapsed, there's other things in the record that makes that a very plausible explanation for what happened to her. We know that she was taking no fewer than 12 medications for pain, seizures, and depression that have side effects of dizziness, drowsiness, and confusion. She was using a Fentanyl patch whose side effects include unconsciousness. There are medical reasons which make the

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explanation that she fell or collapsed very plausible. And the Court, I think, can't lose sight of the fact that it is clear and convincing proof that has to be submitted to the jury.

THE COURT: Sure. But can't you have --

MR. ROBERTS: And --

THE COURT: Can't you have -- meet -- can't the plaintiff meet its burden by clear and convincing evidence based upon circumstantial evidence? Or clear and convincing burden of proof based on circumstantial evidence? And wouldn't many, many prior instances of people slipping off the seat be circumstantial evidence to enable the jury to reach the conclusion on a clear and convincing evidence standard of the dangerousness of the seat, combined with notice to Jacuzzi of the dangerousness?

MR. ROBERTS: Well, Your Honor, theoretically, I think you can have clear and convincing circumstantial evidence. But there simply isn't it here. The two people that are -- we focused on in our briefing who slipped off the seat, both said they had no problem staying on the seat until the jets came on. The jets could push people off the seat. But there's no evidence that that happened to Ms. Cunnison. And she was, in fact, much --

THE COURT: Okay.

MR. ROBERTS: -- much larger and --

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THE COURT: Well, why shouldn't I just let all this go to the jury and let the jury decide? I'm just one man, one person, you know, sitting here. I got my own view. But I can't take it away from the jury if there's some circumstantial evidence that could lead them after hearing everything. Is it really that prejudicial that I need to keep it out, just -- even though it is some circumstantial evidence?

MR. ROBERTS: Yes. I think there is a danger that the jury is going to become inflamed by other incidents that are not substantially similar with the 20/20 hindsight and hindsight bias of knowing what happened to Ms. Cunnison.

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And I would like to maybe throw out an analogy where the Supreme Court has dealt with prior bad acts in a criminal proceeding.

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THE COURT: Okay.

MR. ROBERTS: And, before evidence of the prior bad acts can be admitted, there has to be clear and convincing evidence that such acts actually occurred.

THE COURT: Yeah. It's a *Petrocelli* hearing.

MR. ROBERTS: Right. And I think that the Court is similarly a gatekeeper here where there is a clear and convincing burden of proof of no reasonable juror could reach a conclusion as to how Ms. Cunnison went in that

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footwell, that she didn't fall, by clear and convincing evidence, then it is the Court's responsibility as a gatekeeper to keep that evidence out. Because, at that point, it becomes more prejudicial than probative that someone else slipped off a seat if, in fact, she did not slip off the seat.

The -- and Your Honor, I see that Mr. Cloward also raised 50.265. And we agree that if a witness is not qualified as an expert, the witness can still give an opinion or inference based on their rational perception. But there -- there's an and between sections 1 and 2. And the and requires that the opinion be helpful to the jury to determination of fact at issue. And the caselaw that has dealt with whether or not a lay opinion is helpful has focused to some degree on: Is the lay witness actually in a better position to form that opinion than a jury? And, in this case, none of these witnesses are necessary -- certainly, not Ms. Chopper, who did nothing but look at the tub, are in a better position than the jury to form a lay opinion as to the dangers. And I don't think we ever get there. Because I think that there are experts in tub safety. There is an expert in tub safety. And even the expert says that he can't figure out what happened and has offered no opinion on it, certainly no opinion to clear and convincing evidence.

And the argument that Mr. Cloward makes is this goes to weight and not to admissibility. But the *Williams v. Eighth Judicial District Court* case, which we cite in our brief, makes it clear that because expression of probability is a condition precedent to the opinion of expert testimony on causation, it relates to competence of the evidence and not its weight. And speculative opinions based on conjecture are insufficient to form a finding on causation because a possibility is not the same as a probability.

And all the evidence here, Judge, shows is that it's possible she slipped off the seat. It does not show it's more likely than not. And it certainly doesn't show that it is substantially certain or whatever, you know, the various meanings have been described to clear and convincing evidence. We know that it's more than just more likely than not. And, because there are other explanations for how she could -- she ended up the floor in the record, if she's telling the nurses she fell, if she's telling the first responder she slipped, then the reasonable inference is she doesn't really know what happened. She doesn't remember.

There's certainly no clear and convincing evidence that one explanation in the record to one first responder is somehow so substantially certain that a juror could make

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a finding of clear and convincing evidence on that. And I do think the Court has a responsibility as gatekeeper not to allow all of this possibility and conflicting evidence to come in because it is more prejudicial than probative. And I think it is similar to the *Petrocelli* hearing where the Court has to determine whether or not any juror could find clear and convincing evidence before you start letting this stuff come in in a punitive phase.

The -- I think that's the end of my notes, Your Honor, on the specific issues that I wanted to address that Mr. Cloward addressed. But I would be happy to answer any questions --

THE COURT: Well --

MR. ROBERTS: -- that my argument has raised with the Court.

THE COURT: No. None right now. Mr. Goodhart, did you want to make any reply regarding First Street's Motion in Limine Number 4 regarding the term death trap?

MR. GOODHART: I do, Your Honor, just very, very briefly.

Number one, I had another look at Ms. Chopper's deposition. Mr. Cloward was present at the deposition. Number two, I think I may have misspoke when she never -- when I said she never, ever used the tub. That should have been revised to she had not used the tub before she started

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writing letters complaining about the tub. She wrote letters to Jacuzzi and other individuals prior to the tub being installed. In her deposition testimony, just to clear things up, Your Honor, she testified that she used the jets only twice. And, then, after using the jets, realized that it would push her off of the seat, and, then, only filled the tub up to the bottom of the seat thereafter, but continued to use the tub thereafter.

And this, then, also gets to the issue of the notice, Your Honor, about whether this was a death trap to First Street. Ms. Chopper wrote numerous letters and e-mails directly to Jacuzzi. And, in some of those e-mails and letters, there are references to the words death trap. I'll admit to that. However, there are no letters to First Street or e-mails directly to First Street from Ms. Chopper referencing death trap. In fact, the only letter to First Street, there is a complaint about the tub not filling quickly enough, about her having to sit in the tub cold and freezing while the tub drained, and the like.

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So, I'm not sure how the Court is going to do this when you have two distinct defendants, --

THE COURT: All right.

MR. GOODHART: -- Jacuzzi and First Street/Aithr, who are not receiving all the notices that the plaintiffs are claiming these other consumers are sending out. For

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example, information that Ms. Chopper was sending to Jacuzzi directly and not to First Street, never landed on First Street's lap. So, how could First Street have notice that Ms. Chopper believed that this was a death trap when Ms. Chopper never conveyed that information directly to First Street? And there's also no evidence that Jacuzzi conveyed that information to First Street either.

So, again, Your Honor, I just want to apologize if there was a misconception or a misconstruing of Ms. Chopper's deposition testimony with respect to the word death trap. And I just wanted to make sure the Court was clear on that. Thank you.

THE COURT: Yeah. No. Thank you for clarifying that. And that's certainly going to be a different, difficult issue, too, for the Court to make sure that if it does let in the so-called death trap letters, that they aren't used against First Street. But I don't know if I'm going to let that term be used at all. All right.

So, I think that that covers Motions in Limine Number 1 from Jacuzzi, Jacuzzi Motion in Limine Number 4, Motion in Limine Number 13, Motion in Limine Number 16, and Motion in Limine Number 21. You've all presented sufficient argument to the Court to enable the Court to resolve those. Obviously, I'm going to take this under advisement. I'm just about done with my analysis of the

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Motion that's pending against First Street. I had anticipated having that done the week after Thanksgiving. I'm a little bit behind on that. All right. So, that's done.

So, Madam Clerk, I'm taking under advisement all those Motions in Limine by Jacuzzi that I just mentioned. And, then, we have First Street's Motion in Limine Number 4 regarding the term death trap. That one's also under advisement.

Counsel, there are -- the other briefs that I had read when we were talking about Jury Instructions, I was actually thinking in terms of the Plaintiffs' Motion in Limine Numbers 5, 6, and 7. Or, actually, the Motion in Limine regarding Proposed Jury Instructions 5, 6, and 7. I am prepared to hear argument on that if you're all so inclined. This is the one where plaintiff wanted a Jury Instruction that says, you know, that the Court's found that Jacuzzi willfully withheld evidence related to other end users, etcetera. And, then, the other instruction they wanted is that the Court has found that Jacuzzi willfully withheld evidence tending to show that Jacuzzi had reason to anticipate that Sherry may slip off the seat. And, then, plaintiff also wants a Jury Instruction that says that the Court's found Jacuzzi willfully withheld evidence that would show that Jacuzzi had reason to anticipate that

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if Sherry were to slip off the seat, she would be unable to open the inward opening door.

So, counsel, did you want to address Plaintiffs' Motion in Limine to allow those Jury Instructions?

MR. CLOWARD: Your Honor, can I cut in here for a moment? I've been hesitating to do that because I didn't want to interrupt the Court.

THE COURT: Oh, please.

MR. CLOWARD: But I know the Court reviews things carefully. And, so, I --

THE COURT: Well, I try to. Sometimes I miss things.

MR. CLOWARD: I wanted to just provide the Court with the page references for Mr. Swint's deposition.

THE COURT: Oh.

MR. CLOWARD: Because I think it's somewhat -- he wasn't saying, hey, we can't -- we don't know what happened, I think he was specifically addressing a question as to whether the jets had involvement in pushing her off the seat.

THE COURT: No. I don't want to hear -- get into substance. I saw both of you discuss Swint's deposition testimony. And I have the places in your briefs where that's discussed.

MR. CLOWARD: Okay. It's page 38 through 39 of

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deposition 2. And, then, counsel for First Street just indicated that -- you know, that they didn't received these letters directly. That is accurate. Jerre Chopper did not e-mail -- or, did not address some of the letters directly to First Street. However, they were provided to First Street by Bob Rowan, the Jacuzzi president, via e-mail. They were provided to Dave Modena and that's JACUZZI003092 through JACUZZI003095. And, then, finally, in the event the Court wanted this specific testimony from Ms. Chopper, that's on page 89 of her depo where she discussed the time she used the tub.

THE COURT: All right. All right. Well, I --

MR. CLOWARD: I just wanted to provide those to the Court.

THE COURT: I'll take a look at those references. Thank you. But, Mr. Cloward, what about -- I think you presented it by way of a Motion in Limine. But I don't recall the procedural vehicle exactly. But you did want those Jury Instructions that I just identified. Did you want to discuss those now?

MR. CLOWARD: Yes. If the Court is inclined to hear that, we would have the Court do that.

THE COURT: Okay. Mr. Roberts, those -- just as to those three Proposed Jury Instructions, did you want to be heard on those now?

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MR. ROBERTS: I -- could I let Mr. Henriod or Mr. Polsenberg answer that question, Your Honor?

THE COURT: Sure. Yeah.

MR. ROBERTS: They had prepared the argument on the instructions.

THE COURT: Mr. Henriod? Okay. Mr. Polsenberg, are you on the line, sir?

THE COURT RECORDER: Mr. Polsenberg is logged in. I don't see Mr. Henriod.

THE COURT: All right. I think we still have Mr. Polsenberg, Mr. Roberts. Maybe he can't hear us. Now I can't hear you.

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MR. ROBERTS: I was just -- ironically, I was saying his microphone is muted while my microphone was muted, Your Honor.

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THE COURT: Okay. Well, --

MR. GOODHART: Your Honor, this is Phil Goodhart for First Street and Aithr. I think one of the issues we're going to have with any Proposed Jury Instruction is we don't have a ruling from the Court yet on Plaintiffs' Renewed Motion to Strike First Street's --

THE COURT: These have nothing to --

MR. GOODHART: -- and Aithr's Answer as to Liability.

THE COURT: These have nothing to do with First

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Street. Right?

MR. GOODHART: Well, it -- they're asking for a Jury Instruction basically instructing the jury that Jacuzzi had knowledge of these substantially similar incidents and that they were causing harm. And I don't know how we're going to differentiate that type of a Jury Instruction out if the Court denies Plaintiffs' Motion and we move forward on a trial where First Street and Aithr --

THE COURT: Let's just -- yeah.

MR. GOODHART: -- are able to defend the product.

THE COURT: Yeah. That's a different issue in my mind. I need to determine whether --

MR. GOODHART: Okay.

THE COURT: Let's assume Frist Street's not even in the case, has nothing to do with this case, I would still have to decide whether this kind of instruction is even proper to go to the jury. So, that's really what I wanted to hear from Mr. Cloward --

MR. GOODHART: Okay.

THE COURT: -- and Jacuzzi, whoever it might be. I think -- I guess, what's really in my mind here is isn't Jacuzzi already punished by its discovery misconduct through the Court's, you know, sanction order on liability. And why do we need to go to the next step and tell the jury -- tell the jury what led to their sanction and why they

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were sanctioned? And, so, I guess, really, that's -- you know, that's foremost in my mind are these three Proposed Jury Instructions necessary and overly prejudicial?

So, I wanted to hear from Mr. Cloward but not unless we have someone from Jacuzzi who is also prepared to present argument on that. So, what do we do, Mr. Roberts?

MR. ROBERTS: So, I am trying to reach Mr. Henriod or Mr. Polsenberg right now. It appears they must have stepped away.

THE COURT: Well, we can just -- we can just do this next week if you want. What's today? What day of the week is it?

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THE CLERK: Monday.

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THE COURT: It's a Monday. Want to just do this next Monday? We'll have a certain time, like 10:30. We could do that. What are your thoughts -- that's the 14th. Let's see. Yeah. The 14th, I'll be ready to do this at 10:30. Mr. Cloward, are you still on the line?

MR. CLOWARD: Yes. I'm just checking my calendar for the 14th.

THE COURT: Okay.

[Pause in proceedings]

MR. CLOWARD: That would work for us, Your Honor.

THE COURT: Mr. Roberts, what about Mr. Henriod?

MR. ROBERTS: I -- I cannot reach him, Your Honor.

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The 14th is good for me. So, I will make sure Mr. Henriod knows about this and -- there he is.

MR. POLSENBERG: This is Mr. Polsenberg. I'm standing in for Joel because he sent -- Your Honor, he sent you an e-mail about 8:08 this morning.

THE COURT: I got it. Yeah. Yeah.

MR. POLSENBERG: So, I'm here for him.

THE COURT: What would you like to do? I was either going to entertain argument now on plaintiffs' request for those three Proposed Jury Instructions dealing with the Court's finding about Jacuzzi withholding --

MR. POLSENBERG: No. I --

THE COURT: -- evidence. Do you want to hear those now or next Monday?

MR. POLSENBERG: If you could -- yeah. If you could put that off, under his circumstances, I think that would be best.

THE COURT: Yeah. Okay. Good idea.

So, I'm going to move argument regarding Proposed Jury Instructions 5, 6, and 7 to next Monday at 10:30. If the parties have some conflict with that date, I'm flexible. Please notify my JEA or my Law Clerk. Well, it'll have to be my JEA. My Law Clerk is out for two weeks. And we'll try to get you a different day if that doesn't work. But, right now, the Motions in Limine

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regarding the Proposed Jury Instructions 5, 6, and 7 is moved to Monday at 10:30.

MR. CLOWARD: Thank you.

MR. POLSENBERG: Thank you, Your Honor. We appreciate that.

THE COURT: So, I'm making a deadline for myself to have the First Street sanction Order done -- or, the Order on the Motion for Sanctions against First Street done by Monday, as well as the Order on the Motions in Limine also done by Monday. All right. Anything else, counsel?

MR. CLOWARD: No, Your Honor. Thank you.

THE COURT: All right.

MR. GOODHART: No, Your Honor. Thank you.

THE COURT: All right. Thank you. Have a good day.

MR. ROBERTS: Thank you, Your Honor.

PROCEEDING CONCLUDED AT 12:18 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.

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KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

007115

72

A-16-731244-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Product Liability | **COURT MINUTES** | **December 21, 2020**

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

December 21, 2020 11:00 AM **Hearing: Jury Instructions**

HEARD BY: Scotti, Richard F. **COURTROOM:** RJC Courtroom 03B

COURT CLERK: Castle, Alan

RECORDER: Amoroso, Brittany

REPORTER:

PARTIES PRESENT:

Benjamin P. Cloward	**Attorney for Plaintiff, Special Administrator, Trust**
Brittany M. Llewellyn	**Attorney for Cross Defendant, Defendant**
Charles H. Allen	**Attorney for Plaintiff, Special Administrator**
Daniel F. Polsenberg	**Attorney for Cross Defendant, Defendant**
Ian C. Estrada	**Attorney for Plaintiff, Special Administrator, Trust**
Joel D. Henriod	**Attorney for Cross Defendant, Defendant**
Johnathan T Krawcheck	**Attorney for Cross Defendant, Defendant**
Philip Goodhart	**Attorney for Cross Claimant, Cross Defendant, Defendant**

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JOURNAL ENTRIES

COURT having considered motion for Jury Instruction FINDS inflammatory and prejudicial and ORDERED, Plaintiff's motion to instruct the Jury regarding Defense evidence is DENIED. Colloquy regarding production of discovery documents estimated at 350,000 emails. Court directed Defendants to Allow Mr. Cloward and Mr. Estrada to go through the documents with the limitation that they would not be allowed any copies, taking of pictures; and, would not be allowed to discuss findings with their clients. Counsel would record the bates numbers of the documents they want and Defense would then have the opportunity to object to the requests. This Court will order there be a Protective Order in place until a ruling can be made on any objections. Objection by Mr. Roberts regarding access to the information being an opportunity to apply the information in other cases against Mr. Roberts' clients. Further colloquy regarding objections and cost sharing for a third-party vendor. Mr. Cloward stated he is willing to go in and review the documents himself. COURT ORDERED, Defendant Jacuzzi Inc. to produce for electronic inspection the entire universe of documents/emails by making a computer available to Mr. Cloward and Mr. Estrada at the offices of Jacuzzi Inc. or Jacuzzi's counsel and they shall personally go through the universe of items produced from the search terms utilized for a total of forty (40) hours, absent further order of the Court and shall be completed by January 30, 2021, except by further order of the Court; and provide list to Mr. Roberts BY February 22, 2021. Counsel shall not download, copy, photograph or otherwise reproduce any of the documents reviewed, however, counsel shall be allowed to identify the documents he wants

access to for the purposes of this litigation. Counsel will provide the list of documents to Mr. Roberts by way of a notice which shall be filed with the court. Mr. Roberts will have the opportunity to examine the requested emails and then, to the extent any documents are object to, Mr. Roberts shall produce a privilege log stating the basis of objections. Court directed Mr. Roberts to be circumspect in making any objections on the basis of relevance because the Court has already made several rulings in this case as to the relevance of the search terms being used subject the agreement of the parties that might provide otherwise. COURT FINDS a Protective Order shall issue for any and all documents that are being reviewed by Mr. Cloward and Mr. Estrada prohibiting counsel from using or disclosing the documents or the existence of the documents to his client or to any other attorneys in their law firm, or any other people or entities from any other cases, absent further order of the Court. Court clarified the only notes allowed to be taken are particulars that would go into a privilege log. Court notes if there are no objections by Jacuzzi Inc., then the Protective Order is lifted as to those specific documents. If there are objections, they are to be produced within one week of the assertion of the objection NO LATER THAN March 1, 2021; and, privilege log NO LATER THAN March 8, 2021. If the privilege log is not timely provided, then the protective order is automatically lifted. Court notes if there are objections, then the Court will conduct a hearing on those documents and if determined those documents are discoverable, then the protective order shall be lifted. FURTHER ORDERED, documents compelled to be produced by Jacuzzi Inc. are being produced by Court order and production of any privileged information is not voluntary and would be inadvertent, therefore Jacuzzi Inc. does not waive its privilege. COURT ORDERED, if the request is voluminous to the extent Jacuzzi requires additional time, Jacuzzi has the right to request additional time if it is justified. Mr. Cloward to prepare the order, have opposing counsel review as to form and content and distribute a filed copy to all parties involved in this matter.

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A-16-731244-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Product Liability	**COURT MINUTES**	**December 21, 2020**

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

December 21, 2020 **12:00 AM** **Decision**

HEARD BY: Scotti, Richard F. **COURTROOM:** RJC Courtroom 03B

COURT CLERK: Alan Castle

PARTIES PRESENT: N/A

JOURNAL ENTRIES

007118

- The Court DENIES Jacuzzi's Motions in Limine (MIL) Nos. 1, 4, 13, 16, and 21. The Court FURTHER DENIES First Street for Boomers and Beyond Inc's MIL No. 4. This Court Finds All of the evidence that is the subject of the pending motions is very relevant, and there is no unfair prejudicial impact, nor inflammatory effect, nor risk of confusing the jury. Mr. Cloward shall prepare and submit the final revised proposed Order, pursuant to the electronic submission provisions of AO 20-17 & 20-24.

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CLERK'S NOTE: This Minute Order was electronically served by Courtroom Clerk, Alan Paul Castle Sr., to all registered parties for Odyssey File & Serve. apc/12/21/20.

74

Electronically Filed
1/11/2021 9:58 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT ANSARA, DEBORAH TAMANTINI, ESTATE OF SHERRY LYNN CUNNISON, Plaintiffs, vs. FIRST STREET FOR BOOMERS & BEYOND, INC., ET AL., Defendants.	CASE NO. A-16-731244-C DEPT. NO. II **Transcript of Proceedings**

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE

JURY INSTRUCTIONS

MONDAY, DECEMBER 21, 2020

SEE APPEARANCES ON PAGE 2

RECORDED BY: BRITTANY AMOROSO, DISTRICT COURT
TRANSCRIBED BY: KRISTEN LUNKWITZ

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

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APPEARANCES:
[ALL VIA VIDEO/TELEPHONE CONFERENCE]

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

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

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MONDAY, DECEMBER 21, 2020 AT 11:11 A.M.

THE COURT: Let's see who all is here. Who's here for the plaintiff?

MR. CLOWARD: Good morning, Your Honor. Ben Cloward and Charles Allen are here for the plaintiff. And my paralegal, Cat Barnhill as well.

THE COURT: All right. Great. Thank you. Who's here for Jacuzzi?

MR. POLSENBERG: Good morning, Your Honor. Dan Polsenberg, Joel Henriod, and Lee Roberts for Jacuzzi.

MR. ROBERTS: And, Your Honor, also, I believe my partners John Krawcheck and Brittany Llewellyn are on the line.

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THE COURT: All right. Thank you. All right. Who's here for First Street?

MR. GOODHART: Your Honor, this is Philip Goodhart on behalf of First Street and Aithr.

THE COURT: And Aithr. Perfect. Is there anybody else on the line on this matter that wishes to make an appearance? All right. All right.

So, this is a continuation of our hearing regarding Jury Instructions. I forget who gets to go first. I don't know the context in which this came up. Well, I think this was -- Mr. Cloward, this might have been

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your request for certain instructions. Why don't we begin with you, then?

MR. CLOWARD: Okay. Thank you, Your Honor.

And one of the things that the Court indicated last hearing that I kind of want to focus on because I want to focus on what the Court -- is important to the Court. The Court kind of suggested: Well, you know, these Jury Instructions, why would they be necessary? You know, if I struck the Answer, wouldn't Jacuzzi have been punished enough? And kind of wanted some maybe clarification or explanation as to why the Jury Instructions were necessary, why they would be requested.

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And the way that I look at this case is, you know, if you have a bucket of evidence that you can -- you know, that's kind of considered like a size of a basketball, and that's the evidence in the case, and that's the evidence that should have been turned over from the beginning, you know, you have kind of a bucket with all of those relevant issues. But only evidence the size of a baseball has actually been turned over. You know? By the time we get to the jury on the issues, specifically with respect to the punitive damages, and here I am trying to explain and trying to prove my case that, look, ladies and gentlemen, this is why, you know, you should punish these defendants, this is why you should find that there's punitive damages,

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but I'm only dealing with a very small portion of the totality of the potential evidence at issue, I am prejudiced and I am put at a disadvantage. You know?

In the defendants' brief, they talk a lot about, you know, constitutional issues, and due process rights, and things of that nature. But what about the plaintiffs' due process rights? You know? Strategically, a defendant could say: Look, they already have this giant ball of evidence and it's really bad. It shows that, you know, at the corporate level, we were making decisions that consciously disregarded the rights and safety of the end users of this product. And, so, our strategic decision is going to just be to not turn it over at any cost. And we're going to argue that the judge, if he instructs anybody or the jurors on any of these issues as to us withholding that evidence, that the judge is violating our due process rights and he's violating our constitutional rights.

And that could be a strategic decision of the Court doesn't -- you know, if the Court accepts their position, I mean, think of the ramifications. Ultimately, a defendant that has real bad evidence could, as a strategic decision, just say: You know what, we're not going to turn it over no matter what. No matter what the sanctions are, if we get our Answer struck, we're only

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going to turn over this much, and this much is what plaintiffs have to use to try and convince the jury of punitive damages.

You could have a situation where this really bad conduct, this, you know, bucket of evidence never gets to the jury because of this strategic decision to only turn this over. So, because of the decision to only turn this over, you never have punitive damages because the jury isn't allowed to assess and evaluate the entirety of the evidence.

And, you know, in this situation, we have Jacuzzi that, despite Lee Roberts getting involved, it's clear that there is still evidence that's not being turned over at the insistence, apparently, of Jacuzzi saying: Hey, look, we have these 100,000 e-mails or however many of these e-mails, that were triggered with these search terms, but because of the volume, we're going to turn them over. Well, I don't have a privilege log. I don't have -- you know, and we've offered creative solutions to Mr. Roberts, you know, where we figure out a way to bear the burden of those -- of that production. But, still, we don't have the evidence. You know?

And if you have hundreds of thousands of e-mails, the same thing with First Street and Aithr, you know, Mr. Goodhart represented, you know: We had a whole bunch of e-

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mails, we've gone through them. So, the way I'm looking at it is here's this potential evidence. And, without this curative instruction at the end of the day, I'm going to be using only this, a small amount of evidence to try and convince these jurors that this company engaged in bad conduct.

Like, for instance, Judge, one of the very important -- just pulling one of these examples out, it says this is the home safety bath customer. This is JACUZZI005317 through 5320, and it says, you know:

> The bottom of the tub is extremely slippery. He has slipped. Also, a friend has slipped. We get the slipperiness issue complaint a lot. We have two customers right now that injured themselves seriously and are threatening lawsuits.

Well, I don't have names for any of that. I don't know who those folks are. I can't go and depose them and find out what serious injuries they have.

And, so, at the end of the day, Your Honor, the Jury Instructions that we requested are simply to level the playing field for plaintiffs so that plaintiffs' due process rights are considered and contemplated in this important issue, that our constitutional rights of having a trial on the merits, having a trial with the entirety of the evidence. And the Jury Instructions seeks to

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essentially let the jurors know that, you know, there was an -- there has been an attempt to minimize.

I mean, it would be a different situation if the Court, you know, gave a, you know, an order that said: Look, I don't care the cost, I want all of the evidence turned over to plaintiff. And, so, at the end of the day, we proceed to trial and we have everything, and we know that we have everything, then if I'm asking the Court to impose these Jury Instructions, that's a different story. You know? That is, you know, asking the Judge -- that would be asking the Court to have the jury decide this issue on potential issues of litigation conduct.

But, at the end of the day, what I'm asking the Court to do, because of the way the evidence has been produced and because we don't have all of the evidence, is to simply notify the jurors that, look, there might be additional information out there that wasn't produced. And if the language of my instruction is troublesome to the defendants, then I propose that they -- you know, that they craft a competing instruction that accomplishes the same goal, that educates the jurors that there might be additional information out there that hasn't been turned over and that they need to use that in their calculus regarding their decision-making process.

And, you know, a lot of -- I just wanted to

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finally kind of touch on some of the cases that the defendants pointed to in support of their -- you know, this is a constitutional level issue. You know, a lot of those cases deal with post-accident issues. So, for instance, one of the cases they cite is the *DeMatteo v. Simon* case. And that is where, in New Mexico, they admitted the defendant's post-accident driving record to prove punitive damages. Or, they admitted, you know, that the defendant fled the scene and they, you know, tried to have that evidence admitted to prove that the decisions were made the caused the injury.

In this case, all I'm trying to do is educate the jurors that: Hey, look, plaintiffs have to -- have a burden to prove. And plaintiffs have to prove X, Y, and Z. Well, it's -- you know, the Court has found that in the process of discovering X, Y, and Z, certain things have happened and you might not have all of the evidence because of that. You know? So, it's to protect our due process rights and to give us a fair trial. Because I still have to prove by clear and convincing evidence my elements of punitive damages. So, Your Honor, with that, I would rest, unless the Court has anything in particular that it would like me to address.

THE COURT: No. Other than this. Of course, we would not want the jury to award punitive damages based on

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their speculation as to what evidence might -- what other evidence might exist out there that wasn't produced. You would agree to that. Right?

MR. CLOWARD: Yeah. I think that anytime that the jury is speculating, I think that, you know, the *Grammens* case talks about the dangers of speculation, and I don't think that the Supreme Court wants any verdict that's based on speculation. But I also believe that plaintiffs do have a competing due process right, that they should be entitled to present the evidence, and all of the evidence.

And I know that what plaintiffs are asking has been instructed in other cases. I believe the *Takata* case with Mr. Eglet, in that case, the corporate defendants actually destroyed computers. And the jurors were notified of those -- of that destruction. And, in this case, we're simply asking that the jurors be instructed that, you know, evidence has been withheld and that the Court has found that. And I think that the jurors need to just use that as part of their decision-making process when reaching the ultimate decision.

And, you know, I'm not married to the language that we proposed. I'm open to redrafting that. I'm open to suggestions. I'm open to seeing a competing draft from the defendants. But I don't believe that -- I mean, Your Honor, if you think about it, a strategic litigation

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decision could be -- if this is the bucket of evidence, it could be: Hey, look, you know what, we're going to just risk it because we know that the Court can't instruct the jurors that we withheld that. So, we're only going to turn over this much information and plaintiffs are going to be forced to produce -- or, to prove their case on just this information where this is what exists. Well, that could be a strategic decision to minimize punitive damages in any case. You know? And, so, I think that the jurors need to understand somewhat what is taking place.

THE COURT: So, if the Court were to accept your position, you're essentially arguing that it's not a violation of the defendants' due process rights, or even Nevada law, for a jury to award, say, hypothetically, $10 million in punitive damages, based solely on the supposed cover up of the evidence? Is -- you're saying that that would be appropriate --

MR. CLOWARD: No.

THE COURT: -- for a jury to award punitive damages based solely on the alleged cover-up?

MR. CLOWARD: No. I do not believe that, Judge. I do think that that would be inappropriate. And that's -- and, to the extent if that's what the -- is being interpreted as our desire, no, Judge. I don't want the Court to make reversible error. I think that would be

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reversible error. I'm not asking for that.

What I'm wanting to do is, imagine this would be my closing argument on the punitives. Basically, ladies and gentlemen, you know, we have produced evidence of X, Y, and Z of this limited evidence of the conscious decision-making process of these defendants in this case. However, Jury Instruction Number 14 says that, during the process of this litigation, the Court found that Jacuzzi knowingly withheld evidence and knowingly didn't turn over evidence. And, so, our position, ladies and gentlemen, when you go back and you deliberate, you know, you have to consider the findings of the Court in this case. And when we're only producing evidence of X, Y, and Z, we're asking you to logically take this evidence and circumstantially make the connection that there is other -- there are other events that you didn't even get to hear about. There are other events --

THE COURT: Well, then, --

MR. CLOWARD: -- because of the conduct, that were never produced in this case.

THE COURT: If, rather than speculating, if there is something that we know that's out there that hasn't been produced, then why can't we deal with that by some further discovery orders with appropriate sanctions, perhaps monetary sanctions, if there's noncompliance? Wouldn't

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that get you the information that might exist that you would need without leaving it to the jury to speculate as to what might be out there and why you didn't produce it and why? What's the explanation for there being possibly some holes in your case?

MR. CLOWARD: Well, I would love --

THE COURT: Wouldn't that be -- I mean, if we could do that. I know we're running out of time. But, if we could do that, wouldn't that eliminate any risk of appeal as to that issue, and get you the information you need, and eliminate any risk of speculation? I'm just -- I'm just trying to think this through --

MR. CLOWARD: Sure.

THE COURT: -- right now. Why wouldn't that work?

MR. CLOWARD: I think that that would work, Judge. And, as the Court recalls, at the time we filed this Motion, we were set to basically go to trial in, I think, in February or March.

THE COURT: Right.

MR. CLOWARD: There wasn't the Administrative Order that Chief Justice Pickering, I believe, signed. As I recall -- and Mr. Polsenberg or Mr. Roberts may -- or, Mr. Henriod may have to help me out. But, as I recall, at the time this was filed, we didn't have this kind of breathing room of an additional year on the Five-Year

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issue. So, we were set to go to trial.

THE COURT: You were.

MR. CLOWARD: But, at the end of the day, Judge, I would welcome that suggestion so that there are some teeth in the nonproduction. That's all we've ever wanted is to produce -- is to present this case on the merits. That's all we've ever wanted to do. And we filed the motions to try and -- to try and get the parties to participate in good faith.

And, I can tell the Court, when the Court ordered, hey, look, you know, I want everything turned over, it gave us the supplemental minute order after striking the Answers. Then, you know, a week later, it came back and said: Well, you know what, I don't necessarily know if striking the Answer is necessary, but this -- these are the things that I want turned over. Well, it was then when Jacuzzi turned over the Pullen death and it was shortly after that all of this other avalanche of evidence started to be disclosed in the case, because there was this order from the Court saying: Look, guys, this is kind of -- this is kind of it, you've got to turn it over, the Court wants this stuff right now.

And, I think that if the Court made that order, and this information was produced, and if there was the threat of monetary sanctions, look, I would prefer that

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rather than have the Jury Instruction. Because I -- it's my belief that there's more information out there. And that's what we wanted. And I would prefer that if the Court could come up with a way to draft that to have the teeth that would, you know, be significant enough that they wouldn't just casually set it aside, then I think that that would be the best approach. And, then, the jury doesn't have to --

THE COURT: I'm not sure --

MR. CLOWARD: -- be instructed on this.

THE COURT: I'm not sure if that's workable. We'd have to think through that as to whether that would even work. I don't recall right now what are the specific categories of documents that still haven't been produced. But I do know that the Court would have the authority to impose monetary sanctions on some type of periodic basis for noncompliance with production orders. That, at some point in time, if there's repeated or continued -- or, pervasive noncompliance, I don't know what more the Court could do after already striking the Answer. So, --

MR. CLOWARD: Well, I think if there is continued pervasive non-discovery, then I think that the plaintiffs' due process rights need to be considered --

THE COURT: Right.

MR. CLOWARD: -- when the production of the

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punitive damage issue -- or, I guess the presentation of proof in a production -- in the punitive damage phase, is provided to the jury. You know? We have due process rights as well that the jury needs to understand.

THE COURT: Right. And is it necessarily already established that we have pervasive repeated noncompliance of failure to produce documents if there's already a court order sanctioning Jacuzzi by way of striking their Answer as to liability?

MR. CLOWARD: Yeah. That's a fair point.

THE COURT: I'm not sure, in terms of monetary sanctions, how that would be handled going forward.

All right. Well, thank you. Thank you for that analysis. Let's go ahead and hear Mr. Polsenberg. You introduced yourself first for Jacuzzi. Are you the one who is going to address this?

MR. POLSENBERG: Yes. Thank you.

THE COURT: All right. You have the floor.

MR. POLSENBERG: All right. Well, let me try to cover all the topics that you and Ben were talking about. But let me start by saying that I think it's entirely inappropriate to instruct the juror -- the jury on litigation conduct. I've never been in a case where that has happened. I've been in, unfortunately, such is my life, that I've been in a number of cases where District

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Judges have struck Answers. And, in all those cases, Judges have merely instructed the jury. As our brief points out in the *Bahena* case, that the Court has established liability without getting into anything that the parties did during the litigation, which would be prejudicial and inflammatory. And, in those other cases, I've never seen a case where the judge has told the jury what went on in litigation. And I've seen judges actually explain to parties: No, that's not -- that's something that's handled by Rule 37. We don't tell the jury about that.

In the *Takata* case, yeah, there were some computers that were destroyed. But there wasn't the imposition of liability in that case. There wasn't a striking of the Answer. The jury was informed, just as it usually is and is statutorily provided, that if some specific evidence is missing, they can draw inferences about that. So, the jury in *Takata* was instructed about the inferences they could draw. But they still -- Judge Earley gave that instruction. But the jury still returned a defense verdict because if -- the jury was able to weigh the issue. If you're going to come in and tell the jury that there was misconduct and you sanctioned us for that, that I think is beyond a District Judge's discretion in handling a trial.

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I also think because of the comments on that, and the comments of the behavior, and the comments on the evidence that they had proposed in their instructions, that that is probably an issue you would want the trial judge to decide. Because that is a trial issue. I know you're -- I know that you're trying to get the parameters of how the sanction operates. But I think this goes beyond that.

They argue they want to level the playing field. Well, they don't need to level the playing field in the compensatory damage phase because they've already won under the Court's Order. So, there's no reason to further inflame the jury or further go forward with the sanction in a way that would inflame the jury.

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They argued and, then, you brought up that maybe they could do more from this point forward. And, you know, their -- in their briefs, their Reply brief, they say they can't because we're going to trial in March. But, yes, the Five-Year Rule -- here's what happened. Judge Bell, earlier this year, suspended the operation of the Five-Year Rule. Now, some people wondered whether a District Judge could do that. I actually thought a District Judge couldn't do that. But now it's totally clear. As I pointed out last Monday, the Friday before that, the Supreme Court issued an Administrative Order on their docket that amended Rule 41(e) so that the operation of

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that rule under certain circumstances could be suspended. So, I don't think they can come in here and say that we don't have time, we have to go to trial.

You know, it goes back to the *Takata* issue. There was a specific discovery issue where the plaintiffs came in and said: Here's this evidence and we don't have it anymore because of the defendants. You just can't go to the jury and say: Well, there could be other evidence. They would have to articulate exactly what evidence there is. And, then, we could tell the jury what to do about that. Maybe they can draw an inference. Maybe some fact is established. But they can't just do it on the speculation.

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They argue they have due process rights to punitive damages. Well, that's right under Nevada law, nobody has a right to punitive damages. It's not like compensatory damages. So, the playing field here actually is not so much level as in -- because these are quasi-criminal proceedings, there are special rights that defendants have.

Now, if they wanted to come in here and say they were deprived of particular evidence, we could handle that on a case-by-case basis. Some of their instructions actually would have you making factual findings that not only they do not make, but that the jury could just hear

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the evidence of that. So, yeah, there are huge constitutional issues when we have to do with punitive damages.

We brought up the *Bahena* case because Judge Loehrer there had three phases, as we've explained in our briefing. The first phase was just on compensatory damages. The jury didn't have to worry about the facts, just looked at the damages. And, then, in the second phase, the jury heard all the facts and decided whether or not to impose punitive damages. And I think that's the appropriate thing to do. You cannot issue a sanction that would affect the determination of punitive damages.

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Now, unfortunately, I had an oral -- I had scheduled an oral argument on these exact issues, the first week in November. And, as I said to Lee Roberts, unfortunately, we settled. Not that it was unfortunate to -- for the parties in that case, but we would have had a chance to get a resolution of those issues.

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But, punitive damages, you just can't -- you know, the Nevada Supreme Court is clear under a number of cases, including one of my favorite case names, *Foster versus Dingwall*. The Supreme Court said a sanction doesn't mean you automatically win. You still have to show a prima facie case. You don't just automatically win everything that you've alleged. And that's especially acute when

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we're talking about punitive damages. They're going to have to make a real case for punitive damages. They can't come in with a -- say that there's a bucket of evidence, or a basketball of evidence, or a baseball of evidence. And, since we don't know what it is, then the jury should be told there could be more stuff out there. Now we're back to the *Takata* issue. They have to prove what it is that the evidence -- what evidence is missing. And that's -- that is, especially at a punitive damage context.

We've briefed this at length. I am a real believer on the punitive damages issue. As I said, I was about to argue it in the Supreme Court. But we can't just do this might be additional information. That wouldn't be enough. Thank you, Your Honor.

THE COURT: Thank you. Mr. Goodhart, what would you like to add to this?

MR. GOODHART: Your Honor, Phil Goodhart on behalf of First Street and Aithr.

I really don't know what to add to this, if anything, as -- I think, at the last hearing, Your Honor indicated that this oral argument would go forward and the Court would make a ruling, assuming First Street and Aithr weren't even part of the case anymore.

THE COURT: Right. Right. And I --

MR. GOODHART: And as I have indicated --

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THE COURT: Yeah.

MR. GOODHART: As I've indicated in the past, my concern is what impact -- let me back up. As of right now, I'm not aware of the Court issuing a ruling or a determination on Plaintiffs' Amended -- or Restated Motion to Strike First Street/Aithr's Answer.

THE COURT: Yeah. Correct. I haven't decided --

MR. GOODHART: As of right now --

THE COURT: I haven't decided that yet. I've been struggling with a couple of the issues there. And, given the significance of the remedy being sought, the standard by which I need to review the evidence, and the monumental amount of the evidence, and I don't want to say that I've been going back and forth in my position on that, but I certainly have been struggling with a couple of the issues and I haven't completed my analysis. So, it is taking longer than I wanted. I certainly have to do it within the next -- well, certainly before New Year's. And, actually, I -- to be honest with you, I have to do it before December 30th. So, I am finishing that up and I apologize, everybody, for the delay there. But, go ahead. Go ahead, Mr. Goodhart.

MR. GOODHART: Your Honor, no apologies are necessary. There's a tremendous amount of information. And all the parties -- and I think I can speak for

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everybody, know how closely you reviewed all of the pleadings, all the arguments, and how thoughtful you are in your decisions. So, there's no apology necessary for that.

What I'm just trying to say, Your Honor, is more that I -- as of right now, First Street and Aithr still have the ability to defend the claims against them, which include product liability. And I just want to make sure that whatever ruling the Court makes on theses issues before it today will not have a negative impact on First Street and Aithr's ability to make those arguments if the Court denies the Plaintiffs' Motion to Strike our Answer. And, really, it's kind of hard to argue from the standpoint that I am in right now. And I think Mr. Polsenberg has made excellent arguments and I would just agree and join in those the extent that I need to.

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THE COURT: All right. Mr. Cloward, you get to reply, sir.

MR. CLOWARD: You bet, Your Honor. Thank you. And, again, we also appreciate the Court's time. We know the Court is thoughtful in these issues. If the Court wants additional briefing, we will be more than happy to supplement on the First Street issue.

THE COURT: Don't need that. But thank you.

MR. CLOWARD: You got it, Judge.

You know, so, Mr. Polsenberg points out a couple

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of things and really highlights, I guess, our argument. You know? Mr. Polsenberg says: Look, the plaintiffs have to still show a prima facie case and there has to be a real showing. And that's the whole point. We realize that we have to produce -- or, that we have to prove these issues. It's not a given. It's not, hey, there's a Jury Instruction and that the jurors are instructed that there's punitive damages, and, so, just find -- you know, affix the amount. That's the whole point that I'm trying to make here.

And Mr. Goodhart punctuated another issue that's relevant and important to the jurors. We have to prove our case against First Street as well in the compensatory issue. So, Mr. Polsenberg and the defendants say: Look, you know, Mr. Cloward doesn't need this information because he's already, you know, won on liability with respect to Jacuzzi on these issues. But that's not the same and that's not true with respect to First Street. And, so, you know, I have to prove my case, punitives against Jacuzzi, and compensatory and punitives against First Street and Aging in the Home.

And it's ironic that in the case, the *Takata* case, the one case that Eglet gets a defense, is the one case where there's, you know, allegations that Takata destroys computers with all of the evidence. And that's the whole

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point that I'm trying to make is, you know, this can be a very intelligent -- you know, maybe this is the best way to start defending cases is: Look, let them strike the Answer in a punitive case. Let them strike the Answer and just don't turn anything over ever. And if it comes down to it, destroy the evidence. Destroy the computers. Because the plaintiffs won't be able to prove their case because there's nothing to prove because we haven't turned anything over. And, so, we're going to win in the end. We'll get a defense verdict. We'll get a non-finding on a punitive damages.

And that's the whole -- that was the reason for the request for the Jury Instructions is simply so that I can go to the jurors and at least ask them to draw inferences based on the nonproduction. And how you do that to avoid the prejudice, we're happy to have any recommendations by the defense. We're happy to craft the language in a way that's -- that allows them to draw the inference and that doesn't make -- you know, make it so that there's this presumption of a decision being made. I can see that Mr. Polsenberg and Jacuzzi would not want -- and Mr. Robert -- or, excuse me. Mr. Goodhart would not want the instruction to act as a, quote/unquote: Finding. And I agree with that. I still have to prove my case. But I want to be able to alert the jurors that, look, the

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evidence that we're presenting is based on the evidence that was produced. And, throughout the course of this, there has been other evidence that potentially has been withheld. You can draw inferences when you make your decision in this matter. That's the whole point of this exercise, Your Honor.

So, with that, I appreciate the Court's examination of this. And if the Court has any other questions, I'm happy to address them.

THE COURT: No. I'm fine. I appreciate that.

After careful reflection and consideration of all the law and the facts here, I am denying the Motion to provide those Jury Instructions that the plaintiff was asking the Court to give as they're currently written. The Court's finding that the jury is not entitled to hear about Jacuzzi's wrongful litigation conduct. It would be improperly prejudicial, and inflammatory, and cause the jury to also speculate in reaching its determination on any amount of punitive damages.

There's one exception here. If it's established that Jacuzzi has still withheld, or lost, or destroyed evidence, then such evidence would have to be identified. And, then, the Court would need to decide what to do with the fact that such other evidence has been withheld, lost, or destroyed. That's something that would be handled by

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the judge taking over this case, unless there's something specific that I can address right now.

But the proper thing to do is not to instruct to the jury that there's some probable other evidence out there or task the jury to draw an inference that there's some other evidence based upon litigation conduct. The proper thing to do is to -- is to resolve what is out there that hasn't been produced and, then, to deal with the consequences of the nonproduction.

So, Mr. Cloward, one way to perhaps approach part of this before I'm off the case, I still have time on the 29th next week to -- if we need to. I'm not saying this is what we should do. But you had mentioned being amenable to have some further hearing on missing evidence. You said that there is some stuff that's missing. If I were to give you, say, the right to come forward with three things, your top three things that are missing, and if you could identify that right now to Mr. Roberts, and Mr. Polsenberg, and Mr. Henriod, and everyone else, what those three things are, and, then, I could have a hearing on the 29th and we'll discuss what still remains that is so critical that you don't have yet. Let's get our hands around that rather than ask the jury to speculate about what it is and why it's so important to you. So, I think that's the best way to handle this.

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Again, I don't want the jury to punish Jacuzzi based upon, you know, litigation conduct about noncompliance with production of evidence. Certainly not until we see what evidence is there and whether we can actually get in your hands any relevant evidence that you've asked for.

So, what is it? What is it that still remains that you believe needs to be produced, Mr. Cloward? And leave it to three things. And, anything else, I'm just going to leave in the hands of the new judge.

MR. CLOWARD: You got it, Judge. E-mails would be one. And, number two --

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THE COURT: E-mail. Which -- wait. Let's be specific. Let's be really specific.

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MR. CLOWARD: So, Mr. Roberts has indicated that there is, you know, several hundred thousand e-mails that were triggered when the searches of the search terms that Judge Bulla ordered, you know, several years ago, that -- and I think the evidentiary hearing revealed that even though those representations to Judge Bulla that those searches had been done, they never were done until Mr. Roberts got involved. And, so, the, I guess, results of those searches, which were ordered many years ago.

The forensic search of Salesforce and miss -- I don't want to mischaracterize Mr. Roberts's participation

on this. He's been helpful. And I think that the Covid shutdown has hampered that somewhat. But it would be nice to have a bookend on the continuation of the forensic search of the Salesforce searches.

And, then, the forensic search of the other databases within Jacuzzi's network and devices, potential relevant devices. Those would be the top three things that are still kind of outstanding that have been identified as potentially having information. And the parties have been trying to, you know, complete those issues. And I think with the Court's assistance, it would be very helpful to have, you know, number one, a bookend to -- as to when those things should be completed. And, then, number two, a, I guess, some sort of a sanction if compliance is not had.

THE COURT: Your -- your efforts --

MR. POLSENBERG: Judge, I don't know if you've ever seen --

THE COURT: Go --

MR. POLSENBERG: -- if you've ever seen Aladdin. But, when Genie is explaining the wishes, he says: No wishing for more wishes. So, you asked for three specific things and the first one was several hundred thousand e-mails. So, these are not specific things. If he's asking to reopen discovery despite the sanction, that's not

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something we can do by Monday.

THE COURT: Well, he's asking for -- I don't know how he could be more specific, though, Mr. Polsenberg, when he's been asking for all of the e-mails dealing with these approximate 20 search terms. He's been trying to get at those. And I understand the parties have been conferring ongoing to try to figure out how to do this. And there is no privilege log, which would be -- that would be a monumental task on its own to do a privilege log of several hundred thousand --

MR. POLSENBERG: Right.

THE COURT: -- e-mails. But we have gone over the fact that the search terms that were crafted were reasonable and likely to lead to relevant information. We -- of course, nobody knows until we actually see the e-mails.

MR. POLSENBERG: Sure. That makes the point of what I was saying.

THE COURT: There's some -- no. Go ahead. Go ahead.

MR. POLSENBERG: I interpreted what you said as three specific items. Because, what I was arguing is, you can't give an inference instruction unless it's about a specific thing. So, I thought you were asking him to list three specific things.

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Now, Mr. Cloward might have interpreted your question as what proceeding should we do after this. And he may be saying: Let's do more discovery on the several hundred thousand e-mails and search terms. And I think you can have the authority to do that. But you wouldn't have the authority to come to a conclusion Monday.

THE COURT: What's the current holdup in producing the e-mails? Is it Jacuzzi's position it doesn't need to produce any of them now? Or is it Jacuzzi's position that the search terms were too broad and it's going to come up with its own search terms regardless of what the Court said in the past? What's the slow down in producing either some or all of these e-mails, Mr. Polsenberg?

007149

MR. ROBERTS: So, I --

MR. POLSENBERG: Well, Your Honor, I had a -- I'm going to let Mr. Roberts answer this.

THE COURT: Okay. Please. Yes.

MR. POLSENBERG: Because he doesn't let me do discovery. But it was my own personal belief that that was a moot issue since you struck our Answer.

THE COURT: Well, I would think that -- I mean, if I were the plaintiff, I would think that, you know, e-mails discussing notice of the problem and withholding -- and, well, e-mails regarding notice would be relevant to the punitive damage phase. So, even if the Answer is stricken,

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I would think that that's still relevant. But, Mr. Roberts?

MR. ROBERTS: Thank you. And Mr. Cloward has made it clear to me that he still wants this discovery for the punitive phase. The -- just to give the Court a little bit more background, when Jacuzzi and its lawyers previously ran the search terms, as you know, they testified that they believe that e-mails would be captured within the Salesforce system.

THE COURT: I remember.

MR. ROBERTS: And would be properly branded as a Jacuzzi luxury bath code so that they did not pull in hot tub e-mails with a much higher volume.

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THE COURT: Right.

MR. ROBERTS: Once it became clear that the Salesforce system had not captured all of the e-mails and that the Court was directing that all e-mails be searched, Jacuzzi gave one of my attorneys, who specializes in IT and is very knowledgeable, any discovery, administrator credentials to their systems. And she ran all of the search terms through the entire Jacuzzi e-mail archive that she was able to access. And when we did that, we came up and -- it's been a while since I've looked at it. My recollection is it may have been 300 or 350,000 e-mails. But, certainly, it was several hundred thousand e-mails,

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which had hits.

It was our position at that point that while we had a duty to reasonably produce e-mails related to these subjects, that, for the purposes of this exercise, the manpower to review 350,000 hits, where most of those hits were false hits based on search terms chosen by plaintiffs, that the cost of that search should be borne by the plaintiffs. And that requiring Jacuzzi to pay the cost of that search was disproportionate to the needs of the case under the Nevada Federal Rules of Civil Procedure. And that hit -- I think that objection was properly made in compliance with the rules. There has been no -- as far as I know, Motion to Compel, to overrule that objection. I know that Mr. Cloward asked for the costs to be imposed against us as a sanction. But that has not been granted by the Court and I think it'd be inappropriate.

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So, that's what we're waiting on, I think, Your Honor, is to see if our objection that this cost should be borne by the plaintiff is well taken under these circumstances.

THE COURT: Well --

MR. ROBERTS: And the --

THE COURT: So, I don't know that any further order would need to be issued here. Mr. Cloward's been persistently asking for these and the Court's ordered that

007151

they be produced. And it sounds like you're asking for a cost-shifting decision here. But why can't we go about this a different way? You have -- Jacuzzi has the e-mails on its server. The e-mails have been identified. We know what's been hit, so to speak, from the search terms that we have. We know the universe of documents, about 300 or 350,000, we'll hold you to that. We know how those e-mails are accessible now. Why can't we just allow Mr. Cloward and his people to go sit down at a desk somewhere in Jacuzzi's office and spend their own money and time in looking at these, these documents, that have the hits? And they can decide on their own which of these documents that they want copies of. And everything can be privileged and subject to a protective order until Mr. Cloward has identified this subset of documents.

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And, then, at that point in time, if you believe, Mr. Roberts, that something is still privileged or confidential, or attorney-client privileged and shouldn't be produced, we could deal with it then. But, then, -- but if we follow that procedure, Mr. Roberts, you're not incurring any expense, other than perhaps having a paralegal sit down and just supervise Mr. Cloward's people as they go through the documents to make sure that they don't try to hack into other parts of the system, which I don't know that you would really need to supervise that.

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And, perhaps there's some way that you can lock out other portions of the system so they can only get to the 300/350.

It seems to me that put -- rather than you having to go through and search everything, Mr. Roberts, let them do it, come up with a subset of what they want, and, then, you can assert any privilege objection at that point in time. I -- what am I missing here? Is that a problem?

MR. ROBERTS: I think it is a problem because then you are allowing unlimited access to irrelevant and immaterial confidential information that should not -- we should not have to expose to their attorney without some showing that it's relevant. I do believe that perhaps a third-party vendor to do that review at their cost, who would then provide us with a list of what they thought was relevant and an opportunity to object --

THE COURT: Yeah. That would --

MR. ROBERTS: -- be a doable situation.

THE COURT: I mean, a third party to get up to speed on all of the issues and make that determination. You're talking about a special master. That -- now we're adding -- we are adding, I think, quite a bit of expense here.

I mean, we know -- we know we had a reasonable list of search terms that was developed with the intent to get e-mails that would be as close as we can to being

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responsive, knowing that there will be a lot of stuff in there that's irrelevant. So, we have to balance. How do we -- how do we protect you from all the burden and expense of going through 350,000 pages of documents and protect you from disclosure of confidential or sensitive material, and, yet, provide a way for the plaintiff to be able to get the documents that -- there's certainly going to be relevant documents in there. There's got to be a way for him to get to those without too much invasion of your client's right to protect its confidential data.

So, there has to be -- there has to be some middle ground. There has to be a way to make this work. And, so, I'm trying to think, how do we get plaintiff the information that's in there that's relevant without any undue burden or expense to either side. Mr. Roberts, I appreciate your position on that. I haven't heard from Mr. Cloward on this.

MR. CLOWARD: Your Honor, I think that's a reasonable suggestion. My understanding is that -- and correct me if I'm wrong, Mr. Roberts, but, at one point, there was a discussion regarding the third-party, that that would be borne equally among the parties. It seems as though there's somewhat of a retraction from that position, number one. Number two, it's my understanding that these documents are -- that were downloaded by Mr. Roberts's

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associate, who specializes in this type of forensic discovery, this e-discovery, a female lawyer, I cannot remember her name. It's not Ms. Llewellyn. It's another one of his partners or associates that kind of focuses on this. So, it's not as though I would even have to go to Jacuzzi's facility.

I mean, if Mr. Roberts is truly concerned about the -- you know, the privacy considerations, I'd be willing to just block off a week, come over to his office, in his conference room on a computer, and I'll go through the documents myself. You know? I'm happy with that. I think that's a reasonable, fair solution, Your Honor. And, that way I'm --

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THE COURT: Well, let's go back to Mr. Roberts on two things. Mr. Roberts, I guess, two things. It looks like you both were discussing possibly having a third party do this but splitting the cost 50/50. So, what's your position on that presently? And, then, the other thing is: What if we let Mr. Cloward come in and do that? And, at your office, just go through these for a week, and make sure he wears a mask. And he doesn't get copies of anything. He can't take a picture of anything. He merely -- and he can't discuss anything with his client. He merely records the Bates Number of the documents that he wants. And, then, you have an opportunity to object to

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that, Mr. Roberts. And they'll be a protective order that Mr. Cloward can't share anything that he's seeing until and unless the Court hears your objection.

I mean, Mr. Roberts, you and I have done a lot of discovery, either with each other or against each other, and in complex cases throughout a lot of years. Doesn't this seem reasonable?

MR. ROBERTS: Your Honor, if I could address both those issues separately?

THE COURT: Please.

MR. ROBERTS: I will say that, you know, just from my clients' perspective, you know, that there are several other matters that Mr. Cloward is now suing them on with other plaintiffs in California. There are three other matters there now. And --

THE COURT: Okay.

MR. ROBERTS: -- their -- one of their concerns is that Mr. Cloward could use this as an opportunity to mine for additional clients and additional cases to sue Jacuzzi for, even though they have no relevance to this lawsuit. I'm not intending to, you know, accuse Mr. Cloward of anything here. I know -- I just know that that was one of my client's concerns in providing access to the attorneys to determine what's --

THE COURT: And I think that's a valid concern.

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Is there one way to protect from -- your clients from that is you could have an objection to anything being produced because it's relevant solely for the other case and not this case.

MR. ROBERTS: Correct.

THE COURT: And that would be a valid objection, I would think.

MR. ROBERTS: Yes. And, so, I think a third party is a reasonable alternative. And Mr. Cloward and I did discuss possibly sharing that cost. That is not yet been approved by my client in part because they feel that burdensome discovery, if the plaintiff wants it, the plaintiff should be paying for it. And perhaps partly because Mr. Cloward would be choosing the vendor and they would have no control over the cost. And they would be buying a pig and a poke at this point. But if we did have a cost estimate, which they can give thumbs up or thumbs down to, and the alternative was allowing Mr. Cloward to do that search themselves, then I think it is still possible that we could reach an agreement there if the Court was not inclined to order Mr. Cloward to pay all of the cost of a third party vendor.

THE COURT: All right. Thank you.

MR. CLOWARD: Your Honor, may I respond to that?

THE COURT: Just very briefly, if you could.

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MR. CLOWARD: I guess I wouldn't see the benefit of going through a third party if it's -- you know, the attempt to do that was to, I guess, come up with a way to just get the documents. If I'm willing to go and sit in Mr. Roberts's office and go through the documents myself, spend a week to do that, I guess I don't understand what the difference of having a third-party go through the documents. I'm not -- I think it would be easier for me to go through the documents in his office than to have a third party and, then, have to -- ultimately, I would still go through the documents. So, instead of, I guess, saving the cost of going through a third party, I would now be adding the cost of a third party, whereas if I just go through the documents one time, then I'm avoiding that cost. So, that's --

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THE COURT: Okay.

MR. ROBERTS: And, your -- to clarify, Your Honor, if I may? The theory would be if we got 350,000 documents and 1,000 e-mails are deemed to be particular -- potentially relevant to the claims in this case, then I would then look at those 1,000 e-mails and I would have an opportunity to object and do a privilege long. And, then, we would be limiting our fight to the potentially responsive documents and not this universe of documents that have nothing to do with the dispute but would have to

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-- it would be unduly burdensome to force us to go through all those.

MR. CLOWARD: But Mr. Roberts would have the same ability to do that if I went through the documents, Judge, because I would never take possession of the documents.

MR. POLSENBERG: Well, you get --

THE COURT: All right. Well, hold on.

MR. POLSENBERG: You would have access.

THE COURT: Hold on. Mr. --

MR. CLOWARD: I would write down the Bates Stamp and they would be produced to the Court saying: Hey, Judge, you know, these are the 1,000 documents. Here's 1,000 Bates Stamp Numbers or documents that we believe are relevant. And, at that point, the Court would look at those and make a determination. But, instead of having have gone through a third party, who may not understand the issues, who may not understand the importance of what I'm looking for, you know, to me, that's ripe with missing issues and missing important issues.

And the other consideration I think the Court really needs to evaluate is Jacuzzi represented to the Court, to Commissioner Bulla, that this was done. And now they're trying to come in and say: Well, you know, we realize that we didn't do those things and we told the Court. But we still want protection. We --

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THE COURT: Mr. Polsenberg, I think you were trying to chime in there. This should be the last word.

MR. POLSENBERG: I was, Judge. And I apologize to you and Ben for interrupting. You can imagine that privilege issues are something appellate lawyers deal with on a very keen level. And him getting access to potentially privileged documents, it's not whether you get a copy, it's whether you see it that violates the privilege. And, so, they would know about the documents, they may make notes about the documents. That would just destroy the privilege. You can't un-ring a bell.

THE COURT: All right. One second.

MR. CLOWARD: This happens all the time with forensic discovery.

THE COURT: Hold on.

MR. CLOWARD: That's why we have the claw back provision. It happens all the time.

THE COURT: Yeah. No. I understand all about claw back provisions. All right. So, here's what I'm going to do. I am, subject to agreement of the parties that might provide otherwise, the Court is ordering Jacuzzi to produce for electronic inspection the entire universe of the e-mails that contain the applicable search terms. This should be accomplished in the following manner. Jacuzzi shall make a computer available to Mr. Cloward at the

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offices of either Jacuzzi or any of Jacuzzi's counsel. And, by use of this computer, access to this universe of documents, which we've roughly identified is about 300 to 350,000 e-mails, that should be made available to Mr. Cloward.

It's Mr. Cloward personally who is going to then search this universe of e-mails. And he will be granted at least one full week, let's say 40 hours, absent further order of the Court, and this should be accomplished by January 30th, absent further order of the Court or agreement of the parties. Mr. Cloward shall not be permitted to copy or download any of these documents. He will, however, be allowed to identify particular documents that he wants access to, that he wants permanent access to for purposes of the litigation. He would have to identify those documents by Bates Number or other appropriate identifying means. He will then provide that list of documents that he wants to Mr. Roberts. And I request that the plaintiff do that by way of some semi-formal document that actually gets filed with the Court, such as a notice of request of particular e-mails, something to that effect so that there's a clear court record, that Mr. Roberts shall then examine that list of requested e-mails.

And, then, to the extent any objections are to be asserted, Mr. Roberts shall provide a privilege log stating

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the objections. Objections can be asserted on the basis of attorney-client privilege, or lack of relevance in this proceeding, or trade secret, or personal and sensitive information, or any other appropriate objection. The Court is directing Mr. Roberts to be very circumspect in making any objection on grounds of relevance because the Court has already made several rulings in this case as to the relevance of the search terms that are being used. But it's possible, Mr. Roberts, that some search term might have hit some document that's obviously not relevant and contains something sensitive. And, so, of course, be circumspect in what you list on the privilege log so the new judge taking over doesn't have to revisit issues that we've already dealt with.

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I'm issuing a protective order, protecting any and all documents that are being reviewed by Mr. Cloward, prohibiting Mr. Cloward from using or disclosing any of the documents, or the existence of the documents to his clients, or to anybody else in his law firm, absent further order of the Court, that Mr. Cloward shall not take any notes of anything that he has reviewed, with the exception of identifying the document that you want copied by search term that was given, and the to and from, and the date of the document, and the Bates Number of the document. So, basically, the only notes you're allowed to take are those

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particulars that would go in a privilege log.

MR. POLSENBERG: Your Honor, that's good. Can we make it a protective order that prohibits disclosure to anybody in this case, other cases, or anyone whatsoever?

THE COURT: Sure. And I think that's what I was trying to get it as is Mr. Cloward, you can't disclose it to anybody other than through the preparation of your list of the documents that you want and disclosing the list of the documents that you want. And -- and, at that point in time, we'll see if there's any objections. If there are no objections asserted by Jacuzzi, then the protective order is lifted as to those documents.

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If there is an objection rendered, then a privilege log must be produced within, let's say, one week of the assertion of the privilege -- or, the assertion of the objection. If the privilege log is not timely provided, then the protective order is automatically lifted. If a privilege log is -- if an objection is rendered and a privilege log is timely provided, then the Court will conduct a hearing on the discoverability of the document that's on the privilege log. And if the Court determines that the document is discoverable, then, again, the protective order shall be lifted. So, I think I covered all possible scenarios here.

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Mr. Roberts, since I've indicated that the

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discovery, the access must be provided, full access -- the full week must be provided prior to January 30th, let's say, Mr. Cloward, can you get your list of requested e-mails to Mr. Roberts by, let's say February 5th, the one week following the conclusion of the deadline for your review?

MR. CLOWARD: Yes, Your Honor. I should be able to. The only request modification to the order that I was going to seek is that we be given until February 15th. I have a jury trial on the Convention Center on January, I think, 26th or 27th.

THE COURT: Okay. That's fine.

MR. CLOWARD: That runs for a week.

THE COURT: All right. So, just -- so, you get your week, sometime between now and February 15th. You need to identify the documents you want by Monday, February 22nd.

Mr. Roberts, I'm going to hear from him further in case he wants to modify this. But, Mr. Roberts, you will then have one week after getting that list of e-mails to provide your objections, which, I guess, is going to be March 1st. And, then, you should have one further week, we'll say March 8th, to provide your privilege log as to any documents that you assert an objection to.

I think that is a very reasonable approach that protects Jacuzzi from unwarranted intrusion into its records, that protects Jacuzzi from the burden of going

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through all these documents on its own, and protects Jacuzzi from the attended costs that would otherwise incur.

Mr. Roberts, that's my tentative. What modifications and, if any, would you like to suggest to that?

MR. ROBERTS: One is addressing Mr. Polsenberg's concern is I would like you to make it part of the order that because Jacuzzi is being compelled to provide access to these e-mails, that any production of privileged information would be inadvertent, and not voluntary, and would not waive the privilege.

THE COURT: So ordered.

MR. ROBERTS: And --

THE COURT: That's so ordered. And I'm going to ask Mr. Cloward to put together the order from today. But that is an essential term that any production is court ordered and deemed inadvertent and subject to what -- any further protection that Jacuzzi deems appropriate to request.

MR. ROBERTS: The second thing is that without knowing the volume of e-mails that Mr. Cloward might identify that we would object to, is that this would be subject to our right to seek a continuance on the privilege log if that request is voluminous. Knowing how long it takes to do a privilege log, which meets the requirements

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of this jurisdiction, I can foresee that being a challenge to get that done in that time period. But we'll make our best efforts and only move for a continuance if the request is voluminous and we really need the time.

THE COURT: Let me think about that.

[Pause in proceedings]

MR. ROBERTS: And this is just hypothetical, Judge.

THE COURT: Yeah.

MR. ROBERTS: And I don't expect there to be that many hits. But what if there are 10,000 documents and we're forced to do a privilege log on 10,000 documents in a week?

007166

THE COURT: Yeah. No. Sure. So, the -- right. And I was just doing some rough calculations. Let's say he wanted 1,000 documents and it takes, you know, three minutes per document to put on the privilege log. That's 3,000 -- that could be 3,000 minutes, which is I don't know how many hours. That might be like 75 hours or something like that. So, Mr. Polsenberg's pulling out his calculator.

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MR. POLSENBERG: Exactly.

THE COURT: It might be 50 hours. So, 50 hours, that's an awful lot of time to put on a privilege log. So, yeah, I'll tell you what, so, Mr. Cloward, the order will

007166

say that Jacuzzi has the right to request extra time for preparation of the privilege log if justified.

Mr. Cloward, anything that you want to add to that?

MR. CLOWARD: It would be helpful if the Court would allow my associate, Ian Estrada, access, and that we could have two sets of computers so that we can simultaneously be going through -- you know, he could take half the documents, I could take half the documents. That way we won't -- you know, have to come to the Court and say: Hey, you know, we've spent 40 hours in good faith and --

THE COURT: Yeah.

MR. CLOWARD: -- tried to go through this. But --

THE COURT: Well, let me ask, Mr. Roberts, do you trust Mr. Estrada to the same extent that you would trust Mr. Cloward to comply with the protective order?

MR. ROBERTS: I do, Your Honor. And, without conceding the process as proper, you know, I do trust Mr. Estrada and Mr. Cloward to do that appropriately.

THE COURT: All right.

MR. ROBERTS: And Mr. Cloward is correct that although we just generated the hits and did not download the documents from the system, I fully anticipate that we'll be able to download the documents so that they can

review them on hard drive or disc without having to access Jacuzzi's system. So, what -- we'll -- given that Mr. Cloward may not be available until the first week of February, that would give us time to go through that process.

THE COURT: Perfect. Thank you, Mr. Roberts. So, the order, Mr. Cloward, will also say that Mr. Estrada shall have access.

MR. CLOWARD: Thank you.

THE COURT: And, of course, Jacuzzi may have an observer -- or, Jacuzzi's counsel may have an observer of this entire process. Any further details the parties shall resolve by meeting and conferring and acting in good faith. Anything else? Now, I don't know that I need to get to the other discovery issues. Perhaps I can let you guys try to work those out amongst yourselves in similar fashion.

MR. POLSENBERG: Right. I do have one thing not discovery. It's the phasing issue.

THE COURT: Yes.

MR. POLSENBERG: We've talked about phasing. I was going to ask if the Court would rule on that as part of the sanction order.

THE COURT: I will rule on that as part of the sanction order. Yes. All right. Not now. I'm not ruling today on the sanction order. Mr. Cloward, you looked like

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you have something further to say?

MR. POLSENBERG: Judge -- I'm sorry. Could you rule on phasing, though, now?

THE COURT: What would be the need for that right now?

MR. POLSENBERG: So that we have an understanding how the trial would be phased in light of the sanctions?

THE COURT: Yeah. No. I'm going to issue my ruling. And I'm going to do that by -- I'll do that by the 30th, before the 30th. When I issue the sanction ruling, I'll issue the phasing ruling. And I got, also, the order on the Motions in Limine. That should be coming out as well. And all that's going to be done before the 30th.

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MR. POLSENBERG: Very good. Thank you, Your Honor.

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THE COURT: Was there anything else, counsel?

MR. POLSENBERG: I have one personal thing. I know we talked -- I'm talking for Ben --

THE COURT: Okay.

MR. POLSENBERG: -- and for the firm from my side. Since we're not having a hearing next week, this is probably the last time we'll appear in front of you. We want to thank you for your service --

THE COURT: Thank you.

MR. POLSENBERG: -- and for the time and effort

007169

you devote to all your cases.

THE COURT: Thank you.

MR. POLSENBERG: You know, we've known you for a long time. You were a great lawyer and a great judge.

THE COURT: Thank you. I appreciate that, Mr. Polsenberg. Coming from you, that is quite an honor to hear that. So, thank you very much. Well, I'll see you all back in private practice in some manner. But I'll get you some orders by the 30th.

MR. CLOWARD: Thank you so much.

THE COURT: I think we're done for the day. Thank you, counsel.

007170

MR. POLSENBERG: Thank you, Your Honor.

MR. CLOWARD: Thank you, Your Honor. I appreciate it.

007170

THE COURT: Okay. Okay. Take care.

MR. GOODHART: Thank you, Your Honor. Appreciate it.

THE COURT: Okay. Bye. Court's adjourned.

PROCEEDING CONCLUDED AT 12:27 P.M.

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007170

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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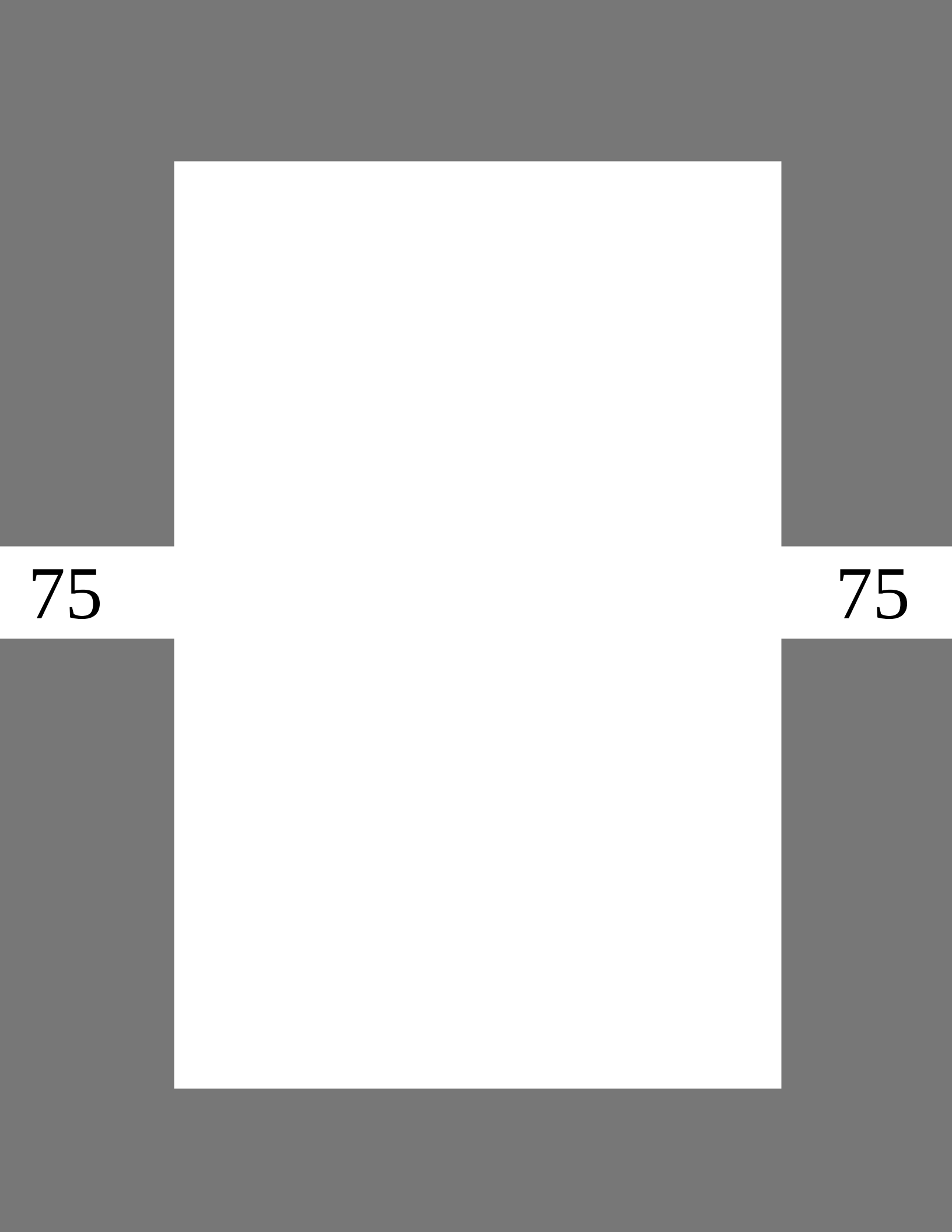
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A-16-731244-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Product Liability	**COURT MINUTES**	**December 28, 2020**

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

December 28, 2020 **Minute Order**

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

COURT CLERK: Keri Cromer

JOURNAL ENTRIES

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

007172

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

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

Jacuzzi tub were discoverable and relevant. Then, on March 4, 2019, this Court ordered the defendants to produce all documents relating to any slip incident in a Jacuzzi tub whether or not there was any injury.

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

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

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

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

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

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

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

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

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

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

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

007175

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

007175

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

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

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

First Street interfered with this process, so a proper message must be sent.

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

The Plaintiff shall prepare and submit the proposed Order forthwith, consistent herewith, correcting for any scrivener errors, and adding appropriate context and authorities, consistent with the Plaintiff s briefs. Further, the Order shall be submitted pursuant to the electronic submission provisions of AOs 20-17 and 20-24. If the Court does not receive the proposed Order by 4 p.m. Wednesday, December 30, 2020, then this Minute Order shall be signed by this Court and shall become the official Court Order in this matter.

CLERK'S NOTE: The above minute order has been distributed to counsel by the Court Clerk via electronic service. kc//12-28-20… Minute Order AMENDED TO reflect a due date of 12/30/2020. kc//12-28-2020

007176

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76

A-16-731244-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Product Liability	COURT MINUTES	December 29, 2020

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

December 29, 2020 **03:00 AM** **Minute Order**

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

COURT CLERK: Garcia, Louisa

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

NEW DISCOVERY DEADLINE: June 30, 2021.

At the last hearing in this matter the parties discussed, among other things, the Plaintiff's request that discovery be re-opened given the numerous productions by the parties very late in the discovery period, as well as after the discovery deadline. The timing of the productions by the defendants has been extensively briefed by the parties and argued extensively in the various hearings on the motions to strike the answers of the defendants.

007177

This Court has the authority and responsibility to efficiently manage its cases. As part of that responsibility, the Court needs to make sure that discovery is conducted in a meaningful way so that the parties can obtain the information they need in the search for truth, so that additional discovery motions can be minimized, and so that the parties will be able to efficiently present their evidence at trial. This Court deems it critical to make a further discovery ruling in this case now because this matter is soon to be re-assigned to a new Judge unfamiliar with the long and complicated history of this case.

007177

The Court hereby ORDERS that the Discovery Period is hereby re-opened, and the parties may conduct discovery on all issues that remain in the case through and including June 30, 2021. The Court notes that a Hearing on a new Motion regarding discovery is presently set; any remaining discovery issues may be discussed with the new Judge assigned to this matter at that time. The Court notes and Orders that the "Five-Year-Rule" period is extended another six (6) months, or as long as permitted under the Court's Administrative Orders, whichever is longer, for the reason that the Covid-19 pandemic substantially interfered with the parties ability to proceed with discovery. A new Scheduling Order with Trial and Pre-Trial Dates should be discussed at the next Hearing in this matter, whenever that it.

The Plaintiff shall prepare and submit the Order in this matter, pursuant to the electronic submission requirements of AOs 20-17 and 20-24.

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

77

Electronically Filed
1/15/2021 5:53 PM
Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

NOTICE OF ENTRY OF ORDER RE-OPENING DISCOVERY

007178

007178

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an *Order Reopening Discovery* was entered in the above entitled matter on the 31st day of December 2020, a copy of which is attached hereto as Exhibit "1."

DATED THIS 15th day of January, 2021.

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

007179

007179

CERTIFICATE OF SERVICE

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

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

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

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

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

EXHIBIT “1”

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12/31/2020 3:37 PM
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

ORDER RE-OPENING DISCOVERY

007182

007182

At the last hearing in this matter, the parties discussed, among other things, the Plaintiffs' request that discovery be re-opened given the numerous productions by the parties very late in the discovery period as well as after the discovery deadline. The timing of the productions by the Defendants has been extensively briefed by the parties and argued extensively in the various hearings on the motions to strike the answers of the Defendants. This Court has the authority and responsibility to efficiently manage its cases. As part of that responsibility, the Court needs to make sure that discovery is conducted in a meaningful way so that the parties can obtain the information they need in the search for truth, so that additional discovery motions can be minimized, and so that the parties will be able to efficiently present their evidence at trial. This Court deems it critical to make a further discovery ruling in this case now because this matter is soon to be re-assigned to a new Judge unfamiliar with the long and complicated history of this case.

The Court hereby ORDERS that the Discovery period is hereby re-opened, and the parties may conduct discovery on all issues that remain in the case through and including June 30, 2021. The Court notes that a Hearing on a new Motion regarding discovery is presently set; any remaining discovery issues may be discussed with the new Judge assigned to this matter at that time. The Court notes and Orders that the "Five-Year-Rule" period is extended another six (6) months, or as long as permitted under the Court's Administrative Orders, whichever is longer, for the reason that the Covid-19 pandemic substantially interfered with the parties' ability to proceed with discovery. A new Scheduling Order with Trial and Pre-Trial Dates should be discussed at the next Hearing in this matter, whenever that is.

Dated this 31st day of December, 2020

IT IS SO ORDERED.

1C9 B49 9F4B 6B5F
Richard F. Scotti
District Court Judge

Prepared and Submitted by:
RICHARD HARRIS LAW FIRM
/s/ *Benjamin P. Cloward*
BENJAMIN P. CLOWARD, ESQ.
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

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Steven D. Grierson
CLERK OF THE COURT

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

NOTICE OF ENTRY OF ORDER REGARDING MOTIONS IN LIMINE

007187

007187

TO: ALL PARTIES AND THEIR COUNSEL OF RECORD;

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an *Order Regarding Jacuzzi, Inc.'s Motions in Limine Nos. 1, 4, 13, 16, & 21 and Order Regarding First Street For Boomers & Beyond, Inc.'s and AITHR Dealer, Inc.'s Motion In Limine No. 4* was entered in the above entitled matter on the 31st day of December 2020, a copy of which is attached hereto as Exhibit "1."

DATED THIS 15th day of January, 2021.

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

007188

007188

CERTIFICATE OF SERVICE

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

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

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

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

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

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

007189

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EXHIBIT “1”

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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

ORDER REGARDING JACUZZI INC.'S MOTIONS IN LIMINE NOS. 1, 4, 13, 16, & 21

AND

ORDER REGARDING FIRST STREET FOR BOOMERS & BEYOND, INC.'S AND AITHR DEALER, INC.'S MOTION IN LIMINE NO. 4

007191

007191

Defendant Jacuzzi Inc.'s ("Jacuzzi") Motions in Limine Nos. 1, 4, 13, 16, and 21 (and Defendant First Street for Boomers & Beyond, Inc.'s ("First Street") and AITHR Dealer, Inc.'s ("AITHR") and Hale Benton's ("Benton") Joinders thereto) and Defendant First Street/AITHR/Benton's Motion in Limine No. 4 (and Jacuzzi's Joinder thereto) came on for hearing before this Honorable Court on December 7, 2020, the Honorable Richard F. Scotti presiding.

Benjamin P. Cloward, Esq. and Ian C. Estrada, Esq. of Richard Harris Law Firm appeared on behalf of Plaintiffs.

Philip Goodhart, Esq. of Thorndal Armstrong Delk Balkenbush & Eisinger appeared on behalf of Defendants First Street/AITHR/Benton.

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

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

The Court DENIES Defendant Jacuzzi's Motions in Limine Nos. 1, 4, 13, 16, and 21 and all joinders thereto. The Court FURTHER DENIES Defendants First Street/AITHR/Benton's Motion in Limine No. 4 and Jacuzzi's joinder thereto.

This Court FINDS that all of the evidence that is the subject of these motions is very relevant, and there is no unfair prejudicial impact, nor inflammatory effect, nor risk of confusing the jury. IT IS SO ORDERED.

Dated this 31st day of December, 2020

54A 93B 2FBD CBE6
Richard F. Scotti
District Court Judge

Prepared and Submitted by:
RICHARD HARRIS LAW FIRM
/s/ *Benjamin P. Cloward*
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
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Attorneys for Plaintiffs

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

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

Service Date: 12/31/2020

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

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

Hearing Requested

PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT JACUZZI'S MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANT'S MOTIONS IN LIMINE NOS. 1, 4, 13, AND 21

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Case Number: A-16-731244-C

AND ALL RELATED MATTERS

Plaintiffs, by and through their attorney of record, BENJAMIN P. CLOWARD, ESQ. of the RICHARD HARRIS LAW FIRM, hereby submits Plaintiffs' Motion to Reconsider the Court's Order Granting in Part, and Denying in Part, Defendant Jacuzzi's Motion to Reconsider the Court's Order Denying Defendants' Motions in Limine Nos. 1, 4, 13, and 21. This Motion is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, and the oral argument of counsel at the hearing on this Motion.

DATED THIS 29th day of April, 2021.

RICHARD HARRIS LAW FIRM

/s/ *Benjamin P. Cloward*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a punitive damages case. Due to pervasive and continued discovery violations, the Court has stricken the Answers of all defendants as to liability. Therefore, Jacuzzi, *first*STREET, and AITHR are all "precluded from presenting any evidence to show that it is not liable for Plaintiffs' harms as to any of Plaintiffs' causes of action."[1] The only issues to be determined at trial are the quantum of damages and whether punitive damages should be awarded. The jury will not determine whether the subject tub was dangerous or defective. Rather, the jury will determine whether the Defendants have acted with malice, express or implied. Essentially, Plaintiffs must prove the Defendants' ***mindset and intentions***. This is a significant burden.

All evidence must be viewed for admissibility keeping the reason it is being offered in mind. Evidence may be inadmissible for one reason but admissible for another. In the case at hand, Defendant Jacuzzi has clothed its preclusion arguments with a flair of constitutional concerns in an attempt to persuade this Court that preclusion is necessary to avoid a violation of Jacuzzi's due process rights. However, Jacuzzi's analysis was very superficial and failed to fully evaluate the actual doctrines behind the decisions and authorities cited. A closer reading reveals that this Honorable Court's decision was too broad and should be revised to account for the nuanced ***but significant*** distinctions in the evidentiary analysis; otherwise, ***Plaintiffs' due process rights*** will be violated.

Plaintiffs are asking the Court to reconsider three key issues:

1) Jacuzzi myopically and incorrectly characterized the cause of Plaintiffs' harm, leading to this Court's overly broad exclusionary ruling;

2) The substantially-similar doctrine is wholly separate from the punitive damage analysis and has no place in interpreting the punitive damage issues. Simply put, it does not apply in the punitive damage analytical framework; and,

3) The punitive damage evidence is not solely limited to incidents occurring ***before*** the

[1] Order Striking Defendant Jacuzzi, Inc.'s Answer as to Liability Only; see also, Order Striking Defendants First Street for Boomers & Beyond, Inc. and AITHR, Inc.'s Answers as to Liability Only

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subject incident but rather can include incidents occurring ***after*** the subject incident also, so long as it bears a nexus to the Plaintiffs' harm.[2]

Because this Honorable Judge's decision was a reconsideration of Judge Richard Scotti's decision, a reconsideration request is appropriate.

II. STATEMENT OF FACTS

A. PLAINTIFF SHERRY CUNNISON WAS ENTRAPPED AND KILLED BY A JACUZZI WALK-IN BATHTUB MARKETED BY *FIRST*STREET AND SOLD BY AITHR

Sherry's case began on January 27, 2014, when she purchased a Jacuzzi Walk-in Tub (hereinafter "**Tub**"). The Jacuzzi Walk-in Tub was manufactured by Jacuzzi, marketed by *first*STREET and distributed by AITHR.[3] On February 18, 2014, Sherry attempted to use the Tub. It was only her 2nd or 3rd use of the Tub. As she was seated in the Tub, Sherry reached for the Tub controls located at the front of the Tub, and her bottom slipped off the front of the Tub seat; she then slipped down into the footwell of the Tub.[4]

Sherry became wedged in a squatted position, unable to move due to her limited strength.[5] Because the door of the Tub opened inward, Sherry was unable to open the door. Tragically, she remained in that position for ***three days***, until a well-check was requested because no one had heard from her. Even when four, trained paramedics arrived, they could not lift her out of the Tub due to the inward opening door and the Tub's high, slick walls. The paramedics snapped Sherry's arm trying to lift her out of the Tub. After trying in vain, the paramedics resorted to cutting the door completely off the Tub to remove her. Sherry was rushed to the hospital, but she ultimately died about a week later from complications related to being trapped for three days in the Tub.

Accordingly, one of the major safety components of Plaintiffs' claims in this case is that the

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[2] See, State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[3] See, **Ex. 1**, Jacuzzi and *first*STREET entered into a Manufacturing Agreement (hereinafter "**Manufacturing Agreement**") on Oct. 1, 2011 (JACUZZI001588-1606). [PROTECTED DOCUMENT]

[4] See, **Ex. 2**, Officer Bradley S. Van Pamel Dep., 16.4-9, Nov. 20, 2017 ("The tub that she was in, she was sitting in like a seat. She said that she went to go turn the water off and to drain the tub out and she slipped off the seat and wedged herself between the seat and like the side of the tub.").

[5] In order to envision how Sherry became trapped, imagine firmly bolting a chair about two feet away from a wall, facing the wall. Next, imagine the person seated in the chair scooting his/her bottom toward the wall, until his/her bottom slipped off the front of the chair. Because of the immobile nature of the chair in this example, the person would be wedged in the narrow area. This is similar to the Tub at issue – it has a very limited space should one fall or slip into the footwell area. See, **Ex. 3**, Photograph of Jacuzzi Walk-in Tub.

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subject incident occurred, in part, because of the slipperiness of the Jacuzzi's tub surfaces. Sherry Cunnison became wedged in the footwell of the tub because she slipped off of the seat. But for the slipperiness of seat, and lack of grab bars or other safety considerations, i.e., warnings, instructions, or emergency protections, Sherry would not have lost her life.

B. PLAINTIFFS' CLAIMS DEAL WITH SEVERAL ISSUES WITH RESPECT TO THE TUB'S DESIGN

The following paragraphs in Plaintiffs' Complaint are relevant in this discussion:

¶ 18. That Defendant JACUZZI . . . marketed its product to the elderly and individuals who were overweight or had physical limitation.

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

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

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

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

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

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

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

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

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

PUNITIVE DAMAGES

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

¶ 76. Defendants conduct was wrongful because Defendants engaged in oppression, malice and with conscious disregard toward individuals like SHERRY who purchased and used the walk-in bathtub and said conduct was despicable.

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

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

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

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

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

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

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

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

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

¶ 91. Because of Defendants conscious choices to put profits before safety, ***the Jacuzzi walk-in bathtub is a deathtrap for nearly any elderly person who happens to fall down inside the bathtub because there are no grab bars positioned in a way that someone can get back up if they fall down and because the door opens inward and traps the elderly person inside the bathtub***.[6]

The essence of Plaintiffs' claims is that no thought was given to the actual safety of the end users in the event of a fall or similar mishap, yet the fact that elderly Americans fall and do so often in the bathroom was a heavy marketing influence to sell the tubs. Because this **thought-process failure and danger appreciation** is what ultimately led to the death of Sherry Cunnison, the other events are, in fact, similar and must be allowed for Plaintiffs to prove the Defendants' **mindset and**

[6] See, **Ex. 4**, Pls.' Fourth Am. Compl. at ¶¶27-30, 38, 40, 42, 76-81, 84-87 and 91 (***emphasis*** added).

intentions.

C. THE DEFENDANTS MARKETED THE SUBJECT WALK-IN TUB TO ELDERLY USERS LIKE SHERRY AND MACK BY USING FEAR TACTICS

Pursuant to the Manufacturing Agreement between Defendant Jacuzzi and Defendant *first*STREET, the phrase, "DESIGNED FOR SENIORS WALK-IN-TUB" must be displayed on the walk-in Tub, as well as on the packaging associated with said Tub.[7] The Jacuzzi walk-in Tub marketing brochures distributed by *first*STREET consistently reinforce that tagline and attempt to re-assure their potential elderly customers that the walk-in Tub is much safer than a traditional tub. The following is a sample of the scare tactics that the Defendants use to persuade potential elderly buyers that the walk-in Tub is dramatically safer than a traditional bathtub:

> **[O]ne out of every three Americans over the age of 65 will experience a fall this year. And for those who suffer injury, most never fully recover**. **The fear of falling has made the simple act of bathing and its therapeutic benefits a thing of the past.** That is why so many proactive seniors have turned to the safety and independence gained by installing a Jacuzzi Walk-In Hot Tub.
>
> In the next 17 seconds, an older adult will be treated in a hospital emergency department for injuries related to a fall. **In the next 30 minutes, an older adult will die from injuries sustained in a fall**. **Most falls occur in the bathroom, getting in and out of the tub.**
>
> **Falls account for 65% of all home injury deaths for adults age 65-84**. 1 in 3 seniors will fall this year. Adults age 65 and older experience an average of 2.3 million nonfatal injuries annually.[8]

Indeed, Defendant *first*STREET specifically instructed its dealers at a sales seminar to "**sell fear of loss – avoid pain rather than get pleasure**."[9]

The Defendants' marketing brochures also emphasize that seniors can, once again, bathe "independently" because the walk-in tub is such a safer option than a traditional tub:

> Seniors are reporting that the safety of the tub has taken a back seat to the therapeutic value provided by the state-of-the art features.
>
> The air and water jets may help to improve circulation and ease the symptoms of arthritis, back problems, muscle cramps, osteoarthritis, and other various injuries.

[7] See, **Ex. 1,** Manufacturing Agreement (JACUZZI001588-1606).
[8] See, **Ex. 5,** Jacuzzi Brochure (JAC000001-12).
[9] See, **Ex. 6**, Jacuzzi Sales Presentation Agenda (JACUZZI005356).

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> **Plus, you'll have the independence and worry-free ability to enjoy bathing again safely.**
>
> Congratulations on your purchase. Like thousands of seniors all over the U.S. you won't spend another day wishing you could enjoy the luxury and pain-relieving benefits of a safe, comfortable bath.[10]

The Defendants also market the Tubs to relatives of the elderly that might be making a difficult decision between providing care to their elderly relative on their own, or, transferring their relative to an assisted living facility or a nursing home facility.

D. JACUZZI DID NOT DESIGN THE WALK-IN TUB FOR USE BY THE ELDERLY AND FIRSTSTREET/AITHR TOOK NO STEPS TO CONFIRM THAT THE TUB WAS SAFE FOR THE ELDERLY

Jacuzzi designed and produced the subject Tub without ever performing any safety testing to confirm that the Tub was safe for elderly customers. Defendant *first*STREET marketed the Tub, and Defendant AITHR distributed and sold the Tub to the elderly and infirm without confirming that Jacuzzi performed any safety testing regarding walk-in bathtub use by the elderly.

For instance, Jacuzzi never performed a test to determine how big a bather could be before he or she might become trapped in the bathtub. Jacuzzi believes that decision is "the responsibility of the user"[11] The Defendants don't give their end users any pamphlets or written information to explain how to use the Tub – just a technical specification sheet.[12] Jacuzzi produced a marketing video for the Tub that *first*STREET played for potential customers, but the marketing video only shows what the Tub looks like—not how to use it.[13] Jacuzzi's corporate representative testified that the Tub is safe because**:**

> **It's an inanimate object … It doesn't move. It doesn't do anything that can go out of its way that could possibly harm you.[14]**

The only safety testing that Jacuzzi performed on the Tub was to ensure that the Tub complied with the applicable electrical and plumbing codes.[15] Jacuzzi didn't consult with any of the following professionals when it designed the Tub: medical doctors, physical therapists,

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[10] See, Id.
[11] See, **Ex. 7**, Michael Dominguez Dep., vol. 1 at 79:14-15, May 24, 2018.
[12] See, Id., Dominguez Dep. at 84:5-6.
[13] See, Id., Dominguez Dep. at 90:18-20.
[14] See, Id., Dominguez Dep. at 101:7-9
[15] See, Id., Dominguez Dep. at 102:2-5.

007203

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occupational therapist, biomechanical engineers, human factors experts, geriatric experts, or mobility experts.[16]

E. JACUZZI WAS AWARE THAT THE SUBJECT WALK-IN TUB MODEL WAS A "DEATH TRAP" AS EARLY AS 2012

In 2012, Jerre Chopper, who resides in Hamilton, Montana, began informing Jacuzzi that her walk-in Tub was a "death trap."[17] On December 20, 2018, Mrs. Chopper's deposition was taken, and it was discovered that **she sent no less than six** letters to Jacuzzi back in 2012, which was well-before Sherry's incident.[18] Those letters are one of the many "smoking guns" in this case because they: 1) are proof that the Walk-in Tub was dangerously defective, but, more importantly, 2) they are proof that Jacuzzi and *first*STREET were well-aware of all of the dangerous issues with the Tub.[19]

In those letters, Mrs. Chopper notified Jacuzzi that the Tub was not safe because the "tub is wet, your feet are wet, and the threshold is too high and slick. The only way to make a safe exit is by doing what commercial truck drivers are trained to do when exiting the cab of a big rig. You back out so you can use the grab bar for stability."[20]

Mrs. Chopper also notified Jacuzzi that "[***i]f a senior lives alone, it seems to me that it could be hours or even days before the victim is discovered***."[21] Mrs. Chopper also notified Jacuzzi that its product was a "***death trap for any senior experiencing a medical emergency while bathing [and] should be recalled***."[22] Jacuzzi even acknowledged the complaints made by Mrs. Chopper and Kurt Bachmeyer (Jacuzzi's Director of Customer Service/Director of Warranty & Technical Services) promised that he had "confirmed with our President of Jacuzzi that they will be responding to [her] concerns and issues outlined in [her] letters . . ."[23]

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[16] See, Id., Dominguez Dep. at 108:17-109:22.
[17] See, **Ex. 8**, Jerre Chopper Dep., Dec. 20, 2018.
[18] Id.
[19] See, **Ex. 4**, Pls.' Fourth Am. Compl., ¶¶75-91.
[20] See generally, **Ex. 8**, Chopper Dep.; see also, **Ex. 9**, Letter from Jerre Chopper to Kurt Bachmeyer, Jacuzzi Director of Customer Service, ***Sept. 1, 2012***
[21] See generally, **Ex. 8**, Chopper Dep.; see also, **Ex. 9**, Letter from Jerre Chopper to Kurt Bachmeyer, Jacuzzi Director of Customer Service, ***Sept. 12, 2012***. (***emphasis*** added).
[22] See generally, **Ex. 8**, Chopper Dep.; see also, **Ex. 9**, Letter from Jerre Chopper to Kurt Bachmeyer, Jacuzzi Director of Customer Service, ***Oct. 15, 2012***. (***emphasis*** added).
[23] See generally, **Ex. 8**, Chopper Dep.; see also, **Ex. 9**, E-mails between Kurt Bachmeyer and Jerre Chopper, Nov. 5-6, 2012.

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In addition to Jacuzzi, Mrs. Chopper also notified *first*STREET and AITHR of her safety concerns with the Walk-in Tub (which is part of the Motion to Strike the Answers of Defendants *first*STREET and AITHR).[24] Jacuzzi was well-aware that she had also contacted *first*STREET and Kurt Bachmeyer even requested that she let him know if *first*STREET failed to reach out to her.[25]

What is also very troublesome is that Mrs. Chopper also submitted a claim to the Consumer Product Safety Commission, which then turned around and submitted the claim directly to Jacuzzi.[26] That is important because Mr. Demeritt, Jacuzzi's Rule 30(b)(6) designee, testified that he receives those reports from CPSC and after receiving them, he created an incident report file for them.[27]

F. DEFENDANTS IGNORED WARNINGS PRIOR TO SHERRY'S DEATH THAT THE SUBJECT WALK-IN TUB MODEL WAS DANGEROUS

A critical part of Plaintiffs' allegations deals with the slipperiness of the Tub as compared to the slipperiness of a bathroom in general.[28] The slipperiness of the Tub was one of numerous substantial factors in Sherry's death.

The documentary evidence in this case shows that the slipperiness of the Tub has been a significant, ongoing issue since at least 2012. A long history of emails shows that the Defendants engaged in significant, frequent discussions about customer complaints regarding tubs' slippery surface. *first*STREET's Rule 30(b)(6) designee, Dave Modena, confirmed this during his deposition when he acknowledged that not long after the Defendants entered into the Manufacturing Agreement, *first*STREET and AITHR began receiving feedback from customers regarding the slipperiness of the tub.[29] Because of these customer complaints, *first*STREET contacted Jacuzzi via e-mail to inquire about this issue.[30]

[24] See generally, **Ex. 8**, Chopper Dep.; see also, **Ex. 10**, Multiple letters between Jerre Chopper or her lawyer to Corporate Counsel for *first*STREET and AITHR, Stacy Hackney, Sept. 28, Nov. 29, and Dec. 4, 2012.
[25] See generally, **Ex. 8**, Chopper Dep.; see also, **Ex. 9**, Emails between Kurt Bachmeyer and Jerre Chopper, Nov. 5-6, 2012.
[26] See generally, **Ex. 8**, Chopper Dep.; see also, **Ex. 11**, Consumer Product Safety Commission Report submitted by Jerre Chopper and correspondence from CPSC, Oct. 10, 17, 18, 23, Nov. 23, and Dec. 19, 2012.
[27] See, **Ex. 12**, William B. Demeritt Dep., vol. 1 at 93:20-95:24, May 24, 2018.
[28] See, **Ex. 4**, Pls.' Fourth Am. Compl., ¶¶75-91.
[29] See, **Ex. 13**, Dave Modena Dep., vol. I at 39:5-40:25; 59:2-25, Dec. 11, 2018; see also, **Ex 14**, E-mail from Mark Gordon to *first*STREET Corporate Officers, Oct. 31, 2012 (REV JACUZZI006616-6617).
[30] See, **Ex. 13**, Modena Dep., vol. I at 41:3-25.

007205

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The evidence shows that AITHR/*first*STREET continued receiving customer complaints and/or concerns regarding the slipperiness of the tub and that the Defendants actually found a product called "Kahuna Grip" which was a grip used on surfboards and similar surfaces that could be installed into the Jacuzzi walk-in tub to provide additional grip.[31] There were many e-mails exchanged between Jacuzzi and AITHR/*first*STREET regarding the slipperiness of the tub based on the ongoing complaints of customers as the tubs were installed.[32]

For instance, on December 21, 2012, AITHR dealer employee Nick Fawkes contacted Jacuzzi Customer Service Manager, Regina Reyes, and shared the following concern:

> Regina this is Xbox wanted to let you know that we actually hear this complaint more and more often and the numbers increasing installations. **I would highly recommend that we consider putting something a little bit more abrasive Not only on the floor but also on the seats as we have had customers call concerned that they slip off the seat** so wouldn't be a bad thing to consider adding to the new job just my thoughts.[33]

Ms. Reyes replied:

> **Hi Nick, I discussed this internally and at this time we will not have any plans to change the surface to make it more abrasive**. If the nonskid bath stickers will be used by the customer we would only recommend they apply them to the floor and not the seat.[34]

On March 6, 2013, AITHR dealer employee, Monique Trujillo, wrote Jacuzzi employees Todd Stout, Norm Murdock, Regina Reyes, and Megan Davis an "**urgent**" e-mail with the following message:

> Jacuzzi Team, The customer [Fred Fuchs] has called in and is very upset because **he says he has almost fallen 3 times since having his new walk-in tub installed. He says that the floor of the tub is too slippery.** He says there is no grip or non-slip feeling to the tub. He said he is no longer able to use the tub until this problem is fixed. **This is a very serious safety concern and I really need someone to contact him ASAP to get a technician out to this home before he falls**.[35]

[31] See, **Ex. 13**, Modena Dep., vol. I at 42:23-44:11.
[32] See, **Ex. 13**, Modena Dep., vol. I at 47:1-51:1.
[33] See, **Ex. 15**, E-mails re: Customer, Manuel Arnouville, Dec. 2012-Jan. 2013 (JACUZZI005414-5417); see also, **Ex. 14**, In an Oct. 31, 2012, e-mail from Mark Gordon of *first*STREET to Dave Modena, John Fleming, John Roberge, and Norm Murdock, Mr. Gordon also suggested that, perhaps, Jacuzzi could "spray a gritty surface in the bottom of the tub for almost no cost." (REV JACUZZI006616-6617)
[34] See, **Ex. 15**, *supra* (JACUZZI005414-5417).
[35] See, **Ex. 16**, Emails re: Customer Fred Fuchs, Mar. 2013 (JACUZZI005465-5466).

007206

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Once again, Regina Reyes replied that Jacuzzi was unwilling to make any changes to the surface of the Tub.[36]

A July 9, 2012, e-mail chain with the Subject, "All Firststreet unresolved incidents" contained a reference to a customer with broken hips complaining about the **slipperiness** and lack of adequate grab bars.[37] An April 9, 2013, e-mail chain contained information about a customer named Donald Raidt who called to complain that he **slipped** and fell and hurt his back. He informed Jacuzzi that he is willing to get a lawyer if the tub is not taken out.[38]

On June 4, 2013, Jacuzzi Marketing Manager, Audrey Martinez, e-mailed her team and attached copies of 30 surveys that Defendant *first*STREET had obtained from its customers. ,One survey complained that the tub surface was too slippery. Another survey complained that the seat in the tub is very slippery. A third survey complained that the floor was very slippery.[39]

On June 5, 2013, Jacuzzi Customer Service Representative, Miguel Rojas, e-mailed Ray Parnell at American Home Design (another one of Jacuzzi's dealers) and stated that he had recently spoken with a customer that "**slipped in the tub and was trapped for two hours trying to get out because he slipped on the floor. He said the unit needs more grip**." Mr. Parnell replied by claiming that the customer had "not told you the truth" and blamed it on the fact that the customer's "demographic is prone to memory loss." Mr. Parnell cc'd the Installation Manager at American Home Design, David Jacobs, who reminded Mr. Rojas that **"[a]s far as the slipping inside the tub we sale [sic] and install your [Jacuzzi's] product**. **Can you get your engineers to work on this**?"[40]

On June 18, 2013, *first*STREET Vice President Norm Murdock e-mailed Jacuzzi Marketing Manager, Audrey Martinez, and attached 3 customer surveys. In that e-mail, Mr. **Murdock complained that he "forward[s] every product related concern to Jacuzzi via e-mail and [he] feels like they treat [him] as a nuisance, rather than a customer with legitimate concerns.**" He added, "**who has the clout to address the real issues that are driving these comments from our**

[36] Id.
[37] See, **Ex. 17**, Evidentiary Hr'g Ex. 2 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005287.
[38] See, **Ex. 18**, Evidentiary Hr'g Ex. 8 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005367.
[39] See, **Ex. 19**, Emails re: *first*STREET Customer Surveys from June 2013 (JACUZZI005298-5301).
[40] See, **Ex. 20**, E-mails re: Customer, David Greenwell, May-June 2013 (JACUZZI005372-5376).

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customers? Mr. Murdock specifically referred to one customer (Mrs. Howard) who complied that the tub was "**dangerous because she slips on the seat** and she is not happy about the jets."[41]

On June 21, 2013 Regina Reyes e-mailed Kurt Bachmeyer and stated:

> Kurt, here are the tubs we talked about:
>
> BDD3W3 5230 mfg 10/15/12; customer I Stoldt; installed 9/18/12 installer Keith Cottett – customer reported that unit would not drain; **she got stuck in tub and had to crawl out of door**; installer addressing to find out why tub would not drain.
>
> BDF78X 5229 mfg 4/17/13; customer D Greenwell; instlled 4/17/13 installer American Home Design – customer reported tub didn't work during conversation he mentioned **he slipped in tub, got stuck in footwell had to call fire dept to get out**.
>
> BDD537 mfg 10/29/12; customer C Lashinsky; installed 12/29/12 installer Anthony Home improvement – customer called to request we replace her door under warranty. **Partner slipped in tub, they had to remove the door to get her out**.[42]

According to Mr. Bachmeyer, employees at Jacuzzi are trained to report incidents like these all the way up to the top of the chain of command to Ron Templer (Jacuzzi's corporate counsel) and/or Bill Demeritt (Jacuzzi's VP of Risk Management).[43]

On June 27, 2013, Jacuzzi Director of Warranty and Technical Services, Kurt Bachmeyer, e-mailed the following to Ray Torres and Audrey Martinez:

> **I'm not sure we are done here, we're compliant [with co-efficient of friction testing] which is great, but are we meeting the needs and safety requirements of this particular demographic? Seems to me if we want to be the leader in this category we would want to eliminate slippage of any kind.** My two cents.[44]

On November 5, 2013, Melanie Borgia of Airtite wrote Deborah Nuanes, Regina Reyes, and *first*STREET Support an e-mail stating:

> **Hello, I have so many people stating the tub seat and floor are extremely slippery. Literally, unsafe.** Is there any type of mat or something that we can do to

[41] See, **Ex. 21**, E-mails re: Customer Satisfaction Surveys, June 2013 (JACUZZI005302-5304).
[42] See, **Ex. 22**, E-mails among Kurt Bachmeyer, Ray Torres, Audrey Martinez, and Regina Reyes re: Customers, Irene Stoldt, David Greenwell, and C. Lashinsky, June 2013 (REV JACUZZI006718).
[43] See, **Ex. 23**, Kurt Bachmeyer Dep. at 171:5-8, July 29, 2019.
[44] See, **Ex. 24**, E-mails re: Non-Skid Patterns Testing for compliance (REV JACUZZI006404-05).

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help this issue? I tried to find online anything to help, but nothing the size we need.[45]

On December 27, 2013, Andrea Dorman of Home Safety Baths (another Jacuzzi dealer) e-mailed Jacuzzi employees Deborah Nuanes, Regina Reyes, Audrey Martinez, and Simona Robertson and stated:

> I called the customer yesterday and was informed that they were still not satisfied with the tub … **he says the bottom of the tub is extremely slippery, he has slipped, and also a friend slipped in using it. We get this complaint a lot, we have two customers right now that have injured themselves seriously and are threatening lawsuits**. We have sent out bath mats to put in the tub to three other customers right now because they slipped and were afraid to use the tub. [46]

Regina Reyes forwarded that e-mail to Audrey Martinez and Kurt Bachmeyer and observed that, "**We have a big issue** and we are only pointing the finger per say, but **due to the circumstances involved with timeline and slip injuries this needs to be settled**."[47] Other incidents that the Defendants were well-aware of **prior** to Sherry's death include those identified in **Exhibit 27**.[48]

As one can tell from the aforementioned communications, the Defendants were keenly aware of the ways that the Jacuzzi walk-in tubs they produced, marketed and sold were harming the Defendants' target consumers. None of those incidents triggered any changes to the tub's design, marketing or sales protocols prior to Sherry's death.

G. THE DEFENDANTS CONTINUED TO IGNORE WARNINGS AFTER SHERRY'S DEATH THAT THE SUBJECT WALK-IN TUB MODEL WAS DANGEROUS

Sherry is the first known user to have died as a result of the design of Jacuzzi's walk-in Tub. Her death presented Jacuzzi with an opportunity to re-design the tub and make sure that it was safe for its elderly consumers. Her death also presented *first*STREET with an opportunity to change its predatory marketing practices so that it no longer targeted the most vulnerable user population. Her

[45] See, **Ex. 25**, E-mails from Regina Reyes to Deborah Nuanes, Audrey Martinez, and Kurt Bachmeyer re: slippery tubs and from Melanie Borgia at Airtite to Regina Reyes, Deborah Nuanes, and *first*STREET Support, Nov. 2013 (REV JACUZZI006489).
[46] See, **Ex. 26**, E-mails from Andrea Dorman at Home Safety Baths re: slip injuries, Dec. 2013 (JACUZZI005328).
[47] See, Id. at JACUZZI005327.
[48] See, **Ex. 27**, The Bates stamped documents identified in this Master OSI index were disclosed to the Court on Sept. 16, 2019, as Pls.' Evidentiary Hr'g Exs. 1-156 (vol 1-2). Should the Court wish for the Plaintiffs to submit the exhibits in their entirety – not just the index – as part of this Motion, then Plaintiffs will supplement their appendix accordingly.

death also present AITHR with an opportunity to stop selling Jacuzzi's dangerous tub by focusing on selling other, safer walk-in tubs that were on the market. Jacuzzi continued to produce the defective Tub, *first*STREET continued to market the Tub to the elderly using fear and deception, and AITHR continued to sell the Tub to the elderly.

Unsurprisingly, the Defendants continued to receive many complaints about the Tub, particularly that it was dangerously slippery. Several other e-mails discuss how customers frequently complained about the slipperiness of the Tub ("Hello: I have so many people stating that the tub seat and floor are extremely slippery;"[49] "we are having a few customers slipping on the bottom of a Jacuzzi tub,"[50] "we have had customers call concerned that they slip off the seat,"[51] "Customer Harris…said the floor of the tub is very slippery. She said she slipped off the seat,"[52]). Another customer complained: "seat slippery – you fall off onto the tub floor – door opens in so very hard to get up or be helped up."[53] One dealer/installer informed Jacuzzi there were "a couple of tubs in the field that people want removed because the customers claim they are too **slippery** to use."[54]

The table in Exhibit 27 summarizes the subsequent incidents that the Defendants were aware of following Sherry's death in February 2014. Additionally, as detailed below, Jacuzzi also learned of other incidents involving similar concerns about the tubs from Ruth Curnutte, Patricia Herman, and Nancy Jones.

B. ISSUES CURRENTLY BEFORE THE COURT

On April 15, 2021, the Court granted in part and denied in part, Jacuzzi's Motion to Reconsider the Court's Order Denying Jacuzzi's Motions in Limine Nos. 1, 4, 13, and 21. In granting Jacuzzi's Motion to Reconsider, in part, this Court ruled that Judge Scotti committed clear error and abused his discretion by allowing the testimony of:

1. Ruth Curnutte;
2. Patricia Herman;
3. Leonard Baize;

[49] See, **Ex. 28**, Evidentiary Hr'g Ex. 37 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005666.
[50] See, **Ex. 29**, Evidentiary Hr'g Ex. 36 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005646.
[51] See, **Ex. 30**, Evidentiary Hr'g Ex. 6 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005414.
[52] See, **Ex. 31**, Evidentiary Hr'g Ex. 47 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005722.
[53] See, **Ex. 32**, Evidentiary Hr'g Ex. 30 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005334.
[54] See, **Ex. 33**, Evidentiary Hr'g Ex. 43 to Pls.' Evidentiary Hr'g Closing Brief, at JACUZZI005643.

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4. Shirli Billings;
5. Jerre Chopper; and,
6. Nancy Jones.

This Court ruled that each of the above witnesses' corresponding incidents were not substantially similar to the subject incident. Additionally, this Court ruled that these witnesses were inadmissible for purposes of punitive damages based on the same analysis, i.e., the corresponding incidents were not substantially similar to the subject incident.

Respectfully, the Court's Order reversing Judge Scotti's ruling as to the above listed witnesses was clear error and Plaintiffs request reconsideration with respect to Ruth Curnutte, Patricia Herman, Jerre Chopper, and Nancy Jones. **Plaintiffs are not seeking reconsideration with respect to Leonard Baize and Shirli Billings.**

III. LEGAL STANDARD

EDCR 2.24 allows a party to seek reconsideration of a ruling of the Court within fourteen (14) days after service of written notice of the order or judgment. EDCR 2.24. Reconsideration is left to the discretion of the trial court and is appropriate in instances where the "decision is clearly erroneous."[55]

A. RECONSIDERATION IS FAVORED AS AN EFFICIENT ALTERNATIVE TO APPEAL

A motion to reconsider is preferred over an appeal as a quicker, easier, and less expensive method of correcting error.[56] As one court explained:

> In doing what he did here [moving for relief from judgment under Rule 60(b) rather than proceeding directly to appeal], it would appear that he followed what we deem ordinarily to be the better practice of bringing to the attention of the trial court at some appropriate time before appeal the errors which it is claimed have been committed. The district court already familiar with the case is thereby given an opportunity to correct any mistakes it might have made and the parties will avoid the expenses and delays involved in appeals.[57]

Where the district court can correct an error on a motion for reconsideration, it should.

B. RECONSIDERATION IS APPROPRIATE TO AVOID ERROR EVEN WHERE THE CIRCUMSTANCES HAVE NOT CHANGED.

"[A] district court may reconsider a previously decided issue if . . . the decision is clearly

[55] Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).
[56] *See*, e.g., Osman v. Cobb, 77 Nev. 133, 136, 360 P.2d 258, 259 (1961) (denying costs because Rule 60 relief was not sought with the trial court).
[57] Beshear v. Weinzapfel, 474 F.2d 127, 130 (7th Cir. 1973).

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erroneous."[58] Reconsideration is appropriate "[a]lthough the facts and the law [are] unchanged [if] the judge [is] more familiar with the case by the time the second motion [is] heard, and [she is] persuaded by the rationale of the newly cited authority."[59]

Reconsideration is warranted in many circumstances, including:

> … when (1) the matter is presented in a 'different light' or under 'different circumstances;' (2) there has been a change in the governing law; (3) a party offers new evidence; (4) 'manifest injustice' will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.[60]

It is appropriate whenever the Court may have overlooked or misapprehended pertinent facts or law or for some other reason mistakenly arrived at its earlier decision.[61]

IV. LEGAL ARGUMENT

A. THE INCIDENTS AT ISSUE ARE SUBSTANTIALLY SIMILAR

This Court ruled that Jerre Chopper, Ruth Curnutte, Patricia Herman, and Nancy Jones' incidents were not substantially similar to Sherry's incident.

1. The Substantial Similarity Analysis is Relaxed When Evidence is Offered to Demonstrate Awareness of a Defect

"The plaintiff has a right in a strict liability action to introduce evidence of a substantially similar accident to prove that the design of the product involved in the accident is defective."[62] Importantly, however, substantial similarity "may be somewhat relaxed" and "depends upon the underlying theory of the case."[63] As the 10th Circuit recognized:

> When the evidence is offered to demonstrate that a highly dangerous condition existed, a high degree of substantial similarity is required. "The requirement of **substantial similarity is relaxed**, however, when the evidence of other incidents is used to demonstrate notice or awareness of a potential defect."[64]

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[58] Masonry & Tile Contractors Ass'n of Southern Nevada v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). *See also* EDCR 2.24.

[59] Harvey's Wagon Wheel, Inc. v. MacSween, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980).

[60] Wasatch Oil & Gas, LLC v. Reott, 263 P.3d 391, 396 (Utah Ct. App. 2011).

[61] See by analogy, NRAP 40(c)(2); see also, Nelson v. Dettmer, 46 A.3d 916, 919 (Conn. 2012); Viola v. City of New York, 13 A.D.3d 439, 441 (N.Y. App. Div. 2004).

[62] Andrews v. Harley Davidson, Inc., 106 Nev. 533, 538, 796 P.2d 1092, 1096 (1990); Ford Motor Co. v. Trejo, _ Nev. _, 402 P.3d 649, 654 (2017) (stating that "evidence of other accidents involving analogous products" are relevant); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, _, 470 P.2d 135, 139 (1970) (admitting evidence of prior and subsequent accidents to show a dangerous or defective condition).

[63] In re Cooper Tire & Rubber Co., 568 F.3d 1180, 1191 (10th Cir. 2009) (citing Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434, 1440 (10th Cir. 1992).

[64] Id. (citing Wheeler v. John Deere Co., 862 F.2d 1404, 1407 (10th Cir. 1988).

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When other accidents are used to prove notice or awareness of a potential defect, the requirement of substantial similarity is more relaxed.[65] The incidents "need only be sufficiently similar to make the defendant aware of the dangerous situation."[66]

Evidence of prior accidents is admissible for purposes of showing notice **without** a showing of substantial similarity; all that is required is that the complaints or accidents be such as to call the manufacturer's attention to the existence of a problem. Where evidence shows that the product in question had substantially similar physical or mechanical characteristics and similar defects, the inherent similarity of the physical properties justifies admission of other product failures to show defect without showing a substantial similarity in the manner in which the accident occurred.[67]

Again, in this case, the dangerousness of the Tub has already been established because the defendants' answers have been stricken. Therefore, the incidents and testimony at issue are only being offered to show that Jacuzzi was aware of them, yet failed to act.

2. Jerre Chopper is Admissible on the Issue of Prior Notice

As discussed at length above, Jerre Chopper sent no less than six letters to Jacuzzi, advising Jacuzzi of the dangers of its tubs. She warned that the tubs were too slick and that a person can become entrapped in the tub for hours. Like others, she called the tub a "death trap" for someone having a medical emergency, e.g., Sherry Cunnison. As discussed above, Mrs. Chopper's communications with Jacuzzi are admissible to show that she attempted to call the manufacturer's attention to the existence of a problem. Her testimony is admissible to show that Jacuzzi was aware of her warnings.[68]

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[65] U.S. Aviation v. Pilatus Business Aircraft, 582 F.3d 1131, 1148 (10th Cir. 2009); Wheeler v. John Deere Co., 862 F.2d 1404, 1507-08 (10th Cir. 1988) (citing Exum v. General Elec. Co., 819 F.2d 1158, 1162-63 (D.D.C. 1987); Four Corners Helicopters, Inc. v. Turbomeca, S.A., 979 F.2d 1434, 1440 (10th Cir.1992) (noting that the requirement of substantial similarity is relaxed when the evidence of other incidents is used to demonstrate notice or awareness of a potential defect); Toe v. Cooper Tire & Rubber Co., 834 N.W.2d 82 (Iowa App. 2013).

[66] Mirchandani v. Home Depot U.S.A., Inc., 470 F.Supp.2d 579, 583 (D.Md. 2007) (citing Benedi v. McNeil-P.P.C., Inc., 66 F.3d 1378, 1386 (4th Cir. 1995)).

[67] See, Hasson v. Ford Motor Co., 32 Cal.3d 388, 404, 185 Cal.Rptr. 654 (1982); Elsworth v. Beech Aircraft Corp., 37 Cal.3d 540, 555, 208 Cal.Rptr. 874 (1984); Ault v. International Harvester Co., 13 Cal.3d 113, 121-122, 117 Cal.Rptr. 812 (1974).

[68] Id.

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3. The Ruth Curnutte, Patricia Herman, and Nancy Jones Incidents Are Substantially Similar Because Slipperiness was a Substantial Factor in All of these Occurrences

The Ruth Curnutte, Patricia Herman, and Nancy Jones incidents are substantially similar to the subject incident because they were caused by the same substantial factors. In product liability and negligence cases, a legal cause need not be the **only** cause, but rather will be found to be a cause warranting the imposition of liability if found to be a substantial factor. Specifically:

> **NEGLIGENCE: LEGAL CAUSE; DEFINITION**
> A legal cause of injury, damage, loss or harm is a cause which is a substantial factor in bringing about the injury, damage, loss or harm.
> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. **It does not have to be the only cause of the harm**.[69]

There can be more than one substantial factor that gives rise to an incident. Here, one common substantial factor in all of these cases is the excessively slippery tub surfaces. Just as the slipperiness of the Tub was a substantial factor in Sherry's death, the slipperiness was a substantial factor in the Curnutte, Herman, and Jones incidents. Additionally, another substantial factor that links all the case is the fact that the Tubs were the result of Jacuzzi's inadequate testing, continuous refusal to listen to complaints, and refusal to heed warnings about the dangerousness of the tub. Just as the failure to test, respond to complaints, and heed warnings was a substantial factor in Sherry's death, they were also a substantial factor in the Curnutte, Herman, and Jones incidents.

a. Ruth Curnutte

Ruth Curnutte is an elderly lady who purchased and used a Jacuzzi walk-in tub. The first time that Ms. Curnutte used the tub, the jets pushed her off of the seat, and she ended up on her knees **in the footwell of the tub** with her head submerged under water.[70] Ms. Curnutte contacted Jacuzzi and notified it that the walk-in Tub was a "death trap" and that the Alert 911 would have been totally useless to save her from drowning.[71]

In reversing Judge Scotti's Order, this Court stated that "[w]hile Ms. Curnutte states that the

[69] See, Nevada Jury Instructions, Civil, 2018 Edition Inst. 4.5 (emphasis added); see also, Holcomb v. Georgia Pac., LLC, 128 Nev.614, 627, 289 P.3d 188, 196 (2012); County of Clark, ex rel. University Medical Center v. Upchurch, 114 Nev. 749, 961 P.2d 754 (1998); RESTATEMENT (SECOND) OF TORTS §431.
[70] See, **Ex. 34**, Ruth Curnutte Dep. at 10:1-10; 77:7-17, Aug. 7, 2019 (**emphasis** added).
[71] See, **Ex. 35**, Curnutte Dep. Ex. 3.

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tub was slippery…this was not the factor she attributed to her incident."[72] This is simply not true. When Ms. Curnutte was asked a question about whether she would have slipped off the seat without the jets, she repeatedly referred to the slipperiness of the tub, not the strength of the jets:

> Q. If you had not turned the jets on, do you think you would have slipped off of the seat?
> A. It **was slippery. It was slippery**. This is why they thought they can -- they can justify by installing the non-slippery two mats on the seat and on the footwell. But I did not even try whether that works, or not.
> Q. Okay. **Now, did you also slip on the floor in the footwell?**
> A. **Yes**.
> Q. Okay.
> A. Well, yes, **it was slippery. It was all slippery**.
> Q. Okay. But you were able to stand up –
> A. No.[73]

Thus, while the jets were a substantial factor in her incident, the slipperiness also was a substantial factor in the incident. The jets, **in addition to the slipperiness** of the Tub, was what led to Ms. Curnutte's unfortunate situation. Jacuzzi attempted to overly narrow the similarities by claiming that the **only** problem that Ms. Curnutte had with her tub was the power of the jets. However, the foregoing testimony reveals that while the jets certainly were a cause of her injuries,[74] so was the slipperiness of the Tub. Furthermore, the Jacuzzi's **thought-process failure and danger appreciation** was what led to Ms. Curnutte's injuries, just as they led to those of Sherry Cunnison. This other incident is substantially similar and should be allowed.

b. Patricia Herman

Patricia Herman is a Florida attorney, who was also her elderly mother's primary caretaker. Ms. Herman purchased the Jacuzzi walk-in tub in early 2015 for her mother because of the advertisements that the tub had "an ADA-compliant seat."[75] Her mother used the tub the day after it was installed. After helping her mother get situated in the tub, Ms. Herman proceeded to walk out of the room to do laundry. As she walked out of the bathroom, she looked over her shoulder at the vanity mirror in the bathroom and noticed that her mother had slipped "into the bottom of the

[72] Order Granting in Part and Denying in Part Jacuzzi's Motion for Reconsideration, at 5:21-22, Apr. 15, 2021.
[73] See, **Ex. 34**, Curnutte Dep. at 77:18-78:7 (discussing bruising to her knees and mental suffering)
[74] See, Id. at 91:7-23.
[75] See, **Ex. 36**, Patricia Herman Dep. at 11:9-24, Aug. 9, 2019.

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tub."[76] Ms. Herman ran into the bathroom, grabbed her mother, pulled her out of the water, and helped her get back on the seat. As soon as she released her mother, her mother slid down into the well of the tub, once again.[77] Ms. Herman had to jump over the tub, lift her up, and hold her in place. Then, she put her knee between her mother's legs, her arm on her chest, before turning off the tub and draining it.[78]

Ms. Herman complained to Jacuzzi that the Tub was dangerous due to the combination of the jets and the fact that the seat is so high and sloped that if your legs are short, you can't brace yourself on the footwell of the tub to prevent yourself from slipping off of the seat.[79] Jacuzzi blew her off.[80]

In reversing Judge Scotti's Order, this Court noted, "while Ms. Herman testified that her mother slipped off the tub's seat several times, it was attributed to the power of the tub's jets…. [Additionally], Ms. Herman does not testify that her mother became stuck in the tub, unable to extricate herself; does not make mention of an inward swinging door; nor does she testify to any injuries." **This is incorrect. Without Ms. Herman being there to save her mother, her mother would have drowned. Ms. Herman's mother was sliding off the seat into the water and Ms. Herman had to jump OVER the tub wall and lift her back onto the seat to save her from drowning. Once she let go, she began sliding again. Had the door opened outward, Ms. Herman could have simply opened the door to let the water out and prevent her mother from drowning. Instead, she had to jump over the tub wall.**

Additionally, the fact that she did not drown does not make this incident dissimilar. To illustrate, if this were a product defect case involving an allegedly dangerous tire, it would be relevant to know if there were a thousand instances of the same tire popping at high speeds, even if only one hundred of those instances led to an injury. The fact that 900 people were lucky enough to avoid injury does not make those 900 incidents irrelevant. A close call is still relevant.

Again, in the instant case and Ms. Herman's case, the slipperiness of the seat was a

[76] See, Id. at 13:3-25.
[77] See, Id. at 13:25-14:3.
[78] See, Id. at 14:4-8.
[79] See, Id. at 17:12-24.
[80] See, **Ex. 37**, Herman Dep. Ex. 15.

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substantial factor that played a causal role in each customer's incident. Simply sharing this common substantial factor is sufficient for purposes of substantial similarity. Further, the fact that the Curnutte and Herman incidents involved the jets does not mean that the slipperiness of their respective Tubs did not play a substantial factor in their incidents.

Additionally, as noted above, another design aspect that Plaintiffs were particularly critical of—as specifically set forth in their Complaint—and therefore **must prove** in their case-in-chief is that Jacuzzi marketed the tub to the elderly, weak, and feeble with a promise of safety (i.e., that the Jacuzzi tub is a safer option to enhance the bathing experience). But, in reality, the Jacuzzi walk-in Tub is actually much more dangerous than a regular tub. Using this reasoning and analysis, the Herman incident is substantially similar to that of Sherry Cunnison and should be allowed to be presented to the jury.

c. Nancy Jones

Nancy Jones is an elderly lady who purchased and used a Jacuzzi walk-in bathtub. Ms. Jones testified that she was bathing while seated one day and "reached for the grab bar [on the right hand side of the tub] and [her] feet" began to slip on the floor such that she feared that if she kept reaching for the grab bar, she would have lost her footing, fallen back and "hit [her] head on the seat."[81] She called "Harry," the dealer who installed the tub and requested that he install another grab bar on the Tub.[82] She also called Jacuzzi[83] and requested that they install a grab bar after Harry didn't respond.[84] No one ever installed the grab bar that Ms. Jones requested, so she no longer sits in the Tub when she bathes because of her fears about the slipperiness of the Tub.[85]

Like all of the customer complaints discussed above, Ms. Jones had serious complaints about the slipperiness of her Tub. Her complaint about the slipperiness of the Tub is a complaint about the substantial factor in Sherry's death. Again, the fact that she was not injured or did not complain about the inward door does not mean that her complaint about slipperiness is irrelevant to this case. Her incident and complaint to Jacuzzi is relevant to show awareness of the danger. On

[81] See, **Ex. 38**, Nancy Jones Dep. at 33:13-34:18, Aug. 2, 2019.
[82] See, Id.
[83] See, Id. at 58:23.
[84] See, Id. at 33:13-34:18.
[85] See, Id. at 37:10-38:7.

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this basis alone, the Court should reverse its Order with respect to Jerre Chopper, Ruth Curnutte, Patricia Herman, and Nancy Jones.

B. THE EVIDENCE IS ADMISSIBLE FOR PUNITIVE DAMAGES PURPOSES

Admissibility depends on the purpose for which the evidence is proffered. Therefore, separate and independent of the argument above, reconsideration is also necessary because the evidence at issue is separately admissible for punitive damages purposes (i.e. to show that the intent and mindset of the defendants). Here, the evidence is being offered to show that Jacuzzi has ignored, and continued to ignore, the letters, phone calls, and emails of complaints and warnings about the dangerousness of its product. It is being offered to show that Jacuzzi – despite knowing of the dangers of the tub – continued to manufacture and sell its tubs to the very demographic most at risk of being harmed in its tubs—the elderly. Therefore, the evidence is relevant to the jury's determination of whether Jacuzzi's conduct warrants punitive damages.

On the issue of punitive damages, this Court's Order states:

> Plaintiff has the burden to prove that Defendant deliberately ignored the unjustified risk of harm that its tub's alleged defect posed to consumers. Such an endeavor can only be born out by way of prior notice through similar incidents, complaints, and lawsuits. **Defendant's due process rights are protected by the substantially similar doctrine, which limits Plaintiff's evidence to only incidents whose facts and circumstances mirror her own**.

Respectfully, Plaintiffs believe that it was clear error for the Court to find that the substantial similarity doctrine controls admissibility with respect to the punitive damages analysis.

1. The substantial similarity doctrine is wholly separate from the punitive damage analysis which focuses on the culpability of the defendants conduct

The substantial similarity doctrine deals with admissibility with regard to a plaintiff's proof of liability and causation. "The plaintiff has a right in a strict liability action to introduce evidence of a substantially similar accident to prove that the design of the product involved in the accident is defective."[86] "Whether the jury may be allowed to draw an inference as to the defectiveness of a product from prior failures depends on whether the factors which produced the prior failures were

[86] Andrews v. Harley Davidson, Inc., 106 Nev. 533, 538, 796 P.2d 1092, 1096 (1990); Ford Motor Co. v. Trejo, _ Nev. _, 402 P.3d 649, 654 (2017) (stating that "evidence of other accidents involving analogous products" are relevant); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, _, 470 P.2d 135, 139 (1970) (admitting evidence of prior and subsequent accidents to show a dangerous or defective condition).

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substantially similar to the factors which produced the present failure."[87]

As the Court's Order notes: "[t]he purpose of the 'substantially similar' doctrine is to determine the existence of a dangerous or defective condition."[88] Here, the evidence at issue is being offered for a separate purpose: to show that Jacuzzi acted with malice. It is being offered to show that Jacuzzi's **conduct** was reprehensible conduct that warrants an award of punitive damages.

2. The Evidence is Admissible to Show Malice, Express or Implied

"A plaintiff may recover punitive damages when evidence demonstrates that the defendant has acted with 'malice, express or implied."[89] "'Malice, express or implied,' means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others."'[90] "A defendant has a 'conscious disregard' of a person's rights and safety when he or she knows of 'the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences."'[91] "In other words, under NRS 42.001(1), to justify punitive damages, the defendant's conduct must have exceeded 'mere recklessness or gross negligence."[92] A plaintiff does not have to demonstrate that a defendant intended to cause harm in order to show a conscious disregard for purposes of implied malice or oppression.[93] Additionally, under NRS 42.001, a plaintiff is not required to produce evidence of direct proof of a defendant's actual knowledge for the purposes of proving conscious disregard.[94] Here, the evidence at issue is relevant to whether Jacuzzi acted with malice, express or implied.

"Punitive damages are designed to punish and deter a defendant's culpable conduct and act as a means for the community to express outrage and distaste for such conduct."[95] Punitive damages are a "means of punishing the tortfeasor and deterring the tortfeasor and others from engaging in

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[87] Id.
[88] Order Granting in Part and Denying in Part Jacuzzi's Motion for Reconsideration, at 5:9-11, Apr. 15, 2021.
[89] Wyeth v. Rowatt, 244 P.3d 765, 783 (Nev. 2010) (quoting NRS 42.005(1)).
[90] Id. (quoting NRS 42.001(3)
[91] Id. (quoting NRS 42.001(1)).
[92] Id. (quoting Thitchener, 124 Nev. 725, 742-43, 192 P.3d 243, 254-55).
[93] Thitchener, 124 Nev. 744 n.55, 192 P.3d at 256 n.55.
[94] Id.
[95] Countrywide Home Loans, Inc. v. Thitchener, 124 Nev. 725, 739, 192 P.3d 243 252 (2008) (emphasis added); see also Republic Ins. v. Hires, 107 Nev. 317, 320, 810 P.2d 790, 792 (1991) ("Punitive damages provide a benefit to society by punishing undesirable conduct not punishable by the criminal law").

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similar conduct."[96] They are a means of allowing the jury to warn the tortfeasor and others that "such conduct will not be tolerated. The allowance of punitive damages also provides a benefit to society by punishing undesirable conduct that is not punishable by the criminal law."[97] Here, the evidence will assist the jury in determining whether Jacuzzi's **conduct** was the type of reprehensible conduct that must be deterred. It is admissible so that the jury can assess Jacuzzi's level of culpability.

3. The Evidence is Relevant to the Reprehensibility of the Defendants' Conduct

The evidence relevant to the jury's determination as to the amount of punitive damages that might be awarded. To protect against grossly excessive or arbitrary awards, the United States Supreme Court has articulated three guideposts for deciding when a punitive damages award is in line with due process rights.[98] The three considerations are: (1) "the degree of reprehensibility of the defendant's conduct," (2) the ratio of the punitive damages award to the "actual harm inflicted on the plaintiff," and (3) how the punitive damages award compares to other civil or criminal penalties "that could be imposed for comparable misconduct." Nevada follows the federal standards for reviewing a punitive damages award.[99] Thus, Nevada plaintiffs must present evidence at trial of the reprehensibility of the defendants' conduct.

Reprehensibility of conduct is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[100] In determining reprehensibility of conduct, the United States Supreme Court has set forth five characteristics of conduct that may be relevant: (1) whether the harm was physical versus economic, (2) whether the conduct evidences "an indifference to or reckless disregard of the health and safety of others," (3) the financial vulnerability of the target of the conduct, (4) whether the conduct involved repeated action versus an isolated incident, and (5) whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident."[101] These factors are similar to the factors used by the Nevada Supreme Court to determine if a punitive

[96] Siggelkow v. Phoenix Ins. Co., 109 Nev. 42, 44-45, 846 P.2d 303, 304-05(1993)
[97] Id. at 45, 846 P.2d at 305.
[98] State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).
[99] Bongiovi, 122 Nev. 556, 138 P.3d at 450 (2006)
[100] BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996)
[101] Campbell, 538 U.S. at 419.

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damages award is reasonable: (1) the financial position of the defendant, (2) the culpability and blameworthiness of the tortfeasor, (3) the vulnerability and injury suffered by the offended party, (4) the offensiveness of the punished conduct when compared to societal norms of justice and propriety, and (5) the means judged necessary to deter future misconduct.[102]

4. Evidence Showing that a Defendant Ignored Multiple Warning Signs is Sufficient to Show a Conscious Disregard

Finally, the evidence at issue is admissible pursuant to Countrywide Home Loans, Inc. v, Thitchener,[103] the leading case in Nevada on punitive damages. In Thitchener, a group of condominium owners sued their mortgage company for breach of contract, trespass, conversion, and other related claims arising from the mortgage company's misidentification of the owners' units as subject to foreclosure and disposal of owners' personal property while the owners were temporarily out of state. Following a trial on damages, the Eighth Judicial District Court in Clark County entered judgment on the jury's verdict with respect to general and special damages and granted the mortgage company's request for remittitur on the award of punitive damages and reduced the punitive damages award from $2,500,000 to $968,070 in accordance with NRS 42.005(l)(a). The mortgage company appealed, and the owners cross-appealed.

On appeal, Countrywide challenged the propriety of the punitive damages award by arguing that the Thitcheners failed to demonstrate by clear and convincing evidence that it was guilty of implied malice or oppression as required to justify an award of punitive damages under NRS 42.005(l). The Nevada Supreme Court disagreed.[104]

The Court reasoned as follows:

> In this case, the Thitcheners presented evidence of **multiple ignored warning signs** suggesting that Countrywide **knew of a potential mixup**, as well as evidence indicating that Countrywide **continued to proceed with the foreclosure despite knowing of the probable harmful consequences of doing so**. The Thitcheners appeared as owners of the condominium unit in several documents in Rangel's foreclosure file, including an appraisal report, a broker price opinion, and a preliminary title report. By her own admission, Baldwin reviewed the appraisal report, understood that the Thitcheners owned this property, **but did not consider**

[102] United Fire Ins. Co. v. McClelland, 105 Nev. 504, 514, 780 P.2d 193, 199 (1989) (citing Ace Truck v. Kahn, 103 Nev. 503, 510, 746 P.2d 132, 137 (1987)).
[103] Countrywide Home Loans, Inc. v. Thitchener, 192 P.3d 243, 124 Nev. 725 (2008).
[104] Countrywide Home Loans, Inc. at 124 Nev. at 739.

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> **this to be problematic** in preparing the property for resale. Baldwin was **similarly indifferent** regarding the broker price opinion, which she also **admittedly ignored**. Although the preliminary title report was available for this property, Baldwin did not review it, leaving that task to a subordinate. What is more, Countrywide's realtor **twice directly notified** Baldwin that there was a potential mix-up. After the second time, Baldwin e-mailed an unidentified person in Countrywide's foreclosure department, who notified her that she could proceed. Countrywide, however, could not produce Baldwin's e-mail, nor could it produce the unidentified person from its foreclosure department who gave her this assurance. Based on the above, there was sufficient evidence to infer that Countrywide knew that it may have been proceeding against the wrong unit.
>
> Moreover, **as a foreclosure specialist, Baldwin presumably understood that proceeding in the face of these warning signs involved an imminent, as opposed to merely a theoretical, risk of harm** to this particular unit's lawful owner. Given this knowledge of the probable harm that would result from a wrongful foreclosure, the jury reasonably could have inferred that Countrywide's **casual attempts** at verification **indicated a willful and deliberate failure on its part to avoid that harm**. Consequently, the jury could have logically concluded that Countrywide consciously disregarded the Thitcheners' rights. As these and other reasonable inferences could have been drawn in the Thitcheners' favor, we cannot conclude that submitting the Thitcheners' punitive damage claim to the jury was improper.[105]

5. A Defendant's Ongoing Conduct is Relevant to Show Malice

If the purpose of punitive damages is to deter future similar conduct, the fact a defendant continues to engage in the dangerous conduct is highly relevant. Continuing the dangerous conduct shows that deterrence is more necessary and demonstrates the reprehensibility of the defendant's conduct. Thus, several courts have held that evidence which demonstrates that a defendant has failed to make changes to a known defective product should be admissible to prove that punitive damages are warranted.

For example, the United States Supreme Court has explained that whether the defendant's conduct involved repeated actions or was an isolated incident is a relevant consideration to the reprehensibility inquiry:

> Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law. Our holdings that a recidivist may be punished more severely than a

[105] Countrywide Home Loans, Inc. 124 Nev. at 744-45. (**emphasis** added) (internal citations removed).

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> first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.[106]

California courts have also expressly held that this evidence, along with evidence of subsequent conduct, is also admissible for the purposes of punitive damages. In Hilliard v. A. H. Robins Co.,[107] the California Court of Appeals noted that a plaintiff in a product liability case "may present any evidence which would tend to prove the essential factors of the conscious disregard concept of malice. This includes evidence of subsequent activities and conduct."[108] The Hillard Court explained:

> Finally, we consider whether the evidence of conduct or activities of defendant Robins in manufacturing and marketing the Dalkon Shield subsequent to the IUD being placed in plaintiff, subsequent to the IUD being removed from plaintiff, and subsequent to the IUD being removed from the domestic market is admissible. We hold that it is admissible on the issues of malice and punitive damages. Proffered evidence which deals with events occurring after a plaintiff had last used the product is generally inadmissible. **On the issue of malice and punitive damages, however, the plaintiff may present any evidence which would tend to prove the essential factors of the conscious disregard concept of malice. This includes evidence of subsequent activities and conduct of defendant Robins**. (*Blank v. Coffin* (1942) 20 Cal.2d 457, 463, 126 P.2d 868.)
>
> In proving that [the] defendant....acted in conscious disregard of the safety of others, plaintiff...was not limited to [defendant's] conduct and activities that directly caused her injuries. The conscious disregard concept of malice does not limit an inquiry into the effect of the conduct and activities of the defendant on the plaintiff, the inquiry is directed at and is concerned with the defendant's conduct affecting the safety of others. Any evidence that directly or indirectly shows or permits an inference that defendant acted with conscious disregard of the safety or rights of others, that defendant was aware of the probable dangerous consequences of defendant's conduct and/or that defendant willfully and deliberately failed to avoid these consequences is relevant evidence. Such evidence includes subsequent conduct unless such subsequent conduct is excluded on policy consideration.[109]

The Hillard Court then went on to explain that the public policy of excluding subsequent remedial measures in negligence cases does not apply to product defect cases because such an exclusion does not promote the removal of dangerous products from the market and does not

[106] Gore, 517 U.S. at 576-77.
[107] Hilliard v. A. H. Robins Co., 148 Cal, App. 374 (1983)
[108] Id., 148 Cal. App. at 401 (citing Blank v. Coffin, 20 Cal,2d 457, 463, 126 P.2d 868 (1942)).
[109] Id.

promote public safety.

> The policy purpose of Evidence Code section 1151 [the California counterpart to NRS 49.095] is to exclude evidence of affirmative remedial or precautionary conduct. The policy consideration was not to exclude evidence of the failure to make changes in a defective product or the failure to withdraw a dangerous product from the market. Admitting evidence of no product change or of no withdrawal from the market, on the issue of punitive damages is consistent with the public policy consideration of Evidence Code section 1151. Failure to make changes in a known defective product, failure to remove such a product from the market does not promote public safety.
>
> Such conduct is contrary to any policy aimed at promoting or encouraging public safety. Such conduct is admissible evidence on the punitive damage issue in order to provide meaningful consumer protection against the manufacture and distribution of dangerous, defective products[110].

Similarly, the Court of Appeals for the Tenth Circuit has repeatedly allowed evidence of subsequent conduct in the determination of punitive damages. For example, in Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co.,[111] the court noted that a defendant's after-the-fact conduct may be probative of a defendant's state of mind at the time of the underlying misconduct, though it cannot itself support a punitive damages award.[112]

In Peshlakai v. Ruiz, the United States District Court for New Mexico allowed evidence of subsequent liquor law violations for the purposes of proving state of mind for punitive damages, in a case involving overserving of bar patrons who later drove and caused a car crash.[113] The court found this evidence to make it more likely than not that the defendant had the wanton, willful, and reckless state of mind needed to establish a punitive damages claim because after the defendant had notice of the subject incident, it continued to have overserving violations.[114]

Numerous other jurisdictions have also approved the admission of evidence of subsequent conduct for the purpose of punitive damages.[115]

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[110] Hillard, at 401.
[111] Farm Bureau Life Ins. Co. v. Am. Nat'l Ins. Co., 408 Fed. Appx. 162 (10th Cir. 2011).
[112] Id. at 169 (citing Juarez v. ACS Gov't Solutions Grp., 314 F.3d 1243, 1247 (10th Cir. 2003) (noting that a cover-up of the misconduct did not necessarily import evil intent, but the jury could infer that the cover-up was planned prior to the misconduct).
[113] Peshlakai v. Ruiz, 39 F. Supp. 3d 1264, 1338 (D.N.M. 2014).
[114] Id.
[115] See, e.g., Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801, 813 (S.D. 1996) (holding a defendant's proclivity

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6. Other Conduct of the Defendant is Relevant and Admissible for Punitive Damages Purposes So Long as It Bears a Nexus to the Plaintiff's Harm

Similarly, any of the defendant's conduct which bears some nexus to the plaintiff's harm is admissible for punitive damages. In State Farm Auto Ins. v. Campbell,[116] the United States Supreme Court reviewed a punitive damage award and applied the three-prong test adopted in BMW of North America, Inc. v. Gore[117]: (1) the degree of reprehensibility, (2) the disparity between the actual or potential harm suffered by the plaintiff and punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.[118]

Campbell involved State Farm insured customers—the Campbells—suing State Farm for its failure to defend the Campbells in a third-party negligence action.[119] In their bad faith case against State Farm, the Campbells received a jury verdict in the amount of $1 million in compensatory damages and $145 million in punitive damages.[120] The trial court reduced the punitive damages award, and the Utah Supreme Court reinstated the full amount.[121] The case was then reviewed by the United States Supreme Court.

In addressing the reprehensibility prong, the U.S. Supreme Court reviewed the Utah court's reliance upon evidence of State Farm's business practices spanning a period of 20 years.[122] The court held that evidence of national campaigns (whether lawful or unlawful) is admissible as

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to repeat wrongful conduct is relevant to punitive damages, as a major purpose of punitive damages is to deter future misconduct of a similar nature); Roth v. Farner Bocken Co., 667 N.W.2d 651 (S.D. 2003) (in determining "degree of reprehensibility," one consideration is whether "the conduct involved repeated actions or was an isolated incident"); Boshears v. Saint-Gobain Calmar, Inc., 272 S.W,3d 215, 226 (Mo. Ct. App. 2008) ("actions subsequent to those for which damages are sought may be relevant and 'admissible under an issue of exemplary damages if so connected with the particular acts as tending to show the defendant's disposition, intention, or motive in the commission of the particular acts for which damages are claimed"); Bergeson v. Dilworth, 1992 U.S. App. LEXIS 6007 (10th Cir. Mar. 30, 1992) (evidence of other acts may be admissible to show knowledge under Fed. R. Evid. 404(b). The fact that the other conduct occurred subsequent to the event giving rise to liability does not make it any less admissible); Eaves v. Penn, 587 F.2d 453, 464 (10th Cir. 1978) (evidence of subsequent conduct admissible to show defendant's intent at time of alleged breach of fiduciary duty); GM Corp. v. Mosely, 213 Ga. App. 875, 877 (Ga. Ct. App. 1994) (finding evidence of other incidents involving a product in a product defect case to be admissible and relevant to the issues of notice of a defect and punitive damages).

[116] State Farm Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

[117] Gore, 517 U.S. 559 (1996).

[118] Campbell, 538 U.S. at 418 (citing Gore, 517 U.S. at 575).

[119] Id. at 412-16.

[120] Id. at 415.

[121] Id.

[122] Id. at 414-15.

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evidence of reprehensibility once the conduct in question has some nexus to the claims of the trial plaintiff. In Campbell, much of the out-of-state conduct had no relationship to the negligence and fraud allegations of the Campbells. The Supreme Court determined that, in this instance, the introduction of out-of-state conduct, was inappropriate because that conduct may have been legal in other states and was unrelated to the type of claim at issue in this case. The Court found that the Campbells, "identified scant evidence of repeated misconduct of the sort that injured them…and the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length."[123] However, the Court further opined that, **"lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff."**[124]

In other words, the requirement for admissibility when it comes to punitive damages is that there is a "nexus to the specific harm suffered by the plaintiff"—not the substantial similarity test. Here, the witness testimony at issue is, "evidence of repeated misconduct of the sort that injured" Sherry (e.g.., a continuous refusal to address customer complaints regarding the safety of the tub; a refusal to conduct adequate testing; a continuous refusal to remove the product from the market; a refusal to address the slipperiness of the tub; etc.).

4. The Court Should Reverse its Order with Respect to Mrs. Chopper

Even before it began to manufacture the Tub, Jacuzzi took zero steps to make sure that the Tub was safe for the elderly despite representing that the Tub was "Designed for Seniors." Prior to Sherry's death, despite receiving complaint after complaint that the Tub was dangerously slippery, that the Tub needed additional grab bars, and that several people had become entrapped in the Tub, Jacuzzi made no effort to safely redesign the Tub despite knowing that the Tub was dangerous.

The substantial number of complaints about the Tub's dangerous defects prior to Sherry's entrapment and death were certainly sufficient to warn Jacuzzi about the imminent harm posed to Tub users. Just like the foreclosure specialist in Thitchener who keenly understood that "proceeding

[123] Id. at 423-24.
[124] Id. at 422 (emphasis added).

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in the face of these warning signs involved an imminent, as opposed to merely a theoretical, risk of harm," Jacuzzi consciously and repeatedly disregarded known safety measures proposed by its customers (i.e., Jerre Chopper and all of the other customers who complained about slipping, falling, becoming stuck, and being injured), marketers, dealers, and employees and proceeded to manufacture the subject walk-in Tub that entrapped and killed Plaintiff Sherry Cunnison. Jacuzzi did so despite knowing that the Tub was dangerously unsafe for its target users – elderly individuals like Sherry who were not able bodied and thus much more prone to slip and fall and entrapment risks. Thus, Mrs. Chopper's testimony is extremely relevant and admissible on the issue of punitive damages.

5. The Court Should Reverse its Order with Respect to Ms. Curnutte, Ms. Herman, and Ms. Jones

Sherry's death ***still*** did not provide enough motivation for Jacuzzi to stop manufacturing the Tub, as demonstrated by Ruth Curnutte, Patricia Herman, Nancy Jones, and users who narrowly escaped death. These subsequent incident witnesses are not being offered to show that the tub was dangerous or defective. They are being offered to show that despite having knowledge of additional incidents, Jacuzzi failed to remove the Tub from the market, conduct additional testing, or otherwise make the product safe. This evidence goes to the reprehensibility of Jacuzzi's **conduct** and its **conscious disregard** for the safety of others.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court reverse its Order Granting in Part and Denying in Part, Defendant Jacuzzi's Motions to Reconsider the Court's Order Denying Defendants' Motions in Limine Nos. 1, 4, 13, and 21 with respect to Ruth Curnutte, Patricia Herman, Jerre Chopper, and Nancy Jones, by finding: (1) that their respective incidents are substantially similar to the subject incident; and, (2) that their testimony is relevant and admissible on the issue of punitive damages. Simply put, even if the Court finds that the witness testimony does not arise out of substantially similar incidents, the testimony is still admissible because it goes directly to the culpability and reprehensibility of defendants' conduct.

DATED THIS 29th day of April, 2021.

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RICHARD HARRIS LAW FIRM

/s/ *Benjamin P. Cloward*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that on this 29th day of April, 2021, I caused to be served a true copy of the foregoing **PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT JACUZZI'S MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANT'S MOTIONS IN LIMINE NOS. 1, 4, 13, AND 21** as follows:

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

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

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

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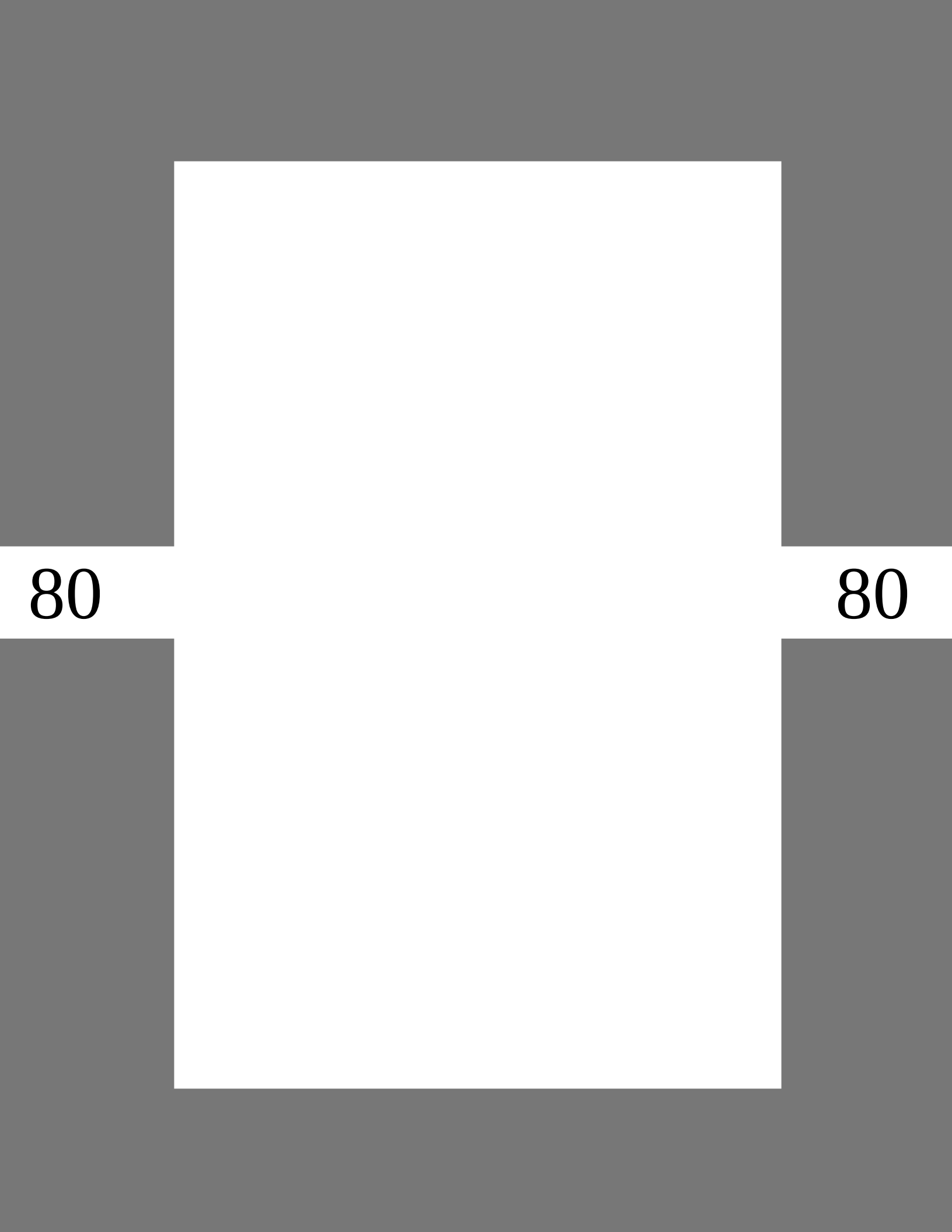
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendants.

AND ALL RELATED MATTERS

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

PLAINTIFFS' APPENDIX TO PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT JACUZZI'S MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANT'S MOTIONS IN LIMINE NOS. 1, 4, 13, AND 21

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COME NOW, the Plaintiffs, by and through their attorneys, BENJAMIN P. CLOWARD, ESQ. and IAN C. ESTRADA, ESQ., of RICHARD HARRIS LAW FIRM, pursuant to EDCR 2.27, and hereby submit **PLAINTIFFS' APPENDIX TO PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT JACUZZI'S MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANT'S MOTIONS IN LIMINE NOS. 1, 4, 13, AND 21**, filed on April 29, 2021.

Ex. No.	Brief Description of Exhibit	# of Pages	Appendix Pg. Range
1	[**PROTECTED DOCUMENT**] Jacuzzi's & *first*STREET's Manufacturing Agreement [JACUZZI001588-1606]	19	001-019
2	Dep. Tr. of Bradley S. Van Pamel, Nov. 20, 2017	8	020-027
3	Photograph of Jacuzzi Walk-In Tub [TUBPHOTO0008]	1	028
4	Pls.' Fourth Am. Compl. [FRAC0001-2, FRAC0012-16]	9	029-037
5	Jacuzzi Brochure [JAC000001-12]	12	038-049
6	Jacuzzi Sales Presentation Agenda [JACUZZI005356]	1	050
7	Dep. Tr. of Michael A. Dominguez, May 24, 2018	15	051-065
8	Dep. Tr. of Jerre Chopper, Dec. 20, 2018	151	066-216
9	Jerre Chopper E-mails & Correspondence with Kurt Bachmeyer, and Ex. 1 to Dep. Tr. of Jerre Chopper, Aug.-Nov. 2012 [JACUZZI005197-5198, JACUZZI005208]	8	217-224
10	Jerre Chopper E-mails & Correspondence with Nick Fawkes, Monique Trujillo, and Stacy L. Hackney, July-Dec. 2012	6	225-230
11	Jerre Chopper Correspondence with U.S. Consumer Product Safety Commission, Oct.-Dec. 2012	12	231-242
12	Dep. Tr. of William B. Demeritt, Vol. I, May 24, 2018	10	243-252
13	Dep. Tr. of David (Dave) Modena, Vol. I, Dec. 11, 2018	18	253-270
14	E-mail from Mark Gordon to Dave Modena, John Fleming, John Roberge, & Norm Murdock, Oct. 31, 2012 [REV JACUZZI006616-6617]	2	271-272
15	E-mails re: Customer, Manuel Arnouville, Dec. 2012 – Jan. 2013 [JACUZZI005414-5417]	4	273-276
16	E-mails re: Customer, Fred Fuchs, Mar. 2013 [JACUZZI005465-5466]	2	277-278
17	Evidentiary Hr'g Ex. 2 to Pls.' Evidentiary Hr'g Closing Brief	2	279-280
18	Evidentiary Hr'g Ex. 8 to Pls.' Evidentiary Hr'g Closing Brief	6	281-286

Ex. No.	Brief Description of Exhibit	# of Pages	Appendix Pg. Range
19	E-mails re: *first*STREET Customer Surveys from June 2013 [JACUZZI005298-5301]	5	287-291
20	E-mails re: Customer, David Greenwell, May-June 2013 [JACUZZI005372-5376]	5	292-296
21	E-mails re: Customer Satisfaction Surveys, June 2013 [JACUZZI005302-5304]	3	297-299
22	E-mails among Kurt Bachmeyer, Ray Torres, Audrey Martinez, and Regina Reyes re: Customers, Irene Stoldt, David Greenwell, and C. Lashinsky, June 2013 [JACUZZI006718]	1	300
23	Dep. Tr. of Kurt Bachmeyer, July 29, 2019	6	301-306
24	E-mails re: Non-Skid Patterns Testing for compliance [JACUZZI006404-6405]	2	307-308
25	E-mails from Regina Reyes to Deborah Nuanes, Audrey Martinez, and Kurt Bachmeyer re: slippery tubs and from Melanie Borgia at Airtite to Regina Reyes, Deborah Nuanes, and *first*STREET Support, Nov. 2013 [REV JACUZZI006489]	1	309
26	E-mails from Andrea Dorman at Home Safety Baths re: slip injuries, Dec. 2013 [JACUZZI005327-5328]	2	310-311
27	Master OSI List	18	312-329
28	Evidentiary Hr'g Ex. 37 to Pls.' Evidentiary Hr'g Closing Brief re: Airtite Customers [JACUZZI005666-5667]	2	330-331
29	Evidentiary Hr'g Ex. 36 to Pls.' Evidentiary Hr'g Closing Brief re: Atlas Home Improvement Customers [JACUZZI005638-5646]	9	332-340
30	Evidentiary Hr'g Ex. 6 to Pls.' Evidentiary Hr'g Closing Brief re: Customer Arnouville [JACUZZI005414-5416, 5958-5961	7	341-347
31	Evidentiary Hr'g Ex. 47 to Pls.' Evidentiary Hr'g Closing Brief re: Customer Harris [JACUZZI005380, 5721-5722, 5970-5971, 6859-6860]	7	348-354
32	Evidentiary Hr'g Ex. 30, to Pls.' Evidentiary Hr'g Closing Brief [JACUZZI005333-5334]	2	355-356
33	Evidentiary Hr'g Ex. 43 to Pls.' Evidentiary Hr'g Closing Brief re: firstSTREET Customers [JACUZZI005638-5646]	1	357
34	Dep. Tr. of Ruth R. Curnutte, Aug. 7, 2019	14	358-371
35	Ex. 3 to Dep. Tr. of Ruth R. Curnutte	2	372-373
36	Dep. Tr. of Patricia K. Herman, Aug. 9, 2019	7	374-380
37	Ex. 15 to Dep. Tr. of Patricia K. Herman	19	381-399

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Ex. No.	Brief Description of Exhibit	# of Pages	Appendix Pg. Range
38	Dep. Tr. of Nancy Jones, Aug. 2, 2019	8	400-407

DATED THIS 29th day of April, 2021.

RICHARD HARRIS LAW FIRM

/s/ *Benjamin P. Cloward*
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801 South Fourth Street
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Attorneys for Plaintiffs

007233

007233

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that on this 29th day of April, 2021, I served a copy of the foregoing **PLAINTIFFS' APPENDIX TO PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S ORDER GRANTING IN PART, AND DENYING IN PART, DEFENDANT JACUZZI'S MOTION TO RECONSIDER THE COURT'S ORDER DENYING DEFENDANT'S MOTIONS IN LIMINE NOS. 1, 4, 13, AND 21** as follows:

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

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

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

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

EXHIBIT 1

MANUFACTURING AGREEMENT
SUBJECT TO PROTECTIVE ORDER - WILL BE
SUBMITTED TO JUDGE'S CHAMGERS UNDER SEAL
PURSUANT TO ORDER

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EXHIBIT 1

007235

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased; et al., Plaintiffs, vs. FIRST STREET FOR BOOMERS & BEYOND, INC.; et al., Defendants. (Complete caption on page 2)	Case No. A-16-731244-C

007236

007236

DEPOSITION OF BRADLEY S. VAN PAMEL

Taken on Monday, November 20, 2017

By a Certified Court Reporter

At 2:06 p.m.

At 6980 South Cimarron Road, Suite 210

Las Vegas, Nevada

Reported by: William C. LaBorde, CCR 673, RPR, CRR

Job No. 24843

DISTRICT COURT

CLARK COUNTY, NEVADA

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

007237

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APPEARANCES:

For the Plaintiffs:

BENJAMIN P. CLOWARD, ESQ.
Richard Harris Law Firm
801 South Fourth Street
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For firstSTREET for Boomers and Beyond, Inc., and AITHR Dealer, Inc.:

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Balkenbush & Eisinger
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For HomeClick, LLC:

DANIELA LaBOUNTY, ESQ.
Olson, Cannon, Gormley, Angulo & Stoberski
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129

For Jacuzzi Brands LLC:

ALEXANDRIA LAYTON, ESQ.
Snell & Wilmer L.L.P.
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For Bestway Building & Remodeling, Inc.:

ARTHUR N. BORTZ, ESQ.
Ropers Majeski Kohn & Bentley
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007238

007238

APPEARANCES (continued):

For The Chicago Faucet Company:

JENNIFER L. MICHELI, ESQ.
Kolesar & Leatham, Chtd.
400 South Rampart Boulevard
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For Budd's Plumbing (via telephone):

ERIC N. TRAN, ESQ.
Lipson, Neilson, Cole, Seltzer & Garin, P.C.
9900 Covington Cross Drive
Suite 120
Las Vegas, Nevada 89144

* * * * * * * *

007239

I N D E X

E X H I B I T S

NUMBER	DESCRIPTION	MARKED

(No exhibits were marked.)

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P R O C E E D I N G S

(Counsel stipulated to waive the reporter requirements under Rule 30(b)(4).)

(Witness sworn.)

BRADLEY S. VAN PAMEL,

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. CLOWARD:

Q. Officer, how you doing today?

A. Good.

Q. Good. So my name is Ben Cloward. I represent the family in this matter.

You're probably wondering why you're here. My understanding is you responded to an event several years ago. We want to just discuss that with you. Is that fair?

A. Yeah.

Q. Okay. Have you ever had your deposition taken before?

A. Yes, I have.

Q. On how many occasions?

A. Two.

Q. Okay. Since it's just limited to those

007241

007241

Q. Yeah.

A. -- how long she had been there or what circumstances were.

So she -- her basic story was, "I was -- I took a bath." The tub that she was in, she was sitting in like a seat. She said that she went to go turn the water off and to drain the tub out and she slipped off the seat and wedged herself between the seat and like the side of the tub.

Q. Okay. And she was able to vocalize all of that?

A. Yes.

Q. Okay. Now, this is kind of a -- kind of a strange question to ask, but it's an important issue in the case: My understanding is from other testimony that there was some human feces in the tub?

A. The smell was like nothing that you could imagine.

Q. It was pretty bad?

A. Yes.

Q. Okay.

A. It smelled like death. If you've been around people that have passed away, it smelled like that.

007242

007242

REPORTER'S CERTIFICATE

STATE OF NEVADA)
) ss
COUNTY OF CLARK)

I, William C. LaBorde, a duly certified court reporter licensed in and for the State of Nevada, do hereby certify:

That I reported the taking of the deposition of the witness, BRADLEY S. VAN PAMEL, at the time and place aforesaid;

That prior to being examined, the witness was by me duly sworn to testify to the truth, the whole truth, and nothing but the truth;

That I thereafter transcribed my shorthand notes into typewriting and that the typewritten transcript of said deposition is a complete, true and accurate record of testimony provided by the witness at said time to the best of my ability.

I further certify (1) that I am not a relative, employee or independent contractor of counsel of any of the parties; nor a relative, employee or independent contractor of the parties involved in said action; nor a person financially interested in the action; nor do I have any other relationship with any of the parties or with counsel of any of the parties involved in the action that may reasonably cause my impartiality to be questioned; and (2) that transcript review pursuant to NRCP 30(e) was waived.

IN WITNESS WHEREOF, I have hereunto set my hand in the County of Clark, State of Nevada, this 20th day of November 2017.

William C. LaBorde

William C. LaBorde, CCR 673, RPR, CRR

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6/21/2017 7:57 AM
Steven D. Grierson
CLERK OF THE COURT

ACOMP
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

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

FOURTH AMENDED COMPLAINT

007245

007245

Case Number: A-16-731244-C

Defendants.

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

I.

PARTIES AND JURISDICTION

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

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

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

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

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

007246

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

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

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

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

FIRST CAUSE OF ACTION
Negligence as to All Defendants

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

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

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

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

007247

007247

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

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

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

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

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

007248

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

007248

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

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

FIFTH CAUSE OF ACTION

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

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

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

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

PUNITIVE DAMAGES

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

007249

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

007249

75. The Defendants JACUZZI INC., doing business as JACUZZI LUXURY BATH, FIRST STREET FOR BOOMERS & BEYOND, INC., AITHR DEALER, INC., and HOMECLICK, LLC, and/or ROE/DOE Defendants, knew or should have known of the subject product's defect which rendered it unreasonably dangerous at the time of placing the subject product into the stream of commerce and failed to undertake measures to prohibit it from entering into the stream of commerce and into the hands of users in the State of Nevada, including warnings of the risks for product failure, proper use and maintenance of the product and proper inspection of the product for potential hazards and/or defects.

76. Defendants conduct was wrongful because Defendants engaged in oppression, malice and with a conscious disregard toward individuals like SHERRY who purchased and used the walk-in bathtub and said conduct was despicable.

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

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

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

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

007250

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

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

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

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

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

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