IN THE SUPREME COURT OF THE STATE OF NEVADA

TKNR, INC., a California Corporation,

Appellant,

v.

W L A B INVESTMENT GROUP, LLC,

Respondent.

SC Case No. 85620
DC Case No.: A-18-785917-C

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Elizabeth A. Brown
Clerk of Supreme Court

From the Eighth Judicial District Court
The Honorable Linda Marie Bell, District Judge
District Court Case No. A-18-785917-C

APPELLANT'S APPENDIX

Michael B. Lee, Esq. (NSB 10122)
Michael Matthis, Esq. (NSB 14582)
MICHAEL B. LEE, P.C.

VOLUME VIII

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DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, v. TKNR, INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKDRANDT, an individual and does 1 through 15 and roe corporation I-XXX, Defendants.	Case No: A-18-785917-C Dept No: 30 **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES** Hearing Date: September 12, 2022 Hearing Time: 9:00 a.m.

COMES NOW Plaintiff WLAB INVESTMENT, LLC, by and through its attorneys, DAY & ASSOCIATES, and submits the following Opposition to Defendants' Motion for Attorneys fees.

STATEMENT OF RELEVANT FACTS

The District Court granted summary judgment in favor of Defendants and notice of entry of order was entered May 25, 2021. Defendants file their current Motion for Attorney's fees August 10, 2022, 442 days after notice of entry of order.

In Defendants' original Motion for Attorney's Fees which was actually incorporated in Defendants' December 15, 2020, Motion for Summary Judgment, Defendants petitioned the District Court for attorney's fees pursuant to Rule 11 and NRS 18.010(2)(b). The District Court, at the time, rejected the NRS 18.010(2)(b) petition choosing instead to award Rule 11 sanctions. (*See* April 7, 2021, Order, p. 41, ll. 7-9 attached hereto as Exhibit "1"). However, the Nevada Supreme Court in its May 12, 2022, order found that Defendants' motion for Rule 11 sanctions did not meet the rule's "mandatory procedural requirements" and reversed the district court's order awarding attorney fees. (*See* Supreme Court order attached hereto as Exhibit "2").

A. Facts providing underlying basis of complaint.

Defendants argue that Plaintiff's case had no "legitimate or factual basis." Plaintiff obviously disagrees. Plaintiff submits the following facts so the court is aware of the factual basis of Plaintiff's complaint.

Plaintiff purchased the subject property during approximately October of 2017. The property was inspected a number of times by Frank Miao, a member of Plaintiff WLAB Investment, LLC. WLAB Investment was an entity that owned a number of rental properties for the anticipated retirement of Frank Miao and his wife, Marie Zhu. The gist of Plaintiff's case was that the sellers and sellers' agents withheld information about the property that could not have been discovered during a routine inspection of the property. The alleged defects included the following. Defendants represented to Plaintiff's representative that the entire property had been "renovated." Plaintiff submits that the "renovation" was nothing

more than Defendants' attempt to hide defects in a property that should have been condemned.

1. The foundation of the building was patched and covered with laminate flooring installed by Sellers' handyman. The foundation was in an extremely dilapidated condition and was structurally unsound. (*See* photographs of triplex foundation attached hereto as Exhibit "3"). The condition of the flooring was discovered sometime after the sale of the property was consummated when the floor began buckling and the flooring was pulled up by Plaintiff's representative. (*See* Frank Miao affidavit attached hereto as Exhibit "4", ¶ 9). It is Plaintiff's position that Defendants attempted to hide the condition of the foundation by installing new flooring over the foundation. The condition of the foundation was not disclosed by Defendants prior to sale. In fact, Defendants reported in Sellers' disclosure, that the foundation was okay. (*See* Seller's Disclosures attached hereto as Exhibit "5"). The condition of the foundation could have only been observed with destructive testing; i.e., pulling up the floor.

2. When Defendants installed new air conditioning units in the triplex, Defendants' handyman piggybacked air conditioning wiring onto wiring for other circuits. (*See* Exhibit "4", ¶ 7). The condition was discovered when the tenant complained that the fuse kept blowing in the electrical panel. The defective wiring was identified after a licensed contractor was retained by Plaintiff and sheetrock was removed to expose the wiring. Short of destructive testing by exposing the wiring behind the wall, the defective wiring could not have been discovered with a routine inspection. (*See* Exhibit "4", ¶ 7).

3. When Defendants replaced a swamp cooler with air conditioning units, they attached the uninsulated ductwork used for the swamp cooler to the new air conditioning units which caused condensation to form in the attic and leak through the unit ceiling. (*See* Exhibit "4", ¶ 8). Plaintiff had to replace the uninsulated ductwork with insulated ductwork

to prevent the condensation issue. (*See* Exhibit "4", ¶ 8). Discovering the uninsulated duct work would have required Plaintiff to uninstall the ductwork from the air conditioning units. The condition of the ductwork was not visible during Plaintiff's inspections of the building.

4. The dryers for the units were vented into the walls. (*See* Exhibit "4", ¶ 8). Discovering the problem with dryer venting would have required Plaintiff to remove sheetrock at the time of its inspection of the property. The condition of the dryer venting could not be discovered during Plaintiff's inspections without destructive testing.

5. Because of the problem with the foundation, other problems with the property developed over time including cracking in the walls and floor. (*See* Exhibit "4", ¶ 9).

6. It was discovered after Plaintiff's possession of the property that the sewer line was broken. (*See* Exhibit "4", ¶ 10). It was further discovered that Defendants' handyman had responded to tenant complaints about the sewer and had discovered that the sewer line was broken. The condition of the sewer line was not reported by Defendants in sellers' disclosures.

This was the basis of Plaintiff's claims against Defendants; that they were aware of problems with the property that were not disclosed. Not only were the issues with the property not disclosed but they covered up the problems by "renovating" the property. How the issues were pled in Plaintiff's complaint and the various causes of action that were included were under the purview of Plaintiff's prior counsel, Benjamin Childs. Plaintiff's current counsel, Steven L. Day, substituted into the case the day before the hearing on Defendants' Motion for Summary Judgment. Mr. Day has been involved in representing Plaintiff since his initial appearance.

B. History underlying purchase of subject triplex and factual basis for complaint.

Frank Miao is a member of WLAB Investment, LLC with his wife, Marie Zhu who is also a member of WLAB Investment, LLC. (*See* Exhibit "4", ¶2). Mr. Miao, with his wife and through various business entities, owned at the time of this transaction 7 apartments in Las Vegas and more than 10 properties in California. (*See* Frank Miao deposition, p. 138, attached hereto as Exhibit "6"). Mr. Miao and his wife purchased the apartments as part of their retirement plan. (*See* Exhibit "4", ¶ 2). Mr. Miao has a PhD in chemical engineering. (*See* Exhibit "6", p. 33). His background was designing and building plants. (*See* Exhibit "6", p. 33). Over his career, he has worked for Westinghouse, Siemens, the Gas Research Institute, ASEA Brown Boveri, one of the world's largest power generation equipment companies. (*See* Exhibit "6", p. 34-37). In addition to designing and building plants, he was involved in the construction and renovation of his houses and apartments. (*See* Exhibit "6", p. 45-46).

Mr. Miao became aware of the subject property for sale via Zillow. (*See* Exhibit "4", ¶ 3). During the inspection, he inspected the property with Mr. Kenny Lin during the afternoon of August 10, 2017. (*See* Exhibit "4", ¶ 3). Mr. Miao asked Mr. Lin about a small crack in the outside sidewalk. (*See* Exhibit "4", ¶ 3). Mr. Lin said that they had purchased the property through an auction but that the property had been entirely rehabilitated. (*See* Exhibit "4", ¶ 3). Mr. Miao checked out Mr. Lin's company, InvestPro. (*See* Exhibit "4", ¶ 3). InvestPro reportedly focused on the customer and further represented that their vendors were licensed and professional who completed cleaning, painting and making repairs when necessary which Mr. Miao liked. (*See* Exhibit "4", ¶ 3). InvestPro was according to Lin one of the largest realtors in Chinatown. (*See* Exhibit "4", ¶ 3). After inspecting the property with Mr. Lin and based upon the representations of Mr. Lin, Mr. Miao told his wife to go

ahead and sign the purchase agreement after the August 10, 2017 inspection. (*See* Exhibit "4", ¶ 3). Ms. Marie Zhu e-signed the Agreement on August 11, 2017 with the help of Kenny Lin and Le Wei Chen from InvestPro who were the buyer's agents. (*See* Exhibit "4", ¶ 3) The form had been completely prepared by the InvestPro agents. (*See* Exhibit "4", ¶ 3). During the inspection, Mr. Miao informed Mr. Lin that the units needed to have proper GFCI outlets and that smoke, combustible gas and CO detectors needed to be installed since they were required by law. (*See* Exhibit "4", ¶ 3). When Ms. Marie Zhu signed the second Residential Purchase Agreement on September 5, 2017, due diligence was waived as Mr. Miao had already completed inspections of the subject property.

After the Residential Purchase Agreement was e-signed, Mr. Miao visited and inspected the triplex additional times prior to closing. (*See* Exhibit "4", ¶ 4). Ceramic tile had been laid in the kitchen, living room, hallway and bathrooms. (*See* Exhibit "4", ¶ 4). Laminate wood flooring had been placed in all the bedrooms. (*See* Exhibit "4", ¶ 4). Mr. Miao did not notice any issues with the flooring except for a few small cracks in the ceramic tile in Unit C. (*See* Exhibit "4", ¶ 4). The floor was not buckling in any of the units. (*See* Exhibit "4", ¶ 4). Mr. Miao also did not notice any cracking in the walls inside the triplex during his inspections. (*See* Exhibit "4", ¶ 4). The units did look as though they had been recently renovated. (*See* Exhibit "4", ¶ 4). At no time during Mr. Miao's initial inspection of the triplex did Mr. Lin report there were significant issues with the foundation and earth movement or that the sewer line was broken causing sewer water backup. (*See* Exhibit "4", ¶ 4).

When considering the purchase of the subject triplex, Mr. Miao asked Kenny Lin to be their buyer's agent. (*See* Exhibit "4", ¶ 5). After the Residential Purchase Agreement was e-signed, Mr. Miao found out Mr. Lin had assigned another agent in his office, Helen Chen, to represent Plaintiff WLAB Investment. (*See* Exhibit "4", ¶ 5). It was Lin's and InvestPro's

handyman who had rehabilitated the triplex by covering up the many issues with the building. (*See* Exhibit "4", ¶ 5). In hindsight, understanding that Lin knew too much about the undisclosed problems with the building, he probably wanted nothing to do with representing Mr. Miao's company. (*See* Exhibit "4", ¶ 5).

After WLAB purchased the 2132 Houston Drive property, Mr. Miao retained InvestPro as the property manager as they had been for the seller since 2015. (*See* Exhibit "4", ¶ 6). Mr. Miao went to the InvestPro Christmas party during December, 2017. (*See* Exhibit "4", ¶ 6). At the party, Lin explained to Mr. Miao that they were buying properties in auctions, then rehabilitate and "flipping" the properties and making large amounts of money. (*See* Exhibit "4", ¶ 6). A number of Lin's investors were present during the party and also confirmed that they were making a lot of money. (*See* Exhibit "4", ¶ 6). Lin explained that he puts investors together to buy properties for the purpose of flipping the properties. (*See* Exhibit "4", ¶ 6). Lin invited Mr. Miao to join his "flipping fund." (*See* Exhibit "4", ¶ 6). Lin explained that Mr. Miao needed only invest some money and that InvestPro would do everything from buying the properties to remodeling and flipping them. (*See* Exhibit "4", ¶ 6). He described it like a mutual fund where he could get a very good return. (*See* Exhibit "4", ¶ 6). Lin also mentioned that the 2132 Houston Drive property was one of the projects in the "flipping fund." (*See* Exhibit "4", ¶ 6). Investors did not need to know anything about the properties. (*See* Exhibit "4", ¶ 6). They simply invested money and Investpro handled the rest like a mutual fund. (*See* Exhibit "4", ¶ 6). The mutual fund was also referenced in InvestPro advertisements in local newspapers. (*See* Exhibit "4", ¶ 6).

During approximately June of 2018, the tenant in unit A reported that the fuse to Unit A kept burning out. (*See* Exhibit "4", ¶ 7). The tenant reported the issue to InvestPro, the property manager. (*See* Exhibit "4", ¶ 7). InvestPro sent their handyman to fix the problem. (*See* Exhibit "4", ¶ 7). The handyman's fix was apparently to disconnect some of

the other circuits to the fuse which resulted in the tenant not being able to use all outlets. (*See* Exhibit "4", ¶ 7). After complaining to Mr. Miao about the problem, Mr. Miao hired a licensed electrical contractor to look at the issue. (*See* Exhibit "4", ¶ 7). At that time, the contractor discovered that InvestPro's handyman had disconnected circuits from the fuse. (*See* Exhibit "4", ¶ 7). The contractor also learned that when the window ACs were installed, Defendants had piggybacked the AC circuit onto other circuits causing an overload on the fuse without the required permit. (*See* Exhibit "4", ¶ 7). The electrical panel further did not have sufficient electrical wattage to power the unit with the addition of the AC units. (*See* Exhibit "4", ¶ 7). InvestPro's handyman is not a licensed professional as InvestPro had represented in their website. (*See* Exhibit "4", ¶ 7). None of this was disclosed by Lin to Mr. Miao prior to the purchase of the triplex. (*See* Exhibit "4", ¶ 7). Mr. Miao approached Lin with the contractor's bid asking for $10,000.00 to fix the electrical problem. (*See* Exhibit "4", ¶ 7). Lin said that it was Mr. Miao's problem. (*See* Exhibit "1", ¶ 7). Mr. Miao ended up paying for the repair. (*See* Exhibit "4", ¶ 7).

Around October of 2018, water was dripping from unit C's ceiling during hot sunny days. (*See* Exhibit "4", ¶ 8). The ceiling was opened up which revealed that Defendants had installed a dryer duct dumping high moisture exhaust gas into the attic instead of venting to outside of the building which was required by law. (*See* Exhibit "4", ¶ 8). Mr. Miao also found that the air conditioning ductwork inside the ceiling was not insulated which is also unlawful. (*See* Exhibit "4", ¶ 8). Later, Mr. Miao discovered that when Defendants replaced the swamp cooler with AC, they left the uninsulated swamp cooler duct in the attic. (*See* Exhibit "4", ¶ 8). When the highly moist gas from the dryer exhaust cooled with cool air coming from the uninsulated AC duct, condensation occurred causing water dropping onto the unit C ceiling. (*See* Exhibit "4", ¶ 8). The wet insulation in the attic was black and no longer working. (*See* Exhibit "4", ¶ 8). Mr. Miao hired LVAC to put in new insulated

ducting and hired Home Depot to reinsulate the attic. (*See* Exhibit "4", ¶ 8). Mr. Miao found that Unit B had the same issue with the dryer vent dumping into the attic. (*See* Exhibit "4", ¶ 8). In Unit A, the dryer vent dumped into the wall between two studs and also eventually dumped into the attic. (*See* Exhibit "4", ¶ 8). None of this was reported by Lin prior to Plaintiff closing on the triplex. (*See* Exhibit "4", ¶ 8).

On February 16, 2021, the flooring in one of the bedrooms in Unit B was pulled up because for laminate was buckling. (*See* Exhibit "4", ¶ 9). The laminate wood flooring installed by Kenny Lin/InvestPro's handyman had been buckling which prompted Mr. Miao to pull up the floor. (*See* Exhibit "4", ¶ 9). Upon pulling up the floor, it was observed that the foundation had severely deteriorated and had been covered by laminate flooring so the foundation defects would be concealed. (*See* Exhibit "4", ¶ 9). The photographs attached as Exhibit "3" were taken by Mr. Miao and accurately reflect the condition of the foundation on February 16, 2021. (*See* Exhibit "4", ¶ 9). Upon seeing the condition of the foundation, it explained the severe cracks in the walls that had been appearing through Defendants' pre-sale renovations. (*See* Exhibit "4", ¶ 9). At the time of the pre-purchase inspections of the triplex, there was no serious cracking in the walls. (*See* Exhibit "4", ¶ 9). After closing, cracks started developing. (*See* Exhibit "4", ¶ 9). The photographs of the wall cracks attached as Exhibit "4 " were taken by Mr. Miao. (*See* Exhibit "4", ¶ 9).

Before the tenant in Unit C moved out August of 2020, he complained of slow drainage issues with the unit, particularly in the kitchen and bathroom. (*See* Exhibit "4", ¶ 10). The tenants in units B and C had complained about drainage issues as early as May or June of 2020. (*See* Exhibit "4", ¶ 10). When Nicholas Quioz, the tenant in Unit A, moved out, he explained to Mr. Miao that he had moved into the unit during April of 2017. (*See* Exhibit "4", ¶ 10). He reported to InvestPro that sewage water had overflowed into Unit A. (*See* Exhibit "4", ¶ 10). He reported that InvestPro had spent several weeks trying to open

the sewer line. (*See* Exhibit "4", ¶ 10). The handyman working on the sewer line explained to Mr. Quioz that the sewer line was broken. (*See* Exhibit "4", ¶ 10). Attached as Exhibit "7 " is a photograph taken by Mr. Miao of sewage backed up into Unit C's bathtub. (*See* Exhibit "4", ¶ 10). Lin said nothing about a broken sewer line prior to or after closing. (*See* Exhibit "4", ¶ 10).

As a result of having a broken sewer line and significant issues with the foundation, as stated, Mr. Miao has decided that they cannot lease triplex units to other tenants. (*See* Exhibit "4", ¶ 15). Lin sold the property to Mr. Miao's company without disclosing the condition of the foundation and sewer line. (*See* Exhibit "4", ¶ 15). Lin's knowledge of the broken sewer line explains other actions prior to Plaintiff purchasing the triplex. (*See* Exhibit "4", ¶ 15).

Procedural History

December 11, 2018	Complaint (filed by Plaintiff's counsel at the time Benjamin Childs).
November 23, 2020	2nd Amended Complaint
December 15, 2020	Defendants' Motion for Summary Judgment.
December 29, 2020	Plaintiff's Opposition to Motion for Summary Judgment (filed by attorney Benjamin Childs).
March 10, 2021	Steven L. Day, Esq., substitutes into case as counsel for Plaintiff one day prior to hearing on Defendants' Motion for Summary Judgment.
March 11, 2021	Hearing on Defendants' Motion for Summary Judgment
April 7, 2021	Order granting Defendants' Motion for Summary Judgment and awarding Defendants Rule 11 Sanctions.
May 3, 2021	Plaintiff's Notice of Appeal. Plaintiff's argued that factual issues exist precluding the District Court from granting summary judgment. Plaintiff's further argue that not only does the case not warrant Rule 11 sanctions but that defendants failed to follow

May 12, 2022	Nevada Supreme Court order affirming in part and reversing in part. The Nevada Supreme Court found that issues of fact did not exist in the record and affirmed the District Court's granting of summary judgment. With respect to the Rule 11 sanctions, the Supreme Court found that Defendants' had not complied with Rule 11 procedural rules; i.e., that Defendants had not served notice of their motion at least 21 days before they filed the motion with the district court. The Court further found that the motion was not made separately from their summary judgment as required by NRCP 11(c)(2). (*See* Supreme Court decision attached hereto as Exhibit " ").
August 10, 2022	Defendants file the instant motion for attorney fees and costs which was served on Plaintiff and Benjamin Childs with the hearing set for September 12, 2022.
August 22, 2022	Defendants file the same motion for attorney fees and costs again served on Plaintiff and Benjamin Childs with the same hearing date set for September 12, 2022.

ARGUMENT

A. **Defendants' Motion for Attorney's Fees is not timely**.

As stated, Defendants' Motion for Attorney Fees has now been filed 442 days and again 454 days after notice of entry of the District Court's order granting summary judgment. NRCP 54(d)(B)(i) states that a motion for attorney fees must be filed within 21 days of notice of entry of order of judgment.

> A. **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.
>
> . . .
>
> (d) Attorney Fees.
>
> (2) *Attorney Fees.*
>
> (A) Claim to Be by Motion. A claim for attorney fees must be made by motion. The court may decide a postjudgment motion for attorney fees

> despite the existence of a pending appeal from the underlying final judgment.
>
> (B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:
>
> (i) be filed no later than 21 days after written notice of entry of judgment is served;
>
> (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
>
> (iii) state the amount sought or provide a fair estimate of it;

Pursuant to NRCP 54(d)(B)(i), Defendants' instant motion for attorney fees based on NRS 18.010, NRS 17.117 and NRCP 68 is untimely. Defendants, in their December 15, 2020, motion for summary judgment, requested attorney fees pursuant to NRS 18.010. The District Court rejected Defendants' request for fees pursuant to NRS 18.010 choosing instead to award fees pursuant to Rule 11. Defendants did not appeal the denial of their request for fees pursuant to NRS 18.010. Defendants now again request fees pursuant to NRS 18.010, 455 days post judgment. Defendants should be precluded from again attempting to obtain fees pursuant to this same statute.

In Defendants' Motion for Summary Judgment, Defendants argued they were entitled to attorney fees based on Rule 11 and NRS 18.010(2)(b). (*See* Defendants' Motion for Summary Judgment, pp. 30-31 attached hereto as Exhibit "8"). Defendants did not request fees pursuant to NRS 17.117 or NRCP 68. *Id.* Defendants argue for the first time, 422 days after notice of entry of judgment, that Defendants are entitled to fees pursuant to NRS 17.117 and NRCP 68. Defendants' request for fees pursuant to this statute and rule is not timely and should be denied.

B. A Rule 11 sanction is not warranted in this case and further does not apply to WLAB Investment, LLC, in this case.

Plaintiff is a limited liability company which is required to be represented by counsel. *Salman v. Newell,* 110 Nev. 1333, 885 P.2d 607 (1994); *Pioneer Title v. State Bar,* 74 Nev. 186, 189-90, 326 P.2d 408, 410 (1958). Plaintiff was represented by counsel Benjamin Childs, Esq. As stated in the rule, Rule 11 applies to "attorneys and unrepresented parties."

> (a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name--or by a party personally if the party is unrepresented. The paper must state the signer's address, email address, and telephone number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
>
> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
>
> > (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> >
> > (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> >
> > (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> >
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Defendants do not point to a specific act by WLAB Investment, LLC that warrants Rule 11 sanctions other than they argue that the complaint filed by Plaintiff was brought "for an improper purpose" and that the lawsuit made "frivolous claims." (*See* Defendants'

motion, p. 6, ll. 26-28). Plaintiff obviously disagrees with Defendants' assertions submitting that there were indeed factual issues relating to what was disclosed by Defendants at the time of sale. While Plaintiff disagrees with the District Court's and Supreme Court's finding that there were no factual issues in the record, Plaintiff submits that there was a valid reason for bringing the lawsuit and that the claims were not frivolous. Awarding Defendants Rule 11 sanctions under the facts of this case would certainly have a chilling affect on counsel in the future. As stated in *Marshall v. Eighth Judicial Dist. Court in and For County of Clark*, 108 Nev. 459, 466, 836 P.2d 37, 43 (1992), Rule 11 sanctions are not intended to chill an attorney's enthusiasm or creativity in reasonably pursuing factual or legal theories, and a court should avoid employing the wisdom of hindsight in analyzing an attorney's action at the time of the pleading.

In this case, the initial pleading was signed by attorney Benjamin Childs, Esq. The pleading was not signed by WLAB's representative. As stated in the rule, Rule 11 applies to "signing, filing, submitting, or later advocating" and when doing so, the "<u>attorney or unrepresented party</u>" is certifying that to the best of that person's knowledge, the pleading or motion is being brought for a proper purpose. NRCP 11(b). The purpose of Rule 11 is to control the practice of attorneys, or those who act as their own attorneys, in the conduct of litigation. Rule 11 imposes a duty on attorneys to certify that they have conducted reasonable inquiry and have determined that any papers filed with the court are well grounded in fact, legal tenable, and not interposed for any improper purpose. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990). Purportedly, Mr. Childs, at the time the complaint and 2nd amended complaint were filed, had made reasonable inquiry that these pleadings were being brought for a proper purpose. Mr. Childs was representing a client who had allegedly been defrauded into buying a triplex that frankly should have been

condemned. To sanction Mr. Childs for doing his job advocating for his client is not warranted and without basis. It is one thing to lose a case. It is quite another to have a court decide that an attorney's advocating for a client is worthy of Rule 11 sanctions.

C. Defendants have again failed to follow the procedural mandates of Rule 11.

Plaintiff is again faced with Defendants' Motion for Attorney Fees that again fails to follow the procedural requirements of Rule 11. Rule 11 requires any motion for sanctions to be made "separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." NRCP 11(c)(1)(a). The motion must describe the specific conduct that allegedly violates section 11(b). *Id.*

The requirement of a separate Rule 11 motion is mandatory. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001). A request for Rule 11 sanctions cannot be contained within any other motion. *Id.* The court in *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 94 (2d Cir. 1999), rejected defendants' argument to treat their affidavit of service and reply affidavit as a motion for Rule 11 sanctions because a motion must "be made separately from other motions or requests." (citations omitted). In *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998), the court acknowledged that defendant gave plaintiff multiple warnings but concluded that such warnings were not motions "and the Rule requires service of a motion."

Defendants' motion for Rule 11 sanctions is combined with their motion for attorney fees. Defendants' motion further fails to describe WLAB's specific conduct that allegedly violates section 11(b). WLAB can only assume that the conduct Defendants are referencing is the filing of the complaint and amended complaint, neither of which was signed by WLAB. Defendants are asking for attorney fees for the entire litigated matter including the appeal so again, Plaintiff can only assume that Defendants are referring to the filing of the initial

action. However, Defendants motion for Rule 11 sanctions should fail in that Defendants have failed to identify the specific conduct they are alleging violates section 11(b).

The Rule 11 motion must be served on opposing counsel but not filed with the court. *Id.* This is the 21 day "safe harbor" provision which allows the targeted attorney and party the opportunity to correct or withdraw the alleged wrongful claim or assertion. If the opposing counsel or party fails or declines to make the correction within the safe harbor provision, the moving party may then file the Rule 11 motion and present it to the court. The court must make express findings of fact and law to establish why there is a violation of Rule 11. If the court determines there is a Rule 11 violation, the sanction is limited by subpart (c)(4) to that which deters the attorney and/or party from the conduct. It can include only those attorney fees and expenses directly related to the violation. The trial court has authority under subpart (c)(3) to issue a Show Cause Order why Rule sanctions should be imposed on an attorney or party for violating Rule 11. The Show Cause Order must describe the specific conduct that violates Rule 11(b). The trial court cannot impose a sanction prior to issuing the Order to Show Cause and completing the required proceeding.

Plaintiff was served on August 10, 2022, with Defendants' filed motion for attorney fees. Plaintiff had not, prior to filing the motion, been served with Defendants' motion for Rule 11 sanctions. Plaintiff was served a second time with Defendants' filed motion for attorney fees on August 22, 2022. This is again a direct violation of the procedural requirements of NRCP 11(c)(2) requiring a 21 day safe harbor before for the motion for Rule 11 sanctions. This was specifically the Nevada Supreme Court's finding with the last Rule 11 motion filed for Defendants over 400 days ago.

> In particular, respondents did not serve notice of their motion at least 21 days before they filed the motion with the district court and the motion was not made separately from their summary judgment motion as required by NRCP 11(c)(2).

See Exhibit "2", Supreme Court Order, p. 7)

The 21-day safe harbor provision is also considered a mandatory step. *Radcliffe* at 788. Other federal appellate courts concur. *Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2000); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995); *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764 (6th Cir. 2014. In *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1058 (7th Cir. 1998), the defendants conceded that rule 11 sanctions were improper where they had failed to comply with the separate motion and safe harbor provisions of Rule 11.

The overwhelming majority of federal appellate courts have held that the conditions of Rule 11 must be strictly followed and that Rule 11 should be rarely used. In *Operating Engineers Pension Trust v. AC Co.*, 859 F.2d 1336, 1343-44 (9th Cir. 1988), the court not only reversed Rule 11 sanctions but admonished lower courts to show more restraint because "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution."

Due process is heavily involved in Rule 11 proceedings. Subsection (c)(2) of the Rule requires notice of the specific claims that are alleged to be improper. The targeted attorney/party must be given an opportunity to respond. No such opportunity was provided for in this case. Finally, a rule 11 sanction should only be imposed "to deter repetition of the conduct or comparable conduct by other similarly situated." NRCP 11(c)(4).

D. **The district court lacks jurisdiction to consider Defendants' motion for attorney fees and costs incurred as a result of the appeal.**

Defendants request in their motion for attorney fees incurred as a result of the appeal. Rule 38 references the **Supreme Court's ability** to award fees and costs for an appeal "frivolously" taken or processed in a frivolous manner.

> (a) Frivolous Appeals; Costs. If the Supreme Court or Court of Appeals determines that an appeal is frivolous, it may impose monetary sanctions.

> (b) Frivolous Appeals; Attorney Fees as Costs. When an appeal has frivolously been taken or been processed in a frivolous manner; when circumstances indicate that an appeal has been taken or processed solely for purposes of delay, when an appeal has been occasioned through respondent's imposition on the court below; or whenever the appellate processes of the court have otherwise been misused, the court may, on its own motion, require the offending party to pay, as costs on appeal, such attorney fees as it deems appropriate to discourage like conduct in the future.

Attorney fees and costs on appeal are permitted only in those contexts where an appeal has frivolously been taken or been processed in a frivolous manner. N.R.S. 18.010; Rules App.Proc., Rule 38. *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 1998, 971 P.2d 383, 114 Nev. 1348, rehearing denied. Rule 38 would imply that the district court does not have standing to consider fees and costs incurred as a result of an appeal. Therefore, those fees and costs incurred as a result of the appeal should be denied.

Rule 39 states that if a judgment is affirmed, costs are taxed against the appellant. NRAP 39(2). If a judgment is reversed, costs are taxed against the respondent. NRAP 39(3). If the judgment is reversed in part and affirmed in part, costs are taxed on as the court orders. NRAP 39(4). In other words, it is up to the Supreme Court to tax costs relating to appeal. Defendants have not distinguished between costs relating to appeal or costs relating to the underlying case. Therefore, Defendants motion for costs should be denied.

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/ / /

Based on the foregoing, Plaintiff respectfully requests an order denying Defendants' request for fees, costs and sanctions.

DATED this 24th day of August, 2022.

DAY & ASSOCIATES

_____

Steven L. Day, Esq.
Nevada Bar No. 3708
1060 Wigwam Parkway
Henderson, NV 89074
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), on the 24th day of August, 2022, service of this PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES made upon each of the parties listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system:

Michael B. Lee, Esq. Michael Mathis, Esq. Michael B. Lee, P.C. 1820 E. Sahara Ave., Suite 110 Las Vegas, NV 89104 *Attorneys for Defendants*	Phone: 702-477-7030 mike@mblnv.com matthis@mblnv.com	Fax: 702-477-0096
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_____

An Employee of Day & Associates

EXHIBIT “1"

ELECTRONICALLY SERVED
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04/07/2021 4:21 PM
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MICHAEL B. LEE, ESQ. (NSB 10122)
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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, vs. TKNR INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual, and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKRANDT, an individual and Does 1 through 15 and Roe Corporation I - XXX, Defendants. AND RELATED CLAIMS.	CASE NO.: A-18-785917-C DEPT. NO.: XIV **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** Date of Hearing: March 11, 2021 Time of Hearing: 9:30 a.m.

This matter being set for hearing before the Honorable Court on March 11, 2021 at 9:30 a.m., on Defendants' TKNR INC., CHI ON WONG aka CHI KUEN WONG, KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, LIWE HELEN CHEN aka HELEN CHEN, YAN QIU ZHANG, INVESTPRO LLC dba INVESTPRO REALTY, MAN CHAU CHENG, JOYCE A. NICKRANDT, INVESTPRO INVESTMENTS LLC, and INVESTPRO MANAGER LLC,

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(collectively, the "Defendants"), Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment ("Motion"), by and through their attorney of record, MICHAEL B. LEE, P.C. Plaintiff W L A B INVESTMENT, LLC appeared on and through its counsel of record, DAY & NANCE. Defendants filed the Motion on December 15, 2020. Plaintiff filed an Opposition to the Motion ("Opposition"), Countermotion for Continuance Based on NRCP 56(f) ("56(f) Countermotion"), and Countermotion for Imposition of Monetary Sanctions (collectively, "Countermotion") on December 29, 2020. On January 20, 2021, Defendants filed a Reply brief. On January 29, 2021, Defendants filed a Supplement ("Supplement") to Defendants' Motion for Summary Judgment. The Supplement included the deposition of Frank Miao ("Miao"), the designated person most knowledgeable for Plaintiff, from January 12, 2021. Plaintiff did not file a response to the Supplement. Mr. Miao attended the hearing.

After considering the pleadings of counsel, the Court enters the following order **GRANTING** the Motion, **DENYING** the 56(f) Countermotion, and Countermotion, and **GRANTING** attorneys' fees and costs to Defendants pursuant to Nevada Rule of Civil Procedure 11:

Findings of Facts

First Residential Purchase Agreement and Waiver of Inspections, Contractual Broker Limitations

1. 2132 Houston Drive, Las Vegas, NV 89104 ("Property") was originally constructed in 1954. On or about August 11, 2017, Marie Zhu ("Zhu"), the original purchaser, executed a residential purchase agreement ("RPA") for the Property. At all times relevant, Ms. Zhu and Mr. Miao, the managing member of Plaintiff, were sophisticated buyers related to "property management, property acquisition, and property maintenance." The purchase price for the property was $200,000.

2. Through the RPA, Ms. Zhu waived her due diligence, although she had a right to conduct inspections:

> During such Period, Buyer shall have the right to conduct, non-invasive/non-destructive inspections of all structural, roofing, mechanical, electrical, plumbing, heating/air conditioning,

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> water/well/septic, pool/spa, survey, square footage, and any other property or systems, through licensed and bonded contractors or other qualified professionals.

3. Ms. Zhu did not cancel the contract related to any issues with the Property.

4. Under Paragraph 7(C) of the RPA, Ms. Zhu waived the Due Diligence condition. *Id.* Under Paragraph 7(D) of the RPA, it provided:

> *It is strongly recommended that Buyer retain licensed Nevada professionals to conduct inspections*. If any inspection is not completed and requested repairs are not delivered to Seller within the Due Diligence Period, Buyer is deemed to have waived the right to that inspection and Seller's liability for the cost of all repairs that inspection would have reasonably identified had it been conducted, except as otherwise provided by law.

5. Ms. Zhu waived any liability of Defendants for the cost of all repairs that inspection would have reasonably identified had it been conducted. Ms. Zhu also waived the energy audit, pest inspection, roof inspection, septic lid removal inspection, mechanical inspection, soil inspection, and structural inspection.

6. Under Paragraph 7(F), it was Ms. Zhu's responsibility to inspect the Property sufficiently as to satisfy her use. Additionally, Wong, Lin, Chen, Zhang, Cheng, and Nickrandt (collectively, "Brokers" or "Broker Defendants") had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party."

7. On August 2, 2017, TKNR submitted Seller's Real Property Disclosure Form ("SRPDF" or "Seller's Disclosures") timely indicating all known conditions of the Subject Property. In fact, TKNR disclosed that "3 units has (sic) brand new AC installed within 3 months," and further that the "owner never resided in the property and never visited the property." It also disclosed that the minor renovations, such as painting, were conducted by the Seller's "handyman" as disclosed in the Seller's Disclosures. Seller also disclosed that it had done construction, modification, alterations, or repairs without permits. Despite these disclosures, Plaintiff chose not to inspect the Subject Property, request additional information and/or conduct any reasonable inquires.

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Second Residential Purchase Agreement and Waiver of Inspections, Contractual Broker Limitations

8. On or before September 5, 2017, Ms. Zhu had issues related to the financing for the Property because of an appraisal, so Ms. Zhu executed a new purchase agreement, and would agree to pay the difference in an appraisal with a lower value than the purchase price, and waive inspections:

> Please note that seller agree the rest of terms and request to add the below term on the contract:
> "Buyer agree to pay the difference in cash if appraisal come in lower than purchase price, not to exceed purchase price of $200k"
> I just send you the docs, please review and sign if you are agree. Thank you!
> **(Per buyer's request will waive licensed home inspector to do the home inspection)**

9. On the same day, Ms. Zhu and TKNR agreed to Addendum No. 1 to cancel the RPA dated August 11, 2017 and entered into a new Residential Purchase Agreement dated September 5, 2017 ("2nd RPA"). As before, the overall purchase price for the Property was $200,000, but Ms. Zhu changed the contingency for the loan to $150,000 with earnest money deposit of $500 and a balance of $49,500 owed at the close of escrow ("COE" or "Closing"). The COE was set for September 22, 2017.

10. Notably, although Ms. Zhu had not initialed the "Failure to Cancel or Resolve Objections" provision in the RPA, she initialed the corresponding provision in the 2nd RPA. This was consistent with Ms. Zhu's instructions to Ms. Chen. Ex. D. This is the second time that Ms. Zhu waived inspections for the Property despite the language in the 2nd RPA that strongly advised to get an inspection done.

11. As noted, Ms. Zhu waived any inspections related to the purchase of the Property in the 2nd RPA. Although Ms. Zhu had actual knowledge of the Seller's Disclosures, and the Parties agreed to extend the COE to January 5, 2018, Ms. Zhu did not conduct professional inspections. Instead, she put down an additional $60,000 as a non-refundable deposit to the TNKR. Moreover, she also agreed to pay rent in the amount of $650 per month for one of the units, and to also pay the property manager $800 for the tenant placement fee. Through

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Addendum 2 to the 2nd RPA, Ms. Zhu later changed the purchaser to Plaintiff.

Deposition of Plaintiff's Person Most Knowledgeable – Mr. Miao

12. Since 2008, Mr. Miao, Ms. Zhu, and/or Plaintiff have been involved in the purchase of approximately twenty residential properties. In Clark County alone, Ms. Zhu and Mr. Miao were involved with the purchase of at least eight rental properties starting in 2014.

13. Plaintiff understands the importance of reading contracts.

14. Mr. Miao specified that he understands that he needs to check public records when conducting his due diligence.

15. Plaintiff was a sophisticated buyer who understood the necessity of getting properties inspected.

Requirement to Inspect was Known

16. The terms of the RPA were clear to Plaintiff.

17. As to Paragraph 7(A), Mr. Miao specified that he believed that his inspection and conversations with the tenant constituted the actions necessary to deem the Property as satisfactory for Plaintiff's purchase.

> 19· · · A.· ·Yes.· Based on -- we bought this -- we go
> 20 to the inspection, then we also talk to the tenant,
> 21 so we thinking this is investment property; right?
> 22 So financial it's looking at the rent, it's
> 23 reasonable, it's not very high compared with the
> 24 surrounding area.· Then also financially, it's good.
> 25· · · · · ·Then I take a look at the – everything
> Page 164
> ·1 outside.· Good.· So I said, Fine.· That's satisfied.
> ·2 That's the reason I command my wife to sign the
> ·3 purchase agreement.

18. At all times relevant prior to the purchase of the Property, Plaintiff had access to inspect the entire property and conduct non-invasive, non-destructive inspections:

> ·2· · · Q.· ·So at the time when you did your
> ·3 diligence, you had a right to conduct noninvasive,
> ·4 nondestructive inspection; correct?
> ·5· · · A.· ·Yes, I did.
> ·6· · · Q.· ·And you had the opportunity to inspect all
> ·7 the structures?
> ·8· · · A.· ·I check the other one -- on the walk, I
> ·9 don't see the new cracking, so the -- some older
> 10 cracking.· I check the neighbor who also have that

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11 one.· I think it's okay; right?· Then the –

Supplement at 166:2-11.

8· · · Q.· ·So you had the right to inspect the
·9 structure; correct?
10· · · A.· ·Yes, yes, I did that.
11· · · Q.· ·You had the right to inspect the roof; is
12 that correct?
13· · · A.· ·Yes.
14· · · Q.· ·Okay.· Did you do that?
15· · · A.· ·I forgot.· I maybe did that because
16 usually I go to the roof.
* * *
22· · · Q.· ·You had the right to inspect the
23 mechanical system; correct?
24· · · A.· ·Right.· Yes, yes.
25· · · Q.· ·You had the right to inspect the
Page 167
·1 electrical systems; correct?
·2· · · A.· ·I check the electrical system, yes.
·3· · · Q.· ·You had a right to inspect the plumbing
·4 systems; correct?
·5· · · A.· ·Yes.
·6· · · Q.· ·You had the right to inspect the
·7 heating/air conditioning system; correct?
·8· · · A.· ·Yes.
* * *
·3· · · Q.· ·And then you could have inspected any
·4 other property or system within the property itself;
·5 correct?
·6· · · A.· ·Yes, yes.

Id. at 167:8-16, 167:22-25-168:1-11, 168:25-169:1-6.

19. Prior to the purchase, Mr. Miao was always aware that the Seller "strongly recommended that buyer retain licensed Nevada professionals to conduct inspections":

13· · · Q.· ·"It is strongly recommended that buyer
14 retain licensed Nevada professionals to conduct
15 inspections."
16· · · A.· ·Yes.
17· · · Q.· ·Yeah.· So you were aware of this
18 recommendation at the time --
19· · · A.· ·Yeah, I know.

Id. at 176:13-19.

20. Plaintiff was also aware of the language in the RPA under Paragraph 7(D) that limited potential damages that could have been discovered by an inspection:

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18· · · Q.· ·Okay.· So going back to paragraph 7D --
19· · · A.· ·Yeah.
20· · · Q.· ·-- right, after the language that's in
21 italics, would you admit that because it's in the
22 italics, it's conspicuous, you can see this
23 language?
24· · · A.· ·Yeah.· Yeah.
25· · · Q.· ·Okay.· Then it goes on to say, "If any
Page 179
·1 inspection is not completed and requested repairs
·2 are not delivered to seller within the due diligence
·3 period, buyer is deemed to have waived the right to
·4 that inspection and seller's liability for the cost
·5 of all repairs that inspection would have reasonably
·6 identified had it been conducted."
·7· · · · · ·Did I read that correctly?
·8· · · A.· ·Yes, yes.
·9· · · Q.· ·Okay.· So we'll eventually get to the
10 issues that, you know, Ms. Chen identified that you
11 wanted corrected in the emails or text messages.
12· · · · · ·Is that fair to say that those are the
13 only issues that you deemed needed to be resolved to
14 go forward with the purchase?
15· · · A.· ·Yeah.· After that time, yes.

Id. at 179:18-25-180:1-15.

21. Finally, as to the RPA, Mr. Miao agreed that all the terms in it were conspicuous and understandable, and it was a standard agreement similar to the other agreements he had used in purchasing the other properties in Clark County, Nevada. *Id*. at 198:19-25-199:1-2, 200:3-15.

Mr. Miao Does Inspections for Plaintiff Although he is not a Licensed, Bonded Professional Inspector

22. As to all the properties purchased by Plaintiff, Mr. Miao always does the inspections and does not believe a professional inspection is necessary. *Id*. at 116:2-9, 119:3-25, 140:5-10. Based on his own belief, he does not believe that a professional inspection is necessary for multi-tenant residential properties. *Id*. at 120:6-9 (his own understanding), 120:16-25 (second-hand information he received).

23. Notably, he does not have any professional license related to being a general contractor, inspector, appraiser, or project manager. *Id*. at 123:5-16 (no professional licenses), 123:23-24 (no property management license), 169:7-14 (no licensed or bonded inspector), 171:23-25 (have not read the 1952 Uninformed Building Code), 172:17-19 (not an electrician),

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172:23-25-1-16 (no general contractor license or qualified under the intentional building code), 174:13-23 (not familiar with the international residential code).

24. Mr. Miao has never hired a professional inspector in Clark County, *Id*. at 140:19-21, so he does not actually know what a professional inspection would encompass here. *Id*. at 143:9-13, 144:8-19.

25. The main reason Plaintiff does not use a professional inspector is because of the cost. *Id*. at 147:2-7.

26. On or about August 10, 2017, Mr. Miao did an inspection of the Property. *Id*. at 158:1-25-159:1-12. During that time, he admitted that he noticed some issues with the Property that were not up to code, finishing issues, GFCI outlets, and electrical issues:

> 16· · · A.· ·I looked at a lot of things.· For example,
> 17 like, the -- I point out some drywall is not
> 18 finished; right?· And the -- some of smoke alarm is
> 19 not -- is missing and -- which is law required to
> 20 put in for smoke alarm.· Then no carbon monoxide
> 21 alarm, so I ask them to put in.
> 22· · · · · ·Then in the kitchen, lot of electrical,
> 23 the outlet is not a GFCI outlet, so I tell them, I
> 24 said, You need to change this GFCI.· Right now this
> 25 outlet is not meet code.· You probably have problem.

Id.

27. Similarly, he also specified that there was an issue with exposed electrical in Unit C. *Id*. at 175:10-24. He also noted that there could have been a potential asbestos issue as well. *Id*. at 160:7-12.

28. Additionally, Mr. Miao noted that there were cracks in the ceramic floor tiles, *Id*. at 249:22-25, and he was aware of visible cracks in the concrete foundation, *Id*. at 269:13-22 (aware of slab cracks), which were open and obvious. *Id*. at 270:14-24.

29. Mr. Miao admitted that he could also have seen the dryer vent during his inspection. *Id*. at 269:23-25.

30. As to those issues, Mr. Miao determined that the aforementioned issues were the only issues that TKNR needed to fix after his inspection. *Id*. at 171:2-9 (was only concerned about the appraisal), *Id*. at 219:13-25-221:1-2.

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31. Moreover, Mr. Miao received the SRPDF prior to the purchase of the Property. Id. at 201:22-25. As to SRPDF, Plaintiff was aware that TKNR was an investor who had not resided in the Property, and there were issues with the heating systems, cooling systems, and that there was work done without permits. *Id*. at 201:1-25-202:1-12. Similarly, it was aware that the Property was 63 years old at that time, *Id*. at 204:4-7, and all the work was done by a handyman other than the HVAC installation. *Id*. at 205:14-25, *Id*. at 134:14-25 (understands the difference between a handyman and a licensed contractor), 243:2 ("Yes. They did by the handyman, yes.").

32. Despite these disclosures, Mr. Miao never followed up:

> 23· · · Q.· ·Okay.· So when they disclosed that there
> 24 was construction and modification, alterations,
> 25 and/or repairs made without State, City, County
> Page 205
> ·1 building permits, which was also work that was done
> ·2 by owner's handyman, did you ever do any follow-up
> ·3 inquiries to the seller about this issue?
> ·4· · · A.· ·No, I didn't follow up.·

Id. at 204:23-25-205:1-4.

33. However, Mr. Miao also admitted that he could have followed up on the issues identified in the SRPDF that included the HVAC and the permits:

> 10· · · Q.· ·Under the disclosure form --
> 11· · · A.· ·Yeah.
> 12· · · Q.· ·-- like, where it specified that there
> 13 were heating system/cooling system issues that
> 14 they're aware of, that you could have elected to
> 15 have an inspection done at that time; correct?
> 16· · · A.· ·Yes.

Id. at 206:10-16.

> 15· · · Q.· ·Okay.· So as your attorney said, you could
> 16 have obtained a copy of the permits at any time?
> 17 Yes?
> 18· · · A.· ·Yes.
> 19· · · Q.· ·Okay.· And then it's fair to say that just
> 20 put you on notice of the potential permit issue;
> 21 correct?
> 22· · · A.· ·Yes.
> 23· · · Q.· ·It also put you on notice of the issues of
> 24 everything that's basically specified on page 38;
> 25 correct?
> Page 209
> 1· · · A.· ·Yes.

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Id. at 209:15-25-210:1, 245:22-25 (could have obtained permit information in 2018).

34. Similarly, Mr. Miao was aware that he should have contacted the local building department as part of his due diligence:

> 22· · · Q.· ·Okay.· So you understand that for more
> 23 information during the diligence process, you should
> 24 contact the local building department?
> 25· · · A.· ·Yes.·
> Page 260
> * * *
> ·5· · · Q.· ·-- it provides you with the address of the
> ·6 building and safety department; is that correct?
> ·7· · · A.· ·Yes.
> ·8· · · Q.· ·And the office hours; is that correct?
> ·9· · · A.· ·Yes.
> 10· · · Q.· ·And it also provides you with a phone
> 11 number; correct?
> 12· · · A.· ·Yes.
> 13· · · Q.· ·And this is information or resources that
> 14 you could have used at any time related to finding
> 15 information about the permits of the property;
> 16 correct?
> 17· · · A.· ·Yes.
> 18· · · Q.· ·And this would have been true prior to the
> 19 purchase of the building; correct?
> 20· · · A.· ·Yes.
> 21· · · Q.· ·And this would also have been true at the
> 22 time you read the disclosure that specified that
> 23 some of the improvements or some of the disclosures
> 24 had been done without a permit; right?
> 25· · · A.· ·Yes.

Id. at 260:22-25, 261:5-25.

35. Plaintiff was also on notice of the potential for mold and the requirement to get a mold inspection:

> ·5· · · Q.· ·Okay.· And it says, "It's the buyer's duty
> ·6 to inspect.· Buyer hereby assumes responsibility to
> ·7 conduct whatever inspections buyer deems necessary
> ·8 to inspect the property for mold contamination.
> ·9· · · · · ·"Companies able to perform such
> 10 inspections can be found in the yellow pages under
> 11 environmental and ecological services."
> 12· · · · · ·I read that correctly?· Yes?
> 13· · · A.· ·Yes.
> 14· · · Q.· ·Okay.· And then you elected not to get a
> 15 mold inspection; correct?
> 16· · · A.· ·Yeah.·

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Id. at 213:5-16.

> ·5· · · Q.· ·So you relied upon your own determination
> ·6 related to the potential mold exposure of the
> ·7 property; correct?
> ·8· · · A.· ·Yes.
> ·9· · · Q.· ·Okay.· And you elected to proceed with
> 10 purchasing it without a professional mold
> 11 inspection; correct?
> 12· · · A.· ·Yes.

Id. at 216:5-12.

36. Despite actual knowledge of these issues, Plaintiff did not elect to have a professional inspection done. 160:17-20.

37. Finally, Plaintiff was also acutely aware of the requirement of Nevada law to protect itself by getting an inspection:

> ·2· · · Q.· ·If we go to page 40 --
> ·3· · · A.· ·Mm-hmm.
> ·4· · · Q.· ·-- there's a bunch of Nevada statutes
> ·5 here.
> ·6· · · A.· ·Mm-hmm.
> ·7· · · Q.· ·If you look at NRS 113.140 --
> ·8· · · A.· ·Mm-hmm.
> ·9· · · Q.· ·-- do you see that at the top of the page?
> 10 "Disclosure of unknown defects not required.· Form
> 11 does not constitute warranty duty of buyer and
> 12 prospective buyer to exercise reasonable care."
> 13· · · · · ·Do you see that?
> 14· · · A.· ·Yes.
> 15· · · Q.· ·Okay.· So this disclosure form gave Marie
> 16 Zhu, your wife, a copy of the Nevada law that was
> 17 applicable to the sale of the property; correct?
> 18· · · A.· ·Yeah.
> 19· · · Q.· ·Okay.· And under NRS 113.1403, it
> 20 specifies, "Either this chapter or Chapter 645 of
> 21 the NRS relieves a buyer or prospective buyer of the
> 22 duty to exercise reasonable care to protect
> 23 himself."
> 24· · · · · ·Did I read that correctly?
> 25· · · A.· ·Yes.

Id. at 209:2-25.

38. Plaintiff assumed the risk of failing to exercise reasonable care to protect itself.

There Is No Dispute a Professional Inspection Could Have Revealed the Alleged Issues

39. The alleged defects identified by both parties' experts could have been discovered

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at the time of the original purchase. As to the ability to inspect, Mr. Miao admitted that he had access to the entire building. *Id*. at 250:22-25. He had access to the attic and looked at it. *Id*. at 251:4-14. Mr. Miao admitted that Plaintiff's expert examined the same areas that he did:

> ·6· · · Q.· ·Okay.· So you walked through the property
> ·7 with him at the time he did his inspection; correct?
> ·8· · · A.· ·Right.
> ·9· · · Q.· ·Okay.· During that time, did he inspect
> 10 any areas that -- that you did not have access to in
> 11 2017?
> 12· · · A.· ·Yes.· He didn't go to anything I didn't
> 13 inspect during 2017 too.
> 14· · · Q.· ·So he inspected the same areas you
> 15 inspected?
> 16· · · A.· ·Yes, yes.

Id. at 291:6-16.

40. Notably, Plaintiff's expert did not do any destructive testing, so the expert's access was exactly the same as Mr. Miao's original inspection. *Id*. at 291:1-5.

41. Mr. Miao admitted that Plaintiff's expert's inspection of the HVAC, *Id*. at 292:2-5, 293:18-23, and the plumbing system, *Id*. at 300:19-25-301:1-4, would have been the same as his in 2017.

42. Mr. Miao also admitted that the pictures attached to Plaintiff's expert report were areas that he could have inspected in 2017. *Id*. at 302:6-13.

43. Additionally, Mr. Miao accompanied Defendants' expert during his inspection. *Id*. at 320:31-25. As before, Mr. Miao had the same access to the Property in 2017 for the areas inspected by Defendants' expert. *Id*. at 321:1-6.

44. Mr. Miao agreed with Defendants' expert that the alleged conditions identified by Plaintiff's expert were "open and obvious":

> 22· · · Q.· ·And then the second line down, the first
> 23 sentence begins, "Items complained about in the Sani
> 24 report were open and obvious in the roof area, attic
> 25 area, and on the exterior/interior of the property."
> Page 318
> * * *
> ·3· · · Q.· ·Do you agree with this statement?
> ·4· · · A.· ·Yes.

Id. at 318:22-25-319:3-4.

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45. He also agreed with Defendants' expert's finding that there was no noticeable sagging in the roof. *Id*. at 333:20-24.

46. Incredibly, Mr. Miao also recognized the deficiency in Plaintiff's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards:

> 17· · · Q.· ·-- midway down the first complete sentence
> 18 says, "The Sani report does not recognize prior
> 19 conditions in existence before any work took place
> 20 by defendants."
> 21· · · · · ·Do you agree with this statement?
> Page 321
> * * *
> ·3· · · · · ·Yes, yes.
> ·4 BY MR. LEE:
> ·5· · · Q.· ·You agree with that?· Okay.
> ·6· · · A.· ·Agree.

Id. at 321:17-21 – 322:3-6. This would have also included any issues with the dryer vent and ducts, *Id*. at 325:3-20, as he recognized that most rentals do not include washer / dryer units. *Id*. at 326:7-25-327:1-9.

<u>*No Permits Required for Cosmetic Work by TKNR*</u>

47. No dispute exists that TKNR did not need permits for the interior work it had done to the Property. Mr. Miao admitted the following:

> ·5· · · Q.· ·Number 5 says, "Painting, papering,
> ·6 tiling, carpeting, cabinets, countertops, interior
> ·7 wall, floor or ceiling covering, and similar finish
> ·8 work."
> ·9· · · · · ·Do you see that?
> 10· · · A.· ·Yes.
> 11· · · Q.· ·So you agree that no permits are required
> 12 for any of these types of work; correct?
> 13· · · A.· ·Yes.

Id. at 262:5-13.

> ·1 Window Replacements where no structural member -- no
> ·2 structural member is altered or changed," that does
> ·3 not need a permit either; right?
> ·4· · · A.· ·Yes.

Id. at 265:1-4.

> 17· · · Q.· ·Okay.· If you turn the page to 82,
> 18 Plumbing Improvements, no permits required to repair

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19 or replace the sink; correct?
20· · · A.· ·Yes.
21· · · Q.· ·To repair or replace a toilet?
22· · · A.· ·Yes.
23· · · Q.· ·To repair or replace a faucet?
24· · · A.· ·Yes.
25· · · Q.· ·Resurfacing or replacing countertops?
Page 264
·1· · · A.· ·Yes.
·2· · · Q.· ·Resurfacing shower walls?
·3· · · A.· ·Yes.
·4· · · Q.· ·Repair or replace shower heads?
·5· · · A.· ·Yes.
·6· · · Q.· ·Repair or replace rain gutters and down
·7 spouts?
·8· · · A.· ·Yes.
·9· · · Q.· ·Regrouting tile?
10· · · A.· ·Yes.
11· · · Q.· ·And a hose bib, whatever that is.
12· · · A.· ·Water freezer.· It's, like, for the
13 filtration of the water.
14· · · Q.· ·Okay.· And then for the mechanical, no
15 permits required for portable heating appliances;
16 correct.
17· · · A.· ·Yes.
18· · · Q.· ·For portable ventilation appliances?
19· · · A.· ·Yes.
20· · · Q.· ·Or portable cooling units; correct?
21· · · A.· ·Yes.
22· · · Q.· ·And for portable evaporative coolers
23 installed in windows; correct?
24· · · A.· ·Yes.

Id. at 264:17-25-265:1-24.

Plaintiff Does not Disclose the Alleged Issues to Potential Tenants

48. Since the date it purchased the Property, Plaintiff has always been trying to lease it. *Id*. at 330:19-25-331:1-2. According to Mr. Miao, the landlord must provide safe housing for the tenant:

19· · · · · ·Then also in according to the law, and
20 they said it very clearly, because this is
21 residential income property, right, rental income
22 property, multi-family, we need -- landlord need
23 provide housing and well-being and -- for the
24 tenant.· The tenant is not going to do all this
25 inspection.· They can't.· The burden is on the
Page 120
·1 landlord to make sure all these building is safe and
·2 in good condition.

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Id. at 120:16-25-121:1-2, 140:10-14. However, they have not done any of the repairs listed by Plaintiff's expert. *Id*. at 331:3-12. This illustrates the lack of merit of Plaintiff that there are underlying conditions with the Property.

49. Moreover, Plaintiff does not provide any notice to the tenants about its expert's report or this litigation:

> ·6· · · Q.· ·All right.· In terms of tenants -- renting
> ·7 out the units to any tenants, do you ever provide
> ·8 them with a copy of the Sani report?
> ·9· · · A.· ·No.
> 10· · · Q.· ·Do you ever provide them with any of the
> 11 pleadings or the first amended complaint, second
> 12 amended complaint, the complaint itself?
> 13· · · A.· ·No.
> * * *
> 22· · · Q.· ·Okay.· So basically, you just tell them,
> 23 There's this.· You can inspect the unit if you want;
> 24 is that it?
> 25· · · A.· ·Yeah.· And also we need to tell is a lot
> Page 337
> 1 of things report that we don't need to go to the
> ·2 inside the building.· It's wall cracking.· It's
> ·3 outside.· You can see.
> ·4· · · Q.· ·Okay.· So it's open and obvious for them?
> ·5· · · A.· ·Yeah.· You can see always outside.

Id. at 337:6-13, 337:22-25-338:1-5.

50. This illustrates the lack of merit of Plaintiff's claims, proven that it has done nothing to correct the allegedly deficient conditions that are clearly not so dangerous as it does not tell prospective tenants about them.

Squatters or Tenants Could Have Damaged the Property

51. Mr. Miao admitted that multiple third parties could have potentially damaged the Property. The Property has a historic problem with squatters during the time that Plaintiff owned it:

> 12· · · Q.· ·Do you generally have a squatter problem
> 13 with the property?
> 14· · · A.· ·Yes.· As a matter of fact, today I just
> 15 saw the one text message that said one -- some
> 16 people go to my apartment.

Id. at 110:12-16. He also admitted that tenants could have damaged the Property while they

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were occupying it:

> ·4· · · Q.· ·Okay.· So the tenant in this context would
> ·5 have damaged the unit at the time that you owned it;
> ·6 is that fair?
> ·7· · · A.· ·Maybe.· Yes.
> ·8· · · Q.· ·Okay.· So some of the -- so the damage
> ·9 that was to the water heater system, could the
> 10 tenant have damaged that as well?
> 11· · · A.· ·Yes.
> 12· · · Q.· ·And then he could have damaged the cooler
> 13 pump and the valve as well; is that correct?
> 14· · · A.· ·Yes.
> 15· · · Q.· ·Okay.· Then on 122, these are all issues
> 16 that the tenant could have damaged; is that correct?
> 17· · · A.· ·Yes.
> 18· · · Q.· ·And then the same through for 145; is that
> 19 right?
> 20· · · A.· ·Yes.

Id. at 306:4-20, 330:5-7. This could also account for the cracking on the walls. *Id*. at 310:8-12. Tenants could have also damaged the Property if they hit it with their cars. *Id*. at 332:14-16.

No Evidence That Defendants Knew of Alleged Conditions

52. Plaintiff's case is based on assertions that Defendants knew about the alleged conditions in the Property; however, Mr. Miao admitted that there is no evidence that shows Defendants knew about them. *Id*. at 245:1-13 (speculating that InvestPro made changes).

53. The entire case is based on Mr. Miao's personal belief and speculation. *Id*. at 253:17-19.

54. Mr. Miao admitted that he has no evidence Defendants knew about the alleged moisture conditions. *Id*. at 293:24-25-294:1-3. Additionally, he also admitted that there is no evidence that Defendants knew about the alleged issues with the plumbing system. *Id*. at 301:21-24. He also admitted that he did not know if Defendants knew about the alleged issues with the duct work when they owned the Property. *Id*. at 314:5-19. He also recognized the deficiency in Plaintiff's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards. *Id*. at 321:17-21 – 322:3-6.

55. Mr. Miao recognized that a 63-year-old property could have issues that were not caused by Defendants. *Id*. at 324:6-15. This would have also included any issues with the dryer

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vent and ducts, *Id*. at 325:3-20, and when the duct became disconnected. *Id*. at 329:1-16.

56. Plaintiff did not identify any discovery illustrating a genuine issue of material fact that Defendants knew of the alleged issues with the Property that they had not already disclosed on Seller's Disclosures.

57. Notably, during Mr. Miao's due diligence period, he spoke with the tenants of the Property. *Id*. at 163:12-25-164:1-6. This included a conversation with the long-term tenant of Unit A, who still resides in the Property to this day. *Id*. At that time, the tenant reported being very happy with the Property and had no complaints. *Id*. In fact, the tenant reported still being very happy with the Property. *Id*. at 170:7-9. This illustrates that there is no basis that Defendants should have been aware of any of the issues when Mr. Miao, a self-professed expert, did not even know about them following his inspection.

No Basis for Claims for RICO and/or Related to Flipping Fund

58. The Flipping Fund had nothing to do with Plaintiff's decision to purchase the Property. *Id*. at 223:15-25.

> 20· · · Q.· ·Yeah.· So there's no way that you relied
> 21 upon any flipping fund since it would have been
> 22 closed at this time; right?
> 23· · · A.· ·Yeah.

Id. at 274:20-23. He also admitted that he never received any pro forma, private placement information, calculations of profit and loss, capital contribution requirements, member share or units, or any such information about the Flipping Fund. *Id*. at 277:7-16.

Cost of Repairs

59. Mr. Miao contacted contractors to bid the potential cost of repair for the Property and determined that it would have been $102,873.00. *Id*. at 307:6-22. However, Plaintiff's expert opined that the cost of repair would have been $600,000, although he did not provide an itemized cost of repair. *Id*. at 334:17-21.

Allegations in the Second Amended Complaint

60. On November 23, 2020, Plaintiff filed its Second Amended Complaint ("SAC").

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Based on the admissions of Mr. Miao and the waivers related to the RPA and the 2nd RPA, these allegations illustrate the overall frivolous nature of this action and why Rule 11 sanctions are appropriate:

> 25. TKNR failed to disclose one or more known condition(s) that materially affect(s) the value or use of the Subject Property in an adverse manner, as required by NRS Chapter 113, in a particular NRS 113.130.
>
> * * *
>
> 27. Factual statements from the August 7, 2017 Seller Real Property Disclosure Form (SRPDF) are set forth in Paragraph 31 and the subsections thereof state whe (sic) the disclosures were either inadequate or false. The SRPDF states that it was prepared, presented and initialed by Kenny Lin.
>
> * * *
>
> 29. Since the Subject Property is a residential rental apartment, to protect tenants and consumers, the applicable local building code requires all renovation, demolition, and construction work must be done by licensed contractors with permits and inspections to ensure compliance with the Uniform Building Code [UBC].
>
> * * *
>
> 31. Defendants Lin, Investpro, as TKNR's agent, TKNR, Wong and INVESTPRO MANAGER LLC, as the true owner of the Subject Property, did not disclose any and all known conditions and aspects of the property which materially affect the value or use of residential property in an adverse manner, as itemized below.
>
> > a. SRPDF stated that Electrical System had no problems or defects. The fact is that many new electric lines were added and many old electric lines were removed by Investpro Manager LLC . The swamp coolers that were removed were supplied by 110 volt power supply lines. Investpro Manager LLC first added one 220v power supply line for one new 5 ton heat pump package unit on one roof top area for the whole building for Unit A. Unit B and Unit C. Investro (sic) Manager, LLC then removed the one year old 5 ton heat pump packaged unit from the roof top with power supply lines and added two new 220v power supply lines for two new 2 ton heart pump package units, one each for Unit B and Unit C.
> > Inestpro (sic) Manager, LLC then added one new 110 volt power supply line for two window cooling units for Unit A. The electrical system load for Unit A was increased due to the installation of two new cooling units and required 100 amp service, but the electrical service was not upgraded to 100 amp service from the existing 50 amp service. Failure to upgrade the electrical service caused the fuses to be blown out multiple times during the cooling seasons of 2018. The tenants in Unit A could not use air conditioning units in cooling seasons of 2018, causing Unit A to be uninhabitable until the Unit A electrical supply panel was upgraded to 100 amp service.
> > All the electrical supply line addition and removal work

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were performed without code required electrical load calculation, permits and inspections. To save money, minimize flipping cost, minimize flipping time, maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers to do the electrical work and used low quality materials used inadequate electrical supply lines.

Further, to save money, minimize flipping cost, minimize flipping time, maximize flipping fund profits, Investpro Manager LLC used unskilled workers who did not know the UBC requirements to do the electrical work This substandard work may lead electrical lines to overheat and cause fires in the attic when tenant electrical load is high.

Further, to save money, minimize flipping cost, minimize flipping time, maximize flipping fund profits, Investpro Manager LLC used unskilled workers who did not know the UBC requirements to do the electrical work. The outlets near the water faucets in kitchens, bathrooms and laundry areas were not GFCI outlets as required by the UBC.

b. SRPDF stated that Plumbing System had no problems or defects

The fact is that that within two years prior to the sale to Plaintiff, Investpro Manager LLC removed and plugged swamp cooler water supply lines without UBC required permits and inspections. To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers who just plugged high pressure water supply lines at rooftop instead of at ground level and who did not remove the water supply lines on top of the roof, inside the attic and behind the drywall. In cold winter, the high pressure water line which was left inside the building may freeze and break the copper line and lead flooding in the whole building.

Further, to save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers to remove and plug natural gas lines for the natural gas wall furnaces without UBC required permits and inspections.

Further, to save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers with little knowledge of natural gas pipe connection requirements. The unlicensed and unskilled workers used the wrong sealing materials and these sealing materials may degrade and lead to natural gas leaks and accumulation inside the drywall and the attic which may cause an explosion or fire.

Further, to save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers to completely renovate all three bathrooms in the Subject Property without UBC required permits and inspections. Some faucets and connections behind tile walls and drywall

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leak and are causing moisture conditions behind tile walls and drywalls.

c. SRPDF stated that Sewer System and line had no problems or defects.
The subject property was built in 1954. Clay pipes were used at that time for sewer lines. Before the sale, within few days after tenants moved into apartment Unit B, they experienced clogged sewer line which caused the bathrooms to be flooded. The tenants called Investpro to ask them to fix the clogged pipes and address the flooding issues. After this report, Investpro asked tenants to pay to hire plumber to snake the sewer line. After tenants threatened to call the Las Vegas code enforcement office, to save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro used unlicensed and unskilled workers to snake the clay sewer pipes. Licensed contractors must be hired to snake sewer pipes as code required. This approach to clearing the clog may break the clay sewer pipes and cause future tree root grown into sewer lines and clogs in sewer lines.

d. SRPDF stated that Heating System had problems or defects.
No full explanation was provided, as required. Investro (sic) Manager, LLC disabled natural gas heating system without UBC required permits and inspections. To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers with little knowledge about natural gas pipe connection requirements. They used the wrong sealing materials and these sealing materials may degrade and lead to a natural gas leak inside the drywall and the attic and may cause an explosion or fire.
Further, Investpro Manager LLC installed two electrical heat pump heating systems without UBC required permits and inspections for Unit B and Unit C. The Unit A does not have an electrical heat pump heating system nor a natural gas wall furnace heating system now. Unit A has to use portable electrical heaters.

e. SRPDF stated that the Cooling System had problems or defects
No full explanation was provided, as required. Investro (sic) Manager, LLC removed old swamp cooler systems without UBC required permits and inspections. To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro used unlicensed and unskilled workers to disconnect water supply lines, cover swamp cooler ducting holes, and disconnect 110V electrical supply lines.
Further, as early as March of 2016, Investro Manager, LLC hired Air Supply Cooling to install one five ton new heat pump package unit with new rooftop ducting systems on

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one roof area to supply cooling and heating air to the whole building consisting of Unit A, Unit B and Unit C without UBC required weight load and wind load calculations, permits and inspections. The five ton heat pumps package unit was too big, too heavy and had control problems. To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC also used unlicensed and unskilled workers to remove the one year old five ton heat pump package unit with ducting system without UBC required permits and inspections. All of this work was done without UBC required structural calculation, permits and inspections.

Further, in early June, 2017, Investro Manager, LLC hired The AIRTEAM to install two new two ton heat pump package units, one each for Unit B and Unit C. Invespro (sic) Manager, LLC also used unlicensed and unskilled workers to install two window cooling units in Unit A's exterior walls. All of the above work was done without UBC required permits and inspections.

Further, to save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investro Manager, LLC did not replace the old, uninsulated swamp cooler ducts with new insulated HVAC ducts as the UBC required. This resulted in the heat pump package units being overloaded and damaged during cooling season because cool air was heated by uninsulated attic hot air before delivering the cooled air to the rooms. The old, uninsulated swamp cooler ducts were also rusted and leaked due to high moisture air from the bathroom vent fans and the clothes washer/dryer combination unit exhaust vents. The heat pumps would run all the time but still could not cool the rooms.

f. SRPDF stated that Smoker detector had no problems or defects

During Plaintiff's inspection at August 10, 2017 afternoon, some smoke detectors were missing.

g. SRPDF stated that no Previous or current moisture conditions and or water damage.

To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investro Manager, LLC used unlicensed and unskilled workers to vent high moisture bathroom fan exhaust and washer/dryer combination unit exhaust into the ceiling attic area instead of venting outside the building roof without UBC required permits and inspections. The improper ventings caused high moisture conditions in ceiling attic and water damages in ceiling and attic. The high moisture conditions in the ceiling attic destroyed ceiling attic insulations, damaged the roof decking, damaged roof trusses and damaged roof structure supports.

To saving money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers to

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complete renovation to all three bathrooms without UBC required permits and inspections. Some faucets and connections behind tile walls and drywall leaks and caused moisture conditions behind tile walls and drywalls.

h. SRPDF stated that there was no structure defect.
Investpro Manager LLC added one new five ton heat pump package unit with ducting systems on the one roof top area for the whole building in early March, 2016 without UBC required weight load and wind load calculation, permits and inspections. Due to the five ton heat pump package unit being too big, too heavy and having control problems to save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investro (sic) Manager, LLC used unlicensed and unskilled workers to remove the one year old five ton heat pump package unit with part of the ducting system again without UBC required permits and inspections. Investpro Manager LLC added two new two ton heat pump package units on the two roof top areas for Unit B and Unit C with new ducting systems without UBC required weight load and wind loan calculation, permits and inspections.
Further, to save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers to open two new window holes on
exterior walls for two window cooling units in Unit A without UBC required structure calculation, permits and inspections. This work damaged the building structure.
Further, the moisture condition behind tile walls and drywall due to faucets leaking damaged the building structure.
Further, Investpro Manager LLC's unlicensed and unskilled workers used the space between two building support columns as a duct to vent high moisture exhaust from the washer/dryer combination unit exhaust vent from Unit A without UBC required permits and inspections and this damaged the building structure.
The recent inspection of the exterior wall found multiple cracks which indicates structural problems caused by the heavy load on the roof.

i. SRPDF marked Yes and NO for construction, modification, alterations or repairs made without required state. city or county building permits.
Defendants Lin, Investpro, as TKNR's agent, TKNR, and Wong did not provide detailed explanations. All renovation, demolition, and construction work was done by Investpro Manager LLC using unlicensed, and unskilled workers without UBC required weight load and wind load calculations, permits and inspections.

j. SRPDF stated that there were not any problems with the roof.
The roof of the Subject Property was damaged by changing

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roof top HVAC units and ducting systems multiple times from October, 2015to June, 2017. Investpro Manager LLC removed the existing swamp coolers from roof top and covered the swamp coolers ducting holes. Investpro Manager LLC added a five ton heat pump package unit with a new ducting system on one roof top area in March, 2016. Investpro the removed the one year old five ton heat pump package unit with part of the ducting system from the one roof top area in June,2017. Then Investpro Manager LLC added two two ton heat pump package units on the two roof top areas in June, 2017. The work damaged the roof of the Subject Property to such an extent that when it rains the roof leaks. All of this renovation, demolition, and construction work was done without UBC required weight load and wind load calculations, permits and inspections and this damaged the building roof structure.

k. SRPDF stated that no there were not any fungus or mold problems.
To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC vented the bathroom high moisture fans and the washer/dryer combination unit exhaust vents into the ceiling and attic without venting outside of the roof. All of this renovation, demolition, and construction work was done without UBC required permits and inspections and this damaged the building structure. After the purchase of the Subject Property, Plaintiff discovered black color fungus mold was found inside ceiling and attic.
l. SRPDF stated that there were not any other conditions or aspects of the property which materially affect its value or use in an adverse manner.

i. Problems with flooring.
To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers to lay low quality cheap ceramic tiles on the loose sandy ground rather than on a strong, smooth, concrete floor base. Within few months after tenants moving into the Subject Property, mass quantities of floor ceramic tiles cracked and the floor buckled. These cracked ceramic tiles may cut tenants' toes and create a trip and fall hazard. These are code violations had to be repaired before the units could be rented to tenants. The plaintiff has to spend lot money to replace all ceramic tile floor in Unit C with vinyl tile floor.
ii. Problems with the land/foundation.
Within few months after tenants moved into the Subject Property in 2017, large quantities of floor tiles cracked and the floor buckled. This indicated that there may have foundation problems likely due to heavy loads by the new HVAC systems and the venting of moisture into the ceiling and attic. Too much weight loads on the walls caused exterior wall

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> cracking.
> iii. Problems with closet doors.
> To save money, minimize flipping cost, minimize flipping time, and maximize flipping fund profits, Investpro Manager LLC used unlicensed and unskilled workers to install closet doors with poor quality for Unit C, all closet doors fell down in three months after tenant move into Unit C.

61. As to 31(a), Mr. Miao admitted that the Seller's Disclosures disclosed issues with the heating and cooling systems, the use of a handyman, and the lack of permits. Additionally, he specified that he noted issues with the electrical system and items not up to code at the time that he did his inspection and/or that any issues with the electrical system were "open and obvious" that a reasonable, professional inspection could have discovered in 2017. Despite these issues, Plaintiff chose not to have a professional inspection. Incredibly, Mr. Miao admitted that he was the person who asked for TKNR to install the GFCI outlets, so he was clearly aware of this issue as well. Moreover, Mr. Miao specified that this was a condition that Plaintiff could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

62. As to 31(b), Mr. Miao admitted that the Seller's Disclosures disclosed issues with the heating and cooling systems, the use of a handyman, the lack of permits, and issues with the sprinklers. Additionally, he specified that he noted issues with the plumbing system were "open and obvious" that a reasonable, professional inspection could have discovered in 2017. Despite these issues, Plaintiff chose not to have a professional inspection. Moreover, Mr. Miao specified that this was a condition that Plaintiff could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

63. As to 31(c), Mr. Miao admitted that the Seller's Disclosures disclosed the use of a handyman, the lack of permits, and issues with the sprinklers. Additionally, he specified that he noted issues with the sewer system were "open and obvious" that a reasonable, professional inspection could have discovered in 2017. Despite these issues, Plaintiff chose not to have a professional inspection. Moreover, Mr. Miao specified that this was a condition that Plaintiff

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could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

64. As to 31(d), Mr. Miao admitted that the Seller's Disclosures disclosed issues with the heating and cooling systems, the use of a handyman, and the lack of permits. Additionally, he specified that he did his inspection and/or that any issues with the heating system were "open and obvious" that a reasonable, professional inspection could have discovered in 2017. Despite these issues, Plaintiff chose not to have a professional inspection. Moreover, Mr. Miao specified that this was a condition that Plaintiff could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

65. As to 31(e), Mr. Miao admitted that the Seller's Disclosures disclosed issues with the heating and cooling systems, the use of a handyman, and the lack of permits. Additionally, he specified that he noted issues with the heating and cooling system and items not up to code at the time that he did his inspection and/or that any issues with the heating and cooling system were "open and obvious" that a reasonable, professional inspection could have discovered in 2017. Despite these issues, Plaintiff chose not to have a professional inspection. Moreover, Mr. Miao specified that this was a condition that Plaintiff could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

66. As to 31(f), this allegation illustrates that Plaintiff had knowledge before purchasing the Property, and the overall emphasis on the failure to obtain a professional inspection of the Property prior to purchasing it.

67. As to 31(g), (k), Mr. Miao admitted Plaintiff executed the mold and moisture waiver, and understood its affirmative duty to have an inspection done prior to the purchase of the Property. He also admitted that that the Seller's Disclosures disclosed the use of a handyman, installation of the cabinetry, bathrooms, and the lack of permits. Additionally, he specified that he personally inspected the attic and the dryer vent before Plaintiff purchased the Property. Despite these issues, Plaintiff chose not to have a professional inspection. Moreover,

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Mr. Miao specified that this was a condition that Plaintiff could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

68. As to 31(h), Mr. Miao admitted that the Seller's Disclosures disclosed issues with the heating and cooling systems, the use of a handyman, and the lack of permits. Mr. Miao admitted that there was visible cracking on the foundation, walls, and the tiles that were open and obvious at the time that Plaintiff purchased the Property in 2017. Moreover, Mr. Miao specified that this was a condition that Plaintiff could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

69. As to 31(i), this allegation illustrates the prior knowledge that Plaintiff had before purchasing the Property, and the overall emphasis on the failure to obtain a professional inspection of the Property prior to purchasing it. Mr. Miao admitted that he should have followed up related to the permit issue prior to Plaintiff purchasing the Property.

70. As to 31(j), Mr. Miao admitted that the Seller's Disclosures disclosed issues with the heating and cooling systems, the use of a handyman, and the lack of permits. Additionally, he specified that he noted issues were "open and obvious" that a reasonable, professional inspection could have discovered in 2017. Mr. Miao agreed that there was no noticeable sagging on the roof. Despite these issues, Plaintiff chose not to have a professional inspection. Moreover, Mr. Miao specified that this was a condition that Plaintiff could have inspected at or before the time it had originally purchased the Property. Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues.

71. As to 31(l), Mr. Miao admitted that the Seller's Disclosures disclosed issues with the heating and cooling systems, the use of a handyman, and the lack of permits. Mr. Miao admitted that there was visible cracking on the foundation, walls, and the tiles that were open and obvious at the time that Plaintiff purchased the Property in 2017. Mr. Miao noted that this condition could have been inspected at or prior to the Property's purchase. Mr. Miao acknowledged there was no evidence that Defendants were aware of these issues.

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Plaintiffs Did Not Reply on Broker Agents

72. As to the Broker Defendants, Ms. Zhu agreed that she was not relying upon any representations made by Brokers or Broker's agent. Ms. Zhu agreed to purchase the Property AS-IS, WHERE-IS, without any representations or warranties. Ms. Zhu waived all claims against Brokers or their agents for (a) defects in the Property . . . (h) factors related to Ms. Zhu's failure to conduct walk-throughs or inspections. Ms. Zhu assumed full responsibility and agreed to conduct such tests, walk-throughs, inspections and research, as she deemed necessary. In any event, Broker's liability was limited, under any and all circumstances, to the amount of that Broker's commission/fee received in the transaction.

Mr. Miao Agreed with Defendants' Expert

73. On November 17, 2020, Defendants' expert, Neil D. Opfer, an Associate Professor of Construction Management at UNLV and overqualified expert, conducted an inspection of the Property. At that time, as noted earlier, Mr. Miao walked the Property with Professor Opfer. Supplement at 320:31-25.

74. Mr. Miao agreed with Professor Opfer that the alleged conditions identified by Plaintiff's alleged expert were open and obvious:

> [n]ote that the Plaintiff could have hired an inspector or contractor to evaluate this real-estate purchase beforehand but did not. Items complained about in the Sani Report were open and obvious at the roof area, attic area, and on the exterior and interior areas of the Property.

Id. at 318:22-25-319:3-4.

75. Mr. Miao agreed with Professor Opfer that Plaintiff's expert did not conduct destructive testing, so the same alleged conditions that the expert noted would have been made by an inspector at the time of the purchase. *Id*. at 291:1-5.

76. Mr. Miao agreed with Professor Opfer that Plaintiff's expert did "not recognize prior conditions in existence before any work took place by the Defendants." *Id*. at 321:17-21 – 322:3-6.

Conclusions of Law

1. Summary judgment is appropriate when the pleadings, depositions, answers to

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interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate that no genuine issue of material fact exist, and the moving party is entitled to judgment as a matter of law. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). Substantive law controls whether factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989).

2. The Nevada Supreme Court has held that the non-moving party may not defeat a motion for summary judgment by relying "on gossamer threads of whimsy, speculation and conjecture." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). The Nevada Supreme Court has also made it abundantly clear when a motion for summary judgment is made and supported as required by Nevada Rule of Civil Procedure 56, the non-moving party must not rest upon general allegations and conclusions, but must by affidavit or otherwise set forth specific facts demonstrating the existence of a genuine factual issue. *Id.*

3. Under Nevada Rule of Civil Procedure 56(a), a party may move for summary judgment, or partial summary judgment. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The court may rely upon the admissible evidence cited in the moving papers and may also consider other materials in the record as well. *Id*. at 56(c). "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case." *Id*. at 56(g).

4. The pleadings and proof offered in a Motion for Summary Judgment are construed in the light most favorable to the non-moving party. *Hoopes v. Hammargren*, 102 Nev. 425, 429, 725 P.2d 238, 241 (1986). However, the non-moving party still "bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered." *Wood*, 121 Nev. at 732, 121 P.3d at

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1031. "To successfully defend against a summary judgment motion, 'the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.'" *Torrealba v. Kesmetis*, 178 P.3d 716, 720 (Nev. 2008) (quoting *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 172 P.3d 131, 134 (Nev. 2007).

5. The non-moving party bears the burden to set forth specific facts demonstrating the existence of a "genuine" issue for trial or have summary judgment entered against him. *Collins v. Union Federal Savings & Loan,* 99 Nev. 284, 294, 662 P.2d 610, 618-619 (1983). When there is no genuine issue of material fact and the non-moving party provides no admissible evidence to the contrary, summary judgment is "mandated." *Celotex Corp. v. Catrett*, 477 US 317, 322 (1986). When a motion for summary judgment is made and supported, an adversary party who does not set forth specific facts showing a genuine issue to be resolved at trial may have a summary judgment entered against him. *Collins v. Union Federal Sav. & Loan Ass'n*, 99 Nev. 284, 294, 662 P.2d 610, 616 (1983) (citing *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1981); *Bird v. Casa Royale West*, 97 Nev. 67, 624 P.2d 17 (1981)).

6. "Under NRS Chapter 113, residential property sellers are required to disclose any defects to buyers within a specified time before the property is conveyed." *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007) (citing NRS 113.140(1)). "NRS 113.140(1), however, provides that a seller is not required to 'disclose a defect in residential property of which [she] is not aware.' A 'defect' is defined as "a condition that materially affects the value or use of residential property in an adverse manner." *Id*. (citing NRS 113.100(1)). The Nevada Supreme Court clarified that:

> [a]scribing to the term "aware" its plain meaning, we determine that the seller of residential real property does not have a duty to disclose a defect or condition that "materially affects the value or use of residential property in an adverse manner," if the seller does not realize, perceive, or have knowledge of that defect or condition. Any other interpretation of the statute would be unworkable, as it is impossible for a seller to disclose conditions in the property of which he or she has no realization, perception, or knowledge. The determination of whether a seller is aware of a defect, however, is a question of fact to be decided by the trier of fact.

Id. at 425 (citations omitted). Thus, in the context where the plaintiff cannot demonstrate an omitted disclosure that caused damage, the seller is entitled to summary judgment as a matter of

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law. *Id*. at 426.

7. Generally, "[n]ondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.' " *Mackintosh v. Jack Matthews & Co*., 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). Moreover, "[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). The general rule foreclosing liability for nondisclosure when property is purchased as-is does not apply when the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to [the seller] and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer. *Mackintosh*, 109 Nev. at 633, 855 P.2d at 552 (alteration in original) (internal quotation marks omitted).

8. A buyer waives its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and/or unjust enrichment when it expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information was reasonably accessible to the buyer. *Frederic and Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 111 (Nev. 2018). Accordingly, the Nevada Supreme Court concluded that an agreement to purchase property as-is foreclosed the buyer's common law claims, justifying the granting of summary judgment on common law claims. *Id*. (citation omitted).

> The terms and conditions of the purchase agreement do not create a duty to disclose. Rather, these disclosures are required by NRS Chapter 113, which sets forth specific statutory duties imposed by law independent of the purchase agreement's terms and conditions. Additionally, the terms of the purchase agreement do not require [the seller] to do anything other than provide the listed disclosures.

Anderson v. Ford Ranch, LLC, 78684-COA, 2020 WL 6955438, at *5 (Nev. App. Nov. 25, 2020).

9. Nevada Revised Statute § 113.140 clearly provides that the Seller Disclosures does not constitute a warranty of the Subject Property and that the Buyer still has a duty to

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exercise reasonable care to protect himself. Nevada Revised Statute § 113.140 also provides that the Seller does not have to disclose any defect that he is unaware of. Similarly, Nevada Revised Statute § 113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property. Nevada Revised Statute § 113.140(2). Chapters 113 and "645 of Nevada Revised Statutes do not relieve a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself." *Id*. at § 113.140(2).

10. Summary Judgment is appropriate as a matter of law on all of Plaintiff's claims. It is undisputed that the alleged deficiencies were either disclosed by Defendants, could have been discovered by an inspection, were open and obvious whereby Plaintiff / Ms. Zhu / Mr. Miao had notice of them at the time Plaintiff purchased the Property, or were unknown to Defendants at the time of the sale.

11. On August 2, 2017, TKNR submitted its Seller Disclosures timely indicating all known conditions of the Subject Property. TKNR disclosed that "3 units has (sic) brand new AC installed within 3 months," and further that the "owner never resided in the property and never visited the property." Plaintiff was also aware that the minor renovations, such as painting, was conducted by the Seller's "handyman" as disclosed in the Seller's Disclosures. TNKR also disclosed that it was aware of issues with the heating and cooling systems, there was construction, modification, alterations, or repairs done without permits, and lead-based paints.

12. On August 11, 2020, through the original RPA, Ms. Zhu waived her due diligence, although she had a right to conduct inspections:

> During such Period, Buyer shall have the right to conduct, non-invasive/non-destructive inspections of all structural, roofing, mechanical, electrical, plumbing, heating/air conditioning, water/well/septic, pool/spa, survey, square footage, and any other property or systems, through licensed and bonded contractors or other qualified professionals.

13. Section II(B)(1) lists the disclosures by TKNR. Despite these disclosures, Plaintiff did not inspect the Subject Property, request additional information and/or conduct any reasonable inquires. Ms. Zhu cancelled the original RPA, Ex. E, because of an issue related to

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her financing, unrelated to the Seller's Disclosures. Notably, she included the explicit waiver of the inspections, which included her initialing the provision that she had not done in the original RPA. Ms. Zhu informed her agent to waive all inspections. Although Ms. Zhu had actual knowledge of the Seller's Disclosures from August 11, 2017, and the Parties agreed to extend the COE to January 5, 2018, Ms. Zhu still never did any professional inspections. Instead, she put down an additional $60,000 as a non-refundable deposit to the TNKR. Moreover, she also agreed to pay rent in the amount of $650 per month for one of the units, and to also pay the property manager $800 for the tenant placement fee. Through Addendum 2 to the 2nd RPA, Ms. Zhu later changed the purchaser to Plaintiff.

14. Ms. Zhu agreed that she was not relying upon any representations made by Brokers or Broker's agent. Ms. Zhu agreed to purchase the Property AS-IS, WHERE-IS, without any representations or warranties. Thus, Ms. Zhu waived all claims against Brokers or their agents for (a) defects in the Property . . . (h) factors related to Ms. Zhu's failure to conduct walk-throughs or inspections. Ms. Zhu assumed full responsibility and agreed to conduct such tests, walk-throughs, inspections and research, as she deemed necessary. In any event, Broker's liability was limited, under any and all circumstances, to the amount of that Broker's commission/fee received in the transaction.

15. As to the waivers, Paragraph 7(D) of the both the RPA and 2nd RPA expressly provided:

> *It is strongly recommended that Buyer retain licensed Nevada professionals to conduct inspections*. If any inspection is not completed and requested repairs are not delivered to Seller within the Due Diligence Period, Buyer is deemed to have waived the right to that inspection and Seller's liability for the cost of all repairs that inspection would have reasonably identified had it been conducted, except as otherwise provided by law.

Nevertheless, Ms. Zhu waived her inspection related to the original RPA and the 2nd RPA, reinforced further by actually initialing next to the waiver in the 2nd RPA. Ms. Zhu also waived the energy audit, pest inspection, roof inspection, septic lid removal inspection, mechanical inspection, soil inspection, and structural inspection. Thereby, Ms. Zhu waived any liability of

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Defendants for the cost of all repairs that inspection would have reasonably identified had it been conducted. The RPA and the 2nd RPA clearly indicated that Ms. Zhu was purchasing the Property "AS-IS, WHERE-IS without any representations or warranties."

16. Additionally, Ms. Zhu also agreed that the Brokers Defendants had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party." Paragraph 7(D) of the RPA.

17. Since 2008, Mr. Miao, Ms. Zhu, and/or Plaintiff have been involved in the purchase of approximately twenty residential properties. In Clark County alone, Ms. Zhu and Mr. Miao were involved with the purchase of at least eight rental properties starting in 2014.

18. Mr. Miao understood the importance to check public records when conducting due diligence.

19. Plaintiff was a sophisticated buyer aware of the necessity of property inspection.

20. At all times relevant prior to the purchase of the Property, Plaintiff had access to inspect the entire property and conduct non-invasive, non-destructive inspections.

21. Prior to the purchase, Mr. Miao was aware that the Seller "strongly recommended that buyer retain licensed Nevada professionals to conduct inspections".

22. Plaintiff was also aware of the language in the RPA under Paragraph 7(D) that limited potential damages that could have been discovered by an inspection.

23. As to the RPA, Mr. Miao agreed that all the terms in it were conspicuous and understandable, and it was a standard agreement similar to the other agreements he had used in purchasing the other properties in Clark County, Nevada.

24. On or about August 10, 2017, Mr. Miao inspected Property. During that time, Mr. Miao noted issues with the Property that were not up to code, finishing issues, GFCI outlets[1], and electrical issues.

25. Mr. Miao acknowledged there was an issue with exposed electrical in Unit C as

[1] The Second Amended Complaint references GFCI at Paragraph 31(a). This illustrates the frivolous nature of the pleading since Mr. Miao requested TKNR to install these for Plaintiff.

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well as possible asbestos.

26. Mr. Miao noted that there were cracks in the ceramic floor tiles and visible cracks in the concrete foundation, which were open and obvious.

27. Mr. Miao admitted that he could also have seen the dryer vent during his inspection.

28. Mr. Miao admitted that he could have followed up on the issues identified in the SRPDF that included the HVAC and the permits.

29. Similarly, Mr. Miao should have contacted the local building department as part of his due diligence.

30. Plaintiff was also on notice of the potential for mold and the requirement to get a mold inspection.

31. Despite actual knowledge of these issues, Plaintiff did not elect to have a professional inspection done.

32. Finally, Plaintiff was also acutely aware of the requirement of Nevada law to protect itself by getting an inspection.

33. Plaintiff assumed the risk of failing to exercise reasonable care to protect itself.

34. The alleged defects identified by both parties' experts could have been discovered at the time of the original purchase as they were "open and obvious".

35. Plaintiff failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards.

36. No dispute exists that TKNR did not need permits for the interior work it had done to the Property.

37. Plaintiff has always been trying to lease the Property despite not doing any of the repairs listed by Plaintiff's expert. This illustrates the lack of merit of Plaintiff that there are underlying conditions with the Property.

38. Moreover, Plaintiff does not provide any notice to the tenants about its expert's report or this litigation. This illustrates the lack of merit of Plaintiff's claims and proves that it has done nothing to correct the allegedly deficient conditions that are clearly not so dangerous as

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it does not tell prospective tenants about them.

39. Mr. Miao admitted that multiple third parties could have potentially damaged the Property.

40. Plaintiff did not present any evidence related to Defendants' alleged knowledge other than his personal belief and speculation.

41. Mr. Miao admitted that he has no evidence Defendants knew about the alleged moisture conditions. Additionally, he also admitted that there is no evidence that Defendants knew about the alleged issues with the plumbing system. He also admitted that he did not know if Defendants knew about the alleged issues with the duct work when they owned the Property. He also recognized the deficiency in Plaintiff's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards.

42. Mr. Miao also recognized that a 63-year-old property could have issues that were not caused by Defendants.

43. The Flipping Fund had nothing to do with Plaintiff's decision to purchase the Property.

44. Plaintiff admittedly amplified its alleged damages by more than 6x, and then trebled the damages, and have run up egregious attorneys' fees for this frivolous action. These are undisputed facts that prove abuse of process as a matter of law given the known issues with the Property and Plaintiff's waivers related to the inspections. Plaintiff waived the inspections and purchased the property "as is". This shows that Plaintiff had no interest in having a professional inspection done. It shows the behavior of the Plaintiff related to the entire case.

45. Plaintiff was encouraged to inspect the property, and they did not do it. It was a 63-year-old property. There were specific disclosures that were made by the Seller, and Plaintiff was strongly encouraged to conduct the inspection, and they did not want to.

46. This is a 2018 case. Plaintiff has not been diligent in conducting discovery.

> Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as

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> otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified.

See *Bakerink v. Orthopaedic Associates*, Ltd., 581 P.2d 9, 11 (Nev. 1978) (quoting *Willmar Poultry Co. v. Morton-Norwich Products*, 520 F.2d 289, 297 (8th Cir. 1975), Cert. denied, 424 U.S. 915, 96 S.Ct. 1116, 47 L.Ed.2d 320 (1975).

47. Plaintiff failed to articulate the alleged discovery that it would likely have. Additionally, Plaintiff already opposed enlarging discovery by specifying that any extension of discovery would prejudice it, indicating that it had no need for additional discovery and that Plaintiff would largely rest upon the findings of its expert. See Plaintiff's Opposition to Motion to Enlarge Discovery. Also, Plaintiff's counsel's declaration in the Opposition illustrated that he had additional discussions with Plaintiff's expert related to the MSJ, but Plaintiff's expert did not proffer any additional opinions to counter the Motion. See *Opp.* at p. 18:7-9.

48. As a matter of law, Plaintiff is precluded from seeking damages from Defendants because of her failure to inspect. "Nondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.' " *Mackintosh v. Jack Matthews & Co*., 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). Moreover, "[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015).

49. Defendants also do not have liability as Ms. Zhu / Plaintiff purchased the Property "as-is" within the reach of the diligent attention and observation of the buyer. *Mackintosh*, 109 Nev. at 633, 855 P.2d at 552. NRS § 113.140 clearly provides that the disclosures do not constitute a warranty of the Property and that the purchaser still has a duty to exercise reasonable care to protect himself. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property. NRS § 113.140(2). Chapters 113 and "645 of Nevada Revised Statutes do not relieve a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself." *Id*. at § 113.140(2).

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50. Plaintiff waived its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and/or unjust enrichment when it expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information regarding Property was reasonably accessible to the buyer. *Frederic and Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 111 (Nev. 2018).

51. Summary judgment is appropriate under NRS § 113.140(1) (seller is not required to disclose a defect in residential property of which she is not aware). Under this statute, "[a]scribing to the term 'aware' its plain meaning, . . . the seller of residential real property does not have a duty to disclose a defect or condition that 'materially affects the value or use of residential property in an adverse manner,' if the seller does not realize, perceive, or have knowledge of that defect or condition." *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007). Thus, as Plaintiff cannot demonstrate an omitted disclosure that caused damage, Defendants are entitled to summary judgment as a matter of law. *Id*. at 426.

52. Under NRS § 113.140(1) (seller is not required to disclose a defect in residential property of which she is not aware), *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007), and NRS § 645.259(2), Defendants are entitled to Summary Judgment on Plaintiff's claims for (1) Recovery Under NRS Chapter 113, (2) Constructive Fraud, (3) Common Law Fraud, (4) Fraudulent Inducement, (5) Fraudulent Concealment, (6) Breach Of Fiduciary Duty, (8) Damages Under NRS 645.257(1), (9) Failure To Supervise, Inadequate training and Education, (12) Civil Conspiracy, (13) Breach Of Contract, and (14) Breach Of Implied Covenant of Good Faith and Fair Dealing]. It also eliminates the causes of action for (7) RICO, (10) Fraudulent Conveyance, (11) Fraudulent Conveyance, and (15) Abuse of Process since they have no basis in fact or law.

53. Eighth Judicial District Court Rule 2.20(e) provides that, "[f]ailure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same." Simply filing an opposition does not relieve a party of its duty to actually oppose the issues raised in the motion. See *Benjamin v. Frias Transportation Mgt. Sys., Inc*., 433 P.3d 1257 (Nev. 2019) (unpublished

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disposition).

54. The Opposition failed to address the Motion's arguments related to summary judgment in favor of Defendants on Plaintiff's claims for: (7) RICO; (10) Fraudulent Conveyance; (11) Fraudulent Conveyance; (12) Civil Conspiracy; and (15) Abuse of Process. Additionally, Plaintiff fails to provide any meaningful or competent opposition to the Motion's argument for summary judgment as to Plaintiff's claims against the Broker Defendants. As there is no Opposition provided to those arguments made in the Motion, this court should find that those arguments are meritorious and grant the request as to those unopposed issues.

55. Pursuant to Nevada Rule of Civil Procedure 11(b), by presenting to the court a pleading or other paper, an attorney or unrepresented party certifies: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation, (2) the claims and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, (3) the factual contentions have evidentiary support, and (4) the denials of factual contentions are warranted on the evidence or.

56. "If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." NEV. R. CIV. PRO. 11(c).

57. "On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)." *Id*. at 11(c)(3). "A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney fees and other expenses directly resulting from the violation." *Id*. at 11(c)(4).

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58. Rule 11 prevents a party from bringing a lawsuit for an improper purpose, which includes: (1) harassment, causing unnecessary delay, or needless increasing the cost of litigation; or (2) making frivolous claims. NEV. R. CIV. PRO. 11(b)(1)-(2). Rule 11 sanctions should be imposed for frivolous actions. *Marshall v. District Court*, 108 Nev. 459, 465, 836 P.2d 47, 52.

59. A frivolous claim is one that is "both baseless and made without a reasonable and competent inquiry." *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993) (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir.1990); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir.1986)). A determination of whether a claim is frivolous involves a two-pronged analysis: (1) the court must determine whether the pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law"; and (2) whether the attorney made a reasonable and competent inquiry. *Bergmann*, 109 Nev. at 676, 856 P.2d at 564. A sanction imposed for violation of Rule 11 shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. *Id.* at 11(c)(2).

60. Furthermore, a court may award attorneys' fees to a prevailing party when it finds that the claim was brought or maintained without reasonable ground or to harass the prevailing party. NEV. REV. STAT. § 18.010(2)(b). In other cases, a court may award attorneys' fees "when it finds that the opposing party brought or maintained a claim without reasonable grounds." *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 800 (Nev. 2009). "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." *Id.* The Nevada Legislature explained that:

> [i]t is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

Id. "A claim is groundless if 'the allegations in the complaint . . . are not supported by any credible evidence at trial.'" *Barozzi v. Benna*, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996)

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(quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo.1984)).

77. The overwhelming facts and law illustrate that Plaintiff's claim is frivolous. The findings of fact are incorporated by reference.

78. Plaintiff's claim is clearly frivolous: (1) where the pleading was not "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law", and (2) Plaintiff's attorney continued to make frivolous claims. *Bergmann*, 109 Nev. at 676, 856 P.2d at 564. Sanctions are warranted against Plaintiff and its counsel, which includes an award attorneys' fees to Defendants.

79. Alternatively, the elements of an abuse of process claim are: "(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). Abuse of process can arise from both civil and criminal proceedings. *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002). Malice, want of probable cause, and termination in favor of the person initiating or instituting proceedings are not necessary elements for a prima facie abuse of process claim. *Nevada Credit Rating Bur. v. Williams*, 88 Nev. 601, 606, 503 P.2d 9, 12 (1972); Restatement (Second) of Torts § 682 cmt. a (1977). The mere filing of a complaint is insufficient to establish the tort of abuse of process. *Laxalt v. McClatchy*, 622 F. Supp. 737, 751 (1985).

80. Under either Rule 11, Plaintiff brought and maintained this action without reasonable ground. NEV. REV. STAT. § 18.010(2)(b). The overwhelming facts and law illustrate that Plaintiff brought or maintained this claim without reasonable grounds, which justifies an award of attorneys' fees. *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 800 (Nev. 2009).

81. The court intends to award to the Defendants the reasonable expenses, including attorneys' fees and costs, incurred for defending this lawsuit under Rule 11. This sanction is limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated.

Based on the foregoing, the Court GRANTS Defendants Motion, DENIES the Counterclaim, and GRANTS attorneys' fees and costs to Defendants pursuant to Nevada Rule of

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Civil Procedure 11.

IT IS HEREBY ORDERED, ADJUDICATED, AND DECREED that the Motion is **GRANTED**.

IT IS FURTHER ORDERED, ADJUDICATED, AND DECREED that the Countermotion, including the 56(f) Countermotion, is **DENIED**. This is a 2018 case. Discovery ended October 30, 2020. This Court will not agree to enlarge discovery.

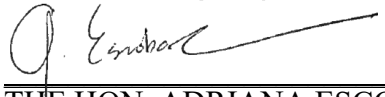
IT IS FURTHER ORDERED, ADJUDICATED, AND DECREED that Defendants are awarded attorneys' fees and costs pursuant to Rule 11. Defendants may file an affidavit in support of requested attorney's fees and costs within 10 days of the entry of Order.

IT IS FURTHER ORDERED, ADJUDICATED, AND DECREED that this is a final order related to the claims and counterclaim. This Court directs entry of a final judgment of all claims.

IT IS FURTHER ORDERED, ADJUDICATED, AND DECREED that any outstanding or pending discovery is quashed as moot.

IT IS FURTHER ORDERED, ADJUDICATED, AND DECREED that any trial dates and/or calendar calls are vacated as moot.

Dated this 7th day of April, 2021



THE HON. ADRIANA ESCOBAR
DISTRICT COURT JUDGE

158 436 3E2D 40F2
Adriana Escobar
District Court Judge

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DISTRICT COURT
CLARK COUNTY, NEVADA

W L A B Investment LLC, Plaintiff(s) vs. TKNR Inc, Defendant(s)	CASE NO: A-18-785917-C DEPT. NO. Department 14

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Amended 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: 4/7/2021

Brinley Richeson	bricheson@daynance.com
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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 4/8/2021

John Savage	Holley Driggs Attn: John Savage, Esq 400 South Fourth Street, Third Floor Las Vegas, NV, 89101
Nikita Pierce	6625 South Valley View Blvd. Suite 232 Las Vegas, NV, 89118

EXHIBIT “2"

IN THE SUPREME COURT OF THE STATE OF NEVADA

WLAB INVESTMENT, LLC,
Appellant,
vs.
TKNR, INC., A CALIFORNIA CORPORATION; CHI ON WONG, A/K/A CHI KUEN WONG, AN INDIVIDUAL; KENNY ZHONG LIN, A/K/A KEN ZHONG LIN, A/K/A KENNETH ZHONG LIN, A/K/A WHONG K. LIN, A/K/A CHONG KENNY LIN, A/K/A ZHONG LIN, AN INDIVIDUAL; LIWE HELEN CHEN, A/K/A HELEN CHEN, AN INDIVIDUAL; YAN QUI ZHANG, AN INDIVIDUAL; INVESTPRO LLC, D/B/A INVESTPRO REALTY, A NEVADA LIMITED LIABILITY COMPANY; MAN CHAU CHENG, AN INDIVIDUAL; JOYCE A. NICKRANDT, AN INDIVIDUAL; INVESTPRO INVESTMENTS LLC, A NEVADA LIMITED LIABILITY COMPANY; AND INVESTPRO MANAGER LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

No. 82835

FILED

MAY 12 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

WLAB INVESTMENT, LLC,
Appellant,
vs.
TKNR, INC., A CALIFORNIA CORPORATION; CHI ON WONG, A/K/A CHI KUEN WONG, AN INDIVIDUAL; KENNY ZHONG LIN, A/K/A KEN ZHONG LIN, A/K/A KENNETH ZHONG LIN, A/K/A WHONG K. LIN, A/K/A CHONG KENNY LIN, A/K/A ZHONG LIN, AN INDIVIDUAL; LIWE HELEN CHEN, A/K/A HELEN CHEN, AN INDIVIDUAL; YAN QUI ZHANG, AN

No. 83051

INDIVIDUAL; INVESTPRO LLC, D/B/A INVESTPRO REALTY, A NEVADA LIMITED LIABILITY COMPANY; MAN CHAU CHENG, AN INDIVIDUAL; JOYCE A. NICKRANDT, AN INDIVIDUAL; INVESTPRO INVESTMENTS LLC, A NEVADA LIMITED LIABILITY COMPANY; AND INVESTPRO MANAGER LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

ORDER AFFIRMING (DOCKET NO. 82835)
AND REVERSING (DOCKET NO. 83051)

These are consolidated appeals from a district court order granting summary judgment in a real property matter (Docket No. 82835) and from an order awarding attorney fees (Docket No. 83051). Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.[1]

Appellant filed the underlying action, alleging generally that respondents had fraudulently induced appellant into purchasing an apartment building that contained numerous defects. Generally speaking, appellant's complaint alleged that respondents concealed the defects and that appellant could not have discovered those defects with due diligence before the purchase was completed. The district court granted summary judgment for respondents, reasoning, among other things, that (1) appellant failed to introduce evidence that respondents were aware of any particular defect that they failed to disclose; and (2) appellant failed to introduce evidence showing that a professionally conducted inspection would not have

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

discovered the complained-of defects. Consequently, the district court granted summary judgment on all 15 of appellant's claims, including its claim for violation of NRS Chapter 113 (Sales of Real Property—Required Disclosures). Appellant then appealed that order (Docket No. 82835). Thereafter, the district court awarded respondents roughly $128,000 in attorney fees under NRCP 11 based on its perception that appellant's action was frivolous. Appellant then appealed that order (Docket No. 83051), and the appeals were consolidated.

Summary judgment (Docket No. 82835)

Appellant contends that summary judgment was improper because it introduced evidence sufficient to create questions of material fact. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing de novo a district court's decision to grant summary judgment and recognizing that summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law" (internal quotation marks and alterations omitted)). In particular, appellant appears to be contending that there are genuine issues of material fact regarding (1) whether respondents were aware of the complained-of defects, and (2) whether appellant was required to conduct a "professional" inspection to satisfy its due diligence.[2]

We disagree. With respect to appellant's first argument, appellant's opening brief simply reiterates its belief that "[n]umerous issues of fact exist as to what Defendants knew, what they disclosed and what they

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[2]To the extent that appellant has raised other arguments challenging the district court's summary judgment, we are not persuaded that those arguments warrant reversal.

covered up." But beyond this statement, appellant's opening brief fails to cite to any evidence in the record that might raise an inference that respondents were aware of a particular complained-of defect, such that a genuine issue of material fact existed regarding the viability of appellant's NRS Chapter 113 claim or any of the related claims. *See Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007) (holding that for purposes of a claim under NRS Chapter 113, in order for a seller to be "aware" of a defect such that the seller is obligated to disclose it, the seller must be able to "realize, perceive, or have knowledge of that defect or condition"); *Land Baron Invs. Inc. v. Bonnie Springs Fam. LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015) ("[Common law] [n]ondisclosure arises *where a seller is aware of materially adverse facts* that could not be discovered by the buyer after diligent inquiry." (Emphasis added and internal quotation marks omitted)). Similarly, appellant's summary judgment opposition failed to identify any evidence that might raise such an inference. Based on this appellate argument and lack of identifiable record evidence, we are unable to conclude that the district court erred in finding that no genuine issue of material fact existed regarding respondents' awareness of the complained-of defects. *See* NRAP 28(a)(10)(A) (requiring briefs to cite to relevant portions of the record)[3]; *Schuck v. Signature Flight Support of Nev., Inc.*,

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[3]Appellant's opening brief *does* cite to an affidavit from appellant's manager that was submitted in conjunction with appellant's motion to reconsider the district court's summary judgment. However, the manager's affidavit submitted in conjunction with appellant's summary judgment opposition did not include the statements upon which appellant relies on appeal, and appellant has not argued that the district court improperly denied its motion for reconsideration. Relatedly, although appellant's reply brief attempts for the first time to identify specific defects of which respondents were aware, we decline to specifically address those

126 Nev. 434, 438, 245 P.3d 542, 545 (2010) ("[A] district court is not obligated to wade through and search the entire record for some specific facts which might support the nonmoving party's claim."); *see also Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003) ("[S]ummary judgment is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events.").

With respect to appellant's second argument, appellant appears to be contending that its manager's own inspection was sufficient to satisfy the due diligence requirement in the parties' Residential Purchase Agreement, such that any defect he did not discover was not "within the reach of the diligent attention and observation of the buyer."[4] *Cf. Frederic*

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arguments. *Francis v. Wynn Las Vegas, LLC*, 127 Nev. 657, 671 n.7, 262 P.3d 705, 715 n.7 (2011) (explaining why this court generally declines to consider arguments raised for the first time in a reply brief).

[4]With the possible exception of its claim for violation of NRS Chapter 645, all the claims in appellant's operative complaint appear to be based on the allegation that respondents *knowingly* did not disclose the complained-of defects. If so, appellant's second argument appears to be moot in light of our rejection of appellant's first argument. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031 ("The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant."); *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (observing that "[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper."). Nonetheless, in the event we are misconstruing appellant's claims and arguments, we address appellant's second argument.

As for appellant's NRS Chapter 645 claim, we affirm the district court's summary judgment based on its finding that appellant did not rely on any representations from the broker respondents, which is a finding that

& Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC, 134 Nev. 570, 578-79, 427 P.3d 104, 111 (2018) (observing that a seller is not liable for nondisclosure of a known condition materially affecting the property's value if the condition is also "within the reach of the diligent attention and observation of the buyer"). Admittedly, this court has not expanded on the meaning of "within the reach of the diligent attention and observation of the buyer." *Id.* However, appellant's manager acknowledged in his deposition that before appellant purchased the building, the manager had access to the same parts of the building that appellant's own expert had when the expert conducted his own inspection as part of this litigation, with the implication being that a "professional" pre-purchase inspection would have discovered the complained-of defects alleged in appellant's complaint. Thus, absent any authority suggesting that "diligent attention and observation of the buyer" would encompass a non-professional or unlicensed inspection, we are unable to conclude that the "inspection" conducted by appellant's manager—and his failure to discover the complained-of defects—provides a basis for holding respondents liable for nondisclosure of those alleged defects.[5]

Accordingly, and to the extent that appellant's second argument implicates an issue of "material" fact, *Wood*, 121 Nev. at 731, 121 P.3d at 1031 ("The substantive law controls which factual disputes are material and

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appellant does not meaningfully contest on appeal. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised by a party on appeal are deemed waived).

[5]In this, we note that the subject property was a 63-year-old apartment building that, by appellant's own admission, "should have been condemned" before appellant purchased it.

will preclude summary judgment . . . ."), we conclude that the district court correctly found that no genuine issue of material fact existed to justify denying summary judgment. We therefore affirm the district court's summary judgment in Docket No. 82835.

Attorney fee award (Docket No. 83051)

Appellant contends that the district court's award of attorney fees as a sanction under NRCP 11 must be reversed because the district court imposed that sanction in contravention of NRCP 11's explicit and mandatory procedural requirements. We agree. In particular, respondents did not serve notice of their motion at least 21 days before they filed the motion with the district court and the motion was not made separately from their summary judgment motion as required by NRCP 11(c)(2). The purpose of that provision is to allow the offending party to correct or withdraw a problematic pleading, and appellant was not afforded the benefit of that provision, which would have allowed appellant to avoid sanctions under that rule.[6] *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001) (concluding that a defendant did not comply with the federal analog to NRCP 11 when it sought Rule 11 sanctions as part of a motion for summary judgment and did not serve the motion on the plaintiffs within Rule 11's 21-day advance service provision); *see also Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir. 1998) ("[W]arnings [are] not motions . . . , and

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[6]Although the summary judgment originally entered by the district court directed respondents to prepare an order to show cause, the district court's amended summary judgment removed that provision such that the district court did not order appellant to show cause why it should not be sanctioned. *See* NRCP 11(c)(3) (providing that the court, on its own, may order a party to "show cause why conduct specifically described in the order has not violated Rule 11(b)").

[Rule 11] requires service of a motion."). Thus, before sanctions may be imposed against an offending party, that party must be given "notice and a reasonable opportunity to respond." NRCP 11(c)(1). Here, respondents failed to comply with the mandatory procedural requirements of NRCP 11(c), which precludes the imposition of sanctions under NRCP 11.[7] We therefore reverse the district court's May 25, 2021, order in Docket No. 83051 insofar as that order awarded respondents attorney fees.

It is so ORDERED.[8]

_____, C.J.
Parraguirre

_____, J.
Herndon

_____, Sr. J.
Gibbons

cc: Hon. Adriana Escobar, District Judge
James A. Kohl, Settlement Judge
Day & Nance
Michael B. Lee, P.C.
Eighth District Court Clerk

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[7]Respondents contend that the district court could have awarded the same sanctions under NRS 7.085 or NRS 18.010(2)(b). However, the district court expressly granted "attorneys' fees and costs pursuant to Rule 11," which required respondents to follow the appropriate procedures for the award to have been appropriate.

[8]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

EXHIBIT “3"

EXHIBIT “4"

AFFIDAVIT OF FRANK MIAO

COUNTY OF CLARK)
) ss.
STATE OF NEVADA)

FRANK MIAO, being first duly sworn upon his oath, deposes and says:

1. That affiant is a member of WLAB Investment, LLC, the Plaintiff in Nevada Eighth Judicial District Court Case No. A-18-785917-C styled *WLAB Investment, LLC v. TKNR, Inc., et al.*

2. That affiant is a member of WLAB Investment, LLC, with his wife, Marie Zhu who is also a member of WLAB Investment, LLC. Their intent was to purchase the subject property as part of their retirement plan. This property along with other properties affiant has purchased over time in Southern California and Southern Nevada was meant to provide retirement income.

3. Affiant became aware of the subject property for sale via Zillow. During the inspection, affiant inspected the property with Mr. Kenny Lin during the afternoon of August 10, 2017. Affiant asked Mr. Lin about a small crack in the outside sidewalk. Mr. Lin said that they had purchased the property through an auction but that the property had been entirely rehabilitated. Affiant checked out Mr. Lin's company, InvestPro. InvestPro reportedly focused on the customer and further represented that their vendors were licensed and professional who complete cleaning, painting and or make repair when necessary which affiant liked. InvestPro was according to Lin one of the largest realtors in Chinatown. After inspecting the property with Mr. Lin and based upon the representations of Mr. Lin, affiant told his wife to go ahead and sign the purchase agreement after the August 10, 2017 inspection. Ms. Marie Zhu e-signed the Agreement

on August 11, 2017 with the help of Kenny Lin and Le Wei Chen from InvestPro who were the buyer's agents. (August 11, 2017 Resident Purchase Agreement attached as Exhibit "8" to Plaintiff's Motion for Reconsideration). The form had been previously completely prepared by the InvestPro agents. In the August 11, 2017 Residential Purchase Agreement, there is no waiver of due diligence. Affiant had inspected the Property with Lin. During the inspection, affiant informed Mr. Lin that the units needed to have proper GFCI outlets and that smoke, combustible gas and CO detectors needed to be installed since they were required by law. When Ms. Marie Zhu signed the second Residential Purchase Agreement on September 5, 2017, due diligence was waived as affiant had already completed inspections of the subject property. (September 5, 2017 Residential Purchase Agreement attached as Exhibit "8" to Plaintiff's Motion for Reconsideration).

4. After the Residential Purchase Agreement was e-signed, affiant visited and inspected the triplex additional times prior to closing. Ceramic tile had been laid in the kitchen, living room, hallway and bathrooms. Laminated wood flooring had been placed in all the bedrooms. Affiant did not notice any issues with the flooring except for a few small cracks in the ceramic tile in Unit C. The floor was not buckling in any of the units. Affiant also did not notice any cracking in the walls inside the triplex during his inspections. The units did look as that they had been recently renovated. At no time during affiant's initial inspection of the triplex did Mr. Lin report that there were significant issues with the foundation and earth movement or that the sewer line was broken causing sewer water backup.

5. When considering the purchase of the subject triplex, affiant asked Kenny Lin to be their buyer's agent. After the Residential Purchase Agreement was e-signed, affiant found out Mr. Lin had assigned another agent in his office, Helen Chen, to

represent Plaintiff WLAB Investment. It was Lin's and InvestPro's handyman who had rehabilitated the triplex by covering up the many issues with the building. In hindsight, understanding that Lin knew too much about the undisclosed problems with the building, he probably wanted nothing to do with representing affiant's company.

6. After WLAB purchased the 2132 Houston Drive property, affiant retained InvestPro as the property manager as they had been for the seller since they got this triplex in 2015. Affiant went to the InvestPro Christmas party during December, 2017. At the party, Lin explained to affiant that they were buying properties in auctions, then rehabilitate and "flipping" the properties and making large amounts of money. A number of Lin's investors were present during the party and also confirmed that they were making a lot of money. Lin explained that he puts investors together to buy properties for the purpose of flipping the properties. Lin invited affiant to joint his "flipping fund." Lin explained that affiant needed only invest some money and that InvestPro would do everything from buying the properties to remodeling and flipping them. He described it like a mutual fund where he could get a very good return. Lin also mentioned that the 2132 Houston Drive property was one of the projects in the "flipping fund." Investors did not need to know anything about the properties. They simply invested money and Investpro handled the rest like a mutual fund. The mutual fund was also referenced in InvestPro advertisements in local newspapers.

7. During approximately June of 2018, the tenant in unit A reported that the fuse to Unit A kept burning out. The tenant reported the issue to InvestPro, the property manager. InvestPro sent their handyman to fix the problem. The handyman's fix was apparently to disconnect some of the other circuits to the fuse which result in the tenant not being able to use all outlets. After complaining to affiant about the problem, affiant

hired a licensed electrical contractor to look at the issue. At that time, the contractor discovered that InvestPro's handyman had disconnected circuits from the fuse. The contractor also learned that when the window ACs were installed, Defendants had piggybacked the AC circuit onto other circuits causing an overload on the fuse without the required permit. The electrical panel further did not have sufficient electrical wattage to power the unit with the addition of the AC units. InvestPro's handyman is not a licensed professional as InvestPro had represented in their website. None of this was disclosed by Lin to affiant prior to the purchase of the triplex. Affiant approached Lin with the contractor's bid asking for $10,000.00 to fix the electrical problem. Lin said that it was affiant's problem. Affiant ended up paying for the repair.

8. Around October of 2018, water was dripping from unit C's ceiling during hot sunny days. The ceiling was opened up which revealed that Defendants had installed a dryer duct dumping high moisture exhaust gas into the attic instead of venting to outside of the building which was required by law. Affiant also found that the air conditioning ductwork inside the ceiling was not insulated which is also unlawful. Later, affiant discovered that when Defendants replaced swamp cooler with AC, they left the uninsulated swamp cooler duct in the attic. When the highly moist gas from the dryer exhaust cooled with cool air coming from the uninsulated AC duct, condensation occurred causing water dropping onto the unit C ceiling. The wet insulation in the attic was black and no longer working. Affiant hired LVAC to put in new insulated ducting and hired Home Depot to reinsulate the attic. Affiant found that Unit B had the same issue with the dryer vent dumping into the attic. In Unit A, the dryer vent dumped into the wall between two studs and also eventually dumped into the attic. None of this was reported by Linn prior to Plaintiff closing on the triplex.

9. During the last several months, affiant has become aware of the condition of the foundation. On February 16, 2021, the flooring in one of the bedrooms in Unit B was pulled up. The laminate wood flooring installed by Kenny Lin/InvestPro's handman had been buckling which prompted affiant to pull up the floor. Upon pulling up the floor, it was observed that the foundation had severely deteriorated and had been covered by laminate flooring so the foundation defects would be concealed. The photographs attached to Plaintiff's Motion for Reconsideration as Exhibit "3" were taken by affiant and accurately reflect the condition of the foundation on February 16, 2021. Upon seeing the condition of the foundation, it explained the severe cracks in the walls that had been appearing through Defendants' pre-sale renovations. At the time of the pre-purchase inspections of the triplex, there was no serious cracking in the walls. The walls had been covered the plaster and wall coverings to hide the cracks and other wall defects. After closing, cracks started developing again. The photographs of the wall cracks attached to Plaintiff's Motion for Reconsideration as Exhibit "4" were taken by affiant.

10. Before the tenant in Unit C moved out August of 2020, he complained of slow drainage issues with the unit, particularly in the kitchen and bathroom. The tenants in units B and C had complained about drainage issues as early as May or June of 2020. When Nicholas Quioz, the tenant in Unit A, moved out, he explained to affiant that he had moved into the unit during April of 2017. He reported to InvestPro that sewage water had overflowed into Unit A. He reported that InvestPro had spent several weeks trying to open the sewer line. The handyman working on the sewer line explained to Mr. Quioz that the sewer line was broken. Attached to Plaintiff's Motion for Reconsideration as Exhibit "6" is a photograph taken by affiant of sewage backed up into Unit C's bathtub. Lin said nothing about a broken sewer line prior to or after closing.

11. That during the week of March 8, 2021, a next-door neighbor explained to affiant that he had been a tenant of the building during 2016 or 2017. After he moved in, the floor buckled and sewage backed up. He called InvestPro who did nothing about the problem so he moved out.

12. The property purchased by WLAB Investments was one of the homes purchased by Lin's flipping fund. TKNR, Inc. who was the seller of the property and which constituted a group of investors who had been put together by Lin and InvestPro. In the disclosure made by the seller attached to Defendants' Motion for Summary Judgment, the seller states that they have never visited the property. This is because the property was one of Mr. Lin's flipping fund properties. Lin handled everything including taking his share of the profit from the sale. It was Lin/InvestPro's handyman who made the repairs to the subject property. Lin was aware that the building was cracking. More importantly, Linn was aware of the condition of the foundation as it was InvestPro's handyman who covered it up. This is why Lin did not want to represent both the buyer and the seller in this transaction as he was aware of the many undisclosed problems with the property.

13. Concerning the condition of the foundation, Lin and InvestPro were more than aware of what was going on. Affiant had an opportunity to review a number of the handyman receipts which have been produced in the litigation one of which acknowledges that the handyman "remove 2 rooms laminate and level concrete." (DEF 23) This took place on April 19, 2017. When the flooring began buckling again, affiant pulled the wood laminate up only to find the condition of the foundation that the handyman had covered to be extremely poor rendering the entire triplex structurally unsound. The condition of the floor was also consistent with the recent reports of tenants that the sewer line was

broken resulting in sewage water leakage backing up under the foundation. As reported by Defendants' expert Neil Opfer, the triplex sits on expansive clay which swells up when wet and then compresses when dry. These conditions cause earth movements resulting in foundation and wall cracking.

14. Affiant has a PhD in chemical engineering. Because sewage gases are so dangerous, affiant removed all tenants from the property immediately and has not leased units to anyone else. Sewage gas is a complex mixture of toxic and nontoxic gases produced by the decomposition of organic household sewer water. The gases may include hydrogen sulfide, ammonia, methane, esters, carbon monoxide, sulfur dioxide and nitrogen oxides. Sewer gases are of concern due to health effects and potential for creating fire or explosions. Exposure to sewer gas can happen if the gas seeps in via a leaking plumping drain, vent pipe or even through cracks in a building's foundation. At higher concentrations (> 300 ppm) hydrogen sulfide can cause loss of consciousness and death. Very high concentrations (> 1000 ppm) can result in immediate collapse, occurring after a single breath. Carbon monoxide is a colorless, odorless, and tasteless toxic and flammable gas. At concentrations above 150 to 200 ppm, disorientation, unconsciousness and death are possible. Sewer gas can contain methane, hydrogen sulfide and carbon monoxide all of which are highly flammable and potentially explosive substances.

15. As a result of having a broken sewer line and significant issues with the foundation, as stated, affiant has refused to lease triplex units to other tenants. What concerns affiant is that Lin knowingly put a tenant in the Triplex knowing that the sewage line was broken and presented an extreme health and safety risk to tenants. Lin also sold the property to affiant's company without disclosing the condition of the foundation and

sewer line. Lin's knowledge of the broken sewer line explains other actions prior to Plaintiff purchasing the triplex. During one of his inspections of the subject property with Lin by his side, affiant noticed that the units did not have smoke, CO or combustible gas detectors. Affiant reminded Lin that this was against the county law and asked him to install detectors in each of the units. Lin had CO and smoke detectors installed. However, after Plaintiff's purchase of the triplex, affiant noticed that Linn had removed the CO and combustible gas detectors. Lin has obviously concerned the CO detectors would sound the alarm knowing that the sewer line was broken and the foundation cracked. Sewage gas seeps into the bedrooms through the cracked foundation.

16. In going through the amended order, affiant noticed a number of factual representations that he submits are at issue in the case.

(a) p. 2, ¶ 1. "2132 Houston Drive, Las Vegas, NV 89104 ("Property") was originally constructed in 1954." *On November 18, 1994, Cecilia Hernandez, with her family, bought the triplex for $117,000.00. They leased the property out for rental income. Before or during their ownership, the sewage line broke leaking sewage water under the foundation. The soil has expansive clays. As Defendants' expert Opfer wrote in his report:*

> The ongoing groundwater condition can impact ground movement particularly with the presence of expansive clays." The point of this discussion is that this then impacts the performance of the walls and concrete floor slabs as to cracking to a significant degree. Cracked floor tile can be replaced in one year only to have the same issues appear again in the next year or year after that as an example. Standard construction materials such as stucco, drywall, floor tile, and concrete will all tend to crack when subjected to these forces. Again, cracking in these materials is seen all over the Las Vegas Valley.

(*See* Opfer report, pp. 9-10).

> *Most likely, clay pipe was used for the sewer system connection. . . . It is a well-known fact that vitrified clay pipe is relatively weak and can be easily penetrated by tree roots.*

(*See* Opfer report, p. 14).

According to Opfer, "the issue with expansive clay is that it can swell up (expand) in the presence of water and then compress when it dries out. Note that expansive clays have created residential-foundation problems in many areas." The expansive clay soil with water leaks from a broken sewage line led to earth under the foundation moving and cracking the foundation. The earth movement broke more sewer line and lead to more water leakage causing more slab cracks. The more tenants they had in the apartments, the more sewage water generated and leaked under the foundation causing more foundation cracks and broken sewage line. The Hernandez family used the property as collateral for a $291,000.00 loan to fix the problems. However, the loan was not sufficient to fix the problems with the property. The tenants moved out so the owners did not have rental income to make the mortgage payment. The bank found out the triplex units could not be rented out to tenants because the units were dangerous because of the foundation and sewage gas. The sewage line needed to be rebuilt along with the foundation and everything else. This is why on September 10, 2015, the bank foreclosed and started the auction at $52,000.00 (the land value) in spite of their $291,000.00 loan. Kenny Lin's flipping fund, with TKNR as the buyer, won the auction on 10/9/2015 and listed the triplex for sale three months later at $188,000.00 on 1/9/2016. Lin/InvestPro knew of the apartment major defects and won the apartment at a very deep discount of market value. Lin/InvestPro rehabilitated the property though they did not fix the foundation or sewage problems. They just had the unlicensed InvestPro

handyman cover major defects up and put the property back on the market for $188,000.00 to make a huge flipping profit.

(b) p. 3, ¶ 4. "Ms. Zhu waived the Due Diligence condition." Under Paragraph 7(D), "Buyer is deemed to have waived the right to that inspection and Seller's liability for the cost of all repairs that inspection would have reasonably identified had it been conducted, except as otherwise provided by law." *It was Helen Chen and Kenny Lin from InvestPro who prepared the purchase agreement and checked the box for home inspection by Buyer and waiving other inspection. Plaintiff did not waive right to inspect as evident in both the August 11, 2017 and September 14, 2017 Purchase Agreements. In fact, affiant inspected the property with Kenny Lin on August 10, 2017, before the Purchase Agreement was e-signed on August 11, 2017, pointing out various issues with the Triplex that needed to be fixed before closing. As stated, affiant could not have uncovered the various defects in the property that are at issue as they were covered up by Lin, acting on behalf of Defendant TKNR. The defects were serious and would have only been revealed during an inspection that allowed destructive opening up of the unit as this purchase agreement did not allow. Further, affiant's understanding of the law is that an inspection by a licensed inspector is not required for multi-family rental properties and that Lin is not relieved of his responsibility to disclose known conditions which affect the value of the property.*

(c) p. 3, ¶ 5. "Ms. Zhu also waived the energy audit, pest inspection, roof inspection, septic lid removal inspection, mechanical inspection, soil inspection and structural inspection." *As stated, affiant inspected the subject property on several occasions. No non-destructive inspection would have uncovered the serious cracking and foundations issue in the triplex. Further, this property is not on septic. The waiver*

checks in the Purchase Agreement were prepared by InvestPro without notifying affiant.

(d) p. 3, ¶ 6. "Additionally, Wong, Lin, Chen, Zhang, Cheng, and Nickrandt (collectively, "Broker" or "Broker Defendants") had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party." *These individuals are the actual sellers of the property. They are the true sellers behind alternations and "flipping. Attached as Exhibit "5" to Plaintiff's Motion is the Flipping Fund's web page found by affiant. InvestPro's web page identifies InvestPro as a participant in the Property purchases and not just from a realtor standpoint. The second page of the website talks about splitting profits with the manager LLC. Lin and his company, InvesPpro, put the deal together, sold units to investors, for a 75/25 split at the end. It was InvestPro's Kenny Lin who participated at the auction and bought the subject property. It was InvestPro's Kenny Lin who hired the InvestPro handyman to "rehabilitate" the property. It was InvestPro's handyman who discovered that the sewer line was broken. Not only did Lin push representation for the buyer to another InvestPro realtor but at no time did Lin actually tell affiant that he had an interest in the subject property; i.e., he was the seller.*

(e) p. 3, ¶ 7. "On August 2, 2017, TKNR submitted Seller's Real Property Disclosure Form ("SRPDF" or "Seller's Disclosures") timely indicating all known conditions of the Subject Property." *Affiant did not meet Lin until August 10, 2017, at the time of affiant's inspection of the Property. There was no communication prior to August 10 with Lin or anyone from InvestPro. Affiant did not decide to go through with the purchase of the Property until August 11, 2017. There is nothing in Seller's*

disclosures referencing and broken sewer line or the structurally unsound foundation caused by earth movements. Sellers were aware of these conditions as Kenny Lin, their representative, covered them up.

(f) p. 3, ¶ 7. "Despite these disclosures, Plaintiff chose not to inspect the Subject Property, request additional information and/or conduct any reasonable inquires." *During affiant's inspection of the property with Kenny Lin, affiant requested information about repairs. Kenny Lin informed affiant that after they won the auction, they did a complete rehabilitation of the property. Because of Lin's representations prior to closing, affiant believed that Investpro had fixed all defects during rehabilitation.*

(g) p. 4, ¶ 10. "This is the second time that Ms. Zhu waived inspections for the Property despite the language in the 2nd RPA that strongly advised to get an inspection done." *Affiant inspected the property with Kenny Lin on August 10, 2017. The original Residential Purchase Agreement was e-signed the day after on August 11, 2017, after the agreement had been prepared completely by Helen Chen and Kenny Lin. The Agreement itself does not state that the buyer is waiving the home inspection. Again, the triplex had already been inspected by Frank Miao with Kenny Lin at his side by the time the initial Agreement had been e-signed by Ms. Zhu. The buyer cannot waive an inspection that has already been completed. Affiant inspected the property again after the initial Purchase Agreement was signed. At no time did affiant or Ms. Zhu waive the right to inspect. Again, both the first and second Purchase Agreements were completed by InvestPro agents allegedly representing Plaintiff at the time of the transaction.*

(h) p. 4, ¶ 10. "Notably, although Ms. Zhu had not initialed the "Failure to Cancel or Resolve Objections" provision in the RPA, she initialed the corresponding provision in the 2nd RPA." *WLAB inspected the property with Kenny Lin on August 10, 2017.*

(i) p. 4, ¶ 11. "Although Ms. Zhu had actual knowledge of the Sller's Disclosures, and the Parties agreed to extend the COE to January 5, 2018, Ms. Zhu still never did any professional inspections." *Frank Miao did inspection with Kenny Kin and put out correction items.*

(j) p. 5, ¶ 15. "Plaintiff was a sophisticated buyer who understood the necessity of getting the properties inspected." *Plaintiff did inspect the property on August 10, 2017, with Mr. Lin. The major defects were covered up and Lin had lied to affiant about the rehabilitation.*

(k) p. 5, ¶ 17. "As to Paragraph 7(A), Mr. Miao specified that he believe that his inspection and conversations with the tenant constituted the action necessary to deem the Property as satisfactory for Plaintiff's purchase." *Due to defendant Kenny Lin lying to affiant and covering up major foundation and structural defects by putting laminate wood flooring and ceramic tile over the major defect, affiant could not discovery these hidden defects during inspection without destructive inspection which the purchase agreement did not allow.*

(l) p. 5, ¶ 18. ". .. Plaintiff had access to inspect the entire property and conduct non-invasive, non-destructive inspections: . . ." *The serious foundational, structural and sewage line issues, which were covered up with laminate wood and ceramic floor tile, would have only been discovered with a destructive open up inspection.*

(m) p. 6, ¶ 19. "Prior to the purchase, Mr. Miao was always aware that the Seller "strongly recommended that buyer retain licensed Nevada professionals to conduct inspections." *Kenny Lin said nothing about retaining a licensed inspector. He knew that affiant was inspecting the building. Mr. Lin was also aware that whether the inspector was licensed or not, he had covered up the significant defects in the property which could not have been discovered without pulling up the floors. After Defendants purchased the property at auction, this property was listed more than three times from January 9, 2016 to August 10, 2017. Each time, the property was removed from escrow which meant Sellers had to go back to the drawing board and make a better effort to cover up the significant issues with the property. Defendants did not actually fix the defects. They simply covered them up.*

(n) p. 6, ¶ 20. "Plaintiff was also aware of the language in the RPA under Paragraph 7(D) that limited potential damages that could have been discovered by an inspection." *The key issue is Defendants did unlawful things and covered up problems with the property. They put making money above tenant and investor safety.*

(o) p. 7, ¶ 22. "Based on his own belief, he does not believe that a professional inspection is necessary for multi-tenant residential properties." *Affiant is wondering if summary judgment was granted because the Court believes that professional licensed inspections are required. Affiant is a professional. He knows building and apartments very well. Affiant is not aware of any legal requirement that a buyer is required to retain a licensed inspector before purchasing an apartment, in this case, a triplex. For multi-tenant residential properties in Las Vegas involving many thousands of units, it is virtually impossible to inspect each and every unit in 14 days*

which is why law requires work on rental units to be done by licensed contractors followed by inspection and permitting by city building and safety departments.

(p) p. 8, ¶ 26. "During that time, he admitted that he noticed some issues with the Property that were not up to code, finishing issues, GFCI outlets, and electrical issues:" *As stated, affiant instructed Kenny Lin to put smoke and CO detectors in the units only to find out that after the purchase, Lin had removed the CO detectors after they were installed. Defendants had hidden some GFCI required outlets by covering up or installing non-functioning GFCI outlets without using a licensed electrician which was dangerous for the tenants. Defendants did not want to use a licensed electrician because a licensed electrician would have asked to pull permits. The city inspector may have found out about the defects and shut down the apartment.*

(q) p. 8, ¶ 28. "Additionally, Mr. Miao noted that there were cracks in the ceramic floor tiles, *Id.* at 249: 22-25, and he was aware of visible cracks in the concrete foundation, *Id.* at 269: 13-22 (aware of slab cracks), which were open and obvious." *Affiant noticed a few cracks in the ceramic floor tiles in Unit C living room. Affiant was not able to see the foundation as it was covered with newly installed flooring. It was at this point with Lin explained to affiant that they had rehabilitated the entire triplex.*

(r) p. 9, ¶ 31. As to SRPDF, Plaintiff was aware that TKNR was an investor who had not resided in the Property, and there were issues with the heating systems, cooling systems, and that there was work done without permits and all the work was done by a handyman other than the HVAC installation." *When affiant inspected the property the Defendant Lin, Lin explained that Investpro had rehabilitated the*

property. There was no defect found at the time of the inspection that would have raised any concern.

(s) p. 9, ¶ 32. "Despite these disclosures, Mr. Miao never followed up." *There were no defects observed at the time of the inspection. They were all covered up.*

(t) p. 9, ¶ 33. "However, Mr. Miao also admitted that he could have followed up on the issues identified in the SRPDF that included the HVAC and the permits:" *SRPDF only disclosed that there was a new air conditioner but never mentioned that the air conditioners replaced swamp coolers. Affiant later learned after a leak in one of the units that the ducting had not been changed from the swamp cooler to air conditioning. This was only learned after opening up the ceiling.*

(u) p. 10, ¶ 34. "Similarly, Mr. Miao was aware that he should have contacted the local building department as part of his due diligence:" *There was no reason to contact the building department as Sellers did not disclose any activity that would have required a permit. Specifically, they disclosed a new kitchen cabinet in each unit, brand new AC installed and three bedrooms were redone. There was no mentioned that the air conditioning units were replacing swamp coolers which required new electrical and plumbing which would have required a permit. If the AC units were replacing AC units, permits would not need to be pulled. Based on the information provided by Lin and in Sellers' disclosures, affiant was not aware of any activity that would have required a permit. It was also learned after the walls were opened that Defendants had not properly wired the AC units leaving wires exposed and presenting a potential fire danger.*

(v) p. 10, ¶ 35. "Plaintiff was on notice of the potential for mold and the requirement to get a mold inspection." *This is a rental property. By law, the seller must*

provide a safe, habitable apartment to the tenants. No tenant will check mold and have professional mold inspection. Further, mold testing usually requires a destructive inspection to verify in ceiling and behind walls.

(w) p. 11, ¶ 37. "Disclosure of unknown defects not required. Form does not constitute warranty duty of buyer and prospective buyer to exercise reasonable care." *Affiant's issue with Sellers' disclosures is that they failed to disclose defects that they were aware of. The Handyman's invoice for patching the concrete underscores that the Sellers were aware of the condition of the foundation when they sold the triplex and failed to disclose to affiant.*

(x) p. 12, ¶ 39. "The alleged defects identified by both parties' experts could have been discovered at the time of the original purchase." *Again, the foundation, wall cracks, AC wiring and ducting, dryer venting, were all under flooring or within the ceilings and walls of the units. These defects would have only been uncovered with prohibitive destructive open up inspection.*

(y) p. 13, ¶ 43. "Additionally, Mr. Miao accompanied Defendants' expert during his inspection." *Defendants' expert did not show all of the pictures taken which reflect new cracks.*

(z) p. 12, ¶ 44. "Mr. Miao agreed with Defendants' expert that the alleged conditions identified by Plaintiff's expert were "Open and obvious":" *Affiant was not shown all of the photographs during his deposition. There were many more new cracks observed than in 2017 at the time of affiant's inspection. The new cracks were hidden by coating materials, dry wall, joint compounds and new floors.*

(aa) p. 13, ¶ 45. "He also agreed with Defendants' expert's finding that there was no noticeable sagging in the roof." *The rook leak was not caused by sagging. It was caused by a broken seal on the roof.*

(bb) p., ¶ 46. "Incredibly, Mr. Miao also recognized the deficiency in Plaintiff's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it and those afterwards." *New cracks appears after Defendants hid the original cracking. When affiant inspected the property with Lin, there was not nearly as much cracking as there is now. Defendants hid most of the cracks and defects. There were dryers and washers installed in the units in 2017 were vented to the attic. The vents ran through the walls. The venting cause moisture in the attic which resulted in the ceilings being opened for find the leaks. It was discovered at that time, after the ceilings were opened, that the dryer had been vented to the attic. Lin at no time explained how the dryers had been vented.*

(cc) p. 13, ¶ 47. "No dispute exists that TKNR did not need permits for the interior work it had done to the Property." *Affiant ultimately learned that the AC units had replaced swamp coolers and that the ducting had not been changed to allow for AC units until after the ceiling was opened up. The new plumbing and electrical for the new AC units would have had to be inspected. Again, affiant did not know that the new AC units did not replace other AC units. Because these units are for lease, the work should have been performed by licensed contractors which is why the work was not done by Defendants as it should have been. One unit had a window AC unit the installation of which should have been performed by a licensed contractor with permit and inspection by the city.*

(dd) p. 14, ¶ 48. "Since the date it purchased the Property, Plaintiff has always been trying to lease it. . . . According to Mr. Miao, the landlord must provide safe housing for the tenant." *Lin and his company InvestPro were the property managers for the property after Plaintiff's purchase. Lin knowingly leased the property to tenants knowing that the property was unsafe. Once affiant learned of the foundation and sewage line defects, he removed all tenants until they are fixed.*

(ee) p. 15, ¶ 49. "Moreover, Plaintiff does not provide any notice to the tenants about its expert's report or this litigation." *Since purchasing the property, affiant has made many repairs as they are discovered with licensed contractors. Specifically, once affiant found out about the foundation and sewer line defects, he asked the tenants to move out immediately.*

(ff) p. 15, ¶ 50. "This illustrates the lack of merit of Plaintiff's claim, proven that it has done nothing to correct the allegedly deficient conditions that are clearly not so dangerous as it does not tell prospective tenants about them." *Affiant has repaired many defects with licensed contractors. It is only with the discovery of the foundation and sewer line defects that affiant had discontinued attempted to repair the triplex.*

(gg) p. 15-16, ¶ 51. "Mr. Miao admitted that multiple third parties could have potentially damaged the Property." *The major cracks in the walls and floors were not done by third parties. The major defects were not done by third parties.*

(hh) p. 16, ¶ 52. "Plaintiff's case is based on speculation that Defendants knew about the alleged conditions in the Property; however, Mr. Miao admitted that there is no evidence that shows Defendants knew about them." *As stated, affiant believes there is substantial evidence that Defendants knew about the defects.*

(ii) p. 17, ¶ 55. "Mr. Miao also recognized that a 63-year-old property could have issues that were not caused by Defendants." *It is not the fact that Defendants didn't cause the foundation or sewer issues, it is the fact that they did not disclose and hid these issues when they sold the property to affiant's company.*

(jj) p. 17, ¶ 56. "Plaintiff did not identify any discovery illustrating a genuine issue of material fact that Defendants knew of the alleged issues with the Property that they had not already disclosed on Seller's Disclosures." *Numerous photographs of cracking floors and walls were produced in discovery which reflected cracks not present at the time of affiant's inspection. Additionally, the floor continues to buckle and as it did, the floor was pulled up which revealed foundation damage as previous mentioned.*

(kk) p. 17, ¶ 58. "The Flipping Fund had nothing to do with Plaintiff's decision to purchase the Property." *The subject triplex was one of the Flipping Fund projects. As stated by Lin, the property was purchased at auction and renovated. The Flipping Fund had everything to do with the alleged rehabilitation of the property as that is what they do, buy, rehabilitate (cover up in this case) and sell for a large profit.*

(ll) p. 17, ¶ 59. "Initially, Mr. Miao contacted contractors to bid the potential cost of repair for the Property and determined that it would have been $102,873.00. . . . However, Plaintiff's expert opined that the cost of repair would have been $600,000.00, although he did not provide an itemized cost of repair." *Initially, the cost of repair to fix the electrical and ductwork inside the ceiling was $102,873.00. However, by the time Plaintiff's expert inspected the property, much more was known about the property and, therefore, the cost of repair was much higher.*

(mm) p. 18, ¶ 60. "He denied, under the penalty of perjury, that he never made an offer to settle this matter for $10,000.00." *This statement completely*

misrepresents what actually transpired. After Plaintiff purchased the property, the fuses to the AC units kept burning out. Affiant hired an electrician to figure out what the problem was. It was learning that when Defendants installed the air conditioners, there was not sufficient room in the electrical box to wire the air conditioners. Therefore, Defendants' handyman piggy-backed the AC wiring onto another fuse which caused the fuse to overload and fail. The electrician estimated the cost of repair to be $10,000.00. Since the electrical problem was Defendants' doing, affiant approached Lin about paying $10,000.00 to repair the electrical. Affiant believes this offer to resolve the electrical issue was prior to a lawsuit being filed. The condition of the wiring was not open and obvious as suggested in paragraph 62 of the order as the wiring was hidden behind the wall. The wall had to be opened up to discovery the electrical issue.

(nn) p. 24, ¶ 62. "Additionally, he specified that he noted issues with the electrical system and items not up to code at the time that he did his inspection and/or that any issues with the electrical system were "open and obvious" that a reasonable, professional inspection could have discovered in 2017." *Defendants did not disclose electrical system changes. They are not "open and obvious" as they were hidden behind the wall. As stated, when Defendants changed out the swamp cooler for an air conditioner, they simply piggy-backed the AC wiring on already existing wiring on the fuse which caused the fuse to overload and burn out. The electrical panel was insufficient to handle the load which required re-wiring by a licensed electrician. Further, when the AC unit was added, additional electrical wiring was required which required a permit and inspection.*

(oo) p. 25, ¶ 63. "Additionally, he specified that he noted issues with the plumbing system were "open and obvious" that a reasonable, profession inspection could

have discovered in 2017." *Affiant learned of the septic issue when the tenants left the property and reported issues with the sewage. Sewage had backed up in one of the tubs which was discovered after the tenant left. Residue from the sewage backup was found in the tub. Affiant further learned from the tenant in Unit A and the former tenant that the sewage issue was something Defendants were aware of as they had previously investigated the problem.*

(pp) p. 25, ¶ 64. "As to 31(c), Mr. Miao admitted that the Seller's Disclosures did disclose the use of a handyman, the lack of permits, and issues with the sprinklers. Additionally, he specified that he noted issues with the sewer system were "open and obvious" that a reasonable, professional inspection could have discovered in 2017." *There is no sprinkler system. The sewer issue was not open and obvious and could not have been discovered with a typical professional inspection. Defendants were aware of the issue and had an obligation to report the sewer problem to Plaintiff.*

(qq) p. 25, ¶ 65. The order suggests that the conditions were open and obvious. *Defendants were aware of these issues and failed to disclose. These issues were not "open and obvious." They were discovered after affiant opened walls and ceilings and floor coverings.*

(rr) p. 25, ¶ 66. "As to 31(e), Mr. Miao admitted that the Seller's Disclosures did disclose issues with the heating and cooling systems, the use of a handyman, and the lack of permits." *A licensed professional inspection cannot and would not discover all of these defects. The issue with the AC wiring behind the wall was not visible without doing some destructive investigation. At no time did Defendants disclose that their handman was not licensed which is unlawful.*

(ss) p. 26, ¶ 67. "As to 31(f), this allegation illustrates the prior knowledge that Plaintiff had before purchasing the Property, and the overall emphasis on the failure to obtain a professional inspection of the Property prior to purchasing it." *31(f) refers to the fact that smoke detectors were missing at the time of the inspection. This allegation says nothing about the serious problems with the Property that Defendants had covered up and that were not readily detectible at the time of affiant's inspection. Obviously, affiant did not see the foundation damage at the time of the inspection as it was covered by wood laminate and ceramic flooring. The order implies that an inspection done by a "professional inspector" would have noticed that serious foundation damage without pulling up the flooring. Affiant was also not aware that the HVAC system had been changed three times until the receipts were disclosed in this case. Affiant was not aware of the shoddy and illegal electrical work that had been done and which was hidden behind the walls. It took a tenant complaining about a fuse and the subsequent retention of a licensed electrician to go into the wall to discover what Defendants had done. It was a tenant and former tenant reporting about the sewage problems as well as sewage remnants in a bathtub for affiant to become aware of that problem. It took a leaking ceiling and opening the ceiling before affiant became aware that Defendants had vented the dryer exhaust to the attic and that Defendants had not properly changed out the swamp cooler ducting for insulated air conditioning ducting. Walls had been covered so as the time of the inspection by affiant, very few if any cracks in the walls were observed. However, as the foundation and walls shifted over time, the cracks in the walls reappeared revealing what Defendants had covered up. To suggest that the discovery of missing smoke detectors is somehow indicative of the extent of affiant's knowledge at the time of the inspection is ridiculous.*

only way affiant would have been aware of the significant issues with the foundation is if Lin told him or if he was allowed to perform a destructive inspection which the Purchase Agreement did not allow. Affiant also did not observe wall cracks as they had been covered up at the time of the inspections. Defendants were aware of the foundation and wall cracks as they had covered them up. Affiant was not aware that the HVAC system had been changed out three times until the receipts were produced during discovery. The roof leak was caused by the failure to seal the roof. The leak had nothing to do with sagging.

(xx) p. 27, ¶ 72. ""Mr. Miao admitted that there was visible cracking on the foundation, walls, and the tiles that were open and obvious at the time that Plaintiff purchased the Property in 2017. . . . Notably, Mr. Miao admitted that no evidence showed that Defendants were aware of any of these issues and also admitted that squatters and tenants could have damaged the Property." *Squatters and tenants could not have caused the foundation and walls to crack. Even if squatters and tenants did cause the damage, Defendants were aware of the damage and covered it up.*

(yy) p. 27, ¶ 73. "As to the Broker Defendants, Ms. Zhu agreed that she was not relying upon any representations made by Brokers or Broker's agent." *Regardless of the inspections by affiant and what affiant discovered during his inspection, Defendants should have warned affiant and Ms. Zhu about serious conditions which they covered up. Affiant was relying upon his broker to tell him about conditions which could not be seen with a routine inspection. Affiant believes his agents should have told him about the fact that they were also financially tied to the sellers in that they were the Flipping Fund, they had put the investors together, they had a*

financial interest in monies made from the transaction and that it was their handyman who had made the purported repairs.

(zz) p. 28, ¶ 74. Mr. Miao walked the property with Defendants' expert, Neil Opfer. *By the time affiant walked the property with Mr. Opfer, numerous cracks had appeared in the walls which were not visible at the time of affiant's inspection on August 10, 2017.*

(aaa) p. 28, ¶ 75. "Mr. Miao agreed with Professor Opfer that the alleged conditions identified by Plaintiff's alleged expert were open and obvious." *Affiant does not agree that the conditions which ultimately appeared in the roof and interior and exterior walls were open and obvious at the time of his pre-purchase inspection.*

(bbb) p. 28, ¶ 76. "Mr. Miao agreed with Professor Opfer that Plaintiff's expert did not do any destructive testing, so the same alleged conditions that the alleged expert notes, would have been made by an inspector at the time of the purchase." *The conditions complained of were not visible at the time of the 2017 inspection as they had been covered up by Defendants.*

17. Mr. Lin, in his declaration attached to Defendants' Motion for Summary Judgment, states in ¶ 2 that he submitted seller disclosures on August 2, 2017. Affiant had not even met Mr. Lin before August 10, 2017. Affiant first met Mr. Lin on August 10, 2017, at the time of his inspection of the subject property. In ¶¶ 3 and 7, Lin states that he told affiant and Ms. Zhu to get an inspection of the Property. At no time did Lin tell affiant that affiant needed to get an inspection of the Property as affiant had already inspected the property with Lin. Mr. Lin was also the seller's agent so after the initial signing of the Residential Purchase Agreement affiant only communicated with Ms. Chen, the buyer's agent. In ¶ 4, Lin says that affiant did not inspect the property. Again, affiant

inspected the Property on several occasions, the first time with Lin present on August 10, 2017. Mr. Lin stated to affiant that they had entirely rehabilitated the Property including the walls and floors. In ¶ 5, Lin states that the rehabilitation done on the Property did not involve opening walls. They had to open the walls to install the window AC units. Lin further states that on multiple occasions he disclosed the work on the HVAC units to affiant. Affiant was aware that the HVAC units had been recently put in but he was not aware that the AC units were replacing a swamp cooler. Lin did not disclose the installation of the HVAC units to affiant. In ¶ 8, Lin states that TKNR did not reside or visit the property implying that Defendants knew very little about the property. TKNR, Lin and InvestPro were all related. TKNR was part of Mr. Lin's flipping fund. Lin put the investor's together and purchased the property. It was Lin and his handyman who performed the rehabilitation of the Property. In ¶ 10, Lin states that original settlement demand was $10,000.00. There were no demands made to Defendants after the lawsuit was filed. Affiant had approached Lin about the electrical issues he discovered the wall relating to the installation of the air conditioners. Affiant asked Lin to pay the anticipated costs of repairing the electrical wiring which was approximately $10,000.00.

FURTHER AFFIANT SAYETH NAUGHT.

FRANK MIAO

SUBSCRIBED AND SWORN to before me
this 16 day of April, 2021.

NOTARY PUBLIC in and
for said County and State.

BRINLEY RICHESON
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 07-22-23
Certificate No: 11-5428-1

EXHIBIT “5"

Authentisign ID: F1D83A3F-0D63-4594-9A8D-9BB6184C513D

InvestPro REALTY

SELLER'S REAL PROPERTY DISCLOSURE FORM

In accordance with Nevada Law, a seller of residential real property in Nevada must disclose any and all known conditions and aspects of the property which materially affect the value or use of residential property in an adverse manner *(see NRS 113.130 and 113.140).*

Date August 2nd, 2017

Do you currently occupy or have you ever occupied this property? YES ☐ NO ☒

Property address 2132 HOUSTON DR LASVEGAS NV 89104

Effective October 1, 2011: A purchaser may not waive the requirement to provide this form and a seller may not require a purchaser to waive this form. *(NRS 113.130(3))*

Type of Seller: ☐Bank (financial institution); ☐Asset Management Company; ☐Owner-occupier; ☒Other: Investor

Purpose of Statement: (1) This statement is a disclosure of the condition of the property in compliance with the Seller Real Property Disclosure Act, effective January 1, 1996. (2) This statement is a disclosure of the condition and information concerning the property known by the Seller which materially affects the value of the property. Unless otherwise advised, the Seller does not possess any expertise in construction, architecture, engineering or any other specific area related to the construction or condition of the improvements on the property or the land. Also, unless otherwise advised, the Seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof. This statement is not a warranty of any kind by the Seller or by any Agent representing the Seller in this transaction and is not a substitute for any inspections or warranties the Buyer may wish to obtain. Systems and appliances addressed on this form by the seller are not part of the contractual agreement as to the inclusion of any system or appliance as part of the binding agreement.

Instructions to the Seller: (1) ANSWER ALL QUESTIONS. (2) REPORT KNOWN CONDITIONS AFFECTING THE PROPERTY. (3) ATTACH ADDITIONAL PAGES WITH YOUR SIGNATURE IF ADDITIONAL SPACE IS REQUIRED. (4) COMPLETE THIS FORM YOURSELF. (5) IF SOME ITEMS DO NOT APPLY TO YOUR PROPERTY, CHECK N/A (NOT APPLICABLE). EFFECTIVE JANUARY 1, 1996, FAILURE TO PROVIDE A PURCHASER WITH A SIGNED DISCLOSURE STATEMENT WILL ENABLE THE PURCHASER TO TERMINATE AN OTHERWISE BINDING PURCHASE AGREEMENT AND SEEK OTHER REMEDIES AS PROVIDED BY THE LAW *(see NRS 113.150).*

Systems / Appliances: Are you aware of any problems and/or defects with any of the following:

	YES	NO	N/A
Electrical System	☐	☒	☐
Plumbing	☐	☒	☐
Sewer System & line	☐	☒	☐
Septic tank & leach field	☐	☐	☒
Well & pump	☐	☐	☒
Yard sprinkler system(s)	☐	☐	☒
Fountain(s)	☐	☐	☒
Heating system	☒	☐	☐
Cooling system	☒	☐	☐
Solar heating system	☐	☐	☒
Fireplace & chimney	☐	☐	☒
Wood burning system	☐	☐	☒
Garage door opener.	☐	☐	☒
Water treatment system(s)	☐	☐	☒
owned.. ☐ leased.. ☐			
Water heater	☐	☒	☐
Toilet(s)	☐	☒	☐
Bathtub(s)	☐	☒	☐

	YES	NO	N/A
Shower(s)	☐	☒	☐
Sink(s)	☐	☒	☐
Sauna / hot tub(s)	☐	☐	☒
Built-in microwave	☐	☐	☒
Range / oven / hood-fan	☐	☐	☒
Dishwasher	☐	☒	☐
Garbage disposal	☐	☒	☐
Trash compactor	☐	☐	☒
Central vacuum	☐	☐	☒
Alarm system	☐	☐	☒
owned.. ☐ leased.. ☐			
Smoke detector	☐	☒	☐
Intercom	☐	☐	☒
Data Communication line(s)	☐	☐	☒
Satellite dish(es)	☐	☐	☒
owned.. ☐ leased.. ☐			
Other _____	☐	☐	☐

EXPLANATIONS: Any "Yes" must be fully explained on page 3 of this form.

_____ *Seller(s) Initials*

MZ _____ *Buyer(s) Initials*

Authentisign ID: F1D83A3F-0D63-4594-9A8D-9BB6184C513D

Property conditions, improvements and additional information: ..... YES NO N/A

Are you aware of any of the following?:

1. **Structure:**
   - (a) Previous or current moisture conditions and/or water damage? ..... ☐ ☒
   - (b) Any structural defect? ..... ☐ ☒
   - (c) Any construction, modification, alterations, or repairs made without required state, city or county building permits? ..... ☒ ☒
   - (d) Whether the property is or has been the subject of a claim governed by NRS 40.600 to 40.695 (construction defect claims)? ..... ☐ ☒
   - (If seller answers yes, FURTHER DISCLOSURE IS REQUIRED)
2. **Land / Foundation:**
   - (a) Any of the improvements being located on unstable or expansive soil? ..... ☐ ☒
   - (b) Any foundation sliding, settling, movement, upheaval, or earth stability problems that have occurred on the property? ..... ☐ ☒
   - (c) Any drainage, flooding, water seepage, or high water table? ..... ☐ ☒
   - (d) The property being located in a designated flood plain? ..... ☐ ☒
   - (e) Whether the property is located next to or near any known future development? ..... ☐ ☒
   - (f) Any encroachments, easements, zoning violations or nonconforming uses? ..... ☐ ☒
   - (g) Is the property adjacent to "open range" land? ..... ☐ ☒
   - (If seller answers yes, FURTHER DISCLOSURE IS REQUIRED under NRS 113.065)
3. **Roof:** Any problems with the roof? ..... ☐ ☒
4. **Pool/spa:** Any problems with structure, wall, liner, or equipment..... ☐ ☒
5. **Infestation:** Any history of infestation (termites, carpenter ants, etc.)? ..... ☐ ☐ ☒
6. **Environmental:**
   - (a) Any substances, materials, or products which may be an environmental hazard such as but not limited to, asbestos, radon gas, urea formaldehyde, fuel or chemical storage tanks, contaminated water or soil on the property? ..... ☐ ☒
   - (b) Has property been the site of a crime involving the previous manufacture of Methamphetamine where the substances have not been removed from or remediated on the Property by a certified entity or has not been deemed safe for habitation by the Board of Heath? ..... ☐ ☒
7. **Fungi / Mold:** Any previous or current fungus or mold? ..... ☐ ☒
8. Any features of the property shared in common with adjoining landowners such as walls, fences, road, driveways or other features whose use or responsibility for maintenance may have an effect on the property? ..... ☐ ☒
9. **Common Interest Communities:** Any "common areas" (facilities like pools, tennis courts, walkways or other areas co-owned with others) or a homeowner association which has any authority over the property? ..... ☐ ☒
   - (a) Common Interest Community Declaration and Bylaws available? ..... ☐ ☒
   - (b) Any periodic or recurring association fees? ..... ☐ ☒
   - (c) Any unpaid assessments, fines or liens, and any warnings or notices that may give rise to an assessment, fine or lien? ..... ☐ ☒
   - (d) Any litigation, arbitration, or mediation related to property or common area? ..... ☐ ☒
   - (e) Any assessments associated with the property (excluding property taxes)? ..... ☐ ☒
   - (f) Any construction, modification, alterations, or repairs made without required approval from the appropriate Common Interest Community board or committee? ..... ☐ ☒
10. Any problems with water quality or water supply? ..... ☐ ☒
11. **Any other conditions or aspects of the property which materially affect its value or use in an adverse manner?** ..... ☐ ☒
12. **Lead-Based Paint:** Was the property constructed on or before 12/31/77? ..... ☒ ☐
    (If yes, additional Federal EPA notification and disclosure documents are required)
13. **Water source:** Municipal ☒ Community Well ☐ Domestic Well ☐ Other ☐
    If Community Well: State Engineer Well Permit # _____ Revocable ☐ Permanent ☐ Cancelled ☐
    Use of community and domestic wells may be subject to change. Contact the Nevada Division of Water Resources for more information regarding the future use of this well.
14. **Conservation Easements** such as the SNWA's Water Smart Landscape Program: Is the property a participant?..... ☐ ☒
15. **Solar panels:** Are any installed on the property? ..... ☐ ☒
    If yes, are the solar panels: Owned...☐ Leased...☐ or Financed...☐
16. **Wastewater disposal:** ☒ Municipal Sewer ☐ Septic System ☐ Other ☐
17. This property is subject to a Private Transfer Fee Obligation? ..... ☐ ☒

EXPLANATIONS: Any "Yes" must be fully explained on page 3 of this form.

_____ *Seller(s) Initials* _____ MZ _____ *Buyer(s) Initials*

Authentisign ID: F1D83A3F-0D63-4594-9A8D-9BB6184C513D

EXPLANATIONS: Any "Yes" to questions on pages 1 and 2 must be fully explained here. Attach additional pages if needed.

one of the unit has brand new kitchen cabinet installed
all 3 Units has brand new AC installed within 3 months.
all 3 bathrooms are realone within 2 years.
sprinkler for Landscaping doesn't work, all pipes are broken.
please consider that there are no sprinkler system.
AC units are installed by Licensed contractor, all other work are done by owner's handyman.
owner never reside in the property, and never visited the property.

Seller(s) Initials

MZ
Buyer(s) Initials

EXHIBIT “6"

1 IN THE EIGHTH JUDICIAL DISTRICT COURT

2 CLARK COUNTY, NEVADA

3

4 WLAB INVESTMENT, LLC,)
)
5 Plaintiff,)
)
6 vs.)CASE NO.: A-18-785917-C
)DEPT NO.: 14
7 TKNR INC., a California)
Corporation, and CHI ON WONG)
8 aka CHI KUEN WONG, an)
individual, and KENNY ZHONG)
9 LIN, aka KEN ZHONG LIN aka)
KENNETH ZHONG LIN aka WHONG)
10 K. LIN aka CHING KENNY LIN)
aka ZHONG LIN, an)
11 individual, and LIWE HELEN)
CHEN aka HELEN CHEN, an)
12 individual and YAN QIU)
ZHANG, an individual, and)
13 INVESTPRO LLC dba INVESTPRO)
REALTY, a Nevada Limited)
14 Liability Company, and MAN)
CHAU CHENG, an individual,)
15 and JOYCE A. NICKRANDT, an)
individual, and INVESTPRO)
16 INVESTMENTS LLC, a Nevada)
Limited Liability Company,)
17 and INVESTPRO MANAGER LLC, a)
Nevada Limited Liability)
18 Company, and JOYCE A.)
NICKRANDT, an individual and)
19 Does 1 through 15 and Roe)
Corporation I-XXX,)
20)
Defendants.)
21 _____)

22 Job Number. 697915

23 DEPOSITION OF FRANK MIAO

24

25

DEPOSITION OF FRANK MIAO
PERSON MOST KNOWLEDGABLE FOR WLAB INVESTMENT, LLC

Taken at Litigation Services
on Tuesday, January 12, 2021
at 9:00 a.m.
at 3960 Howard Hughes Parkway, Suite 700
Las Vegas, Nevada 89169

Reported by: Trina K. Sanchez, CCR No. 933, RPR
Job No.: 697915

APPEARANCES:
For the Defendants via videoconference:

MICHAEL B. LEE, ESQ.
MICHAEL B. LEE, P.C.
1820 East Sahara Avenue, Suite 110
Las Vegas, Nevada 89104
(702) 477-7030
mike@mblnv.com

For the Plaintiff:

BENJAMIN B. CHILDS, ESQ.
318 South Maryland Parkway
Las Vegas, Nevada 89101
(702) 251-0000
ben@benchilds.com

Also present via videoconference: Helen Chen

I N D E X

WITNESS:		PAGE
FRANK MIAO		
	Examination by Mr. Michael Lee	7

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1 Entry onto Land and for Inspection
2 of Tangible Things Pursuant
3 to NRCP 34
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Page 7

1 LAS VEGAS, NEVADA, TUESDAY, JANUARY 12, 2021;
2 9:00 A.M.
3 -OOO-
4
5 (In an off-the-record discussion held prior to the
6 commencement of the deposition proceedings, counsel
7 agreed to waive the court reporter requirements
8 under Rule 30(b)(5) of the Nevada Rules of Civil
9 Procedure.)
10
11 Whereupon,
12 FRANK MIAO,
13 having been first duly sworn to testify to the
14 truth, the whole truth and nothing but the truth,
15 was examined and testified as follows:
16
17 EXAMINATION
18 BY MR. LEE:
19 **Q. Good morning, sir. Thank you for**
20 **appearing for your deposition today. You're**
21 **appearing as the 30(b)(6) or the person most**
22 **knowledgable for this deposition; is that correct?**
23 A. Yes.
24 **Q. And you understand what that term means?**
25 A. Yes.

Page 8

1 **Q. I think I saw you going through the**
2 **deposition exhibits. The top of the pile should**
3 **have been the 30(b)(6) notice.**
4 **Do you see that?**
5 A. 30(b)(6)? I don't know what that -- what
6 document?
7 MR. LEE: For the record, Helen Chen, the
8 defendant, has just joined us for the deposition.
9 THE WITNESS: I haven't read that one yet.
10 MR. LEE: Ms. Court Reporter, can you help
11 him?
12 MADAM REPORTER: Yes. Let's go off the
13 record.
14 (A discussion was held of the record.)
15 BY MR. LEE:
16 **Q. We're back on the record. It appears the**
17 **exhibits didn't get printed, but we'll go ahead and**
18 **wait for them to get printed.**
19 **During the interim, I'll just share my**
20 **screen so you can see what the exhibits are; okay?**
21 A. Okay.
22 **Q. Then I'll go over the rules of the**
23 **deposition. You're doing a good job right now. I**
24 **just want to get this PMK notice out of the way;**
25 **okay?**

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1 **Did you have an audible response?**
2 MADAM REPORTER: No.
3 BY MR. LEE:
4 **Q. You need to say "yes" or "no."**
5 **Do you understand?**
6 THE WITNESS: What did he ask?
7 MADAM REPORTER: He's --
8 BY MR. LEE:
9 **Q. "Audible" means out loud.**
10 A. Can you speak a little slowly? Because if
11 you speak too quick, I -- I cannot catch up.
12 **Q. Okay. So I just -- I'll go over the rules**
13 **of the deposition with you after I just do this PMK**
14 **notice; okay?**
15 A. Okay. What's a "PMK" mean?
16 **Q. "PMK" means person most knowledgable.**
17 A. Oh, okay. Okay. Yes.
18 **Q. See right where I highlighted it, person**
19 **most knowledgable?**
20 A. Yeah, yeah, yeah.
21 **Q. Okay. So for the record, what I'm doing**
22 **is showing you what will eventually be proposed**
23 **Exhibit 1 to the deposition, which is the notice of**
24 **deposition of the person most knowledgable for WLAB**
25 **Investments, LLC.**

Page 30

1 now.
2 **Q. You were born in 1963 in Nanjing, China.**
3 A. Yeah.
4 **Q. Did you go to high school there?**
5 A. Yes, in China.
6 **Q. Did you -- what kind of education did you**
7 **have after high school?**
8 A. I got a bachelor degree in chemical
9 engineering in Beijing in Chemical University --
10 Chemical Technology University.
11 Then after that, I come to U.S. to pursue
12 the advance degree, then I got the Ph.D. at Illinois
13 Institute of Technology all in the engineering
14 background.
15 **Q. Now, you got your bachelor's degree in**
16 **Beijing in chemical engineering?**
17 A. Chemical Technology University, I think
18 they call it, right.
19 **Q. Technology.**
20 **What year?**
21 A. 1985. Then I come to U.S. 1986.
22 **Q. Okay. So you went to high school. Is**
23 **that a four-year program or how long is it?**
24 A. Where?
25 **Q. In China --**

Page 31

1 A. In China, it's four-year bachelor degree.
2 **Q. Okay. So you went from high school, then**
3 **you went to this college program in Beijing; is that**
4 **correct?**
5 A. Beijing, yes, yes.
6 **Q. Okay. Then what year did you go to the**
7 **Illinois Institute of Technology?**
8 A. I think it was 1986. 1986 to 19 -- oh,
9 I'm sorry. 1987, January.
10 **Q. What?**
11 A. 1987.
12 **Q. To when?**
13 A. To all the way to the 1990, I guess.
14 **Q. You said this was a Ph.D. program?**
15 A. Yeah, yeah. I think it's only been four
16 years to get my Ph.D. degree without master degree.
17 **Q. So you skipped the master's and just got a**
18 **Ph.D. in three years?**
19 A. Four years. Around four years, yeah. By
20 that time, they said I set a record for Chinese
21 student at that time for fastest --
22 **Q. So between 1985 and 1987, what were you**
23 **doing?**
24 A. I -- first, before I went to get some
25 education for foreign language, study English a

Page 32

1 little bit before come to U.S. Prepare English.
2 When I first come to U.S. in 1986, I went
3 to Ohio University. Then when I found out Ohio
4 University in a small town, so very difficult to get
5 some job employment for students enrolled in the
6 school, so I moved to transfer to IIT, Illinois
7 Institute of Technology. At that time, the
8 professor have some of the Department of Energy
9 program, the grant money, so they are looking for
10 some research assistants, so I went --
11 **Q. What's the name of the college where you**
12 **studied in Ohio?**
13 A. Called Ohio University.
14 **Q. Oh, just Ohio University --**
15 A. Yeah.
16 **Q. -- not, like, you know, any city, like**
17 **Columbus?**
18 A. In Athens, Ohio.
19 **Q. I'm sorry, what city?**
20 A. Athens, just like -- A-N-T-H-E-N-S [sic],
21 Athens.
22 **Q. Anthem?**
23 A. Athens, yeah.
24 **Q. Okay. When you got your Ph.D. from**
25 **Illinois Institute, what was the Ph.D. in?**

Page 33

1 A. Huh?
2 **Q. What was the Ph.D. in?**
3 A. In engineering.
4 **Q. Chemical engineering?**
5 A. Yeah, engineering. Chemical and the
6 mechanical both. It's, like -- also, they said is
7 chemical but mostly is mechanical side.
8 **Q. And what was the course of your study**
9 **work?**
10 A. Oh, study lot of work. Chemistry and also
11 mechanical science, structure. Basically, my
12 background is, like, in building the factory system
13 design, engineering, that kind of thing.
14 **Q. So a large commercial building?**
15 A. Commercial building, factory, like a
16 chemical plant, refinery plant, power plant. Build
17 the power plant. Mostly power plant.
18 So after that, most of my career is power
19 plant.
20 **Q. So after 1990, what did you do?**
21 A. Huh? After the --
22 **Q. Like, in terms of work after 1990.**
23 A. After 1990, I working for the one company
24 called the Gas Research Institute.
25 **Q. Gas Research Institute?**

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A. Yeah. There is the company is sponsored by the American gas company, like the Southwest Gas Company or the Edison or the so called gas company. They all contribute to many to do the research and technology developed at that branch. So I working for them.

Q. I recently reviewed a document related to the Edison group in California.

A. Yeah.

Q. So --

A. Yeah.

Q. -- how long did you work at the --

A. I working there and here in 1995.

Q. What was your job title?

A. I was engineer and -- research engineer and research --

Q. What were you researching?

A. Huh?

Q. What were you researching?

A. I was researching two fields. One is gasification. It's to convert the natural -- convert the coal to the natural gas. So it's a program, you know. Sometimes before they shorten the natural gas, so they think it can work from the coal through the coal gasification to make the gas.

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Q. I'm going to circle back.

When you went to the Illinois Institute of Technology, did you get a degree or a certificate from there?

A. Ph.D. degree.

Q. Okay.

A. Yeah, Ph.D. degree. It's highest engineering degree. And actually, it's a field, the gasification.

Q. So after 1995, what did you do?

A. Then I went to the company called the Westinghouse, which is later the Siemens. The German company called Siemens acquired the Westinghouse Power Generation Group. That was there. I was working -- I ended up working for the Siemens corporation, which is one of the --

Q. How long did you work there for?

A. Huh?

Q. How long did you work there for?

A. I working for there for two years.

Q. In 1997?

A. Yeah. Then I moved -- that is --

Q. Hold on one second.

A. Mm-hmm.

Q. One second.

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What was your job title with Siemens?

A. Siemens engineer.

Q. What were your job duties?

A. Our duties is just design the coal gasification power plants and design the natural gas combined circle power plant.

Q. Then in 1997 -- let me go back.

Why did you leave your position? What was the name of the company you worked for in 1990?

A. Gas Research Institute. Presently they're called -- yeah, Gas Research. Before they call the Institute of Gas Technology. It's also called IGT, but it's Institute of Gas Technology.

Then later, they change the name called Gas Research Institute.

Q. Why did you leave the Gas Research Institute to go work for Siemens?

A. Because I don't want to work in the research academic; right? That is research organization. I want to do the real -- build the real plant, real commercial company, so I went to the company, which is build the power plant, build all the power system.

Q. 1997, what did you do after that?

A. Then I joined the company called the -- original they called it Combustion Engineering, then they later called it ABB, ASEA Brown Boveri, which is a Swiss and Sweden company. It is one of the largest -- at that time, it was the largest power generation company in the world.

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Q. How long did you work there for?

A. I working there until -- later, this ABB been acquired -- the power generation people is acquired by the company -- French company called Alstom, A-L-S-T-O-M.

Then General Electric bought this Alstom. So later, before I left -- it's General Electric. So after that, I working for them until 2004 -- 2004.

Q. So in 1997 to 2004, you started with ABB who got acquired by other companies --

A. Right.

Q. -- until 2004?

A. Yeah, 2004.

Q. What was your position when you started?

A. I was starting as a senior consulting engineer, then later as a technical fellow, then as a project manager and project director.

Q. And what were your job duties?

A. Was supervisor, build the power plant,

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1 commercial power plant; training the licensee in
2 Asia; and mostly doing the competitive bid for the
3 new power plant in U.S. worldwide.
4 **Q. These are gas or coal power plants?**
5 A. Gas. Mostly it's combined cycle power
6 plant.
7 **Q. So you mean gas. Does that mean, like,**
8 **natural gas or is there another type of gas?**
9 A. One is coal gasification gas or natural
10 gas. Sometimes they also use diesel. Build a
11 diesel plant for the -- we call it peaker. It's a
12 simple cycle. Like the Las Vegas or the NV Energy,
13 they have some plant. On the 215, you'll see that
14 small plant. That is a simple cycle peaker. We
15 called it peaker. During the high demand season,
16 they running that kind of plant.
17 **Q. Okay.**
18 A. Yeah.
19 MADAM REPORTER: I'm sorry, Counsel.
20 Are you saying peak, P-E-A-K?
21 THE WITNESS: P-E-A-K, yeah.
22 MADAM REPORTER: Okay. Thanks.
23 THE WITNESS: Yeah, yeah. Because when in
24 the summer the electricity demand is high, so they
25 have running some simple cycle plant, yeah.

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1 BY MR. LEE:
2 **Q. Okay. This is 2004. What did you do**
3 **after that?**
4 A. Then I come to California. I come to
5 California working with a company called Parsons
6 Engineering.
7 **Q. Parson, P-A-R-S-O-N?**
8 A. Yeah, P-A-R-S-O-N. Which at that time is
9 world's largest engineering company in West Coast
10 for the power generation and the refinery and the
11 chemical.
12 **Q. How long did you work there for?**
13 A. Until the 2008, I think. 2010. We do all
14 kinds. We design the power plant and we do the
15 refinery engineering. We do chemical plant
16 engineering. We do mining company engineering,
17 design.
18 **Q. So what was your job title?**
19 A. I was the supervisor -- senior supervisor.
20 **Q. Did you provide (inaudible) --**
21 A. Huh?
22 **Q. You were supervising?**
23 A. Yeah. Supervise a whole bunch of
24 engineering doing this kind of design and also
25 project management. Project manager, project

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1 director kind of, yeah.
2 **Q. Okay. Then 2008, the recession, what did**
3 **you do after that?**
4 A. After that, I just -- I don't want to work
5 for other people. I just working for myself.
6 **Q. Okay. So what does that mean?**
7 A. That means WLAB. We bought a lot of land
8 and a rental house, so we just collected rent.
9 **Q. 2008 to the present, that's when you**
10 **formed and --**
11 A. Yeah, yeah, yeah.
12 **Q. -- still are involved with WLAB; right?**
13 A. Yeah, yeah, yeah, yeah. I forgot exactly
14 when we set up this WLAB lab, but we starting since
15 2008, 2010, that range. Not I -- exactly I don't
16 know when I start working for company.
17 The reason why the -- I stopped working at
18 company is the company want to assign me to the
19 Saudi for the supervisor design the one refinery in
20 Saudi. Then I found out, they said in the middle of
21 nowhere in the desert.
22 So at that time, my kids were too small in
23 the education, so I don't want to go there. So I
24 tell them I just rather working for myself.
25 **Q. You don't want to go to Saudi Arabia, so**

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1 **you decided to start your own business?**
2 A. Yeah, yeah, yeah.
3 **Q. Okay. Then you're already in California,**
4 **so you just stayed in California; correct?**
5 A. Right, right, yeah.
6 **Q. Okay. WLAB, what does WLAB stand for?**
7 A. I forgot why it's called the name of WLAB,
8 you know. To be honest, maybe my wife choose the
9 name and -- yeah. I don't know why we call that
10 name.
11 **Q. So your wife would be a little bit more**
12 **knowledgable related to some of the formation of**
13 **WLAB?**
14 A. I think so. We both -- we have
15 50/50 percent share for that LLC right now, yeah.
16 **Q. Okay. As part of the PMK notice, it does**
17 **specify Topic 13, which is formation of Plaintiff.**
18 **This would be something else that your wife would be**
19 **more knowledgable about?**
20 A. Yeah. Maybe for that company, yeah.
21 MADAM REPORTER: Sorry. You broke up
22 there.
23 BY MR. LEE:
24 **Q. You and your wife are the only partners or**
25 **members of WLAB; is that right?**

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A. At this moment, yes.
Q. Okay. I believe that you presented an operating agreement related to eventually doing a 1031 exchange for the property.
Do you recall if that's the same operating agreement that you have in place today?
A. Yes, yes.
Q. Have you ever amended your operating agreement?
A. I don't know. My wife usually doing that kind of hard work, you know. I'm not sure.
Q. Is your wife a little bit better -- what does your wife do?
A. My wife, well, she's also engineering background. Actually, we met in Chicago. Then she -- she's an engineering Ph.D. too, but she's more focused on the biotech side. So later, she just -- when we purchase this property, she's the CEO for the company in San Diego.
Q. I'm sorry. You said you purchased a company. What company did you purchase?
A. No. We purchased the property, the -- the -- currently the 2132 Houston Drive. At that time, she's the CEO of the one biotech company in San Diego.

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Q. What's the name of the biotech company?
A. I don't know. You got to -- in Chinese is MabPlex, MabPlex, MabPlex, yeah.
MADAM REPORTER: What is it?
THE WITNESS: It's MabPlex, M-I -- I don't know how to spell that. Her company is in China company, and one branch is subsidiary in San Diego. She own -- the CEO for that company.
BY MR. LEE:
Q. Okay. So in 2017 or so, 2018, she was the CEO of this biotech company in San Diego; correct?
A. Right, right, yeah.
Q. And at the same time, she was also a managing member of WLAB; is that correct?
A. Right, right. She's the managing member of this WLAB, but she don't do the daily operation. I'm the mostly person doing the daily operation.
Q. Okay. But she's the one who handled, like, the underlying transactional documents for WLAB such as your operating agreement; is that fair?
A. I think so. Maybe, yeah.
Q. Did you -- were you also involved in the drafting of the operating agreement?
A. Yes, yes. I -- I cannot remember very clearly. Actually, we went to the one accounting

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firm in Monterey Park, Los Angeles, and working with this accounting firm to set up the company. Then I get the seal, all the documents together. Then accounting firm continued to the accountants.
Every year we file the tax returns through the company firm. I think they called the Southern California Accounting something company.
Q. A California accounting company?
A. Yeah, California company. It's actually we set up through that company.
Q. What's the name of the company?
A. Southern California Accounting.
Q. Oh, okay.
A. Yeah. If you go to the Chinese newspaper, you will see that advertise, yeah, from the Chinese newspaper, local newspaper.
Q. So I went through your work history. You know, like, 1990 to 2008, you were working in a, you know -- capacity as an engineer supervisor. Did you have to review many contracts during that time?
A. Yes, yes. Yeah.
Q. Okay. And then you understood the importance of reading contracts; is that fair?
A. Yes, yes.
Q. How many of these contracts led to the

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development or building of buildings?
A. I'll be very honest with you, I like building, building the house. My family, all my kids, my wife live in the house I build. So since the one we have ability to buy the house, instead of buying or leasing a house, we always build the house, so we --
Q. So this is the Sewanee --
A. Yeah. I build that house too. That house I build. That one in Connecticut, we build the house too. So we go through all this document.
And the Sewanee name, the house, I bought all the house that he tear down immediately, then I build that house.
Q. So Sewanee is a house that you built and constructed.
A. Yeah.
Q. Did you act as the general contractor?
A. Yes, yes.
Q. You acted as the project manager?
A. Yes, yeah.
Q. Did you hire contractors to help you construct it?
A. Yeah. We hire -- we negotiate the -- we doing the -- first we solicited the subcontract and

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1 then we evaluate the subcontractor code and also the
2 qualification and then submit to the subcontract
3 doing the work, then doing the quality control.
4 **Q. Quality control.**
5 **During that process, this was -- how many**
6 **homes have you constructed?**
7 A. Huh?
8 **Q. How many homes have you constructed?**
9 MADAM REPORTER: You keep breaking up,
10 Counsel.
11 THE WITNESS: I cannot hear you.
12 BY MR. LEE:
13 **Q. How many homes have you constructed?**
14 A. Oh, boy. Probably three or four. Yes,
15 because -- yeah, because some houses we completed
16 from starting all the way together I do my own. But
17 at the beginning, we build a house. It's through
18 the Nacka ne ma (phonetic) or some other company;
19 right? So we sign the contract after the company to
20 build the house.
21 Just like in Las Vegas from the home
22 builder, you go to their site -- community, you sign
23 the contract, you participate in the building
24 together, then they build it for you.
25 **Q. Okay. So let's do this: With the Quiet**

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1 **Cove property in Las Vegas, is it a residential**
2 **property?**
3 A. Yes, yeah.
4 **Q. Okay. Did you improve upon it or it's as**
5 **is?**
6 A. I bought this one. Actually, it's from
7 auction. What happened -- done the remodeling. I
8 bought this one from the homeowners association
9 auction.
10 **Q. When did you buy this?**
11 A. October 2019.
12 **Q. Recently?**
13 A. Yeah.
14 **Q. It was a foreclosure; correct?**
15 A. Yes, yeah.
16 **Q. Did it have damage or it was just a**
17 **foreclosure?**
18 A. Damage. It's -- the second floor, one
19 room is burned.
20 **Q. You were living in a burned home?**
21 A. The second floor.
22 **Q. Okay. So you're just living in the --**
23 A. First floor.
24 **Q. The habitable places is where you're**
25 **residing?**

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1 A. Right, right, right. Right now I put in
2 the second floor. I clean the second floor, all the
3 burned stuff, and started doing the remodeling.
4 **Q. You're doing that yourself?**
5 A. No. It's also through some people.
6 **Q. Who are you contracting?**
7 A. Right now it's -- I interview contractor,
8 yeah. I haven't done the -- complete the remodeling
9 yet because we -- last year we have some issue and
10 the -- for the company homeowners association hired
11 the attorney to do foreclosure. Then we have some
12 issues. So we waiting for the -- until that one
13 settle down, then we can do...
14 **Q. So you bought this by an HOA foreclosure**
15 **or a bank foreclosure?**
16 A. HOA foreclosure.
17 **Q. Okay. So it was, like, a superpriority**
18 **lien? Do you understand what that means?**
19 A. I don't know. I tell you what's happened
20 we found out last year. It's -- actually, HOA
21 only -- that house own -- actually, previous owner
22 owe actually about $6,000. Actually put in auction
23 for that property. That I pay 85,000 cash for that
24 property.
25 Then we found out this lien about $70,000.

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1 That legal -- the County and the City are going to
2 foreclose on the house again, so we are trying to
3 use that, actually gather the $85,000 so they have
4 access to proceeding. So want to use that access of
5 proceedings to pay off for the County and the City
6 name. That's --
7 **Q. Do you have an attorney that's**
8 **representing you for this action right now?**
9 A. Yeah, yeah. It's Mr. Lee -- Ben.
10 **Q. Ben Childs. I'm Mr. Lee.**
11 A. Yeah, yeah.
12 **Q. That's your attorney; right?**
13 A. Yeah.
14 **Q. Okay. It sounds like basically the public**
15 **works utility liens is something that he's trying to**
16 **help you resolve; is that fair?**
17 A. Yes, yeah.
18 **Q. Mr. Childs is shaking his head no.**
19 A. Huh?
20 **Q. Maybe you guys can confer about that**
21 **later.**
22 MR. CHILDS: It's tax liens.
23 THE WITNESS: Tax lien.
24 BY MR. LEE:
25 **Q. A tax lien. Thank you.**

heating -- or heater is not light up, so I call the AC company -- or they call the AC company then to fix the other one. They give me the receipt. Then I just keep the receipt, then I pay them.

Q. Do you have a property management company that manages the property for you or do you do it?

A. No. That one, no. No property manager. Just I do it.

Q. And then for the handyman work or the maintenance of it, how do you resolve that?

A. I just hire the -- from the -- the yellow page or the Google, found the local people and call them, ask them to go there to fix things.

Q. Are they -- like, what kind of people? Like, handyman?

A. No. Usually it's a company. Licensed contractor, not a handyman. I never hire handyman. Mostly it's go to the yellow pages, found the plumber. Go to the local plumber, licensed plumber to do that. Actually, I say call the licensed -- actually, I say to do that.

Q. Well, like, in 2009, it's fair to say that you understood the difference between a licensed contractor and a handyman?

A. Yes, yes.

Q. How many times do you think you have to hire a contractor to address issues with the Bundy property on a yearly basis?

A. Not very many. Maybe one year one time. I currently have a tenant living there for more than three years. They only call me one time.

Q. And what was that issue?

A. They said it's a -- water heater is not light up, so he text me and said that the -- he needed me to come over and take a look and fix that. I said, Go ahead and fix that and send me the bill, and we just deduct from the rent.

Q. For the water heater, did you hire a plumber or did you just hire, like, a company to give you a new water heater and install --

A. Plumber, plumber. In California, usually you hire the plumber. They sell you the -- they go to replace the water heater.

Q. Do you have an understanding that a water heater requires permit work for replacement?

A. I don't think so. Water heater don't need a permit. In California, no, no permit.

(Two speakers at once.)

Q. Okay. Clark County -- it should be subject to a permit. Would you insist on a

contractor showing you a permit?

A. In California, that one, I don't think so. They don't apply the permit. Because this is -- since they need to do immediately, how you get a permit? You know, the tenant said today, I don't have hot water. I need to replace. So I call the plumper go there to the place. How you get a tenant the permit even in the weekend? No, I don't think so.

Q. So if you hire, like, a contractor, you understand that they'll take care of any permitting issues that there will be?

A. Depends. Sometimes with the contractor need me to work with them to get the permit. They cannot directly by themself. But my understanding for the water heater in California, no permit is required.

Q. Well, if a permit was required, would you expect that the contractor will take care of that for you?

A. Yes, but usually I know that sometimes the permit -- I need to apply for permit, they need my information from contractor. Contractor need my information, and my -- some documents that they can apply the permit. I gave them my authority.

Q. After the work is performed, do you ever ask the contractor to show you the permits they obtained?

A. Yes. Sometimes I need. I ask for it before.

Q. Does that also mean sometimes you don't ask for one?

A. Some -- in California, that house, I just said -- you asked me in California, the house, I didn't -- I don't think I asked them to permit for the -- for water heater replacement.

Q. So just in general, not just for water heaters, but if a contractor does work for you, are there times where you don't ask to see any related permits?

A. To my knowledge, I don't think so. I probably doing that. If they required a permit, I will ask them to show me permit and also ask them to show me the inspection and the inspection result. Because that is your duty, you know. You pay the contractor to do the work. Then when they performed the work, you need to gather the certain party to inspect, make sure they're doing it safely and meet law requirement; right?

Q. Okay. So when you asked, you know, for

someone to do the work, you want -- you would usually follow up and ask to see the permit and inspection?

A. Yes, I will do that.

Q. Okay. So after Bundy, what else did you guys buy?

A. We buy a lot of property in California.

Q. In general, how many properties do you own?

A. A lot. More than ten. But I cannot count exactly right now.

Q. More than ten in California or in total?

A. In California.

Q. So we know you own eight or nine here in Vegas and that you own more than ten in California; right?

A. Right, right, right.

Q. And then the properties that WLAB owns, are there separate properties that you and Marie own that aren't part of WLAB?

A. Yes, yes. We -- we thinking in the -- sometimes they use my wife name because she's get a W-2. She can get a loan, so -- but some we change the title. I went to the County recording office and change the title because time to move to the

WLAB now. Some haven't --

Q. How many properties do you and Marie own that are outside of what WLAB owns?

A. I don't -- I don't know. Usually when my wife file the tax return, they think it's mostly WLAB for rental property.

Q. So this is an area that Marie would know better than you would?

A. I think so. She's the person involved in more that.

Q. In general with the properties that you purchased, walk me through the process of how you go through it. Like, do you find it on Zillow? Do you find it on some type of listing agreement? How does this work?

A. In general, it's I found the property from the Redfin or Zillow; right? Then I contact the listing agent, then I make the listing agent appointment with the listing agent, then go to the property, take a look at the property, do some inspection, then I recording all that by myself and say what's the -- and that property.

Then after that, I make the offer to the -- ask my wife make the offer, then sign the purchase agreement after negotiation the price.

Q. So in terms of the inspection, like, in general, have you ever used a professional inspection company to do those for you?

A. I did some. One or two. Not much. Because we did some work, buy some property in Yuca Valley. I think I hired an inspector to do that. Then later I found out, you know, what later inspector report is not much different than what I found. So later, we just didn't hire the professional inspector doing this work.

Q. Can you spell Yucca Valley? Is that Y-U-C-C-A?

A. Yeah, Y-U-C-C-A. Yeah.

Q. So you've only hired a professional inspector once or twice. Do you recall which years that would have been when you did that?

A. 2014, something like that. It's -- yeah, early 2014, 2015. Let me see.

Q. Have you ever hired a professional inspection company in Clark County, Nevada?

A. No. That's -- like I said, in the Nevada, all the property is multi-family rental property, so -- multi-family rental property usually don't need professional inspector to do that.

Q. Do you know if there's professional

inspectors that will inspect multi-tenant residential properties that have six units or less?

A. I -- I think some of the advertisement they can do that, but I contact the -- they tried to log money, but also we found out that you don't need to do that. According to -- I talk to the other landlord, them said it's a -- you know, if you have lot of unit in that apartment, you cannot do the inspection.

Then also the law is -- what they said for the multi-family rental property, the seller must provide a good, safe, and healthy environment for tenant. So that is a burden is on the seller to make sure that everything is safe.

The tenant is not going to inspect -- hire an inspector to do the inspection before they rented the building or the room; right? Then it's also --

Q. First of all, what is the law that you're referencing in your discussion?

A. This is -- even you take a look at the -- here on this one, what's the deed of permit inspection, is on the tenant and the landlord they said this way. Yeah, they said you -- you have to provide in the tenant. You have to provide healthy, well-being facility for the tenant.

1 of things report that we don't need to go to the
2 inside the building. It's wall cracking. It's
3 outside. You can see.
4 **Q. Okay. So it's open and obvious for them?**
5 A. Yeah. You can see always outside.
6 **Q. So is there any information that you want**
7 **to provide that I haven't asked you about?**
8 A. No.
9 **Q. No? Okay.**
10 **Would you like to revise or supplement any**
11 **of your prior answers?**
12 A. Yes. I need to read this description,
13 the -- what's it called?
14 MR. CHILDS: Transcript.
15 THE WITNESS: Transcript, yeah.
16 BY MR. LEE:
17 **Q. Okay. So I presume you guys are going to**
18 **buy a copy of the transcript. You'll need to let**
19 **the court reporter know. If you are, they'll mail**
20 **you a copy. If not, you're going to have to go to**
21 **the court reporter's office to review it; okay?**
22 A. Yeah. We just buy one.
23 **Q. Okay. And then in terms of the areas that**
24 **we covered that was based on your experience or your**
25 **speculation, are you planning on offering those**

1 **opinions at the time of trial?**
2 A. Yes, yes.
3 **Q. Okay.**
4 MR. LEE: I don't have any further
5 questions, so we can go off record and -- or
6 actually, I pass the witness. How about that?
7 MR. CHILDS: No questions.
8 THE WITNESS: No questions.
9 MR. LEE: Okay. Then I'll release you
10 subject to any disclosure of any additional
11 documents that we haven't received at this time, but
12 I thank you for your time today; okay?
13 THE WITNESS: Thank you.
14 MADAM REPORTER: Counsel, would you like a
15 copy of the transcript?
16 MR. CHILDS: Yeah, I think --
17 THE WITNESS: Yeah, yeah.
18 MADAM REPORTER: Do you want electronic?
19 MR. CHILDS: Sure.
20 MR. LEE: I only want an e-copy with
21 exhibits.
22 MADAM REPORTER: Okay.
23 (The deposition concluded at 5:26 p.m.)
24
25

1 CERTIFICATE OF WITNESS
2 PAGE LINE CHANGE REASON
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16 * * * * *
17
18 I, FRANK MIAO, witness herein, do hereby
19 certify and declare under the penalty of perjury the
20 within and foregoing transcription to be my
21 deposition in said action; that I have read,
22 corrected and do hereby affix my signature to said
23 deposition.
24 _____ _____
FRANK MIAO
25 Witness Date

1 REPORTER'S CERTIFICATE
2 STATE OF NEVADA)
) ss
3 COUNTY OF CLARK)
4 I, Trina K. Sanchez, a duly certified
court reporter licensed in and for the State of
5 Nevada, do hereby certify:
6 That I reported the taking of the
deposition of the witness, FRANK MIAO, at the time
7 and place aforesaid;
8 That prior to being examined, the witness
was by me duly sworn to testify to the truth, the
9 whole truth, and nothing but the truth;
10 That I thereafter transcribed my shorthand
notes into typewriting and that the typewritten
11 transcript of said deposition is a complete, true
and accurate record of testimony provided by the
12 witness at said time to the best of my ability.
13 I further certify (1) that I am not a
relative, employee or independent contractor of
14 counsel or of any of the parties; nor a relative,
employee or independent contractor of the parties
15 involved in said action; nor a person financially
interested in the action; nor do I have any other
16 relationship with any of the parties or with counsel
of any of the parties involved in the action that
17 may reasonably cause my impartiality to be
questioned; and (2) that transcript review pursuant
18 to NRCP 30(e) was requested.
19 IN WITNESS WHEREOF, I have hereunto set my
hand in the County of Clark, State of Nevada, this
20 23rd day of January, 2021. Trina K. Sanchez
21
22 _____
TRINA K. SANCHEZ, RPR, CCR NO. 933
23
24
25

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16 attorneys, and their HIPAA Business Associates and Subcontractors will
17 make every reasonable effort to protect and secure patient health
18 information, and to comply with applicable Privacy Law mandates,
19 including but not limited to restrictions on access, storage, use, and
20 disclosure (sharing) of transcripts and transcript exhibits, and
21 applying "minimum necessary" standards where appropriate. It is
22 recommended that your office review its policies regarding sharing of
23 transcripts and exhibits - including access, storage, use, and
24 disclosure - for compliance with Privacy Laws.
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EXHIBIT “7"

EXHIBIT “8"

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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, vs. TKNR INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual, and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKRANDT, an individual and Does 1 through 15 and Roe Corporation I - XXX, Defendants.	CASE NO.: A-18-785917-C DEPT. NO.: XIV ***HEARING REQUESTED*** **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** Date of Hearing: Time of Hearing:

Defendants TKNR INC. ("TKNR"), CHI ON WONG ("WONG"), KENNY ZHONG LIN ("LIN"), LIWE HELEN CHEN ("CHEN"), YAN QIU ZHANG ("ZHANG"), INVESTPRO LLC ("INVESTPRO"), MAN CHAU CHENG ("CHENG"), JOYCE A. NICKRANDT ("NICKRANDT"), INVESTPRO INVESTMENTS, LLC ("Investments"), and INVESTPRO MANAGER LLC (hereinafter collectively referred to as the "Defendants"), by and through their counsel of record, MICHAEL B. LEE, P.C., hereby files this Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment ("Motion"). This Motion is made on the following

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Memorandum of Points and Authorities, any affidavits, declarations or exhibits attached hereto, and any oral arguments accepted at the time of the hearing of this matter. Plaintiff W L A B INVESTMENT, LLC is hereinafter referred to as "Plaintiff" or "WLAB".

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Overview

Summary Judgment is appropriate as a matter of law. The overwhelming case law in Nevada applies the doctrine of caveat emptor on buyers of real property. Notably, the Property was 63 years old at the time of purchase and being used as a rental property. Nevertheless, Plaintiff waived her inspections twice as it relates to the Property, defined below, as she cancelled her original purchase agreement and entered into a new one. Despite the clear statements that she needed to get an inspection done, and clear disclosures related to the conditions of the Property, Plaintiff still waived her inspection and forged ahead with the purchase. The entire crux of Plaintiff's action is premised that that there was alleged work done without permits, but TKNR disclosed that it the Seller's Disclosures. Additionally, permit work is publicly available on the City of Las Vegas' website, which illustrates that Plaintiff should have known about this issue at the time of purchase, absolving Defendants of any liability.

Moreover, alleged conditions identified by Plaintiff's alleged expert were all open and obvious, and would have been uncovered by an inspection. Plaintiff's alleged expert never did any destructive testing, so an inspector would have had the same opportunity to observe everything that he did. Importantly, Plaintiff is a sophisticated commercial buyer who has purchased and renovated several similar properties, so it has a higher burden to demonstrate why it waived inspections. As Defendants disclosed all conditions known to them at the time of the sale, Nevada law does not permit this action to continue. This justifies Summary Judgment on all of Plaintiff's claims, including the frivolous claims for RICO, fraudulent conveyance, and abuse of process.

Finally, sanctions are also justified against Plaintiff. Astonishingly, Plaintiff is claiming $16.25 Million in damages related to the purchase of the Property (original purchase price -

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$200,000). Incredibly, the original demand by Plaintiff for settlement was $10,000. Regardless of whether Plaintiff or Plaintiff's counsel, who have charged Plaintiff approximately $64,000 for this matter so far, are responsible for the violation of Rule 11 in prosecuting this frivolous claim, Rule 11 permits sanctions against both, which should include an award of attorneys' fees and costs to Defendants.

B. Statement of Facts

1. *First Residential Purchase Agreement and Waiver of Inspections, Contractual Broker Limitations*

The Property (defining as 2132 Houston Drive, Las Vegas, NV 89104) was originally constructed in 1954. MLS Listing attached as **Exhibit A**. On or about August 11, 2017, Marie Zhu ("Zhu"), the original purchaser, executed a residential purchase agreement ("RPA") for the Property. Residential Purchase Agreement attached as **Exhibit B** (Plaintiff's Disclosure) 26 of 166. At all times relevant, Ms. Zhu and Frank Miao ("Miao"), the managing member of Plaintiff, were sophisticated buyers related to "property management, property acquisition, and property maintenance." ROG Response (excerpt) at 3:3-4 attached as **Exhibit N.** The purchase price for the property was $200,000. *Id.* Through the RPA, Ms. Zhu waived her due diligence, although she had a right to conduct inspections:

> During such Period, Buyer shall have the right to conduct, non-invasive/non-destructive inspections of all structural, roofing, mechanical, electrical, plumbing, heating/air conditioning, water/well/septic, pool/spa, survey, square footage, and any other property or systems, through licensed and bonded contractors or other qualified professionals.

Id. at 28 of 166 at 7(A) lines 36-39.

Ms. Zhu did not cancel the contract related to any issues with the Property. *Id.* Under Paragraph 7(C) of the RPA, Ms. Zhu waived the Due Diligence condition. *Id.* Under Paragraph 7(D) of the RPA, it provided:

> *It is strongly recommended that Buyer retain licensed Nevada professionals to conduct inspections*. If any inspection is not completed and requested repairs are not delivered to Seller within the Due Diligence Period, Buyer is deemed to have waived the right to that inspection and Seller's liability for the cost of all

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> repairs that inspection would have reasonably identified had it been conducted, except as otherwise provided by law.

Id. Ms. Zhu waived any liability of Defendants for the cost of all repairs that inspection would have reasonably identified had it been conducted. *Id.* Ms. Zhu also waived the energy audit, pest inspection, roof inspection, septic lid removal inspection, mechanical inspection, soil inspection, and structural inspection. *Id.*

Under Paragraph 7(F), it was Ms. Zhu's responsibility to inspect the Property sufficiently as to satisfy her use. *Id.* Additionally, Wong, Lin, Chen, Zhang, Cheng, and Nickrandt (collectively, "Brokers" or "Broker Defendants") had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party." *Id.*

On August 2, 2017, TKNR submitted its Seller Disclosures timely indicating all known conditions of the Subject Property. Plaintiff's Disclosure Page 36 of 166 attached as **Exhibit C**. In fact, TKNR disclosed that "3 units has (sic) brand new AC installed within 3 months," and further that the "owner never resided in the property and never visited the property." *Id.* at Page 38. Plaintiff was also aware that the minor renovations, such as painting, was conducted by the Seller's "handyman" as disclosed in the Seller's Disclosures. *Id.* Seller also disclosed that it had done construction, modification, alterations, or repairs without permits. *Id.* at 37. Despite these disclosures, Plaintiff chose not to inspect the Subject Property, request additional information and/or conduct any reasonable inquires. *Id.*

2. *Second Residential Purchase Agreement and Waiver of Inspections, Contractual Broker Limitations*

On or before December 5, 2017, Ms. Zhu had issues related to the financing for the Property because of an appraisal. Chen-Ms. Zhu email attached as **Exhibit D**. As such, Ms. Chen confirmed that Ms. Zhu would do a new purchase agreement, and would agree to pay the difference in an appraisal with a lower value than the purchase price, and waive inspections:

> Please note that seller agree the rest of terms and request to add the below term on the contract:
> "Buyer agree to pay the difference in cash if appraisal come in

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> lower than purchase price, not to exceed purchase price of $200k"
> I just send you the docs, please review and sign if you are agree.
> Thank you!
> **(Per buyer's request will waive licensed home inspector to do the home inspection)**

Id. (emphasis added).

On the same day, Ms. Zhu and TKNR agreed to Addendum No. 1 to cancel the RPA dated August 11, 2017, Addendum No. 1 attached as **Exhibit E**, and entered into a new Residential Purchase Agreement dated September 5, 2017 ("2nd RPA"). 2nd RPA attached as **Exhibit F**. As before, the overall purchase price for the Property was $200,000, but Ms. Zhu changed the contingency for the loan to $150,000 with earnest money deposit of $500 and a balance of $49,500 owed at the close of escrow ("COE" or "Closing"). *Id*. at DEF4000355. The COE was set for September 22, 2017. *Id*. at DEF4000357 at ¶ 5C.

Notably, although Ms. Zhu had not initialed the "Failure to Cancel or Resolve Objections" provision in the RPA, Ex. B. at Page 29 at ¶ 7(c), she initialed the corresponding provision in the 2nd RPA. Ex. F at DEF4000358 at ¶ 7(c). This was consistent with Ms. Zhu's instructions to Ms. Chen. Ex. D. This is the second time that Ms. Zhu waived inspections for the Property despite the language in the 2nd RPA that strongly advised to get an inspection done.

As noted, Ms. Zhu waived any inspections related to the purchase of the Property in the 2nd RPA. *Id*. at DEF4000357 at ¶ 7. Although Ms. Zhu had actual knowledge of the Seller's Disclosures, Ex. C, from August 11, 2017, and the Parties agreed to extend the COE to January 5, 2018, Ex. F at Addendum 1 at DEF4000365, Ms. Zhu still never did any inspections. Instead, she put down an additional $60,000 as a non-refundable deposit to the TNKR. *Id*. Moreover, she also agreed to pay rent in the amount of $650 per month for one of the units, and to also pay the property manager $800 for the tenant placement fee. *Id*. Through Addendum 2 to the 2nd RPA, Ms. Zhu later changed the purchaser to Plaintiff. *Id*. at DEF4000366.

3. *No Reliance on Broker Agents*

As to the Brokers, Ms. Zhu agreed that she was not relying upon any representations made by Brokers or Broker's agent. *Id.* at DEF4000361 ¶ 22. Ms. Zhu agreed to purchase the Property AS-IS, WHERE-IS, without any representations or warranties. *Id.* Ms. Zhu agreed to

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satisfy herself, as to the condition of the Property, prior to the close of escrow. *Id.* Ms. Zhu waived all claims against Brokers or their agents for (a) defects in the Property . . . (h) factors related to Ms. Zhu's failure to conduct walk-throughs or inspections. *Id.* Ms. Zhu assumed full responsibility and agreed to conduct such tests, walk-throughs, inspections and research, as she deemed necessary. *Id.* In any event, Broker's liability was limited, under any and all circumstances, to the amount of that Broker's commission/fee received in the transaction. *Id.*

4. *Inspection Would Have Revealed Alleged Conditions*

On November 17, 2020, Defendants' expert, Neil D. Opfer, an Associate Professor of Construction Management at UNLV and overqualified expert, conducted an inspection of the Property. Opfer Report attached as **Exhibit G**. At that time, while he only had interior access to one of the three units due to the failure of Plaintiff to accommodate the request for the inspection, he did a visual inspection of all the areas specified in Plaintiff's expert's report. *Id*. Moreover, he also found pictures of the Property from 2017 that depicted the condition of the Property prior to August 11, 2017. *Id*. at DEF5000368. While Professor Opfer illustrated the dubious findings by Plaintiff's expert with citations showing the actual misstatements of the building code requirements as it relates to permits, he noted that TNKR did disclose that it did the work without permits through its disclosures. *Id*. at DEF5000371.

As to the alleged issues, Professor Opfer noted that the alleged conditions identified by Plaintiff's alleged expert were open and obvious:

> [n]ote that the Plaintiff could have hired an inspector or contractor to evaluate this real-estate purchase beforehand but did not. Items complained about in the Sani Report were open and obvious at the roof area, attic area, and on the exterior and interior areas of the Property.

Ex. G at DEF5000372.

Professor Opfer also noted that Plaintiff's expert did not do any destructive testing, so the same alleged conditions that the alleged expert noted, would have been made by an inspector at the time of the purchase. *Id*. at DEF5000372-373. Similarly, he later noted:

> it is the fault of the Plaintiffs for not conducting requisite inspections of the Property prior to its purchase. Since this issue is apparently open and obvious as per the Sani Report, it would have

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been open and obvious as well during a pre-purchase inspection.

Id. at DEF5000380. Moreover, he also noted that Plaintiff's alleged expert did "not recognize prior conditions in existence before any work took place by the Defendants." *Id*. at DEF5000376.

As to the open and obvious nature of the alleged issues, Professor Opfer noted the following:

1. the photographs from 2017 showed extensive cracking to the stucco and slab to the Property prior to any work by Defendants and/or the licensed contractor it hired to install the HVAC. *Id*.

2. the alleged attic issues could have been inspected at the time of the purchase. *Id*. at DEF5000378

3. "any deficient electrical work related to this 220-volt service situation could have been readily ascertained by an inspection at the time of purchase by the Plaintiff". *Id*. at DEF5000379

4. the alleged HVAC issues were open and obvious. *Id*. at DEF5000381

5. "the conditions complained about as to venting and ducting were present at the Property prior to Defendants owning the Property". *Id*. at DEF5000388,

6. Plaintiff could have conducted an online search related to the permits or lack of permits for the Property. *Id*. at DEF5000389.

7. The basis of the Sani Estimate is nonsensical in the first place and there is nothing seen from this Sani Report that was not present at the time of sale of the Triplex Property. There were cracks in the stucco system and concrete slab system existing in 2017. Roof venting/duct venting had not been changed by Defendants and was existing in 2017 and could have been inspected by Plaintiff. *Id*. at DEF5000391.

8. Any deficiencies with this electrical installation were open, obvious and could have been inspected prior to purchase as with all other items with this Triplex Property. Any cracks such as wall or floor cracks subsequent to the purchase would obviously be new but again this occurs even on new homes across the Las Vegas Valley and elsewhere. *Id*. at DEF5000392.

Professor Opfer also noted that it was well known at the time of the purchase that the Property was a 63 year old rental property that was subject to potential renter abuse:

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> Rental properties experience more-severe-service requirements due to many factors often including a lack of knowledge in order to care for a Property on the part of tenants along with often an uncaring attitude as well.

Id. at DEF5000379.

C. Statement of Procedure

On November 23, 2020, Plaintiff filed its second amended complaint ("SAC"). In large part, the SAC completely failed to acknowledge the waivers by Ms. Zhu related to the inspection of the Property and/or the open and obvious nature of the alleged defects in the then-63 year old Property at the time of purchase. That said, the SAC alleges fifteen causes of action: (1) Recovery Under NRS Chapter 113 [Defendants TKNR, Wong, and Investpro Manager LLC]; (2) Constructive Fraud [Defendants Investpro, Nickrandt, and Chen]; (3) Common Law Fraud [Defendants Investpro, Investpro Manager LLC , TKNR, Wong and Lin]; (4) Fraudulent Inducement [Defendants TKNR, Investpro Manager LLC , Wong, Investpro and Lin]; (5) Fraudulent Concealment [Defendants TKNR, Wong, Investpro, Investpro Manager LLC, and Lin]; (6) Breach Of Fiduciary Duty [Defendants Investpro and Nickrandt and Chen]; (7) RICO [Defendants Lin, Cheng, Investpro Manager LLC and Investpro Investments I LLC]; (8) Damages Under NRS 645.257(1) [Defendant Chen, Lin, Investpro and Nickrandt]; (9) Failure To Supervise, Inadequate training and Education [Defendant Investpro, Zhang, and Nickrandt]; (10) Fraudulent Conveyance [TKNR]; (11) Fraudulent Conveyance [Investpro Investments I LLC]; (12) Civil Conspiracy [As To Defendant Man Chau Cheng, Lin, Investpro, Wong, TKNR, Investpro Investments I LLC and Investpro Manager LLC]; (13) Breach Of Contract [As To Defendant Investpro]; (14) Breach Of Implied Covenant of Good Faith and Fair Dealing [As To Defendant Investpro]; and (15) Abuse of Process [As To All Defendants].

II. DISCUSSION

The following Discussion is organized into six Parts. Part A sets forth the legal standards for summary judgment and real estate disclosures. Part B provides the supporting facts and application of the law to illustrate that the waiver of inspections is fatal to Plaintiff's case as a matter of law. In four subparts, it provides an analysis of (1) the disclosures by TKNR, (2) the

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waiver of inspections, (3) the alleged deficiencies were open and obvious, and (4) Defendants did not know about any of those conditions. Part C asserts Nevada law does not permit any claims against the Broker Defendants. Part D, in four parts, specifies the lack of merit of the ancillary claims for (1) RICO, (2) Fraudulent Conveyance, (3) Civil Conspiracy, and (4) Abuse of Process. Part E, in the alternatively, requests partial summary judgment of the uncontested facts and law if Summary Judgment is not awarded. Finally, Part F requests Rule 11 sanctions.

A. <u>Legal Standards</u>

1. *<u>Summary Judgment</u>*

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate that no genuine issue of material fact exist, and the moving party is entitled to judgment as a matter of law. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). Substantive law controls whether factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989).

The Nevada Supreme Court has held that the non-moving party may not defeat a motion for summary judgment by relying "on gossamer threads of whimsy, speculation and conjecture." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). The Nevada Supreme Court has also made it abundantly clear when a motion for summary judgment is made and supported as required by Nevada Rule of Civil Procedure 56, the non-moving party must not rest upon general allegations and conclusions, but must by affidavit or otherwise set forth specific facts demonstrating the existence of a genuine factual issue. *Id.*

Under Nevada Rule of Civil Procedure 56(a), a party may move for summary judgment, or partial summary judgment. "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The court may rely upon the admissible evidence cited in the moving papers

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and may also consider other materials in the record as well. *Id*. at 56(c). "If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case." *Id*. at 56(g).

The pleadings and proof offered in a Motion for Summary Judgment are construed in the light most favorable to the non-moving party. *Hoopes v. Hammargren*, 102 Nev. 425, 429, 725 P.2d 238, 241 (1986). However, the non-moving party still "bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts in order to avoid summary judgment being entered." *Wood*, 121 Nev. at 732, 121 P.3d at 1031. "To successfully defend against a summary judgment motion, 'the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact.'" *Torrealba v. Kesmetis*, 178 P.3d 716, 720 (Nev. 2008) (quoting *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 172 P.3d 131, 134 (Nev. 2007).

The non-moving party bears the burden to set forth specific facts demonstrating the existence of a "genuine" issue for trial or have summary judgment entered against him. *Collins v. Union Federal Savings & Loan,* 99 Nev. 284, 294, 662 P.2d 610, 618-619 (1983). When there is no genuine issue of material fact and the non-moving party provides no admissible evidence to the contrary, summary judgment is "mandated." *Celotex Corp. v. Catrett*, 477 US 317, 322 (1986). When a motion for summary judgment is made and supported, an adversary party who does not set forth specific facts showing a genuine issue to be resolved at trial may have a summary judgment entered against him. *Collins v. Union Federal Sav. & Loan Ass'n*, 99 Nev. 284, 294, 662 P.2d 610, 616 (1983) (citing *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 633 P.2d 1220 (1981); *Bird v. Casa Royale West*, 97 Nev. 67, 624 P.2d 17 (1981)).

2. <u>*Real Estate Disclosures*</u>

"Under NRS Chapter 113, residential property sellers are required to disclose any defects to buyers within a specified time before the property is conveyed." *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007) (citing NRS 113.140(1)). "NRS 113.140(1), however, provides that a seller is not required to 'disclose a defect in residential property of which [she] is not aware.' A

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'defect' is defined as "a condition that materially affects the value or use of residential property in an adverse manner." *Id*. (citing NRS 113.100(1)). The Nevada Supreme Court clarified that:

> [a]scribing to the term "aware" its plain meaning, we determine that the seller of residential real property does not have a duty to disclose a defect or condition that "materially affects the value or use of residential property in an adverse manner," if the seller does not realize, perceive, or have knowledge of that defect or condition. Any other interpretation of the statute would be unworkable, as it is impossible for a seller to disclose conditions in the property of which he or she has no realization, perception, or knowledge. The determination of whether a seller is aware of a defect, however, is a question of fact to be decided by the trier of fact.

Id. at 425 (citations omitted). Thus, in the context where the plaintiff cannot demonstrate an omitted disclosure that caused damage, the seller is entitled to summary judgment as a matter of law. *Id*. at 426.

Generally, "[n]ondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.' " *Mackintosh v. Jack Matthews & Co*., 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). Moreover, "[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). The general rule foreclosing liability for nondisclosure when property is purchased as-is does not apply when the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to [the seller] and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer. *Mackintosh*, 109 Nev. at 633, 855 P.2d at 552 (alteration in original) (internal quotation marks omitted).

A buyer waives its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and/or unjust enrichment when it expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information was reasonably accessible to the buyer. *Frederic and Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 111 (Nev. 2018). Accordingly, the Nevada Supreme Court concluded that an agreement to purchase property as-is

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foreclosed the buyer's common law claims, justifying the granting of summary judgment on common law claims. *Id*. (citation omitted).

> The terms and conditions of the purchase agreement do not create a duty to disclose. Rather, these disclosures are required by NRS Chapter 113, which sets forth specific statutory duties imposed by law independent of the purchase agreement's terms and conditions. Additionally, the terms of the purchase agreement do not require [the seller] to do anything other than provide the listed disclosures.

Anderson v. Ford Ranch, LLC, 78684-COA, 2020 WL 6955438, at *5 (Nev. App. Nov. 25, 2020).

Nevada Revised Statute ("NRS") § 113.140 clearly provides that the Seller Disclosures does not constitute a warranty of the Subject Property and that the Buyer still has a duty to exercise reasonable care to protect himself. NRS § 113.140 also provides that the Seller does not have to disclose any defect that he is unaware of. Similarly, NRS § 113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property. NRS § 113.140(2). Chapters 113 and "645 of Nevada Revised Statutes do not relieve a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself." *Id*. at § 113.140(2).

B. <u>The Two Waivers of Inspection and the Open and Obvious Nature of the Alleged Deficiencies are Fatal to Plaintiff's Claims as a Matter of Law</u>

Summary Judgment is appropriate as a matter of law on all of Plaintiff's claims. It is undisputed that the alleged deficiencies were either disclosed by Defendants, could have been discovered by an inspection, were open and obvious whereby Plaintiff / Ms. Zhu had notice of them at the time she purchased the Property, or were unknown to Defendants at the time of the sale.

1. *<u>Disclosures by Seller</u>*

On August 2, 2017, TKNR submitted its Seller Disclosures timely indicating all known conditions of the Subject Property. Ex. C. TKNR disclosed that "3 units has (sic) brand new AC installed within 3 months," and further that the "owner never resided in the property and never

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visited the property." *Id.* at Page 38. Plaintiff was also aware that the minor renovations, such as painting, was conducted by the Seller's "handyman" as disclosed in the Seller's Disclosures. *Id.* TNKR also disclosed that it was aware of issues with the heating and cooling systems, *Id.* at 36, there was construction, modification, alterations, or repairs done without permits, *Id.* at 37, and lead-based paints. *Id.*

As such, Summary Judgment is appropriate under NRS § 113.140(1) (seller is not required to disclose a defect in residential property of which she is not aware). Under this statute, "[a]scribing to the term 'aware' its plain meaning, . . . the seller of residential real property does not have a duty to disclose a defect or condition that 'materially affects the value or use of residential property in an adverse manner,' if the seller does not realize, perceive, or have knowledge of that defect or condition." *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007). Thus, as Plaintiff cannot demonstrate an omitted disclosure that caused damage, Defendants are entitled to summary judgment as a matter of law. *Id.* at 426.

Moreover, information related to permits is publicly available. The City of Las Vegas has a website[1] that allows anyone in the public to search for permits. Permit Search for Property attached as **Exhibit H**. NRS § 645.259(2) precludes any liability for misrepresentation or under Chapter 113 if the information is a public record:

> [e]xcept as otherwise provided in this subsection, the failure of the seller to make the disclosures required by NRS 113.130 and 113.135 if the information that would have been disclosed pursuant to NRS 113.130 and 113.135 **is a public record which is readily available to the client**.

(Emphasis Added). As the SAC is largely premised on the allegation that TNKR allegedly did not disclose that it did not use licensed contractors who obtained permits, SAC at ¶ 29, NRS 645.259(2) precludes any of these claims as a matter of law. As such, Summary Judgment is appropriate as TNKR disclosed that it did not have permits and the information was publicly available.

In total, under NRS § 113.140(1) (seller is not required to disclose a defect in residential

[1] https://www.lasvegasnevada.gov/Business/Permits-Licenses/Building-Permits/Permit-Application-Status?search=address&addrkey=237304

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property of which she is not aware), *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007), and NRS § 645.259(2), Defendants are entitled to Summary Judgment on Plaintiff's claims for (1) Recovery Under NRS Chapter 113, (2) Constructive Fraud, (3) Common Law Fraud, (4) Fraudulent Inducement, (5) Fraudulent Concealment, (6) Breach Of Fiduciary Duty, (8) Damages Under NRS 645.257(1), (9) Failure To Supervise, Inadequate training and Education, (12) Civil Conspiracy, (13) Breach Of Contract, and (14) Breach Of Implied Covenant of Good Faith and Fair Dealing]. It also eliminates the causes of action for (7) RICO, (10) Fraudulent Conveyance, (11) Fraudulent Conveyance, and (15) Abuse of Process since they have no basis in fact or law.

2. *Waiver of Inspections*

On August 11, 2020, through the original RPA, Ms. Zhu waived her due diligence, although she had a right to conduct inspections:

> During such Period, Buyer shall have the right to conduct, non-invasive/non-destructive inspections of all structural, roofing, mechanical, electrical, plumbing, heating/air conditioning, water/well/septic, pool/spa, survey, square footage, and any other property or systems, through licensed and bonded contractors or other qualified professionals.

Ex. B at 28 of 166 at 7(A) lines 36-39.

Section II(B)(1) lists the disclosures by TKNR. Despite these disclosures, Plaintiff chose not to inspect the Subject Property, request additional information and/or conduct any reasonable inquires. *Id.* In fact, Ms. Zhu only cancelled the original RPA, Ex. E, because of an issue related to her financing, not because of any concerns related to the Seller's Disclosures. Notably, she included the explicit waiver of the inspections, which included her initialing the provision that she had not done in the original RPA. Ex. F. Ms. Zhu even directly informed her agent to waive all inspections. Ex. D. Although Ms. Zhu had actual knowledge of the Seller's Disclosures, Ex. C, from August 11, 2017, and the Parties agreed to extend the COE to January 5, 2018, Ex. F at Addendum 1 at DEF4000365, Ms. Zhu still never did any inspections. Instead, she put down an additional $60,000 as a non-refundable deposit to the TNKR. *Id.* Moreover, she also agreed to pay rent in the amount of $650 per month for one of the units, and to also pay the property manager $800 for the tenant placement fee. *Id.* Through Addendum 2 to the 2nd RPA, Ms. Zhu

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later changed the purchaser to Plaintiff. *Id*. at DEF4000366.

As to the Brokers, Ms. Zhu agreed that she was not relying upon any representations made by Brokers or Broker's agent. *Id.* at DEF4000361 ¶ 22. Ms. Zhu agreed to purchase the Property AS-IS, WHERE-IS, without any representations or warranties. *Id.* Ms. Zhu agreed to satisfy herself, as to the condition of the Property, prior to the close of escrow. *Id.* Ms. Zhu waived all claims against Brokers or their agents for (a) defects in the Property . . . (h) factors related to Ms. Zhu's failure to conduct walk-throughs or inspections. *Id.* Ms. Zhu assumed full responsibility and agreed to conduct such tests, walk-throughs, inspections and research, as she deemed necessary. *Id.* In any event, Broker's liability was limited, under any and all circumstances, to the amount of that Broker's commission/fee received in the transaction. *Id.*

As to the waivers, Paragraph 7(D) of the both the RPA and 2nd RPA expressly provided:

> *It is strongly recommended that Buyer retain licensed Nevada professionals to conduct inspections*. If any inspection is not completed and requested repairs are not delivered to Seller within the Due Diligence Period, Buyer is deemed to have waived the right to that inspection and Seller's liability for the cost of all repairs that inspection would have reasonably identified had it been conducted, except as otherwise provided by law.

Id. Under Paragraph 7(F), it was Ms. Zhu's responsibility to inspect the Property sufficiently as to satisfy her use. *Id.* Nevertheless, Ms. Zhu waived her inspection related to the original RPA and the 2nd RPA, reinforced further by actually initialing next to the waiver in the 2nd RPA. Ex. F. Ms. Zhu also waived the energy audit, pest inspection, roof inspection, septic lid removal inspection, mechanical inspection, soil inspection, and structural inspection. *Id.* Thereby, Ms. Zhu waived any liability of Defendants for the cost of all repairs that inspection would have reasonably identified had it been conducted. *Id.* The RPA and the 2nd RPA clearly indicated that Ms. Zhu was purchasing the Property "AS-IS, WHERE-IS without any representations or warranties." *Id*. at DEF4000361 at ¶ 22.

Additionally, Ms. Zhu also agreed that the Brokers Defendants had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party." *Id*.

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As a matter of law, Plaintiff is precluded from seeking damages from Defendants because of her failure to inspect. "Nondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.' " *Mackintosh v. Jack Matthews & Co.*, 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). Moreover, "[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). Defendants also do not have liability as Ms. Zhu / Plaintiff purchased the Property "as-is" within the reach of the diligent attention and observation of the buyer. *Mackintosh*, 109 Nev. at 633, 855 P.2d at 552. NRS § 113.140 clearly provides that the disclosures do not constitute a warranty of the Property and that the purchaser still has a duty to exercise reasonable care to protect himself. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property. NRS § 113.140(2). Chapters 113 and "645 of Nevada Revised Statutes do not relieve a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself." *Id*. at § 113.140(2).

Thus, Plaintiff waived its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and/or unjust enrichment when it expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information regarding Property was reasonably accessible to the buyer. *Frederic and Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 111 (Nev. 2018).

In this context, Summary Judgment is appropriate as a matter of law. *Id*. (citation omitted). Defendants are entitled to Summary Judgment as to Plaintiff's claims for (1) Recovery Under NRS Chapter 113, (2) Constructive Fraud, (3) Common Law Fraud, (4) Fraudulent Inducement, (5) Fraudulent Concealment, (6) Breach Of Fiduciary Duty, (8) Damages Under NRS 645.257(1), (9) Failure To Supervise, Inadequate training and Education, (12) Civil Conspiracy, (13) Breach Of Contract, and (14) Breach Of Implied Covenant of Good Faith and Fair Dealing. It also eliminates the causes of action for (7) RICO, (10) Fraudulent Conveyance,

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(11) Fraudulent Conveyance, and (15) Abuse of Process since they have no basis in fact or law.

3. *Alleged Deficiencies Open and Obvious*

The alleged conditions identified by Plaintiff's alleged expert in the Property were open and obvious:

> [n]ote that the Plaintiff could have hired an inspector or contractor to evaluate this real-estate purchase beforehand but did not. Items complained about in the Sani Report were open and obvious at the roof area, attic area, and on the exterior and interior areas of the Property.

Ex. G at DEF5000372.

Plaintiff's expert did not do any destructive testing, so the same alleged conditions that the alleged expert noted, would have been made by an inspector at the time of the purchase. *Id*. at DEF5000372-373. Similarly, Professor Opfer noted:

> it is the fault of the Plaintiffs for not conducting requisite inspections of the Property prior to its purchase. Since this issue is apparently open and obvious as per the Sani Report, it would have been open and obvious as well during a pre-purchase inspection.

Id. at DEF5000380. The open and obvious nature of the alleged issues include the following:

1. the photographs from 2017 showed extensive cracking to the stucco and slab to the Property prior to any work by Defendants and/or the licensed contractor it hired to install the HVAC. *Id*.

2. the alleged attic issues could have been inspected at the time of the purchase. *Id*. at DEF5000378

3. "any deficient electrical work related to this 220-volt service situation could have been readily ascertained by an inspection at the time of purchase by the Plaintiff". *Id*. at DEF5000379

4. the alleged HVAC issues were open and obvious. *Id*. at DEF5000381

5. "the conditions complained about as to venting and ducting were present at the Property prior to Defendants owning the Property". *Id*. at DEF5000388,

6. Plaintiff could have conducted an online search related to the permits or lack of permits for the Property. *Id*. at DEF5000389.

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7. The basis of the Sani Estimate is nonsensical in the first place and there is nothing seen from this Sani Report that was not present at the time of sale of the Triplex Property. There were cracks in the stucco system and concrete slab system existing in 2017. Roof venting/duct venting had not been changed by Defendants and was existing in 2017 and could have been inspected by Plaintiff. *Id*. at DEF5000391.

8. Any deficiencies with this electrical installation were open, obvious and could have been inspected prior to purchase as with all other items with this Triplex Property. Any cracks such as wall or floor cracks subsequent to the purchase would obviously be new but again this occurs even on new homes across the Las Vegas Valley and elsewhere. *Id*. at DEF5000392.

9. Rental properties experience more-severe-service requirements due to many factors often including a lack of knowledge in order to care for a Property on the part of tenants along with often an uncaring attitude as well. *Id*. at DEF5000379.

Summary Judgment is appropriate as Plaintiff either knew of or could have discovered the defects prior to the purchase. *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). Clearly, the open and obvious issues were within the reach of the diligent attention and observation of the buyer. *Mackintosh*, 109 Nev. at 633, 855 P.2d at 552 (alteration in original) (internal quotation marks omitted). In this context, Summary Judgment is appropriate as a matter of law. *Id*. (citation omitted). Defendants are entitled to Summary Judgment as to Plaintiff's claims for (1) Recovery Under NRS Chapter 113, (2) Constructive Fraud, (3) Common Law Fraud, (4) Fraudulent Inducement, (5) Fraudulent Concealment, (6) Breach Of Fiduciary Duty, (8) Damages Under NRS 645.257(1), (9) Failure To Supervise, Inadequate training and Education, (12) Civil Conspiracy, (13) Breach Of Contract, and (14) Breach Of Implied Covenant of Good Faith and Fair Dealing.

4. *Unknown to any Defendant*

At all times relevant, no Defendant was aware of any issues related to any of the alleged complaints raised by Plaintiff and/or Plaintiff's alleged expert. Declaration of Kenny Lin attached as **Exhibit I**. The only issues that Defendants were aware of were properly disclosed with an explanation. No Defendant was aware of any issues with any structural, electrical, plumbing, sewer, mechanical, roof, fungus/mold, flooring, and/or foundation issues with the

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Property before the time of the sale to Ms. Zhu. *Id*. Nor was any Defendant aware of any issues with any structural, electrical, plumbing, sewer, mechanical, roof, fungus/mold, flooring, and/or foundation issues with the Property at the time of the sale to Ms. Zhu. *Id*. As to the HVAC issue, Defendants were aware that tenants of the Property complained about the cooling of the Property, which is why TKNR paid to have the system upgraded by a licensed contractor. Air Team Invoice attached as **Exhibit J**.

At all times relevant, during the Due Diligence Period, Plaintiff had access to inspect: the mechanical systems, the structure of the Property, the windows, for mold / fungus, the electrical systems, the plumbing systems, the gas lines, the attic, the bathroom exhaust vent / washer /dryer exhaust vent, the ceiling insulation, the roof decking, the roof trusses, the roof support structures, the duct system, and the flooring and tiles. Ex. G. At all times relevant, Plaintiff knew that the Property was originally constructed in 1954. *Id.* at ¶ 70.

NRS § 113.140 provides that the Seller does not have to disclose any defect that he is unaware of. Similarly, NRS § 113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware. The Nevada Supreme Court has also made it abundantly clear that a seller does not have any liability for unknown defects and/or where the diligent buyer should have done an inspection. *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007) (citing NRS 113.140(1)); *Mackintosh v. Jack Matthews & Co*., 109 Nev. 628, 633, 855 P.2d 549, 552 (1993) (nondisclosure by the seller of adverse information concerning real property will not provide the basis for an action by the buyer for damages when property is sold as is); *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015) ("[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase."); Frederic and *Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 111 (Nev. 2018) (buyer waives its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and/or unjust enrichment when it expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information was reasonably accessible to the buyer); *Anderson v. Ford Ranch, LLC*, 78684-COA, 2020 WL

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6955438, at *5 (Nev. App. Nov. 25, 2020) (the terms of the purchase agreement do not require the seller to do anything other than provide the listed disclosures).

Therefore, the overwhelming authority demands Summary Judgment in favor of Defendants as a matter of law. As such, Summary Judgment is appropriate as a matter of law. *Id*. (citation omitted). Defendants are entitled to Summary Judgment as to Plaintiff's claims for (1) Recovery Under NRS Chapter 113, (2) Constructive Fraud, (3) Common Law Fraud, (4) Fraudulent Inducement, (5) Fraudulent Concealment, (6) Breach Of Fiduciary Duty, (8) Damages Under NRS 645.257(1), (9) Failure To Supervise, Inadequate training and Education, (12) Civil Conspiracy, (13) Breach Of Contract, and (14) Breach Of Implied Covenant of Good Faith and Fair Dealing. It also eliminates the causes of action for (7) RICO, (10) Fraudulent Conveyance, (11) Fraudulent Conveyance, and (15) Abuse of Process since they have no basis in fact or law. It also eliminates the causes of action for (7) RICO, (10) Fraudulent Conveyance, (11) Fraudulent Conveyance, and (15) Abuse of Process since they have no basis in fact or law.

C. <u>Summary Judgment is Warranted as to Broker Defendants</u>

As to the Brokers, Ms. Zhu agreed that she was not relying upon any representations made by Brokers or Broker's agent. *Id.* at DEF4000361 ¶ 22. Ms. Zhu agreed to purchase the Property AS-IS, WHERE-IS, without any representations or warranties. *Id.* Ms. Zhu agreed to satisfy herself, as to the condition of the Property, prior to the close of escrow. *Id.* Ms. Zhu waived all claims against Brokers or their agents for (a) defects in the Property . . . (h) factors related to Ms. Zhu's failure to conduct walk-throughs or inspections. *Id.* Ms. Zhu assumed full responsibility and agreed to conduct such tests, walk-throughs, inspections and research, as she deemed necessary. *Id.* In any event, Broker's liability was limited, under any and all circumstances, to the amount of that Broker's commission/fee received in the transaction. *Id.* Additionally, Ms. Zhu also agreed that the Brokers Defendants had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party." *Id.*

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NRS 645.252 sets forth the duties of real estate agents. Based on the Seller's Disclosures, the RPA, and the 2nd RPA, Defendants clearly do not have any liability to Plaintiff under Nevada law. Plaintiff had a separate agent representing them for the purchase of the Property. As noted earlier, Plaintiff cancelled the first RPA and entered into the second with actual knowledge of the Seller's Disclosures and the roles of all Defendants. Exs. A-F. NRS 645.252(4) clearly specifies that agents do not owe a duty to "(a) [i]ndependently verify the accuracy of a statement made by an inspector certified pursuant to chapter 645D of NRS or another appropriate licensed or certified expert" or "(c) [c]onduct an investigation of the condition of the property which is the subject of the real estate transaction."

In addition to the authority cited above, Summary Judgment is appropriate as a matter of law on Plaintiff's claims for (1) Recovery Under NRS Chapter 113, (2) Constructive Fraud, (3) Common Law Fraud, (4) Fraudulent Inducement, (5) Fraudulent Concealment, (6) Breach Of Fiduciary Duty, (8) Damages Under NRS 645.257(1), (9) Failure To Supervise, Inadequate training and Education, (12) Civil Conspiracy, (13) Breach Of Contract, and (14) Breach Of Implied Covenant of Good Faith and Fair Dealing]. It also eliminates the causes of action for (7) RICO, (10) Fraudulent Conveyance, (11) Fraudulent Conveyance, and (15) Abuse of Process since they have no basis in fact or law.

D. <u>No Basis for Extraneous Claims</u>

The SAC contains claims that appear to be loosely associated with the alleged non-disclosure claims related to the sale of the Property: (7) RICO; (10) Fraudulent Conveyance; (11) Fraudulent Conveyance; (12) Civil Conspiracy; and (15) Abuse of Process. As noted in the prior sections, each of these claims fall as a matter of law based on the aforementioned authority and facts. Nevertheless, this Section will address the lack of merit of each of these claims.

1. *<u>RICO</u>*

In 1970, the United States Congress passed the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), as a portion of the Organized Crime Control Act of 1970. In passing RICO, "Congress created a wide array of novel civil and criminal weapons to use against crime and corruption." *Chappell v. Robbins*, 73 F.3d 918, 919

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(9th Cir. 1996). Similarly, "Congress created a private claim under RICO at least in part to compensate victims of racketeering." *Id.* at 1153 (citing *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1358 (3d Cir.1987)). Nevertheless, "RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff." *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992). "[A]s a matter of law, personal injury, including emotional distress, is not compensable under section 1964(c) of RICO." *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990). RICO "provides compensation only for damages caused by racketeering activity." *Oscar*, 965 F.2d at 813.

"Nevada's anti-racketeering statutes . . . are patterned after the federal [RICO] statutes." *Hale v. Burkhardt*, 104 Nev. 632, 634, 764 P.2d 866, 867 (1988). Nevada codified its own version of RICO under NRS §§ 207.350-207.520. NRS 207.400(1)(a) specifies that it is unlawful for a person **with criminal intent** received any proceeds derived, directly or indirectly, **from racketeering activity**. (Emphasis added). For a federal RICO claim, a plaintiff must allege the following elements to prevail on a RICO claim under a pattern of racketeering activity: (1) the conduct; (2) of an enterprise; (3) through a pattern; (4) of racketeering activity. *See Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir.1987).

However, "Nevada's civil RICO statute differs in some respects from the federal civil RICO statute." *Hale*, at 635, 764 P.2d at 868. One critical distinction is found in comparing the language of 18 U.S.C. § 1961(5) with that of NRS 207.390. The federal statute provides that a claimant must plead a pattern of racketeering activity and that such a pattern requires at least two predicate acts; Nevada's RICO statute does not speak in terms of a "pattern of racketeering" and provides that racketeering activity means two predicate acts of the type described in NRS 207.390 and NRS 207.360. Thus, there is no pattern/continuity requirement as is required under federal law. *Siragusa v. Brown*, 971 P.2d 801, 811 (Nev. 1998).

a. An Enterprise

Under RICO, an "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact

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although not a legal entity. 18 U.S.C. § 1961(4). It is " 'a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit.' " *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir.1984) (quotation omitted). For the purposes of a single action, a corporate defendant cannot be both the RICO person and the RICO enterprise under section 1962(c). *See Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522, 529 (9th Cir.1987). In terms of a pleading, problems arise when the named defendant is both the "person" and the "enterprise." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992).

b. Racketeering Activity

"[R]acketeering activity" is any act indictable under several provisions of Title 18 of the United States Code, and includes the predicate acts of mail fraud, wire fraud and obstruction of justice. . . ." *Turner v. Cook*, 362 F.3d 1219, 1229 (9th Cir. 2004) (citing 18 U.S.C. § 1961(1)). It includes general crimes involving acts or threats of murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance. *Id*. at § 1961(1)(A). It also includes specific enumerated federal crimes related to various crimes involving theft, fraud, immigration violations, and obstruction of justice. Id. at § 1961(1)(B)-(G).

"Continuity" is both a closed and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement[.]

c. No Basis for RICO Claim

Incorporating the prior sections related to the lack of merit of any of the other claims, there is no "racketeering" or form of predicate misconduct that "by its nature projects into the future with a threat of repetition", *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366 (9th Cir.1992), related to the sale of the Property to Plaintiff. First, there is no "Racketeering Activity" as it is legal to sell real property to a third party. Also, since the sale to Plaintiff

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concluded after the sale, there was no continuity. If there was any potential action for the alleged non-disclosure of **known** defects, then the action would fall under recognized torts specified in this brief, not RICO. As such, Summary Judgment is appropriate as (1) the other claims fail as a matter of law, (2) there was no criminal intent, (3) or a "racketeering activity".

2. *No Action for Fraudulent Conveyance*

Fraudulent Conveyance is governed by NRS §§ 112.180(1), 112.190(1). This requires a transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation (a) with actual intent to hinder, delay or defraud any creditor of the debtor; or (b) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor. NEV. REV. STAT. § 112.180(1)(a-b). Alternatively, NRS § 112.190(1) specifies that a transfer made, or obligation incurred, by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Here, Plaintiff failed to identify what the alleged transfer was and who the alleged creditor was that was defrauded. First, this claim lacks any merit as Summary Judgment is already appropriate as to the supporting claim for alleged liability by Defendants to Plaintiff. Second, this claim is premature since Plaintiff is not a creditor. Third, there has not been a showing that Defendants transferred anything. As Plaintiff will not be able to show any transfer was made "with actual intent to hinder, delay or defraud any creditor of the debtor", *Id.* at §112.180(1)(a), and Plaintiff does not have any basis for the claims in this matter, Summary Judgment is appropriate as a matter of law.

3. *Civil Conspiracy*

Under Nevada law, to establish a civil conspiracy claim, a plaintiff must show (1) the commission of an underlying tort; and (2) an agreement between the defendants to commit that tort. *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*, 121 Nev. 44, 110 P.3d 30, 51

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(2005) (per curiam) (stating that "an underlying cause of action for fraud is a necessary predicate to a cause of action for conspiracy to defraud"), abrogated on other grounds *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 n. 6 (2008); *GES, Inc. v. Corbitt*, 117 Nev. 265, 21 P.3d 11, 15 (2001). "[I]t suffices under Nevada law to allege that Defendants . . . owed a duty to Plaintiffs not to conspire with those who do owe fiduciary duties to Plaintiffs to breach those duties." *Boorman v. Nev. Mem'l Cremation Soc'y, Inc.*, 772 F. Supp. 2d 1309, 1315 (D. Nev. 2011).

Here, incorporating the preceding arguments illustrating that Summary Judgment is appropriate as a matter of law, Plaintiff cannot demonstrate (1) the commission of an underlying tort or (2) an agreement amongst the defendants to commit that tort. This illustrates that Summary Judgment is appropriate as a matter of law.

4. *Abuse of Process*

The elements of an abuse of process claim are: "(1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). Abuse of process can arise from both civil and criminal proceedings. *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002). Malice, want of probable cause, and termination in favor of the person initiating or instituting proceedings are not necessary elements for a prima facie abuse of process claim. *Nevada Credit Rating Bur. v. Williams*, 88 Nev. 601, 606, 503 P.2d 9, 12 (1972); Restatement (Second) of Torts § 682 cmt. a (1977). The mere filing of a complaint is insufficient to establish the tort of abuse of process. *Laxalt v. McClatchy*, 622 F. Supp. 737, 751 (1985).

Here, Plaintiff illustrated the overall lack of merit related to the abuse of process claim in its limited opposition to Defendants' motion to file amended answer, counterclaim, and third-party claim

> If Defendants are allowed to file the proposed Counterclaim, Plaintiff will likely file it's (sic) own motion to file a Second Amended Complaint and allege an additional cause of action for abuse of process based on the Defendants' cause of action for abuse of process.

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Opposition (brief only) at 6:10-13 attached as **Exhibit K**. Notably, this Honorable Court found the totality of the Opposition meritless. Order at 2:20-21 attached as **Exhibit L**.

Clearly, the totality of the legal and factual arguments in this Motion illustrate the bad faith nature of Plaintiff's claim. First, it is clear that Plaintiff's action is merely an attempt to extort Defendants with a meritless claim in abuse of the legal process. Second, the Property was a then-63 year old home that Plaintiff purchased in 2018. Third, the purchase price was $200,000. Fourth, illustrating the abuse of process, Plaintiff are claiming $16.25 Million in damages:

Damage No.	Amount
1	1,950,000
2	2,600,000
3	2,600,000
4	2,600,000
5	650,000
6	650,000
7	650,000
8	650,000
9	650,000
10	2,600,000
11	Omitted
12	Omitted
13	650,000
	16,250,000

Plaintiff's First Supplemental Disclosure (excerpt) attached as **Exhibit M**. Fourth, Plaintiff also made bad faith claims under RICO and other baseless claims as part of this action. Fifth, Plaintiff's counsel has charged Plaintiff approximately $64,000 in attorneys' fees to prosecute these worthless claims. Ex. N. Sixth, the original settlement demand from Plaintiff was $10,000. Ex. I.

As Plaintiff admitted the only purpose in filing the claim for abuse of process was retaliatory, and the overwhelming facts and law illustrate the abuse of process by Plaintiff in bringing this action, Summary Judgment is appropriate as a matter of law.

E. <u>Partial Summary Judgment</u>

Under Nevada Rule of Civil Procedure 56(a), a party may move for summary judgment or partial summary judgment. "If the court does not grant all the relief requested by the motion,

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it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case." *Id*. at 56(g). "[A]n admitting party is barred from denying that which it has already admitted. *La-Tex Partn. v. Deters*, 893 P.2d 361, 365 (Nev. 1995) (citing *Wagner v. Carex Investigations & Sec. Inc.*, 93 Nev. 627, 632, 572 P.2d 921, 924 (1977) (commenting on the application of Nev. R. Civ. Pro. 36).

Here, if this Honorable Court does not grant Summary Judgment on all claims, then Defendants respectfully request that It grant partial Summary Judgment as to the following undisputed facts:

1. The Property was originally constructed in 1954.
2. On or about August 11, 2017, Ms. Zhu executed the RPA for the Property.
3. The purchase price for the property was $200,000.
4. Through the RPA, Ms. Zhu waived her due diligence, although she had a right to conduct inspections.
5. Ms. Zhu did not cancel the contract related to any issues with the Property.
6. Under Paragraph 7(C) of the RPA, Ms. Zhu waived the Due Diligence condition.
7. Under Paragraph 7(D) of the RPA, it provided:

> *It is strongly recommended that Buyer retain licensed Nevada professionals to conduct inspections*. If any inspection is not completed and requested repairs are not delivered to Seller within the Due Diligence Period, Buyer is deemed to have waived the right to that inspection and Seller's liability for the cost of all repairs that inspection would have reasonably identified had it been conducted, except as otherwise provided by law.

8. Ms. Zhu waived any liability of Defendants for the cost of all repairs that inspection would have reasonably identified had it been conducted.
9. Ms. Zhu also waived the energy audit, pest inspection, roof inspection, septic lid removal inspection, mechanical inspection, soil inspection, and structural inspection.
10. Under Paragraph 7(F), it was Ms. Zhu's responsibility to inspect the Property sufficiently as to satisfy her use.
11. The Brokers had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or

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requested by one party."

12. On August 2, 2017, TKNR submitted its Seller Disclosures timely indicating all known conditions of the Subject Property. In fact, TKNR disclosed that "3 units has (sic) brand new AC installed within 3 months," and further that the "owner never resided in the property and never visited the property." Plaintiff was also aware that the minor renovations, such as painting, was conducted by the Seller's "handyman" as disclosed in the Seller's Disclosures. Seller also disclosed that it had construction, modification, alterations, or repairs done without permits. Despite these disclosures, Plaintiff chose not to inspect the Subject Property, request additional information and/or conduct any reasonable inquires.

13. On or before December 5, 2017, Ms. Zhu had issues related to the financing for the Property because of an appraisal. As such, Ms. Chen confirmed that Ms. Zhu would do a new purchase agreement, and would agree to pay the difference in an appraisal with a lower value than the purchase price, and waive inspections.

14. On the same day, Ms. Zhu and TKNR agreed to Addendum No. 1 to cancel the RPA dated August 11, 2017, and entered into the 2nd RPA. As before, the overall purchase price for the Property was $200,000, but Ms. Zhu changed the contingency for the loan to $150,000 with earnest money deposit of $500 and a balance of $49,500 owed at the COE.

15. Although Ms. Zhu had not initialed the "Failure to Cancel or Resolve Objections" provision in the RPA, she initialed the corresponding provision in the 2nd RPA. This was consistent with Ms. Zhu's instructions to Ms. Chen. This is the second time that Ms. Zhu waived inspections for the Property despite the language in the 2nd RPA that strongly advised to get an inspection done.

16. Ms. Zhu waived any inspections related to the purchase of the Property in the 2nd RPA. Although Ms. Zhu had actual knowledge of the Seller's Disclosures from August 11, 2017, and the Parties agreed to extend the COE to January 5, 2018, Ms. Zhu still never did any inspections. Instead, she put down an additional $60,000 as a non-refundable deposit to the TNKR. Moreover, she also agreed to pay rent in the amount of $650 per month for one the units, and to also pay the property manager $800 for the tenant placement fee.

17. Through Addendum 2 to the 2nd RPA, Ms. Zhu later changed the purchaser to Plaintiff.

18. As to the Brokers, Ms. Zhu agreed that she was not relying upon any representations made by Brokers or Broker's agent.

19. Ms. Zhu agreed to purchase the Property AS-IS, WHERE-IS, without any representations or warranties.

20. Ms. Zhu agreed to satisfy herself, as to the condition of the Property, prior to the close of escrow.

21. Ms. Zhu waived all claims against Brokers or their agents for (a) defects in the Property . . . (h) factors related to Ms. Zhu's failure to conduct walk-throughs or inspections. Ms. Zhu assumed full responsibility and agreed to conduct such tests, walk-throughs, inspections and research, as she deemed necessary. In any event, Broker's liability was limited, under any and all circumstances, to the amount of that Broker's commission/fee received in the transaction.

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22. Information related to permits is publicly available. The City of Las Vegas has a website that permits anyone in the public to search for permits.

23. NRS § 645.259(2) precludes any liability for misrepresentation or under Chapter 113 if the information is a public record.

24. Plaintiff could have hired an inspector or contractor to evaluate this real-estate purchase beforehand but did not. Items complained about in the Sani Report were open and obvious at the roof area, attic area, and on the exterior and interior areas of the Property.

25. Plaintiff's expert did not do any destructive testing, so the same alleged conditions that the alleged expert noted, would have been made by an inspector at the time of the purchase.

26. It is the fault of the Plaintiffs for not conducting requisite inspections of the Property prior to its purchase. Since this issue is apparently open and obvious as per the Sani Report, it would have been open and obvious as well during a pre-purchase inspection.

27. The photographs from 2017 showed extensive cracking to the stucco and slab to the Property prior to any work by Defendants and/or the licensed contractor it hired to install the HVAC.

28. The alleged attic issues could have been inspected at the time of the purchase.

29. Any deficient electrical work related to this 220-volt service situation could have been readily ascertained by an inspection at the time of purchase by the Plaintiff".

30. The alleged HVAC issues were open and obvious.

31. The conditions complained about as to venting and ducting were present at the Property prior to Defendants owning the Property.

32. Plaintiff could have conducted an online search related to the permits or lack of permits for the Property.

33. The basis of the Sani Estimate is nonsensical in the first place and there is nothing seen from this Sani Report that was not present at the time of sale of the Triplex Property. There were cracks in the stucco system and concrete slab system existing in 2017. Roof venting/duct venting had not been changed by Defendants and was existing in 2017 and could have been inspected by Plaintiff.

34. Any deficiencies with this electrical installation were open, obvious and could have been inspected prior to purchase as with all other items with this Triplex Property. Any cracks such as wall or floor cracks subsequent to the purchase would obviously be new but again this occurs even on new homes across the Las Vegas Valley and elsewhere.

35. It was well known at the time of the purchase that the Property was a 63 year old rental property that was subject to potential renter abuse.

36. At all times relevant, no Defendant was aware of any issues related to any of the alleged complaints raised by Plaintiff and/or Plaintiff's alleged expert. The only issues that Defendants were aware of were properly disclosed with an

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explanation. No Defendant was aware of any issues with any structural, electrical, plumbing, sewer, mechanical, roof, fungus/mold, flooring, and/or foundation issues with the Property before the time of the sale to Ms. Zhu. Nor was any Defendant aware of any issues with any structural, electrical, plumbing, sewer, mechanical, roof, fungus/mold, flooring, and/or foundation issues with the Property at the time of the sale to Ms. Zhu. As to the issue HVAC issue, Defendants were aware that tenants of the Property complained about the cooling of the Property, which is why TKNR paid to have the system upgraded by a licensed contractor.

37. At all times relevant, during the Due Diligence Period, Plaintiff had access to inspect: the mechanical systems, the structure of the Property, the windows, for mold / fungus, the electrical systems, the plumbing systems, the gas lines, the attic, the bathroom exhaust vent / washer /dryer exhaust vent, the ceiling insulation, the roof decking, the roof trusses, the roof support structures, the duct system, and the flooring and tiles.

38. NRS 645.252(4) clearly specifies that agents do not owe a duty to "(a) [i]ndependently verify the accuracy of a statement made by an inspector certified pursuant to chapter 645D of NRS or another appropriate licensed or certified expert" or "(c) [c]onduct an investigation of the condition of the property which is the subject of the real estate transaction."

F. <u>Attorneys' Fees and Costs</u>

Pursuant to Nevada Rule of Civil Procedure 11(c), the court may order a party to show cause why it has not violated the mandates of Rule 11. Rule 11 prevents a party from bringing a lawsuit for an improper purpose, which includes: (1) harassment, causing unnecessary delay, or needless increasing the cost of litigation; or (2) making frivolous claims. NEV. R. CIV. PRO. 11(b)(1)-(2). Rule 11 sanctions should be imposed for frivolous actions. *Marshall v. District Court*, 108 Nev. 459, 465, 836 P.2d 47, 52.

A frivolous claim is one that is "both baseless and made without a reasonable and competent inquiry." *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993) (quoting *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir.1990); *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537 (9th Cir.1986)). A determination of whether a claim is frivolous involves a two-pronged analysis: (1) the court must determine whether the pleading is "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law"; and (2) whether the attorney made a reasonable and competent inquiry. *Bergmann*, 109 Nev. at 676, 856 P.2d at 564. A sanction imposed for violation of Rule 11 shall be limited to what is sufficient to deter

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repetition of such conduct or comparable conduct by others similarly situated. *Id.* at 11(c)(2).

Furthermore, a court may award attorneys' fees to a prevailing party when it finds that the claim was brought or maintained without reasonable ground or to harass the prevailing party. NEV. REV. STAT. § 18.010(2)(b). In other cases, a court may award attorneys' fees "when it finds that the opposing party brought or maintained a claim without reasonable grounds." *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 800 (Nev. 2009). "The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations." *Id.* The Nevada Legislature explained that:

> [i]t is the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

Id. "A claim is groundless if 'the allegations in the complaint . . . are not supported by any credible evidence at trial.'" *Barozzi v. Benna*, 112 Nev. 635, 639, 918 P.2d 301, 303 (1996) (quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo.1984)).

As noted in Section II(D)(4), the overwhelming facts and law illustrate that Plaintiff's claim is frivolous. Not only did Plaintiff intentionally omit the waiver of inspections from the pleadings, they also egregiously claimed damages in excess of $16.25 Million related to the Property. Plaintiff's claim is clearly frivolous: (1) where the pleading was not "well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law", and (2) Plaintiff's attorney continued to make frivolous claims. *Bergmann*, 109 Nev. at 676, 856 P.2d at 564. Sanctions are warranted against Plaintiff and its counsel, which should include an award attorneys' fees to Defendants. Plaintiff brought or maintained this action without reasonable ground and only to harass Defendants. NEV. REV. STAT. § 18.010(2)(b). The overwhelming facts and law also show that Plaintiff brought or maintained this claim without reasonable grounds, which justifies an award of attorneys' fees. *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 800 (Nev. 2009).

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III. CONCLUSION

For the aforementioned reasons, this Honorable Court should grant the Motion.

DATED this 15 day of December, 2020.

MICHAEL B. LEE, P.C.

/s/ Michael Lee

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15 day of December, 2020, I placed a copy of the **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** as required by Eighth Judicial District Court Rule 7.26 by delivering a copy or by mailing by United States mail it to the last known address of the parties listed below, facsimile transmission to the number listed, and/or electronic transmission through the Court's electronic filing system to the e-mail address listed below:

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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, vs. TKNR INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual, and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKRANDT, an individual and Does 1 through 15 and Roe Corporation I - XXX, Defendants.	CASE NO.: A-18-785917-C DEPT. NO.: XIV **SUPPLEMENT TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES**

Defendants TKNR INC. ("TKNR"), CHI ON WONG ("WONG"), KENNY ZHONG LIN ("LIN"), LIWE HELEN CHEN ("CHEN"), YAN QIU ZHANG ("ZHANG"), INVESTPRO LLC ("INVESTPRO"), MAN CHAU CHENG ("CHENG"), JOYCE A. NICKRANDT ("NICKRANDT"), INVESTPRO INVESTMENTS, LLC ("Investments"), and INVESTPRO MANAGER LLC ("Manager") (hereinafter collectively referred to as the "Defendants"), by and

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through their counsel of record, Michael B. Lee, P.C., hereby files this Supplement ("Supplement") to Defendants' Motion for Attorneys' Fees ("Motion").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Overview

This Supplement provides additional basis for Defendants' request for attorneys' fees by virtue of the terms and provisions included in the Residential Purchase Agreement.

B. Undisputed Facts as Provided by Mr. Miao

Please see the statement of facts / procedure included in the Motion.

II. DISCUSSION

A court may not award fees unless authorized by statute, rule, or contract. *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1219, 197 P.3d 1051, 1059 (2008). "Parties are free to provide for attorney fees by express contractual provisions." *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P.3d 501, 515 (2012) (*citing Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477 (1988)). "The objective in interpreting an attorney fees provision, as with all contracts, 'is to discern the intent of the contracting parties.' " *Id.* (*quoting Cline v. Rocky Mountain, Inc.*, 998 P.2d 946, 949 (Wyo. 2000)). " '[T]raditional rules of contract interpretation [are employed] to accomplish that result.' " *Id.*

"[T]he term 'prevailing party' is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants." *Valley Elec. Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005) (*citing Smith v. Crown Financial Services*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995)). "To be a prevailing party, a party need not succeed on every issue." *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015), reh'g denied (May 29, 2015), reconsideration en banc denied (July 6, 2015) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (observing that "a plaintiff [can be] deemed 'prevailing' even though he succeeded on only some of his claims for relief")).

Additionally, a plaintiff may be the prevailing party "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing the suit." *Women's*

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Fed. Sav. & Loan Ass'n v. Nevada Nat'l Bank, 623 F. Supp. 469, 470 (D. Nev. 1985); *see also Chowdhry v. NLVH, Inc.*, 851 P.2d 459, 464 (Nev. 1993). This includes litigation involving claims and counterclaims, where the "net winner" is considered to be the prevailing party. *Parodi v. Budetti*, 115 Nev. 236, 984 P.2d 172, 1999 Nev. LEXIS 48 (Nev. Aug. 27, 1999).

Moreover, if a party successfully defended against a breach of contract actions, the successful party is entitled to recover reasonable attorney fees incurred in defense of those particular claims pursuant to the clear language of agreement. *Davis*, 278 P.3d at 515–16 (2012) (citing *Valley Elec. Ass'n*, 121 Nev. at 10, 106 P.3d at 1200 (explaining that parties "prevail" if they succeed on any substantial aspect of the case and noting that the term "prevailing party" "is broadly construed so as to encompass plaintiffs, counterclaimants, and defendants")).

Here, the Residential Purchase Agreement for the Subject Property giving rise to this litigation included a provision that allowed the prevailing party to recover attorneys' fees and costs for any litigation related to the terms of the Residential Purchase Agreement.

> **26. OTHER ESSENTIAL TERMS:** Time is of the essence. No change, modification or amendment of this Agreement shall be valid or binding unless such change, modification or amendment shall be in writing and signed by each party. This Agreement will be binding upon the heirs, beneficiaries and devisees of the parties hereto. This Agreement is executed and intended to be performed in the State of Nevada, and the laws of that state shall govern its interpretation and effect. The parties agree that the county and state in which the Property is located is the appropriate forum for any action relating to this Agreement. Should any party hereto retain counsel for the purpose of initiating litigation to enforce or prevent the breach of any provision hereof, or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorney's fees and costs incurred by such prevailing party.

See Residential Purchase Agreement attached as **Exhibit A**, at pp. 8-9.

It is undisputed that Defendants are the prevailing party in this litigation. Defendants were granted summary judgment on all claims. See Appendix to Motion at Exhibits B and C. Plaintiff's motion for reconsideration was denied, and summary judgment upheld. See Appendix to Motion at Exhibits F. Despite Plaintiff's appeal, the Court affirmed the order granting summary judgment in favor of Defendants on all claims. See Appendix to Motion at Exhibit H.

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Moreover, Plaintiff's request for rehearing of the appeal was denied. See Appendix to Motion at Exhibit I. As such, there can be no argument that Defendants have prevailed in this litigation and are entitled to an award of attorneys' fees and costs pursuant to the express terms of the Residential Purchase Agreement.

III. CONCLUSION

Based on the foregoing, Defendants are entitled to attorneys' fees and costs pursuant to the terms of the Residential Purchase Agreement. As such, Defendants respectfully request that Defendants be awarded fees and costs as requested in the Motion.

Dated this 25 day of August, 2022.

MICHAEL B. LEE, P.C.

/s/ Michael Lee

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that I am an employee of MICHAEL B. LEE, and that on the 25th day of August, 2022, the foregoing **SUPPLEMENT TO DEFENDANTS' MOTION FOR ATTORNEYS' FEES** was served via the Court's electronic filing and/or service system and/or via facsimile and/or U.S. Mail first class postage pre-paid to all parties addressed as follows:

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Nevada State Bar No. 3708
DAY & NANCE
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EXHIBIT A

Authentisign ID: [illegible]

REALTOR

InvestPro REALTY

EQUAL HOUSING OPPORTUNITY

RESIDENTIAL PURCHASE AGREEMENT

(Joint Escrow Instructions)

Date: 09/05/17

Marie Zhu ("Buyer"), hereby offers to purchase 2132 HOUSTON DR ("Property"), within the city or unincorporated area of LASVEGAS, County of CLARK, State of Nevada, Zip 89104, A.P.N. # 162-01-110-017 for the purchase price of $ 200,000.00 (Two Hundred Thousand dollars) ("Purchase Price") on the terms and conditions contained herein: BUYER ☐ does –OR– ☒ does not intend to occupy the Property as a residence.

Buyer's Offer

1. FINANCIAL TERMS & CONDITIONS:

$ 500.00 **A. EARNEST MONEY DEPOSIT** ("EMD") is ☐ presented with this offer –OR– ☒ will wire to escrow upon acceptance. Upon Acceptance, Earnest Money to be deposited within one (1) business day from acceptance of offer (as defined in Section 23 herein) or 2 business days if wired to: ☒ Escrow Holder, ☐ Buyer's Broker's Trust Account, –OR– ☐ Seller's Broker's Trust Account. *(NOTE: It is a felony in the State of Nevada—punishable by up to four years in prison and a $5,000 fine—to write a check for which there are insufficient funds. NRS 193.130(2)(d).)*

$ 0.00 **B. ADDITIONAL DEPOSIT** to be placed in escrow on or before (date) _____. The additional deposit ☐ will –OR– ☐ will not be considered part of the EMD. (Any conditions on the additional deposit should be set forth in Section 28 herein.)

$ 150,000.00 **C. THIS AGREEMENT IS CONTINGENT UPON BUYER QUALIFYING FOR A NEW LOAN:** ☒ Conventional, ☐ FHA, ☐ VA, ☐ Other (specify) _____.

$ 0.00 **D. THIS AGREEMENT IS CONTINGENT UPON BUYER QUALIFYING TO ASSUME THE FOLLOWING EXISTING LOAN(S):** ☐ Conventional, ☐ FHA, ☐ VA, ☐ Other (specify) _____. Interest: ☐ Fixed rate, _____ years – OR – ☐ Adjustable Rate, _____ years. Seller further agrees to provide the Promissory Note and the most recent monthly statement of all loans to be assumed by Buyer within FIVE (5) calendar days of acceptance of offer.

$ 0.00 **E. BUYER TO EXECUTE A PROMISSORY NOTE SECURED BY DEED OF TRUST PER TERMS IN"FINANCING ADDENDUM" which is attached hereto.**

$ 49,500.00 **F. BALANCE OF PURCHASE PRICE** (Balance of Down Payment) in Good Funds to be paid prior to Close of Escrow ("COE").

$ 200,000.00 **G. TOTAL PURCHASE PRICE.** (This price DOES NOT include closing costs, prorations, or other fees and costs associated with the purchase of the Property as defined herein.)

2. ADDITIONAL FINANCIAL TERMS & CONTINGENCIES:

A. **NEW LOAN APPLICATION:** Within 2 business days of Acceptance, Buyer agrees to (1) submit a

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completed loan application to a lender of Buyer's choice and (2) furnish a preapproval letter to Seller based upon a standard factual credit report and review of debt to income ratios. If Buyer fails to complete any of these conditions within the applicable time frame, Seller reserves the right to terminate this Agreement. In such event, both parties agree to cancel the escrow and return EMD to Buyer. Buyer shall use Buyer's best efforts to obtain financing under the terms and conditions outlined in this Agreement.

B. APPRAISAL CONTINGENCY: Buyer's obligation to purchase the property is contingent upon the property appraising for not less than the Purchase Price. If after the completion of an appraisal by a licensed appraiser, Buyer receives written notice from the lender or the appraiser that the Property has appraised for less than the purchase price (a "Notice of Appraised Value") Buyer may attempt to renegotiate or cancel the RPA by providing written notice to the Seller (with a copy of the Appraisal) no later than 7 calendar days after Acceptance of the RPA; whereupon the EMD shall be released to the Buyer without the requirement of written authorization from Seller. **IF this Residential Purchase Agreement is not cancelled, in writing on or before the Appraisal Deadline, Buyer shall be deemed to have waived the appraisal contingency.**

C. LOAN CONTINGENCY: Buyer's obligation to purchase the property is contingent upon Buyer obtaining the loan referenced in Section 1(C) or 1(D) of the RPA unless otherwise agreed in writing. Buyer shall remove the loan contingency in writing, attempt to renegotiate, or cancel the RPA by providing written notice to the Seller no later than 0 calendar days after Acceptance of the RPA; whereupon the EMD shall be released to the Buyer without the requirement of written authorization from Seller. **IF this Residential Purchase Agreement is not cancelled, in writing on or before the Loan Contingency Deadline, Buyer shall be deemed to have waived the loan contingency.**

D. CASH PURCHASE: Within n/a business days of Acceptance, Buyer agrees to provide written evidence from a bona fide financial institution of sufficient cash available to complete this purchase. If Buyer does not submit the written evidence within the above period, Seller reserves the right to terminate this Agreement.

3. SALE OF OTHER PROPERTY: This Agreement ☒ **is not –OR–** ☐ **is** contingent upon the sale (and closing) of another property which address is _____.
Said Property ☐ **is** ☒ **is not currently listed –OR-**☐ **is** presently in escrow with _____.
Escrow Number: _____. Proposed Closing Date: _____.

When Buyer has accepted an offer on the sale of this other property, Buyer will promptly deliver a written notice of the sale to Seller. If Buyer's escrow on this other property is terminated, abandoned, or does not close on time, this Agreement will terminate without further notice unless the parties agree otherwise in writing. If Seller accepts a bona fide written offer from a third party prior to Buyer's delivery of notice of acceptance of an offer on the sale of Buyer's property, Seller shall give Buyer written notice of that fact. Within three (3) calendar days of receipt of the notice, Buyer will waive the contingency of the sale and closing of Buyer's other property, or this Agreement will terminate without further notice. In order to be effective, the waiver of contingency must be accompanied by reasonable evidence that funds needed to close escrow will be available and Buyer's ability to obtain financing is not contingent upon the sale and/or close of any other property.

4. FIXTURES AND PERSONAL PROPERTY: The following items will be transferred, free of liens, with the sale of the Property with no real value unless stated otherwise herein. Unless an item is covered under Section 7(F) of this Agreement, all items are transferred in an "AS IS" condition. All EXISTING fixtures and fittings including, but not limited to: electrical, mechanical, lighting, plumbing and heating fixtures, ceiling fan(s), fireplace insert(s), gas logs and grates, solar power system(s), built-in appliance(s) including ranges/ovens, window and door screens, awnings, shutters, window coverings, attached floor covering(s), television antenna(s), satellite dish(es), private integrated telephone systems, air coolers/conditioner(s), pool/spa equipment, garage door opener(s)/remote control(s), mailbox, in-ground landscaping, trees/shrub(s), water softener(s), water purifiers, security systems/alarm(s);

The following additional items of personal property: _____

_____

5. ESCROW:

A. OPENING OF ESCROW: The purchase of the Property shall be consummated through Escrow ("Escrow"). Opening of Escrow shall take place by the end of one (1) business day after Acceptance of this Agreement

("Opening of Escrow"), at National Title title or escrow company ("Escrow Company" or "ESCROW HOLDER") with Lynnette Marrujo ("Escrow Officer") (or such other escrow officer as Escrow Company may assign). Opening of Escrow shall occur upon Escrow Company's receipt of this fully accepted Agreement. ESCROW HOLDER is instructed to notify the Parties (through their respective Agents) of the opening date and the Escrow Number.

B. EARNEST MONEY: Upon Acceptance, Buyer's EMD as shown in Section 1(A), and 1(B) if applicable, of this Agreement, shall be deposited pursuant to the language in Section 1(A) and 1(B) if applicable.

C. CLOSE OF ESCROW: Close of Escrow ("COE") shall be on or before: 09/22/17 (date). If the designated date falls on a weekend or holiday, COE shall be the next business day.

D. IRS DISCLOSURE: Seller is hereby made aware that there is a regulation that requires all ESCROW HOLDERS to complete a modified 1099 form, based upon specific information known only between parties in this transaction and the ESCROW HOLDER. Seller is also made aware that ESCROW HOLDER is required by federal law to provide this information to the Internal Revenue Service after COE in the manner prescribed by federal law.

6. TITLE INSURANCE: This Purchase Agreement is contingent upon the Seller's ability to deliver, good and marketable title as evidenced by a policy of title insurance, naming Buyer as the insured in an amount equal to the purchase price, furnished by the title company identified in Section 5(A). Said policy shall be in the form necessary to effectuate marketable title or its equivalent and shall be paid for as set forth in Section 8(A).

7. BUYER'S DUE DILIGENCE: Buyer's obligation **is** ____ **is not** MZ conditioned on the Buyer's Due Diligence as defined in this section 7(A) below. This condition is referred to as the "Due Diligence Condition" if checked in the affirmative, Sections 7 (A) through (C) shall apply; otherwise they do not. Buyer shall have 0 calendar days from Acceptance (as defined in Section 23 herein) to complete Buyer's Due Diligence. Seller agrees to cooperate with Buyer's Due Diligence. **Seller shall ensure that all necessary utilities (gas, power and water) and all operable pilot lights are on for Buyer's investigations and through the close of escrow.**

A. PROPERTY INSPECTION/CONDITION: During the Due Diligence Period, Buyer shall take such action as Buyer deems necessary to determine whether the Property is satisfactory to Buyer including, but not limited to, whether the Property is insurable to Buyer's satisfaction, whether there are unsatisfactory conditions surrounding or otherwise affecting the Property (such as location of flood zones, airport noise, noxious fumes or odors, environmental substances or hazards, whether the Property is properly zoned, locality to freeways, railroads, places of worship, schools, etc.) or any other concerns Buyer may have related to the Property. During such Period, Buyer shall have the right to conduct, non-invasive/ non-destructive inspections of all structural, roofing, mechanical, electrical, plumbing, heating/air conditioning, water/well/septic, pool/spa, survey, square footage, and any other property or systems, through licensed and bonded contractors or other qualified professionals. Seller agrees to provide reasonable access to the Property to Buyer and Buyer's inspectors. Buyer agrees to indemnify and hold Seller harmless with respect to any injuries suffered by Buyer or third parties present at Buyer's request while on Seller's Property conducting such inspections, tests or walk-throughs. Buyer's indemnity shall not apply to any injuries suffered by Buyer or third parties present at Buyer's request that are the result of an intentional tort, gross negligence or any misconduct or omission by Seller, Seller's Agent or other third parties on the Property. Buyer is advised to consult with appropriate professionals regarding neighborhood or Property conditions, including but not limited to: schools; proximity and adequacy of law enforcement; proximity to commercial, industrial, or agricultural activities; crime statistics; fire protection; other governmental services; existing and proposed transportation; construction and development; noise or odor from any source; and other nuisances, hazards or circumstances. If Buyer cancels this Agreement due to a specific inspection report, Buyer shall provide Seller at the time of cancellation with a copy of the report containing the name, address, and telephone number of the inspector.

B. BUYER'S RIGHT TO CANCEL OR RESOLVE OBJECTIONS: If Buyer determines, in Buyer's sole discretion, that the results of the Due Diligence are unacceptable, Buyer may either: (i) no later than the Due Diligence Deadline referenced in Section 7, cancel the Residential Purchase Agreement by providing written notice to the Seller, whereupon the Earnest Money Deposit referenced in Section 1(A) shall be released to the Buyer without the requirement of further written authorization from Seller; or (ii) no later than the Due Diligence Deadline referenced in Section 7, resolve in

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writing with Seller any objections Buyer has arising from Buyer's Due Diligence.

C. FAILURE TO CANCEL OR RESOLVE OBJECTIONS: If Buyer fails to cancel the Residential Purchase Agreement or fails to resolve in writing with Seller any objections Buyer has arising from Buyer's Due Diligence, as provided in Section 7, **Buyer shall be deemed to have waived the Due Diligence Condition.**

MZ **Buyer's Initials** _____ **Buyer's Initials**

D. INSPECTIONS: Acceptance of this offer is subject to the following reserved right. Buyer may have the Property inspected and select the licensed contractors, certified building inspectors and/or other qualified professionals who will inspect the Property. Seller will ensure that necessary utilities (gas, power and water and all operable pilot lights) are turned on and supplied to the Property within two (2) business days after Acceptance of this Agreement, to remain on until COE. *It is strongly recommended that Buyer retain licensed Nevada professionals to conduct inspections.* If any inspection is not completed and requested repairs are not delivered to Seller within the Due Diligence Period, Buyer is deemed to have waived the right to that inspection and Seller's liability for the cost of all repairs that inspection would have reasonably identified had it been conducted, except as otherwise provided by law. The foregoing expenses for inspections will be paid outside of Escrow unless the Parties present instructions to the contrary prior to COE, along with the applicable invoice.

(Identify which party shall pay for the inspection noted below either: SELLER, BUYER, 50/50, WAIVED or N/A.)

Type	Paid By	Type	Paid By	Type	Paid By
Energy Audit	Waived	Fungal Contaminant Inspection	Waived	Well Inspection (Quantity)	N/A
Home Inspection	Buyer	Mechanical Inspection	Waived	Well Inspection (Quality)	N/A
Termite/Pest Inspection	Waived	Pool/Spa Inspection	N/A	Wood-Burning Device/ Chimney Inspection	N/A
Roof Inspection	Waived	Soils Inspection	Waived	Septic Inspection	N/A
Septic Lid Removal	Waived	Septic Pumping	N/A	Structural Inspection	Waived
Survey (type):	N/A	Other:		Other:	

E. CERTIFICATIONS: In the event an inspection reveals areas of concern with the roof, septic system, well, wood burning device/chimney or the possible presence of a fungal contaminant, Buyer reserves the right to require a certification. The expenses for certifications will be paid outside of Escrow unless the Parties present instructions to the contrary prior to COE (along with the applicable invoice). A certification is not a warranty.

F. BUYER'S REQUEST FOR REPAIRS: It is Buyer's responsibility to inspect the Property sufficiently as to satisfy Buyer's use. Buyer reserves the right to request repairs, based upon the Seller's Real Property Disclosure or items which materially affect value or use of the Property revealed by an inspection, certification or appraisal. Items of a general maintenance or cosmetic nature which do not materially affect value or use of the Property, which existed at the time of Acceptance and which are not expressly addressed in this Agreement are deemed accepted by the Buyer, except as otherwise provided in this Agreement. The Brokers herein have no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party.

8. FEES, AND PRORATIONS (Identify which party shall pay the costs noted below either: SELLER, BUYER, 50/50, WAIVED or N/A.)

A. TITLE, ESCROW & APPRAISAL FEES:

Type	Paid By	Type	Paid By	Type	Paid By
Escrow Fees	50/50	Lender's Title Policy	Buyer	Owner's Title Policy	Seller
Real Property Transfer Tax	Seller	Appraisal	Buyer	Other:	

B. PRORATIONS: Any and all rents, taxes, interest, homeowner association fees, trash service fees, payments on bonds, SIDs, LIDs, and assessments assumed by the Buyer, and other expenses of the property shall be prorated as of the date of the recordation of the deed. Security deposits, advance rentals or considerations involving future lease credits shall be

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.

Buyer's Name: Marie Zhu

Property Address: 2132 HOUSTON DR

BUYER(S) INITIALS: MZ

SELLER(S) INITIALS: CW

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credited to the Buyer. All prorations will be based on a 30-day month and will be calculated as of COE. Prorations will be based upon figures available at closing. Any supplementals or adjustments that occur after COE will be handled by the parties outside of Escrow.

C. PRELIMINARY TITLE REPORT: Within ten (10) business days of Opening of Escrow, Title Company shall provide Buyer with a Preliminary Title Report ("PTR") to review, which must be approved or rejected within five (5) business days of receipt thereof. If Buyer does not object to the PTR within the period specified above, the PTR shall be deemed accepted. If Buyer makes an objection to any item(s) contained within the PTR, Seller shall have five (5) business days after receipt of objections to correct or address the objections. If, within the time specified, Seller fails to have each such exception removed or to correct each such objection, Buyer shall have the option to: (a) terminate this Agreement by providing notice to Seller and Escrow Officer, entitling Buyer to a refund of the EMD or (b) elect to accept title to the Property as is. All title exceptions approved or deemed accepted are hereafter collectively referred to as the "Permitted Exceptions."

D. LENDER AND CLOSING FEES: In addition to Seller's expenses identified herein, Seller will contribute $ 5000 to Buyer's Lender's Fees and/or Buyer's Title and Escrow Fees ☒ **including** –OR– ☐ **excluding** costs which Seller must pay pursuant to loan program requirements. Different loan types (e.g., FHA, VA, conventional) have different appraisal and financing requirements, which will affect the parties' rights and costs under this Agreement.

E. HOME PROTECTION PLAN: Buyer and Seller acknowledge that they have been made aware of Home Protection Plans that provide coverage to Buyer after COE. **Buyer** ☒ **waives** –OR– ☐ **requires** a Home Protection Plan with N/A. ☒ **Seller** –OR– ☐ **Buyer** will pay for the Home Protection Plan at a price not to exceed $ 0. **Buyer** will order the Home Protection Plan. Neither Seller nor Brokers make any representation as to the extent of coverage or deductibles of such plans.

9. TRANSFER OF TITLE: Upon COE, Buyer shall tender to Seller the agreed upon Purchase Price, and Seller shall tender to Buyer marketable title to the Property free of all encumbrances other than (1) current real property taxes, (2) covenants, conditions and restrictions (CC&R's) and related restrictions, (3) zoning or master plan restrictions and public utility easements; and (4) obligations assumed and encumbrances accepted by Buyer prior to COE. Buyer is advised the Property may be reassessed after COE which may result in a real property tax increase or decrease.

10. COMMON-INTEREST COMMUNITIES: If the Property is subject to a Common Interest Community ("CIC"), **Seller shall provide AT SELLER's EXPENSE the CIC documents as required by NRS 116.4109** (collectively, the "resale package"). Seller shall request the resale package within two (2) business days of Acceptance and provide the same to Buyer within one (1) business day of Seller's receipt thereof.

- **Pursuant to NRS 116.4109, Buyer may cancel this Agreement without penalty until midnight of the fifth (5th) calendar day following the date of receipt of the resale package.** If Buyer elects to cancel this Agreement pursuant to this statute, he/she must deliver, via hand delivery, prepaid U.S. mail, or electronic transmission, a written notice of cancellation to Seller or his or her authorized agent.
- **If Buyer does not receive the resale package within fifteen (15) calendar days of Acceptance, this Agreement may be cancelled in full by Buyer without penalty.** Notice of cancellation shall be delivered pursuant to Section 24 of the RPA.
- Upon such written cancellation, Buyer shall promptly receive a refund of the EMD. The parties agree to execute any documents requested by ESCROW HOLDER to facilitate the refund. If written cancellation is not received within the specified time period, the resale package will be deemed approved. Seller shall pay all outstanding CIC fines or penalties at COE.

A. CIC RELATED EXPENSES: (Identify which party shall pay the costs noted below either: SELLER, BUYER, 50/50, WAIVED or N/A.)

Type	Paid By	Type	Paid By	Type	Paid By
CIC Demand	Seller	CIC Capital Contribution	Seller	CIC Transfer Fees	Seller
Other: _____					

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.

Buyer's Name: Marie Zhu BUYER(S) INITIALS: MZ

Property Address: 2132 HOUSTON DR SELLER(S) INITIALS: CW

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11. DISCLOSURES: Within five (5) calendar days of Acceptance of this Agreement, Seller will provide the following Disclosures and/or documents. **Check applicable boxes.**

☒ **Seller Real Property Disclosure Form:** (NRS 113.130) ☐ **Open Range Disclosure:** (NRS 113.065)

☐ **Construction Defect Claims Disclosure:** If Seller has marked "Yes" to Paragraph 1(d) of the Sellers Real Property Disclosure Form (NRS 40.688)

☒ **Lead-Based Paint Disclosure and Acknowledgment:** required if constructed before 1978 (24 CFR 745.113)

☐ **Other:** (list) _____.

12. FEDERAL FAIR HOUSING COMPLIANCE AND DISCLOSURES: All properties are offered without regard to race, color, religion, sex, national origin, age, gender identity or expression, familial status, sexual orientation, ancestry, or handicap and any other current requirements of federal or state fair housing laws.

13. WALK-THROUGH INSPECTION OF PROPERTY: Buyer is entitled under this Agreement to a walk-through of the Property within 3 calendar days prior to COE to ensure the Property and all major systems, appliances, heating/cooling, plumbing and electrical systems and mechanical fixtures are as stated in Seller's Real Property Disclosure Statement, and that the Property and improvements are in the same general condition as when this Agreement was Accepted by Seller and Buyer. To facilitate Buyer's walk-through, Seller is responsible for keeping all necessary utilities on, including all operable pilot lights. If any systems cannot be checked by Buyer on walk-through due to non-access or no power/gas/water, then Buyer reserves the right to hold Seller responsible for defects which could not be detected on walk-through because of lack of such access or power/gas/water. The purpose of the walk-through is to confirm (a) the Property is being maintained (b) repairs, if any, have been completed as agreed, and (c) Seller has complied with Seller's other obligations. **If Buyer elects not to conduct a walk-through inspection prior to COE, then all systems, items and aspects of the Property are deemed satisfactory, and Buyer releases Seller's liability for costs of any repair that would have reasonably been identified by a walk-through inspection, except as otherwise provided by law.**

14. DELIVERY OF POSSESSION: Seller shall deliver the Property along with any keys, alarm codes, garage door opener/controls and, if freely transferable, parking permits and gate transponders outside of Escrow, upon COE. Seller agrees to vacate the Property and leave the Property in a neat and orderly, broom-clean condition and tender possession no later than ☒COE –OR– ☐_____. In the event Seller does not vacate the Property by this time, Seller shall be considered a trespasser in addition to Buyer's other legal and equitable remedies. Any personal property left on the Property after the date indicated in this section shall be considered abandoned by Seller.

15. RISK OF LOSS: Risk of loss shall be governed by NRS 113.040. This law provides generally that if all or any material part of the Property is destroyed before transfer of legal title or possession, Seller cannot enforce the Agreement and Buyer is entitled to recover any portion of the sale price paid. If legal title or possession has transferred, risk of loss shall shift to Buyer.

16. ASSIGNMENT OF THIS AGREEMENT: Unless otherwise stated herein, this Agreement is non-assignable unless agreed upon in writing by all parties.

17. CANCELLATION OF AGREEMENT: In the event this Agreement is properly cancelled in accordance with the terms contained herein, then Buyer will be entitled to a refund of the EMD. Neither Buyer nor Seller will be reimbursed for any expenses incurred in conjunction with due diligence, inspections, appraisals or any other matters pertaining to this transaction (unless otherwise provided herein or except as otherwise provided by law).

18. DEFAULT:

A. MEDIATION: Before any legal action is taken to enforce any term or condition under this Agreement, the parties agree to engage in mediation, a dispute resolution process, through GLVAR. Notwithstanding the foregoing, in the event the Buyer finds it necessary to file a claim for specific performance, this section shall not apply. Each party is encouraged to have an independent lawyer of their choice review this mediation provision before agreeing thereto. By initialing below, the parties confirm that they have read and understand this section and voluntarily agree to the provisions thereof.

BUYER(S) INITIALS: MZ / _____ **SELLER(S) INITIALS:** CW / _____

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.

Buyer's Name: Marie Zhu BUYER(S) INITIALS: MZ / _____

Property Address: 2132 HOUSTON DR SELLER(S) INITIALS: CW / _____

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B. IF SELLER DEFAULTS: If Seller defaults in performance under this Agreement, Buyer reserves all legal and/or equitable rights (such as specific performance) against Seller, and Buyer may seek to recover Buyer's actual damages incurred by Buyer due to Seller's default.

C. IF BUYER DEFAULTS: If Buyer defaults in performance under this Agreement, as Seller's sole legal recourse, Seller may retain, as liquidated damages, the EMD. In this respect, the Parties agree that Seller's actual damages would be difficult to measure and that the EMD is in fact a reasonable estimate of the damages that Seller would suffer as a result of Buyer's default. Seller understands that any additional deposit not considered part of the EMD in Section 1(B) herein will be immediately released by ESCROW HOLDER to Buyer.

Instructions to Escrow

19. ESCROW: If this Agreement or any matter relating hereto shall become the subject of any litigation or controversy, Buyer and Seller agree, jointly and severally, to hold ESCROW HOLDER free and harmless from any loss or expense, except losses or expenses as may arise from ESCROW HOLDER'S negligence or willful misconduct. If conflicting demands are made or notices served upon ESCROW HOLDER with respect to this Agreement, the parties expressly agree that Escrow is entitled to file a suit in interpleader and obtain an order from the Court authorizing ESCROW HOLDER to deposit all such documents and monies with the Court, and obtain an order from the Court requiring the parties to interplead and litigate their several claims and rights among themselves. Upon the entry of an order authorizing such Interpleader, ESCROW HOLDER shall be fully released and discharged from any obligations imposed upon it by this Agreement; and ESCROW HOLDER shall not be liable for the sufficiency or correctness as to form, manner, execution or validity of any instrument deposited with it, nor as to the identity, authority or rights of any person executing such instrument, nor for failure of Buyer or Seller to comply with any of the provisions of any agreement, contract or other instrument filed with ESCROW HOLDER or referred to herein. ESCROW HOLDER'S duties hereunder shall be limited to the safekeeping of all monies, instruments or other documents received by it as ESCROW HOLDER, and for their disposition in accordance with the terms of this Agreement. In the event an action is instituted in connection with this escrow, in which ESCROW HOLDER is named as a party or is otherwise compelled to make an appearance, all costs, expenses, attorney fees, and judgments ESCROW HOLDER may expend or incur in said action, shall be the responsibility of the parties hereto.

20. UNCLAIMED FUNDS: In the event that funds from this transaction remain in an account, held by ESCROW HOLDER, for such a period of time that they are deemed "abandoned" under the provisions of Chapter 120A of the Nevada Revised Statutes, ESCROW HOLDER is hereby authorized to impose a charge upon the dormant escrow account. Said charge shall be no less than $5.00 per month and may not exceed the highest rate of charge permitted by statute or regulation. ESCROW HOLDER is further authorized and directed to deduct the charge from the dormant escrow account for as long as the funds are held by ESCROW HOLDER.

Brokers

21. BROKER'S COMPENSATION/FEES: Buyer herein requires, and Seller agrees, as a condition of this Agreement, that Seller will pay Listing Broker and Buyer's Broker, who becomes by this clause a third party beneficiary to this Agreement, that certain sum and/or percentage of the Purchase Price (commission), that Seller, or Seller's Broker, offered for the procurement of ready, willing and able Buyer via the Multiple Listing Service, any other advertisement or written offer. Seller understands and agrees that if Seller defaults hereunder, Buyer's Broker, as a third-party beneficiary of this Agreement, has the right to pursue all legal recourse against Seller for any commission due. **In addition to any amount due to Buyer's Broker from Seller or Seller's Broker, Buyer ☒ will –OR– ☐ will not pay Buyer's Broker additional compensation in an amount determined between the Buyer and Buyer's Broker.**

22. WAIVER OF CLAIMS: Buyer and Seller agree that they are not relying upon any representations made by Brokers or Broker's agent. Buyer acknowledges that at COE, the Property will be sold AS-IS, WHERE-IS without any representations or warranties, unless expressly stated herein. Buyer agrees to satisfy himself/herself, as to the condition of the Property, prior to COE. Buyer acknowledges that any statements of acreage or square footage by Brokers are simply estimates, and Buyer agrees to make such measurements, as Buyer deems necessary, to ascertain actual acreage or square footage. Buyer waives all

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claims against Brokers or their agents for (a) defects in the Property; (b) inaccurate estimates of acreage or square footage; (c) environmental waste or hazards on the Property; (d) the fact that the Property may be in a flood zone; (e) the Property's proximity to freeways, airports or other nuisances; (f) the zoning of the Property; (g) tax consequences; or (h) factors related to Buyer's failure to conduct walk-throughs or inspections. Buyer assumes full responsibility for the foregoing and agrees to conduct such tests, walk-throughs, inspections and research, as Buyer deems necessary. In any event, Broker's liability is limited, under any and all circumstances, to the amount of that Broker's commission/fee received in this transaction.

Other Matters

23. DEFINITIONS: **"Acceptance"** means the date that both parties have consented to a final, binding contract by affixing their signatures to this Agreement and all counteroffers and said Agreement and all counteroffers have been delivered to both parties pursuant to Section 24 herein. **"Agent"** means a licensee working under a Broker or licensees working under a developer. **"Agreement"** includes this document as well as all accepted counteroffers and addenda. **"Appraisal"** means a written appraisal or Notice of Value as required by any lending institution prepared by a licensed or certified professional. **"Bona Fide"** means genuine. **"Buyer"** means one or more individuals or the entity that intends to purchase the Property. **"Broker"** means the Nevada licensed real estate broker listed herein representing Seller and/or Buyer (and all real estate agents associated therewith). **"Business Day"** excludes Saturdays, Sundays, and legal holidays. **"Calendar Day"** means a calendar day from/to midnight unless otherwise specified. **"CFR"** means the Code of Federal Regulations. **"CIC"** means Common Interest Community (formerly known as "HOA" or homeowners associations). **"CIC Capital Contribution"** means a one-time non-administrative fee, cost or assessment charged by the CIC upon change of ownership. **"CIC Transfer Fees"** means the administrative service fee charged by a CIC to transfer ownership records. **"Close of Escrow (COE)"** means the time of recordation of the deed in Buyer's name. **"Default"** means the failure of a Party to observe or perform any of its material obligations under this Agreement. **"Delivered"** means personally delivered to Parties or respective Agents, transmitted by facsimile machine, electronic means, overnight delivery, or mailed by regular mail. **"Down Payment"** is the Purchase Price less loan amount(s). **"EMD"** means Buyer's earnest money deposit. **"Escrow Holder"** means the neutral party that will handle the closing. **"FHA"** is the U.S. Federal Housing Administration. **"GLVAR"** means the Greater Las Vegas Association of REALTORS®. **"Good Funds"** means an acceptable form of payment determined by ESCROW HOLDER in accordance with NRS 645A.171. **"IRC"** means the Internal Revenue Code (tax code). **"LID"** means Limited Improvement District. **"N/A"** means not applicable. **"NAC"** means Nevada Administrative Code. **"NRS"** means Nevada Revised Statues as Amended. **"Party"** or **"Parties"** means Buyer and Seller. **"PITI"** means principal, interest, taxes, and hazard insurance. **"PMI"** means private mortgage insurance. **"PST"** means Pacific Standard Time, and includes daylight savings time if in effect on the date specified. **"PTR"** means Preliminary Title Report. **"Property"** means the real property and any personal property included in the sale as provided herein. **"Receipt"** means delivery to the party or the party's agent. **"RPA"** means Residential Purchase Agreement. **"Seller"** means one or more individuals or the entity that is the owner of the Property. **"SID"** means Special Improvement District. **"Title Company"** means the company that will provide title insurance. **"USC"** is the United States Code. **"VA"** is the Veterans Administration.

24. SIGNATURES, DELIVERY, AND NOTICES:

A. This Agreement may be signed by the parties on more than one copy, which, when taken together, each signed copy shall be read as one complete form. This Agreement (and documents related to any resulting transaction) may be signed by the parties manually or digitally. Facsimile signatures may be accepted as original.

B. When a Party wishes to provide notice as required in this Agreement, such notice shall be sent regular mail, personal delivery, overnight delivery, by facsimile, and/or by electronic transmission to the Agent for that Party. The notification shall be effective when postmarked, received, faxed, delivery confirmed, and/or read receipt confirmed in the case of email. Delivery of all instruments or documents associated with this Agreement shall be delivered to the Agent for Seller or Buyer if represented. Any cancellation notice shall be contemporaneously delivered to Escrow in the same manner.

25. IRC 1031 EXCHANGE: Seller and/or Buyer may make this transaction part of an IRC 1031 exchange. The party electing to make this transaction part of an IRC 1031 exchange will pay all additional expenses associated therewith, at no cost to the other party. The other party agrees to execute any and all documents necessary to effectuate such an exchange.

26. OTHER ESSENTIAL TERMS: Time is of the essence. No change, modification or amendment of this Agreement

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shall be valid or binding unless such change, modification or amendment shall be in writing and signed by each party. This Agreement will be binding upon the heirs, beneficiaries and devisees of the parties hereto. This Agreement is executed and intended to be performed in the State of Nevada, and the laws of that state shall govern its interpretation and effect. The parties agree that the county and state in which the Property is located is the appropriate forum for any action relating to this Agreement. Should any party hereto retain counsel for the purpose of initiating litigation to enforce or prevent the breach of any provision hereof, or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorney's fees and costs incurred by such prevailing party.

THIS IS A LEGALLY BINDING CONTRACT. All parties are advised to seek independent legal and tax advice to review the terms of this Agreement.

THIS FORM HAS BEEN APPROVED BY THE GREATER LAS VEGAS ASSOCIATION OF REALTORS® (GLVAR). NO REPRESENTATION IS MADE AS TO THE LEGAL VALIDITY OR ADEQUACY OF ANY PROVISION IN ANY SPECIFIC TRANSACTION. A REAL ESTATE BROKER IS THE PERSON QUALIFIED TO ADVISE ON REAL ESTATE TRANSACTIONS. IF YOU DESIRE LEGAL OR TAX ADVICE, CONSULT AN APPROPRIATE PROFESSIONAL.

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27. ADDENDUM(S) ATTACHED: _____

28. ADDITIONAL TERMS:
Buyer agree to pay the difference in cash if appraisal come in lower than purchase price, not to exceed purchase price of $200k.

Buyer's Acknowledgement of Offer

Confirmation of Representation: The Buyer is represented in this transaction by:

Buyer's Broker:	Joyce Nickrandt	Agent's Name:	Liwei Helen Chen
Company Name:	Investpro Realty	Agent's License Number:	S.0175520
Broker's License Number:	B0144660	Office Address:	3553 VALLEY VIEW BLVD
Phone:	702-997-3832	City, State, Zip:	LAS VEGAS NV 89103
Fax:	702-997-3836	Email:	helen0510c@gmail.com

BUYER LICENSEE DISCLOSURE OF INTEREST: Pursuant to NRS 645.252(1)(c), a real estate licensee must disclose if he/she is a principal in a transaction or has an interest in a principal to the transaction. Licensee declares that he/she:
_X_ **DOES NOT** have an interest in a principal to the transaction. **–OR–**
___ **DOES** have the following interest, direct or indirect, in this transaction: ☐ Principal (Buyer) **–OR–** ☐ family or firm relationship with Buyer or ownership interest in Buyer (if Buyer is an entity): (specify relationship) _____.

Seller must respond by: 5 (☐AM☒PM) **on (month)** September **, (day)** 6 **, (year)** 2017 **. Unless this**

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.

Buyer's Name: Marie Zhu
Property Address: 2132 HOUSTON DR

BUYER(S) INITIALS: MZ
SELLER(S) INITIALS: CW

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Agreement is accepted, rejected or countered below and delivered to the Buyer's Broker before the above date and time, this offer shall lapse and be of no further force and effect. Upon Acceptance, Buyer agrees to be bound by each provision of this Agreement, and all signed addenda, disclosures, and attachments.

Marie Zhu	Marie Zhu	09/05/2017	4:05 PM ☐AM/☐PM
Buyer's Signature	Buyer's Printed Name	Date	Time
			☐AM/☐PM
Buyer's Signature	Buyer's Printed Name	Date	Time

Seller's Response

Confirmation of Representation: The Seller is represented in this transaction by:

Seller's Broker: Joyce Nickrandt
Company Name: Investpro Realty
Broker's License Number: B0144660
Phone:
Fax: 866-782-3075

Agent's Name: Liwei Helen Chen
Agent's License Number: S.0172460
Office Address: 3553 Valley View Dr
City, State, Zip: Las Vegas NV 89103
Email: zhong.kenny@gmail.com

SELLER LICENSEE DISCLOSURE OF INTEREST: Pursuant to NRS 645.252(1)(c), a real estate licensee must disclose if he/she is a principal in a transaction or has an interest in a principal to the transaction. Licensee declares that he/she:

_X_ **DOES NOT** have an interest in a principal to the transaction. **–OR–**

___ **DOES** have the following interest, direct or indirect, in this transaction: ☐ Principal (Seller) **–OR–** ☐ family or firm relationship with Seller or ownership interest in Seller (if Seller is an entity): (specify relationship)

_____.

FIRPTA: If applicable (as designated in the Seller's Response herein), Seller agrees to complete, sign, and deliver to Buyer's FIRPTA Designee a certificate indicating whether Seller is a foreign person or a nonresident alien pursuant to the Foreign Investment in Real Property Tax Act (FIRPTA). A foreign person is a nonresident alien individual; a foreign corporation not treated as a domestic corporation; or a foreign partnership, trust or estate. A resident alien is not considered a foreign person under FIRPTA. Additional information for determining status may be found at www.irs.gov. Buyer and Seller understand that if Seller is a foreign person then the Buyer must withhold a tax in an amount to be determined by Buyer's FIRPTA Designee in accordance with FIRPTA, unless an exemption applies. Seller agrees to sign and deliver to the Buyer's FIRPTA Designee the necessary documents, to be provided by the Buyer's FIRPTA Designee, to determine if withholding is required. (See 26 USC Section 1445).

SELLER DECLARES that he/she _X_ **is not** **–OR–** ___ **is** a foreign person therefore subjecting this transaction to FIRPTA withholding. **SELLER(S) INITIALS:** CW / _____

_X_ **ACCEPTANCE:** Seller(s) acknowledges that he/she accepts and agrees to be bound by each provision of this Agreement, and all signed addenda, disclosures, and attachments.

___ **COUNTER OFFER:** Seller accepts the terms of this Agreement subject to the attached Counter Offer #1.

___ **REJECTION:** In accordance with NAC 645.632, Seller hereby informs Buyer the offer presented herein **is not** accepted.

	TKNR INC	09/05/2017	4:53 PM ☐AM/☐PM
Seller's Signature	Seller's Printed Name	Date	Time
			☐AM/☐PM
Seller's Signature	Seller's Printed Name	Date	Time

Each party acknowledges that he/she has read, understood, and agrees to each and every provision of this page unless a particular paragraph is otherwise modified by addendum or counteroffer.

Buyer's Name: Marie Zhu
Property Address: 2132 HOUSTON DR

BUYER(S) INITIALS: MZ / _____
SELLER(S) INITIALS: CW / _____

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InvestPro REALTY

ADDENDUM NO. 1
TO PURCHASE AGREEMENT

REALTOR® EQUAL HOUSING OPPORTUNITY

In reference to the Purchase Agreement executed by Marie Zhu as Buyer(s) and TKNR INC as Seller(s), dated 09/05/17 covering the real property at 2132 HOUSTON DR LASVEGAS NV 89104, the ☒ Buyer ☐ Seller hereby proposes that the Purchase Agreement be amended as follows:

1.buyer and seller agree to extend the COE to 1/5/18.
2.buyer to make an immediate additional deposit of $60,000 (sixty thousand dollars) to escrow , and the escrow to release the entire $60,000 (sixty thousands dollars) to seller immediately, and become non-refundable. If this transfer is not completed within 48 hours of execution of this addendum , this addendum will become invalid immediately,either buyer and seller have any obligations to each other.
3.Total of $60,000 will be applied to purchase price as buyer's credit at COE. All other terms on the existing RPA and addendum to stay the same and effective .
4. Buyer also agree to pay for the rent on one of 2 bedroom unit at the rate of $650 per month until seller place a tenant in the unit ,the rent will be paid by buyer to seller at successful COE .in the event that seller place a tenant in the unit , buyer will no longer be paying the rent to seller , and buyer will pay $800 tenant placement fee (leasing fee) to current PM immediately, which is none refundable and to be prorated at successful COE.
5. Time is essence on this addendum.
6. Seller has the right to cancel the escrow without any obligation to the buyer only if the buyer fails to close the escrow for any reason what so ever by Jan 5th, 2018.
7. Buyer agrees to hold harmless against the seller, listing agent and its broker, selling agent and its broker if the buyer fails the close by Jan 5th, 2018 per RPA and this addendum.

Authentisign
Joyce Nickrandt
witness 9/27/2017 Joyce Nickrandt

☐ **ADDITIONAL PAGE(S) ATTACHED. This Addendum is not complete without the additional terms on the attached _____ page(s).**

When executed by both parties, this Addendum is made an integral part of the aforementioned Purchase Agreement.

WHEN PROPERLY COMPLETED, THIS IS A BINDING CONTRACT. IF YOU DO NOT FULLY UNDERSTAND ITS CONTENTS, YOU SHOULD SEEK COMPETENT LEGAL COUNSEL BEFORE SIGNING.

Authentisign
Marie Zhu
☒ Buyer ☐ Seller 9/26/2017 7:48:07 PM PDT — Date 09/26/2017

☐ Buyer ☐ Seller — Time 7:48 PM

Acceptance:

Authentisign
☐ Buyer ☒ Seller 9/27/2017 11:06:[illegible] AM PDT — Date 09/27/2017

☐ Buyer ☐ Seller — Time 11:06 AM

Prepared by: Liwei Helen Chen
Agent's Printed Name — Phone

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InvestPro REALTY

ADDENDUM NO. 2
TO PURCHASE AGREEMENT

REALTOR® EQUAL HOUSING OPPORTUNITY

In reference to the Purchase Agreement executed by Marie Zhu as Buyer(s) and TKNR INC as Seller(s), dated 09/05/17 covering the real property at 2132 HOUSTON DR LASVEGAS NV 89104, the ☒ Buyer ☐ Seller hereby proposes that the Purchase Agreement be amended as follows:

1. Buyer's name amend to WLAB INVESTMENT GROUP LLC

☐ **ADDITIONAL PAGE(S) ATTACHED. This Addendum is not complete without the additional terms on the attached _____ page(s).**

When executed by both parties, this Addendum is made an integral part of the aforementioned Purchase Agreement.

WHEN PROPERLY COMPLETED, THIS IS A BINDING CONTRACT. IF YOU DO NOT FULLY UNDERSTAND ITS CONTENTS, YOU SHOULD SEEK COMPETENT LEGAL COUNSEL BEFORE SIGNING.

Authentisign Marie Zhu 12/12/2017 1:39:33 PM PST

☒ Buyer ☐ Seller — Date: 12/12/2017

☐ Buyer ☐ Seller — Time: 1:39 PM

Acceptance:

Authentisign 12/12/2017 2:45:12 PM PST

☐ Buyer ☒ Seller — Date: 12/12/2017

☐ Buyer ☐ Seller — Time: 2:45 PM

Prepared by: Liwei Helen Chen
Agent's Printed Name — Phone

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Steven D. Grierson
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MICHAEL B. LEE, ESQ. (NSB 10122)
MICHAEL MATTHIS, ESQ. (NSB 14582)
MICHAEL B. LEE, P.C.
1820 East Sahara Avenue, Suite 110
Las Vegas, Nevada 89104
Telephone: (702) 477.7030
Facsimile: (702) 477.0096
mike@mblnv.com
Attorney for Defendants

IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, vs. TKNR INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual, and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKRANDT, an individual and Does 1 through 15 and Roe Corporation I - XXX, Defendants.	CASE NO.: A-18-785917-C DEPT. NO.: XIV **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES** Date of Hearing: September 14, 2022 Time of Hearing: 9:00 a.m.

Defendants TKNR INC. ("TKNR"), CHI ON WONG ("WONG"), KENNY ZHONG LIN ("LIN"), LIWE HELEN CHEN ("CHEN"), YAN QIU ZHANG ("ZHANG"), INVESTPRO LLC ("INVESTPRO"), MAN CHAU CHENG ("CHENG"), JOYCE A. NICKRANDT ("NICKRANDT"), INVESTPRO INVESTMENTS, LLC ("Investments"), and INVESTPRO MANAGER LLC (hereinafter collectively referred to as the "Defendants"), by and through their counsel of record, MICHAEL B. LEE, P.C., hereby files this Reply ("Reply") to Plaintiff's Opposition ("Opposition") to Defendants' Motion for Attorneys' Fees and Costs ("Motion").

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

This Reply is made on the following Memorandum of Points and Authorities, any affidavits, declarations or exhibits attached hereto, and any oral arguments accepted at the time of the hearing of this matter. Plaintiff W L A B INVESTMENT, LLC is hereinafter referred to as "Plaintiff" or "WLAB".

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Overview

The Motion for Attorneys' Fees and Costs ("Motion") was timely filed by Defendants following the remittitur of this matter, which was filed with the Supreme Court on August 16, 2022. See Remittitur attached hereto as **Exhibit A**. Although the docket in this matter indicates a remittitur was filed on July 26, 2022, Defendants do not recall receiving notice thereof. However, using either date, the Motion was filed within the 21-day deadline required by NRCP 54(d)(2)(B).

Additionally, the requirements of Rules 54(d)(2)(A) and 54(d)(2)(B) do not apply to claims for attorney fees as sanctions or when the applicable substantive law requires attorney fees to be proved at trial as an element of damages." See NRCP § 54(d)(D). Here, part of the basis for the award of attorneys' fees to Defendants is that this action was frivolously maintained by Plaintiff from its onset. See *Appendix to Motion ("Appendix")* at Ex. J [0137-0176] p. 0166, lines 2-6 ("I don't see in good faith how this can be brought – this can be brought by the plaintiffs in good faith when they've waived everything. And in addition, they refused to conduct an inspection knowing that they were purchasing a 63-year-old property. I mean it's just absurd."). As such, the Motion's request for attorneys' fees pursuant to NRCP § 11 and/or NRS § 18.010 was timely made.

Moreover, Defendants are entitled to attorneys' fees and costs following the appeal pursuant to the terms of the Residential Purchase Agreement that was entered between the Parties and is the underlying document giving rise to this entire action. See *Supp. to Mot.* at Ex. A; see also *Musso v. Binick*, 104 Nev. 613, 615, 764 P.2d 477, 477-78 (1988). The Motion's request for fees and costs as a prevailing party on appeal obviously could not have been brought

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until after the Remittitur was filed. As the Motion, and Supplement, were filed within 21 days of the filing and notice of the Remittitur, the requests for fees and costs related to the appeal are timely.

Finally, Defendants will be greatly prejudiced if denied attorneys' fees and costs as requested. Through no fault of Defendants, the Honorable judge previously presiding over this matter created a procedural deficiency by unilaterally amending the original order granting summary judgment [see *Appendix* at Ex. D] and removing the language related to the "order to show cause" prior to imposing Rule 11 sanctions. See *Id.* at Ex. C. That is the only basis for why the award of attorneys' fees was reversed. *Id.* at Ex. H. However, it is clear based on the relevant facts and applicable law, as cited in the Amended Order, and affirmed by the Court, that this matter was frivolously maintained, which forced Defendants to incur unnecessary legal fees that in fairness and equity should be reimbursed. *Id.* at Exs. C-J.

B. Summary of the Arguments

1. *Motion*

The Motion requests attorneys' fees and costs incurred by Defendants related to the frivolous nature of Plaintiff's claims, the entry of summary judgment in favor of Defendants on all claims, the subsequent affirmation of the order granting summary judgment, Plaintiff's decision to reject the good faith offer of judgment provided by Defendants, and pursuant to Nevada statutes and the terms of the underlying contract between the Parties. In support, the Motion provides the relevant facts, procedural history involved in this matter, and the applicable case law supporting Defendants' request for attorneys' fees.

First, the Motion provides that an award of fees and costs is appropriate pursuant to Rule 11 and NRS § 18.010(2)(b). The Motion included citation to the record where this Honorable Court clearly and unequivocally determined that summary judgment in favor of Defendants was appropriate on all claims and counterclaims based on the clear frivolous nature of the action as illustrated by Plaintiff's sophistication as a buyer, it's knowledge prior to entering the agreement, refusal to conduct inspections, the disclosures made by the sellers, and the lack of evidence to support any of Plaintiff's claims. See *Appendix* at Exs. C-J.

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Second, the Motion requests fees and costs be awarded to Defendants as the prevailing party pursuant to NRS § 18.010(2)(a). The Motion illustrates that Defendants are clearly the prevailing party as summary judgment was entered in their favor on all claims, which was then affirmed on appeal. As such, award of fees and costs is appropriate.

Third, the Motion requests fees and costs pursuant to the NRS § 17.117 and NRCP § 68 related to Plaintiff's rejection of the Offer of Judgment [see *Appendix* at Ex. A] and the subsequent order granting summary judgment in favor of Defendants and against Plaintiff, wherein Plaintiff was awarded nothing. The Motion indicates that the offer was reasonable in the amount given the facts of the case, which are included in the offer, further illustrating Defendants' unreasonableness in failing to accept the offer of judgment.

Fourth, the Motion requests fees and costs pursuant to summary judgment being entered on the competing claims for abuse of process filed by Plaintiff and Defendants. The Motion cites to both the record where the court indicates that Defendants have succeeded on their counterclaim for abuse of process and to the case law illustrating that attorneys' fees and costs are recoverable as damages related to a successful claim for abuse of process.

Finally, the Motion includes and affidavit from Defendants' counsel of record including the required analysis of the *Brunzell* factors illustrating the reasonableness and necessity of the fees and costs incurred by Defendants.

2. *Supplement*

Plaintiff filed a supplement to the Motion on August 25, 2022, to include a request for fees and costs pursuant to the terms of the Residential Purchase Agreement signed by the Parties in this matter. The Supplement includes citation to the provision of the Residential Purchase Agreement between the Parties that provide for recovery of attorneys' fees and costs by the prevailing party. The Supplement further illustrates that Defendants were unequivocally the prevailing party in this matter considering the award of summary judgment on all claims and subsequent affirmance of that order by the Court.

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/ / / /

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3. *Opposition*

The Opposition filed by Plaintiff first endeavors to rewrite the facts of this matter in a deleterious attempt to argue that the matter was not frivolously maintained by Plaintiff. See *Opp.* at pp. 2-10. Incredibly, Plaintiff cites to a self-serving and unsupported declaration of Frank Miao that was generated after this Honorable Court had already granted Defendants' Motion for Summary Judgment and discovery had long been closed. *Id.* at Ex. 4 at p. 27 (affidavit notarized on April 16, 2021). Notably, the exact same declaration was already considered by this Honorable Court in reviewing Plaintiff's Motion to Reconsider the entry of summary judgment in favor of Defendants. Despite that declaration, this Honorable Court affirmed the entry of summary judgment in favor of Defendants. See *Appendix* at Ex. F ("Plaintiff has not demonstrated that this Court's decision to grant Rule 11 sanctions was clearly erroneous."). As such, the Opposition's alleged statement of facts and procedure should not be considered by this Honorable Court.

In terms of arguments, the Opposition argues that the Motion filed by Defendants is not timely because it was not filed within 21 days after entry of the order granting summary judgment ("Amended Order") pursuant to NRCP 54(d)(2)(B). Notably, the Opposition fails to include that Defendants, on April 6, 2021, filed an Affidavit in support of an Award for Attorneys' Fees as indicated by the Amended Order. Additionally, the Opposition fails to address that Plaintiff's appeal was a direct appeal of the Amended Order and the actual award of attorneys' fees ("Judgment").

Next, the Opposition argues that the facts of the case do not provide a basis for Rule 11 sanctions because Plaintiff's former counsel was just "doing his job" and that "[p]urportedly, Mr. Childs […] made reasonable inquiry that [the complaint and amendments] were being brought for a proper purpose." *Id.* at pp. 14:25-28 – 15:1-3. However, the Opposition fails to provide any analysis or information on the competent inquiry made by Plaintiff's and his counsel, especially in light of the findings by the Courts in this matter that have found no legitimate basis for why this case was ever filed. The Opposition also argues that Defendants have failed to follow the procedural requirements of Rule 11 prior to filing the Motion.

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Finally, the Opposition asserts that this Honorable Court lacks jurisdiction to consider the Motion's request for fees and costs on appeal. In support, the Opposition cites to Nevada Rule of Appellate Procedure ("NRAP") § 38, asserting that fees and costs are only awarded if the appeal is frivolous.

4. *Response to Supplement*

The Response requests that the Supplement should be viewed as the de facto reply and that no other filing by Defendants should be considered by this Honorable Court in terms of the Motion and Defendants requested relief. However, the Response fails to cite to any authority, whatsoever, that would support such a request.

II. DISCUSSION

The following Discussion is organized into four (4) separate parts in support of the Motion's request for attorneys' fees and costs. Part A sets forth that the Motion was timely filed following the Remittitur pursuant to the relevant procedural and factual circumstances surrounding this matter. Part B illustrates that because the Motion is timely, this Honorable Court can award attorneys' fees and costs pursuant to statute and/or agreement. Part C provides that Rule 11 sanctions are appropriate and can be awarded following an order to show cause, which will allow Plaintiff sufficient notice and opportunity to be heard on the matter. Lastly, Part D establishes that this Honorable Court has jurisdiction to award fees and costs on appeal pursuant to the terms of the Residential Purchase Agreement.

A. The Motion was Timely Made following the Remittitur

The Motion was timely following the Remittitur because Plaintiff appealed both the underlying order, which was the basis for the award of attorneys' fees, and the award of attorneys' fees itself. See *Appendix* at Ex. H, p. 0125-0133. As such, Defendants would not have been able to bring another motion for attorneys' fees while the appeal was pending, as is suggested by the Opposition. See *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006) ("the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits.").

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The procedural history of the case is important to illustrate the timeliness of the instant Motion.

First, on December 15, 2020, Defendants filed their motion for summary judgment ("MSJ"), including a request for attorneys' fees and costs pursuant to Rule 11, NRS § 18.010(2), and as damages for abuse of process. See *Opp.* at Ex. 8; see also Supplement to MSJ attached hereto as **Exhibit B** [filed on 1/29/2021]. On March 31, 2021, the original order granting summary judgment in favor of Defendants on all claims—including the competing claims for abuse of process—was filed, also ordering a hearing to show cause hearing related to the violation of Rule 11 by Plaintiff. See *Appendix* at Ex. D p. 0098. However, the then-presiding judge unilaterally amended the original order, removing the order to show cause language, instead directing Defendants to "file an affidavit in support of requested attorney's fees and costs within 10 days of the entry of Order." See *Appendix* at Ex. C, p. 0051. As such, on April 6, 2021, Defendants filed the Affidavit on support of Attorneys' Fees and Costs ("Affidavit") indicating that the requested fees and costs were appropriate after "under either Rule 11 or for abuse of process." See Affidavit attached hereto as **Exhibit C** [without exhibits] at p. 5, ¶ 18.

On April 16, 2021, Plaintiff filed its Motion to Reconsider the Amended Order, which was both granted in, part, and denied, in part. See *Appendix* at Ex. F [0105-0115]. Notably, Plaintiff did "not oppose the specific amounts requested" by Defendants in the Affidavit; instead, Plaintiff merely argued against the imposition of attorneys' fees and costs in general. See *Id.* at 110; ¶ 14. On or about May 25, 2021, Judgment was entered awarding Defendants the sum of $128,166.78 in attorneys' fees and costs from Plaintiff. *Id.* at 0111-0112.

On April 26, 2021, Plaintiff filed its notice of appeal of the Amended Order, which was the underlying basis for the award of attorneys' fees.

On June 1, 2021, Benjamin Childs, Esq. ("Childs"), former counsel for Plaintiff, filed a Writ of Mandamus or Writ of Prohibition ("Writ") related to the Judgment. In connection with the Writ, Mr. Childs filed a motion to stay enforcement of the judgment, which was subsequently granted on or about June 24, 2021. See June 24, 2021, Order for Stay of Enforcement, attached hereto as **Exhibit D**.

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On June 8, 2021, Plaintiff filed its notice of appeal of the Judgment.

On June 13, 2021, Plaintiff filed its Motion for Stay of Execution of Judgment Pending Appeal on Order Shortening Time. The Motion was set for hearing on June 24, 2021, but was vacated, presumably because the Court had already entered the order to stay enforcement from the Court related to Mr. Childs' Writ, which was decided on or about October 19, 2021.

On December 28, 2021, Plaintiff filed another motion for stay, this time requesting the stay be granted without security. The Motion was granted, in part, allowing for the stay of execution, but requiring a security bond be provided. See Jan. 21, 2022, Order for Stay of Enforcement, attached hereto as **Exhibit E**.

On May 12, 2022, the Court entered its Decision, affirming the entry of summary judgment in favor of Defendants on all claims, but reversing the monetary sanctions portion of the Judgment. See *Appendix* at Ex. H [0125-0133]. On June 29, 2022, the Court denied Plaintiff's request for rehearing of the appeal. *Id.* at Ex. I [0136].

On August 16, 2022, the Remittitur was filed with the Court. See Ex. A.

Here, it is undisputed that the award of attorneys' fees and costs was the direct subject at issue in the appeals and the Writ. Therefore, this Honorable Court was divested of jurisdiction of any matter that would affect the merits of the appeal. See *Mack-Manley v. Manley*, 122 Nev. 849, 855,1387 P.3d 525, 529-530 (2006) (quoting *Rust v. Clark Cty. School District*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987) ("when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, [but] the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits.").

Moreover, Plaintiff moved for a stay, which was subsequently granted, immediately after the Judgment was entered, further illustrating that it would not have been procedurally appropriate for Defendants to file another motion for attorneys' fees. Had Defendants filed another motion for attorneys' fees, Plaintiff would have undoubtedly argued that the court lacked jurisdiction because the matter was pending appeal and subject of the stay entered by the Court. Plaintiff should not be allowed to have its cake and eat it too. Plaintiff twice filed a request for

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stay of execution, arguing that the award of fees is pending with the Supreme Court. However, now that Plaintiff has appreciated the benefit of the stay, it incredibly asks this Honorable Court to forgo the same in order to prejudice the Defendants.

Finally, the facts of this matter illustrate that a motion for fees filed during the pendency of the appeal would likely be denied because Defendants had already been awarded full fees and costs requested. See *Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) ("a plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories"); see also *Davis v. Beling*, 128 Nev. 301, 322, 278 P.3d 501, 516 at fn. 9 (2012) ("the court should ensure that the Doughertys do not receive a double recovery of attorney fees"). So, if Defendants requested attorneys' fees again, even on a different theory of recovery, Plaintiff would have objected that Defendants were not entitled to double recovery of their damages. Therefore, not only would a motion for attorneys' fees be procedurally inappropriate due to the appeals and related stay of the Judgment, but it would have been superfluous to the damages already awarded and factually unnecessary.

B. Attorneys' Fees and Costs should be Awarded to Defendants

Here, the Opposition's only argument against recovery of attorneys' fees pursuant to NRS § 18.010(2)(a), NRS § 17.117, NRCP 68, or the Residential Purchase Agreement is that the requests were not timely made. See *Opp.* at pp. 11-12. As such, the Opposition concedes that, should the Motion be deemed timely, Defendants would be entitled to recover attorneys' fees and costs pursuant to those theories of recovery. See E. Jud. Dist. Ct. R. § 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same."); see also *Benjamin v. Frias Transportation Mgt. Sys., Inc.*, 433 P.3d 1257 (Nev. 2019) (unpublished disposition) (Simply filing an opposition does not relieve a party of its duty to actually oppose the issues raised in the motion.).

In *Benjamin*, the opposing party filed an Opposition but did not present any argument to actually address the issues raised. *Id.* Although the opposing party did raise such arguments in a subsequent opposition, that opposition was untimely filed, and the court properly decided not to

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consider those untimely arguments. *Id.* Similarly, in this matter, the Opposition only argues that the Motion's request for fees and costs is untimely, waiving the other arguments that could have been made in opposition.

Ultimately, the facts clearly illustrate recovery of attorneys' fees and costs by Defendants is the appropriate under NRS § 18.010(2)(a), NRS § 17.117, NRCP 68, or the Residential Purchase Agreement. Defendants are decidedly the prevailing party [see *Appendix* at See Exs. B-I], as indicated in the Motion, and it is undisputed that the recovery was less than $20,000.00. See NRS § 18.010(2)(a). Defendants are also clearly the prevailing party under the terms of the Residential Purchase Agreement. See *Supplement* at Ex. A. And, Defendants made an offer of judgment to Plaintiff, who rejected it and failed to improve on the offer and was, in fact, completely defensed on all of its causes of action. See NRS § 17.117 and NRCP § 68. For any, or all, of these reasons, the Motion should be granted.

C. Order to Show Cause Effectuates Procedural Requirements of Rule 11

Defendants respectfully request recovery of attorneys' fees and costs pursuant to their successful defense of the frivolous claims brought by Plaintiff. As a matter of both law and equity, recovery of attorneys' fees and costs are appropriate. Here, Defendants were forced to expend significant resources defending against this baseless litigation and, although Defendants are unequivocally the prevailing party in this matter, they have nothing to show for it other than a massive litigation bill.

The Opposition argues that Defendants failed to follow the safe harbor requirement of Rule 11 prior to filing the Motion. However, the procedural posture of the case did not allow for the purpose of the safe harbor provision to be effectuated. Even if opportunity for safe harbor was provided, Plaintiff could not withdraw its complaint, which is the basis for the sanctions, because the summary judgment had already been affirmed. Moreover, as Plaintiff cited by Plaintiff, the purpose of the safe harbor is to allow the offending party an opportunity to respond, which Plaintiff has done in its Opposition, and which can still be allowed through an order to show cause as requested by the Motion.

/ / / /

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This Honorable Court has the authority to unilaterally set an order to show cause why the conduct described in the Amended Order has not violated Rule 11(b), which would alleviate the concerns raised by the Court in reversing the attorney's fees portion of the Judgment. See Nev. R. Civ. Pro. at § 11(c)(3); see also Ex. H. Additionally, an order to show cause will further the intent of Rule 11, which is to punish and deter frivolous claims.

At this point it cannot be disputed that this action was frivolously maintained by Plaintiff. This Honorable Court made that fact as clear as possible when granting Defendants' MSJ. See *Appendix* at Ex. B, 0009 ("motion granted as to all claims and attorney's fees"); see also *Id.* at Ex. C, 0050, ¶ 77 ("The overwhelming facts and law illustrate that Plaintiff's claim is frivolous. The findings of fact are incorporated by reference"). Not only did Plaintiff intentionally omit the waiver of inspections from the pleadings, they also egregiously claimed damages in excess of $16.25 Million related to the Property. See *Id.* at Ex. J, 0166, lines 2-6 ("I don't see in good faith how this can be brought – this can be brought by the plaintiffs in good faith when they've waived everything. And in addition, they refused to conduct an inspection knowing that they were purchasing a 63-year-old property. I mean it's just absurd."). In fact, this Honorable Court advised that, "this is one of the clearest cut cases [for summary judgment] I've seen." *Id.* at 0167, line 5. Further determining that, "when you're looking at the residential purchase agreement and signed disclosure, its's clear in my view that this is a baseless lawsuit, and I will grant attorneys' fees under NRCP 11." *Id.* at 0167, lines 11-14.

Moreover, the Court was very clear in its Decision "that the district court correctly found that no genuine issue of material fact existed to justify denying summary judgment." See *Id.* at Ex. H, 0132. As such, summary judgment was affirmed. *Id.* Notably, although the portion of the Judgment awarding attorneys' fees pursuant to Rule 11 was reversed, the reversal was based solely on a procedural defect. *Id.* at 0132-0133. Plaintiff should not escape sanctions because of a procedural defect, especially in light of this Honorable Court's unequivocal determination that this matter was frivolously maintained by Plaintiff. For these reasons, an order to show cause will effectuate the purpose of Rule 11 to deter and punish frivolous litigation, while also providing Plaintiff with opportunity to respond.

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D. Residential Purchase Agreement Allows for fees and Costs on Appeal

Here, the Residential Purchase Agreement for the Subject Property giving rise to this litigation included a provision that allowed the prevailing party to recover attorneys' fees and costs for any litigation, including appeal, related to the terms of the Residential Purchase Agreement.

> **26. OTHER ESSENTIAL TERMS:** Time is of the essence. No change, modification or amendment of this Agreement shall be valid or binding unless such change, modification or amendment shall be in writing and signed by each party. This Agreement will be binding upon the heirs, beneficiaries and devisees of the parties hereto. This Agreement is executed and intended to be performed in the State of Nevada, and the laws of that state shall govern its interpretation and effect. The parties agree that the county and state in which the Property is located is the appropriate forum for any action relating to this Agreement. Should any party hereto retain counsel for the purpose of initiating litigation to enforce or prevent the breach of any provision hereof, or for any other judicial remedy, then the prevailing party shall be entitled to be reimbursed by the losing party for all costs and expenses incurred thereby, including, but not limited to, reasonable attorney's fees and costs incurred by such prevailing party.

See *Supplement* at Ex. A, pp. 8-9.

"The purpose of such contractual provisions, to indemnify the prevailing party for the full amount of the obligation, is defeated and a party's contract rights are diminished if the party is forced to defend its rights on appeal at its own expense." See *Musso v. Binick*, 104 Nev. 613, 614, 764 P.2d 477, 477 (1988). Therefore, recovery of attorneys' fees and costs on appeal are recoverable "pursuant to the contractual agreement of the parties." *Id.* at 615. The amount of fees and costs to award on appeal should be addressed by the district court. *Id.*

Moreover, this provision further illustrates that the Motion was timely made. Defendants could not have brought the Motion prior to the Remittitur being filed because the fees and costs had not yet accrued. The Motion would have been premature for both lack of actual fees and costs incurred, but also because the claim would not be ripe until after the Court made its determination to affirm or reverse the Amended Order and/or Judgment, which would have obviously affected the prevailing party analysis. Defendants claim for attorneys' fees as a prevailing party pursuant to the terms of the Residential Purchase Agreement did not begin to

accrue because of the condition precedent had not yet been met, i.e., the Court's determination of the prevailing party. Also, as stated in *Musso* decision, the district court is to make the determination on those fees and costs in the first instance, indicating that the motion cannot be filed until after the Remittitur. *Id.*; see also Order Granting Motion for Attorneys' Fees on Appeal, Case No. A-10-614548-C attached hereto as **Exhibit E** ("the Motion was filed timely, following Remittitur from the Court of Appeals. Further, the Court of Appeals specifically indicated the District Court was to decide the issue of attorney s [sic] fees, pursuant to *Musso v. Binick*").

As such, the Motion is timely, and provides basis for recovery of all fees and costs incurred by Defendants, including those on appeal.

III. CONCLUSION

For the aforementioned reasons, this Honorable Court should grant the Motion and award attorneys' fees in the amount of **$179,007.64** and costs of **$10,214.77**, for a total award of **$189,222.41** to Defendants.

DATED this 7th day of September, 2022.

MICHAEL B. LEE, P.C.

/s/ Michael Matthis

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 7th day of September, 2022, I placed a copy of the **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES** as required by Eighth Judicial District Court Rule 7.26 by delivering a copy or by mailing by United States mail it to the last known address of the parties listed below, facsimile transmission to the number listed, and/or electronic transmission through the Court's electronic filing system to the e-mail address listed below:

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/s/Mindy Pallares
An employee of MICHAEL B. LEE, P.C.

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EXHIBIT A

IN THE SUPREME COURT OF THE STATE OF NEVADA

WLAB INVESTMENT, LLC,
Appellant,
vs.
TKNR, INC., A CALIFORNIA CORPORATION; CHI ON WONG, A/K/A CHI KUEN WONG, AN INDIVIDUAL; KENNY ZHONG LIN, A/K/A KEN ZHONG LIN, A/K/A KENNETH ZHONG LIN, A/K/A WHONG K. LIN, A/K/A CHONG KENNY LIN, A/K/A ZHONG LIN, AN INDIVIDUAL; LIWE HELEN CHEN, A/K/A HELEN CHEN, AN INDIVIDUAL; YAN QUI ZHANG, AN INDIVIDUAL; INVESTPRO LLC, D/B/A INVESTPRO REALTY, A NEVADA LIMITED LIABILITY COMPANY; MAN CHAU CHENG, AN INDIVIDUAL; JOYCE A. NICKRANDT, AN INDIVIDUAL; INVESTPRO INVESTMENTS LLC, A NEVADA LIMITED LIABILITY COMPANY; INVESTPRO MANAGER LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JOYCE A. NICKDRANDT, AN INDIVIDUAL,
Respondents.

WLAB INVESTMENT, LLC,
Appellant,
vs.
TKNR, INC., A CALIFORNIA CORPORATION; CHI ON WONG, A/K/A CHI KUEN WONG, AN INDIVIDUAL; KENNY ZHONG LIN, A/K/A KEN ZHONG LIN, A/K/A KENNETH ZHONG LIN, A/K/A WHONG K. LIN, A/K/A CHONG KENNY LIN, A/K/A ZHONG LIN, AN INDIVIDUAL; LIWE HELEN CHEN, A/K/A HELEN CHEN, AN INDIVIDUAL; YAN QUI ZHANG, AN INDIVIDUAL; INVESTPRO LLC, D/B/A INVESTPRO REALTY, A NEVADA LIMITED LIABILITY COMPANY; MAN CHAU CHENG, AN INDIVIDUAL; JOYCE A. NICKRANDT, AN INDIVIDUAL; INVESTPRO INVESTMENTS LLC, A NEVADA LIMITED LIABILITY COMPANY; INVESTPRO MANAGER LLC, A NEVADA LIMITED LIABILITY COMPANY;

Supreme Court No. 82835/83051
District Court Case No. A785917

FILED
AUG 18 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY DEPUTY CLERK

AND JOYCE A. NICKDRANDT, AN INDIVIDUAL,
Respondents.

REMITTITUR

TO: Steven D. Grierson, Eighth District Court Clerk

Pursuant to the rules of this court, enclosed are the following:

Certified copy of Judgment and Opinion/Order.
Receipt for Remittitur.

DATE: July 25, 2022

Elizabeth A. Brown, Clerk of Court

By: Rory Wunsch
Deputy Clerk

cc (without enclosures):
Hon. Adriana Escobar, District Judge
Day & Nance
Michael B. Lee, P.C.

RECEIPT FOR REMITTITUR

Received of Elizabeth A. Brown, Clerk of the Supreme Court of the State of Nevada, the REMITTITUR issued in the above-entitled cause, on JUL 26 2022.

Deputy District Court Clerk

RECEIVED
APPEALS
JUL 26 2022
CLERK OF THE COURT

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No. 82835/83051
District Court Case No. A785917

WLAB INVESTMENT, LLC,
Appellant,
vs.
TKNR, INC., A CALIFORNIA CORPORATION; CHI ON WONG, A/K/A CHI KUEN WONG, AN INDIVIDUAL; KENNY ZHONG LIN, A/K/A KEN ZHONG LIN, A/K/A KENNETH ZHONG LIN, A/K/A WHONG K. LIN, A/K/A CHONG KENNY LIN, A/K/A ZHONG LIN, AN INDIVIDUAL; LIWE HELEN CHEN, A/K/A HELEN CHEN, AN INDIVIDUAL; YAN QUI ZHANG, AN INDIVIDUAL; INVESTPRO LLC, D/B/A INVESTPRO REALTY, A NEVADA LIMITED LIABILITY COMPANY; MAN CHAU CHENG, AN INDIVIDUAL; JOYCE A. NICKRANDT, AN INDIVIDUAL; INVESTPRO INVESTMENTS LLC, A NEVADA LIMITED LIABILITY COMPANY; INVESTPRO MANAGER LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JOYCE A. NICKDRANDT, AN INDIVIDUAL,
Respondents.

WLAB INVESTMENT, LLC,
Appellant,
vs.
TKNR, INC., A CALIFORNIA CORPORATION; CHI ON WONG, A/K/A CHI KUEN WONG, AN INDIVIDUAL; KENNY ZHONG LIN, A/K/A KEN ZHONG LIN, A/K/A KENNETH ZHONG LIN, A/K/A WHONG K. LIN, A/K/A CHONG KENNY LIN, A/K/A ZHONG LIN, AN INDIVIDUAL; LIWE HELEN CHEN, A/K/A HELEN CHEN, AN INDIVIDUAL; YAN QUI ZHANG, AN INDIVIDUAL; INVESTPRO LLC, D/B/A INVESTPRO REALTY, A NEVADA LIMITED LIABILITY COMPANY; MAN CHAU CHENG, AN INDIVIDUAL; JOYCE A. NICKRANDT, AN INDIVIDUAL; INVESTPRO INVESTMENTS LLC, A NEVADA LIMITED LIABILITY COMPANY; INVESTPRO MANAGER LLC, A NEVADA LIMITED LIABILITY COMPANY;

AND JOYCE A. NICKDRANDT, AN INDIVIDUAL,
Respondents.

CLERK'S CERTIFICATE

STATE OF NEVADA, ss.

I, Elizabeth A. Brown, the duly appointed and qualified Clerk of the Supreme Court of the State of Nevada, do hereby certify that the following is a full, true and correct copy of the Judgment in this matter.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"We therefore affirm the district court's summary judgment in Docket No. 82835. We therefore reverse the district court's May 25, 2021, order in Docket No. 83051 insofar as that order awarded respondents attorney fees."

Judgment, as quoted above, entered this 12th day of May, 2022.

JUDGMENT

The court being fully advised in the premises and the law, it is now ordered, adjudged and decreed, as follows:

"Rehearing denied."

Judgment, as quoted above, entered this 29th day of June, 2022.

IN WITNESS WHEREOF, I have subscribed my name and affixed the seal of the Supreme Court at my Office in Carson City, Nevada this July 26, 2022.

Elizabeth A. Brown, Supreme Court Clerk

By: Sandy Young
Deputy Clerk

EXHIBIT B

Electronically Filed
1/29/2021 5:33 PM
Steven D. Grierson
CLERK OF THE COURT

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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, vs. TKNR INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual, and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKRANDT, an individual and Does 1 through 15 and Roe Corporation I - XXX, Defendants.	CASE NO.: A-18-785917-C DEPT. NO.: XIV **SUPPLEMENT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO COUNTERMOTION FOR CONTINUANCE BASED ON NRCP 56(f) AND COUNTERMOTION FOR IMPOSITION OF MONETARY SANCTIONS**

Defendants TKNR INC. ("TKNR"), CHI ON WONG ("WONG"), KENNY ZHONG LIN ("LIN"), LIWE HELEN CHEN ("CHEN"), YAN QIU ZHANG ("ZHANG"), INVESTPRO LLC ("INVESTPRO"), MAN CHAU CHENG ("CHENG"), JOYCE A. NICKRANDT ("NICKRANDT"), INVESTPRO INVESTMENTS, LLC ("Investments"), and INVESTPRO MANAGER LLC ("Manager") (hereinafter collectively referred to as the "Defendants"), by and

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through their counsel of record, Michael B. Lee, P.C., hereby files this Supplement ("Supplement") to Defendants' Motion for Summary Judgment ("Motion"). This Supplement is made on the deposition of Frank Miao ("Miao"), the designated 30(b)(6) witness for Plaintiff W L A B INVESTMENT, LLC ("Plaintiff" or "WLAB").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Overview

This supplement includes the testimony of Mr. Miao following his deposition as the person most knowledgeable ("PMK") for Plaintiff. Mr. Miao's testimony confirmed numerous undisputed facts that are dispositive to Plaintiff's claims and support granting Summary Judgment as requested by Defendants' Motion.

B. Undisputed Facts as Provided by Mr. Miao

1. *Plaintiff is Sophisicated Buyer*

Since 2008, Mr. Miao, Ms. Zhu, and/or Plaintiff have been involved in the purchase of approximately twenty residential properties. Miao Deposition at 129:12-18, 138:6-17 attached as **Exhibit 1**. In Clark County alone, Ms. Zhu and Mr. Miao were involved with the purchase of at least eight rental properties starting in 2014. *Id.* at 111:1-25, 114:19-22. Plaintiff understands the importance of reading contracts. *Id.* at 44:17-24. Additionally, Mr. Miao specified that he understands that he needs to check public records when conducting his due diligence. *Id*. at 56:21-24.

2. *Plaintiff's Purchase of Property was Part of 1031 Exchange*

As to the Property, Plaintiff purchased it as part of a 1031 exchange with four other properties at that time. *Id*. at 114:23-25-115:1-8, 149:1-8, 149:21-25. Plaintiff had an issue with financing and the appraisal for the Property, which threatened the 1031 Exchange. *Id*. at 153:12-25. Interestingly, although the Property failed the appraisal for a value of $200,000, Plaintiff still pressed forward with the sale although it has not provided the appraisal or the basis for why the Property did not apprise for $200,000. Prior to purchasing it, Plaintiff was aware that TKNR had purchased it as a foreclosure. *Id*. at 216:22-25.

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3. *Requirement to Inspect was Known*

In terms of the RPA (as defined by the Motion), the terms of the contract were clear to Plaintiff. *Id*. at 156:7-21 (due diligence period), 163:3-11. As to Paragraph 7(A), Mr. Miao specified that he believed that his inspection and conversations with the tenant constituted the actions necessary to deem the Property as satisfactory for Plaintiff's purchase.

> 19· · · A.· ·Yes.· Based on -- we bought this -- we go
> 20 to the inspection, then we also talk to the tenant,
> 21 so we thinking this is investment property; right?
> 22 So financial it's looking at the rent, it's
> 23 reasonable, it's not very high compared with the
> 24 surrounding area.· Then also financially, it's good.
> 25· · · · · ·Then I take a look at the – everything
> Page 164
> ·1 outside.· Good.· So I said, Fine.· That's satisfied.
> ·2 That's the reason I command my wife to sign the
> ·3 purchase agreement.

Id. at 164:9-25-165:1-3.

At all times relevant prior to the purchase of the Property, Plaintiff had access to inspect the entire property and conduct non-invasive, non-destructive inspections:

> ·2· · · Q.· ·So at the time when you did your
> ·3 diligence, you had a right to conduct noninvasive,
> ·4 nondestructive inspection; correct?
> ·5· · · A.· ·Yes, I did.
> ·6· · · Q.· ·And you had the opportunity to inspect all
> ·7 the structures?
> ·8· · · A.· ·I check the other one -- on the walk, I
> ·9 don't see the new cracking, so the -- some older
> 10 cracking.· I check the neighbor who also have that
> 11 one.· I think it's okay; right?· Then the –

Id. at 166:2-11.

> 8· · · Q.· ·So you had the right to inspect the
> ·9 structure; correct?
> 10· · · A.· ·Yes, yes, I did that.
> 11· · · Q.· ·You had the right to inspect the roof; is
> 12 that correct?
> 13· · · A.· ·Yes.
> 14· · · Q.· ·Okay.· Did you do that?
> 15· · · A.· ·I forgot.· I maybe did that because
> 16 usually I go to the roof.
> * * *
> 22· · · Q.· ·You had the right to inspect the
> 23 mechanical system; correct?
> 24· · · A.· ·Right.· Yes, yes.

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25· · · Q.· ·You had the right to inspect the
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·1 electrical systems; correct?
·2· · · A.· ·I check the electrical system, yes.
·3· · · Q.· ·You had a right to inspect the plumbing
·4 systems; correct?
·5· · · A.· ·Yes.
·6· · · Q.· ·You had the right to inspect the
·7 heating/air conditioning system; correct?
·8· · · A.· ·Yes.
* * *
·3· · · Q.· ·And then you could have inspected any
·4 other property or system within the property itself;
·5 correct?
·6· · · A.· ·Yes, yes.

Id. at 167:8-16, 167:22-25-168:1-11, 168:25-169:1-6.

Prior to the purchase, Mr. Miao was always aware that the Seller "strongly recommended that buyer retain licensed Nevada professionals to conduct inspections":

13· · · Q.· ·"It is strongly recommended that buyer
14 retain licensed Nevada professionals to conduct
15 inspections."
16· · · A.· ·Yes.
17· · · Q.· ·Yeah.· So you were aware of this
18 recommendation at the time --
19· · · A.· ·Yeah, I know.

Id. at 176:13-19.

Plaintiff was also aware of the language in the RPA under Paragraph 7(D) that limited potential damages that could have been discovered by an inspection:

18· · · Q.· ·Okay.· So going back to paragraph 7D --
19· · · A.· ·Yeah.
20· · · Q.· ·-- right, after the language that's in
21 italics, would you admit that because it's in the
22 italics, it's conspicuous, you can see this
23 language?
24· · · A.· ·Yeah.· Yeah.
25· · · Q.· ·Okay.· Then it goes on to say, "If any
Page 179
·1 inspection is not completed and requested repairs
·2 are not delivered to seller within the due diligence
·3 period, buyer is deemed to have waived the right to
·4 that inspection and seller's liability for the cost
·5 of all repairs that inspection would have reasonably
·6 identified had it been conducted."
·7· · · · · ·Did I read that correctly?
·8· · · A.· ·Yes, yes.
·9· · · Q.· ·Okay.· So we'll eventually get to the
10 issues that, you know, Ms. Chen identified that you

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11 wanted corrected in the emails or text messages.
12· · · · · ·Is that fair to say that those are the
13 only issues that you deemed needed to be resolved to
14 go forward with the purchase?
15· · · A.· ·Yeah.· After that time, yes.

Id. at 179:18-25-180:1-15. Finally, as to the RPA, Mr. Miao agreed that all the terms in it were conspicuous and understandable, and it was a standard agreement similar to the other agreements he had used in purchasing the other properties in Clark County, Nevada. *Id*. at 198:19-25-199:1-2, 200:3-15.

3. *Mr. Miao Does Inspections for Plaintiff Although he is not a Licensed, Bonded Professional Inspector*

As to all the properties purchased by Plaintiff, Mr. Miao always does the inspections and does not believe a professional inspection is necessary. *Id*. at 116:2-9, 119:3-25, 140:5-10. Based on his own belief, he does not believe that a professional inspection is necessary for multi-tenant residential properties. *Id*., 120:6-9 (his own understanding), 120:16-25 (secondhand information he received). Notably, he does not have any professional license related to being a general contractor, inspector, appraiser, or project manager. *Id*. at 123:5-16 (no professional licenses), 123:23-24 (no property management license), 169:7-14 (no licensed or bonded inspector), 171:23-25 (have not read the 1952 Uniformed Building Code), 172:17-19 (not an electrician), 172:23-25-1-16 (no general contractor license or qualified under the intentional building code), 174:13-23 (not familiar with the international residential code). Importantly, he has never hired a professional inspector in Clark County, *Id*. at 140:19-21, so does not actually know what a professional inspection would encompass here. *Id*. at 143:9-13, 144:8-19. The main reason Plaintiff does not use a professional inspector is because of the cost. *Id*. at 147:2-7. On or about August 10, 2017, Mr. Miao did an inspection of the Property. *Id*. at 158:1-25-159:1-12. During that time, he admitted that he noticed some issues with the Property that were not up to code, finishing issues, GFCI outlets[1], and electrical issues:

[1] The Second Amended Complaint references GFCI at Paragraph 31(a). This illustrates the overall bad faith and frivolous nature of the pleading since Mr. Miao is the one who requested TKNR to install these for Plaintiff.

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> 16· · · A.· ·I looked at a lot of things.· For example,
> 17 like, the -- I point out some drywall is not
> 18 finished; right?· And the -- some of smoke alarm is
> 19 not -- is missing and -- which is law required to
> 20 put in for smoke alarm.· Then no carbon monoxide
> 21 alarm, so I ask them to put in.
> 22· · · · · ·Then in the kitchen, lot of electrical,
> 23 the outlet is not a GFCI outlet, so I tell them, I
> 24 said, You need to change this GFCI.· Right now this
> 25 outlet is not meet code.· You probably have problem.

Id. Similarly, he also specified that there was an issue with exposed electrical in Unit C. 175:10-24. He also noted that there could have been a potential asbestos issue as well. *Id*. at 160:7-12. Additionally, he noted that there were cracks in the ceramic floor tiles, *Id*. at 249:22-25, and he was aware of visible cracks in the concrete foundation, *Id*. at 269:13-22 (aware of slab cracks), which were open and obvious. *Id*. at 270:14-24. He also admitted that he could also have seen the dryer vent during his inspection. *Id*. at 269:23-25. As to those issues, Mr. Miao determined that the aforementioned issues were the only issues that TKNR needed to be fixed after his inspection. *Id*. at 171:2-9 (was only concerned about the appraisal), *Id*. at 219:13-25-221:1-2.

Moreover, Mr. Miao received the Seller's Real Property Disclosure Form ("SRPDF") prior to the purchase of the Property. *Id*. at 201:22-25. As to SRPDF, Plaintiff was aware that TKNR was an investor who had not resided in the Property, and there were issues with the heating systems, cooling systems, and that there was work done without permits. *Id*. at 201:1-25-202:1-12. Similarly, it was aware that the Property was 63 years old at that time, *Id*. at 204:4-7, and all the work was done by a handyman other than the HVAC installation. *Id*. at 205:14-25, *Id*. at 134:14-25 (understands the difference between a handyman and a licensed contractor), 243:2 ("Yes. They did by the handyman, yes.").

Despite these disclosures, Mr. Miao never followed up:

> 23· · · Q.· ·Okay.· So when they disclosed that there
> 24 was construction and modification, alterations,
> 25 and/or repairs made without State, City, County
> Page 205
> ·1 building permits, which was also work that was done
> ·2 by owner's handyman, did you ever do any follow-up
> ·3 inquiries to the seller about this issue?

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·4· · · A.· ·No, I didn't follow up.·

Id. at 204:23-25-205:1-4. However, Mr. Miao also admitted that he could have followed up on the issues identified in the SRPDF that included the HVAC and the permits:

10· · · Q.· ·Under the disclosure form --
11· · · A.· ·Yeah.
12· · · Q.· ·-- like, where it specified that there
13 were heating system/cooling system issues that
14 they're aware of, that you could have elected to
15 have an inspection done at that time; correct?
16· · · A.· ·Yes.

Id. at 206:10-16.

15· · · Q.· ·Okay.· So as your attorney said, you could
16 have obtained a copy of the permits at any time?
17 Yes?
18· · · A.· ·Yes.
19· · · Q.· ·Okay.· And then it's fair to say that just
20 put you on notice of the potential permit issue;
21 correct?
22· · · A.· ·Yes.
23· · · Q.· ·It also put you on notice of the issues of
24 everything that's basically specified on page 38;
25 correct?
Page 209
1· · · A.· ·Yes.

Id. at 208:15-25-209:1, 245:22-25 (could have obtained permit information in 2018).

Similarly, Mr. Miao was aware that he should have contacted the local building department as part of his due diligence:

22· · · Q.· ·Okay.· So you understand that for more
23 information during the diligence process, you should
24 contact the local building department?
25· · · A.· ·Yes.·
Page 260
* * *
·5· · · Q.· ·-- it provides you with the address of the
·6 building and safety department; is that correct?
·7· · · A.· ·Yes.
·8· · · Q.· ·And the office hours; is that correct?
·9· · · A.· ·Yes.
10· · · Q.· ·And it also provides you with a phone
11 number; correct?
12· · · A.· ·Yes.
13· · · Q.· ·And this is information or resources that
14 you could have used at any time related to finding
15 information about the permits of the property;
16 correct?
17· · · A.· ·Yes.

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> 18· · · Q.· ·And this would have been true prior to the
> 19 purchase of the building; correct?
> 20· · · A.· ·Yes.
> 21· · · Q.· ·And this would also have been true at the
> 22 time you read the disclosure that specified that
> 23 some of the improvements or some of the disclosures
> 24 had been done without a permit; right?
> 25· · · A.· ·Yes.

Id. at 260:22-25, 261:5-25.

Plaintiff was also on notice of the potential for mold and the requirement to get a mold inspection:

> ·5· · · Q.· ·Okay.· And it says, "It's the buyer's duty
> ·6 to inspect.· Buyer hereby assumes responsibility to
> ·7 conduct whatever inspections buyer deems necessary
> ·8 to inspect the property for mold contamination.
> ·9· · · · · ·"Companies able to perform such
> 10 inspections can be found in the yellow pages under
> 11 environmental and ecological services."
> 12· · · · · ·I read that correctly?· Yes?
> 13· · · A.· ·Yes.
> 14· · · Q.· ·Okay.· And then you elected not to get a
> 15 mold inspection; correct?
> 16· · · A.· ·Yeah.·

Id. at 213:5-16.

> ·5· · · Q.· ·So you relied upon your own determination
> ·6 related to the potential mold exposure of the
> ·7 property; correct?
> ·8· · · A.· ·Yes.
> ·9· · · Q.· ·Okay.· And you elected to proceed with
> 10 purchasing it without a professional mold
> 11 inspection; correct?
> 12· · · A.· ·Yes.

Id. at 216:5-12. Despite actual knowledge of these issues, Plaintiff did not elect to have a professional inspection done. 160:17-20. It would have refused to get a professional inspection because it believed that Mr. Miao had already performed one. *Id*. at 162:23-25-163:1.

Finally, Plaintiff was also acutely aware of the requirement of Nevada law to protect itself by getting an inspection:

> ·2· · · Q.· ·If we go to page 40 --
> ·3· · · A.· ·Mm-hmm.
> ·4· · · Q.· ·-- there's a bunch of Nevada statutes

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·5 here.
·6· · · A.· ·Mm-hmm.
·7· · · Q.· ·If you look at NRS 113.140 --
·8· · · A.· ·Mm-hmm.
·9· · · Q.· ·-- do you see that at the top of the page?
10 "Disclosure of unknown defects not required.· Form
11 does not constitute warranty duty of buyer and
12 prospective buyer to exercise reasonable care."
13· · · · · ·Do you see that?
14· · · A.· ·Yes.
15· · · Q.· ·Okay.· So this disclosure form gave Marie
16 Zhu, your wife, a copy of the Nevada law that was
17 applicable to the sale of the property; correct?
18· · · A.· ·Yeah.
19· · · Q.· ·Okay.· And under NRS 113.1403, it
20 specifies, "Either this chapter or Chapter 645 of
21 the NRS relieves a buyer or prospective buyer of the
22 duty to exercise reasonable care to protect
23 himself."
24· · · · · ·Did I read that correctly?
25· · · A.· ·Yes.

Id. at 209:2-25. As such, no dispute exists that Plaintiff was aware that the Property had the same issues complained of in the pleadings at the time it put an offer on it, and that Plaintiff assumed the risk of failing to exercise reasonable care to protect itself.

4. *No Dispute a Professional Inspection Could Have Revealed the Alleged Issues*

The alleged defects identified by both parties' experts could have been discovered at the time of the original purchase. As to the ability to inspect, Mr. Miao admitted that he had access to the entire building. *Id*. at 250:22-25. He had access to the attic and looked at it. *Id*. at 251:4-14. Mr. Miao admitted that Plaintiff's expert examined the same areas that he did:

·6· · · Q.· ·Okay.· So you walked through the property
·7 with him at the time he did his inspection; correct?
·8· · · A.· ·Right.
·9· · · Q.· ·Okay.· During that time, did he inspect
10 any areas that -- that you did not have access to in
11 2017?
12· · · A.· ·Yes.· He didn't go to anything I didn't
13 inspect during 2017 too.
14· · · Q.· ·So he inspected the same areas you
15 inspected?
16· · · A.· ·Yes, yes.

Id. at 291:6-16. Notably, Plaintiff's expert did not do any destructive testing, so the expert's access was exactly the same as Mr. Miao's original inspection. *Id*. at 291:1-5. Mr. Miao

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admitted that Plaintiff's expert's inspection of the HVAC, *Id*. at 292:2-5, 293:18-23, and the plumbing system, *Id*. at 300:19-25-301:1-4, would have been the same as his in 2017. He also admitted that the pictures attached to Plaintiff's expert report were areas that he could have inspected in 2017. *Id*. at 302:6-13.

Additionally, Mr. Miao accompanied Defendants' expert during his inspection. *Id*. at 320:31-25. As before, Mr. Miao had the same access to the Property in 2017 for the areas inspected by Defendants' expert. *Id*. at 321:1-6. Mr. Miao agreed with Defendants' expert that the alleged conditions identified by Plaintiff's expert were "open and obvious":

> 22· · · Q.· ·And then the second line down, the first
> 23 sentence begins, "Items complained about in the Sani
> 24 report were open and obvious in the roof area, attic
> 25 area, and on the exterior/interior of the property."
> Page 318
> * * *
> ·3· · · Q.· ·Do you agree with this statement?
> ·4· · · A.· ·Yes.

Id. at 318:22-25-319:3-4. He also agreed with Defendants' expert's finding that there was no noticeable sagging in the roof. *Id*. at 333:20-24.

Incredibly, Mr. Miao also recognized the deficiency in Plaintiff's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards:

> 17· · · Q.· ·-- midway down the first complete sentence
> 18 says, "The Sani report does not recognize prior
> 19 conditions in existence before any work took place
> 20 by defendants."
> 21· · · · · ·Do you agree with this statement?
> Page 321
> * * *
> ·3· · · · · ·Yes, yes.
> ·4 BY MR. LEE:
> ·5· · · Q.· ·You agree with that?· Okay.
> ·6· · · A.· ·Agree.

Id. at 321:17-21 – 322:3-6. This would have also included any issues with the dryer vent and ducts, *Id*. at 325:3-20, as he recognized that most rentals do not include washer / dryer units. *Id*. at 326:7-25-327:1-9.

/ / /

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5. *No Permits Required for Cosmetic Work by TKNR*

No dispute exists that TKNR did not need permits for the interior work it had done to the Property. Mr. Miao admitted the following:

> ·5· · · Q.· ·Number 5 says, "Painting, papering,
> ·6 tiling, carpeting, cabinets, countertops, interior
> ·7 wall, floor or ceiling covering, and similar finish
> ·8 work."
> ·9· · · · · ·Do you see that?
> 10· · · A.· ·Yes.
> 11· · · Q.· ·So you agree that no permits are required
> 12 for any of these types of work; correct?
> 13· · · A.· ·Yes.

Id. at 262:5-13.

> ·1 Window Replacements where no structural member -- no
> ·2 structural member is altered or changed," that does
> ·3 not need a permit either; right?
> ·4· · · A.· ·Yes.

Id. at 265:1-4.

> 17· · · Q.· ·Okay.· If you turn the page to 82,
> 18 Plumbing Improvements, no permits required to repair
> 19 or replace the sink; correct?
> 20· · · A.· ·Yes.
> 21· · · Q.· ·To repair or replace a toilet?
> 22· · · A.· ·Yes.
> 23· · · Q.· ·To repair or replace a faucet?
> 24· · · A.· ·Yes.
> 25· · · Q.· ·Resurfacing or replacing countertops?
> Page 264
> ·1· · · A.· ·Yes.
> ·2· · · Q.· ·Resurfacing shower walls?
> ·3· · · A.· ·Yes.
> ·4· · · Q.· ·Repair or replace shower heads?
> ·5· · · A.· ·Yes.
> ·6· · · Q.· ·Repair or replace rain gutters and down
> ·7 spouts?
> ·8· · · A.· ·Yes.
> ·9· · · Q.· ·Regrouting tile?
> 10· · · A.· ·Yes.
> 11· · · Q.· ·And a hose bib, whatever that is.
> 12· · · A.· ·Water freezer.· It's, like, for the
> 13 filtration of the water.
> 14· · · Q.· ·Okay.· And then for the mechanical, no
> 15 permits required for portable heating appliances;
> 16 correct.
> 17· · · A.· ·Yes.
> 18· · · Q.· ·For portable ventilation appliances?
> 19· · · A.· ·Yes.

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> 20· · · Q.· ·Or portable cooling units; correct?
> 21· · · A.· ·Yes.
> 22· · · Q.· ·And for portable evaporative coolers
> 23 installed in windows; correct?
> 24· · · A.· ·Yes.

Id. at 264:17-25-265:1-24.

6. *Plaintiff Desperate to Close on Property to Complete 1031 Exchange*

Plaintiff needed to close on the Property to complete the 1031 Exchange. *Id*. at 286:1-7. Thus, when it could not close on the first RPA, it agreed to the second RPA and waived all inspections. *Id*. at 281:12-16 (Miao did inspections already), 288:22-25-289:1-6. Plaintiff could not meet the close of escrow because its financing fell through for the Property, so it amended the first RPA and agreed to guaranty the purchase price of $200,000 and put down $60,000 as earnest money to get TKNR to agree to the second RPA. *Id*. at 285:4-25-286:1-7.

7. *Plaintiff Does not Disclose the Alleged Issues to Potential Tenants*

Since the date it purchased the Property, Plaintiff has always been trying to lease it. *Id*. at 330:19-25-331:1-2. According to Mr. Miao, the landlord must provide safe housing for the tenant:

> 19· · · · · ·Then also in according to the law, and
> 20 they said it very clearly, because this is
> 21 residential income property, right, rental income
> 22 property, multi-family, we need -- landlord need
> 23 provide housing and well-being and -- for the
> 24 tenant.· The tenant is not going to do all this
> 25 inspection.· They can't.· The burden is on the
> Page 120
> ·1 landlord to make sure all these building is safe and
> ·2 in good condition.

Id. at 120:16-25-121:1-2, 140:10-14. However, they have not done any of the repairs listed by Plaintiff's expert. *Id*. at 331:3-12. This illustrates the lack of merit of Plaintiff that there are underlying conditions with the Property.

Moreover, it does not provide any notice to the tenants about its expert's report or this litigation:

> ·6· · · Q.· ·All right.· In terms of tenants -- renting
> ·7 out the units to any tenants, do you ever provide
> ·8 them with a copy of the Sani report?

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·9· · · A.· ·No.
10· · · Q.· ·Do you ever provide them with any of the
11 pleadings or the first amended complaint, second
12 amended complaint, the complaint itself?
13· · · A.· ·No.
* * *
22· · · Q.· ·Okay.· So basically, you just tell them,
23 There's this.· You can inspect the unit if you want;
24 is that it?
25· · · A.· ·Yeah.· And also we need to tell is a lot
Page 337
1 of things report that we don't need to go to the
·2 inside the building.· It's wall cracking.· It's
·3 outside.· You can see.
·4· · · Q.· ·Okay.· So it's open and obvious for them?
·5· · · A.· ·Yeah.· You can see always outside.

Id. at 337:6-13, 337:22-25-338:1-5. This illustrates the lack of merit of Plaintiff's claims, proven that it has done nothing to correct the allegedly deficient conditions that are clearly not so dangerous as it does not tell prospective tenants about them.

8. *Squatters or Tenants Could Have Damaged the Property*

Multiple third parties could have potentially damaged the Property. The Property has a historic problem with squatters during the time that Plaintiff owned it:

12· · · Q.· ·Do you generally have a squatter problem
13 with the property?
14· · · A.· ·Yes.· As a matter of fact, today I just
15 saw the one text message that said one -- some
16 people go to my apartment.

Id. at 110:12-16. He also admitted that tenants could have damaged the Property while they were occupying it:

·4· · · Q.· ·Okay.· So the tenant in this context would
·5 have damaged the unit at the time that you owned it;
·6 is that fair?
·7· · · A.· ·Maybe.· Yes.
·8· · · Q.· ·Okay.· So some of the -- so the damage
·9 that was to the water heater system, could the
10 tenant have damaged that as well?
11· · · A.· ·Yes.
12· · · Q.· ·And then he could have damaged the cooler
13 pump and the valve as well; is that correct?
14· · · A.· ·Yes.
15· · · Q.· ·Okay.· Then on 122, these are all issues
16 that the tenant could have damaged; is that correct?
17· · · A.· ·Yes.
18· · · Q.· ·And then the same through for 145; is that

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19 right?
20· · · A.· ·Yes.

Id. at 306:4-20, 330:5-7. This could also account for the cracking on the walls. *Id*. at 310:8-12. Tenants could have also damaged the Property if they hit it with their cars. *Id*. at 332:14-16.

9. *No Evidence That Defendants Knew of Alleged Conditions*

Plaintiff's case is based on speculation that Defendants knew about the alleged conditions in the Property; however, Mr. Miao admitted that there is no evidence that shows Defendants knew about them. *Id*. at 245:1-13 (speculating that InvestPro made changes). The entire case is based on Mr. Miao's personal belief and speculation. *Id*. at 253:17-19.

Mr. Miao admitted that he has no evidence Defendants knew about the alleged moisture conditions. *Id*. at 293:24-25-294:1-3. Additionally, he also admitted that there is no evidence that Defendants knew about the alleged issues with the plumbing system. *Id*. at 301:21-24. He also admitted that he did not know if Defendants knew about the alleged issues with the duct work when they owned the Property. *Id*. at 314:5-19. He also recognized the deficiency in Plaintiff's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards. *Id*. at 321:17-21 – 322:3-6. He also recognized that a 63 year old property could have issues that were not caused by Defendants. *Id*. at 324:6-15. This would have also included any issues with the dryer vent and ducts, *Id*. at 325:3-20, and when the duct became disconnected. *Id*. at 329:1-16.

Notably, during Mr. Miao's due diligence period, he spoke with the tenants of the Property. *Id*. at 163:12-25-164:1-6. This included a conversation with the long-term tenant of Unit A, who still resides in the Property to this day. *Id*. At that time, the tenant reported being very happy with the Property and had no complaints. *Id*. In fact, the tenant reported still being very happy with the Property. *Id*. at 170:7-9. This illustrates that there is no basis that Defendants should have been aware of any of the issues when Mr. Miao, a self-professed expert, did not even know about them following his inspection.

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10. *No Basis for Claims for RICO and/or Related to Flipping Fund*

The Flipping Fund had nothing to do with Plaintiff's decision to purchase the Property. *Id*. at 223:15-25.

> 20· · · Q.· ·Yeah.· So there's no way that you relied
> 21 upon any flipping fund since it would have been
> 22 closed at this time; right?
> 23· · · A.· ·Yeah.

Id. at 274:20-23. He also admitted that he never received any pro forma, private placement information, calculations of profit and loss, capital contribution requirements, member share or units, or any such information about the Flipping Fund. *Id*. at 277:7-16. Mr. Miao solely made his statements in the Declaration related to the Flipping Fund based on information he reviewed on a website and alleged conversations at a holiday party. Id. at 227:22-25. He also specified that he does not know the structure between the Investpro Defendants and the scope of each's purpose. *Id*. at 230:20-25-231:1.

11. *Miao Declaration is Based on Speculation and Hearsay*

As to the representations in the Declaration to the Opposition to the Motion, Mr. Miao makes them according to his experience and his speculation:

> 11· · · Q.· ·So you're -- when you say your experience,
> 12 it's based on you speculating based on your own
> 13 belief; correct?
> 14· · · A.· ·Based on my experience.
> 15· · · Q.· ·Okay.· So you're still speculating; right?
> 16· · · A.· ·Okay.· Yes.

Id. at 233:11-16. His additional statements are based on hearsay statements from third parties. *Id*. at 234:12-24. In terms of the allegations he made as to Defendants' knowledge, those are only based on his personal belief:

> 17· · · Q.· ·So no one ever told you that.· It's just
> 18 based on your own personal belief?
> 19· · · A.· ·Yes.
> 20· · · Q.· ·Okay.· And then, "Removal of natural gas
> 21 supply line was, which occurred with no permit or
> 22 inspection and was not performed by active licensed
> 23 contractor as required by law," this is also based
> 24 on your personal belief?
> 25· · · A.· ·Yeah

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Id. at 253:17-25, 254:2-7 (electrical system – personal belief), 254:17-25 (personal belief about HVAC).

> 24· · · · · ·So as it relates to all these items here,
> 25 no defendant ever came up to you and said, Yes,
> Page 255
> 1 we're actually aware of these issues; right?
> ·2· · · A.· ·No.

Id. at 255:24-25-256:1-2.

> 19· · · Q.· ·This is the first time it ever became an
> 20 issue known to you; right?
> 21· · · A.· ·Yeah, for the roof.
> 22· · · Q.· ·How do you know that the defendants knew
> 23 about this issue?
> 24· · · A.· ·I don't know -- I don't know the
> 25 defendant -- no.· I don't know the defendant know
> Page 256
> 1 this issue or not.

Id. at 256:19-25-257:1.

> 9· · · Q.· ·Like, the violations were hidden behind
> 10 the drywall, like, what information do you have that
> 11 the defendants hid it behind the drywall?· You know
> 12 or you don't know?
> 13· · · A.· ·I just know behind the drywall that put
> 14 the vent without -- that is a violation, but I don't
> 15 know who did that.
> 16· · · Q.· ·Okay.· So you don't know who did it?
> 17· · · A.· ·Yeah, yes.
> 18· · · Q.· ·Okay.· So it's possible that the
> 19 defendants did not know about it or hide it; is that
> 20 fair?
> 21· · · A.· ·Yes.

Id. at 258:9-21.

> 22· · · Q.· ·Okay.· And then you have this other thing
> 23 about the wood paneling.· Same question.· How do you
> 24 know the defendants knew about it?
> 25· · · A.· ·I don't know defendants know about it. I
> Page 258
> ·1 only found out this one.
> ·2· · · Q.· ·So it's possible they didn't know about
> ·3 this issue as well; correct?
> ·4· · · A.· ·Yes.

Id. at 258:22-25–259:1-4.

> ·1· · · Q.· ·So "It's impossible that Defendants, at
> ·2 least the ones involved in the sale, which are
> ·3 Defendants TKNR, et cetera, did not know about the

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·4 renovations."
·5· · · · · ·So you're basically speculating; right?
·6· · · A.· ·Yeah, yeah, yeah.

Id. at 260:1-6.

12. *Plaintiff Admitted it Inflated its Cost of Repairs*

Initially, Mr. Miao contacted contractors to bid the potential cost of repair for the Property, and determined that it would have been $102,873.00. *Id*. at 307:6-22. However, Plaintiff's expert opined that the cost of repair would have been $600,000, although he did not provide an itemized cost of repair. *Id*. at 334:17-21. This illustrates that the bad faith purposes of this lawsuit was to simply harass Defendants.

Mr. Miao perjured himself in his Declaration, Opp'n, Ex. 2. He denied, under the penalty of perjury, that he never made an offer to settle this matter for $10,000. *Id*. at Page 5 of 5. However, during his deposition he admitted that he did make this offer. Ex. 1 at 259:5-15 ("so maybe I tell Lin, Just pay us $10,000"). As noted in the Motion, this illustrates the overall bad faith of the litigation where Plaintiff admittedly amplified its alleged damages by more than 6x, and then trebled the damages, and have run up egregious attorneys' fees for this frivolous action. These are undisputed facts that prove abuse of process as a matter of law.

II. DISCUSSION

This Discussion is made in support of the Motion's request for summary judgment and broken down into two (2) subparts. Part A identifies the undisputed facts supported by Mr. Miao's deposition testimony establishing sufficient basis for the court to grant the Motion. Part B illustrates that Plaintiff has engaged in abuse of process by bringing this litigation, supporting summary judgment on Defendants' counterclaim for the same.

A. Mr. Miao's Admissions Support Summary Judgment in Favor of Defendants

1. *Undisputed That No Evidence Shows Defendants' Knowledge of Defects*

Nevada Revised Statute ("NRS") § 113.140 also provides that the Seller does not have to disclose any defect that he is unaware of. "Under NRS Chapter 113, residential property sellers are required to disclose any defects to buyers within a specified time before the property is conveyed." *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007) (citing NRS 113.140(1)). "NRS

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113.140(1), however, provides that a seller is not required to 'disclose a defect in residential property of which [she] is not aware.' " *Id*. (citing NRS 113.100(1)). The Nevada Supreme Court clarified that:

> [a]scribing to the term "aware" its plain meaning, we determine that the seller of residential real property does not have a duty to disclose a defect or condition that "materially affects the value or use of residential property in an adverse manner," if the seller does not realize, perceive, or have knowledge of that defect or condition. Any other interpretation of the statute would be unworkable, as it is impossible for a seller to disclose conditions in the property of which he or she has no realization, perception, or knowledge. The determination of whether a seller is aware of a defect, however, is a question of fact to be decided by the trier of fact.

Id. at 425 (citations omitted).

Here, Mr. Miao admitted that there is no evidence that shows Defendants knew about them. *Id*. at 245:1-13 (speculating that InvestPro made changes). He admitted that he has no evidence Defendants knew about the alleged moisture conditions. *Id*. at 293:24-25-294:1-3. Additionally, he also admitted that there is no evidence that Defendants knew about the alleged issues with the plumbing system. *Id*. at 301:21-24. He also admitted that he did not know if Defendants knew about the alleged issues with the duct work when TKNR owned the Property. *Id*. at 314:5-19. He also recognized the deficiency in Plaintiff's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards. *Id*. at 321:17-21 – 322:3-6. He also established that a 63 year old property could have issues that were not caused by Defendants. *Id*. at 324:6-15. This would have also included any issues with the dryer vent and ducts, *Id*. at 325:3-20, and when the duct became disconnected. *Id*. at 329:1-16. Finally, as admitted by Mr. Miao, the long-term tenant of the Property was very happy with it and still resides there today, never specifying that Defendants knew or should have known about the alleged issues. *Id*. at 163:12-25-164:1-6.

2. *Undisputed That Plaintiff Knew About Issues From SRPDF*

"Liability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). NRS § 113.140 clearly

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provides that the Seller Disclosures does not constitute a warranty of the Subject Property and that the Buyer still has a duty to exercise reasonable care to protect himself. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property. NRS § 113.140(2). Chapters 113 and "645 of Nevada Revised Statutes do not relieve a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself." *Id*. at § 113.140(2).

Here, Plaintiff received the SRPDF prior to the purchase of the Property. *Id*. at 201:22-25. As to SRPDF, Plaintiff was aware that TKNR was an investor who had not resided in the Property, and there were issues with the heating systems, cooling systems, and that there was work done without permits. *Id*. at 201:1-25-202:1-12. Similarly, it was aware that the Property was 63 years old at that time, *Id*. at 204:4-7, and all the work was done by a handyman other than the HVAC installation. *Id*. at 205:14-25, *Id*. at 134:14-25 (understands the difference between a handyman and a licensed contractor), 243:2 ("Yes. They did by the handyman, yes.").

Despite these disclosures, Mr. Miao never followed up although he acknowledged that he knew about the alleged permit issues. *Id*. at 204:23-25-205:1-4. Mr. Miao admitted that he could have followed up on the issues identified in the SRPDF that included the HVAC and the permits, *Id*. at 206:10-16, and he knew how to investigate the permit issue. *Id*. at 208:15-25-209:1, 245:22-25 (could have obtained permit information in 2018). Similarly, Mr. Miao was aware that he should have contacted the local building department as part of his due diligence. *Id*. at 260:22-25, 261:5-25. Further, he admitted Plaintiff was also on notice of the potential for mold and the requirement to get a mold inspection. *Id*. at 213:5-16. Finally, Plaintiff was also acutely aware of the requirement of Nevada law to protect itself by getting an inspection. *Id*. at 209:2-25. Despite actual knowledge of these issues, Plaintiff did not elect to have a professional inspection done. *Id*. at 160:17-20.

3. *Undisputed That an Inspection Could Have Revealed Alleged Defects*

"Liability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). Liability for nondisclosure

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does not apply when such facts are within the reach of the diligent attention and observation of the buyer. *Mackintosh*, 109 Nev. at 633, 855 P.2d at 552 (alteration in original) (internal quotation marks omitted). A buyer waives its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and/or unjust enrichment when it expressly agreed that it would carry the duty to inspect the property and ensure that all aspects of it were suitable prior to close of escrow, and the information was reasonably accessible to the buyer. *Frederic and Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 111 (Nev. 2018).

Here, the alleged defects identified by both parties' experts could have been discovered at the time of the original purchase. Mr. Miao admitted that he had access to the entire building when he originally inspected the Property in 2017. *Id*. at 250:22-25. He had access to the attic and looked at it. *Id*. at 251:4-14. Mr. Miao admitted that Plaintiff's expert examined the same areas that he did. *Id*. at 291:6-16. As Plaintiff's expert did not do any destructive testing, the expert's access was exactly the same as Mr. Miao's original inspection. *Id*. at 291:1-5. In terms of the Plaintiff's expert's inspection, Mr. Miao admitted that Plaintiff's expert's inspection of the HVAC, *Id*. at 292:2-5, 293:18-23, and the plumbing system, *Id*. at 300:19-25-301:1-4, would have been the same as his in 2017, and the pictures attached to Plaintiff's expert report were areas that he could have inspected in 2017. *Id*. at 302:6-13.

Moreover, Mr. Miao had the same access to the Property in 2017 for the areas inspected by Defendants' expert. *Id*. at 321:1-6. Incredibly, Mr. Miao agreed with Defendants' expert that the alleged conditions identified by Plaintiff's expert were "open and obvious" in the roof area, the attic area, and on the exterior/interior of the property. *Id*. at 318:22-25-319:3-4. He also agreed with Defendants' expert's finding that there was no noticeable sagging in the roof. *Id*. at 333:20-24.

B. <u>Deposition Illustrates Abuse of Process by Plaintiff</u>

Plaintiff inflated its alleged cost of repair for issues known to it at the time it purchased the Property from $102,873.00 to $600,000. *Id*. at 307:6-22. Moreover, Mr. Miao perjured himself in his Declaration, Opp'n, Ex. 2, when he denied, under the penalty of perjury, that he

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never made an offer to settle this matter for $10,000. Ex. 1 at 259:5-15 ("so maybe I tell Lin, Just pay us $10,000"). Section II(D)(4) of the Motion illustrates the overall bad faith of the litigation where Plaintiff admittedly amplified its alleged damages by more than 6x, and then trebled the damages demanding $16.25 Million in damages. It also set forth the egregious attorneys' fees by Plaintiff, which still continue as evidenced by the Opposition. It is unclear what the driving force is related to this frivolous lawsuit, but the abuse of process is clear as a matter of law and summary judgment should be granted accordingly.

III. CONCLUSION

Based on the foregoing, Defendants respectfully request that the Motion be granted in its entirety.

Dated this 29 day of January, 2021.

MICHAEL B. LEE, P.C.

/s/ Michael Lee

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CERTIFICATE OF MAILING

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that I am an employee of MICHAEL B. LEE, and that on the 29 day of January, 2021, the foregoing **SUPPLEMENT TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO COUNTERMOTION FOR CONTINUANCE BASED ON NRCP 56(f) AND COUNTERMOTION FOR IMPOSITION OF MONETARY SANCTIONS** was served via the Court's electronic filing and/or service system and/or via facsimile and/or U.S. Mail first class postage pre-paid to all parties addressed as follows:

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/s/ Mindy Pallares
An employee of Michael B. Lee PC

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EXHIBIT C

Electronically Filed
4/6/2021 6:16 PM
Steven D. Grierson
CLERK OF THE COURT

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IN THE EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, vs. TKNR INC., a California Corporation, ET AL. Defendants. And Related Claims	CASE NO.: A-18-785917-C DEPT. NO.: XIV **AFFIDAVIT IN SUPPORT OF ATTORNEYS' FEES FOR ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** Date of Hearing: March 11, 2021 Time of Hearing: 9:30 a.m. **Amount Requested: $128,166.78**

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MICHAEL B. LEE, ESQ., being first duly sworn, deposes and says:

1. I, MICHAEL B. LEE, being first duly sworn, deposed, and said, that I have personal knowledge and am competent to testify to the facts below, and that this Declaration is submitted in support of the pleading referenced in the above-matter. The facts stated herein are true to the best of my own personal knowledge, except for those facts stated upon information and belief, and as to those facts, I believe them to be true.

2. This Declaration is made in support of the attorneys' fees related to ORDER ("Order") GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT ("Motion"). I am an attorney with the law firm of MICHAEL B. LEE, P.C. This law firm represents Defendants.

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3. Defendants were awarded attorneys' fees related to the underlying Order and related to the Motion. To date, Defendants incurred attorneys' fees in the total amount of $100,267.64 from the office of Michael B. Lee, P.C. A true and correct copy of the Invoices are attached as **Exhibit A**. The Firm charged Defendants an hourly rate of $425.00 per hour. This is a reasonable rate giving that the Firm charges $475 per hour for business law cases, and was just approved at that rate related to a fee award in business court for an evidentiary hearing. A true and correct copy of the Minute Order is attached as **Exhibit B**.

4. I anticipate an additional twenty hours of work related to this Application, which would be an estimated fee of $8,500.

5. To date, Defendants incurred attorneys' fees in the total amount of $10,187.50 from the office of Burdick Law, PLLC. A true and correct copy of the Invoices are attached as **Exhibit C**.

6. Further illustrating the reasonableness of the rate, Plaintiff's counsel, Benjamin Childs, charged Plaintiff $400 per hour for his representation. A true and correct copy of Childs Retainer Agreement is attached as **Exhibit D**.

7. Defendants are seeking reimbursement of **$118,955.14** for their attorneys' fees and costs.

Michael B. Lee, P.C.

8. I graduated in the top 25% of my law school class, was on the Dean's List, and achieved a CALI Award. I also did an externship with the Clark County Public Defender's Office and one with the United States District Court, District of Nevada with (then) Chief Judge Phillip M. Pro.

9. I have been practicing law since 2006. I am an AV rated attorney and have been AV rated since 2012. I have several industry awards and recognitions based on peer reviews for being a top lawyer in Southern Nevada from Super Lawyers Magazine, AVVO, Nevada Business Magazine, Desert Companion, and various other publications. Additionally, I have also argued before the Nevada Supreme Court and the Ninth Circuit and have three published opinions in the favor of my clients, and several unpublished opinions. I am licensed in Nevada,

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California, the United States District Court, District of Nevada, the United States Court of Appeals for the Ninth Circuit, and the Supreme Court of the United States. I have sat on the Executive Council for the Young Lawyers Section of the State Bar of Nevada, the Fee Dispute Arbitration Committee for the State Bar of Nevada, and currently sit on the Discipline Panel for the State Bar of Nevada. I am also a vice-chair of the Business Law Committee, SOLO Law Firms, and Plaintiff's Task Force for the Tort Insurance Practice Section of the America Bar Association, and was previously a vice-chair for the Trial Techniques and Corporate Counsel committees.

10. I have the highest level of professional standing and skill. Based on my qualities, ability, training, experience, and professional standing with the Nevada Bar Association, the rate and fees charges by Michael B. Lee, P.C. are reasonable according to the *Brunzell* factors.

Burdick Law, PLLC

11. Mrs. Burdick served as a research assistant for Professor Goodman teaching California Evidence, and student articles editor for the Dispute Resolution Law Journal, and finally as a judicial extern to the Honorable Mark R. Denton. She served as a law clerk to the Honorable Mark R. Denton. During this clerkship, Mrs. Burdick gained extensive exposure to a docket of over 800 complex business litigation cases from both the litigator's perspective and the judge. After her clerkship, Mrs. Burdick joined several prestigious law firms in Las Vegas, Nevada prior to opening Burdick Law, PLLC. Her rate of $200 per hour is reasonable according to the *Brunzell* factors.

Character of the Work Done

12. The work performed in this matter was reasonably suited to the nature of this dispute. Defendants had to defend a frivolous lawsuit from Plaintiff. To illustrate the frivolous nature of the lawsuit, Plaintiff submitted false, misleading representations to defend the initial motion to dismiss by Defendants. A true and correct copy of Opposition is attached as **Exhibit E**. The court minutes demonstrate that Mr. Childs falsely argued that there were issues not disclosed by Defendants, a true and correct copy of Minutes is attached as **Exhibit F**, which the underlying Order denoted as false, misleading.

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13. After this Honorable Court permitted Plaintiff leave to amend its pleadings, Plaintiff amended the initial complaint's three causes of action ((1) RECOVERY UNDER NRS CHAPTER 113 [Defendants TKNR and Wong]; (2) CONSTRUCTIVE FRAUD [Defendants Investpro and Nickrandt]; (3) COMMON LAW FRAUD [Defendants Investpro and Nickrandt and Lin]; and (4) FRAUDULENT INDUCEMENT [All Defendants]) to fifteen baseless causes of action: (1) Recovery Under NRS Chapter 113 [Defendants TKNR, Wong, and Investpro Manager LLC]; (2) Constructive Fraud [Defendants Investpro, Nickrandt, and Chen]; (3) Common Law Fraud [Defendants Investpro, Investpro Manager LLC , TKNR, Wong and Lin]; (4) Fraudulent Inducement [Defendants TKNR, Investpro Manager LLC , Wong, Investpro and Lin]; (5) Fraudulent Concealment [Defendants TKNR, Wong, Investpro, Investpro Manager LLC, and Lin]; (6) Breach Of Fiduciary Duty [Defendants Investpro and Nickrandt and Chen]; (7) RICO [Defendants Lin, Cheng, Investpro Manager LLC and Investpro Investments I LLC]; (8) Damages Under NRS 645.257(1) [Defendant Chen, Lin, Investpro and Nickrandt]; (9) Failure To Supervise, Inadequate training and Education [Defendant Investpro, Zhang, and Nickrandt]; (10) Fraudulent Conveyance [TKNR]; (11) Fraudulent Conveyance [Investpro Investments I LLC]; (12) Civil Conspiracy [As To Defendant Man Chau Cheng, Lin, Investpro, Wong, TKNR, Investpro Investments I LLC and Investpro Manager LLC]; (13) Breach Of Contract [As To Defendant Investpro]; (14) Breach Of Implied Covenant of Good Faith and Fair Dealing [As To Defendant Investpro]; and (15) Abuse of Process [As To All Defendants].

14. On November 19, 2020, Defendants proffered an offer of judgment on Plaintiff that illustrated the overall frivolous nature of Plaintiff's case. A true and correct copy of Offer of Judgment is attached as **Exhibit F**. In Response, Plaintiff propounded frivolous discovery requests on Cheng, Investments, Management, Realty, Wong, Manager, and TKNR on November 26, 2020, with actual knowledge that there was no basis for the alleged discovery. This action substantially increased Defendants' cost of defense.

15. More illustrating the improper actions by Plaintiff, on February 4, 2021, counsel responded to an e-mail inquiry from Ariana Reed. I sent a simple response. A true and correct copy of the Email chain is attached as **Exhibit G**. Thereafter, Mr. Childs responded with

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misleading information, which I had to correct and provide the corroborating documentation. A true and correct copy of the Email chain is attached as **Exhibit H**. As noted in Mr. Childs' e-mail, Plaintiff used discovery to directly try to circumvent the frivolous nature of the lawsuit ("Defendants' Summary Judgment motion is highly unlikely to be granted given the state of outstanding discovery and Plaintiff has filed an extensive opposition and countermotion"). *Id*. at February 4, 2021 5:39 PM.

Actual Work Done

16. The actual work performed in this matter required expertise and significant time and attention to the work. As noted by the preceding exhibits, counsel had to create an exacting plan to demonstrate the frivolous nature of this lawsuit. After extensive preparation for Frank Miao's ("Miao") deposition, the person most knowledgeable, counsel successfully obtained testimony related to the frivolous nature of this lawsuit. Moreover, this testimony also illustrated that this lawsuit was frivolous from the commencement of the action based on the disclosures made prior to the purchase of the property, Mr. Miao's actual knowledge prior to the purchase, and Mr. Miao's actual knowledge of what due diligence required of him.

Work Performed

17. I actually performed all the work on the case with the requisite skill, time and attention required for the work, other than the work performed by Mrs. Burdick.

The Result

18. Defendants successfully obtained, *inter alia*, orders for summary judgment, an order finding that Plaintiff's case was frivolous and violated Rule 11, and an order granting attorneys' fees under either Rule 11 or for abuse of process.

19. This Application is not made or based to cause any undue harassment, delay, or annoyance.

20. Defendants are seeking reimbursement of **$118,955.14** for attorneys' fees and costs.

/ / / /

/ / / /

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Memo of Costs

21. Michael Lee, Esq., being duly sworn, states: he has personal knowledge of the costs and disbursements expended below; that the items contained in the memorandum are true and correct to the best of this declarant's knowledge and belief; and that the said disbursements have been necessarily incurred and paid in this action.

1. Odyssey Record attached as **Exhibit I**. The Fees only show the filing fee, but do not show the additional electronic filing fees of $3.50, the merchant fee for the original filing, etc.
2. Transcript invoices attached as **Exhibit J**.
3. Expert Fee attached as **Exhibit K**.

Pursuant to NRS 18.005, 18.010, and 18.020, Defendants hereby claim the following costs:

Filing Fees:	$766.00
Photographs:	$12.97
Transcripts:	$3,934.14
Expert:	$5,000
TOTAL:	**$9,211.64**

Summary

22. Defendants are seeking $118,955.14 for attorneys' fees, and $9,211.64 in costs for a total of $128,166.78.

23. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 6 day of April, 2021.

/s/ Michael Lee
MICHAEL B. LEE

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6 day of April, 2021, I placed a copy of **AFFIDAVIT IN SUPPORT OF ATTORNEYS' FEES FOR ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT** as required by Eighth Judicial District Court Rule 7.26 by delivering a copy or by mailing by United States mail it to the last known address of the parties listed below, facsimile transmission to the number listed, and/or electronic transmission through the Court's electronic filing system to the e-mail address listed below.

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Attorneys for Plaintiff

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EXHIBIT D

IN THE SUPREME COURT OF THE STATE OF NEVADA

BENJAMIN B. CHILDS,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ADRIANA ESCOBAR, DISTRICT JUDGE,
Respondents,
and
WLAB INVESTMENT, LLC; TKNR, INC., A CALIFORNIA CORPORATION; CHI ON WONG, A/K/A CHI KUEN WONG, AN INDIVIDUAL; KENNY ZHONG LIN, A/K/A KEN ZHONG LIN, A/K/A KENNETH ZHONG LIN, A/K/A WHONG K. LIN, A/K/A CHONG KENNY LIN, A/K/A ZHONG LIN, AN INDIVIDUAL; LIWE HELEN CHEN, A/K/A HELEN CHEN, AN INDIVIDUAL; YAN QUI ZHANG, AN INDIVIDUAL; INVESTPRO LLC, D/B/A INVESTPRO REALTY, A NEVADA LIMITED LIABILITY COMPANY; MAN CHAU CHENG, AN INDIVIDUAL; JOYCE A. NICKRANDT, AN INDIVIDUAL; INVESTPRO INVESTMENTS LLC, A NEVADA LIMITED LIABILITY COMPANY; AND INVESTPRO MANAGER LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JOYCE A. NICKDRANDT, AN INDIVIDUAL,
Real Parties in Interest.

No. 82967

FILED

JUN 24 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DIRECTING ANSWER AND GRANTING STAY

This original petition seeks a writ of mandamus or prohibition directing the district court to withdraw the imposition of NRCP 11 sanctions against petitioner. Having reviewed the petition, it appears that an answer may assist this court in resolving this matter. Therefore, real parties in interest, on behalf of respondents, shall have 28 days from the date of this order within which to file and serve an answer, including authorities, against issuance of the requested writ. Petitioner shall have 14 days from service of the answer to file and serve any reply.

Further, petitioner has filed a motion and emergency motion to stay enforcement of the sanctions order against him pending resolution of this writ petition. Real parties in interest oppose the motion on procedural grounds, and petitioner has filed a reply. In considering whether to grant such a stay, we are guided by the following factors: (1) whether the object of the writ petition will be defeated if the stay is denied; (2) whether the petitioner will suffer irreparable or serious injury if the stay is denied; (3) whether the real parties in interest will suffer irreparable or serious injury if the stay is granted; and (4) whether the petitioner is likely to prevail on the merits in the writ petition. NRAP 8(c).

Applying these principles, and having considered the motion, opposition, and reply, we conclude that, on balance, the pertinent factors weigh in favor of a stay. In particular, although we do not express an opinion at this juncture as to the ultimate merits of the petition, the failure of real parties in interest to address this factor in their opposition outweighs the other relevant factors. *See Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248, 251, 89 P.3d 36, 38 (2004) (explaining that in evaluating a motion to stay, no single factor is dispositive and a strong showing on some factors

may counterbalance weak factors).[1] Accordingly, we grant petitioner's motion and stay enforcement of the district court's sanctions order pending further order of this court.

It is so ORDERED.

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Herndon

cc: Hon. Adriana Escobar, District Judge
Benjamin B. Childs
Michael B. Lee, P.C.
Day & Nance
Eighth District Court Clerk

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[1]In addition, we are not persuaded by real parties in interest's assertion that the motion to stay is procedurally improper under NRAP 8 or NRCP 62.

EXHIBIT E

Electronically Filed
1/21/2022 10:43 AM
Steven D. Grierson
CLERK OF THE COURT

NEOJ
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

W L A B INVESTMENT, LLC, Plaintiff, v. TKNR, INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKDRANDT, an individual and does 1 through 15 and roe corporation I-XXX, Defendants.	Case No: A-18-785917-C Dept No: 30

NOTICE OF ENTRY OF ORDER

TO: ALL PARTIES; and

TO: THEIR COUNSEL OF RECORD

PLEASE TAKE NOTICE that an Order was entered in the above-entitled action on the 21st day of January, 2022, a copy of which is attached hereto.

DATED this 21st day of January, 2022.

DAY & NANCE

_____

Steven L. Day, Esq.
Nevada Bar No. 3708
1060 Wigwam Parkway
Henderson, NV 89074
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), on the 21st day of January, 2022, service of this NOTICE OF ENTRY OF ORDER made upon each of the parties listed below, via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system:

Michael B. Lee, Esq.
Michael Mathis, Esq.
Michael B. Lee, P.C.
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Las Vegas, NV 89104
Attorneys for Defendants

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Fax: 702-384-1119

_____

An Employee of Day & Nance

ELECTRONICALLY SERVED
1/21/2022 10:17 AM

Electronically Filed
01/21/2022 10:16 AM
CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA
-oOo-

WLAB INVESTMENT, LLC, Plaintiff, vs. TKNR INC., a California Corporation, And CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN Aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, And LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QUI ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, And JOYCE A. NICKRANDT, an Individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKRANDT, an individual, and Does 1 through 15 and Roe Corporations I - XXX, Defendants. _____	CASE NO.: A-18-785917-C DEPT. NO.: XXX **ORDER RE: PLAINTIFF'S MOTION FOR STAY OF EXECUTION OF JUDGMENT PENDING APPEAL WITHOUT SECURITY**

INTRODUCTION

This matter is scheduled for a hearing on Wednesday, December 16, 2022, with regard to Plaintiff's Motion for Stay of Execution of Judgment Pending Appeal Without Security. Pursuant to the Administrative Orders of the Court, as well as EDCR 2.23, this matter may be decided with or without oral argument. This Court has determined that it would be appropriate to decide this matter on the pleadings, and consequently, this Order issues.

FACTUAL AND PROCEDURAL HISTORY

The underlying facts of this litigation are somewhat irrelevant at this point. It is sufficient to note that on or about 3/9/21, a hearing was held on Defendant's Motion for Summary Judgment, and Plaintiff's Countermotion for a Continuance and for Sanctions. This Court granted summary judgment in favor of Defendants and denied Plaintiff's Countermotions, by Order dated 3/30/21. On 4/6/21, Defendants filed an affidavit in support of fees and costs. On 4/16/21, Plaintiff, through new counsel, filed a Motion to Reconsider the Order Granting Summary Judgment in Favor of Defendants. That matter was heard in Chambers on 5/17/21, and an Order and Judgment was entered on 5/25/21.

On 4/26/21, Plaintiff filed a Notice of Appeal related to the Order Granting Summary Judgment in Favor of Defendants. On 6/1/21, Mr. Childs filed a Petition for Writ of Mandamus or Writ of Prohibition. The Supreme Court granted the Petition and issued an Order directing the lower court "to vacate the portion of its order imposing sanctions against petitioner."

On 6/8/21, Plaintiff filed a Notice of Appeal related to the Order and Judgment entered on 5/25/21. On 8/30/21, the aforementioned appeals were consolidated.

On 10/25/21, this matter was reassigned to Department 30.

On 11/8/21, the Court issued an Order for Further Proceedings, relating to the direction of the Supreme Court, and a hearing was set for 11/18/21. On 11/16/21, Defendants filed a status report in advance of the hearing. Competing Orders were submitted to the Court, and on 12/1/21, the Court executed the Order submitted by Mr. Childs. Subsequently, the Court reconsidered its 12/1/21 Order, and simply ordered that that the portions of this Court's Order entered on May 25, 2021, imposing sanctions against Benjamin Childs, Esq., were vacated.

The Appeal relating to the Order Granting Summary Judgment in Favor of Defendants is still pending.

Plaintiff now requests an Order of the Court staying execution of the Judgment, without security, or in the alternative, that the Plaintiff be permitted to provide security in another form.

. . . .

FACTUAL AND LEGAL ANALYSIS

Plaintiff proposes that the real property located at 2132 Houston Drive, Las Vegas, Nevada, provides sufficient security to support a Stay. NRCP 62(d) provides that a party is entitled to a stay by providing bond or other security. Plaintiff states the property is unencumbered and is owned by WLAB Investment, LLC, and subject to this litigation. According to Plaintiff, the present value of the property is more than sufficient to secure Defendant's $128,166.78 judgment.

In Opposition, Defendants argue that either Plaintiff's Motion should be denied, or Plaintiff should be forced to provide a cash bond of 150% the amount of the Judgment entered. Defendants contend that Plaintiff's request for a stay absent security is absurd and unsupported by any factual or legal basis. Defendants believe that it is unlikely that the Supreme Court would vacate the entry of summary judgment, even if it decides to vacate the Judgment for failure to comply with procedural requirements of Rule 11. Further, if the portion of the order granting summary judgment is not vacated, Plaintiff would be contractually obligated to pay the attorneys' fees and costs incurred by Defendants pursuant to the purchase agreement. The amount of the Judgment is directly related to the attorneys' fees and costs incurred by Defendants in this action, the amount of which were not opposed by Plaintiff.

Defendants argue that the Subject Property is not sufficient security, as Plaintiff has not established that the current value of the Subject Property is equal to or greater than the Judgment. Currently, there is no perfected security lien on the Subject Property to ensure payment of the Judgment in the likely event the Amended Order and Judgment are affirmed.

Defendants believe that Plaintiff should be required to post the bond in cash as referenced in NRCP 62(d)(1), because the purpose of the bond is to reimburse attorneys' fees paid by Defendants as a result of defending against the frivolous action by Plaintiff. Defendants argue that those fees have already been incurred and paid by Plaintiff, which indicates that a cash bond is required to maintain the status quo.

In Reply, Plaintiff argues that the Supreme Court only dismissed the sanctions against Mr. Childs, as they were only addressing attorney Childs' Writ of Mandamus. Plaintiff's remedy is with its appeal. Although Defendants argue that an award of attorney's fees and costs could still be available to Defendants via an abuse of process

claim or pursuant to NRS §§ 7.085 or 18.010(2)(b), the District Court awarded Defendants fees pursuant to Rule 11, not pursuant to an abuse of process claim or the referenced statutes. Plaintiff argues that Defendants made that same argument to the Supreme Court in their Opposition to Benjamin B. Childs' Petition for Writ of Mandamus, which the Supreme Court rejected.

Plaintiff argues that Defendants incorrectly contend that offering security other than bond would only be available "when unusual circumstances exist and so warrant." Citing *McCulloch v. Jenkins*, 99 Nev. 122, 659 P.2d 302, 303 (1983). However, in *Nelson v. Heer*, 121 Nev. 832, 833, 122 P.3d 1252 (2005), the Nevada Supreme Court retreated from the court's emphasis on unusual circumstances enunciated in *McCulloch* and instead adopted the Seventh Circuit's five factors set forth in *Dillon v. City of Chicago*, 866 F.2d 902 (7th Cir.1988). Those factors are:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Nelson at 836, 1254.

Plaintiff argues that NRCP 62(d) specifically entitles a party to a stay by providing security other than a bond. The District Court has jurisdiction to grant the stay and to allow other forms of judgment guarantee. *Rakovich v. Wade*, 834 F.2d 673 (C.A. Wis. 1987); *International Telemeter Corp. v. Hamlin Intern. Corp.*, 754 F.2d 1492 (9th Cir. 1985); *Poplaar Grove Planting and Refining Co. Inc., v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189 (5th Cir. 1979).

Here, Plaintiff claims to own the Subject Property free and clear of mortgage or other encumbrance. Should the Supreme Court affirm the District Court's Rule 11 sanction, Defendants already have a judgment. Collection would involve a simple foreclosure on the property. Plaintiff further argues that while it purchased the Subject Property four years ago for $200,000.00, the value has likely increased given the current real estate market.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the factors set forth in *Nelson v. Heer*, 121 Nev. 832, 833, 122 P.3d 1252 (2005), this Court finds and concludes that the value of the property at issue "may" be sufficient, but there is insufficient evidence to conclude that it "will" be sufficient security for the requested Stay. This Court finds and concludes that a Stay is appropriate, but only upon evidence that the Plaintiff has obtained or posted a bond in the sum of $128,166.78. If additional fees or costs are awarded, the subject property should be sufficient to satisfy any additional award.

CONCLUSION/ORDER

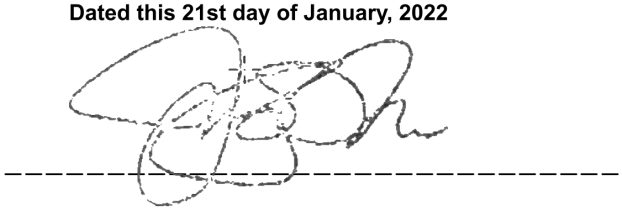
Based upon the foregoing, and good cause appearing,

The Plaintiff's Motion for Stay of Execution of Judgment Pending Appeal Without Security is hereby **GRANTED IN PART and DENIED IN PART**. It is GRANTED to the extent that a Stay of Execution of Judgment Pending Appeal will apply, but DENIED to the extent that it was requested without security. Such Stay of Execution of Judgment Pending Appeal will only be effective upon evidence that the Plaintiff has obtained or posted a bond in the sum of $128,166.78.

The Court requests that Plaintiff's counsel prepare and process a Notice of Entry relating to this Order.

Because this matter has been decided on the pleadings, the hearing scheduled for 1/26/22 will be taken off calendar, and consequently, there is no need for any parties or attorneys to appear.

Dated this 21st day of January, 2022



58B 939 9FA0 C393
Jerry A. Wiese
District Court Judge

CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

W L A B Investment LLC, Plaintiff(s) vs. TKNR Inc, Defendant(s)	CASE NO: A-18-785917-C DEPT. NO. Department 30

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: 1/21/2022

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Frank Miao	frankmiao@yahoo.com
Benjamin Childs	ben@benchilds.com

If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 1/24/2022

John Savage	Holley Driggs Attn: John Savage, Esq 400 South Fourth Street, Third Floor Las Vegas, NV, 89101
Nikita Pierce	6625 South Valley View Blvd. Suite 232 Las Vegas, NV, 89118