IN THE SUPREME COURT OF THE STATE OF NEVADA

TKNR, INC., a California corporation, Appellant, vs. WLAB INVESTMENT, LLC, Respondent.	Supreme Court Case No. 85620 District Court Case No. A-18-785917-C

Appeal from the Eighth Judicial District Court
District Court Case No. A-18-785917-C
Adriana Escobar, District Judge

RESPONDENT APPENDIX – Volume 9 of 10

KAEMPFER CROWELL
Lesley Miller, No. 7987
Elva Castaneda, No. 15717
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135
Telephone: (702) 792–7000
Facsimile: (702) 796–7181
Email: lmiller@kcnvlaw.com
Email: ecastaneda@kcnvlaw.com

Attorneys for Respondent WLAB Investment, LLC

DESCRIPTION	DATE	PAGES	VOL
Decision and Order	10/18/2022	RA000925-RA000932	10
Defendant's Motion for Summary Judgment	12/15/2020	RA000047-RA000187	1, 2
Motion for Attorney Fees	08/22/2022	RA000001-RA000020	1
Nevada Supreme Court Order Affirming and Reversing	05/12/2022	RA000021-RA000028	1
Notice of Appeal	05/03/2021	RA000630-RA000759	8
Notice of Entry of Order Granting Defendant's Motion for Summary Judgment	03/31/2021	RA000354-RA000399	4
Opposition to Defendant's Motion for Summary Judgment	12/29/2020	RA000188-RA000353	2, 3
Order Granting Defendant's Motion for Summary Judgment	04/07/2021	RA000579-RA000621	7
Order Granting, In Part, and Denying, In Part, Plaintiff's Motion to Reconsider and Judgment	05/25/2021	RA000622-RA000629	7
Plaintiff's Motion to Reconsider	04/16/2021	RA000400-RA000578	4, 5, 6
Plaintiff's Opposition to Motion for Attorney Fees	08/24/2022	RA000764-RA000924	9, 10
Remittitur	07/26/2022	RA000760-RA000763	8
Supplement to Defendant's Motion for Fees	08/25/2022	RA000029-RA000046	1

KAEMPFER CROWELL

Lesley B. Miller, No. 7987
Elva A. Castaneda No. 15717
1980 Festival Plaza Drive, Suite 650
Las Vegas, Nevada 89135

Attorneys for Respondent
WLAB Investment, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, I electronically filed the foregoing **RESPONDENT APPENDIX** with the Clerk of the Court for the Supreme Court of the State of Nevada by using the electronic filing system to be delivered to the following registered user:

Michael B. Lee, Esq.
Michael Matthis, Esq.
Michael B. Lee, P.C.
1820 East Sahara Avenue, Suite 110
Las Vegas, Nevada 89104
mike@mblnv.com
matthis@mblnv.com

Attorney for Appellant

James A. Kohl
Howard & Howard Attorneys PLLC
3800 Howard Hughes Pkwy, #1000
Las Vegas, Nevada 89169
jkohl@howardandhoward.com

Settlement Judge

DATED August 3, 2023

Kimberly Rupe
An employee of Kaempfer Crowell

Steven L. Day, Esq.
Nevada Bar No. 3708
DAY & ASSOCIATES
1060 Wigwam Parkway
Henderson, NV 89074
Tel. (702) 309-3333
Fax (702) 309-1085
sday@dayattorneys.com
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

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.
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> . . .
>
> (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 "attorney or unrepresented party" 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.

/ / /

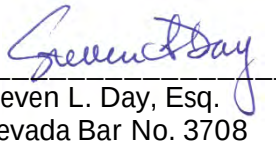
/ / /

/ / /

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

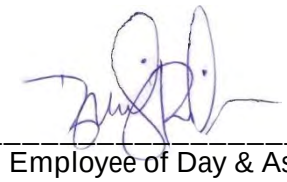


Steven L. Day, Esq.
Nevada Bar No. 3708
1060 Wigwam Parkway
Henderson, NV 89074
Attorneys for Plaintiff

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
Benjamin B. Childs, Esq. 318 S. Maryland Pkwy. Las Vegas, NV 89101	Phone: 702-251-0000 ben@benchilds.com	Fax: 702-384-1119



An Employee of Day & Associates

EXHIBIT “1"

ELECTRONICALLY SERVED
4/7/2021 4:39 PM

Electronically Filed
04/07/2021 4:21 PM
CLERK OF THE COURT

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.
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,

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

Case Number: A-18-785917-C

(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,

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

> 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.

/ / / /

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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:

/ / / /

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),

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.·

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.

No Permits Required for Cosmetic Work by TKNR

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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").

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

> 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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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,

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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.

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

> 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).

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

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).

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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)

(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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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

MICHAEL B. LEE, P.C.
1820 E. SAHARA AVENUE, SUITE 110
LAS VEGAS, NEVADA 89104
TEL – (702) 477.7030; FAX – (702) 477.0096

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 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
Steven Day	sday@daynance.com
Michael Matthis	matthis@mblnv.com
BENJAMIN CHILDS	ben@benchilds.com
Nikita Burdick	nburdick@burdicklawnv.com
Michael Lee	mike@mblnv.com
Bradley Marx	brad@marxfirm.com
Frank Miao	frankmiao@yahoo.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 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
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

FILED

MAY 12 2022

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

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

[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

[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"

RA000837

RA000838

RA000839

RA000840

RA000842

RA000843

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