Case No. 77668

IN THE SUPREME COURT OF NEVADA

JANETTE BYRNE, as TRUSTEE OF THE UOFM TRUST,

Appellant,

vs.

SUNRIDGE BUILDERS, INC.; a Nevada Corporation; LANDS WEST BUILDERS, INC., a Nevada Corporation; BRYANT MASONRY, LLC, a Nevada Limited Liability Company; DMK CONCRETE, INC., a Nevada Corporation; CIRCLE S DEVELOPMENT DBA DECK SYSTEMS OF NEVADA, a Nevada Corporation; GREEN PLANET LANDSCAPING, LLC, a Nevada Limited Liability Company; LIFEGUARD POOL MAINT. dba LIFEGUARD POOLS, a Nevada Corporation; PRESTIGE ROOFING, INC., a Nevada Corporation; PYRAMID PLUMBING, a Nevada Corporation; RIVERA FRAMING INC. DBA RIVERA FRAMERS, a Nevada Corporation; S&L ROOFING, INC., a Colorado Corporation,

Respondents.

NEVADA JUSTICE ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Eighth Judicial District Court
The Honorable Richard Scotti, District Judge
District Court Case A-16-742143-D

J. RANDALL JONES (#1927)
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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Nevada Rule of Appellate Procedure ("NRAP") 29(a), the Nevada Justice Association ("NJA") respectfully moves this Honorable Court to grant leave to file the accompanying Brief of *Amicus Curiae* in support of Appellant's Petition for Rehearing. This motion is timely, as Appellants' Petition was filed on December 30, 2020. *See* NRAP 29(f). Pursuant to NRAP 26(c), a copy of the proposed *amicus curiae* brief is attached hereto as **Exhibit A**.

I. Interest of *Amicus Curiae.*

The NJA, formerly known as the Nevada Trial Lawyers Association, is a non-profit organization of independent lawyers who represent consumers and share the common goal of improving the civil justice system. The NJA strives to ensure that Nevadans' access to the courts is not diminished. The Chapter 40 process and NRS 11.202 impact all Nevada homeowners.

II. The Accompanying *Amicus Curiae* Brief Will Assist the Court.

The NJA believes that the Supreme Court's decision in this case presents an extreme and unexpected departure from the understanding of AB 125's impact on the statute of repose and the mandatory Chapter 40 prelitigation process that threatens fair access to Nevada's courts. The accompanying *amicus curiae* brief addresses the primary issues in this case: the interpretation, impact, and reconciliation of AB 125, including 21(6), and the Chapter 40 process.

The *Byrne* case involves important facets of Nevada law regarding statutory interpretation, the rights of all Nevada homeowners, and fundamental fairness. The NJA is confident that its members' extensive experience in litigating and protecting property rights, including construction-defect matters, will assist this Court in considering Byrne's Petition. Moreover, the *amicus curiae* brief provides supplemental, rather than repeated, arguments that are necessary and desirable to a full and fair evaluation of the important matters presented by the Petition.

For the forgoing reasons, the NJA urges this Court to grant its motion for leave to file an *amicus curiae* brief in support of Appellant's Petition.

DATED: January 6th, 2021

KEMP JONES, LLP

/s/ Randall Jones

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CERTIFICATE OF COMPLIANCE

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2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 28.1(e)(2)(B)(i) and NRAP 32(a)(7)(A)(ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 323 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of

the Nevada Rules of Appellate Procedure.

DATED: January 6th, 2021

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CERTIFICATE OF SERVICE

I certify that on the 6th day of January, 2021, I caused to be served via the District Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing BRIEF OF AMICUS CURIAE OF NEVADA JUSTICE ASSOCIATION IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system as follows:

Resnick & Lewis / Melissa L. Alessi
Gordon & Rees Scully Mansukhani LLP / Robert E. Schumacher
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/s/ Ali Augustine
An employee of Kemp Jones, LLP

Exhibit A

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NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. The law firm of Kemp Jones, LLP represents the *Amicus Curiae*.

DATED: January 6th, 2021

KEMP JONES, LLP

/s/ Randall Jones

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I. Introduction

Amicus curiae, the Nevada Justice Association ("NJA"), joins in seeking rehearing of the Court's opinion because the analysis and outcome contradict Nevada law and substantially deviate from the legislative purpose, spirit, and intent of the Chapter 40 prelitigation scheme—protecting Nevada homeowners. The *Byrne* decision, including its interpretation of §21(6), violates Nevada's rules of statutory interpretation, ignores the Legislature's express intent that then-existing statutes of repose should be applied during the grace period, and leads to numerous nonsensical results.

Without correction, substandard builders will be rewarded with the dismissal of pending homeowner lawsuits without ever considering the merits simply because these homeowners complied with Nevada's *mandatory* prelitigation process before suing for defective construction. This outcome would destroy the Legislature's true intent. Moreover, due to Nevada's long history of modifying the statutes of repose, the opinion will have longstanding negative implications for homeowners and the mandatory Chapter 40 prelitigation process.

II. Interest of the *Amicus Curiae*

The NJA, formerly known as the Nevada Trial Lawyers Association, is a non-profit organization of independent lawyers who represent consumers and share the common goal of improving the civil justice system. The NJA strives to ensure that

Nevadans' access to the courts is not diminished. The Chapter 40 process and NRS 11.202 impact all Nevada homeowners.

III. Relevant Legislative Background

A. Nevada's History of Modifying the Statute of Repose.

In 1965, Nevada adopted a statute of repose for construction projects. Since then, Nevada has a long history of lengthening and retroactively shortening the statute of repose. This Court has an almost equally long history of considering the constitutionality of the Legislature's retroactive shortening of the statute of repose. *See G and H Assoc. v. Ernest V. Hahn, Inc.*, 113 Nev. 265, 268–70, 934 P.2d 229, 231–32 (1997) (reciting history).

In 2015, Nevada adopted Assembly Bill 125 ("AB 125") that modified the Chapter 40 prelitigation process and NRS 116 and replaced NRS 11.203–.205 with a single, retroactive six-year statute of repose. AB 125 provides one year for claimants to sue for claims that accrued before its passage under the then-existing "statutes of repose" (*i.e.*, NRS 11.203–.205). AB 125, 2015 Nev. Stat., ch. 2, Legislative Counsel's Digest at 3.[1]

[1] The 2019 Legislature retroactively extended the statute of repose to 10 years.

B. Nevada's Mandatory Chapter 40 Prelitigation Process.

In 1995, Nevada adopted a comprehensive mandatory prelitigation process for residential construction-defect claims "to protect the rights of homeowners"[2] that was simple enough that an "*average homeowner* who is not able to hire a lawyer, *can 'walk themselves through the system and not be harmed by it*[.]'" Hearing on SB 395 Before the Senate Judiciary Comm., 68th Leg. 15 (Nev., May 10, 1995) (emphasis added). This process requires homeowners to complete numerous steps before commencing a lawsuit. *See, e.g.*, NRS 40.645(1)(a) (requiring notice), 40.647(1) (requiring inspection), 40.680 (requiring mediation).

Chapter 40 must be interpreted "in light of the policy and spirit of the law" to avoid results contradicting this intent. *Westpark*, 123 Nev. at 357, 167 P.3d at 427; *see Oxbow Constr. v. Dist. Ct.*, 130 Nev. 867, 874–75, 335 P.3d 1234, 1240 (2014).[3]

IV. Argument

The *Byrne* decision violates Nevada's rules of statutory construction in finding §21(6) unambiguous, ignores the Legislature's directive that the then-existing statutes of repose (*i.e.*, NRS 11.203–.205) apply during the grace period,

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[2] *Gonski v. Dist. Ct.*, 126 Nev. 551, 562, 245 P.3d 1164, 1171–72 (2010); *Westpark Owners' Ass'n v. Dist. Ct.*, 123 Nev. 349, 359, 167 P.3d 421, 428 (2007) (citing SB 395 at 23 (statement of Valerie Cooney)).

[3] The *Oxbow* Court declined to interpret a statute in a manner that involved "policy questions better left to the Legislature." 130 Nev. at 875, 335 P.3d at 1240.

applies irreconcilable interpretations to similar statutory language with the same functions and purposes (*i.e.*, §21(6) and NRS 11.202), and creates the absurd result of robbing certain claimants of NRS 40.695's protections and forcing them to skip the mandatory *prelitigation* process. The decision also fails to interpret §21(6) consistently with this Court's directive to interpret Chapter 40's statutory scheme so it protects Nevada homeowners. Instead, the decision interprets the constitutionally required grace period so it creates an unpredictable and unavoidable trap for homeowners.

A. The Finding that §21(6) is Unambiguous Conflicts with Nevada Law.

In declaring §21(6) unambiguous, the *Byrne* Court (1) fails to follow the definition of an ambiguous statute; (2) uses an incorrect framework to discern and give effect to the Legislature's intent; and (3) creates absurd results that, among other things, renders the mandatory prelitigation process meaningless. The Court should revisit its interpretation of §21(6) to apply the proper rules of statutory construction and hold that a Chapter 40 notice served during the grace period tolled the time to "commence" an action.

1. Under Nevada Law, §21(6) is Ambiguous.

"The ultimate goal of statutory construction is to effect the Legislature's intent." *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). A statute is ambiguous when: (1) "it is capable of being understood in two or more senses by

reasonably informed persons," *Clark County Office of Coroner v. Las Vegas Review-Journal*, 136 Nev. 44, 48, 458 P.3d 1048, 1052 (2020); or (2) "it ***does not speak to the particular matter at issue***[.]" *Id.* (emphasis added); *see Byrne* petition for additional rules of statutory construction.

Section 21(6) is ambiguous because it is capable of more than one reasonable interpretation and because it "does not speak" to *Byrne*'s issues: how §21(6) impacts the repose period, the Chapter 40 process, or tolling under NRS 40.695. ***First***, reasonable minds *have differed* regarding §21(6)'s interpretation.[4] ***Second***, §21(6) is silent on whether it requires Chapter 40 claimants to violate the mandatory prelitigation process to avoid being time-barred or whether it is subject to tolling under NRS 40.695. Thus, Nevada law requires a finding that §21(6) is ambiguous.[5] ***Third***, the Court's opinion describes a statutory conflict: "Chapter 40 requires" prelitigation conduct and §21(6) seems to require that claimants skip those requirements. Opinion at 8–9. ***Finally***, Chapter 40's requirements "prevail[] over any conflicting law," including NRS 11.202 and §21(6). NRS 40.635(2).

[4] *See* **Exhibit 1** (including four trial court orders, three issued by construction-defect specialty courts).

[5] Even if §21(6) could be found to be unambiguous, which it cannot, the *Byrne* decision conflicts with Nevada law by stripping all meaning from the mandatory *prelitigation* requirements cited by the 2015 Legislature, Leg. Dig. at 1, forcing absurd results, and failing to give effect to the Legislature's express intent.

2. The Byrne *Court's Analysis is Internally Inconsistent.*

As Byrne argued in her petition, this Court's conclusion that §21(6) is unambiguous is belied by its reliance on NRS 40.647(2)(b) to purportedly reconcile §21(6) with the mandatory prelitigation scheme. Pet. at 10. NRS 40.647 has no connection to the tolling issue and does not speak to the issues in Byrne's appeal. *Id.* at 14–17. Thus, NRS 40.647 underscores that Chapter 40's prelitigation requirements and NRS 40.695 remain in full force for all claimants.

3. The Legislative Intent Requires NRS 40.695 to Apply During §21(6)'s One-Year Period.

Because §21(6) is ambiguous, the plain meaning rule of construction "is inapplicable" and the legislative intent "becomes the controlling factor[.]" *Harris Assoc. v. Clark County School Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). The *Byrne* Court erred by applying the plain meaning of "commence" to §21(6).[6] To give effect to the legislative intent, the Court must (i) interpret §21(6) consistent with reason and public policy, (ii) give meaning to all words in the context of §21(6)'s

[6] The *Byrne* Court elevates form over substance by determining that "commenced" meant a homeowner must file a lawsuit within the grace period to preserve his or her action, not merely serve a Chapter 40 notice. *Byrne*, 136 Nev. Adv. Op. 69, 475 P.3d at 42. Considering a similar issue, this Court recently noted "requiring the filing of a suit, which in this context must be preceded by a demand . . . adds nothing except an increase in attorney fees." *Jesseph v. Digital Ally, Inc.*, 136 Nev. Adv. Op. 59, 472 P.3d 674, 681 (2020) (Hardesty, J. and Pickering, J., concurring and dissenting). The same is true here.

purpose, (iii) harmonize §21(6) with existing statutes, and (iv) avoid absurd results. Respectfully, the *Byrne* decision fails to achieve these purposes.

First, Chapter 40 establishes a clear public policy barring claimants from "commencing" lawsuits until *after* the mandatory prelitigation process. Actions commenced in violation of this requirement may not proceed. NRS 40.647(2). In contradiction of this policy, the *Byrne* decision forces some claimants to file suit before complying with the mandatory prelitigation process. This point alone serves as sufficient grounds to reverse the *Byrne* decision.

Second, to avoid violating the constitutional due process rights of claimants with pre-existing construction defect claims, §21(6) purposely provides every claimant a full year to assert their claims. Yet the *Byrne* decision interprets §21(6) in a manner that disregards this purpose by concluding, without analysis, that §21(6) cannot be tolled under NRS 40.695.

Third, rather than harmonizing §21(6) with Chapter 40, the *Byrne* decision repurposes NRS 40.647 to hold the Legislature unambiguously intended for claimants to sue before completing the mandatory prelitigation process—rendering Chapter 40's entire prelitigation purpose nugatory (*i.e.*, to avoid unnecessary lawsuits by allowing builders the opportunity to make repairs before being sued).

Fourth, the absurd results created by the *Byrne* decision include robbing certain claimants of NRS 40.695's protections and forcing claimants to skip the mandatory prelitigation process.[7]

A holding that NRS 40.645 tolls §21(6) is the only reasonable interpretation because it addresses and corrects these significant issues, complies with the rules of statutory construction, and gives consistent effect to the legislative intent to protect homeowners and require them to complete the mandatory prelitigation process *before* commencing an action.

B. The *Byrne* Decision Ignores the Legislature's Directive that the Existing Statutes of Repose Apply During the Grace Period.

Because the ultimate goal of statutory interpretation is to achieve the legislative intent, what legislators said about a statute is important. *Harris*, 119 Nev. at 642, 81 P.3d at 534. When the 2015 Legislature enacted AB 125, it acknowledged the mandatory prelitigation process, *see* Leg. Dig. at 1, and directed that during §21(6)'s one-year period "a person may commence an action ***under the existing***

[7] Under *Byrne*, claimants whose claims accrued more than six years before AB 125's enactment would have been immediately deprived of NRS 40.695's protection and forced to skip the mandatory prelitigation process. Claimants whose claims accrued five years or less before AB 125's enactment would have enjoyed NRS 40.695's protections during the entire grace period. And claimants whose claims accrued from five to six years before AB 125's enactment would have had 1 to 364 days to serve Chapter 40 notices and be protected by NRS 40.695. AB 125 does not support this confusing, impractical, and unfair system.

statutes of repose[.]" Leg. Dig. at 3 (emphasis added). In other words, during the grace period, the new six-year repose period does not apply to pre-existing claims.

Contrary to this clear legislative directive, the *Byrne* Court held—without analysis—that the (i) retroactively shortened six-year repose period barred Byrne's claim just months after AB 125's enactment; and (ii) after that time, §21(6) required Byrne to commence her action without completing the mandatory prelitigation process. This result was never intended by the Legislature and results in different outcomes for similarly situated homeowners with pre-existing claims. Consistent outcomes and predictability only exist if the opinion is corrected to apply AB 125's plain directive that then-existing statutes (plural) of repose apply throughout the grace period. Because the 2015 Legislature stated its intent on this point, the Court erred by deviating from this intent, which deprived Byrne of NRS 40.695's protection and culminated with the erroneous conclusion that Byrne's claim was time-barred.

C. The *Byrne* Decision Erroneously Treats §21(6) Differently Than the Statute of Repose.

Besides the rules of statutory construction identified above, "[t]he meaning of a statute may be determined by referring to laws which are in *pari materia*. Statutes may be said to be in *pari materia* when they relate to the same person or things, to the same class of persons or things, or have the same purpose or object." *State Farm Mut. v. Comm'r of Ins.*, 114 Nev. 535, 541, 958 P.2d 733, 737 (1998) (internal

quotations omitted). Numerous courts have applied tolling statutes to a grace period required for a retroactively shortened limitation period. *See, e.g.*, *Gendron v. United States,* 154 F.3d 672, 675 (7th Cir.1998); *Hoggro v. Boone,* 150 F.3d 1223, 1226 (10th Cir.1998); *Lovasz v. Vaughn,* 134 F.3d 146, 148–49 (3d Cir.1998); *Fields v. Johnson,* 159 F.3d 914 (5th Cir.1998); *Diaz v. Mantello*, 47 F. Supp. 2d 485, 487 (S.D.N.Y. 1999).

This Court erred in distinguishing §21(6) from NRS 11.202 because these statutes, both in AB 125, use the same "commence" language, have the same function, and accomplish the same purposes. Both statutes (1) require Chapter 40 claimants to "commence" an action, (2) set an outside time limit on doing so, and (3) exist to prevent stale claims and provide certainty.[8] Under Nevada law, the Court must harmonize these in *pari materia* statutes because the Legislature gave no indication to the contrary. Harmonization is easily accomplished by applying then-existing statutes of repose during the grace period, which achieves the intended result that NRS 40.695 tolls the statute of repose for claimants who comply with Chapter 40's mandatory prelitigation requirements.

[8] *See G and H Assoc.*, 113 Nev. 265, 934 P.2d 229 (discussing functions and purposes of statutes of repose).

V. Conclusion

The Court's interpretation of AB 125 and §21(6) is inconsistent with Chapter 40's mandatory prelitigation requirements and its spirit and intent to protect Nevada homeowners. The Court should reconsider its decision and apply NRS 11.203–.205 and NRS 40.695 during the one-year grace period.

DATED: January 6th, 2021

KEMP JONES, LLP

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for an improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of

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/s/_____
An employee of Kemp Jones, LLP

Exhibit 1

2016 WL 6988486
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

Brittany LOPEZ, et al., Plaintiffs,

v.

U.S. HOME CORPORATION, et al., Defendants.

Case No.: 2:16–cv–01754–GMN–CWH
|
Signed 11/27/2016

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ORDER

Gloria M. Navarro, Chief Judge United States District Judge

***1** Pending before the Court is Motion to Remand, (ECF No. 10), filed by Plaintiffs.[1] Defendants U.S. Home Corporation ("U.S. Home") and Greystone Nevada, LLC ("Greystone") (collectively "Defendants") filed a Response, (ECF No. 14), and Plaintiffs filed a Reply, (ECF No. 18).

Also pending before the Court is Defendant's Motion to Dismiss, (ECF No. 5). Plaintiff filed a Response, (ECF No. 11), and Defendant filed a Reply, (ECF No. 13). For the following reasons, the Motion to Remand is DENIED, and the Motion to Dismiss is GRANTED in part and DENIED in part.

I. BACKGROUND

This case concerns a class action suit for claims arising out of alleged construction defects. Plaintiffs are a class of named and unnamed homeowners in the Sierra Ranch development in North Las Vegas. (Compl. ¶¶ 1–12, ECF No. 1–1). Defendants are the "developer, Nevada licensed general contractor, builder marketer and/or seller" of the 357 homes located in Sierra Ranch. (*Id.* ¶¶ 6–7).

On July 30, 2014, twelve Plaintiffs submitted to Defendants their first notice of common defects pursuant to NRS Chapter 40 on behalf of themselves and all "similarly situated" residences in the Sierra Ranch housing development. (*Id.* ¶ 17). Plaintiffs subsequently forwarded two supplemental notices, adding an additional ten homes. (*Id.*). On June 9, 2016, Defendants informed Plaintiffs of their election not to repair any of the alleged construction defects and their waiver of NRS Chapter 40 mediation. (*Id.* ¶ 18).

On June 22, 2016, Plaintiffs filed their Complaint in state court, alleging the following causes of action: (1) breach of implied warranties; (2) strict liability; (3) negligence and negligence per se; (4) and declaratory and other equitable relief. (*Id.* ¶¶ 20–36). Defendants removed this action, citing federal jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. §

1332. (Pet. in Removal ¶ 1, ECF No. 1). In the instant motions, Defendants' seek to dismiss certain claims alleged by Plaintiffs, and Plaintiffs seek to remand this case back to state court.

II. LEGAL STANDARD

A. Motion to Remand

Federal courts are of limited jurisdiction and possess only that jurisdiction which is authorized by either the Constitution or federal statute. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Pursuant to CAFA, a federal district court has jurisdiction over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which any member of a class of plaintiffs is a citizen of a State different from any defendant," so long as the class has more than 100 members. 28 U.S.C. § 1332(d)(2)(A), (d)(5)(B). Generally, courts "strictly construe the removal statute against removal jurisdiction." *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992). However, "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court." *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). "CAFA's provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant." *Id.* As noted above, to meet the diversity requirement under CAFA, a removing defendant must show "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A). "Thus, under CAFA, complete diversity is not required; 'minimal diversity' suffices." *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1021 (9th Cir. 2007).

B. Motion to Dismiss

***2** Dismissal is appropriate under Rule 12(b)(6) where a pleader fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A pleading must give fair notice of a legally cognizable claim and the grounds on which it rests, and although a court must take all factual allegations as true, legal conclusions couched as a factual allegations are insufficient. *Twombly*, 550 U.S. at 555. Accordingly, Rule 12(b)(6) requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.*

If the court grants a motion to dismiss for failure to state a claim, leave to amend should be granted unless it is clear that the deficiencies of the complaint cannot be cured by amendment. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d655, 658 (9th Cir. 1992). Pursuant to Rule 15(a), the court should "freely" give leave to amend "when justice so requires," and in the absence of a reason such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

III. DISCUSSION

A. Motion to Remand

Plaintiffs ask the Court to remand this case back to state court. Plaintiffs claim that Defendants have failed to meet their burden to demonstrate the adequate numerosity and amount in controversy requirements for federal jurisdiction under CAFA, and therefore, removal was improper. (*See* Mot. to Remand, ECF No. 10). For the following reasons, the Court finds that Defendants have met their burden of showing, by a preponderance of the evidence, that the jurisdictional requirements of CAFA are met in this case, and thus, remand is inappropriate.

1. ***Numerosity***

First, Plaintiffs argue that the class before the court does not contain the adequate number of plaintiffs to be removed under CAFA. (Reply 6:9−14, ECF No. 18). To establish numerosity, the proposed class need only logically meet the minimum number of plaintiffs. *Kuxhausen v. BMW Financial Servs. NA, LLC*, 707 F.3d 1136, 1140 (9th Cir. 2013). Class actions may include named and unnamed parties. *Mississippi ex rel. Hood v. AU OptronicsCorp.*, 134 S. Ct. 736, 742 (2014).

Plaintiffs purport to represent a class of "all persons and entities presently owning an interest in one or more [of the 357] residential living units constructed upon a designated Lot in the single Sierra Ranch development." (Compl. ¶ 3, ECF No. 1–1). Even accounting for the 40 homes represented in a separate case against Defendants, the class logically exceeds 100 plaintiffs. As such, the putative class exceeds the numerosity threshold of CAFA.

2. ***Amount in Controversy***

Turning to CAFA's amount in controversy requirement, a removing defendant must plausibly assert that the amount in controversy exceeds $5,000,000. *See Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015). This requires only a "short and plain statement" of the grounds for removal. 28 U.S.C. 1446; *Dart*, 135 S. Ct. at 553–54. But where "the plaintiff contests, or the court questions, the defendant's allegation" in its notice of removal, further evidence establishing that the amount in controversy meets the jurisdictional minimum is required. *Dart*, 135 S. Ct. at 554. Although no presumption against removal exists, the Court must determine, "by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied." *Id.* "The parties may submit evidence outside the complaint, including affidavits or declarations, or other summary-judgment-type evidence relevant to the amount in controversy at the time of removal." *Ibarra*, 775 F.3d at 1198. Where a defendant relies on a chain of reasoning and assumptions to establish the amount in controversy, both must be reasonable. *LaCross v. Knight Transp. Inc.*, 775 F.3d 1200, 1202 (9th Cir. 2015).

***3** In their Motion for Remand, Plaintiffs contend that Defendants failed to meet their burden to establish by a preponderance of the evidence that it is more likely than not that the amount in controversy exceeds the CAFA jurisdictional amount. (Mot. to Remand 7: 9–8:11). In particular, Plaintiffs argue that the Complaint does not facially request a sum over $5,000,000. (*Id.*). Plaintiffs assert that "Defendants misread Plaintiffs' prayer for damage or speculate, at best, the amount of damages sought by Plaintiffs." (*Id.* 8:2–4). In support of their calculation of the amount in controversy, Defendants submit a cost of repair report ("*Medina* Report") prepared by an expert in a separate construction defect case currently pending in state court, *Medina v. U.S. Home Corp.*, No. A–12–668394–D (Dist. Court Clark County filed Aug. 7, 2013). (Resp. 8:11–13, ECF No. 14). As in this case, the homes included in the *Medina* Report were built and sold by U.S. Home and are interspersed throughout the Sierra Ranch housing development. (*See* Ex. 1 to Odia Decl. ("*Medina* Compl."), ECF No. 14–7).

Plaintiffs in both cases allege substantially similar defects; in the *Medina* complaint, for example, the plaintiffs allege that the forty properties at issue have "defectively built roofs, leaking windows, dirt coming through windows, drywall cracking, stucco cracking, stucco staining, water and insect intrusion through foundation slabs, and other poor workmanship." (*Medina* Compl. ¶ 9). Likewise, Plaintiffs here allege that their homes have "improperly designed or constructed ... slabs, ... foundations, exterior masonry site retaining/fence walls, drainage and drainage systems[,] ... roof and roofing systems, windows and window systems, stucco and stucco weatherproofing systems." (Compl. ¶ 13).

In light of these substantial similarities, the Court finds that the *Medina* Report suffices as a reasonable approximation of Plaintiffs' damages.[2] Of the forty homes in the *Medina* Report, none had an estimated repair cost attributed to construction defects below $41,034.84. (*See Medina* Report, ECF No. 14–10). Multiplying this figure by the purported 317 class members, discussed *supra*, yields a total of $13,008,044.28, well above the jurisdictional amount. Federal jurisdiction under CAFA is therefore proper, and the Motion to Remand is denied.

B. Motion to Dismiss

In the instant Motion to Dismiss, Defendants seek to dismiss as time-barred certain Plaintiffs' claims arising from alleged construction defects and breach of statutory implied warranties. In addition, the Motion seeks to dismiss Plaintiffs' strict liability claim. The Court considers these three arguments in turn.

1. ***Claims Arising from Construction Defects***

Defendants argue that the six-year statute of limitations imposed by NRS § 11.202, as amended by Assembly Bill ("AB") 125, forecloses the construction defect claims of seventeen sets of named Plaintiffs[3] whose homes were built in 2006 and 2007.[4] (MTD 5:22–6:19, ECF No. 5). Pursuant to NRS § 11.202 as amended in 2015,

> 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than 6 years after the substantial completion of such an improvement, for the recovery of damages for:
>
> (a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement[.]

NRS § 11.202(1)(a). The Nevada legislature provided that this version of NRS § 11.202 "applies retroactively to actions in which the substantial completion of the improvement to the real property occurred before the effective date [February 24, 2015] of this act" and incorporated a one-year grace period to commence an action. 2015 Nev. Stat. Ch. 2 § 21(5), (6) ("AB 125"). Based on AB 125, Defendants assert that these Plaintiffs' claims expired when Plaintiffs failed to "commence an action" before expiration of the grace period on February 24, 2016. (MTD 6:10–19).

***4** Defendants' argument, however, fails to account for the tolling provision articulated in NRS § 40.695. The operative version of NRS § 40.695 states that "statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695 ... are tolled from the time notice of the claim is given, until 30 days after mediation is concluded or waived in writing."[5] NRS § 40.695 (2003). This tolling provision "[p]revail[s] over any conflicting law otherwise applicable to the claim or cause of action." NRS § 40.635. Accordingly, the tolling provision in NRS § 40.695 takes precedence over the statute of limitations articulated in NRS § 11.202. Indeed, NRS Chapter 11 reinforces this conclusion: "Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, *except where a different limitation is prescribed by statute*." NRS § 11.010 (emphasis added).

Plaintiffs' construction defect claims were therefore tolled from July 30, 2014, the date of the first NRS Chapter 40 Notice, to July 9, 2016, thirty days after Defendants waived mediation. *See* NRS § 40.695 (tolling "statutes of limitation ... applicable to a claim based on a constructional defect ... from the time notice of the claim is given, until 30 days after mediation is concluded or waived in writing"). Plaintiffs filed the instant Complaint in state court within the tolling period on June 22, 2016. (*See* Compl.). Consequently, Plaintiffs timely filed their construction defect claims, and Defendants' Motion to Dismiss is DENIED as to these claims.

2. ***Breach of Implied Warranties Pursuant to NRS § 116.4114***

Defendants argue that Plaintiffs' breach of implied warranties claim pursuant to NRS § 116.4114 is time barred for the seventeen sets of Plaintiffs discussed *supra*. (*See* MTD 10:10–11:7). Plaintiffs concede this point. (Resp. 19:15–20:3, ECF No. 11). Accordingly, the Court GRANTS Defendants' Motion and, to the extent Plaintiffs allege a claim for breach of implied warranties

pursuant to NRS § 116.4114, this claim is DISMISSED with prejudice with respect to these Plaintiffs. Plaintiffs' breach of common law implied warranties claim survives as asserted by all Plaintiffs.

3. *Strict Liability*

Next, Defendants argue that a strict liability claim based upon alleged defects in homes or components is not viable under Nevada law. The Complaint alleges strict liability against Defendants on the basis that the homes "have been defective ..., including but not limited to the installation of defective products." (Compl. ¶ 32). In their Response, Plaintiffs clarify that the Complaint asserts strict liability under "the legal theory for design and manufacturing defects of a product itself (i.e. plumbing systems, windows and sliding glass doors)." (Resp. 10:27–19:2).

However, the Supreme Court of Nevada has ruled that a building itself is not a "product" for the purposes of strict liability in Nevada. *See Calloway v. City of Reno*, 993 P.2d 1259, 1272 (Nev. 2000). The Supreme Court of Nevada explained:

> [O]ne is strictly liable for damages from a dangerously defective product only if one is a seller "engaged in the business of selling such a product." *See* Restatement (Second) of Torts § 402A (1965). Although a contractor may, as part of a construction or remodeling project, install certain products, a contractor, without doing more, is not engaged in the business of "manufacturing" or selling such products and therefore does not come within the ambit of section 402A.

Id.

Although *Calloway* has been overruled in light of Chapter 40 to the extent it held that a negligence claim is not viable in a construction defect case, *see Olson v. Richard*, 89 P.3d 31, 33 (Nev. 2004), *Calloway*'s holding that strict liability is not available for damage to property from a defective component has not been overruled. The Court therefore GRANTS Defendants' Motion with regard to this claim and DISMISSES Plaintiffs' strict liability claim with prejudice.

IV. CONCLUSION

***5 IT IS HEREBY ORDERED** that Plaintiff's Motion to Remand, (ECF No. 10), is **DENIED**.

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss, (ECF No. 5), is **GRANTED in part and DENIED in part**.

All Citations

Not Reported in Fed. Supp., 2016 WL 6988486

Footnotes

1 "Plaintiffs" are Brittany Lopez, Anthony Lopez, Paula Earl–McConico, Willie McConico, Martin Freeman, Veronica Freeman, Timmy Le, Nguyen Trinh, Gerda Pierrot, Shawn Ybarra, Shelby McEvoy, Kenneth Pfeifer, Pablo Echevarria, Patrease Ashley, Nicholas Spendrich, Maryann Undis, Shuren Zhang, Ping Yue, Robyn Cooper, Linda Yarbrough, Soon Lewis, Nicole Jenkins, Matthew Bachman, Timothy Thompson, Steve Feldman, Jennifer Durham, Jennier Houghland, Seth Mackert, Kristal Mackert, Lillie A. Banks, Nathan Reeder, Kylee Reeder, Derek Bao, Nicole Shinavar, Jerome A. Reyes, Paul E. Melendez, Scott Wortley, and Holly Wortley.

2 Plaintiffs argue that the *Medina* Report cannot aid in establishing the amount in controversy because it was prepared in the course of separate litigation and the Court has no way to evaluate the origin of the damages in the *Medina* Report or whether they are comparable. (Resp. 7:25−8:4). Because of the similar underlying defects, the fact that the Medina Report was prepared for separate litigation does not undermine its validity.

3 These seventeen sets of Plaintiffs are: Paul E. and Anna G. Melendez; Nicholas P. Speldrich and Maryann Undis; Nathan and Kylee E. Reeder; Derek H. Bao and Nicole W. Shinavar; Pablo Echevarria and Patrease L. Ashley; Jennifer Durham; Seth M. and Kristal

A. Mackert; Jennifer Houghland; Scott B. and Holly Wortley; Robyn Cooper; Linda Yarbrough; Shuren and Ping Yue Zhang; Timmy and Trinh Nguyen Le; Gerda Pierrot; Martin and Veronica P. Freemanl Steve Feldman; Shawn Ybarra. (MTD 8:1–16).

4 Prior to its amendment in 2015, NRS § 11.202 imposed six, eight, and ten-year statutes of limitations. *See* NRS § 11.202 (1983).

5 Although NRS § 40.695 was amended in 2013, both parties cite this statute as it read prior to amendment. (*See* Resp. 6:26–7:5, ECF No. 11); (Reply 8:26–9:2, ECF No. 13).

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2017 WL 3204958 (Nev.Dist.Ct.) (Trial Order)
District Court of Nevada.
Clark County

SKY LAS VEGAS CONDOMINIUMS, INC., a Nevada Corporation; M.J. Dean Construction, Inc., a Nevada corporation, Plaintiffs,
v.
SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant.
SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant,
v.
SKY LAS VEGAS CONDOMINIUMS, INC., a Nevada Corporation; M.J. Dean Construction, Inc., a Nevada corporation, Counter-Defendants.

No. 16A738730.
June 9, 2017.

Order Re: Sky Las Vegas Condominiums, Inc.'s and M.J. Dean Construction, Inc.'s Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose

Susan H. Johnson, Judge.

***1** This matter concerning SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose filed November 21, 2016 came on for hearing on the 7th day of February 2017 at the hour of 10:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiffs/Counter-Defendants SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. appeared by and through their attorneys, MEGAN K. DORSEY, ESQ. of the law firm, KOELLER NEBEKER CARLSON & HALUCK, and PETER C. BROWN, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and through its attorney, MICHAEL C. RUBINO, ESQ. of the law firm, FENTON GRANT MAYFIELD KANEDA & LITT. Having reviewed the papers and pleadings on file herein, heard oral arguments of the lawyers and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. This case arises as a result of eight (8) constructional defects allegedly located at the SKY LAS VEGAS mixed-use 45-story tower located at 2700 Las Vegas Boulevard South, Las Vegas, Nevada. The property in question comprises retail and commercial development as well as 409 condominium units within the high-rise as well as four (4) levels of parking below the plaza level pool deck.

2. Plaintiff/Counter-Defendant SKY LAS VEGAS CONDOMINIUMS, INC. was the project's developer and Plaintiff/Counter-Defendant M.J. DEAN CONSTRUCTION, INC. was the general contractor. Defendant/Counter-Claimant SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION is the homeowners' association responsible for maintaining the condominium component of the aforementioned project.

3. Certificates of Completion and Occupancy for the project were issued by the county on April 26, 2007 and November 26,

2007, respectively.[1] The final building inspection of the project occurred May 24, 2007. All parties agree the latest date of the three, i.e. November 26, 2007, when the Certificate of Occupancy was issued, is when the project was substantially completed.[2] *See* NRS 11.2055.

4. Notably, the eight (8) constructional defects for which SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION seeks damages[3] were discovered in about January and February 2015[4] when extrapolation testing took place by order of the Court in another related case, *Sky Las Vegas Condominium Unit Owners' Association v. Sky Las Vegas Condominiums, Inc., et al.*, Case No. A-13-680709-D filed in Department XVI of the Eighth Judicial District Court, in and for Clark County, Nevada.[5] While the district judge there allowed the extrapolation testing to take place, he cautioned no new defects could be included within that litigation. When the homeowners' association sought to include the newly-discovered eight (8) constructional defects within the litigation before Department XVI, the district judge reiterated, as these defects were new, such would not be added within that lawsuit.[6]

***2 5.** On January 12, 2016, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION served its Notice of Constructional Defects upon SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. pursuant to NRS 40.645, concerning the eight (7) deficiencies. As it was not properly authenticated by the homeowners' association's board as required by NRS 40.645(2)(d), the Notice was amended and served upon the developer/contractor with the proper authentication on February 23, 2016. The parties were unable to resolve their differences through the pre-litigation process which concluded June 16, 2016 when the mediation took place.

6. On June 20, 2016, four (4) days after the NRS 40.680 mediation took place, SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. filed their Complaint for Declaratory Relief, seeking declaration from this Court concerning the rights, responsibilities and obligations of the parties, and, as pertinent here, that SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION'S claims for damages resulting from the eight (8) constructional defects are time-barred. SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION filed its Answer and Counter-Claim on August 2, 2016, seeking damages for constructional defects.

7. On November 21, 2016, Plaintiffs filed their Motion for Summary Judgment, arguing the homeowners' association's constructional defect claims are time-barred by the virtue of the six-year statute of repose in that the project was substantially completed November 26, 2007, and the Notice of Constructional Defects was not served until February 23, 2016. SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION opposes arguing, *first*, the period for the statute of repose is not six (6) years as the exception to the retroactive application of the revised statute of repose found in Assembly Bill 125, enacted by the 2015 Nevada Legislature, operates to toll the new statute of repose period. *Second*, the statute of limitations did not accrue until the homeowners' association knew or should have known of facts giving rise to the damage, and such constitutes a factual issue for the jury to decide.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *See* NRCP 55(c); *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026 (2005). The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Id.*, 121 Nev. at 731. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party. *Id.*, 121 Nev. at 731.

2. While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party 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 in the moving party's favor. *Matsushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986), *cited by Wood*, 121 Nev. at 732. The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman Inc. v. Nevada Bell* 108 Nev. 105, 110, 825 P.2d 588, 591 (1992), *cited by Wood*. 121 Nev. at 732. The non-moving party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture."'

P.2d 591, *quoting Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

***3 3.** NRS 30.040(1) provides as follows:

> Any person interested under a deed, written contract or other writings constituting a contract, or whose wrights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

While actions for declaratory relief are governed by the same liberal pleading standards that are applied in other civil actions, they must raise a presently justiciable issue. *Cox v. Glenbrook Co.*, 78 Nev. 254, 267-268, 371 P.2d 647, 655 (1962). In this case, this Court concludes a present justiciable issue does exist as the homeowners' association has served Plaintiffs with Notice of Constructional Defects pursuant to NRS 40.645, and intends to pursue its claims through litigation. In Plaintiffs' view, the claims for damages caused by the eight (8) constructional defects discussed above are time-barred by virtue of the six-year statute of repose enacted retroactively by the 2015 Nevada Legislature. Plaintiffs now seek a declaration from this Court as to the rights, responsibilities and obligations of the parties as they pertain to the homeowners' association's claims. As the parties have raised arguments concerning the application of both statutes of limitation and repose, this Court begins its analysis with a review of them.

4. The statutes of limitation and repose are distinguishable and distinct from each other. "'Statutes of repose' bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. In contrast, 'statutes of limitation' foreclose suits after a fixed period of time following occurrence or discovery of an injury." *Alenz v. Twin Lakes Village*, 108 Nev. 1117, 1120, 843 P.2d 834. 836 (1993), *citing Allstate Insurance Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988). Of the two, statutes of repose set an outside time limit, generally running from the date of substantial completion of the project and with no regard to the date of the injury, after which causes of action for personal injury or property damage allegedly caused by deficiencies in the improvements to real property may not be brought. *G and H Associates v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997), *citing Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868, 873 (1983). While there are instances where both the statutes of repose and limitations may result to time-bar a particular claim, there, likewise, are situations where one statute obstructs the cause of action, but the other does not.

5. NRS Chapter 11 does not set forth a specific statute of limitations dealing with the discovery of constructional defects located within a residence. However, the Nevada supreme Court has held these types of claims are subject to the "catch all" statute, i.e. NRS 11.220. *See Hartford Ins. Group v. Statewide Appliances, Inc.*, 87 Nev. 195, 198, 484 P.2d 569, 571 (1971).[7] This statute specifically provides "[a]n action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."

***4 6.** The four-year limitations period identified in NRS 11.220 begins to run at the time the plaintiff learns, or in the exercise of reasonable diligence should have learned of the harm to the property caused by the constructional defect. *Tahoe Village Homeowners Association v. Douglas County*, 106 Nev. 660, 662-663, 799 P.2d 556, 558 (1990), *citing Oak Grove Investment v. Bell & Gossett Co.*, 99 Nev. 616, 621-623, 669 P.2d 1075, 1078-1079 (1983); *also see G and H Associates*, 113 Nev. at 272, 934 P.2d at 233, *citing Nevada State Bank v. Jamison Partnership*, 106 Nev, 792, 800, 801 P.2d 1377, 1383 (1990) (statutes of limitation are procedural bars to a plaintiff's action; the time limits do not commence and the cause of action does not accrue until the aggrieved party knew or reasonably should have known of the facts giving rise to the damage or injury); *Beazer Homes Nevada, Inc. v. District Court*, 120 Nev. 575, 587, 97 P.3d 1132, 1139 (2004) ("For constructional defect cases, the statute of limitations does not begin to run until 'the time the plaintiff learns, or in the exercise of reasonable diligence should have learned, of the harm to the property."').

7. Prior to February 24, 2015, when the 2015 Nevada Legislature enacted Assembly Bill (AB) 125, the statutes of repose were contained in NRS 11.203 through 11.205, and they barred actions for deficient construction after a certain number of

years from the date the construction was substantially completed.[8] *See Alenz*, 108 Nev. at 1120, 843 P.2d at 836. NRS 11.203(1) provided an action based on a known deficiency may not be brought "more than 10 years after the substantial completion of such an improvement." NRS 11.204(1) provided an action based on a latent deficiency may not be commenced "more than 8 years after the substantial completion of such an improvement...." NRS 11.205(1) provided an action based upon a patent deficiency may not be commenced "more than 6 years after the substantial completion of such an improvement...." Further, and notwithstanding the aforementioned, if the injury occurred in the sixth, eighth or tenth year after the substantial completion of such an improvement, depend upon which statute of repose was applied, an action for damages for injury to property or person could be commenced within two (2) years after the date of injury. *See* NRS 11.203(2), 11.204(2) *and* 11.205(2) in effect prior to February 24, 2015.

8. In addition, prior to the enactment of AB 125, NRS 11.202 set forth the exception to the application of the statute of repose. It provided an action could be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property *at any time* after the substantial completion where the deficiency was the result of willful misconduct or fraudulent misconduct. For the NRS 11.202 exception to apply, it was the plaintiff, not the defendant, who had the burden to demonstrate defendant's behavior was based upon willful misconduct. *See Acosta v. Glenfed Development Corp.*, 128 Cal.App.4th, 1278, 1292, 28 Cal.Rptr.3d 92, 102 (2005).

9. As alluded to in Paragraph 7 above, AB 125 made sweeping revisions to statutes addressing residential constructional defect claims. One of those changes included revising the statutes of repose from the previous six (6), eight (8) and ten (10) years to no "more than 6 years after the substantial completion of such an improvement,...." *See* NRS 11.202 (as revised 2015). As set forth in Section 17 of AB 125, NRS 11.202 was revised to state in pertinent part as follows:
5** 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property ***more than 6 years after the substantial completion of such an improvement for the recovery of damages for:

(a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement;

(b) Injury to real or personal property caused by any such deficiency; or

(c) Injury to or the wrongful death of a person caused by any such deficiency.

(Emphasis added)

…

10. Section 21(5) of AB 125 specifies the period of limitations on actions set forth in NRS 11.202 is to be applied *retroactively* to actions in which the substantial completion of the improvement to the real property occurred before the effective date of the act. However, Section 21(6) also provides a "safe harbor" or grace period, meaning actions that accrued before the effective date of the act are not limited if they are commenced within one (1) year of AB 125's enactment, or no later than February 24, 2016. Section 21 of AB 125 specifically provides in pertinent part:
5. Except as otherwise provided in subsection 6, the period of limitations on actions set forth in NRS 11.202, as amended by section 17 of this act, applies retroactively to actions in which the substantial completion of the improvement to the real property occurred before the effective date of this act.

6. The provisions of subsection 5 do not limit an action:

(a) That accrued before the effective date of this act, and was commenced within 1 year after the effective date of this act; …

11. While the statute of repose's time period was shortened, NRS 40.600 to 40.695's tolling provisions were not retroactively changed. That is, statutes of limitation or repose applicable to a claim based upon a constructional defect governed by NRS

40.600 to 40.695 *still* toll deficiency causes of action from the time the NRS 40.645 notice is given until thirty (30) days after mediation is concluded or waived in writing. *See* NRS 40.695(1).[9]

12. In this case, as noted above, the date of substantial completion for the project is November 26, 2007. The eight (8) alleged constructional defects were discovered by the homeowners' association when extrapolation testing took place, which this Court understands was January and February 2015.[10] The homeowners' association made a claim for constructional defects when it served its authenticated NRS 40.645 notice on February 23, 2016. As the constructional defects notice was served upon Plaintiffs on February 23, 2016, the statutes of limitation and repose applicable to the claim as of that date would be tolled. *See* NRS 40.695.

***6 13.** To determine whether the pre- or post-AB 125 version of the statute of repose applies, this Court notes Section 21(5) of AB 125 provides the period of limitations on actions set forth in NRS 11.202 as amended by Section 17 applies *retroactively* to actions in which the substantial completion of the improvement to the real property occurred before AB 125's effective date, *except* as otherwise provided in Section 21(6). Section 21(6) states the provisions of Section 21(5) do not limit an action that accrued before the effective date of AB 125, and was commenced within one (1) year after the effective date of the act. Applying the aforementioned analysis to the facts here, this Court concludes the statute of repose applicable to Defendant's claim for constructional defects is six (6) years, but as it accrued prior to the effective date of AB 125, or February 24, 2015, the action would not be limited if it was commenced within one (1) year after, or by February 24, 2016.

In this case, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION served its NRS 40.645 constructional defect notice February 23, 2016, or one day before the one-year "safe harbor" expired. The service of the NRS Chapter 40 notice operated to toll the applicable statute of repose until thirty (30) days after the NRS 40.680 mediation was concluded or waived in writing. *See* NRS 40.695. The NRS 40.680 mediation took place on June 16, 2016, and unfortunately, the matter was not resolved. The statute of repose was tolled another thirty (30) days or until July 16, 2016. In this Court's view, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION had up to and including July 16, 2016 in which to file its lawsuit. It did not do so until August 2, 2016 when the Answer and Counter-Claim to Plaintiffs' Complaint for Declaratory Relief was filed. As the action was not commenced on or before July 16, 2016, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION'S claim for damages allegedly caused by the eight (8) constructional defects is time-barred.[11]

14. SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION argues the one-year grace period addressed in Section 21(6) operates to toll the new statute of repose period of six (6) years. This Court disagrees. There is nothing stated in Section 21(6) to suggest it tolls the new statute of repose period. To the contrary, Section 21(6) states the retroactive application of the amended NRS 11.202 will not limit actions that occurred prior to the effective date of the act if it is commenced within one year thereafter. In this case, the homeowners' association was given the benefit of not only the one year "safe harbor" provision, but also the period of time tolled to allow the NRS Chapter 40 pre-litigation process to proceed. *See* NRS 40.695.

Accordingly, and based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose filed November 21, 2016 is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S Counter-Claim filed August 2, 2016 is dismissed, as there remains no genuine issue of material fact, and Counter-Defendants SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. is entitled to judgment as a matter of law, pursuant to NRCP 56.

DATED this 9th day of June 2017.

<<signature>>

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

Footnotes

[1] *See* Exhibits H and I attached to SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose filed November 21, 2016.

[2] *See* SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose, p. 15; *also see* Association's Opposition to Plaintiffs' Motion for Summary Judgment by Application of the Statute of Repose filed December 28, 2016.

[3] These constructional defects are:
a. Geotechnical issues relating to improperly compacted support fill placed during construction;
b. Vehicle gates;
c. Attachment of exterior handrails;
d. Improperly secured surface drains;
e. Lack of slope and float finish of structural concrete decks;
f. Stained metal ceiling panels below the parking area;
g. Lack of slope at the penthouse balcony structural concrete deck; and
h. Inadequately installed drain lines.
See Association's Opposition to Plaintiffs' Motion for Summary Judgment by Application of the Statute of Repose, p. 4.

[4] *See* Exhibit D, p. 8 attached to SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose; *also see* Association's Opposition to Plaintiffs' Motion for Summary Judgment by Application of the Statute of Repose, pp. 7-8.

[5] The parties have also referred to this case as "*Sky I*."

[6] *See* Findings of Fact, Conclusions of Law and Order Re: November 4, 2015 Hearing on Motion for Clarification of October 2, 2015 Minute Order filed January 22, 2016 in Case No. A-13-680709-D, attached as Exhibit D to SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief.

[7] In *Hartford Ins. Group*, an action was brought for damages to a home caused by an explosion of a heater made for use with natural as opposed to propane gas. The high court held such matter was not an "action for waste or trespass to real property" subject to a three-year statute of limitation nor was it an "action upon a contract…not founded upon an instrument in writing" even though plaintiff sued under a theory of breach of express and implied warranties. *See* NRS 11.190. This action fell into the "catch all" section, i.e. NRS 11.220, the statute of limitations of four (4) years.

[8] NRS 11.2055 identifies (and identified prior to the enactment of AB 125) the "date of substantial completion" of an improvement to real property as the date on which: "(a) The final building inspection of the improvement is conducted; (b) A notice of completion is issued for the improvement; or (c) A certificate of occupancy is issued for the improvement, whichever occurs later." In this case, as noted above, the parties agree the date the Certificate of Occupancy, November 26, 2007, is the date of substantial completion.

[9] NRS 40.695(1) provides: "Except as otherwise provided in subsection 2, statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive are tolled from the time notice of the claim is given, until 30 days after mediation is concluded or waived in writing pursuant to NRS 40.680."

[10] While January 2015 is the time frame when the eight (8) alleged constructional defects were discovered, it is unknown whether such date represents when the homeowners' association should have known through the exercise of reasonable diligence these defects existed on the property.

[11] As this Court finds SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION'S claims are time-barred by the pertinent six-year statute of repose, it does not address the application of the four-year statute of limitations to this matter.

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DISTRICT COURT

CLARK COUNTY, NEVADA

SUN CITY ANTHEM COMMUNITY ASSOCIATION, INC. Plaintiff, v. DEL WEBB COMMUNITIES, INC., a Nevada Corporation, and PN II, INC., a Nevada Corporation dba PULTE HOMES OF NEVADA, DOUGLAS FREDRIKSON ARCHITECTS, INC., a Foreign Corporation doing business in Nevada as DOUGLAS FREDRIKSON ARCHITECTS, INC., and DOES 1 through 50, inclusive, Defendant.	CASE NO.: A-16-744756-D DEPT.: XXXI **Order Denying TWC Construction, Inc.'s Motion for Summary Judgment** Date of Hearing: March 6, 2019 Hearing Time: 9:00 a.m.
DEL WEBB COMMUNITIES, INC., a Nevada Corporation; and PN II, INC., a Nevada Corporation dba PULTE HOMES OF NEVADA, Third-Party Plaintiff, v. T.W.C CONSTRUCTION, INC., Third-Party Defendant.	

T.W.C. CONSTRUCTION, INC.,

Fourth-Party Plaintiff,

v.

ALL ABOUT STONE, LLC, a foreign limited-liability company; AMERICAN AIR BALANCE CO., INC., a foreign corporation; BORLASE PLUMBING COMPANY, a Nevada corporation; BULL CONCRETE CORP., a Nevada corporation; GREEN POWER SYSTEMS, INC., a Nevada corporation; INTEGRITY POOLS, INC., a Nevada corporation; SILVER TATE REFRIGERATION & HVAC, LLC, a Nevada limited-liability company; SKY DESIGN CONCEPTS, INC., an Arizona corporation; SPECIALITY TILE, INC., a Nevada corporation; T&V PLASTER, INC., a Nevada corporation; UNITED BUILDING SOLUTIONS, INC., a Nevada corporation; and ZOES 1 through 100, inclusive,

Fourth-Party Defendants.

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THIS MATTER having come before the Court on March 6, 2019, on Third-Party Defendant TWC Construction, Inc.'s ("TWC") Motion for Summary Judgment, and the Joinders to said Motion; the Court having reviewed and considered the pleadings and papers on filed herein, including Plaintiff Sun City Anthem Community Associations, Inc.'s ("Sun City") Opposition, Defendant/Third-Party Plaintiff Del Webb Communities, Inc. and PN II dba Pulte Homes of Nevada's (collectively, "Del Webb") Limited Opposition, Del Webb's Objection to TWC's Untimely Reply Brief; having heard oral argument from all counsel present at the hearing who elected to argue and with good cause appearing, with no just reason for delay, the Court makes the following findings of fact, conclusions of law, and order:

I.

FINDINGS OF FACT

1. AB 125 was enacted on February 24, 2015. Section 21(5) of AB 125 specifies that the period of limitations on actions set forth in NRS 11.202 is to be applied retroactively to actions in which

the substantial completion to the improvement of the real property occurred before the effective date of AB 125. However, Section 21(6) of AB 125 also provides a "safe harbor" of grace period, meaning actions that accrued before the effective date of the act are not limited if they are commenced within one (1) year of AB 125's enactment, or no later than February 24, 2016.

2. Under NRS 40.695, the statute of limitation and repose periods are tolled from the time notice of the claims is given until the earlier of one (1) year after notice of the claim is given or thirty (30) days after mediation is concluded or waived in writing pursuant to NRS 40.680.

3. On February 23, 2016, Sun City served its notice of construction defects ("Chapter 40 Notice") on Del Webb due to the existence of various construction defects at the Liberty Center, a common area facility at Sun City Anthem.

4. On September 20, 2016, the parties conducted the pre-litigation mediation required pursuant to NRS 40.680 regarding the construction defects identified in Sun City's Chapter 40 Notice.

5. On October 7, 2016, Sun City filed its Complaint against Del Webb.

6. On January 25, 2019, TWC filed its Motion for Summary Judgment arguing that Sun City's claims were barred by the statute of repose. TWC contends that when Sun City served its Chapter 40 Notice on February 23, 2016, the Notice did not toll the relevant statute of repose because it had already expired. TWC also contends that Sun City's Complaint was time barred.

7. In opposition, Sun City argues that because Sun City's action accrued before the enactment of AB 125, it timely asserted its construction defect claims within AB 125's one-year grace period when it served its Chapter 40 Notice on February 23, 2016. Sun City further contends that the Court needs to take into account the date Sun City served its mandatory Chapter 40 Notice, a statutory prerequisite to filing the Complaint, because that Notice tolled the statute of repose until 30 days after the mediation.

8. Del Webb argues in their limited opposition that because the 8-year and 10-year statute of repose periods were still in effect during Section 21(6) of AB 125's one-year grace period, these

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statutes of repose were tolled under NRS 40.695 when Sun City served is Chapter 40 Notice. Del Webb also contends that AB 125's shorter statute of repose does not apply to claims for indemnity and contribution, which are the only claims Del Webb has asserted in its Third-Party Complaint against TWC, and so TWC's motion, if granted, cannot impact Del Webb's claims against TWC.

9. No party disputes the applicability of AB 125 or its one-year grace period to Sun City's action. No party disputes that providing a Chapter 40 notice is a pre-requisite to filing a Complaint. No party disputes that Chapter 40 notices toll the statute of repose. TWC contends that the statute of repose was expired by the time Sun City served the Chapter 40 Notice.

10. Pursuant to E.D.C.R. 2.20(h) and 1.14(a), the deadline for TWC to file its Reply in Support of Motion for Summary Judgment was February 27, 2019. However, TWC did not file its Reply in Support of Motion for Summary Judgment until March 1, 2019.

11. On March 4, 2019, Del Webb filed an Objection to TWC's Untimely Reply Brief to Its Motion for Summary Judgment.

12. At the hearing on March 6, 2019, TWC failed to demonstrate good cause for the untimely filing of its Reply. Nevertheless, TWC was permitted to orally argue its position, including those arguments made in its Reply, on multiple occasions and in response to questions posed to all parties. Thus, TWC could not suffer any prejudice as result of a refusal to consider TWC's written Reply brief.

II.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate under NRCP 56 and "shall be rendered forthwith" when the pleadings and other evidence properly before the court demonstrate that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 731, 121 P.3d 1026, 1029, 1031 (2005) (quoting NEV. R. CIV. P. 56(c)).

2. The statute of limitation and repose periods applicable for construction defect actions set forth in NRS 40.600 to 40.695 were not retroactively changed as result of the enactment of AB 125. Thus, pursuant to NRS 40.695(1), the statute of limitation and repose periods applicable to claims made under NRS 40.600 to 40.695 are tolled from the time an NRS 40.645 notice of constructional defect is given until thirty (30) days after mediation is concluded or waived in writing.

3. Applying these clear statutory provisions to the present case, Sun City commenced the present action within the one-year grace period, as set forth in Section 21(6) of AB 125, when it served the Chapter 40 Notice on February 23, 2016, which was one (1) day before the grace-period expired.

4. By serving the Chapter 40 Notice on February 23, 2016, Sun City then tolled the statute of repose until 30 days after the statutorily required pre-litigation mediation was conducted on September 20, 2016. When Sun City filed its Complaint on October 7, 2016, it instituted this action within the 30-day statutory tolling period.

5. Therefore, pursuant to the applicable statutes and requirements, Sun City's action was timely commenced before the expiration of the statute of repose.

6. As TWC failed to file its Reply in Support of Motion for Summary Judgment on or before February 27, 2019, in compliance with E.D.C.R. 2.20(h), TWC's written Reply is untimely and will not be considered.

7. If any of these Conclusions of Law should more properly be construed as Findings of Fact or vice versa, then they shall be so construed.

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III.

ORDER

Based on the foregoing findings of fact and conclusions of law, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that TWC's Motion for Summary Judgment, and all Joinders thereto, are hereby DENIED.

IT IS FURTHER ORDER, ADJUDGED, AND DCREED that Del Webb's Objection to TWC's Untimely Reply Brief to Its Motion for Summary Judgment is SUSTAINED and TWC's Reply in Support of Motion for Summary Judgment is STRICKEN As to new Arguments but Counsel was Allowed to argue the issues in his opening argument as set forth below.

DATED this 4 day of April, 2019.

DISTRICT COURT JUDGE

Respectfully submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada corporation, Plaintiffs, Vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation. Defendant.	Case No. A-16-744146-D Dept. No. XXII FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant, Vs. LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Counter-Defendants.	

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation,

Third-Party Plaintiff,

Vs.

SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION; DEAN ROOFING COMPANY; FORD CONSTRUCTING, INC.; INSULPRO, INC.; XTREME EXCAVATION; SOUTHERN NEVADA PAVING, INC.; FLIPPINS TRENCHING, INC.; BOMBARD MECHANICAL, LLC; R. RODGERS CORPORATION; FIVE STAR PLUMBING & HEATING, LLC dba SILVER STAR PLUMBING; and ROES 1 through 1000, inclusive,

Third-Party Defendants.[1]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters concerning:

1. Plaintiffs'/Counter-Defendants' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019; and

2. Defendant's/Counter-Claimant's Conditional Counter-Motion for Relief Pursuant to NRS 40.695(2) filed March 1, 2019,

both came on for hearing on the 23rd day of April 2019 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION,

[1]As the subcontractors are not listed as "plaintiffs" in the primary action, the matter against them is better characterized as a "third-party" claim, as opposed to "counter-claim."

INC. appeared by and through their attorneys, JEFFREY W. SAAB, ESQ. and DEVIN R. GIFFORD, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant/Third-Party Plaintiff PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and through their attorneys, MICHAEL J. GAYAN, ESQ. of the law firm, KEMP JONES & COULTHARD.[2] Having reviewed the papers and pleadings on file herein, heard oral arguments of the lawyers and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. This case arises as a result of alleged constructional defects within both the common areas and the 616 residential condominium units located within two tower structures of the PANORAMA TOWERS located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada. On February 24, 2016, Defendant/Counter-Claimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its original NRS 40.645 Notice of Constructional Defects upon Plaintiffs/Counter-Defendants (also identified herein as the "Contractors" or "Builders"), identifying deficiencies within the residential tower windows, fire blocking, mechanical room piping and sewer. Subsequently, after the parties engaged in the pre-litigation process with the NRS 40.680 mediation held September 26, 2016 with no success, the Contractors filed their Complaint on September 28, 2016 against the Owners' Association, asserting the following claims that, for the most part, deal with their belief the NRS 40.645 notice was deficient:

1. Declaratory Relief—Application of AB 125;

2. Declaratory Relief—Claim Preclusion;

[2]SCOTT A. WILLIAMS, ESQ. of the law firm, WILLIAMS & GUMBINER, also appeared telephonically on behalf of PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION. Via Minute Order filed January 13, 2017, this Court granted the Motion to Associate Counsel filed January 3, 2017 given non-opposition by Plaintiffs/Counter-Defendants. However, no formal proposed Order granting the motion was ever submitted to the Court for signature.

3. Failure to Comply with NRS 40.600, *et seq.*;

4. Suppression of Evidence/Spoliation;

5. Breach of Contract (Settlement Agreement in Prior Litigation);

6. Declaratory Relief—Duty to Defend; and

7. Declaratory Relief—Duty to Indemnify.

2. On March 1, 2017, PANORAMA TOWER CONDOMINIUM UNIT OWNERS' ASSOCIATION filed its Answer and Counter-Claim, alleging the following claims:

1. Breach of NRS 116.4113 and 116.4114 Express and Implied Warranties; as well as those of Habitability, Fitness, Quality and Workmanship;

2. Negligence and Negligence *Per Se;*

3. Products Liability (against the manufacturers);

4. Breach of (Sales) Contract;

5. Intentional/Negligent Disclosure; and

6. Duty of Good Faith and Fair Dealing; Violation of NRS 116.1113.

3. This Court previously dismissed the constructional defect claims within the mechanical room as being time-barred by virtue of the "catch-all" statute of limitations of four (4) years set forth in NRS 11.220.[3] With respect to challenges to the sufficiency and validity of the NRS 40.645 notice, this Court stayed the matter to allow PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION to amend it with more specificity. This Court ultimately determined the amended NRS 40.645 notice served upon the Builders on April 15, 2018 was valid with respect to the windows' constructional defects only.[4]

. . .

[3] *See* Findings of Fact, Conclusions of Law and Order filed September 15, 2017.
[4] *See* Findings of Fact, Conclusions of Law and Order filed November 30, 2018.

4. The Builders or Contractors now move this Court for summary judgment upon the basis the Association's claims are time-barred by the six-year statute of repose set forth in NRS 11.202(1), as amended by Assembly Bill (AB) 125 in 2015, in that its two residential towers were substantially completed on January 16, 2008 (Tower I) and March 26, 2008 (Tower II), respectively, and claims were not brought until February 24, 2016 when the NRS 40.645 Notice was sent; further, the Association did not file its Counter-Claim until March 1, 2017.

5. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION opposes, arguing, first, the Builders do not provide this Court all facts necessary to decide the motion which, therefore, requires its denial. Specifically, NRS 11.2055, the statute identifying the date of substantial completion, defines such as being the latest of *three* events: (1) date the final building inspection of the improvement is conducted; (2) date the notice of completion is issued for the improvement; or (3) date the certificate of occupancy is issued. Here, the Association argues the Builders provided only the dates the Certificates of Occupancy were issued for the two towers.[5] Second, the NRS 40.645 notice was served within the year of "safe harbor" which tolled any limiting statutes, and the primary action was filed within two days of NRS Chapter 40's mediation. In the Owners' Association's view, its Counter-Claim filed March 1, 2017 was compulsory to the initial Complaint filed by the Builders, meaning its claims relate back to September 28, 2016, and thus, is timely. Further, the Association notes it learned of the potential window-related claims in August 2013, less than three years before it served its notice, meaning their construction defect action is not barred by the statute of limitations. The Association also counter-moves this Court for relief under NRS 40.695(2) as, in its view, good cause exists for this Court to extend the tolling period to avoid time-barring its constructional defect claims.

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[5]As noted *infra,* the Certificates of Occupancy also identify the date of the final building inspection as being March 16, 2007 (Tower I) and July 16, 2007 (Tower II). That is, the Builders identified two of the three events, and not just one.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrates no "genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *See* NRCP 56(c); Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026 (2005). The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Id.*, 121 Nev. at 731. A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the non-moving party. *Id.*

2. While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party 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 in the moving party's favor. Matsushita Electric Industrial Co. v. Zenith Radio, 475, 574, 586 (1986), *cited by* Wood, 121 Nev. at 732. The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the evidence of a genuine issue for trial or have summary judgment entered against him." Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992), *cited by* Wood, 121 Nev. at 732. The non-moving party "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" Bulbman, 108 Nev. at 110, 825 P.2d 591, *quoting* Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

3. Four of Builders' causes of action seek declaratory relief under NRS Chapter 30. NRS 30.040(1) provides:

> Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validly arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

. . .

Actions for declaratory relief are governed by the same liberal pleading standards applied in other civil actions, but they must raise a present justiciable issue. Cox v. Glenbrook Co., 78 Nev. 254, 267-268, 371 P.2d 647, 766 (1962). Here, a present justiciable issue exists as PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served the Builders with a notice of constructional defects pursuant to NRS 40.645 on February 24, 2016, and later demonstrated its intention to purchase the claims through this litigation. As noted above, the Contractors propose the remaining claim for constructional defects within the windows is time-barred by virtue of the six-year statute of repose enacted retroactively by the 2015 Nevada Legislature through AB 125. As set forth in their First Cause of Action, the Builders seek a declaration from this Court as to the rights, responsibilities and obligations of the parties as they pertain to the association's claim. As the parties have raised arguments concerning the application of both statutes of repose and limitation, this Court begins its analysis with a review of them.

4. The statutes of repose and limitation are distinguishable and distinct from each other. "'Statutes of repose' bar causes of action after a certain period of time, regardless of whether damage or an injury has been discovered. In contrast, 'statutes of limitation' foreclose suits after a fixed period time following occurrence or discovery of an injury." Alenz v. Twin Lakes Village, 108 Nev. 1117, 1120, 843 P.2d 834, 836 (1993), *citing* Allstate Insurance Company v. Furgerson, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988). Of the two, the statute of repose sets an outside time limit, generally running from the date of substantial completion of the project and with no regard to the date of injury, after which cause of action for personal injury or property damage allegedly caused by the deficiencies in the improvements to real property may not be brought. G and H Associates v. Ernest W. Hahn, Inc., 113 Nev. 265, 271, 934 P.2d 229, 233 (1977), *citing* Lamb v. Wedgewood South Corp., 308 N.C. 419302 S.E.2d 868, 873 (1983). While there are

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instances where both the statutes of repose and limitations may result to time-bar a particular claim, there also are situations where one statute obstructs the cause of action, but the other does not.

5. NRS Chapter 11 does not set forth a specific statute of limitations dealing with the discovery of constructional defects located within a residence. However, the Nevada Supreme Court has held these types of claims are subject to the "catch all" statute, NRS 11.220. *See* Hartford Insurance Group v. Statewide Appliances, Inc., 87 Nev. 195, 198, 484 P.2d 569, 571 (1971).[6] This statute specifically provides "[a]n action for relief, not hereinbefore provided for, must be commenced within 4 years after the cause of action shall have accrued."

6. The four-year limitations period identified in NRS 11.220 begins to run at the time the plaintiff learns, or in the exercise of reasonable diligence should have learned of the harm to the property caused by the constructional defect. Tahoe Village Homeowners Association v. Douglas County, 106 Nev. 660, 662-664, 799 P.2d 556, 558 (1990), *citing* Oak Grove Investment v. Bell & Gossett Co., 99 Nev. 616621-623, 669 P.2d 1075, 1078-1079 (1983); *also see* G and H Associates, 113 Nev. at 272, 934 P.2d at 233, *citing* Nevada State Bank v. Jamison Partnership, 106 Nev. 792, 800, 801 P.2d 1377, 1383 (1990) (statutes of limitations are procedural bars to a plaintiff's action; the time limits do not commence and the cause of action does not accrue until the aggrieved party knew or reasonably should have known of the facts giving rise to the damage or injury); Beazer Homes Nevada, Inc. v. District Court, 120 Nev. 575, 587, 97 P.3d 1132, 1139 (2004) ("For constructional defect cases, the statute of limitations does not begin to run until 'the time the plaintiff learns, or in the exercise of reasonable diligence should have learned, of the harm to the property.'").

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[6]In Hartford Insurance Group, an action was brought for damages to a home caused by an explosion of a heater made for use with natural as opposed to propane gas. The State's high court held such matter was not an "action for waste or trespass to real property" subject to a three-year statute of limitation nor was it an "action upon a contract…not founded upon an instrument in writing" even though plaintiff sued under a theory of breach of express and implied warranties. *See* NRS 11.190. This action fell into the "catch all" section, NRS 11.220, the statute of limitations of which is four (4) years.

7. Prior to February 25, 2015, when AB 125 was enacted into law, the statutes of repose were contained in NRS 11.203 through 11.205, and they barred actions for deficient construction after a certain number of years from the date the construction was substantially completed. *See* Alenz, 108 Nev. at 1120, 843 P.2d at 836. NRS 11.203(1) provided an action based on a known deficiency may not be brought "more than 10 years after the substantial completion of such an improvement." NRS 11.204(1) set forth an action based on a latent deficiency may not be commenced "more than 8 years after the substantial completion of such an improvement…." NRS 11.205(1) stated an action based upon a patent deficiency may not be commenced "more than 6 years after the substantial completion of such an improvement…." Further, and notwithstanding the aforementioned, if the injury occurred in the sixth, eighth or tenth year after the substantial completion of such an improvement, depending upon which statute of repose was applied, an action for damages for injury to property or person could be commenced within two (2) years after the date of injury. *See* NRS 11.203(2), 11.204(2) *and* 11.205(2) as effective prior to February 24, 2015.

8. In addition, prior to the enactment of AB 125, NRS 11.202 identified an exception to the application of the statute of repose. This exception was the action could be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property *at any time* after the substantial completion where the deficiency was the result of willful misconduct or fraudulent misconduct. For the NRS 11.202 exception to apply, it was the plaintiff, not the defendant, who had the burden to demonstrate defendant's behavior was based upon willful misconduct. *See* Acosta v. Glenfed Development Corp., 128 Cal.App.4th 1278, 1292, 28 Cal.Rptr.3d 92, 102 (2005).

9. AB 125 made sweeping revisions to statutes addressing residential construction defect claims. One of those changes included revising the statutes of repose from the previous six (6), eight (8) and ten (10) years to no "more than 6 years after the substantial completion of such an

improvement…" *See* NRS 11.202 (as revised in 2015). As set forth in Section 17 of AB 125, NRS 11.202 was revised to state in pertinent part as follows:

> 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property *more than 6 years* after the substantial completion of such an improvement for the recovery of damages for:
>
> (a) Any deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement;
> (b) Injury to real or personal property caused by any such deficiency; or
> (c) Injury to or the wrongful death of a person caused by any such deficiency.
> (Emphasis added)

In addition, the enactment of AB 125 resulted in a deletion of the exception to the application of the statute of repose based upon the developer's willful misconduct or fraudulent concealment.

10. Section 21(5) of AB 125 provides the period of limitations on actions set forth NRS 11.202 is to be applied *retroactively* to actions in which the substantial completion of the improvement to the real property occurred before the effective date of the act. However, Section 21(6) also incorporated a "safe harbor" or grace period, meaning actions that accrued before the effective date of the act are not limited if they are commenced within one (1) year of AB 125's enactment, or no later than February 24, 2016.

11. NRS 11.2055 identifies the date the statute of repose begins to run in constructional defect cases, to wit: the date of substantial completion of improvement to real property. NRS 11.2055(1) provides:

> 1. Except as otherwise provided in subsection 2, for the purposes of this section and NRS 11.202, the date of substantial completion of an improvement to real property shall be deemed to be the date on which:
> (a) The final building inspection of the improvement is conducted;
> (b) A notice of completion is issued for the improvement; or
> (c) A certificate of occupancy is issued for the improvement, whichever occurs later.

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NRS 11.2055(2) states "[i]f none of the events described in subsection 1 occurs, the date of substantial completion of an improvement to real property must be determined by the rules of the common law."

12. While the statute of repose's time period was shortened, NRS 40.600 to 40.695's tolling provisions were not retroactively changed. That is, statutes of limitation or repose applicable to a claim based upon a constructional defect governed by NRS 40.600 to 40.695 *still* toll deficiency causes of action from the time the NRS 40.645 notice is given until the earlier of one (1) year after notice of the claim or thirty (30) days after the NRS 40.680 mediation is concluded or waived in writing. *See* NRS 40.695(1). Further, statutes of limitation and repose may be tolled under NRS 40.695(2) for a period longer than one (1) year after notice of the claim is given but only if, in an action for a constructional defect brought by a claimant after the applicable statute of limitation or repose has expired, the claimant demonstrates to the satisfaction of the court good cause exists to toll the statutes of limitation and repose for a longer period.

13. In this case, the Owners' Association argues the Builders have not provided sufficient information to determine when the statute of repose started to accrue, and without it, this Court cannot decide the motion for summary judgment. Specifically, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposes the Builders have identified only one date addressed within NRS 11.2055(1), and to establish the date of accrual, this Court needs all three as the defining date is the one which occurs last. This Court disagrees with the Association's assessment the date of substantial completion has not been established for at least a couple of reasons. *First,* the Builders did not provide just one date; they identified two events addressed in NRS 11.2055, i.e. the date of the final building inspection and when the Certificate of Occupancy was issued as identified in Exhibits C and D of their motion. Those dates are March 16, 2007 and January 16, 2008, respectively, for Tower I, and July 16, 2007 and March 26, 2008, respectively, for

Tower II. *Second,* this Court does not consider the Builders' inability or failure to provide the date of the third event, i.e. when the notice of completion was issued, as fatal to the motion, especially given the common-law "catch-all" provision expressed in NRS 11.2055(2) that applies if none of the events described in NRS 11.2055(1) occurs. This Court concludes the dates of substantial completion are January 16, 2008 (Tower I) and March 16, 2008 (Tower II), respectively, as these dates are the latest occurrences. Given this Court's decision, the dates of substantial completion obviously accrued before the enactment of AB 125. Applying the aforementioned analysis to the facts here, this Court concludes the statute of repose applicable to the Association's constructional defects claim is six (6) years, but, as it accrued prior to the effective date of AB 125 or February 24, 2015, the action is not limited if it was commenced within one (1) year after, or by February 24, 2016.

14. In this case, the Association served its NRS 40.645 constructional defect notice on February 24, 2016, or the date the one-year "safe harbor" was to expire. The service of the NRS 40.645 notice operated to toll the applicable statute of repose until the earlier of one (1) year after notice of the claim or thirty (30) days after the NRS 40.680 mediation is concluded or waived in writing. *See* NRS 40.695(1). The NRS 40.680 mediation took place and was concluded on September 26, 2016. Applying the earlier of the two expiration dates set forth in NRS 40.695, the statute of repose in this case was tolled thirty (30) days after the mediation or until October 26, 2016, which is earlier than the one (1) year after the notice was served. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION had up to and including October 26, 2016 to institute litigation or its claims would be time-barred.

15. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION filed its Counter-Claim against the Builders on March 1, 2017, over four (4) months after October 26, 2016. As noted above, in the Builders' view, the constructional defect claims relating to the

windows, therefore, are time-barred. The Association disagrees, arguing its Counter-Claim was compulsory, and it relates back to the date of the Complaint's filing, September 28, 2016. Alternatively, the Association counter-moves this Court for relief, and to find good cause exists to toll the statute of repose for a longer period given its diligence in prosecuting the constructional defect claims against the Builders. The Court analyzes both of the Association's points below.

16. NRCP 13 defines both compulsory and permissive counter-claims. A counter-claim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. *See* NRCP 13(a). The purpose of NRCP 13(a) is to make an "actor" of the defendant so circuity of action is discouraged and the speedy settlement of all controversies between the parties can be accomplished in one action. *See* Great W. Land & Cattle Corp. v. District Court, 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970). In this regard, the compulsory counter-claimant is forced to plead his claim or lose it. *Id.* A counter-claim is permissive if it does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. *See* NRCP 13(b).

17. Here, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposes its counter-claims are compulsory as they arise out of the same transaction or occurrence that is the subject matter of the Builders' claims. This Court disagrees. The Builders' claims are for breach of the prior settlement agreement and declaratory relief regarding the sufficiency of the NRS 40.645 notice and application of AB 125. The Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its windows in the two towers. If this Court ruled against the Builders on their Complaint,

the Association would not have lost their claims if they had not pled them as counter-claims in the instant lawsuit. In this Court's view, the Association had two options: it could make a counter-claim which is permissive or assert its constructional defect claims in a separate Complaint. Here, it elected to make the permissive counter-claim. The counter-claim does not relate back to the filing of the Complaint, September 28, 2016.

18. However, even if this Court were to decide the counter-claim was compulsory, meaning the Association was forced to plead its claims in the instant case or lose them, the pleading still would not relate back to the date of the Complaint' filing. As noted in Nevada State Bank v. Jamison Family Partnership, 106 Nev. 792, 798, 801 P.2d 1377, 1381 (1990), statutes of limitation and repose were enacted to "'promote repose by giving security and stability to human affairs....They stimulate to activity and punish negligence.'" *Citing* Wood v. Carpenter, 101 U.S. 135, 139, 25 L.Ed.2d 807 (1879). Indeed, the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations or repose and to create a final deadline for filing suit that is not subject to any exceptions except perhaps those clearly specified by the state's legislature. Without a statute of repose, professionals, contractors and other actors would face never-ending uncertainty as to liability for their work. As stated by the Supreme Court in Texas in Methodist Healthcare System of San Antonio, Ltd., LLP v. Rankin, 53 Tex.Sup.Ct.J. 455, 307 S.W.3d 283, 287 (2010), "'while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.'" *Quoting* Galbraith Engineering Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 866 (Tex. 2009). For the reasons articulated above, the Nevada Supreme Court held the lower court did not err by finding a plaintiff, by instituting an action before the expiration of a statute of limitation, does not toll the running of that statute against compulsory counter-claims filed

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by a defendant after the statute has expired. In short, whether the Association's counter-claims are compulsory or permissive, the filing of the Builders' Complaint did not toll the statute of repose.

19. The next question is whether good cause exists for this Court to toll the statute of repose for a longer period as so authorized in NRS 40.695(2). The Association proposes there is good cause given their diligence in prosecuting their constructional defect claims, and, as they are seeking tolling of only five (5) days after the one (1) year anniversary of the original NRS 40.645 notice, the Builders' ability to defend the deficiency causes of action has not been adversely impacted. In making this argument, the Association seems to assume the tolling under NRS 40.695 ended February 24, 2017, or one (1) year after it served the NRS 40.645 notice when, in actuality, the tolling ended October 26, 2016, or thirty (30) days after the NRS 40.680 mediation. *See* 40.695(1). The Association does not show this Court good cause exists for its failure to institute litigation before October 26, 2016. Whether the Builders' ability to defend the Association's claim is not adversely affected is, therefore, not relevant to the issue of good cause. Accordingly, this Court declines tolling the statute of repose for a period longer than one (1) year after the NRS 40.645 notice was made. The Builders' Motion for Summary Judgment is granted, and the Association's Conditional Counter-Motion for Relief is denied.

20. As this Court decides the six-year statute of repose bars the Association's constructional defect claims, it does not analyze the statute of limitations issue presented.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Plaintiffs'/Counter-Defendants' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019 is granted; and

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IT IS FURTHER ORDERED, ADJUDGED AND DECREED Defendant's/Counter-Claimant's Conditional Counter-Motion for Relief Pursuant to NRS 40.695(2) filed March 1, 2019 is denied.

DATED this 23rd day of May 2019.

Susan H. Johnson

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

SUSAN H. JOHNSON
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CERTIFICATE OF SERVICE

I hereby certify, on the 23rd day of May 2019, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to the following counsel of record, and that first-class postage was fully prepaid thereon:

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File Into Existing Case

Case Number	Location	Description	Case Type
A-16-744146-D	Department 22	Laurent Hallier, Plaintiff(s...	Chapter 40

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▸ **Party:** Panorama Towers I Mezz LLC - Counter Defendant	
▸ **Party:** MJ Dean Construction Inc - Plaintiff	
▸ **Party:** MJ Dean Construction Inc - Counter Defendant	
▸ **Party:** Panorama Towers Condominium Unit Owners Association - Counter Claimant	

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File Into Existing Case

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A-16-744146-D	Department 22	Laurent Hallier, Plaintiff(s...	Chapter 40

1 20 items per page 1 - 1 of 1 items

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