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 6 TOMJANOVICH

**FILED**  
 SUPERIOR COURT OF CALIFORNIA  
 COUNTY OF LOS ANGELES

AUG 16 2012

John A. Clarke, Executive Officer/Clerk  
 BY Raul Sanchez, Deputy

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 9 FOR THE COUNTY OF LOS ANGELES

11 STEVEN BARDACK, an individual,  
 12 Plaintiff,

Case No. SC101085

13 vs.

**TRIAL BRIEF OF RUDY AND SOPHIE  
 TOMJANOVICH**

14 RUDY TOMJANOVICH, an individual;  
 15 SOPHIE TOMJANOVICH, an individual;  
 JOSEPH R. FRANCIS, an individual; JF, LLC,  
 16 a California limited liability company;  
 GORDON PROPERTY INSPECTIONS, INC.,  
 17 a California corporation; WAYNE  
 BERRYHILL, individually and doing business  
 as L.A.M.B. ENTERPRISES; WESTLAN  
 18 CONSTRUCTION COMPANY, INC., a  
 California corporation; ROCHA NUEZ ABDOH  
 19 CONSTRUCTION, INC., a California  
 corporation; TOM HENRY HALE, an  
 20 individual; JON ALAN IRVINE, an individual;  
 ARA MALOYAN, an individual; MORTON  
 21 NEWMAN, an individual; FARREL T. MILES,  
 an individual; J. BYER GROUP, INC., a  
 22 California corporation; ROBERT ZWEIGLER;  
 CARLOS JOEL ROCHA, and individual;  
 23 TRACY PRICE, an individual; and DOES 1  
 through 200, inclusive,

Trial  
 Date: September 4, 2012  
 Time: 8:30 a.m.  
 Dept.: 3 – Central  
 Judge: Hon. J. Stephen Czuleger

FSC: August 20, 2012

24 Defendants.

25 AND RELATED CROSS-ACTIONS.  
 26

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1 Defendants, Cross-Complainants, and Cross-Defendants Rudy Tomjanovich and  
2 Sophie Tomjanovich (“Tomjanovichs”) hereby submit the following trial brief for the upcoming  
3 jury trial.

4 **I.**

5 **INTRODUCTION**

6 This lawsuit arises out of plaintiff’s claims that he purchased a 6600 square foot  
7 mansion in Pacific Palisades for \$6.5 million that is “rife with construction defects associated with  
8 the remodel performed by Joe Francis, through the Construction Defendants.” (Plaintiff’s Trial  
9 Brief, p. 12, Ins. 16-18.) He claims that it will cost over \$3 million to repair the 14 categories of  
10 construction defects his team of experts has revealed. He seeks to hold the “Construction  
11 Defendants” liable for his alleged damages. He also seeks to hold Rudy and Sophie Tomjanovich  
12 liable for the **same** list of construction defects, since they sold him the property, allegedly without  
13 disclosing prior water intrusion in the entry foyer at the residence.

14 The critical problem with plaintiff’s case against the Tomjanovichs is that **they did**  
15 **disclose prior water intrusion at the residence to plaintiff in their real estate transfer**  
16 **disclosure documents**, as well as several other disclosures. (See Exhibits 39, 112, 120.) Plaintiff  
17 did not pay any attention to the Tomjanovichs’ disclosures, and instead had his broker hire eleven  
18 (11) inspectors to give him opinions regarding the condition of the property. Plaintiff Bardack did  
19 not act on, inquire further regarding, or provide his inspectors with a copy of **any** of those  
20 disclosures. The Tomjanovichs gave those inspectors **full access to the property and never**  
21 **prevented any of the plaintiff’s consultants from performing whatever inspections they**  
22 **wanted**. (Ex. 41; Bardack Dep., Vol. I, 91:7-22.) Thus, the Tomjanovichs did not induce or  
23 defraud plaintiff into buying the property. Quite to the contrary, plaintiff, a wealthy hedge fund  
24 manager—with an MBA and law degree—wanted to buy the subject property **long before the**  
25 **Tomjanovichs owned it, and long before the Tomjanovichs decided to sell it**. (Bardack Dep.,  
26 Vol. I, 30:9-16.)

27 Sellers of real property, such as the Tomjanovichs in this case, may not be held  
28 liable for any error, inaccuracy or omission of information delivered in their real estate disclosures

1 if the error, inaccuracy or omission was not within the Tomjanovichs' personal knowledge at the  
2 time of the disclosures. It is an actual knowledge standard. (Civil Code section 1102.4(a);  
3 *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347.) The Tomjanovichs disclosed material facts  
4 regarding the condition of the property that they knew of at the time of the disclosures. Any error  
5 or omission in the disclosures was not due to fraud, negligence, or any breach of statutory or  
6 common law duties of disclosure. Nor are the errors or omissions that plaintiff complains of  
7 "material" to the sale of the property.

8           The **only place** the Tomjanovichs ever experienced water intrusion was in the  
9 **entry foyer**. Yet, plaintiff seeks to hold them liable for repair of design and construction defects  
10 throughout the exterior and interior of the 6600 square foot residence. Plaintiff, through his  
11 lawyers, hired a team of forensic experts to develop a construction defect case against the design  
12 and construction defendants, including: Joseph R. Francis; JF, LLC; Mohammed Hadid; Hadid  
13 Development Corp.; Hadid Development Companies, Inc.; Carlos Rocha; Feraidon Abdoh;  
14 Strategic Plans Architects and Engineers, Inc., dba Rocha Nuez & Associates; Rocha, Nuez,  
15 Abdoh Construction, Inc.; and Westlan Construction.

16           His team of experts headed by Architect Penny Kronberg of Gafcon, Inc. prepared  
17 a \$3,030,340 "Detailed Cost Estimate" to repair 14 "defect" categories, which includes everything  
18 from replacing windows (which never leaked while the Tomjanovichs owned the property) to  
19 removing and replacing the exterior stucco, and repairing all of the property's retaining walls (a  
20 condition Bardack knew about before escrow closed). (Exs. 272, 279.) Expert Matthew Nardella  
21 of Bert Howe & Associates has reviewed plaintiff's cost of repair and has testified that **none** of the  
22 repair items results from the Tomjanovichs' alleged failure to disclose. These alleged defects are  
23 the result of Bardack's experts' post mortum destructive testing and construction at the property  
24 long **after** the sale. The Tomjanovichs cannot be legally liable for the cost to repair the alleged  
25 "defects" revealed long after they sold the property to Bardack of which they had no actual  
26 knowledge.

1 As for Bardack's rescission claim, it is entirely misplaced in the context of this  
2 alleged failure to disclose case. (Civil Code section 1102.13.) Even setting section 1102.13 aside,  
3 rescission is an equitable remedy that would require the Court to determine that: (1) Bardack's  
4 consent to the purchase agreement was "given by mistake" or "obtained through fraud" (Civil  
5 Code section 1689(b)(1)); (2) Bardack's alleged mistake or the Tomjanovichs' alleged  
6 misrepresentations were "material" and went to the "essence of the contract," meaning  
7 Bardack actually and reasonably relied on the mistake or misrepresentation and would not have  
8 purchased the property had such mistake or misrepresentation not existed (Civil Code section  
9 1577, 1578); (3) that Bardack gave prompt notice of rescission and offered to restore all  
10 consideration and value received to the Tomjanovichs (Civil Code section 1691); and (4) that the  
11 parties can be returned to the status quo (to the same position they were in 5 years ago when the  
12 transaction occurred). (Civil Code section 1689(b)(1); *MF Kemper Const. Co. v. City of Los*  
13 *Angeles* (1951) 37 Cal.2d 696, 701.)  
14

## 15 II.

### 16 PERTINENT BACKGROUND

#### 17 A. The Design and Construction of the Subject Property

18 Defendant Joseph R. Francis ("Francis") acquired 1639 San Onofre, Pacific  
19 Palisades, California in 1999. The house on the property was originally constructed in 1960 and  
20 was approximately 800 square feet. Francis, as owner / builder, then embarked on a construction  
21 project that began in 2000 to demolish the existing residence and construct a new much larger  
22 modern-style home. After having a falling out with his original architect and contractor on the  
23 project, Francis hired defendant Rocha Nuez Associates ("RNA") in approximately July 2002 to  
24 complete the design and construction. Feraidon Abdoh is RNA's civil engineer. Mr. Abdoh also  
25 provided construction management services on the project under defendant Hadid Development,  
26 Inc. Construction on the project continued based on RNA's plans, and was substantially complete  
27 by April 2003. On September 2, 2004, Francis recorded a grant deed on the property in favor of  
28 defendant JF, LLC.

1 **B. The Tomjanovichs' Purchase the Property from JF, LLC**

2 In September 2004, the Tomjanovichs purchased the property from JF, LLC for  
3 approximately \$4.25 million. Escrow closed on September 30, 2004. In connection with the sale,  
4 Francis/JF provided a Real Estate Transfer Disclosure Statement to the Tomjanovichs, which  
5 states in pertinent part:

6 Are you (Seller) aware of any significant defects/malfunctions in  
7 any of the following? \_\_\_ Yes  x  No

8 \_\_\_ Interior Walls \_\_\_ Ceilings \_\_\_ Floors \_\_\_ Exterior Walls  
9 \_\_\_ Insulation \_\_\_ Roof(s) \_\_\_ Windows \_\_\_ Doors \_\_\_ Foundation  
10 \_\_\_ Slab(s) \_\_\_ Driveways \_\_\_ Sidewalks \_\_\_ Walks/Fences  
11 \_\_\_ Electrical Systems \_\_\_ Plumbing/Sewers/Septics  
12 \_\_\_ Other Structural Components (Ex. No. 18.)

13 Since Francis rebuilt the property from the ground up, the Tomjanovichs justifiably  
14 believed that the property did not have any significant defects as reported by the Francis/JF  
15 defendants.

16 The Tomjanovichs' real estate agent at the time, Paul Spiegel obtained from  
17 Francis' agent portions of an inspection report prepared by "Inspectech" dated April 6, 2004. The  
18 Tomjanovichs never saw this report. (Ex. 3.)

19 On April 26, 2004, civil engineer and construction manager Feraidon Abdoh sent a  
20 letter to Francis' attorney addressing each of the issues raised in the Inspectech report and how  
21 they were resolved. One of the items mentioned was water staining under the balcony eaves, and  
22 Mr. Abdoh stated that said condition was due to "caulking at the glass railing," and that the  
23 caulking had been replaced. (Exs. 3, 141.)

24 While in escrow in September 2004, Mr. Spiegel hired an inspection company  
25 called Pro-Tech Building Inspection to inspect the property for the Tomjanovichs. Not knowing  
26 about the Inspectech report or Mr. Abdoh's letter addressing the issues, Pro-Tech identified many  
27 of the same issues including water staining around some of the balconies. The Pro-Tech report  
28 was sent directly to and maintained by Mr. Spiegel, *not* the Tomjanovichs. (Exs. 11, 16.) Mr.  
Spiegel also obtained a \$2000 estimate to make some improvements to the roof from Economy



1 Roofing in September 9, 2004. (Ex. 20.) He also obtained a proposal from a company called  
2 California Stoneworks dated September 9, 2004 in the amount of \$42,385 to attempt to  
3 troubleshoot and rewaterproof approximately 500 square feet of decking. (Ex. 22.)  
4 Approximately \$25,000 of the estimate was a glass subcontractor's bid to demolish and replace  
5 the glass railings. Based on those reports, Mr. Spiegel prepared a request for price reduction on  
6 behalf requesting a \$60,000 reduction in the sale price. Francis agreed to a \$50,000 price  
7 reduction. The final sale price was \$4,249,000, and escrow closed on September 30, 2004.

8  
9 **C. The Tomjanovichs' Maintenance and Repair Work**

10 In or about December 2004, the Tomjanovichs experienced a **localized water leak**  
11 **in the entry foyer of the home.** (Sophie Tomjanovich Depo., 254:7-13.) As a result, Sophie  
12 retained Humberto Escobar who represented himself as a knowledgeable contractor to identify and  
13 repair the problem. Escobar testified that he recommended re-sealing the skylight and sealing the  
14 windows in the entryway. Per his recommendations, Escobar applied silicone around all the glass  
15 in the entryway, and removed, resealed and replaced the skylight. He also permanently removed  
16 the railing adjacent to the balcony closest to the skylight, and caulked and sealed off the nail holes  
17 where that railing had been fastened to the structure. (Escobar Depo., 49:16-53:1.) Once he  
18 completed all of the repairs he thought were necessary, he and his co-worker water tested the  
19 skylight and did not find any active leak. (*Id.*, 26:13-31:20.) He then recommended to Sophie that  
20 she wait to see if these solutions worked, since his testing indicated that it would. As a result of  
21 the leak in the foyer, Escobar also repaired the water damaged drywall and repainted the entryway.  
22 (*Id.*, 14:5-21:17.) Although Sophie had Escobar periodically change interior paint colors and  
23 touchup marks and scuffs on the walls with paint through mid-2005, Escobar confirmed that none  
24 of that work had anything to do with water stains or damage in the home. (*Id.*, 54:18-56:13.)

25 There was no further water intrusion for over a year. In or about April 2006, a  
26 minor leak occurred in the area by the foyer skylight. (Sophie Tomjanovich Depo., 254:19-25 and  
27 256:7-10.) As a result of that minor leak, Sophie retained Victor Corona of Corona Construction.  
28 Corona's first visit to the property took about two hours, at which time he advised Sophie that he

1 would be able to help fix the leak. (Ex. 182; Corona Depo., 20:12-21:1.) Corona advised Sophie,  
2 and she believed, that he would find the problem and do whatever was necessary to repair it.  
3 (Sophie Tomjanovich Depo., 199:1-23.) Since it was determined that the balcony railing system  
4 needed to be resealed and caulked, the Tomjanovichs had the base of the balcony railings caulked  
5 and sealed and paid Corona \$6,100 for that work alone. (Exs. 33, 182.) After Corona performed  
6 the repairs in or about April 2006, the Tomjanovichs “never had a problem after that.” (Sophie  
7 Tomjanovich Depo., 199:14-23.) They experienced no water intrusion during the winter rains of  
8 2006-2007. (*Id.*)

9 The Tomjanovichs diligently maintained the property. It was a stunningly beautiful  
10 home in excellent condition while the Tomjanovichs owned it. (See Exs. 201, 634.)

11  
12 **D. Plaintiff's Efforts to Purchase the Property Before the Tomjanovichs Listed It**

13 Plaintiff first became interested in the property in the 2002-2003 time frame. In  
14 2004, its then owner, Joe Francis listed the property for \$9 million. Plaintiff thought the list price  
15 was too high but continued to monitor the listing. As plaintiff recalls, the price dropped about \$4  
16 million dollars in the span of 9-12 months. When the list price was in the \$5 million range, he had  
17 his broker arrange a viewing. (*Id.* at 33:5-41:13.) He liked the property and tendered an offer for  
18 \$3.6 million. (Bardack Dep., Vol. I, 47:1-49:15.) He was outbid by the Tomjanovichs who  
19 purchased the property from Francis for \$4.2 million in the fall of 2004. (*Id.* at 50:23-51:19.)

20 About a year later when plaintiff read in the newspaper that Rudy Tomjanovich  
21 was resigning as coach of the Lakers due to health problems, plaintiff rushed to the property and  
22 put a note in the mailbox asking if the Tomjanovichs would sell him the property. (Ex. 206.)  
23 When that did not work, he had his real estate agent transmit **three** consecutive unsolicited offers  
24 to purchase the property to the Tomjanovichs ranging from \$4.6 - \$5.3 million. (Bardack Dep.,  
25 Vol. I, 62:2-65:11; Ex. 207.) Bardack was able to offer over a million dollars more for the  
26 property than he had in 2004, since a company in which he was a partner sold to Yahoo for \$4.5  
27 billion. (*Id.* at 22:22-23:3, 64:3-22.)

1 With still no luck, plaintiff bought the undeveloped lot next door to the subject  
2 property for \$1,089,830 in August 2006, even though that lot had evidence of a “slope failure.”  
3

4 **E. Plaintiff’s Purchase of the Property From the Tomjanovichs**

5 The Tomjanovichs deliberated for several months before finally deciding that, since  
6 Mr. Tomjanovich was no longer coaching, it was too expensive to maintain the Palisades property  
7 and their house in Houston. Hence, they listed the property for sale in March 2007. They hired  
8 Coldwell Banker and two experienced real estate agents, William Stimming and David Becker  
9 who represented themselves as licensed and competent professionals, to guide them through the  
10 listing and sale process.

11 Coldwell Banker listed the property for the Tomjanovichs at \$7.4 million. Again,  
12 Bardack expressed interest. He again viewed the home and saw that it was “well taken care of”  
13 and had what he was looking for—a large modern-style home with a view. He testified that “at  
14 that point, it was just a question of price.” (Bardack Dep. Vol. I, 81:4-25.) He again offered to  
15 buy the property. He was finally successful. He negotiated the purchase price down to \$6.5  
16 million. On May 16, 2007, plaintiff entered into a Residential Purchase Agreement and Joint  
17 Escrow Instructions to finally purchase the property he had been after for five years.

18 During escrow, the Tomjanovichs disclosed to their real estate agents what they  
19 knew about the condition of the property. Based on the assistance and advice of Coldwell  
20 Banker’s agents, the Tomjanovichs filled out the real estate disclosure paperwork the agents gave  
21 them. Mrs. Tomjanovich and their business agent, Jesse Brown specifically communicated to  
22 Misters Stimming and Becker that they were looking to them for guidance, since they had no prior  
23 experience with California real estate transfers. (Ex. 38, 110.) The agents guided Mrs.  
24 Tomjanovich and Mr. Brown through the disclosure process.

25 Sophie earnestly tried to be as accurate and thorough as she could when preparing  
26 disclosures to plaintiff. She helped prepare a thirty-three item disclosure list of known items and  
27 work done on the property in conjunction with the Seller’s Property Questionnaire form through  
28

1 consultations with her Coldwell Banker agents. Sophie checked "Yes" in response to the question  
2 regarding water intrusion as follows:

3 ARE YOU (SELLER) AWARE OF:

4 WATER RELATED AND MOLD ISSUES:

5 6. Water intrusion into any part of any physical structure on the  
6 Property; leaks from or in any appliance, pop, slab, or roof; standing  
7 water, drainage, flooding, underground water, moisture, water-  
related soil settling or slippage on or affecting the Property: Yes ✓

8 Explanation: See Seller's Disclosure. (Ex. No. 112.)

9 The "Seller's Disclosure" referenced was a two page list describing what they knew  
10 and the work that the Tomjanovichs had done at the property related to the water intrusion. It  
11 included the following items, among others: "exterior painting of stucco in necessary areas" (¶1);  
12 "stucco on underside of eave outside Master Bath is chipped" (¶4); "small cracks and bubbles in  
13 paint at ceiling in home have been repaired..." (¶7); "painting throughout home has been patched  
14 and repaired..." (¶9); "sealed and repaired outside travertine walls" (¶22); "proper waterproof  
15 caulking has been applied...[m]inor water stains might still be visible under decks" (¶24); "two  
16 railings were removed by the skylight due to improper installation of connection hardware" (¶26);  
17 "skylight removed and properly resealed, with necessary drywall replaced and painted (¶27);  
18 "balconies off bedrooms-tile has been re-grouted with waterproof grout" (¶28); "metal flashings  
19 near roof have been repaired..." (¶29); "retaining wall has repaired cracks at right side gate"  
20 (¶31)... (Ex. 120.)

21 During the entire escrow period from May 17, 2007 through July 5, 2007, plaintiff  
22 was free to and did have various professionals inspect the condition of the property. Plaintiff had  
23 inspections performed on the property by, and received reports from, the following: (1) Boston  
24 Brick and Stone; (2) The Chimney Doctor; (3) Gordon Property Inspections; (4) Sun Coast  
25 Elevator; (5) A&B Plumbing and Heating; (6) American Geotechnical- Gregory Axten, Civil and  
26 Geotechnical Professional Engineer; (7) Encino Pool & Spa; (8) L.A.M.B. Enterprises; (9) AEI  
27 Consultants; (10) Tracy Price; and (11) Angeles Termite Control. (*Id.*) **The Tomjanovichs did**  
28 **not prevent any of plaintiff's consultants from conducting full inspections of the property.**

1 (Bardack Dep., Vol. I, 95:9-96:5.)

2           Indeed, on May 23, 2007, P.J. Severtson of Gordon Property Inspections (“GPI”)  
3 inspected the property for plaintiff and published his home systems survey and report the next day.  
4 Severtson spent **five (5) hours** at the property. (Ex. 108.) GPI’s report consists of sixteen (16)  
5 pages, and outlines eighty-one (81) issues, about which plaintiff was unequivocally placed on  
6 notice. (*Id.*) AEI Consultants found “no existing moisture in the structure.” (Ex. 41.) The report  
7 prepared for plaintiff by roofing expert L.A.M.B. Enterprises states: “Upon interior inspection, no  
8 signs of moisture intrusion were discovered. Upon exterior inspection, roof was discovered to be  
9 in excellent condition....” (Ex. 627.)

10           After receiving the disclosures and after plaintiff’s inspectors gave him their expert  
11 opinions regarding the property, plaintiff negotiated a \$33,000.00 reduction in the purchase price.  
12 (*Id.*) With respect to the price reduction, the contract documents state in pertinent part as follows:

13           Buyer and seller mutually agree to use the \$33,000 in the form of a  
14 reduction in purchase price. **Buyer is satisfied with the amount**  
15 **and in the event that the cost of any repairs should exceed**  
16 **credit; buyer agrees to assume financial responsibility for same.**  
17 (Ex. No. 41.) [Emphasis added.]

18           Plaintiff signed that agreement on June 26, 2007. (*Id.*) Plaintiff also received and  
19 signed the following during escrow:

20           “WATER INTRUSION DISCLOSURE. Some homes and  
21 apartments suffer from water intrusion or leakage. The causes of  
22 water intrusion are varied, and can include defective construction,  
23 deterioration of building materials, and absence of waterproof  
24 barriers. Water intrusion can potentially cause serious damage to a  
25 property. This damage can consist of wood rot, mold, mildew and  
26 even damage to the structural integrity of the property. Cost of  
27 repairing the remediating water intrusion damage and its causes  
28 can be very significant. The existence and cause of water intrusion  
is often very difficult to detect. You should not assume that,  
because neither you nor your sales agent can visually observe any  
effects of water intrusion, it does not exist. Only an expert with  
proper training is qualified to undertake a proper investigation to  
determine the existence of water intrusion, its cause and the  
appropriate method for remediation. You should retain the  
services of such an expert to examine the property during the

1 inspection period that is set forth in the purchase contract. If you  
2 do not do so, you are acting against the advice of Broker.” (Ex. 54,  
3 see also 43.)

4 Escrow between the Tomjanovichs and plaintiff closed on July 5, 2007.

5 **F. Plaintiff’s Failure to Maintain, Destructive Testing, and Construction at the Property**

6 The property that the Tomjanovichs transferred to plaintiff on July 5, 2007, was in  
7 a vastly different condition than the property is now. One of plaintiff’s own experts testified that  
8 the mold that plaintiff complains of at the property developed during Bardack’s ownership. On  
9 April 25, 2008, plaintiff’s designated mold experts inspected the entire interior and exterior of the  
10 property. (Depo. of Peter Sierck, 36:6-13.) There was no evidence of water intrusion, water  
11 damage or mold growth in the east guest bedroom (maid’s room), living room, bar area, gym,  
12 laundry room, family room, master bedroom, dining room, kitchen, massage room, office, or  
13 garage area. When plaintiff’s mold experts returned to the property in August and September of  
14 2009, however, they found fungal growth and elevated moisture inside the walls of the maid’s  
15 room, gym and garage areas all due to plaintiff’s overwatering of the large exterior planter box  
16 adjacent to that wing of the property. (Id. at 44:3-11; 67:23-69:10-13; 71:18-24.)

17 Plaintiff’s civil / geotechnical engineer, who has over 40 years of engineering  
18 experience, Greg Axten inspected the property “inside and out on all four levels” in May 2007,  
19 and reported that the “main structure at the property was found to be in excellent condition inside  
20 and out.” (Ex. 201, pp. 4, 5.) He also noted in his May 2007 cracks in the exterior retaining walls  
21 and stucco, and predicted that the cracking would continue to progress over time, and would need  
22 periodic cosmetic treatment. (Id. at p. 5.) Sure enough when Mr. Axten went back to the property  
23 in 2008, 2009, and 2010, after plaintiff bought it, Mr. Axten observed that the condition of the  
24 property, particularly the exterior, was “noticeably worse” than his first viewed it while the  
25 Tomjanovichs owned the property. (Axten Depo., 108:11-23.) Plaintiff’s contractors have also  
26 performed destructive testing, construction, and remodeling work at the property.

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III.

DISCUSSION AND AUTHORITIES

A. Each of Plaintiff's Causes of Action Against the Tomjanovichs Lacks Merit

1. *The Tomjanovichs Disclosed The Material Facts Of Which They Had Actual Knowledge; Nothing Else Was Required of Them Under California Law*

Plaintiff bases his causes of action for (1) breach of contract; (2) negligence per se; (3) intentional misrepresentation; (4) negligent misrepresentation; (5) concealment; and (6) negligence causes of action on the assertion that they failed to disclose "all known material facts and defects" to him.

The weight of the evidence demonstrates that the Tomjanovichs did disclose to plaintiff the "material facts" they knew, including that there had been water intrusion at the property and what they did to remedy it. As lay persons selling a home, **nothing** else was required of the Tomjanovichs under California law. The Tomjanovichs complied with their duty to disclose water intrusion in the entry foyer area. The notion that a lay homeowner needs to give disclosures regarding the technical cause(s) of various conditions when selling a home is not the law. All that is required is disclosure of **facts** that materially affect the value or desirability of the property that are actually known, or accessible only to the seller if the seller knows that such facts are not known to, and cannot be discovered by the diligent attention and observation of the buyer. The key factor that creates the seller's disclosure duty is the actual knowledge of the defect. There is no "should have known" standard. The two essential elements of a breach of the disclosure duty are: (1) the fact is known to or accessible only to the seller; and (2) the seller knows that the buyer is unaware of the fact and cannot reasonably discover the undisclosed fact. This second element requires that the seller have actual personal knowledge of the fact that the buyer does not have knowledge of the fact. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 347.) The duty to disclose requires some element of **scienter**—knowledge of the other party's ignorance. (*Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544-1545.) When the evidence fails to prove that the seller had knowledge of the condition,

1 the seller has not breached a duty of disclosure to the buyer. (*Goodman, supra*, 18 Cal.3d at 347-  
2 348.)

3 In *Pagano v. Krohn*, (1997) 60 Cal. App. 4th 1, a seller of a condominium disclosed  
4 that some of the units in the project experienced water intrusion problems. The buyer was made  
5 aware that the condominium association was dealing with a “water intrusion problem” in litigation.  
6 (*Id.* at p. 8.) The buyer brought suit for damages and rescission for the seller’s alleged failure to  
7 disclose details about the water intrusion. Specifically, the buyer alleged the seller received thirty  
8 one documents about the water intrusion chronicling the water leaks, she was aware of severe  
9 problems with other units, and she read the complaint against the developer. (*Id.* at p. 9.) In  
10 upholding summary judgment for the seller’s agent, the court held:

11 [T]he essential facts about the water intrusion problem were  
12 disclosed to Pagano before he made his second offer to buy the  
13 subject property. Chodorow was not duty bound to elaborate on  
14 those facts by providing further details regarding the various  
15 manifestations of water intrusion throughout the development or the  
16 precise allegations in the Association’s complaint against the  
17 developer.

18 The court then cited Civil Code section 2079.5 which states “Nothing in this article  
19 relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or  
20 herself, including those facts which are known to or within the diligent attention and observation of  
21 the buyer or prospective buyer.” The court held the same principle applied to claims against the  
22 seller noting the analysis “applies equally” to the seller stating “Pagano was apprised of the general  
23 water intrusion problem at Blackhouse....” (*Id.* at pp. 10-11.) The court also noted that the contents  
24 of a lawsuit regarding the home was public record that the buyer should have obtained on their own.  
25 (*Id.* at p. 12.)

26 Similarly here, the Tomjanovichs put plaintiff on notice regarding the water intrusion  
27 issues with the foyer area and the subsequent fix that they thought addressed the problem. The  
28 Tomjanovichs had the base of the balcony railings caulked and sealed, (which was the repair  
method recommended by three contractors: L.A.M.B. Enterprises, Fred Abdoh of Mohammed  
Development/RNAC, and Victor Corona of Corona Construction). The Tomjanovichs experienced  
no other water leak after the work was done in April 2006; thus, they reasonably believed the



1 water intrusion had been remedied. The Tomjanovichs did not experience any **other water leaks**  
2 **in the home from April 2006 through July 2007, when they sold the property to Bardack.**  
3 The Tomjanovichs had no way of predicting or knowing that any leaks would occur in 2008, since  
4 they experienced no water leaks during the rainy season of November 2006 - April 2007 prior to  
5 their sale to Bardack.

6 It was then plaintiff's duty, as expressly stated over and over again in the purchase  
7 and escrow agreement documents, to hire experts with the proper training and expertise to  
8 investigate the "cause and appropriate method for remediation" to address any water intrusion issue.  
9 (See Ex. 43 and 54.) The "Buyer's Inspection Advisory" signed by Bardack states:

10 "Seller does not have an obligation to inspect the property for your  
11 benefit nor is Seller obligated to repair, correct or otherwise cure  
12 known defects that are disclosed to you or previously unknown  
13 defects that are discovered by you or your inspectors during escrow.  
14 The purchase agreement obligates the Seller to make the Property  
15 available to you for investigation." (Ex. 211.)

16 Plaintiff complains that the Tomjanovichs did not properly repair or remediate the  
17 water intrusion they experienced and disclosed. The Tomjanovichs had no legal obligation to  
18 "repair, correct or otherwise cure" known or unknown defects.

19 A buyer is obligated to inspect the property to be purchased, and is charged with  
20 knowledge of the facts a reasonable inspection would disclose, and of course, knowledge of facts  
21 actually disclosed regardless of whether the disclosure came from the sellers, the buyer's experts,  
22 or elsewhere. Plaintiff's own deposition testimony demonstrates he was aware of water intrusion  
23 issues.

24 Q: Did you understand Number 6 in the sellers disclosure  
25 statement you're looking at to indicate to you that there was a water  
26 intrusion issue at the homes somewhere inside or outside or on the  
27 property?

28 A: Yes. (Plaintiff's Depo., 169:8-14).

In the Real Estate Purchase Agreement, the Buyer and Seller Advisory states in  
pertinent part:

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**BUYER RIGHTS AND DUTIES:** You have an affirmative duty to exercise reasonable care to protect yourself, **including discovery of the legal, practical and technical implications of disclosed facts**, and the investigation and verification of information and facts that you know or that are within your diligent attention and observation. ...[¶] **“YOU [BUYER] ARE STRONGLY ADVISED TO INVESTIGATE THE CONDITION AND SUITABILITY OF ALL ASPECTS OF THE PROPERTY. IF YOU DO NOT DO SO, YOU ARE ACTING AGAINST THE ADVICE OF BROKERS.”** In the same document, under item 7 *labeled WATER INTRUSION* is says in pertinent part: “Buyer and seller are advised that many homes suffer from water intrusion or leakage. The causes of water intrusion are varied and can include defective construction, faulty grading, deterioration of building materials **and the absence of waterproof barriers . . . broker recommends that buyer have the property inspected for water intrusion by an appropriate professional.**” (Ex. 43, 212.)

Paragraph 3 of the Amended Escrow Instructions states:

Buyer further acknowledges that **any repairs or corrections which Buyer deems necessary or desired, now or in the future, shall be the responsibility of the Buyer and Buyer releases the Seller, Brokers, Agents and Professional Escrow Services, Inc. from any responsibility, liability or costs in connection therewith.**

These contract documents, and applicable law demonstrate that Bardack had a duty to take the water intrusion facts disclosed by the Tomjanovichs and “exercise reasonable care to protect [himself], **including discovery of the legal, practical and technical implications of the disclosed facts.**” **He failed to give the disclosures to his inspectors and failed to hire a water intrusion expert as recommended; he did so at his own risk.** There is no basis to conclude that the inspectors such as Pro-Tech, or contractors such as California Stoneworks, hired by the Tomjanovichs in 2004, had any advantage over Bardack’s inspectors, contractors and engineers inspecting the property in 2007. In fact, the California Stoneworks contractor on which plaintiff focuses, had no experience with balconies such as the ones at the property.

Notably, plaintiff sued the general inspection company he hired to inspect the property for him, **Gordon Property Inspections**, then inexplicably dismissed the company.

1           **2.     *Plaintiff's "Negligence Per Se" Cause of Action Is Legally Improper and Should***  
2           ***be Stricken From Plaintiff's Second Amended Complaint***

3           The doctrine of negligence per se is **not** a separate cause of action. Rather, it is an  
4           evidentiary presumption codified by Evidence Code section 669, that may be asserted in  
5           conjunction with a plaintiff's general negligence cause of action. The doctrine of negligence per  
6           se is not a separate cause of action, but creates an evidentiary presumption that affects the standard  
7           of care in a cause of action for negligence. *Millard v. Biosources, Inc.* (2007) 156 Cal. App. 4th  
8           1338.

9           Under subdivision (a), the doctrine creates a presumption of negligence if four  
10          elements are established: (1) the defendant violated a statute, ordinance, or regulation of a public  
11          entity; (2) the violation proximately caused death or injury to person or property; (3) the death or  
12          injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was  
13          designed to prevent; and (4) the person suffering the death or the injury to his person or property  
14          was one of the class of persons for whose protection the statute, ordinance, or regulation was  
15          adopted. (*Quiroz v. Seventh Ave. Ctr.* (2006) 140 Cal. App. 4th 1256, 1285.) These latter two  
16          elements are determined by the court as a matter of law. (*Galvez v. Frields* (2001) 88 Cal.App.4th  
17          1410, 1420.) If the presumption of negligence is established, it may be rebutted under subdivision  
18          (b) by proof that "(1) [t]he person violating the statute, ordinance or regulation did what might  
19          reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who  
20          desired to comply with the law...." (*Id.*)

21          The Tomjanovichs did not violate any statutory duty prescribed by Civil Code  
22          section 1102.6, or any other statute. It provided plaintiff with the Transfer Disclosure Statement  
23          required by law. (Ex. 42.) The complaints that plaintiff asserts pertain to a Seller's Property  
24          Questionnaire form and related documents, that are not required by statute. (See Ex. 39, 40, Civil  
25          Code sections 1102 et seq.) Even assuming there was any violation of the statute by an erroneous  
26          or misunderstood answer to a question in the disclosure documents, they answered the questions  
27          reasonably in the same way a "person of ordinary prudence, acting under similar circumstances,  
28          who desired to comply with the law" would have. One of the items that plaintiff claims the

1 Tomjanovichs concealed from him is the existence of reports they obtained when they purchased  
2 the property in 2004. A reasonably prudent person selling a property in 2007 would not think of  
3 reports obtained 3 years or so earlier when making disclosures. Indeed, real estate agent William  
4 Stimming testified that based on his over 30 years in real estate, sellers do not typically disclose to  
5 purchasers the old inspection reports they obtained when they purchased the property, since what  
6 the buyer is interested in and will rely on is information regarding the **current** condition of the  
7 property at the time of their purchase.

8  
9 **3. Plaintiff Cannot Prove the Essential Elements of Intentional Misrepresentation**

10 To establish a claim for deceit based on intentional misrepresentation, the plaintiff  
11 must prove seven essential elements: (1) the defendant represented to the plaintiff that an  
12 important fact was true; (2) that representation was false; (3) the defendant knew that the  
13 representation was false when the defendant made it, or the defendant made the representation  
14 recklessly and without regard for its truth; (4) the defendant intended that the plaintiff rely on the  
15 representation; (5) the plaintiff reasonably relied on the representation; (6) the plaintiff was  
16 harmed; and (7) the plaintiff's reliance on the defendant's representation was a substantial factor in  
17 causing that harm to the plaintiff. (*Manderville v. PCG & S Group, Inc.*, (2007) 146 Cal. App. 4th  
18 1486). For purposes of establishing a claim for deceit based on intentional misrepresentation,  
19 reliance exists when the misrepresentation or nondisclosure was an immediate cause of the  
20 plaintiff's conduct which altered his or her legal relations, and when without such  
21 misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered  
22 into the contract or other transaction. (*Id.*)

23 In the context of a claim for deceit based on intentional misrepresentation, if the  
24 conduct of the plaintiff in light of his or her own intelligence and information was manifestly  
25 unreasonable, the plaintiff will be denied a recovery. (*Id.*)

1           4.       ***Nor Does The Evidence Support Plaintiff's Negligent Misrepresentation Claim***

2           The elements of negligent misrepresentation are: (1) the misrepresentation of a past  
3 or existing material fact, (2) **without reasonable ground for believing it to be true**, (3) with  
4 intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the  
5 misrepresentation, and (5) resulting damage. (*Apollo Capital Fund, LLC v. Roth Capital Partners,*  
6 *LLC* (2007) 158 Cal. App. 4th 226.) A positive assertion is required to support a negligent  
7 misrepresentation claim; an omission or an implied assertion or representation is **not sufficient**.  
8 (*Id.*)

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10           5.       ***Similar To Plaintiff's Misrepresentation Claims, His Concealment Claim is***  
11               ***Unsupported by the Evidence***

12           The elements of a cause of action for fraud based on concealment are: (1) the  
13 defendant must have concealed or suppressed a material fact, (2) the defendant must have been  
14 under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally  
15 concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have  
16 been unaware of the fact and would not have acted as he did if he had known of the concealed or  
17 suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must  
18 have sustained damage. (*Bank of Am. Corp. v. Superior Court* (2011) 198 Cal. App. 4th 862.)

19  
20           6.       ***Plaintiff's Claim For Rescission and Restitution Lacks Merit***

21           Civil Code section 1102.13 states that "no transfer [of real property] shall be  
22 invalidated solely because of the failure of any person to comply with" the disclosure requirements  
23 of Civil Code section 1102 et seq. Rather, the statute says that a person who willfully or  
24 negligently violates or fails to perform their disclosure duties shall be liable in the amount of  
25 "actual damages suffered" by the buyer. (Civil Code section 1102.13.)

26           Even setting section 1102.13 aside, rescission is an equitable remedy that would  
27 require the Court to determine that: (1) Bardack's consent to the purchase agreement was "given  
28 by mistake" or "obtained through fraud" (Civil Code section 1689(b)(1)); (2) Bardack's alleged

1 mistake or the Tomjanovichs' alleged misrepresentations were "material" and went to the "essence  
2 of the contract," meaning Bardack actually and reasonably relied on the mistake or  
3 misrepresentation and would not have purchased the property had such mistake or  
4 misrepresentation not existed (Civil Code section 1577, 1578); (3) that Bardack gave prompt  
5 notice of rescission and offered to restore all consideration and value received to the  
6 Tomjanovichs (Civil Code section 1691); and (4) that the parties can be returned to the status quo  
7 (to the same position they were in 5 years ago when the transaction occurred). (Civil Code section  
8 1689(b)(1); *MF Kemper Const. Co. v. City of Los Angeles* (1951) 37 Cal.2d 696, 701.)

9           With respect to the first two elements, there was no material mistake of fact as  
10 defined by Civil Code section 1577, upon which plaintiff actually and reasonably relied in  
11 consenting to the purchase agreement. He contracted to purchase a 6600 square foot, four story  
12 modern-style mansion on San Onofre in Pacific Palisades, and that is what he purchased. A  
13 contracting party seeking rescission based on unilateral mistake must show that he received  
14 something "substantially different" from what the party was induced to expect." (*Vickerson v.*  
15 *Frey* (1950) 100 Cal.App.2d 621, 628.) There is no such "material" "mistake" or  
16 misrepresentation here.

17           With respect to the third element, plaintiff's notice of rescission was not prompt or  
18 timely, and therefore rescission is barred by statute, and the doctrine of laches. (Civil Code  
19 section 1691.) Plaintiff fist filed this action against the Tomjanovichs and others on December 22,  
20 2008, about **a year and a half after he purchased the property, and about a year after he said**  
21 **he first experienced water intrusion in the home.**

22           Finally, with respect to the fourth essential element, the parties, and particularly the  
23 Tomjanovichs cannot be returned to the status quo of five (5) years ago. "One insuperable  
24 obstacle to rescission is that [the defendants] cannot be restored to status quo." (*Larsen v.*  
25 *Johannes* (1970) 7 Cal.App.3d 491, 503.) The Tomjanovichs cannot be restored to the status quo,  
26 because plaintiff has made material modifications and alterations to the property without their  
27 involvement, and failed to properly maintain the property including allowing mold to develop in  
28 areas of the house where his own experts say it did not exist in 2007. Also, the real estate market

1 is vastly different from what it was at the time of the sale in 2007. Where, as here, the court  
2 cannot do equity or adequately “adjust the equities” to restore the parties even to an approximate  
3 status quo, rescission is unavailable. (*Id.*, *Joshua Tree Townsite Co. v. Joshua Tree Land Co.*  
4 (1950) 100 Cal.App.2d 590, 596.)

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6 **B. Plaintiff’s Alleged Damages<sup>1</sup>**

7 Plaintiff’s experts headed by Architect Penny Kronberg of Gafcon, Inc. prepared a  
8 \$3,030,340 “Detailed Cost Estimate” to repair 14 “defect” categories, which includes everything  
9 from replacing windows (which never leaked while the Tomjanovichs owned the property) to  
10 removing and replacing the exterior stucco, and repairing all of the property’s retaining walls (a  
11 condition Bardack knew about before escrow closed). (Exs. 272.) This is the same cost of repair,  
12 plaintiff alleges that the Construction Defendants are liable for. While plaintiff’s experts have  
13 testified at length in their depositions regarding why they believe these defects fall below the  
14 standard of care for contractors and design professionals, none have testified whether or how this  
15 global cost of repair was caused by any failure to disclose claims against the Tomjanovichs. Yet,  
16 Bardack seeks to hold the Tomjanovichs liable for that cost to repair the alleged construction  
17 defects. These alleged defects are the result of Bardack’s experts’ post mortum destructive testing  
18 and construction at the property long after the sale. Thus, the Tomjanovichs cannot be legally  
19 liable for the cost to repair the alleged “defects” revealed long after they sold the property to  
20 Bardack of which they had no actual knowledge.

21 The information and documentation that Bardack claims that the Tomjanovichs  
22 failed to disclose pertain to leaking decks in the vicinity of the foyer skylight. His contractor has  
23 repaired those leaking decks and the alleged resultant damage for \$95,255, exclusive of general  
24 conditions and contractor burden. (Ex. 299.) Bardack has already settled with the defendant  
25

26  
27 <sup>1</sup> Plaintiff has thus far failed to elect between the inconsistent remedies alleged in his complaint. Plaintiff cannot  
28 recover a judgment based on rescission, breach of contract damages, and tort damages. He must choose one before  
the case is submitted to the jury for deliberation.

1 company that waterproofed the decks for \$100,000; hence he has been compensated for that  
2 alleged damage.

3  
4 **C. Plaintiff Cannot Recover “Stearman” Costs and Expenses From the Tomjanovichs**

5 In *Stearman*, the court held that prevailing tort plaintiffs “in a construction defect”  
6 case who incurred fees for hiring experts are entitled to be made whole, which included expert  
7 fees incurred for investigative services that were not litigation costs. (*El Escorial Owners' Ass'n v.*  
8 *DLC Plastering, Inc.*, (2007) 154 Cal. App. 4th 1337, 1361, citing *Stearman v. Centex Homes*  
9 (2000) 78 Cal.App.4th 617, 625.) The Tomjanovichs are not construction defect defendants, and  
10 the claims against them are not construction defect claims. There is no case entitling plaintiff to  
11 recover “Stearman” costs from the Tomjanovichs.

12  
13 **D. Although the Tomjanovichs Dispute That Plaintiff Should Be Entitled To Any**  
14 **Recovery, If They Are Found Liable, Coldwell Banker Which Had a Fiduciary Duty**  
15 **to the Tomjanovichs and a Higher Duty of Disclosure, Should Pay the Liability**

16 A seller’s duty of disclosure is not comparable with a real estate broker’s duty to  
17 investigate and disclose in the same transaction, because the **broker is a professional with**  
18 **greater knowledge, education, and experience.** The seller’s agent has a statutory duty to both  
19 the seller and the buyer to exercise reasonable skill and care in the performance of agency duties, a  
20 duty of honest and fair dealing and good faith, and a duty to disclose all facts known to the agent,  
21 or determinable by a reasonable visual inspection of the property to be sold, which materially  
22 affect the value or desirability of the property that are not known to, or within the diligent attention  
23 of, the parties. The standard of care that is imposed on the broker is not the standard applicable to  
24 laymen generally, **and is higher than is imposed on the seller.** The broker is subject to the high  
25 duty of skill, care, and diligence commensurate with the professional standards that the real estate  
26 industry has held out to the public and that the public reasonably can expect. (*Richards Realty Co.*  
27 *v. Real Estate Com’r* (1956) 144 Cal.App.2d 357, 362; *Gardner v. Murphy* (1975) 54 Cal.App.3d  
28 164, 168.)



1 Coldwell Banker was on both sides of the sale to Bardack. Coldwell and its agents  
2 made over hundreds of thousands of dollars from the sale. Given their fiduciary duties owed to  
3 their clients, their statutory and contractual obligations, and the amount of money they made on  
4 the deal, their position that all they were required to do was shuttle paperwork from party to party  
5 lacks merit.

6 IV.

7 CONCLUSION

8 The substantial weight of the evidence demonstrates that there were no material  
9 facts pertaining to the condition of the property known to the Tomjanovichs in May 2007 that they  
10 intentionally or negligently misrepresented or concealed from plaintiff. They disclosed the  
11 material facts they knew regarding the condition of the property in May 2007. There is no case,  
12 contract, or statute that required them to disclose anything beyond that which they did. Nor can  
13 plaintiff prove that he actually or reasonably relied on the Tomjanovichs' representations such that  
14 he would not have purchased the property he pursued for five (5) years had he known about a few  
15 reports regarding the condition of one portion of the property, dated years before his purchase.

16  
17 Date: August 15, 2012

Respectfully submitted,

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20 By: 

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23 TOMJANOVICH  
24