Case No. 80615

IN THE SUPREME COURT OF NEVADA

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

Appellant,

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,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County, Nevada
The Honorable Susan H. Johnson, District Judge
District Court Case No. A-16-744146-D

APPELLANT'S APPENDIX VOL 4 OF 27

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(a) Must state whether the contractor, subcontractor, supplier or design professional has elected to repair the defect or cause the defect to be repaired. If an election to repair is included in the response and the repair will cause the claimant to move from the claimant's home during the repair, the election must also include monetary compensation in an amount reasonably necessary for temporary housing or for storage of household items, or for both, if necessary.

(b) May include a proposal for monetary compensation, which may include contribution from a subcontractor, supplier or design professional.

(c) May disclaim liability for the constructional defect and state the reasons for such a disclaimer.

3. If the claimant is a homeowners' association, the association shall send a copy of the response to each member of the association not later than 30 days after receiving the response.

4. If the contractor, subcontractor, supplier or design professional has elected not to repair the constructional defect, the claimant or contractor may bring a cause of action for the constructional defect or amend a complaint to add a cause of action for the constructional defect.

5. If the contractor, subcontractor, supplier or design professional has elected to repair the constructional defect, the claimant must provide the contractor, subcontractor, supplier or design professional with a reasonable opportunity to repair the constructional defect.

Sec. 13. NRS 40.648 is hereby amended to read as follows:

40.648 1. If the response provided pursuant to NRS 40.6472 includes an election to repair the constructional defect:

(a) The repairs may be performed by the contractor, subcontractor, supplier or design professional, if such person is properly licensed, bonded and insured to perform the repairs and, if such person is not, the repairs may be performed by another person who meets those qualifications.

(b) The repairs must be performed:

(1) On reasonable dates and at reasonable times agreed to in advance with the claimant;

(2) In compliance with any applicable building code and in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of repair; and

(3) In a manner which will not increase the cost of maintaining the residence or appurtenance than otherwise would have been required if the residence or appurtenance had been constructed without the constructional defect, unless the contractor

and the claimant agree in writing that the contractor will compensate the claimant for the increased cost incurred as a result of the repair.

(c) Any part of the residence or appurtenance that is not defective but which must be removed to correct the constructional defect must be replaced.

(d) The contractor, subcontractor, supplier or design professional shall prevent, remove and indemnify the claimant against any mechanics' liens and materialmen's liens.

2. Unless the claimant and the contractor, subcontractor, supplier or design professional agree to extend the time for repairs, the repairs must be completed:

(a) ~~[If the notice was sent pursuant to subsection 4 of NRS 40.645 and there are four or fewer owners named in the notice, for the named owners, not later than 105 days after the date on which the contractor received the notice.~~

~~(b) If the notice was sent pursuant to subsection 4 of NRS 40.645 and there are five or more owners named in the notice, for the named owners, not later than 150 days after the date on which the contractor received the notice.~~

~~(c) If the notice was sent pursuant to subsection 4 of NRS 40.645, not later than 105 days after the date on which the contractor provides a disclosure of the notice to the unnamed owners to whom the notice applies pursuant to NRS 40.6452.~~

~~(d) If the notice was not sent pursuant to subsection 4 of NRS 40.645:~~

~~(1)~~] Not later than 105 days after the date on which the notice of the constructional defect was received by the contractor, subcontractor, supplier or design professional if the notice of a constructional defect was received from four or fewer owners; or

~~[(2)]~~ ***(b)*** Not later than 150 days after the date on which the notice of the constructional defect was received by the contractor, subcontractor, supplier or design professional if the notice was received from five or more owners or from a representative of a homeowners' association.

3. If repairs reasonably cannot be completed within the time set forth in subsection 2, the claimant and the contractor, subcontractor, supplier or design professional shall agree to a reasonable time within which to complete the repair. If the claimant and contractor, subcontractor, supplier or design professional cannot agree on such a time, any of them may petition the court to establish a reasonable time for completing the repair.

4. Any election to repair made pursuant to NRS 40.6472 may not be made conditional upon a release of liability.

5. Not later than 30 days after the repairs are completed, the contractor, subcontractor, supplier or design professional who

repaired or caused the repair of a constructional defect shall provide the claimant with a written statement describing the nature and extent of the repair, the method used to repair the constructional defect and the extent of any materials or parts that were replaced during the repair.

Sec. 14. NRS 40.650 is hereby amended to read as follows:

40.650 1. If a claimant unreasonably rejects a reasonable written offer of settlement made as part of a response pursuant to paragraph (b) of subsection 2 of NRS 40.6472 and thereafter commences an action governed by NRS 40.600 to 40.695, inclusive, ***and sections 2 and 3 of this act,*** the court in which the action is commenced may:

(a) Deny the claimant's attorney's fees and costs; and

(b) Award attorney's fees and costs to the contractor.

➥ Any sums paid under a homeowner's warranty, other than sums paid in satisfaction of claims that are collateral to any coverage issued to or by the contractor, must be deducted from any recovery.

2. If a contractor, subcontractor, supplier or design professional fails to:

(a) Comply with the provisions of NRS 40.6472;

(b) Make an offer of settlement;

(c) Make a good faith response to the claim asserting no liability;

(d) Agree to a mediator or accept the appointment of a mediator pursuant to NRS 40.680; or

(e) Participate in mediation,

➥ the limitations on damages and defenses to liability provided in NRS 40.600 to 40.695, inclusive, ***and sections 2 and 3 of this act*** do not apply and the claimant may commence an action or amend a complaint to add a cause of action for a constructional defect without satisfying any other requirement of NRS 40.600 to 40.695, inclusive ~~[.]~~ ***, and sections 2 and 3 of this act.***

3. If a residence or appurtenance that is the subject of the claim is covered by a homeowner's warranty that is purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive ~~[, a claimant shall diligently pursue a claim under the contract.]~~ ***:***

(a) A claimant may not send a notice pursuant to NRS 40.645 or pursue a claim pursuant to NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act unless the claimant has first submitted a claim under the homeowner's warranty and the insurer has denied the claim.

(b) A claimant may include in a notice given pursuant to NRS 40.645 only claims for the constructional defects that were denied by the insurer.

(c) If coverage under a homeowner's warranty is denied by an insurer in bad faith, the homeowner and the contractor, subcontractor, supplier or design professional have a right of action for the sums that would have been paid if coverage had been provided, plus reasonable attorney's fees and costs.

(d) Statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act are tolled from the time notice of the claim under the homeowner's warranty is submitted to the insurer until 30 days after the insurer rejects the claim, in whole or in part, in writing.

4. Nothing in this section prohibits an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure or NRS 17.115 ~~[if the offer of judgment includes all damages to which the claimant is entitled pursuant to NRS 40.655.]~~ ***or section 3 of this act.***

Sec. 15. NRS 40.655 is hereby amended to read as follows:

40.655 1. Except as otherwise provided in NRS 40.650, in a claim governed by NRS 40.600 to 40.695, inclusive, ***and sections 2 and 3 of this act,*** the claimant may recover only the following damages to the extent proximately caused by a constructional defect:

(a) ~~[Any reasonable attorney's fees;~~

~~(b)]~~ The reasonable cost of any repairs already made that were necessary and of any repairs yet to be made that are necessary to cure any constructional defect that the contractor failed to cure and the reasonable expenses of temporary housing reasonably necessary during the repair;

~~[(c)]~~ ***(b)*** The reduction in market value of the residence or accessory structure, if any, to the extent the reduction is because of structural failure;

~~[(d)]~~ ***(c)*** The loss of the use of all or any part of the residence;

~~[(e)]~~ ***(d)*** The reasonable value of any other property damaged by the constructional defect;

~~[(f)]~~ ***(e)*** Any additional costs reasonably incurred by the claimant ~~[.]~~ ***for constructional defects proven by the claimant,*** including, but not limited to, any costs and fees incurred for the retention of experts to:

(1) Ascertain the nature and extent of the constructional defects;

(2) Evaluate appropriate corrective measures to estimate the value of loss of use; and

(3) Estimate the value of loss of use, the cost of temporary housing and the reduction of market value of the residence; and

~~[(g)]~~ ***(f)*** Any interest provided by statute.

2. ~~[The amount of any attorney's fees awarded pursuant to this section must be approved by the court.~~

~~3.]~~ If a contractor complies with the provisions of NRS 40.600 to 40.695, inclusive, ***and sections 2 and 3 of this act,*** the claimant may not recover from the contractor, as a result of the constructional defect, ~~[anything]~~ ***any damages*** other than ~~[that which is provided]~~ ***damages authorized*** pursuant to NRS 40.600 to 40.695, inclusive ~~[.~~ ~~4.]~~ ***, and sections 2 and 3 of this act.***

3. This section must not be construed as impairing any contractual rights between a contractor and a subcontractor, supplier or design professional.

~~[5.]~~ ***4.*** As used in this section, "structural failure" means physical damage to the load-bearing portion of a residence or appurtenance caused by a failure of the load-bearing portion of the residence or appurtenance.

Sec. 16. NRS 40.695 is hereby amended to read as follows:

40.695 1. Except as otherwise provided in ~~[subsection]~~ ***subsections*** 2 ~~[,]~~ ***and 3,*** statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, ***and sections 2 and 3 of this act*** are tolled from the time notice of the claim is given, until ~~[30]~~ ***the earlier of:***

(a) One year after notice of the claim is given; or

(b) Thirty days after mediation is concluded or waived in writing pursuant to NRS 40.680.

2. Statutes of limitation and repose may be tolled under this section for a period longer than 1 year after notice of the claim is given 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 that good cause exists to toll the statutes of limitation and repose under this section for a longer period.

3. Tolling under this section applies to a third party regardless of whether the party is required to appear in the proceeding.

Sec. 17. NRS 11.202 is hereby amended to read as follows:

11.202 1. ~~[An]~~ ***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 ~~[at any time]~~ ***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 ***;*** ~~[which is the result of his or her willful misconduct or which he or she fraudulently concealed;]~~

(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.

2. The provisions of this section do not apply ~~[in]~~ *:*

(a) To a claim for indemnity or contribution.

(b) In an action brought against:

~~[(a)]~~ ***(1)*** The owner or keeper of any hotel, inn, motel, motor court, boardinghouse or lodging house in this State on account of his or her liability as an innkeeper.

~~[(b)]~~ ***(2)*** Any person on account of a defect in a product.

Sec. 18. NRS 11.2055 is hereby amended to read as follows:

11.2055 1. Except as otherwise provided in subsection 2, for the purposes of ***this section and*** NRS 11.202 , ~~[to 11.206, inclusive,]~~ 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.

2. If 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.

Sec. 19. NRS 113.135 is hereby amended to read as follows:

113.135 1. Upon signing a sales agreement with the initial purchaser of residential property that was not occupied by the purchaser for more than 120 days after substantial completion of the construction of the residential property, the seller shall:

(a) Provide to the initial purchaser a copy of NRS 11.202 ~~[to 11.206, inclusive,]~~ , ***11.2055*** and 40.600 to 40.695, inclusive ~~[.]~~ , ***and sections 2 and 3 of this act;***

(b) Notify the initial purchaser of any soil report prepared for the residential property or for the subdivision in which the residential property is located; and

(c) If requested in writing by the initial purchaser not later than 5 days after signing the sales agreement, provide to the purchaser without cost each report described in paragraph (b) not later than 5 days after the seller receives the written request.

2. Not later than 20 days after receipt of all reports pursuant to paragraph (c) of subsection 1, the initial purchaser may rescind the sales agreement.

3. The initial purchaser may waive his or her right to rescind the sales agreement pursuant to subsection 2. Such a waiver is

effective only if it is made in a written document that is signed by the purchaser.

Sec. 20. NRS 116.3102 is hereby amended to read as follows:

116.3102 1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:

(a) Shall adopt and, except as otherwise provided in the bylaws, may amend bylaws and may adopt and amend rules and regulations.

(b) Shall adopt and may amend budgets in accordance with the requirements set forth in NRS 116.31151, may collect assessments for common expenses from the units' owners and may invest funds of the association in accordance with the requirements set forth in NRS 116.311395.

(c) May hire and discharge managing agents and other employees, agents and independent contractors.

(d) May institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community. ***The association may not institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners with respect to an action for a constructional defect pursuant to NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act unless the action pertains exclusively to common elements.***

(e) May make contracts and incur liabilities. Any contract between the association and a private entity for the furnishing of goods or services must not include a provision granting the private entity the right of first refusal with respect to extension or renewal of the contract.

(f) May regulate the use, maintenance, repair, replacement and modification of common elements.

(g) May cause additional improvements to be made as a part of the common elements.

(h) May acquire, hold, encumber and convey in its own name any right, title or interest to real estate or personal property, but:

(1) Common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to NRS 116.3112; and

(2) Part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to NRS 116.3112.

(i) May grant easements, leases, licenses and concessions through or over the common elements.

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than

limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

(k) May impose charges for late payment of assessments pursuant to NRS 116.3115.

(l) May impose construction penalties when authorized pursuant to NRS 116.310305.

(m) May impose reasonable fines for violations of the governing documents of the association only if the association complies with the requirements set forth in NRS 116.31031.

(n) May impose reasonable charges for the preparation and recordation of any amendments to the declaration or any statements of unpaid assessments, and impose reasonable fees, not to exceed the amounts authorized by NRS 116.4109, for preparing and furnishing the documents and certificate required by that section.

(o) May provide for the indemnification of its officers and executive board and maintain directors and officers liability insurance.

(p) May assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides.

(q) May exercise any other powers conferred by the declaration or bylaws.

(r) May exercise all other powers that may be exercised in this State by legal entities of the same type as the association.

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or other thoroughfare within the common-interest community in violation of the governing documents. In addition to complying with the requirements of NRS 487.038 and any requirements in the governing documents, if a vehicle is improperly parked as described in this paragraph, the association must post written notice in a conspicuous place on the vehicle or provide oral or written notice to the owner or operator of the vehicle at least 48 hours before the association may direct the removal of the vehicle, unless the vehicle:

(1) Is blocking a fire hydrant, fire lane or parking space designated for the handicapped; or

(2) Poses an imminent threat of causing a substantial adverse effect on the health, safety or welfare of the units' owners or residents of the common-interest community.

(t) May exercise any other powers necessary and proper for the governance and operation of the association.

2. The declaration may not limit the power of the association to deal with the declarant if the limit is more restrictive than the limit imposed on the power of the association to deal with other persons.

3. The executive board may determine whether to take enforcement action by exercising the association's power to impose sanctions or commence an action for a violation of the declaration, bylaws or rules, including whether to compromise any claim for unpaid assessments or other claim made by or against it. The executive board does not have a duty to take enforcement action if it determines that, under the facts and circumstances presented:

(a) The association's legal position does not justify taking any or further enforcement action;

(b) The covenant, restriction or rule being enforced is, or is likely to be construed as, inconsistent with current law;

(c) Although a violation may exist or may have occurred, it is not so material as to be objectionable to a reasonable person or to justify expending the association's resources; or

(d) It is not in the association's best interests to pursue an enforcement action.

4. The executive board's decision under subsection 3 not to pursue enforcement under one set of circumstances does not prevent the executive board from taking enforcement action under another set of circumstances, but the executive board may not be arbitrary or capricious in taking enforcement action.

5. Notwithstanding any provision of this chapter or the governing documents to the contrary, an association may not impose any assessment pursuant to this chapter or the governing documents on the owner of any property in the common-interest community that is exempt from taxation pursuant to NRS 361.125. For the purposes of this subsection, "assessment" does not include any charge for any utility services, including, without limitation, telecommunications, broadband communications, cable television, electricity, natural gas, sewer services, garbage collection, water or for any other service which is delivered to and used or consumed directly by the property in the common-interest community that is exempt from taxation pursuant to NRS 361.125.

Sec. 21. 1. Section 2 of this act applies only to residential construction for which a contract is entered into on or after the effective date of this act.

2. The provisions of NRS 40.615 and 40.655, as amended by sections 6 and 15 of this act, apply to any claim that arises on or after the effective date of this act.

3. The provisions of NRS 40.645, 40.650 and 40.695, as amended by sections 8, 14 and 16 of this act, apply to a notice of a constructional defect given on or after the effective date of this act.

4. The provisions of NRS 40.647, as amended by section 11 of this act, apply only to an inspection conducted pursuant to NRS 40.6462, as amended by section 10 of this act, on or after the effective date of this act.

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; or

(b) If doing so would constitute an impairment of the obligation of contracts under the Constitution of the United States or the Constitution of the State of Nevada.

7. The provisions of NRS 116.3102, as amended by section 20 of this act, do not apply if a unit-owners' association has given notice of a constructional defect pursuant to NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act on or before the effective date of this act.

8. As used in this section:

(a) "Residential construction" means the construction of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance.

(b) "Unit-owners' association" has the meaning ascribed to it in NRS 116.011.

Sec. 22. NRS 11.203, 11.204, 11.205, 11.206 and 40.6452 are hereby repealed.

Sec. 23. This act becomes effective upon passage and approval.

LEADLINES OF REPEALED SECTIONS

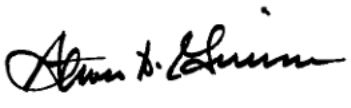
11.203 Actions for damages for injury or wrongful death caused by deficiency in construction of improvements to real property: Known deficiencies.

11.204 Actions for damages for injury or wrongful death caused by deficiency in construction of improvements to real property: Latent deficiencies.

11.205 Actions for damages for injury or wrongful death caused by deficiency in construction of improvements to real property: Patent deficiencies.

11.206 Actions for damages for injury or wrongful death caused by deficiency in construction of improvements to real property: Limitation of actions not a defense in actions based on liability as innkeeper or for defect in product.

40.6452 Common constructional defects within single development: Response to notice of defect by contractor; disclosure to unnamed owners; effect of contractor failing to provide disclosure to unnamed owners.



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EIGHTH JUDICIAL 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 **DEFENDANT/COUNTERCLAIMANT PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S OPPOSTION TO PLAINTIFFS/COUNTERDEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM AND OPPOSTION TO PLAINTIFFS/COUNTERDEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THEIR THIRD CLAIM FOR RELIEF IN THEIR COMPLAINT FOR DECLARATORY RELIEF**
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, and Does 1 through 1000, Counterclaimants, vs.	

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION,; DEAN ROOFING COMPANY; FORD CONTRACTING, INC.; INSULPRO, INC.; XTREME XCAVATION; SOUTHERN NEVADA PAVING, INC.; FLIPPINS TRENCHING, INC.; BOMBARD MECHANICAL, LLC; R. RODGERS CORPORATION; FIVE STAR PLINBING & HEATING, LLC, dba Silver Star Plumbing; and ROES 1 through 1000, inclusive,

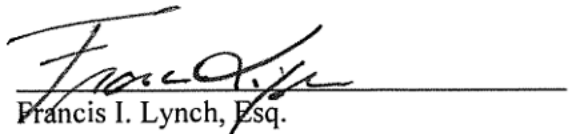
Counterdefendants.

Defendant/Counterclaimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION (hereinafter "Panorama" or "the Association"), by and through its counsel of record, hereby files their Opposition to Plaintiffs/Counterdefendants Laurent Hallier's, Panorama Towers I, LLC's, Panorama Towers I Mezz, LLC's, and M.J. Dean Construction, Inc.'s Motion for Summary Judgment on Defendant/Counterclaimant Panorama Tower Condominium Unit Owners' Association's Counterclaim and Partial Motion for Summary Judgment on their Third Claim for Relief in their Complaint for Declaratory Relief.

This Opposition is based upon the papers and pleadings on file, the following Memorandum of Points and Authorities, and any other argument that the Court may choose to entertain.

Dated: April 26, 2017

LYNCH HOPPER, LLP

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The instant action arises out of allegations of construction defects at the Panorama Towers Condominiums development ("Development"). The Development is a two-tower Master Planned Community located at 4525 Dean Martin Drive, Las Vegas, Nevada ("Tower I") and 4575 Dean Martin Drive, Las Vegas, Nevada ("Tower II"). The Development is composed of 616 separate interest condominium units, together with various common elements and amenities appurtenant thereto. Plaintiffs/Counterdefendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC were the developer entities for the Development, and Plaintiff/Counterdefendant M.J. Dean Construction, Inc. was the Development's general contractor. Collectively, the Plaintiffs/Counterdefendants shall hereinafter be referred to as "Builders".

Builders seek summary judgment on the Association's Counterclaim, and partial summary judgment on the third claim for relief in the Builder's complaint, because the Builders allege that Panorama "failed to comply with the express and mandatory requirements of Chapter 40". *See* Builders' Motion, p.7:23-24. Builders' Motion should be denied for the following reasons.

First, the Association has complied with the pre-litigation requirements of NRS 40.600 et seq., as set forth below.

Second, the Builder's Motion does not challenge the merits of the Association's Notice, only it's sufficiency. Builders' statutory interpretation of AB 125 notice requirements lacks authority, leads to absurd and unreasonable results and violates due process.

Third, summary judgment is inappropriate as there are unresolved questions of fact regarding the Association's Counterclaims.

Finally, even if the Association's compliance with the pre-litigation notice requirements of NRS 40.600 et seq. is found to be deficient, granting summary judgment on the Counterclaim would have the effect of dismissal, which is prohibited pursuant to NRS 40.647(2)(b) as it would prevent the Association "from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose." *See* NRS 40.647(2)(b) (This provision

was not altered by the enactment of AB 125). Instead, if the Court determines that the Association's Chapter 40 Notice is insufficient, it should stay the case and/or provide curative instructions, either through the Chapter 40 process or under the existing jurisdiction of the Court through the discovery process using the appointed Special Master. Therefore, the Association asks this court to deny the Builders' Motion in its entirety.

PROCEDURAL HISTORY/STATEMENT OF FACTS

The only facts needed to resolve the instant motion are those that have been alleged in the papers and pleadings on file herein, and in the exhibits and attachments thereto.

A. THE PRIOR LITIGATION

The Association filed a construction defect suit against Builders on September 9, 2009. That suit was settled pursuant to a settlement agreement in June, 2011, which specifically **did not** extend to claims arising out of defects that were not known to the Association at the time the agreement was executed. *See* Builders' Complaint, ¶51; *See* also Exhibit 4 to Plaintiffs' Opposition to Defendant Panorama Towers Unit Owners Association's Motion to Dismiss Complaint (submitted for in-camera review on January 4, 2017). Builder's Counsel in the instant litigation represented the Builders in the prior litigation.

B. THE CHAPTER 40 PRE-LITIGATION PROCESS

On February 24, 2016, the Association served Builders with a Chapter 40 Notice ("Notice") asserting defects discovered by the Association subsequent to the settlement of the prior litigation. The Chapter 40 Notice alerted Builders to defects and damages involving (1) residential tower windows; (2) residential tower fire blocking; (3) mechanical room piping; and (4) sewer piping. See Builders' Motion, *Exhibit 1*, p.1-2.

On or about March 24, 2016, Builders attended a visual inspection of the defects alleged in the Notice. During the inspection, Builders observed that certain repairs to the defects alleged in the Notice had been commenced or completed based upon their imminent threat to the health and safety of the Development's occupants. Builders declined to cure or participate in the any of the repairs at that time.

On May 24, 2016, Builders served the Association with their Response to the Association's

Chapter 40 Notice. In their Response, Builders disclaimed liability for each defect and elected not to perform repairs. On September 26, 2016, the parties participated in a pre-ligation mediation conference regarding the allegations contained the Chapter 40 Notice.

However, instead of participating in the mediation conference in good faith to simplify the dispute resolution process or to prevent litigation, Builder's participation was perfunctory. At no point were the merits of the Association's Notice challenged, nor was its legal sufficiency. In fact, instead of endeavoring to avoid litigation, Builders expressly announced their intent to sue the Association for having given notice of the defects, going so far as to prepare a tender of defense which was theatrically served upon the Association's counsel at the mediation. *See* Builders' Opposition to Motion to Dismiss, p.7:20-23.

The legislative intent behind Chapter 40 can only be accomplished if the parties work together in good faith. *See* e.g. *Olson v. Richard*, 120 Nev. 240, 246, 89 P.3d 31, 25 (2004) (dissent) (Chapter 40 "is an alternative dispute resolution process with penalties for failure to participate or bad faith participation") (*citing* 2 Journal S., 68th Leg. 1186-87 (Nev. 1995); Hearing on S.B. 395 Before the Assembly Comm. On Judiciary, 68th Leg. 5 (Nev., June 23, 1995)). For precisely that reason, the Legislature included a duty of good faith in the statute, expressed in terms of reasonableness.[1] Builders clearly did not intend to mediate in good faith, as further evidence by the fact that their Complaint for Declaratory Relief was filed 48 hours after the close of mediation.

C. THE BUILDERS' COMPLAINT

On September 28, 2016, two days after the mediation conference, Builder filed a Complaint against the Association. The Complaint asserts the following claims for relief: (1) Declaratory Relief – Application of AB 125; (2) Declaration Relief – Claim Preclusion; (3) Failure to Comply with NRS 40.600 et seq.; (4) Suppression of Evidence/Spoliation; (5) Breach of Contract; (6) Declaratory Relief – Duty to Defend; and (7) Declaratory Relief – Duty to Indemnify. The Association moved for dismissal of Builders' Complaint, which was denied at the motion's hearing

[1] *See e.g.* NRS 40.650 (contractor's denial of liability must be made in good faith, NRS 40.670(2) (liability for attorney's fees and costs dependent upon contractor's good faith in certain circumstances, NRS 40.680 and 40.684(2) (requirement to mediate in good faith))).

on January 24, 2017.

The Association filed its Answer to Builders' Complaint as well as a Counterclaim against Builders and other named counterdefendants. None of the other counterdefendants have appeared in the case to this point. Service of the Association's Counterclaim is ongoing.

The parties stipulated to deem the case complex and to the appointment of Floyd Hale, Esq. as Special Master. A Case Management Order was filed and served upon the parties on March 23, 2017, and subsequently amended via correspondence with the Special Master on April 21, 2017. While Builders' motion contends that discovery has not commenced, litigation is moving forward, as evidenced by Builders' Notice of Taking the Deposition of the Custodian of Records for Southern Nevada Health District, filed with this Court of April 24, 2017. No trial date has been set.

LEGAL ARGUMENT

A. LEGAL STANDARD

1. Summary Judgment Standard

Summary judgment is appropriate only when, reviewing the evidence in the light most favorable to the non-moving party, "the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

2. Application of NRS 40.600 et seq.

Nevada's construction defect law, NRS 40.600 et seq., was enacted to promote and facilitate the timely and cost-effective settlement of complex construction defect cases without resort to litigation. *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 123 Nev. at 481, 168 P.3d at 741 (2007) ("*First Light I*"). The pre-litigation notice provisions, which are intended to allow homeowners and contractors working together to resolve disputes without litigation, should thus be interpreted in such a way that an unsophisticated layperson can comply with the statute unaided by counsel. *Id.* at 478-479, 738-39.

The law dictates that any notice a property owner sends, whether individually or similarly situated, is presumed to be valid. *Id.* at 481, 741. The burden of demonstrating that a notice is

insufficient rests entirely upon the contractor, and the contractor must do so with specificity. *Id.* Public policy favors this approach, and for obvious reasons. The Chapter 40 pre-litigation process strips property owners of their constitutional right to timely access to justice and equal protection of the law if contractors are allowed to use the process as a shield to frustrate civil litigation. *Id.* at 482, 741; *See also* NV. Const. Art. 1§3; NV. Const. Art. XIV §1. These principles are paramount to this Court's "wide discretion" in equity to review these virtually automatic, and almost perfunctory, defense challenges to notices regardless of their content.

3. The Builders Remedy Under NRS 40.647(2).

NRS 40.647(2) provides:

> If a claimant commences an action without complying with subsection 1 or NRS 40.645, the court shall:
> (a) Dismiss the action without prejudice and compel the claimant to comply with those provisions before filing another action; or
> (b) If dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance with those provisions by the claimant.

NRS 40.647 provides that where NRS Chapter 40 compliance is found to be inadequate, a court need only stay proceedings to allow for compliance with Chapter 40, especially where dismissal of claims would place claims in jeopardy as a result of applicable statutes of limitation or repose.

Here, the sole basis asserted by Builders in support of their Motion is the allegation that the Association failed to comply with the pre-litigation notice procedures of NRS 40.600 et seq. *See e.g.* Builders' Motion, p.18:15-17. While the Association disputes this allegation, nevertheless, even if this allegation were true, dismissing the Association's claims would be improper on the grounds that that the Association will be procedurally barred from bringing a new action by the statute of limitation and/or the statute of repose.

B. THE ASSOCIATION SATISFIED CHAPTER 40'S NOTICE REQUIREMENTS

1. Chapter 40 Notices are presumed valid; which can only be overcome by a specific showing of unreasonableness.

In *First Light I,* the Nevada Supreme Court held that it is within the discretion of the courts to determine whether or not property owners provided "reasonable detail" in their Chapter 40

Notices. However, the exercise of that discretion must begin with presumption of validity that can only be overcome by a specific showing that the notice is unreasonable.

> We further conclude that pre-litigation notices are **presumed valid** under NRS 40.645. **A contractor who wishes to challenge the adequacy of a pre-litigation notice bears the burden of doing so with specificity**. Because each case is factually distinct, the district courts have wide discretion to consider each contractors challenge to the reasonableness of each pre-litigation notice.

First Light I, 123 Nev. at 481, 168 P.3d at 741 (emphasis added). Under *First Light I*, the presumption of validity remains intact until such a time as the builder meets its burden to prove "with specificity" that the notice in question is inadequate. *Id.* Additionally, the Nevada Supreme Court states, "To guide district courts in the exercise of that discretion, this court now establishes a 'reasonable threshold test,' which every pre-litigation notice must satisfy, but only if challenged by the contractor." *Id.* at 479, 739. Here, on the day that it was given, February 24, 2016, the Association's Chapter 40 Notice was presumed valid. *Id.* at 481, 168, P.3d at 741. The presumption of validity remains intact unless and until a court holds otherwise. In order for a court to determine that a builder has adequately rebutted that presumption of validity, a builder must first challenge the validity of the notice in court. Notably, the Builders in the instant action elected not to offer such a challenge at any point during the Chapter 40 process. The adoption of AB 125, and its subsequent changes to NRS Chapter 40, has not overturned the presumption of validity or the Nevada Supreme Court's guidance in *First Light I*.

2. Notice statutes require substantial, rather than technical compliance.

Notice statutes, including NRS 40.645, must be pragmatically, rather than rigidly applied. Accordingly, when evaluating compliance with NRS 40.645, courts must apply a substantial compliance standard. *See Leven v. Frey*, 123 Nev. 399, 408, 168 P.3d 712, 718 (2007) (recognizing "the general tenant that 'time and manner' requirements are strictly construed, whereas substantial compliance may be sufficient for 'form and content' requirements."); *Las Vegas Convention and Visitors Authority v. Miller*, 124 Nev. 669, 191 P.3d 1138 (2008) ("substantial compliance standard generally applies to the statutory requirements"). As explained by the Nevada Supreme Court in

Schleining v. Cap. One, Inc., "In determining whether strict or substantial compliance with a statute is required, 'we examine whether the purpose of the statute or rule can be adequately served in a manner other than by technical compliance with the statutory or rule language.'" 130 Nev. Adv. Op. 36, 326 P.3d 4, 5 (2014) (quoting *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 255 P.3d 1275, 1278 (2011)). This is in keeping with the well-established policy that claims should be decided based upon their merits rather than technical niceties. *See e.g. Costello v. Caslet*, 127 Nev. Adv. Op. 36, 254 P.3d 631, 634-635 (2011).

3. The Association's Notice comports with Chapter 40's statutory intent.

In *First Light I,* the Nevada Supreme Court held the reasonable detail requirements of NRS 40.645 are ambiguous. *First Light I*, 123 Nev. at 478, 168 P.3d at 738. Therefore, the courts must interpret NRS 40.645 "in light of the policy and the spirit of the law, and the interpretation should avoid absurd results." *Westpark Owners' Ass'n v. Eight Judicial Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007) ("*Westpark*").

NRS Chapter 40 is a dispute resolution statute intended to reduce the complexity and the cost of construction defect litigation. In service of this intention, pre-litigation notice is meant to simplify the dispute resolution process and, where possible, "prevent litigation altogether." *First Light I,* 123 Nev. at 476, 168 P.3d at 737. Where it instead makes the process more cumbersome and costly, pre-litigation notice frustrates rather than furthers the purpose and intent of the statute. *Id.* at 482, 741 (instructing "the district court [to] use its wide discretion to ensure that a contractor is not utilizing NRS 40.645 as a shield for the purpose of delaying the commencement of repairs or legitimate litigation."). Moreover, Chapter 40 should be interpreted in a way that "preserves the legislative purpose of providing homeowners a fairly expansive remedy[.]" *Westpark,* 123 Nev. at 360, 167 P.3d at 429.

Additionally, although a pre-litigation notice is not a pleading, Nevada's general pleading rule provides guidance as to what level of detail should be deemed reasonable. *See* NRCP 8(a). The general pleading rule is designed to ensure plaintiffs have their day in court and defendants receive information regarding the claims against them sufficient to respond and defend themselves.

See e.g. Hall v. SFF, Inc., 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) (complaint sufficient if it gives defending party adequate notice of nature of claims asserted and relief sought.) Similarly, NRS 40.645 is designed to ensure that contractors receive information regarding construction defect claims sufficient to either repair the claims or defend against them in ensuing litigation. Under Nevada's notice pleading standard, the allegations in a complaint are sufficient if they give "fair notice" of the nature and basis of the claim. *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408 (1984). Similarly, if the information contained in a Chapter 40 notice gives fair notice of the nature and basis of the underlying construction defect claims, it should be deemed reasonable.

In determining whether pre-litigation notices provide fair notice to contractors, it is also important to remember that, unlike contractors, homeowners and associations who are tasked with providing notice are laypeople. Trained and experienced contractors, on the other hand, have a differing level of expertise altogether. They are well equipped to conduct forensic investigations to determine the cause of defects and scope of repairs. Arguably, no one knows the Development better than the Builders (they built it). Thus, in determining whether the Notice is reasonable, this Court must consider whether the information provided by a lay homeowners' association provided fair notice of the claims, and thereby afforded Builders (construction professionals) reasonable opportunity to exercise their right to inspect and decide to repair or litigate.

4. The Association's Notice was reasonable, valid and substantially complied with NRS 40.600 et seq.

a. The Association's Notice identifies each defect and their respective locations.

Because the Chapter 40 Notice gives sufficient detail for the Builder to identify the location of each defect in each location where it has occurred, the Chapter 40 Notice is reasonable, valid, and complies with the requirements of Chapter 40, as amended by AB 125. Moreover, the details pertaining to the identities and locations of the defects are inherent in their descriptions. For example, design deficiencies in window assemblies are located inside of windows. Corrosion damage to mechanical room piping can be found in the piping of the mechanical room. Beyond

the obvious, the Notice includes descriptions of the defects, and their locations, in detail sufficient to put the Builder on notice of the claims asserted.

(1) Residential Tower Windows

The descriptions set forth in the Notice identify specific defects in the window assemblies of the residential tower units. Specifically, the Notice identifies the absence of "sill pans, proper weepage components or other drainage provisions designed to direct water from and through the window assemblies to the exterior of the building." *Id.* This defect is further described as a "design deficiency that exists in all (100%) of the residential tower window assemblies". *Id.* The identification of this defect as a design deficiency is significant; as the Court no doubt understands, design defects are homogenous. They appear in all locations that the deficiency predicts their appearance. In this instance, that means it is located in **all** of the residential tower window assemblies, precisely as described in the Notice. The Builder decries the reality that there are in excess of 9,500 windows in the Development. *Id.*, p.14:24-25. This does not, however, challenge the sufficiency of the Notice, which specifically describes the deficiency as being confined to the window assemblies of the **residential tower units**. *Id.*, *Exhibit 1,* p.1. If anything, the quantity of windows at the Development serves as a demonstration of the defect's significance (the merits of which have yet to be challenged in any way by the Builders), not as an argument for the Notice's inadequacy. Builders additionally direct the courts attention to Exhibits 2 and 3 of their Motion as further evidence that the Chapter 40 is deficient in its description of the window defects. *Id.,* p.15:1-3. Curiously, though, the correspondence in these Exhibits contain no discussion whatsoever regarding the windows.

(2) Residential Tower Fire Blocking

The descriptions set forth in the Notice also specifically identify the absence of fire blocking insulation, which is required by the building code and called for by the buildings plans. Specifically, the Notice identifies that the fire blocking insulation "was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both." *Id.* The defect is specifically identified as an installation deficiency, present in "all (100%) of the residential tower units". *Id.* The defect and its exact location are specifically identified with sufficient detail to appraise the

Builder of the claims that are being asserted.

(3) Mechanical Room Piping

The descriptions set forth in the Notice further identify corrosion damage to the piping in the mechanical rooms of the Development's tower structures. Specifically, the Notice alerts the Builder that "[t]he piping in the two lower and two upper mechanical rooms in the two tower structures has sustained corrosion damage as described in the attached ATMG report…" *Id.,* Exhibit 1, p.2. The ATMG report, attached to the original Notice as Exhibit B, specifically identifies not only the precise piping room defects that are alleged, but also their specific locations (including photographic documentation). *See generally Id., Exhibit 1*, p.29-71. Given the level of detail contained in the report, Builders position that "it also fails to provide the requisite **specific details** regarding the alleged defect and resulting damage" appears almost absurd. *Id.,* p16:1-2. The report is extensive to say the least.

(4) Sewer Problem

Finally, the descriptions set forth in the Notice identify a rupture in the main sewer line connecting the Development to city sewer system. The defect (a rupture due to an installation error) and the location (the main sewer line connecting to the city sewer system) are identified specifically. *Id.,* Exhibit 1, p.2. Moreover, the defect was described as presenting an unreasonable risk of injury to persons or property "resulting from the disbursement of unsanitary matter". *Id.* Consequently, the defect was repaired almost immediately upon its discovery. Notice and inspections of the defect simply weren't possible at the time. It was only after the Association was made aware that damages resulting from the defect were recoverable because the sewer problems were not released in the Prior Litigation that the decision was made to pursue the issue.

Builders are not prejudiced by the inclusion of this defect in the Chapter 40 Notice, despite their claims to the contrary. The discovery process would be more than sufficient to provide the Builders with the information they claim to require. The Notice elucidated the defect and its location, sufficient to alert the builder to the claim alleged. What Builders claim to seek beyond the information contained in the Notice appears calculated not to inform them, but to fuel a spurious suppression of evidence/spoliation claim against the Association. *See* Builders'

Complaint, p.14: ¶'s 91-93. Notably, Nevada does not recognize an independent tort for such a claim. *See Timber Tech Engineered Bldg. Product v. The Home Ins. Co.,* 118 Nev. 630, 55 P.3d 952 (2002).

b. The Association's Notice also describes in reasonable detail the cause of the defects, and the nature and extent of the damage to the extent that they are known.

The same portions of the Notice that describe the defects also identify the cause of the defects and the resulting damages to the extent they were known at the time. In some instances, the defects themselves are the damage. In others, the damage is inherent in the description or explicitly identified in the same section. For example, "[t]he piping . . . has sustained corrosion damage", which was subsequently described in detail in the Notice's exhibits. *See* Builders' Motion, Exhibit 1, p.2. All that is required by statute is a "reasonable description" of the cause of the defects and the damages "to the extent that is known". NRS 40.645(2)(c). That is exactly what was provided in the Association's Notice.

c. The Association's Notice contained a statement, signed under penalty of perjury by a member of the Association's executive board or officer of the homeowners' association.

Specifically, the Chapter 40 Notice contains a "Verification of Expert Reports Pursuant to 40.645" bearing the signature of Dennis Kariger. *See* Builders' Motion, Exhibit 1, p.3-4.

C. THE BUILDER'S INTERPRETATION OF AB 125 IS UNREASONABLE, LEADS TO AN ABSURD RESULT, AND VIOLATES DUE PROCESS

Builders' summary judgment motion makes no effort whatsoever to challenge the sufficiency of the Association's Notice on its merits. Instead, Builders motion is based entirely upon the construction of NRS 40.600 et seq., as amended by AB 125. Builders' Motion, p.13:25-28 – p.14:1-5. Curiously, they do so without citing to even a single case statutory construction. The reason for the absence of such authority is simple: Builders' interpretation on AB 125 violates many of the well known and long accepted standards for statutory construction. The statutory interpretation espoused by Builders' Motion is contrary to Nevada law, is unreasonable, leads to an absurd result, and violates the due process rights of the Association.

Builders grossly overstate the requirements of Chapter 40 with respect to the requirements

for descriptions of defects. NRS 40.600 et seq. requires a notice to identify the specific defect including its location within a typical unit. It does **not**, however, require every defect to be specifically located within **each and every** unit. *See* NRS 40.645(2). The statute requires a notice to "identify in specific detail each defect, damage and injury to each residence . . . that is the subject of the claim, including, without limitation, the exact location of each such defect, damage and injury" *Id.* Builders apparently wish to add the words "in each unit" to the end of that sentence, so that each defect's location much be identified "in each unit". That is not what the statute says, however. There is no requirement to identify each defect location in each unit, but only to identify each defect, by nature and location, and the units or locations to which that defect applies. This distinction is significant as Builders' interpretation would require the inspection and destructive testing of every unit, and would obviate any use of extrapolation or representative sampling. It would raise the Associations' costs exponentially in the Chapter 40 process. This is precisely the type of absurd result that statutory interpretation must avoid. *See Westpark,* 123 Nev. at 349, 357; *See also Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 ("a statute's language "'should not be read to produce absurd or unreasonable results.'").

Builders' strained interpretation leads to additional absurd and unreasonable results. The costs associated with the inspection and destructive testing for **each and every** occurrence of the defects is prohibitive. The specific identification of each and every occurrence of the design deficiency relating to the residential unit windows, or the installation deficiency relating to the residential tower fire blocking, would be so expensive as to frustrate even preliminary pursuit of the Association's claims. For example, inspection and testing of the window assemblies in each and every unit where the design deficiency is calculated to occur would require: (1) the retention of contractors to remove furniture, cabinetry, carpeting, and appliances in preparation for testing; (2) the removal of baseboards, sheetrock, water proof membranes and mineral wool fiberglass insulation; (3) the attendance of representative for both parties *during* the testing, instead of before and/or after, as evidence of damage (biological growth, e.g.) would be removed during the testing; and (4) extensive put back work, including the return and installation of all items moved or removed during preparation. *See Affidavit of Omar Hindiyeh* attached hereto as *Exhibit A*, p.4:15-

25 and p.5:1-23. According to Builders' interpretation of AB 125, this work would need to be repeated in **each and every** of the Development's 616 units. The projected cost of this work exceeds **$8,000,000**. *Id.,* ¶ 9. These costs do not include financial expenditures for testing of the additional 20 townhouse units or the loft, retail and office space. Nor do they account for the costs that would incurred in providing the residents with temporary housing during the testing and inspections. *Id.,* ¶'s 9-10.

Moreover, the inspection and testing relating to the mechanical room piping is similarly cost prohibitive. The inspection and testing of **each and every** occurrence of the defects delineated in the Associations notice (and described in specific detail in the attachments thereto) would require: (1) thermodynamic and water analysis; (2) extensive disassembly and laboratory testing of the boilers and lochinvar; (3) extensive disassembly and laboratory testing of the Victaulic butterfly valves; (4) extensive disassembly and testing of the Victaulic/Shurjoint/Rigidlok couplings; (5) extensive disassembly and laboratory testing of the Victaulic end cap on the stainless steel piping; (6) cutting welded connections and extensive testing of the stainless steel piping; (7) the removal of fasteners and performance of composition analysis of the braided SS flex pipe flanges; (8) the extraction and analysis of multiple steel to stainless and brass connections; (9) the disassembly of cast iron bodies, stainless steel diaphragm caps, along with bolts, copper pipe, brass fittings, and pilot valve controllers; (10) the extraction and laboratory testing of the Flowguard Gold CPVC used in the hot water lines; and (11) the extraction and laboratory testing of the Keeney-Single chrome plated yellow brass angle stops, laundry valves and HVAC valves.) *See Affidavit of Randy Kent,* attached hereto as *Exhibit B,* at p.3:4-27 and p.5:1-21. Each of these steps additionally requires the draining and refilling of multiple lines, as well as reassembly of each component following disassembly and testing. *Id.* The total cost of the testing and inspection of **each and every** occurrence of the mechanical room piping defects exceeds **$2,400,000**. *Id.,* p.4:21-22.

Effectively requiring a claimant to expend costs exceeding **$10,000,000** before they may even gain access to the courts is not a pragmatic application of NRS Chapter 40, and this is precisely what Builders' interpretation requires. More importantly, these costs demonstrate that

this strained reading of the statute produces results that are both absurd and unreasonable, which is what courts aim to avoid when interpreting statutes like those at issue here. *See Westpark,* 123 Nev. at 349, 357; *See also Leven v. Frey*, 123 Nev. at 399, 405.

In addition to the absurd and unreasonable results yielded by Builders' interpretation of AB 125, it also violates the Association's due process rights. The Nevada Supreme Court has already recognized that NRS 40.645 is "ambiguous" and puts up extraordinary impediments to the constitutional right of access to justice. *First Light I,* 123 Nev. At 482, 168 P.3d at 741. By requiring homeowners to expend exorbitant costs to specifically identify each defect and its location in **each and every** instance where it occurs (which is not contemplated by the statute), Builders put up impediments to the constitutional right of access to justice that aren't simply extraordinary, they are plainly unconstitutional.

D. SUMMARY JUDGMENT ON THE ASSOCIATION'S CAUSES OF ACTION MAY NOT BE GRANTED AS THERE ARE UNRESOLVED QUESTIONS OF FACT

Builders provide absolutely no discussion whatsoever of the elements essential and material to the Association's claims for breach of warranties, negligence, products liability, breach of contract, intentional/negligent nondisclosure, or breach of the duty of good faith and fair dealing. Builder's "summary of undisputed facts" utterly fails to address the facts necessary to establish or defeat such claims. *See* Builders' Motion, p.10-11. The Association, however, has set forth facts demonstrating myriad unresolved questions of fact related to its Counterclaims. *See Exhibit A; See also Exhibit B.* The affidavits attached hereto affirmatively set forth evidence demonstrating the existence of material issues of fact. Summary judgment is only appropriate in the absence of such a demonstration, and Builders have fallen far short of meeting this requirement.

In spite of Builders' wholesale failure to address the Counterclaims' merits or factual content, they ask this Court to grant summary judgment in its favor and against the Association. The unsupported request for summary judgment on the Counterclaims' substantive causes of action highlights the abuses that would follow if builders are allowed to ignore their obligation to challenge presumptively valid Chapter 40 notices in court before the close of the Chapter 40 pre-litigation process. Specifically, if Builders had raised their challenge to the Association's Notice

during the Chapter 40 process, a court could have evaluated the sufficiency of the Notice and if, for some reason, it found the contents to be insufficient, could have directed the Association to provide additional information, after which the Association would have had a meaningful opportunity to participate in, and have their claims resolved, though the pre-litigation dispute resolution procedures set forth in NRS Chapter 40. Instead, by waiting to challenge the Notice until after the Chapter 40 process was completed, and by initiating litigation against the Association, Builders now seek to use their notice challenge not as a means to obtain additional information to assist the parties in resolving their disputes, but to completely shield itself from any liability to the Association. This use of the NRS Chapter 40 process renders it futile, and if by engaging in such practices Builders are allowed to prevent the Association from accessing the courts and obtaining redress for their legitimate construction defect claims, the entire statutory scheme is rendered unconstitutional.

E. IN THE ALTERNATIVE, THE COURT SHOULD STAY THE CASE AND/OR PROVIDE CURATIVE INSTRUCTIONS

This Court has the discretion to say and/or offer curative instructions to preserve all or any claims from forfeiture even in the event that it determines that there might be issues with the Notice. NRS 40.647(2)(b*)*. The law plainly favors the prosecution of legitimate claims and resolution on the merits. This is especially true given that the Nevada Supreme Court openly opined that NRS 40.645 is "ambiguous" and puts up extraordinary impediments to the constitutional right of access to justice. *First Light I*, 123 Nev. At 482, 168 P.3d at 741. Given that Builders elected not to challenge the sufficiency of the Chapter 40 Notice in court during the Chapter 40 pre-litigation process, electing instead to sue the Association immediately following their perfunctory participation in pre-litigation dispute resolution, and given that the merits of the Association's claims have yet to be challenged in any substantive fashion, the exercise of that discretion would be called for should the Court determine that the Notice at issue is in some way deficient.

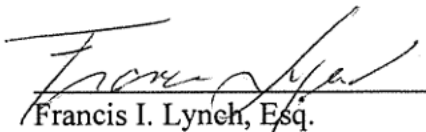
F. CONCLUSION

For all of the foregoing reasons, Builders' motion should be denied in its entirety. Not only

did the Association's Notice satisfy Chapter 40's notice requirements, but Builders' interpretation of AB 125 lacks authority, is unreasonable, leads to an absurd result, and violates due process. Moreover, genuine issues of material facts regarding the Association's counterclaims abound, rendering summary adjudication of the claims inappropriate. Alternatively, in the event that the Court determines that the Association's Notice is somehow deficient, the proper remedy is to stay the litigation and/or to provide curative instructions, not the effective dismissal of the Association's claims.

Dated: April 26, 2017

LYNCH HOPPER, LLP

By: 

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Nevada Bar No. 4145
Charles "Dee" Hopper, Esq.
Nevada Bar No. 6346
Sergio Salzano, Esq.
Nevada Bar No. 6482
1210 S. Valley View Blvd., Suite 208
Las Vegas, Nevada 89102

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of April, 2017, a copy of the foregoing, DEFENDANT/COUNTERCLAIMANT PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S OPPOSTION TO PLAINTIFFS/ COUNTERDEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM AND OPPOSTION TO PLAINTIFFS/COUNTERDEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON THEIR THIRD CLAIM FOR RELIEF IN THEIR COMPLAINT FOR DECLARATORY RELIEF, was electronically served through Wiznet upon all parties on the master e-file and serve list, including:

BREMER WHYTE BROWN & O'MEARA LLP
Peter C. Brown, Esq.
Darlene M. Cartier, Esq.
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144

By: _____
for Lynch Hopper, LLP

EXHIBIT A

EXHIBIT A

Francis I. Lynch, Esq. (Nevada Bar No. 4145)
Charles "Dee" Hopper, Esq. (Nevada Bar No. 6346)
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(Admitted Pro Hac Vice)

Counsel for Defendant

EIGHTH JUDICIAL 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
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, and Does 1 through 1000, Counterclaimants, vs. LAURENT HALLIER, an individual;	

PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION,; DEAN ROOFING COMPANY; FORD CONTRACTING, INC.; INSULPRO, INC.; XTREME XCAVATION; SOUTHERN NEVADA PAVING, INC.; FLIPPINS TRENCHING, INC.; BOMBARD MECHANICAL, LLC; R. RODGERS CORPORATION; FIVE STAR PLINBING & HEATING, LLC, dba Silver Star Plumbing; and ROES 1 through 1000, inclusive,

Counterdefendants.

AFFIDAVIT OF OMAR HINDIYEH IN SUPPORT OF PANORAMA'S OPPOSITION TO HALLIER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Omar Hindiyeh, being first duly sworn, state as follows:

1. I received a Bachelor of Science degree in civil engineering from San Jose State University in 1978. I am a licensed general contractor in California (license no. 757672) and in Nevada (license no. 53133). I am the owner and president of CMA Consulting (CMA), formed in 1985, which specializes in construction management and forensic investigation services. A copy of my CV, which includes my licenses, certifications and professional affiliations, is attached hereto as Exhibit 1.

2. If called as a witness, I could and would testify to the matters stated herein based on my own personal knowledge.

3. CMA Consulting was retained by the Panorama Towers Condominium Unit Owners' Association in August, 2013, to investigate and repair leakage conditions in one of the units of the Panorama development, Unit 300, located on the third story of Tower 1, 4525 Dean

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Martin Drive, Las Vegas. When CMA was retained, the walls had all already been opened by another contractor and the mold conditions in the wall assemblies had been remediated.

4. I was personally involved in all phases of CMA's investigation and repair of Unit 300, which took place over the period August 2013 through July 2016, at a total cost of $206,058 (exclusive of demolition and mold remediation).

5. The conditions in Unit 300 that required repair were twofold:

(a) Window leakage – The exterior wall window assemblies were not properly designed with drainage provisions, such as sill pans and weepage components, with the result that water entering the window assemblies was not diverted to the exterior of the building, but instead drained into the wall assemblies below and adjacent to the windows, causing corrosion to the metal framing components of the exterior wall assemblies, including the curb walls that support the windows, thereby compromising the structural integrity of the exterior walls.

(b) Fire blocking and insulation – While investigating the leakage conditions in Unit 300, we discovered that insulation was missing in the ledger shelf cavities and that fire blocking was missing in the steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. The plans called for insulation and fire blocking, as required by the building code, at these locations. The purpose of the fire blocking and insulation is to deter the spread of fire from one tower unit to the units above or below, and to prevent condensation from occurring within the exterior wall assemblies.

6. From November, 2015, through January, 2016, CMA inspected 15 units in the two towers to determine if the conditions observed in Unit 300 existed in other units in the towers. Units in the two towers were selected from different floors and with different facing exposures to obtain a mixed sampling. The inspections, which typically included multiple locations within each unit inspected, included pulling back carpet, removing electrical outlet faceplates, pulling back baseboards and/or cutting through the sheetrock behind the baseboards. These inspections yielded the following results:

(a) Window leakage – The steel stud framing was found to be corroded as the

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result of leakage in 76% of the window locations inspected.

(b) Fire blocking and insulation – Of the ledger shelf cavities inspected, 76% had no insulation. Many of the steel stud framing cavities had questionable and/or a lack of proper fire blocking provisions.

7. For purposes of responding to Hallier's motion, CMA was asked to estimate the costs that would be required to perform the following:

(a) Identify "in specific detail … the exact location of each … defect, damage and injury" related to (i) leakage through the window assemblies that is causing corrosion damage to the metal framing components of the building, and (ii) required fire blocking and insulation that is missing.

(b) Schedule and have a CMA representative "present" for inspections by Hallier's representatives to provide them with the identifications described in Paragraph 7(a), above.

8. In order to perform the above functions, the following steps would be required for each unit in each of the two towers:

(a) Preparation – It would be necessary to retain a contractor to first remove all furniture and fixtures adjacent or connected to the exterior walls of the unit, and pull back any carpeting from those areas. In the case of kitchens, this would include the removal of cabinetry and built-in kitchen appliances on the exterior walls. The removed furniture, fixtures and appliances would have to be stored in a secure location if there is insufficient room within the unit. The contractor would have to then provide protective floor coverings for paths of ingress and egress and the work areas adjacent to the exterior walls.

(b) Destructive testing – In order to identify "the exact location of each … defect, damage and injury" related to (i) corrosion, mold and other damage caused by leaking windows, and (ii) missing insulation and fire blocking, the following destructive testing would be required: Remove all baseboards along the entire length of the exterior walls of the unit, remove all sheetrock covering the curbs below each of the windows, and remove all water proof membranes, mineral wool and fiberglass insulation from the curbs.

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(c) Inspection – It would be necessary to have a CMA representative and Hallier's representative present for the above testing to conduct an inspection to identify "in specific detail … the exact location of each … defect, damage and injury." They would have to be present during the testing, instead of after the testing is completed, because, for example, evidence of "damage" – *e.g.*, evidence of biological growth on the back of sheetrock – would be removed during the testing. Notably, inherent delays are involved when scheduling mutually convenient dates and times when multiple parties are involved, which would add to the cost of the inspections.

(d) Put-back work – It be necessary following the inspection to have the contractor return and install insulation and waterproof membrane in all the curbs, reinstall cabinetry, fixtures and appliances that had been removed (and/or stored), touch-up paint the cabinetry, replace the sheetrock and baseboard that had been removed, repaint the baseboard, retexture and repaint the sheetrock on walls that had been painted, replace wallpaper or other wall coverings where appropriate, replace all carpeting furniture that had been removed (and/or stored) from the exterior wall locations.

9. CMA estimates that the foregoing expenses – for the work and materials provided by a contractor, storage of the occupant's property, and charges for CMA's services – would amount to an average cost of $13,145 per unit. There are 616 "standard" units in the two towers, which would bring the total cost to $8,097,320 ($13,145 x 616 units) for the standard units. This does not include an additional 20 townhouse units, 12 lofts and retail and office space in the two towers, the testing and inspections of which would substantially increase this estimated cost.

10. Also, the above cost does not include the cost of placing the occupants in temporary housing during the testing and inspections.

11. Performing the above described testing and inspections, at a cost of $8,097,320 for the 616 "standard" units, would result in a phenomenal waste of money, as all these costs would have to be duplicated when the Association subsequently undertakes to repair the defects involved.

12. I declare under the penalty of perjury under the laws of Nevada that the foregoing

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is true and correct. If called as a witness, I could and would competently testify thereto.

Omar Hindiyeh

SUBSCRIBED and SWORN to before me this 26 day of April, 2017.

NOTARY PUBLIC

AVTAR SINGH NAT
NOTARY PUBLIC - CALIFORNIA
COMMISSION # 2094185
SANTA CLARA COUNTY
My Comm. Exp. January 16, 2019

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EXHIBIT “1"

OMAR HINDIYEH
CMA CONSULTING
PRESIDENT

EXPERIENCE

CMA Consulting, Livermore, CA, Owner, President 1985-Present. Construction Management and Building Construction Consulting Firm. Responsible for and perform the following: Pre-construction planning (cost feasibility studies, technical inspections, construction contracts negotiation, quality control, specification writing), on-site construction inspection and management of all phases of construction including earthwork, paving, concrete, carpentry, roofing, fenestrations, stucco, cladding, plumbing, mechanical, electrical; etc., building component studies, forensic construction defect investigations.

OSO Developers, Inc., San Jose, CA, Owner, President, Vice President 1980-1987. General Engineering and Building Construction Firm. Responsible for and performed the following: Earth-moving, excavating, grading, trenching, paving and concrete foundation work; building construction of all phases of construction including carpentry, roofing, fenestrations, stucco, cladding, plumbing, mechanical, electrical etc., new construction, alteration, improvement and repair of single-family and multi-family residential structures; light commercial and industrial structures; building construction inspection and general engineering consulting work.

Chemtech, San Jose, CA, Owner, President, 1983-1987. Hazardous Chemical Storage Facility Construction Firm. Responsible for and performed the following: Design and construction of flammable and toxic materials storage system facilities; hazardous materials management planning; procedural monitoring training.

CM4 Engineers, San Jose, CA, Owner, Vice-President, 1984-1985. Construction Management and Engineering Consulting Firm. Responsible for and perform the following: Pre-construction planning (cost feasibility studies, technical inspections, construction contracts negotiation, quality control, specification writing), on-site construction management of all phases of construction including carpentry, roofing, fenestrations, stucco, cladding, plumbing, mechanical, electrical; etc.

Aspen Roofing Systems, San Jose, CA, Owner, President, 1982-1986. Roofing Construction and Subcontracting Firm; specialists in re-roofing with tile. Responsible for and performed the following: Supervision of design staff, performed engineering calculations and design of structural roof framing upgrades on commercial and residential structures; new construction and repair of concrete, clay and slate tile roof systems; shake and shingle roof systems; built-up roof systems; single ply roof and waterproofing membrane systems; design and installation of roof flashing, etc.

Garden City Associates, San Jose, CA, Employee, Assistant Civil Engineer, Construction Coordinator, Supervisor, 1978-1979. Large commercial and residential earth moving, paving and grading projects. Coordinated work schedules; operations; and assisted in supervising employees from initial design stages to the finished product.

Supervised: demolition work, rough grading, finish grading, underground plumbing and electrical and concrete and asphaltic concrete paving operations.

EDUCATION

San Jose State University, San Jose, CA May 1978
Bachelor of Science Degree in Civil Engineering with emphasis in Construction

LICENSES AND CERTIFICATIONS

State of California, General Building Contractor, Roofing Contractor, Asbestos Abatement Contractor, License #757672
State of Nevada, General Building Contractor, License #0053133
State of Nevada, Roofing & Contractor, License #0054183
EIT Certificate
ICBO Certified Building Inspector
Certified Professional Construction Cost Estimator
OSHA 30 Certified

ORGANIZATIONS AND AFFILIATIONS

American Architectural Manufacturers Association
American Society for Testing and Materials
American Society of Professional Estimators
California Association of Community Managers
California State Contractors License Board
Community Associations Institute
The Executive Council of Homeowners
Forensic Expert Witness Association
ICC-International Code Council
The National Roofing Contractors Association
National Fire Protection Association
Nevada State Contractors License Board
Western Construction Consultants Association

EXHIBIT B

EXHIBIT B

Francis I. Lynch, Esq. (Nevada Bar No. 4145)
Charles "Dee" Hopper, Esq. (Nevada Bar No. 6346)
Sergio Salzano, Esq. (Nevada Bar No. 6482)
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(Admitted Pro Hac Vice)

Counsel for Defendant

EIGHTH JUDICIAL 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
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, and Does 1 through 1000, Counterclaimants, vs.	

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LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION,; DEAN ROOFING COMPANY; FORD CONTRACTING, INC.; INSULPRO, INC.; XTREME XCAVATION; SOUTHERN NEVADA PAVING, INC.; FLIPPINS TRENCHING, INC.; BOMBARD MECHANICAL, LLC; R. RODGERS CORPORATION; FIVE STAR PLINBING & HEATING, LLC, dba Silver Star Plumbing; and ROES 1 through 1000, inclusive,

Counterdefendants.

AFFIDAVIT OF RANDY K. KENT IN SUPPORT OF PANORAMA'S OPPOSITION TO HALLIER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Randy K. Kent being first duly sworn, state as follows:

1. I received a Bachelors and Masters of Science degree in Metallurgical engineering from the University of Washington in 1983 and 1986. I am a licensed principal engineer in Washington (license no. 26530). I am the Principal Engineer of Kent Engineering, LLC (Kent), formed in 1983, which specializes in forensic investigation services. A copy of my CV, which includes my licenses, certifications and professional affiliations, is attached hereto as Exhibit 1.

2. If called as a witness, I could and would testify to the matters stated herein based on my own personal knowledge.

3. Kent Engineering performed an inspection of the plumbing, HVAC and fire protection system (FPS) at the Panorama Towers complex. In that investigation, multiple defects were suspected from external indicators and historic understanding of the products. The following

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is a rough outline of the investigation required to confirm these defects, including the site and laboratory work. The general task at the site and laboratory is defined with the number of hours noted.

A. Thermodynamic and Water analysis ($12,000):
- Logging of temperature-4 locations,3 days
- Logging of pressure-4 locations, 3 days
- Chlorine and chloramine analysis-4 locations
- pH testing-4 locations
- Water sampling for hardness, dissolved oxygen, metals, conductivity, langlier.

B. Boilers, Lochinvar (4/building, total 8) ($50,000):
- Duct disassembly, evaluation and sampling
- Duct sample lab chemistry
- Burner disassembly, evaluation and passive layer sampling
- Burner passive layer chemistry
- Heat exchanger disassembly, borescope, passive layer sampling
- Heat exchanger passive layer chemistry
- Laboratory sample stereomicroscopy, digital scanning microscopy
- GCMS and SEM/EDS composition analysis of samples

C. Victaulic butterfly valves (model 763) ($100,000):
- Drain and refill lines
- Disassemble valves, replace and reinstall
- Disassemble valves to evaluate gaskets and connections in Laboratory
- Laboratory sample stereomicroscopy, digital scanning microscopy
- GCMS and SEM/EDS composition analysis of samples

D. Victaulic/Shurjoint/Rigidlok Couplings ($119,000):
- Drain and refill lines
- Disassemble valves, replace and reinstall
- Disassemble valves to evaluate gaskets and connections in Laboratory
- Laboratory sample stereomicroscopy, digital scanning microscopy
- GCMS and SEM/EDS composition analysis of samples

E. Victaulic End Cap on stainless piping (6"Quickvic) ($8,000):
- Drain and refill lines
- Disassemble valves, replace and reinstall
- Disassemble valves to evaluate gaskets and connections in Laboratory
- Laboratory sample stereomicroscopy, digital scanning microscopy
- GCMS and SEM/EDS composition analysis of samples

F. Stainless Steel pipe (DSC 0093) ($142,000):
- Cut out welded connections and reweld new sections
- Perform ASTM A 262 sensitization testing

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G. Braided SS flex pipe flange (DSC 0105) ($7,000)
- o Remove fasteners in stainless steel flange
- o Perform O/E composition analysis or each fastener

H. Multiple steel to stainless and brass connections causing accelerated dissimilar metal corrosion and dezincification of the brass, then the brass fittings dezincifying on own. (Includes Brass Craft-double angle stops, Hot & Cold). Extract and analyze ($1,574,000):
- o Extract watts angle stop fittings and braided hoses.
- o Disassemble in laboratory
- o SEM/EDS materials brass (zinc and lead content)
- o ISO 6509 and FIB/SEM/EDS test

I. Watts ACV-epoxy coated cast iron body, stainless steel diaphragm cap (some cast) with ASTM 307 steel bolts, copper pipe and brass fittings and pilot valve controller. ($123,000)
- o Extract:
- o Drain and refill lines
- o Disassemble valves, replace and reinstall
- o Disassemble valves to evaluate gaskets and connections in Laboratory
- o Laboratory sample stereomicroscopy, digital scanning microscopy
- o GCMS and SEM/EDS composition analysis of samples
- o Manufacturers specifications and installation instructions

J. Flowguard Gold CPVC used in domestic hot water line (in boiler room only) ($9,000).
- o Extraction of pipe in each unit at the hot water main, include fittings.
- o Section pipe in lab for Tensile tests, flattening, MW, FTIR.

K. Keeney-Single chrome plated yellow brass angle stops, laundry valves and HVAC valves. ($300,000)
- o Drain and refill
- o Extract angle stops from stub outs
- o Disassemble in the laboratory
- o Perform ISO 6509 and FIB/SEM/EDS

Estimated Total = $2,444,000

4. The work quoted in the above sections, includes labor both on site and in the laboratory. It includes third party laboratories to perform some of the compositional analysis and it includes the materials needed to replace the components and piping removed for the laboratory testing where modes of failure and defects are confirmed. Reports of the testing, analysis and opinions therein will be provided at the conclusion of the site extractions/analysis and laboratory work.

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5. Kent Engineering has performed these types of investigations in many states throughout the U.S. and can provide references and example condominium complexes where each of these types of known defects have been examined and remediated with success. Kent presently has 3 complexes in Washington and Hawaii being evaluated and remediated for the plumbing defects as found at the Panorama.

I declare under the penalty of perjury under the laws of Nevada that the foregoing is true and correct. If called as a witness, I could and would competently testify thereto.

Randy K. Kent

SUBSCRIBED and SWORN to before me this 26 day of April, 2017.

NOTARY PUBLIC

MONIQUE N. NAVARRETTE
STATE OF NEVADA
NOTARY PUBLIC
APPT. NO. 15-3414-1
MY APPT. EXPIRES 10-09-2019

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Curriculum Vitae:

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Randy K. Kent P.E., M.S.

SUMMARY

Registered Professional Engineer with over 33 years of experience in failure analysis, corrosion engineering, maritime, product design, plumbing, medical implants, power and construction industries, Crane-heavy equipment-lift equipment trouble shooting and inspection (state certified). Research and development of self- patented alloys, Stainless Steel, Cast Irons and Brasses, along with the development of heat exchanger systems, plumbing system and component design, heat treatment processes, dissimilar metal weldments, underground drilling, Steel/Stainless Steel fabrication, and foundry processes. Experienced in forensics in the maritime, construction defects, boiler and machinery, crane and heavy equipment, piping systems, implants, aircraft, transportation, pulp & paper, printing, product defects, recreational equipment, and power industries. Offers expertise in multiple publications and presentations including the industry standard ASM Handbook series and International Fatigue Congress publications, with over 100 depositions, trials and arbitrations.

PROFESSIONAL EXPERIENCE

Kent Engineering, LLC - Seattle, WA (1982-1997, 2006 - present) Principal
Registered Professional Engineer- Failure analysis/inspection of materials and components used in manufacturing process design and troubleshooting. Forensic investigations include materials testing and failure analysis of metallic, rubber, and plastic components and construction defect analysis in plumbing and mechanical systems. Forensics in the maritime, plumbing, tower cranes, mobile cranes, heavy equipment, boilers, turbines, construction defects, piping, aircraft, recreational equipment, diesel engines, cathodic protection; water, sewer, and chemical piping; and storage tank systems (potable water, fuels, chemicals, and wastes); and underground mining and construction equipment. Provided design and troubleshooting of batch treatment processes for the removal of heavy metals. Simulations of various systems, including; fire protection, building envelope, hydraulic and water piping, tanks and heaters, dynamo for engines, etc.

Kent Crane Inspection Services, LLC – Seattle, WA (2007-present) Principal
Registered Professional Crane Inspector/Certifier (Washington State) - inspection, troubleshooting, design and failure analysis of maritime and construction cranes. Inspection and certification to ASME, ANSI, ASTM, ISO and OSHA standards. Investigation of crane and heavy equipment accidents- U.S.A.

University of Washington - Seattle, WA (2006 to present)
Faculty- Mechanical Engineering Department (Affiliate) – Professor of Materials Engineering Class for upper level engineering students. Topics include materials properties and selection, corrosion, failure analysis, fatigue, electro-chemical processes, and surface treatments of materials.

Haward Technology Middle East (2008 to present)
Faculty – International Classes - curriculum development (Russia, Kuwait, Saudi Arabia, Abu Dhabi, Dubai, United Arab Emirates) – Topics include: Metallurgy, Corrosion, Failure Analysis/Prevention.

EXHIBIT “1"

MDE Engineers, Inc. - Seattle, WA (1997 to 2006)
Vice President and Principal - Failure analysis/inspection of materials and components used in various mechanical systems, the construction industry as well as manufacturing process design and troubleshooting. Forensic investigations include and construction defect analysis. Forensics in the maritime, plumbing, construction, heavy equipment piping, pulp & paper, aircraft, and other transportation industries.

Kent Engineering - Seattle, WA (1982 - 1997)
Metallurgical Engineer and Principal - Responsible for investigations of failed components and systems, and the processing of raw materials and manufactured goods. Projects include evaluations of marine systems; diesel engines; aircraft engines and structures, heavy equipment and all types of cranes; computer hardware systems; heat exchanger systems; fasteners; various transportation systems;

Romac Industries, Inc. - Seattle, WA (1983 - 1997, concurrent with Kent Engineering)
Quality Assurance and Metallurgical Engineering Manager - Responsible for corporate quality assurance efforts, as well as design, research and development of dissimilar metal weldments, foundry metallurgy and process troubleshooting (cast iron, brass, stainless steel), corrosion processes (underground and atmospheric), rubber compounding, pipe fittings, and machinery design. Implementation of ISO 9000 criteria (certified lead Auditor) and other improvement process programs. One of the company's directors for strategic planning and implementation. In charge of staff within the fabrication, machinery, and foundry divisions that oversaw supplier certification (NSF, ISO), internal quality assurance, environmental affairs, and product returns, mediations and arbitration. Responsible for product certification and maintenance with National Sanitation Foundation (NSF), Underwriters Laboratories (UL), and Factory Mutual (FM). Manufacturers consortium for the drafting of NSF St. 61, research and development of red and yellow brasses for NSF St. 61-SWDA (Safe Water Drinking Act).

Cascade Designs, Inc. - Seattle, WA (1980 - 1983)
Quality Assurance Technician - Responsible for testing physical properties of various materials used in backpacking and mountain climbing equipment. Designed and manufactured dedicated equipment for testing. Assisted in the installation of pneumatic and hydraulic systems for large presses. Performed and managed various manufacturing processes.

Shiloh Construction - Seattle, WA (1977 - 1980)
Assistant to framers, plumbers, mechanical system installer, roofers, electricians, and finish carpenters.

General/Subcontractor - Residential (1977 – 1987) (Plumbing subcontractor-2 years)
Heavy equipment operator, built and assisted in five homes; plumber, electrician, framer, foundation, etc.

PROFESSIONAL REGISTRATION & CERTIFICATION

Registered Professional Engineer, State of Washington, #26530
Registered Professional Engineer, State of Alaska #104472
Registered Residential Plumbing Inspector No. 5270226-P1 ICC ('03-'07)
Registered Certifier/Inspector, Maritime Cranes, WA Dept. Labor and Industries, #100162
Register Certifier/Inspector, Construction Cranes, WA Dept. Labor and Industries, #100162

EDUCATION & TRAINING

B.S. Metallurgical Engineering, University of Washington, 1983
M.S. Metallurgical Engineering, University of Washington, 1986
Failure Analysis (ASM)

Principles of Failure Analysis (ASM)
Cathodic Protection and Corrosion Protection (NACE)
Weld Design and Analysis (AWS)
Physical Properties of Metals (ASM)
Plastics Fracture Analysis (SPE)
Plastics Failure Analysis/Prevention and Testing (SPE)
Microbiological Control in Oil Industry Operations (NACE)
Microelectronics Failure Analysis (International Symposium for Testing and Failure Analysis)

PROFESSIONAL ASSOCIATIONS
Member - American Society of Metals (ASM)
Member - Society of Plastics Engineers (SPE, past)
Member - National Association of Corrosion Engineers (NACE)
Past Chairman of Regional Chapter (NACE)
Member - American Foundrymens Society (1983-1997)
Member - National Committee for the Development of Lead Free Brasses (1987)
Member - National Sanitation Foundation (NSF), Standard 61 (1995-1997)
Member - American Waterworks Association (Romac Industries Corp., 1983-1997)

PUBLICATIONS & PRESENTATIONS
-ASM Handbook Volume 11 rev.10, 2002
• Uniform Corrosion
• Intergranular Corrosion
• Velocity-Affected Corrosion
-ASM Handbook Volume 11 rev. 10, 2002 Editing of "Stages of a Failure Analysis"
-Failure of a Swing Bridge Hydraulic Cylinder, Fatigue 2002 Volume 2/5, International Fatigue Conference
-Authored paper for American Water Works Assoc. Intl. Conf.: "Extend the Life of DI up to 55%," 1987.
-Authored paper for NACE Intl. Conference: "Anodic Polarization Measurements of Alloyed DI," 1987.
-Master's Degree Thesis: Corrosion and physical property effects of the minor elements in iron base alloy systems.
-Presentations at various regional conferences/ meetings of: ASM, NACE, AWWA, Boiler Association, Marine Surveyors.
-Failure Analysis: Presentation of Evidence, 30th Annual Pacific Northwest Aviation Law and Insurance Seminar, 2003
-Guest Lecturer, University of Washington, Material Science Engineering Department forensics class.
-Tolt River Pipeline Failure Analysis-Seattle Water Dept. (Seattle Prof. Engr. Society, etc.)
-C-901 Stripper 4" Pipeline Failure Analysis (API National Convention, 2000)
-Manufacturing Based Failure Assessment (1998, WA Defense Trial Lawyers Assoc.)
-Microbial Effects of Stressed and Non-Stressed Components in Closed Water Sys. (2000 Assoc. of Water Tech.)
-Plumbing Defect Analysis (2000 Association of Property Managers)
-International Conference on Engineering Failure Analysis (Investigation/Litigation of an Upgraded 5000 Ton Press That Failed by Fatigue-West Seattle Bridge Failure-2000)
-Vehicle Maintenance Management Conference, 2010, Fastener Usage and Failures.
-Vehicle Maintenance Management Conference, 2011, Basic Metallurgy (Failure Analysis)
-Vehicle Maintenance Management Conference, 2012-2015, Weld design-failure analysis in truck frames.

PATENTS
U. S. Patent, #4,702,886, Nickel Alloyed Ductile Cast Iron, 1987
Canadian Patent, Nickel Alloyed Ductile Cast Iron, 1992

RPLY
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LAURENT HALLIER; PANORAMA TOWERS I, LLC;
PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN
CONSTRUCTION, INC.

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. XXII **PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER'S, PANORAMA TOWERS I, LLC'S, PANORAMA TOWERS I MEZZ, LLC'S, AND M.J. DEAN CONSTRUCTION, INC.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON DEFENDANT/COUNTER-CLAIMANT PANORAMA TOWER CONDOMINIUM UNIT OWNERS' ASSOCIATION'S COUNTER-CLAIM AND PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER'S, PANORAMA TOWERS I, LLC'S, PANORAMA TOWERS I MEZZ, LLC'S AND IN SUPPORT OF M.J. DEAN CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THEIR THIRD CLAIM FOR RELIEF IN THEIR COMPLAINT FOR DECLARATORY RELIEF** Date: May 18, 2017 Time: 10:30 a.m.
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	

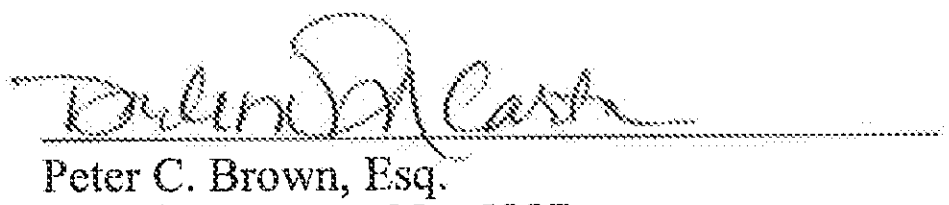
CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION; DEAN ROOFING COMPANY; FORD CONTRACTING, INC.; INSULPRO, INC.; XTREME EXCAVATION; SOUTHERN NEVADA PAVING, INC.; FLIPPINS TRENCHING, INC.; BOMBARD MECHANICAL, LLC; R. RODGERS CORPORATION; FIVE STAR PLUMBING & HEATING, LLC, dba SILVER STAR PLUMBING; and ROES 1 through , inclusive,	)
Counter-Defendants.	)

COME NOW Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. (hereinafter collectively referred to as "Builders"), by and through their attorneys of record, Peter C. Brown, Esq. and Darlene M. Cartier, Esq. of Bremer Whyte Brown & O'Meara LLP, and hereby files their Reply in Support of Motion for Summary Judgment on Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners' Association's Counter-Claim and in Support of Motion for Partial Summary Judgment on Their Third Claim for Relief in Their Complaint for Declaratory Relief ("Reply").

This Reply is made and based upon the pleadings and papers on file herein, the following Memorandum of Points and Authorities in support thereof, and any and all evidence and/or testimony accepted by this Honorable Court at the time of the hearing on this Motion.

Dated: May 10, 2017

BREMER WHYTE BROWN & O'MEARA LLP

By: 

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Notwithstanding the Association's attempt to create an issue of fact to preclude this Court from granting summary judgment against the Association, no genuine issues of material facts exist. Rather, there is a single question of law before this Court: whether the Association's Chapter 40 Notice to Builders meets the mandatory requirements of NRS 40.645(2) and NRS 40.647(1), as amended by AB 125. The answer is unequivocally, **no**. Not only did the Association's Chapter Notice fail to meet the mandatory statutory requirements, as to three of the four defects alleged by the Association, the Association provided no notice whatsoever, including a Chapter 40 Notice, prior to performing repairs. Thus, Builders have been denied their rights under Chapter 40, including but not limited to, their right to inspect and to repair the alleged defects. As a result, summary judgment against the Association is appropriate. Staying the action to allow the Association to attempt to somehow retroactively comply with Chapter 40 will not cure the Notice issue because the Association has already commenced and/or completed repairs of the alleged defects. Discovery will not change that.

II. LEGAL ARGUMENT

A. Facts Not Disputed by the Association

The following material facts are undisputed by the Association:

1. The Association did not provide any notice to Builders of the allegedly defective windows in Unit 300 prior to removing and replacing the windows, including but not limited to a Chapter 40 Notice;

2. The Association did not provide notice to Builders of the allegedly defective mechanical room piping prior to removing and replacing the piping including, but not limited to, a Chapter 40 Notice; and

3. The Association did not provide notice to Builders of the allegedly defective sewer piping prior to repairing the sewer piping, including, but not limited to, a Chapter 40 Notice.

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The Association acknowledges in its Opposition that at the time of Builders' visual inspection on March 24, 2016, the Association had commenced or completed repairs to some of the alleged defects. Yet, the Association argues that Builders declined to cure or participate in any of the repairs at that time. The repairs to Unit 300 were well underway on March 26, 2016 – the windows had been removed and replaced. In addition, the repairs to the mechanical room and the sewer line were fully completed prior to Builders' inspection. Thus, it is unclear how Builders could have participated in repairs that the Association had already performed.

B. The Association Failed to Comply with NRS 40.645(2)(b)

1. The Alleged Defects in Unit 300 Were Known to the Association Prior to the Association Commencing Repairs; However, the Association Failed to Provide Any Notice to Builders Prior to Commencing Repairs

The Association's Opposition includes a sworn Affidavit from Omar Hindiyeh, the owner and president of CMA Consulting ("CMA").[1] Mr. Hindiyeh's Affidavit states that CMA was retained by the Association in **August 2013** to investigate and repair leaks in Unit 300, and at the time of CMA's retention "the walls had already been opened by another contractor…"[2] In addition, his Affidavit states that investigation and repairs of Unit 300 took place over a period beginning in August 2013.[3] Thus, the Association had actual knowledge of the alleged window issues in Unit 300 at least two and a half years prior to the date the Association sent a Chapter 40 Notice to Builders. Given that the repairs to Unit 300 reportedly took place from August 2013 through July 2016, there was more than sufficient opportunity for the Association to have provided notice to Builders prior to beginning repairs, to allow Builders their statutory right to inspect the alleged defects and to offer a repair.

In addition, based on Mr. Hindiyeh's Affidavit, at least some of the alleged damage to Unit 300, including alleged mold, was known by him (and arguably the Association) because the walls had been opened and the alleged mold conditions in the wall assemblies had been mediated

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[1] Affidavit of Omar Hindiyeh, attached as Exhibit "A" to the Association's Opposition.
[2] Affidavit of Omar Hindiyeh, ¶¶ 3 – 4, attached as Exhibit "A" to the Association's Opposition.
[3] Affidavit of Omar Hindiyeh, ¶ 4, attached as Exhibit "A" to the Association's Opposition.

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sometime prior to August 2013. Thus, notwithstanding that the Association failed to provide any notice prior to commencing repairs to Unit 300, none of the information regarding the alleged leak and Mr. Hindiyeh's investigation of the alleged leak, or any known damages, was provided in the Association's post-repair Chapter 40 Notice, as required by NRS 40.645(2).

Mr. Hindiyeh's Affidavit also states "while investigating the leakage conditions in Unit 300, we discovered that the insulation was missing in the ledger shelf cavities and that fire blocking was missing in the steel stud framing cavities at the exterior wall locations between residential floors in the two towers structures."[4] Therefore, just as with the alleged window issues above, the Association knew of the alleged fireblocking issue in Unit 300 as early as **August 2013**. Yet, the Association failed to provide notice to Builders prior to repairing the fire blocking, including a Chapter 40 Notice.

2. The Association Failed to Comply with NRS 40.645(2)(b) Regarding the Alleged Residential Tower Windows and Fireblocking Defects

Mr. Hindiyeh's Affidavit also states that from **November 2015** through January 2016, **which is prior to the date of the Association's Chapter 40 Notice to Builders**, CMA inspected 15 units within the two towers (the Unit numbers are not provided).[5] His Affidavit states that CMA's inspections revealed that the steel stud framing was found to be corroded as result of leaking in 76% of the windows inspected, and of the ledge shelf cavities inspected, 76% had no insulation.[6] Despite having actual knowledge of the specific units CMA purportedly inspected, the Association failed to identify even a single unit where the alleged window or fireblocking conditions and/or damages were purportedly observed by CMA in the Association's Chapter 40 Notice.

As to Mr. Hindiyeh's statements/opinions regarding what steps would be required to comply with NRS 40.645(2), the alleged costs associated with these steps, or any "inherent delays"

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[4] Affidavit of Omar Hindiyeh, ¶ 5(b), attached as Exhibit "A" to the Association's Opposition.
[5] Affidavit of Omar Hindiyeh, ¶ 6, attached as Exhibit "A" to the Association's Opposition.
[6] Affidavit of Omar Hindiyeh, ¶ 6(a) and (b), attached as Exhibit "A" to the Association's Opposition.

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associated with scheduling mutual convenient dates for inspections,[7] these statements/opinions are not relevant to the Association's failure to provide notice of the alleged defects in Unit 300 prior to performing repairs. It also does not relieve the Association of its Association's statutory obligation to provide a Notice to Builders that "identifies in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim, including, without limitation, the exact location of each such defect, damage and injury" as required by NRS 40.645(2)(b). This is especially true as it relates to Unit 300 as the alleged defects/damages in this Unit were known to the Association at least two and a half years prior to issuing its Chapter 40 Notice. Furthermore, none of the statements/opinions in Hindiyeh's Affidavit create an issue of fact to preclude summary judgment against the Association. As a result, his Affidavit should have no bearing on the legal issue before the Court.

3. The Association Failed to Comply with NRS 40.645(2)(b) Regarding the Alleged Mechanical Room Piping Defects

The Association's Chapter 40 Notice included a report from Advanced Technology & Marketing Group ("ATMG") relating to the alleged mechanical room piping defects, dated **November 17, 2011 - more than 4 years prior** to the date of the Association's Chapter 40 Notice.[8] Given that the Association had actual knowledge of alleged issues with the mechanical room piping in 2011, the Association could have and should have provided notice to Builders prior to performing repairs to the mechanical room piping, including a Chapter 40 Notice.[9] Furthermore, even though the Association had already completed the repairs to the mechanical room prior to the date it issued its Chapter 40 Notice, the Notice fails to identify what specific repairs were performed, the exact locations of the repairs or the exact location of the alleged damages. NRS 40.645(2). Furthermore, despite Builders' requests during the pre-litigation process, the Association has failed to provide

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[7] Affidavit of Omar Hindiyeh, ¶¶ 7 - 11, attached as Exhibit "A" to the Association's Opposition.
[8] See Builders' Motion, **Exhibit "1,"** p. 9 – 11.
[9] This Association does not contend that the alleged mechanical room piping defects created any imminent threat to the health or safety of the Association's residents (or anyone else). However, even if such a threat existed, this did not alleviate the Association from its obligation to provide notice to Builders of the alleged imminent conditions, and to provide a Chapter 40 Notice prior to the Association performing repairs of the alleged defects. NRS 40.670.

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any information regarding the repairs to the mechanical room performed by the Association.[10]

4. The Association Failed to Comply with NRS 40.645(2)(b) Regarding the Alleged Sewer Problems

The Association's Opposition includes a sworn Affidavit from Randy K. Kent, the Principal Engineer of Kent Engineering, LLC ("Kent").[11] Mr. Kent's Affidavit states that Kent performed an inspection of the plumbing, HVAC and fire sprinkler system at the project.[12] Glaringly absent from Mr. Kent's Affidavit is the date when he performed this inspection. Thus, it is unknown when the inspection took place, including whether it was prior to or after the Association's Chapter 40 Notice to Builders. However, given that Mr. Kent uses the phrase "multiple defects **were** suspected" (emphasis added), it is reasonable to conclude that Mr. Kent conducted his inspection prior to the date the Association served its Chapter 40 Notice. [13]

Like Mr. Hindiyeh's Affidavit, Mr. Kent statements/opinions regarding what steps would be required to comply with NRS 40.645(2) or the alleged costs associated with these steps are not relevant to the Association's failure to provide notice to Builders prior to performing repairs to the sewer line. It also does not relieve the Association of its statutory obligation to provide a Notice to Builders that "identifies in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim, including, without limitation, the exact location of each such defect, damage and injury" as required by NRS 40.645(2)(b). Furthermore, as with Mr. Hindiyeh's Affidavit, none of the statements/opinions in Mr. Kent's Affidavit create an issue of fact to preclude summary judgment against the Association. As a result, his Affidavit should also have no bearing on the question of law before this Court.

In enacting Chapter 40, the Nevada Legislature intended to provide contractors such as Builders with an opportunity to repair an alleged construction defect in order to avoid litigation. *See D.R. Horton, Inc. v. Eighth Judicial District ex rel. County of Clark*, 123 Nev. 468, 168 P.3d

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[10] See Builders' Motion, **Exhibits "2" and "3."**
[11] Affidavit of Randy K. Kent, attached as Exhibit "B" to the Association's Opposition.
[12] Affidavit of Randy K. Kent, ¶ 3, attached as Exhibit "B" to the Association's Opposition.
[13] Affidavit of Randy K. Kent, ¶ 3, ln. 26 – 27, attached as Exhibit "B" to the Association's Opposition.

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731 (Nev. 2007). AB 125 raised the standard of specificity of defects in a Chapter 40 Notice from "reasonable detail" to "specific detail" for all defects, damages and injuries.[14] NRS 40.645(2)(b) (as amended by AB 125, Section 8); Stephen A. Davis, *Under Construction: The Past, Present and Future of Chapter 40, Nevada's Construction-Defect Laws*, 16 Nev. L.J. 1201, 1225 (2016). "This new standard eliminates extrapolation and guessing by requiring a physical inspection of each defect." *Id.* at 1228.

As discussed in Builders' Motion, the defects as alleged in the Association's Chapter 40 Notice were too general to allow Builders to determine the location of the defects to inspect the alleged defects and to consider an offer of repair. Instead, the Association has placed an unfair burden on Builders to try to determine what the Association contends is defective or any resulting damages. The Association, which has unfettered access to and is in control of the common areas of the project, is in the best position to know what it alleges is defectively constructed and what damages have allegedly occurred. In fact, as discussed above, the Association has actual knowledge of the alleged defects by virtue of the Association's prior repairs.

The Association's deficient Notice was compounded by the fact that the Association failed to have a representative or an expert present at Builders' March 24, 2016 inspections to identify the exact location of each alleged defects as required by NRS 40.647(1)(b) (as amended by Section 11 of AB 125).[15] Thus, not only are Builders faced with a Chapter 40 Notice that fails to provide the required specific details and damages, Builders were unable to obtain any of this information from the Association or its expert(s) during Builders' visual inspection.

The Association has failed to provide a Chapter 40 Notice that complies with NRS 40.645(2)(b) and also failed to comply with NRS 40.647(1)(b), both of which are mandatory in order to pursue a construction defect claim against Builders. As a result, Builders are entitled to summary judgment on the Association's Counter-Claim, as well as Builders' Third Claim for Relief in its Complaint for Declaratory Relief.

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[14] See Builders' Motion, **Exhibits "4."**

[15] See Builders' Motion, **Exhibit "4,"** p. 15.

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C. A Stay of the Litigation Will Not Cure the Association's Notice

Even if this Court disagrees with Builders and finds the Association met the requirements for its Chapter 40 Notice, Builders are still entitled to summary judgment on the basis that the Association failed to provide any notice prior to performing repairs to the windows in Unit 300 (and based on Mr. Hindiyeh's Affidavit also repairs to the fireblocking) as well as repairs to the mechanical room piping and the sewer line. Staying the litigation will not cure the Association's defective Notice because the Association has already commenced and completed repairs of these alleged defects. No amount of discovery will change that. As a result, unless this Court finds that the Association's Notice **issued post-repair**, is sufficient under the statute, summary judgment is appropriate. *See Manor v. D.R. Horton, Inc.*, 2016 U.S. Dist., LEXIS 33195, 2016 WL 1045484 (D. Nev. 2016).

III. CONCLUSION

As demonstrated above and in Builders' Motion, there are no genuine issues of material fact. The Association failed to comply with the **mandatory** requirements set forth in Chapter 40 denying Builders' statutory rights under NRS 40.6472. As a result, Builders are entitled to summary judgment as to the Association's Counter-Claim, and partial summary judgment as to Builders' Third Claim for Relief in their Complaint for Declaratory Relief, as a matter of law. In the alternative, Builders are entitled to summary judgment as to the repairs performed by the Association to Unit 300 and to the mechanical room and sewer line, which were completed prior to providing any notice to Builders, including a Chapter 40 Notice.

Dated: May 10, 2017

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Darlene M. Cartier, Esq.
Nevada State Bar No. 8775
Attorneys for Plaintiffs/Counter-Defendants, LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN CONSTRUCTION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2017, a true and correct copy of the foregoing document was electronically served through Wiznet upon all parties on the master e-file and serve list.

Amree Stellabotte, an Employee of
BREMER, WHYTE, BROWN & O'MEARA, LLP

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TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, Plaintiff, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS ASSOCIATION, Defendant.	CASE NO. A-744146 DEPT. XXII

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

JUNE 20, 2017

RECORDER'S TRANSCRIPT OF HEARING RE

RE-NOTICE OF HEARING OF PLAINTIFF'S/COUNTER-DEFENDANTS LAURENT HALLIER'S, PANORAMA TOWERS I, LLC'S, PANORAMA TOWERS I, MEZZ, LLC'S, AND M.J. DEAN CONSTRUCTION, INC'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT/COUNTER-CLAIMANT PANORAMA TOWER CONDOMINIUM UNIT OWNERS' ASSOCIATION'S COUNTER-CLAIM AND PLAINTIFFS/COUNTER DEFENDANTS LAURENT HALLIER'S. PANORAMA TOWERS I, LLC'S, PANORAMA TOWERS I MEZZ, LLC'S AND M.J. DEAN CONSTRUCTION, INC'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THEIR THIRD CLAIM FOR RELIEF IN THEIR COMPLAINT FOR DECLARATORY RELIEF

APPEARANCES:

For the Plaintiff: PETER C. BROWN, ESQ.
JEFFREY SAAB, ESQ.

[Additional appearances on following page]

[ADDITIONAL PARTIES]

For the Defendant: SERGIO SALZANO, ESQ.
FRANCIS I. LYNCH, ESQ.
CHARLES DEE HOPPER, EQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

TUESDAY, JUNE 20, 2017 AT 10:41:26 A.M.

THE COURT: Okay. Hallier versus Panorama Towers Condominium Unit Owners Association versus [sic] A16-744146-D.

MR. BROWN: Good morning, Your Honor. Peter Brown on behalf of Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. the moving parties.

MR. SALZANO: Good morning, Your Honor. Sergio Salzano on behalf of the HOA.

THE COURT: It's good to see you, sir. It's been a while.

MR. SALAZANO: Thank you. It has been a while.

THE COURT: Yes.

MR. LYNCH: Good morning, Your Honor. Francis Lynch on behalf of the Association.

MR. HOPPER: And Dee Hopper, Your Honor, on behalf of the Association.

THE COURT: Okay. Well, it's been a while since I've seen Mr. Lynch too as well, but I see you, Mr. Hopper, every once in a while.

MR. HOPPER: Yes, Your Honor.

THE COURT: Okay. By the way, counsel, just an FYI. On the D side of the V, I noticed you had a bunch of people listed as counter defendants and they weren't counter defendants. And I'm talking about the subs, they should

be third party. We might want to talk about changing that in your caption because it was a little confusing to me. And of course – because – it was a little confusing because Mr. Brown is usually not on the P side of the V, okay? You guys are on the D side of the V which is also confusing to me and then whenever we had the counter defendants who aren't counter defendants, the third party defendants.

MR. LYNCH: Your Honor, it is so confusing. We left it as counter defendants to [indecipherable] the clerk's office since we had to serve a bunch of subcontractors. But that happened and so we were gonna come in and talk to Peter and see if we could just change that to third parties.

THE COURT: Okay. We might want to consider doing that.

MR. LYNCH: For sure. We will.

THE COURT: Okay. But first I need to hear the motion for summary judgment.

MR. BROWN: Thank you, Your Honor. Peter Brown on behalf of the moving parties who I will refer to collectively as the builders throughout the hearing on this motion.

Your Honor, everyone has a favorite time in their life. I don't know what yours is, for me it's 1985 to 1992 and that is when I and my wife had just left graduate school in UC San Diego, we went to New York City, we were actors there, it was exciting. I don't know if you recall but back then New York was a grittier, let's say more in my recollection, energetic city. You really felt alive because you were – got up every morning and you said I lived another day. And for me I always think back and said, oh, that's just a great part of my life. But, Your Honor, we have to move forward, you can't live in the past, and

I know when I go back to New York City it's not the same, people change. The area changes, rules change, laws change. Something as silly as I called up my wife and I said "New York will never be the same." And she said "why?" Because I'm standing outside of a California Pizza Kitchen in New York City. It's not the same, I can't go back.

Why do I say this, Your Honor? Because the HOA wants to live in the past. When you look at their opposition is it any wonder that they cite to cases that run from a 1984 case that predates Chapter 40 by eleven years and involves notice pleading not Chapter 40 notice. They cite to the dissenting opinion in *Olson* in 2004, they cite to the 2007 *First Light* decision that's based upon a reasonable standard that no longer applies with regard to notice because AB125 changed that from reasonable to specific. They rely on cases that run from 2007 through 2011 none of which are CD cases but they rely upon those for the argument that they stand for the proposition that substantial compliance of the statute is all that's really required not specific compliance as what is required by AB125.

The one case that they cite to *Westpark* which is again a 2007 case prior to AB125, they cite to that for the proposition that what my client's motion is proposing is an absurd result because it would require them to do an unbelievable amount of costly investigation in order to comply with AB125. But *Westpark* is famous from my perspective as a defense attorney in construction defect is for what it says is that the statute if it is unambiguous then the Court is not to read beyond that. And AB125, as we'll talk about later, that statute is clear, it is not unambiguous the changes that it made to Chapter 40 with regard to what are requirements for a notice. The HOA wants

this Court to allow them to rely upon what was required under the old version of Chapter 40. It would have allowed them to provide a notice such as that they provided in this particular case. It would allow them to rely upon extrapolated evidence for the notice. But, Your Honor, you realize that that part of Chapter 40 was taken out by AB125. They want to rely upon reasonable as opposed to specific and exact which is what is required of their notice.

Now, we've couched our motion in two particular ways, one being a motion for summary judgment on the entire claim seeking the Court to have it dismissed and then also if the Court is not inclined to go that far, to specifically look at sections of what they've raised in their claims – in their counterclaim and to grant summary judgment with regard to our third cause of action for declaratory relief for failure to comply with Chapter 40. And in contrast to how the moving papers set forth, I want to start actually on those three elements which are in the second section of our motion. There are undisputed material facts. The first undisputed material fact that that notice on February 24, 2015 – or 16 references the tower windows with alleged corrosion to metal components, corroded mechanical room piping and sewer piping. It is undisputed that my client did not receive statutorily required notice of any of the repairs being performed to Unit 300, it's undisputed that my client did not receive any notice of the removal and replacement of elements of the mechanical piping claim that are alleged to be corroded. It's undisputed that my client did not receive notice of the removal and replacement of the alleged defective sewer components. It is also undisputed that on two separate occasions my office on behalf of my clients sent letters to counsel for the HOA asking for clarification during the Chapter 40 process and what I will call the

who, the what, the where, the when, the how and the why pertaining to the mechanical plumbing claims, piping claims and the sewer and never received any response. And in fact, it wasn't until a year after that second letter was sent to the HOA. In the opposition did we get even an attempt by the HOA. And it wasn't in an affidavit by the HOA but it was just counsel's representation as to the justification from their perspective as to why they did not give my clients notice of the removal and replacement of the sewer components.

They try to get around this by saying that the elements posed an unreasonable risk of injury and they specifically say that the alleged corrosion of the metal components of the exterior wall and floor assemblies, that those were in a reasonable risk of injury because they caused corrosion and although it's not really in the notice, it's not until yet Mr. Hindiyeh's affidavit after the fact where he says: "Oh well, that compromises the structural integrity." Although there is no structural engineers report for that, there's no notice of actual structural integrity compromising. They also say that there's unreasonable risk of injury with regard to the sewer line, and what they say in their opposition is that it's due to alleged disbursement of unsanitary matter.

Well, let's look at those claims with regards to the three areas where we're asking this Court for summary judgment with regards to my client's third claim for relief, the first being unit 300. Unit 300 is where we have the alleged genesis of the claims pertaining to the windows and to the fire blocking. What we find out in the oppositions – affidavit from Mr. Hindiyeh that those issues were known as far back as August of 2013 and that work in that particular unit took place from August of 2013 through Jan – or July of

2016. And yet despite all of that, my client does not get a notice of these so called issues which represent allegedly an unreasonable risk of injury until February of 2016. Now, even if this Court were to accept the premise that that was an unreasonable risk of injury there is NRS 40.670 which again would have required notice to my client when you're talking about issues that create an eminent threat to health or safety. So, whether you're under 40.655 or you're under NRS 40.670 it is undisputed that my client had to receive notice. And it is also undisputed that my client did not receive any notice prior to the repairs being performed.

With regard to the sewer line claims frankly we still have no information whatsoever as to where this occurred, why it occurred, when it occurred, who did the repairs, when they did the repairs, the cost of the repairs. No information as to the alleged damage to other components of the property arising from this sewer line which is asserted in the notice but there's information other than that. And again, Your Honor, we asked twice for them to clarify that during the Chapter 40 process and it wasn't until one year after April 29, 2016 the date we sent the second request. It wasn't until April 29th of 2016 a year later the HOA's counsel provides the following which is found on page 12 of their opposition. Notice and inspections of a defect simply weren't possible at the time, it was only after the Association was made aware that damages resulting from the defect were recoverable because the sewer problems were not released in the prior litigation that the decision was made to pursue the issue.

Now again, Your Honor, this is just a statement by counsel, there is no affidavit to that effect in support of the opposition. Now, let's take that

statement and consider it. This HOA board is asking you to take that as the basis for denial of my client's motion for summary judgment as to the claims regarding the sewer line. This is a board which has been through years of pre-litigation Chapter 40 process and years of litigation in the first Panorama Towers litigation that was in front of this Court. This same board sat through hours, days of expert presentations both by their own experts and by my experts during that original litigation which involved tens and millions of dollars of alleged claims for construction defects. This same board demanded and obtained as part of the settlement agreement in the first case a release which excluded from the release defects that were not raised during the first case. They demanded that and it's in the settlement agreement and attached to that settlement agreement, Your Honor, is a list of every single defect that was raised during the case. So, there's no question as to what was raised during the earlier case and yet they're asking you to believe that this sophisticated board that has been through years of litigation and at the time of the first litigation were represented by what is the premiere construction defect law firm in Nevada with regard to high rise litigation. This is no denigration whatsoever with regard to my opponents. An additional premiere law firm in construction defect litigation especially with regard to product liability claims. But the firm of Feinberg, Grant is known in this town and is known throughout California as specializing in high rise CD litigation. They represented this board when that settlement agreement was executed and yet this board is asking this Court to believe the statement of counsel that we just didn't know, we didn't realize and so we didn't figure out that we could give notice and so we didn't give notice until after the repair was done.

MR. SALZANO: Your Honor, I'm sorry. Those specific issues are not before the Court on this motion.

THE COURT: Okay. Well, I'll listen to everybody, okay? And I'm gonna be listening to you too, okay?

MR. SALZANO: I just don't want us to steer into other areas regarding the – for instance the release which –

THE COURT: I understand.

MR. SALZANO: -- is not – it's not a matter that he even brings – raises in his motion.

THE COURT: I understand.

MR. BROWN: Thank you. Your Honor. The – if this Court was faced with an argument from an HOA on a construction defect case that says to you, well, we didn't know that we had to give notice prior to giving – filing a lawsuit or we didn't know that we had to give the builders an opportunity to repair, or, Your Honor, we didn't know what a statute of repose was. Ignorance of the law is not a defense.

This HOA board with regard to the sewer had all the information that they needed in order to know that they should have provided notice to my client. And the only thing that you have in front of you is a statement on page 12 from counsel not from the HOA board asking you in essence to give them a pass, to say it's okay, it's okay Panorama Tower, sophisticated, experienced, experienced and sophisticated in construction defect litigation. It's okay that you didn't give the builders notice.

With regard to the mechanical room piping claim, the HOA doesn't make a claim that there's an unreasonable risk of injury. That's nowhere in the

Chapter 40 notice, it's nowhere in the expert reports that's attached from 2011. And they can't say that, Your Honor, because when you look at that particular report they couldn't possibly make that claim because Exhibit B to their report – and that's found as exhibit – it's Exhibit B to builder's Exhibit 1. It identifies three different categories that back in 2011 this particular inspecting company made recommendations to replace certain components now, replace within one to five years or replace long term. So, Your Honor, if this was done back in 2011 there were years prior to the replacement of these components for them to give my client notice and to give my client an opportunity to inspect and make a decision as to whether or not it wanted to repair if indeed my client felt that those were valid claims not barred by the terms of the settlement agreement or by statute or by other arguments.

NRS 40.645 requires the claimant to give my client notice, NRS 40.670 requires notice, NRS 40.647 requires the claimant to allow my client to do an inspection of the alleged issues and NRS 40.647(2) includes an inviolate right of my clients to make a determination after they get a proper notice and after they do their inspection to make a decision as to whether or not they want to repair. In all of the instances for these three categories everything having to do with unit 300, everything having to do with any mechanical room component that has already been removed and replaced and the entire sewer claim, all of those completely disregarded those statutes. The only remedy, Your Honor, to my client if for you to grant summary judgment on those particular issues because there is no justification that's been provided to you to support an argument as to why they can completely disregard the statutory requirements. They didn't provide my client notice. And in fact what is being

said to this Court today is that that's all right, Mr. Brown's experts can look at photographs, Mr. Brown's experts can talk to our experts, Mr. Brown, he can take depositions of the people who did the repairs. But what doesn't change, Your Honor, is that the statute says my client has an absolute right to make the determination as to whether or not it is going to do the repair and that can never be given back to my client. They took that away, Your Honor. And the only remedy is for this Court to grant summary judgment as to those three categories; all of the defects that are alleged to exist in unit number 300, any mechanical piping component that has already been removed and replaced. And again, Your Honor, we've asked for them to identify where are they. Even today there isn't a single word in the opposition or in the affidavit from Mr. Kent, their mechanical expert, as to where these components are; whether they were saved, whether any documentation was taken of them.

So, even if this Court were to say, "Well, Mr. Brown, you can expect – inspect them." There's been no evidence provided to me even after a year of asking and no evidence provided to this Court that those components exist. The same thing for the sewer repairs, Your Honor, we've asked where are they? Did you save the components? The only remedy, Your Honor, with regard to those three elements of Plaintiff's case is to dismiss them – is to grant our motion for summary judgment. Now, overall we were also seeking summary judgment as to their notice in its entirety because we believe that it is such an egregious disregard for what AB125 requires. That there is no remedy but for the Court to send them back to the drawing board and to attempt – to attempt to give a proper notice. That's the only remedy, Your Honor.

What's surprising is that at the time the notice was given there

were two separate law firms representing the HOA. There was the one law firm out of California and then also there was local counsel Leach, Johnson, Song and Gruchow. I was familiar with Mr. Leach because he used to work for Feinberg, Grant. And they gave notice, Your Honor, and they knew what AB125 required. How do we know they knew that? Well, one, they knew they had to try to get it in on that last day of the one year savings clause, they knew that there was something out there that required them to get something in under that deadline, they knew that AB125 required them to get an affidavit from a representative of the board which they did but they didn't comply with the very specific language of AB125. The HOA spends a lot of time talking about the *First Light* case and makes two arguments. One, that somehow my clients have waived the right to raise an objection to the notice because it wasn't done back during the Chapter 40 process and that we didn't file something prior to filing our declaratory relief action. Well, Your Honor, Plaintiffs in their opposition opened the door to what I believe is improper reference to what occurred during the mediation. If you recall that in the opposition they said "Well, they didn't attend the mediation in good faith." They opened that door, Your Honor. And I'm gonna tell you that in my clients Chapter 40 response there is a section that specifically talks about what is wrong with the notice. In my motion I said it's protected from disclosure so all I'm gonna tell you is that I'm gonna represent to this Court that not according to what plaintiff's said but what I know what I did –

THE COURT: You keep calling them Plaintiffs.

MR. BROWN: I know I did that. What the HOA –

THE COURT: You're –

MR. BROWN: -- did.

THE COURT: -- on the P side of the V –

MR. BROWN: I know.

THE COURT: -- Mr. Brown.

MR. BROWN: Thank you, Your Honor. The HOA contends that nothing was done during the Chapter 40 process and that is patently untrue, Your Honor. It was raised as part of the response to the Chapter 40 notice and it was raised during the mediation. And, Your Honor, the two letters that I specifically asked for information from them with regard to what I believe were problems with their Chapter 40 notice and we did what was appropriate. In our declaratory relief action that's our third cause of action failure to comply with Chapter 40, and it specifically says in our declaratory relief complaint that they failed to comply with what AB125 required them to do with regard to specific identifications of defects, damages and injuries.

The undisputed material facts with regard to this portion of the motion is that the notice does not give a location of each alleged defect damage and/or injury in each unit. It does not. The notice also references specifically corrosion damage to nail framing components, it also specifically states that fire blockings not installed as required in two different areas. And what we now know but which we didn't know when we received the notice is that prior to the notice being issued, Omar Hindiyeh, one of the experts for the HOA, in December and January prior to the issuance of the notice went out and his company inspected fifteen units. Now, whether inspecting fifteen units is sufficient in a project the size of this one with two towers of hundreds upon hundreds of units is another issue, Your Honor, but even then Mr. Hindiyeh in

an affidavit said that of the fifteen units inspected he's then trying to extrapolate a seventy-six percent occurrence rate of corrosion, a seventy-six percent occurrence rate of the lack of fire blocking in the ledge or shelf area and then he doesn't give any percentage whatsoever and just says, well, the fire blocking materials in the steel stud framing cavities really wasn't done as well as it should have been done. Well, number one, Your Honor, that – even if it was included in the AB125 notice AB125 specifically took out from the notice portion of the statute. And this is Exhibit 4 to the builder's motion. In talking about NRS 40.645 on page 12, Your Honor, you'll see that along with changing what type of detail was to be provided there is sections of the old Chapter 40 that were specifically removed. And I'm referring to subsection four and subsection three which says that a notice based upon a valid and reliable representative sample maybe used. That is taken out of the statute. It no longer exists, Your Honor. You cannot rely upon extrapolation or a representative sample in your notice under AB125.

Going back to the *Westpark* case where the HOA says that *Westpark* stands for the premise that you cannot have an absurd result. Your Honor, you'll recall Westpark. What was absurd about that decision was absurd – the Supreme Court determined that what was absurd is that a unit which had been occupied for seven years as an apartment could not and should not be classified as new under the definition of residence under Chapter 40 and that's why that District Court decision was overturned by the Supreme Court. But Westpark specifically says that where the language of the statute is unambiguous the Courts are not permitted to look beyond the statute itself when determining its meaning. And so when you look at the statute, Your

Honor – and this again is back to Exhibit 4, what does that statute require? In 40.6 – NRS 40.645 subsection 2, subsection B – this is on page 12 of the exhibit that I provided to you --

THE COURT: I'm there.

MR. BROWN: -- took out what was the reasonable detail language which was the basis for the *First Light I* decision and put in that the notice must identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim including without limitation the exact location of each such defect, damage and injury. Now, there are a couple of things that the HOA brings up in their opposition. Number one, they accuse the builders of inserting unit in the definition but when you look at the definition of residence under NRS 40.630 residence means any dwelling in which title to the individual units is transferred to the owners. The statute itself identifies residences including a unit, Your Honor. And this statute says that you must have identified in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim including without limitation the exact location of each such defect, damage or injury.

In the Chapter 40 notice we first have to look at what is alleged in the Chapter 40 notice. Now, they allege that all of the windows have the same design deficiency. Now, Your Honor, I know that's not true. Why do I know that? Because about a month ago the HOA tried to serve a new Chapter 40 notice which they withdrew for different windows that don't have this particular issue. They tried to give a Chapter 40 notice for an entirely new window issue but that was so far beyond the one year savings period of AB125 they withdrew that. But you've got claims that the windows have alleged to

water intrusion. And in the Chapter 40 notice it specifically says: "As a consequence of this deficiency water that should have drained to the exterior of the building has been entering the metal framing components of the exterior wall and floor assemblies including the curb walls that support the windows and is causing corrosion damage to the metal parts and components within these assemblies." So, their notice – and this is –

THE COURT: But you're –

MR. BROWN: -- Exhibit 1.

THE COURT: Exhibit 1, page 1?

MR. BROWN: Page 2.

THE COURT: Page 2.

MR. BROWN: At the top of page 2 you'll see, Your Honor, in the first paragraph in the fourth line the notice specifically identifies corrosion damage. We know that Mr. Hindiyeh, in his post-notice affidavit, in the opposition says that "oh well, I went out and I inspected fifteen units amongst these hundreds and hundreds of units and of those units we believe that corrosion exists in seventy-six percent of them." Now, we already know that the statute doesn't allow them to do that but what the statute does require is that identify in specific detail each defect damage and injury to each residence including without limitation the exact location. So, the statute required the HOA once it decided it was going to make a claim for corrosion damage to identify in specific detail where that corrosion damage is in each and every unit without limitation the exact location and they did not do that, Your Honor.

The notice is not in compliance with the specific requirements of AB125. The HOA contends that we must challenge with specificity what is

wrong with the notice and that's what we've done but they don't want to live up to what the statute requires. So, for unit 300 they cannot rely as part of their notice on post-notice affidavits from Mr. Hindiyeh to convince this Court that a seventy-six percent rate based upon fifteen units or an unknown percentage because it gives none as to one of the fire blocking issues is somehow specific enough to satisfy that portion of the statute. So, that aspect of the notice is completely non-compliant with the statute and the Court should send them back to start again.

The residential fire blocking. We talked about that that they can't rely upon that. Again, that's what they found – allegedly found in unit 300 and allegedly in those fifteen units. We already know that the sewer piping claim they've given absolutely no information on that. There's no specifics despite our requesting that and so they should be sent back. If the Court does not summarily rule in my client's favor with regard to the sewer claim then they got to give information but that should be out of the case period. The same thing with regard to the mechanical room piping as to any aspect of that claim that has already repaired; it should be out of the case. With regard to the rest of it, what you don't have – they say, oh, there's plenty of information, there's photographs and there's a chart, but when you look at the actual report that's provided by their expert, Mr. – by – not their expert, by the original, he talks about generalities. Look, there's some yellow brass issues out there and, you know, when they start to leak you should maybe replace them. That's not specific, Your Honor, that's not giving my client the specificity that is required by the statute. They also make the claim – I guess Mr. Hindiyeh makes this claim although it's not in the notice that somehow the corrosion has affected

the structural integrity of the mechanical -- of the metal stud walls and other aspects of the – of the building. That's not in the Chapter 40 notice, Your Honor, and, you know, I'd say they're time barred from bringing that particular claim but in any event it's not part of the notice.

Your Honor, this Court should not reward the HOA for a claim – and let's not beat around the bush. They're seeking tens of millions of dollars with regard to the window claims in this case and the fire blocking claims in this case and yet they don't believe that they're required to follow the statute. They bring to you affidavits from their experts and say this is why it's absurd because look what we would have to spend in order to comply with the statute. My response is three-fold. Number one, if the Plaintiff's bar did not like that aspect of the statute they could have attempted to have it changed this time around from the legislature. In fact, there were attempts to get the statute changed to some extent but they never were put up to a vote and so we have AB125 at least for the next two years.

They say that, Your Honor, it would be unfair to put that onus upon them to do the inspection that they believe is required in order to comply with the statute, but isn't that what they're saying my clients would have to do? That they can rely upon an extrapolated number and say to my client that, oh, there's corrosion in seventy-six percent of the units. There's a failure of – a lack of fire blocking in seventy-six percent of the units, there's an unknown percentage of fire blocking issues here. If you want to fight it out you do this inspection, you spend that money and figure out whether or not you want to pay for it or repair. So, they want this Court to give them sympathy but then they want my client to incur these costs. But, Your Honor, when I was reading

those costs I thought to myself what do we hear all the time today in the political field? Things want to be done and what you hear are these the sky is falling premises as -- if this is done this is what's gonna happen or if this is not done this is what's gonna happen. Two examples. What did we hear back in 2009 when the Affordable Care Act was being put up for consideration? 2009, everyone talked about something that never came to pass. And in fact, PolitiFact said it was the biggest lie of 2009, death panels. What are we hearing today? We're hearing today that if the new medical care act goes through – the last statement I heard is that twenty-three million people would lose their coverage. We don't know until one act goes through to the other to see whether or not something actually occurs, Your Honor. But what we do know is that that is what happens and that's what's happening here as well. I'm not trying to equate this claim with the Affordable Care Act or the new potential care act, Your Honor, except to –

THE COURT: Thank God.

MR. BROWN: -- say this. Except to say this, that that is what is being done with regard to trying to get this Court to disregard what the statute requires, to disregard that the statute is clear on its face that it must come – any new claim with a notice that's specifically identifies the defect, the damage, the injury without limitation in exact locations in every residence. Residence includes the definition of a unit. That wasn't done, Your Honor. This Court has no choice but to grant our motion and to send them back and to see if they can do this right the next time around, Your Honor. The statute gives you the right to do that, to dismiss it without prejudice or to stay the case. Now, if you choose to stay the case, Your Honor, respectfully I don't

think that you should stay – I think you stay their counterclaim – the HOA's counterclaim, I don't believe you have to stay my client's declaratory relief action if the Court does choose to take that option. Do you have any questions, Your Honor?

THE COURT: No.

MR. BROWN: Thank you.

MR. SALZANO: Good morning, Your Honor. I'm gonna give you one reason why you cannot grant their motion, one reason why you shouldn't grant their motion and one reason why it would be unwise to grant their motion.

Let me start out with the cannot. Usually that's sufficient to defeat a motion for summary judgment but unfortunately we're gonna have to cover all three because of the nature of the allegations made by the builder in this case. First of all, under NRS 40.6427(2)(B) the statute that I'm certain you're familiar with. I'll go ahead and read it into the record, Your Honor. Starting at subsection two: "If a claimant commences an action without complying with subsection or NRS 40.645 the Court shall" -- under subsection B, "if dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose the Court shall stay the proceedings pending compliance with those provisions by the claimant." This Court does not have discretion. I normally wouldn't use such strong language with the Court. I know the Court has discretion – wide discretion on many things and courts usually exercise that when they see fit, but here the statute says "shall stay the litigation pending resolution of the Chapter 40 issues."

THE COURT: The one thing that Mr. Brown did say is that – and maybe

you can address this. That if I were to apply the statute that it would be applied here, a counterclaim or a third party action – or both but not to his – not to the primary action which is seeking declaratory relief.

MR. SALZANO: Let's discuss that for a bit. The action that was brought by the builder was a declaratory relief on a number of different issues; some involving indemnification, interpretation of the settlement agreement as a contract, some involving the insufficiency of the Chapter 40 which is before the Court today. And that's why I didn't understand why Mr. Brown kept discussing the settlement agreement or what my clients should have known four years ago because that's not really before the Court, meaning that settlement agreement – at some point we'll get an opportunity to discuss the ins and outs of it I think likely because Mr. Brown referred to specifics within that settlement agreement that any confidentiality that his client hoped to have in it is likely gone because he raised an issue in open court with regards to certain aspects of it. I'm gonna have to dive into it to defend my client with respect to that settlement agreement. But ultimately you've seen it, it's before you in camera and you know that the specific claims that are raised by us are not covered within it, okay? That much is simple. But there are a number of different issues that relates in that deck relief action and it's not simply a deck relief action on the sufficiency of Chapter 40. It's a deck relief action for a number of different issues and the kicker is it seeks affirmative damages, it's asking for damages against my client. So, in reality it's not a deck relief, it's a lawsuit. And that gets to my second point. And I'll circle back to this issue of what should and should not be stayed.

Under NRS 645 subsection 4(A) -- and again I'm sure you've read

this many times: "Notice is not required pursuant to this – this section before commencing an action if (a) the contractor, subcontractor, supplier or design professional has filed an action against the claimant." Now, I've heard parties in here saying "well, but there's an unwritten exception for declaratory relief when all I'm trying to do is the *First Light* type of thing. I'm trying to determine whether or not the 40 is sufficient." They did way more than that, Your Honor, they're asking for damages against us. That's a regular old garden variety lawsuit against us. They're trying to enforce a contract and get damages from us. If that's the case, Your Honor, under subsection 4(a) –

MR. BROWN: Your Honor –

MR. SALZANO: -- 40 goes away, it –

MR. BROWN: -- I'm going to object –

MR. SALZANO: -- evaporates.

MR. BROWN: -- to his argument, it's nowhere in his moving papers.

THE COURT: Okay. Well, I'm gonna listen to what Mr. – I listened to you, counsel, and I appreciate –

MR. BROWN: Thank you.

THE COURT: -- if we had a jury here I'd be a little bit more concerned, but –

MR. BROWN: I appreciate it. Thank you.

THE COURT: Wait a minute; you said you were looking at 40.6454?

MR. SALZANO: 4(a).

THE COURT: Now – maybe – is that in the new one? Because the old one says 4(a) talks about – except – well, 4 says: "Except as otherwise provided in subsection 5 one notice may be sent." Or is there – am I missing

something?

MR. SALZANO: We just printed this out. This should be the new version. It has all the AB –

THE COURT: Well –

MR. SALZANO: -- 125 –

THE COURT: -- if it's in the new version I'll look. Oh, I'm with you. Okay, thank you. But you had already filed –

MR. SALZANO: We did.

THE COURT: Well, what I mean is you already provided them a 40.645 notice before they filed the lawsuit.

MR. SALZANO: In the words of the builder the Chapter 40 process was complete. That was their excuse for filing. And having filed the Chapter 40 requirements rights and responsibilities evaporate, they're gone. This statute says that once they sue us the requirements of the Chapter 40 notice go away.

THE COURT: Well, yeah, but you – no, I took what he – what Mr. Brown said is we instituted the deck action two days after the mediation took place. So, you guys were far beyond the notice –

MR. SALZANO: Yes.

THE COURT: -- right?

MR. SALZANO: Yes.

THE COURT: So, as far as the 40.645 notice it had already been done, I mean, you –

MR. SALZANO: And there's no need to go back to it, correct?

THE COURT: Well, as far as whether or not the notice is sufficient?

MR. SALZANO: Well, there's no need to go back to it anyway. They

filed an action against us and the statute says: "Notice is not required if the contractor has sued us." So, why would we go back and get a second attempt to a notice when we've already been sued and the notice is not required?

THE COURT: Well, the deck – the purpose of the deck action that – from what I understand – and forgive me, I have not gone through and read the entire thing which I probably will do after this – after this hearing today. I'm hoping to decide this issue without taking it under advisement. Which by the way I am getting on time, I've only got three dealing with one case now but – that I've gotta write. But the fact is the deck action from what I understand is challenging the sufficiency of the notice, I mean, at least in part.

MR. SALZANO: In one cause of action. In the first cause of action it asks for the application of AB125 to the – to the Chapter –

THE COURT: Right.

MR. SALZANO: -- 40 notice. And I have –

THE COURT: Right.

MR. SALZANO: -- seen instances in cases and judges apply when you file a deck relief action that's not really an action against the HOA. The type of action they're talking about is when you're suing them for damages for some reason outside the Chapter 40 notice.

THE COURT: Yeah, like for –

MR. SALZANO: The problem is –

THE COURT: -- example if your client had – if you were representing the homeowner and didn't pay the cost of the repair or something like that. That's kind of the way I take it. But a complaint for declaratory relief to challenge the sufficiency of the notice I see as a different animal.

MR. SALZANO: But they sue us for spoliation, they sue us for breach of contract, they sue us for an application of a duty to defend and an application of a duty to identify in four separate causes of action that are completely unrelated to the Chapter 40 notice itself. They are based upon a contract that was executed between the HOA and the builder relative to the previous settlement and they asked for damages. And that has nothing to do with the declaratory relief on the sufficiency of the Chapter 40 notice. Though I disagree, Your Honor, I don't think that you should be able to challenge the sufficiency of a Chapter 40 through a deck relief action. I understand the reasoning behind why courts have ruled that that does not trigger the four – the subsection 4 that essentially takes you out of the Chapter 40 context.

THE COURT: Probably because – well, of course that's – okay, they just changed the numbering from six to four.

MR. SALZANO: Yes.

THE COURT: Okay. Never mind. I was gonna say, well, we haven't been subjected to number four yet –

MR. SALZANO: You know –

THE COURT: -- but we have on six so –

MR. SALZANO: -- you gave me a little bit of a fright, Your Honor, because as I go through these Chapter 40's I have older copies of it sitting around my office and sometimes I pull out that older copy and I get into to it and I'm like wait a second, this is the old version. There are so many versions of Chapter 40 we have that we should think [indecipherable] we have the right one.

Setting aside those two issues. Number one; that – the statute

says shall – shall stay because of the statute of limitations. The statute also gives you the right to essentially turn off Chapter 40 and put Chapter 40 in the past. As my – as counsel so eloquently stated "we don't want to live in the past anymore." Let's put it behind us and go into discovery. I would like to discuss however some of the merits of the action – of this discussion about whether or not our Chapter 40 notice satisfied the AB125 requirements. And clearly there's a disagreement between the HOA and the builder as to what the effect of the requirements of AB125 are. I would like to start out by stating that I just flat disagree with any notion that Chapter 40 forbids extrapolation. I understand that the notice requirements that allowed for extrapolation to be done in the notice have been removed and I know that the language under 645(a) – or (b) was changed and it kind of looks that way. But the reason why I have a problem with that blanket statement that you can never use extrapolation in a Chapter 40 notice is because if they wanted it to say that they could have said it in one sentence. Extrapolation or representative sampling will not be used to satisfy your requirements under Chapter 40, NRS 40.6 [indecipherable] et seq. They could have said that and they didn't. And I think it's important to know why they wouldn't have said something like that because there are instances where without it Chapter 40 becomes kind of a dead letter.

In the case of my clients we have 600 units, 600 condominium units in a – in a high rise and the builders expect us to blue tape every single defect. Let me explain what blue taping is. It's a word that I came up with to describe something I've been asked to do a few times over the last twenty some odd years. I was born and raised here in Vegas; I still have friends, family

all over the town. And on occasion when one of my friends or family buys a new house they call me, they say Serg you do construction defect, why don't you come over and look at my house in a walk through because I don't want to sign off on anything with the builder until I've had you look at it. As if I have some secret knowledge about how a house should look when it's built. I don't know but they invite me over, usually they give me a pastry and so I go. And invariably when you arrive you get – you get this role of blue masking tape, you know, the type that the painters use when they mask stuff off and it sticks to stuff but it doesn't leave any of the residue behind so they love to use it when you're doing these walk throughs. And they – they tell you rip a little piece off and stick it wherever you see a problem. Oh, you know, the painter didn't get all the way up into the corner, blue tape; crack in the tub, blue tape; a chip off of the sink, blue tape; no hot water, blue tape; crack in the tile, blue tape. Well, sometimes you get lucky. Sometimes these houses are very well built and there's very few problems and very few pieces of blue tape, but I've had those experiences, Your Honor, where sometimes you walk in and the house is full of blue tape, it's all over the place. And sometimes it's not just little things like a little scratch here or a little bump there or a mark there, sometimes it's – we got tile here and we paid for wood flooring. We paid for wood flooring why is there tile here? Sometimes there's serious issues.

Well, the reason why I bring up blue taping – and I apologize for you indulging me on this, but the builder's interpretation of Chapter 40 is that homeowners have to blue tape each and every defect in each and every home. If you got a thousand homes you gotta walk a thousand homes and blue tape every single defect in that house and homes. I don't think that's right, I think

that's incorrect. If you look at NRS 645(2)(b) it says: "Identify in specific detail each defect, damage and injury to each residence or appurtenance as the subject of this – of the claim including without limitation the exact location of each such defect, damage and injury." It doesn't say you have to identify each defect in each home with the exact location in each home or in each unit. And this is where Mr. – where counsel for the builders misunderstood our argument. There's no – we don't care about units or residences; we understand that they're interchangeable within the statute. We believe that they want to add in each unit to the end of subsection B to require us to blue tape every single defect in every single home. I don't think that's a correct interpretation, Your Honor. I think that if you blue tape a particular defect that's gonna apply to the next thousand homes in the exact same location you have satisfied your burden under this statute. Now, you could call it representative sampling, you can call it extrapolation, you can call it whatever you want to, it satisfies the statute because you have identified the exact location where it's gonna occur in every single home. And the reason why I go through this discussion is because that's what we did in our Chapter 40 notice.

For instance with the windows, we alleged that there's a missing damaged sill plate in the window assembly. And I think that much is clear from that little paragraph that's included in the Chapter 40 notice. Well, once you understand what a missing sill plate is you know exactly where that sill plate is missing from in each and every unit. It's not gonna change. In the first unit it's found in the window, in the second unit it's found in the exact same place at the bottom of every metal framing around each of the windows. You're not gonna go to a unit and say, hey, there's a missing sill plate from the – from the

washing machine room or let's go look under the – under the bathroom cabinet to see if there's a missing sill plate. No. It's in the exact same place in every unit. Meaning once you define the defect and define it with enough certainty you locate – you locate it, you localize it in every single unit. And I believe that if you'll read the actual words of 645(2)(b) that's sufficient for AB125 because we've given the exact location. In other words, Peter's experts or his client can walk in with that short description and go right to where that defect is in any one of the units.

THE COURT: Can I ask you this? Going down to subsection D of NRS 40.645 it also requires: "That there be a signed statement by each named owner of a residence or appurtenance in the notice that each such owner verifies that each such defect, damage and injury is specified in the notice exists in the residence or appurtenance owned by him." And so on.

MR. SALZANO: Then the next sentence too.

THE COURT: Yes. Right. "And if the notice is sent on behalf of the homeowners association the statement required must be signed under penalty of perjury by a board -- member of the executive board or officer of the association."

MR. SALZANO: And it was.

THE COURT: Okay.

MR. SALZANO: The HOA – the HOA board signed –

THE COURT: So, I take it that this sill plate that you've been talking about is an HOA issue it is not a unit issue?

MR. SALZANO: Whether it's in the common areas? Yes, we believe it's in the common areas.

THE COURT: Okay. All right.

MR. SALZANO: And it's in the same – it's the same missing issue or damages issue in the exact same place in every single one of the units. And here's what I find particularly troubling about the builder's description of the problem. They have the burden still under *First Light*, it's still good law as far as I understand. They have the burden to explain with specificity what the problems are with our Chapter 40 notice. Here's what they stated relative to this window issue. Let me read this into the record. I'm on page 14, lines 22 to 24. "The purpose of requiring a claimant to provide specific details regarding an alleged defect is to allow a contractor to inspect the alleged defect." It's right there on page 14, lines 22 to 24. They're asserting that because we didn't give an exact enough description of the defect or location of the defect they can't do an inspection. Here's the issue, Your Honor. They can't inspect it anyway; it's inside the window railing. You'd have to pull that thing apart to see what's missing. It's the same problem with the fire blocking. They can't inspect that fire blocking because it's behind the drywall, you gotta pull the drywall off to get back there to see where it's missing. Omar found it not because he was doing some pre-litigation work up because we're gonna send a Chapter 40 notice as the builder has alleged, Omar found it because there were leaking in a unit and the HOA that was sitting at that time said, "hey, Omar, we know you from the previous litigation, would you come here and take a look at this?" Omar said, "Sure. Here's my – here's what I – it's gonna cost." And he came out and looked at it and found the problems and he reported that to the HOA board. And then other units leaked and so they said, "Omar, go take a look at those too." And it's the accumulation of these leaks that causes a

Chapter 40 to start being considered. Now, I have no idea as I stand here today whether or not the same HOA board that negotiated the settlement with Mr. Brown, he was the attorney back then in 2011, and Feinberg, Grant. I don't know if that's the same board. For all I know they're completely different people. I'm not sure why he spent so much time talking about what they know because what they know really is immaterial to whether or not these defects are valid, but there has been some investigation and Omar did go look at multiple units. Why? Because we see this issue cropping up more and more.

Now, with regards to the – to the mechanical room. Randy Kent who – I'm sorry, but you know him. You probably have spent more time with him than you ever cared to as an expert. He wrote a report and his report is very detailed, it includes photographs, it includes verbal descriptions of the defects. That's a report that I would put him on the stand at trial in front a jury and cross exam – or direct examination, direct exam him based upon that report. It's a trial report; it is far more than what you would normally get in Chapter 40. In other words, if that report is not good enough to try him on, I mean – and I think it is, it certainly ought to be good enough to do a Chapter 40 on it. I mean, what kind of a world do we live in now where my expert has to produce a better report for Chapter 40 than the one he uses at the time of trial. That makes no sense to me, Your Honor, that's turning the statute on its head. So, Randy Kent's trial report meaning – and that's a report I would use at the time of trial, it should be sufficient for Chapter 40. And that's why each of the same hackneyed recycled arguments that the builder makes about the insufficiency of the description – they also make it for the mechanical room – the mechanical issues and it shows you they're just – they're just regurgitating

arguments. I'm actually analyzing that specific report and detailing what they think is wrong. They do bring up that one particular defect which is represented in two pictures that they have to – they couldn't really figure out what those two pictures were trying to show or they had to actually physically see the valves before they can make a determination. Your Honor, that's not what Chapter 40 requires.

Just to bring us back to reality. Chapter 40 was instituted in 1995 as a self-help statute so that homeowners could get their defects fixed by the builders, then in 2003 this election to repair came along; they call it a right to repair, I call it a right to be repaired. And it's just proven – it has morphed into something it was never intended to be. Chapter 40 has become weaponized so that the builders, the subcontractors can use it as a killing field to force homeowner claims to have to run through it. And if they survive, if they make it to the other side of that killing field well then yes, they can graduate to wonderful litigation. It was never intended to be that way; it was never intended to be a windowing process that sifts out claims on technicalities or weakness or anything, it was supposed to be a process why which homeowners should get their homes fixed. And that's the purpose of Chapter 40 and it remains the purpose of Chapter 40 despite AB125.

And so when you come across a defect like the sewer pipe – and, you know, I listened to counsel make a number of – a lengthy argument about how somehow the builder has a right to see the sewer pipe before it was repaired, to watch the repair before it's repaired, to watch the repair and to force my client to keep that broken sewer pipe. On the off chance that someday my client decides to bring a Chapter 40 against him, that's – that's

horse pucky, Your Honor. that's not the way the statute is written.

THE COURT: Well, can I – ask you this? Under 40.670 it does say – I mean, it talks about what happens whenever there's an eminent threat. And I will be honest with you; I think the thing that bothers me about that statute is what is – I think an eminent threat is suddenly, you know, let's say you got water gushing through the house, well, you don't have time to write a 40.645 notice but I would think even a phone call to the builder saying, hey, we got this problem, we're gonna Band-Aid it up to, you know, keep it from going all over the house and then once we get it stopped maybe turn the water off at the, you know, the house, you know, thing so that we could get the water out of the house, then come right away to look at this thing because it needs to be repaired and if they say, no, sorry, we're not coming, we don't have time then you have to get it repaired. But I am troubled by the – it sounds like you have to get a 645 notice out before you can even make a claim for eminent harm but –

MR. SALZANO: Let's read the first sentence, Your Honor.

THE COURT: Okay.

MR. SALZANO: It says: "A contractor, subcontractor who receives written notice of a construction defect resulting –

THE COURT: Right.

MR. SALZANO: -- work performed by the contractor –

THE COURT: Right.

MR. SALZANO: -- that creates a supplier – which creates an eminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure it." That means that any time a problem happens at a

home you have to make a – essentially a guess that an expert would make or a – or an expert determination that this defect or this threat was caused by the contractor's work that is beyond the ability of most homeowners and even most HOA boards. To make a determination at the time that that pipe is spewing raw sewage into the basement of your building are you gonna sit there and calculate was this a constructional defect or was this some other cause? Did we put something on the pipe to cause it to break or is – did this arise from some previous repair that we did? The statute, if you interpret it that any time a life safety issue arises that a decision has to be made whether or not it was caused by the contractor versus some other cause. Before you repair the life safety issue is gonna cause a lot of people to get sued because if they take that time to try and figure it out bad stuff is gonna happen. Because while we're thinking or trying to call people to come in and assess and write reports and stuff there's raw sewage filling our basement. In reality most people mitigate automatically, they shut the water off at the street, they call somebody in. Where it's sewer you can't shut it off so you – you have to fix it immediately. You have to call somebody in to essentially stop, dig it up and replace it. And you have to do it quickly because it's raw sewage, it has people's poop on it.

So, I hate to be so graphic, Your Honor, but this to me is –

THE COURT: It's a crappy problem. I think we –

MR. SALZANO: Yes.

THE COURT: -- all could stipulate about that, right?

MR. SALZANO: And to be perfectly honest, I thought it was a crappy argument but – I apologize, Peter, that was too much.

THE COURT: Well – but the thing is though I am concerned about was it

so eminent of a problem? I'm gathering from Mr. Brown's argument that this wasn't that eminent and – I mean, we didn't have raw sewage going down in the basement --

MR. SALZANO: No –

THE COURT: -- right?

MR. SALZANO: -- I believe we did. And the HOA, you have to understand they have a – they have a – they have a duty to their tenants, a fiduciary duty, a responsibility to make sure they do for their tenants, you know, to act in their best interest. And I think they made a determination that it needed to be fixed – fixed immediately. I resist however, Your Honor, the thought that under 670 there remains on homeowners a responsibility where something could in some future or fashion impact the livability of the home, that they must notify the builder before they make a repair.

THE COURT: But the statute unfortunately says that doesn't it?

MR. SALZANO: And see, I'm not sure that it does, Your Honor, because – you're right. And Francis just reminded me that the HOA did – the board actually called the fire department when it happened, it was over the Christmas holiday. And when they called the fire department the fire department came out and it was something that needed to be fixed very quickly --

THE COURT: Okay.

MR. SALZANO: -- so – I'm troubled by this idea that if I know there's a roof leak on my house that I have to call the builder. My house is three years old and I gotta call KB. Hey, KB, come out because I'm hiring a guy who is gonna go up there for a hundred-fifty bucks and fix the flashing on the edge of the home that was damaged for whatever reason. But because at some future

point I may do a Chapter 40 notice on you and because this could cause mold at some point which could affect health and could affect me severely I'm inviting you to my house. I mean --

THE COURT: But unfortunately that –

MR. SALZANO: -- it violates – it violates common sense to have that interpretation of the law. I understand what the – what it says –

THE COURT: Right.

MR. SALZANO: -- and I think that it's very convenient for them to say this is what should have been done, but in reality you don't fix those types of things and expect that you're gonna call the builder because you think on the top of the your mind this may ripen into litigation in three years so therefore I have to call the builder. It's just – it boggles common sense to think that that's – that would be people's thinking. And so I think that that interpretation of Chapter 40 – or that interpretation of the specific statute it – it shouldn't be the interpretation that this Court places on it. I'll leave it at that.

THE COURT: Okay.

MR. SALZANO: Your Honor, I just want to – just -- before I sum up, rectify a couple of things that I heard from counsel for the builder. I don't know whether or not since it's the board that's making the determination now that settled the claim then, I don't know if there's been board turnover. I wouldn't be surprised if it's a completely different board. And so I don't know how Mr. Brown thinks that these new people – if there are new people, would know, geez, we gotta call the – we gotta call the builder in because we've got a sewer pipe break. Again, I don't think that that's a – that's a common interpretation of that statute.

Counsel for the builder has made a big deal about the fact that when you have prior – prior repairs – in fact, he made it sound as if – under Chapter 40 if you do a repair without notifying the builder that you've somehow waived any ability to ever bring that lawsuit. That specific argument, Your Honor, was brought in front of Judge Williams in the KiTech case because we had dozens of homeowners who had KiTech breaks and had fixed them and had never notified their builders and I believe it was brought in front of you by KB –

MR. BROWN: Objection, Your Honor.

MR. SALZANO: -- because there were –

MR. BROWN: Objection. We raised this in the opposition; there was no mention of it. We addressed this, Your Honor, and there was no mention of it in the opposition. These are arguments that counsel is introducing today for the first time.

THE COURT: Okay.

MR. BROWN: It's inappropriate to reference other cases, Your Honor.

MR. SALZANO: I believe he –

THE COURT: I understand –

MR. SALZANO: -- raised –

THE COURT: -- but –

MR. SALZANO: -- it in the reply and of course I don't get a chance to –

THE COURT: I'll listen to you, Mr. Salzano.

MR. SALZANO: I believe that KB raised this specific argument to you in your portion of the KiTech case and I believe that you rejected it then because there's nothing in Chapter 40 that says that if you self-help, if you mitigate and fix a problem that you forever waive any right to bring a Chapter 40 notice on

that specific problem that has already been repaired. And the class action settlement fund actually paid those people back for their repairs. So, I don't think there's any waiver under Chapter 40 if you self-help and if you repair the issue yourself. You are able to bring that claim still under Chapter 40 and I don't think AB125 changed that.

Lastly, Your Honor, with regards to this issue that we discussed about if this Court were to stay. We would ask that this Court stay the entire litigation and here's why. This litigation was not brought simply to challenge Chapter 40, it was brought for a number of different issues some of them involving contract interpretation, some of them involving indemnity and shifting of responsibility. Those issues I believe should be held in abeyance if – if and – until that such time as the HOA has the opportunity to properly present their claim to this – to the builder. Now, we believe they sued us for many grounds over and above simply the interpretation of Chapter 40 that this Court has a right to say Chapter 40 is done, let's move on to discovery.

Now, next week we're meeting with Floyd Hale, we're gonna go over our CMO, we're gonna start setting up our schedules for inspections, to start testing, depositions, and move this case forward. Our request, Your Honor, is is that you not only deny their motion, that you declare the Chapter 40 process has been completed under subsection 4 so that the parties can move on, get to the merits of the litigation and get some type of resolution on this claim. Thank you.

MR. BROWN: Thank you, Your Honor. Peter Brown again on behalf of the moving parties. Number one, for the record my clients absolutely disagree with the HOA's representation that this Court knows already that the issues

raised by the new Chapter 40 notice are not covered by the settlement agreement. And in fact, we agree there will be motion practice eventually depending on how the rest of this case goes as to whether or not certain claims are barred by the very terms of the settlement agreement. And so it is presumptuous of counsel to state to the Court that you have already determined and that you know already that the issues that are raised are issues that were not part of the defects that were released via the first settlement. In fact, Your Honor, we'll be making arguments that there are several of these issues that are indeed ones that were identified during the original and/or related to ones that were related during the original litigation which is the terms of the settlement agreement. It is contemplated in the settlement that if there are disputes over the settlement agreement that portions of the settlement agreement would be disclosed but not the entire. So, that is something that I know because I was part of the drafting of it, counsel was not and so he's not as familiar with the terms as I am.

You – one argument that he made as to why this Court cannot grant the motion is interesting because the counter to the argument because he relies upon that subsection 4 that the notice is not required. Again, it's a portion of the statute that he did not reference -- or the HOA did not reference in their opposition, it was raised for the first time today. But, Your Honor, I believe the Court already hit on what is important. Notice was already provided. It would be a complete rejection if indeed counsel says that *First Light I* still applies, it would be a complete rejection of that ruling which allow my clients to challenge the specificity of the notice. And as I pointed out we believe that the standard now is that it must be a very specific notice based

upon exact location, based upon specific identification of defect, damage and injury and not on the reasonable standard of *First Light I*. But what cannot be provided to my client which there's no way around this is that repairs were done to unit 300 in their entirety to – and as yet to be determined but we believe a significant portion of the mechanical piping issues and the entire sewer issue without my client being afforded an opportunity to inspect, to provide a response, to make a determination as to whether that response would include an election to repair.

And as the Court kept commenting during my colleagues' representation, NRS 40.645 specifically states: "That before a claimant commences an action you must give written notice." And that written notice must, according to AB125, identify in specific detail each defect, damage, injury to each residence, the exact location. I don't know how else to read that, Your Honor, but to read it that there was a reason why the legislature two years ago approved by the governor, signed into law, took out reasonable detail and put in new language that says specific detail and used the word "each". Not specific detail of defects, damages and injuries but specific detail as to "each" defect, damage and injury. To each. Not in the blue tape example; oh, one unit here and a sample there, but to each residence including without limitation the exact location of each such defect.

And then Mr. Salzano said: "You know, it should still be okay for him to put up that blue tape and put it here." And he says, "You can call that sampling, you can call that extrapolation." Again, Your Honor, I don't know how else this Court can interpret what the legislature did and what the governor approved and signed into law when it took out specifically subparagraph three

of NRS 40.645(2) – or (3) which specifically took out the language that originally said: "That a notice that includes an expert opinion concerning the cause of the constructional defects and the nature and extent of the damage or injury resulting from the defects which is based on a valid and reliable representative sample of the components of the residences or appurtenances may be used as notice." It's out. It was specific language that existed. It's gone and what was put in its place is a requirement that there be specific detail of each defect, each injury, each damage in each unit, in every exact location.

The notice that was provided to my clients did not give that, Your Honor. We've identified that there were over 9,000 windows of different configurations. Now, the representation, Your Honor, today is that they're all the same windows. We've represented to you that they're not, Your Honor, but he says that none of them are of the sill plate. It doesn't take away, Your Honor, from the alleged corrosion damage, it doesn't take away from what we've now heard is apparently Mr. Hindiyeh wants to claim that the corrosion damage causes structural compromise of the building. That's brand new. That's not in the notice, that's in Mr. Hindiyeh's affidavit. But that is specific damage that that statute says must be identified in each residence, every location. That's what the statute says. They may not like it. They fought it, the Plaintiff's bar fought desperately against that change and they lost. This is the law.

You cannot – Mr. Salzano said – using the blue tape example: "You localize where it is and then it's on my client to say, oh, well, they localized that. We can figure out where else it is." You cannot localize corrosion, you cannot localize structural issues, you cannot localize fire

blocking. That's specific. Even if you were to look at what would not be allowable extrapolation summary affidavit from Mr. Hindiyeh that is not pursuant to the statute. Mr. Hindiyeh can't even give you that. He just says, well, I looked at fifteen units. I think you were told there were over 600 units between the two towers. Fifteen units? That's – even under the old Chapter 40 would that be a sufficient sampling?

Mr. Salzano says that the report from Mr. Kent, boy, he's use that at trial. Your Honor, the report that is provided is not from Mr. Kent, it's from a Mr. Fehr. The only thing that Mr. Kent provides is an anticipated cost associate with what he thinks it would cost to do the inspection that the HOA's counsel says, oh, we may have to do if we have to follow the statute. Mr. Kent did not provide a report, the report that's provided in the Chapter 40 notice was from ATMG, Advanced Technology and Marketing Group and the author of that is Gregory Fehr, F-e-h-r.

Today – I've learned more today about that sewer issue than I knew before for over now a year of litigation. I learned today it happened on Christmas, I learned today that sewage was being spewed somewhere. I learned today that they called up the fire department; I learned today that they didn't know that they should call my client. Today, not in the moving papers, but today that's what you were told. Notes were being given, oh, this is more information we now know. Nowhere despite two letters asking give me something as to the sewer claim. They didn't respond. Give me something as to what – what you did with those fittings and component parts and mechanical piping. What you did with them. No response whatsoever. And you didn't hear anything today did you? Those probably are long gone because

there's never been a representation that anything that was removed and replaced is anywhere to be found.

Your Honor, Mr. Salzano asked you at the end to completely disregard everything my client says – has asked for. That we're gonna go in front of the special master next week and he's gonna set this case on course. Let's let Special Master Hale set everything for it, we don't need to go back to the Chapter 40 process, we just do depositions and inspections and just move on so we can get to the money. That's what they want. Your Honor, before they get to ask for money they've got to give my client a proper notice. It would be a complete disregard of AB125 if this Court were to agree with Mr. Salzano's position that (1) my clients' declaratory relief action somehow completely dismisses the Chapter 40 issues and that regardless of whether there are huge problems with the Chapter 40 notice my client cannot ever challenge that. My client has challenged it, challenged it in the Chapter 40 response, challenged it at – during the mediation, challenged it in two letters to them and challenged it appropriately in the declaratory relief action.

Now, finally with regard to whether or not if this Court makes the determination to stay to see if they can fix their Chapter 40 problems, the notice problems, the statute specifically talks about if the action is filed without the Chapter 40 notice being properly done then the Court has two options. It can stay that -- it can dismiss without prejudice that action or it can stay that action. It doesn't say anything about my clients' claims. And, Your Honor, my client should not be precluded from going forward on discovery on certain things like the spoliation of evidence. I still after all this time, Your Honor -- and this Court has no additional information as to whether or not the mechanical

pipe components still are anywhere to be found so that my client could possibly do a test on them to see if what is alleged is true, to see whether or not my client can confirm the components parts. Maybe my client wants to make a claim against a third party manufacturer but my client has no information upon which to base that because my client does not have the component parts. There are aspects of my clients' declaratory relief that should still be allowed to go forward, Your Honor, because the statute talks about an improperly filed action by a claimant. My client is not the claimant; my client is seeking its own relief in its declaratory relief action and did so appropriately. And, Your Honor, we were here months ago in which they did a full blown challenge to my clients' declaratory relief action and you denied their motion to dismiss on every single ground and yet they're dredging that up again today. You already ruled that my clients' deck relief action was appropriate and could move forward.

This Court should grant the motion for summary judgment on the Third Cause of Action as to all claims related to unit 300, as to any aspect of mechanical piping claims that have been removed and replaced without notice being given to my client and the opportunity to repair prior to being done, and the sewer claim because no notice was given to my client. My client can never be provided that right to repair again it's done, it's gone, and AB125 required that. With regard to the overall claim this Court should grant the motion and send the HOA back to the drawing board to see if it can comply with AB125 which requires that specificity. And we have with – with our own specificity shown what is wrong in each and every instance with the Chapter 40 notice that we received. Thank you, Your Honor.

THE COURT: Counsel, I would like to write on this one. And I know

that sometimes I take a while to do them and it's not because I'm not working. But the good news is, even though I'm right in the middle of a murder trial, I have got just a few left with respect to the Copper Sands case and I frankly am kind of anxious to get that one off of the drawing board. And I am – I've gotten one of them out and I got three more to do, but the good news is I don't think that they're gonna take me that long to do. This would be next in line after that.

MR. BROWN: Your Honor, is – could you give us any type of – and I apologize for this. Could you give us any type of estimate? What I'm getting at is that there are so many issues that are raised today including requests by counsel as to what the HOA thinks you should do with regard to staying the case and what aspect of the case. If we had some general idea my recommendation would be to inform the special master that until we get the order from the Court it would be inappropriate for the Court to set a discovery schedule on this case until we get this Court's ruling.

THE COURT: I'm pretty confident I can get it to you within the three or four weeks. My murder trial goes into next week and then I'm going to the state bar for a couple of day, but I am here after that so I should be able – I mean, those other things won't take me that long to do.

MR. BROWN: So, you believe within three to four weeks?

THE COURT: Yes.

MR. BROWN: Your Honor –

THE COURT: I really do.

MR. BROWN: -- my clients would request that the Court recommend that the special master hold off on setting any discovery dates until the ruling on

this particular motion.

MR. LYNCH: That's no problem, Your Honor. We'll go ahead and write Floyd today and put it off until you come back with your decision.

THE COURT: Well, it'll save you guys all some money. I mean, I know that sometimes I take long on these and it's just it takes me a while to write them anyway. But I'd just like to write on this one. I'm interested.

MR. SALZANO: Thank you, Your Honor.

MR. BROWN: Thank you so much, Your Honor.

THE COURT: Okay.

MR. BROWN: Thank you for your time.

* * * * *

* * * * *

THE COURT: You bet.

[Proceedings concluded at 12:12:57 p.m.]

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video recording in the above-entitled case to the best of my ability.

NORMA RAMIREZ
Court Recorder
District Court Dept. XXII
702 671-0572

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MESS, 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

This matter, concerning Plaintiffs'/Counter-Defendants' Motion for Summary Judgment on Defendants'/Counter-Claimants' Counter-Claim, and Motion for Partial Summary Judgment on the Third-Claim for Relief contained in Plaintiffs'/Counter-Defendants' Complaint for Declaratory Relief filed March 20, 2017, came on for hearing on the 20th day of June 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 appeared by and through their attorneys, PETER C. BROWN, ESQ. and JEFFREY W. SAAB, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendants/Counter-Claimants/Third-Party Plaintiffs appeared by and through their attorneys, SERGIO SALZANO, ESQ., CHARLES "DEE"

[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."

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HOPPER, ESQ. and FRANCIS I. LYNCH, ESQ. of the law firm, LYNCH HOPPER. 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.[2]

2. On February 24, 2016, Defendant/Counter-Claimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its NRS 40.645 Notice of Constructional Defects upon Plaintiffs/Counter-Defendants (also identified herein as the "Contractors" or "Builders"), identifying the following deficiencies:

> **1.** ***Residential tower windows***—There are two tower structures in the Development, consisting of 616 residential condominium units located above common areas and retails (sic) spaces below. The window assemblies in the residential tower units were defectively designed such that water entering the assemblies does not have an appropriate means of exiting the assemblies. There are no sill pans, proper weepage components or other drainage provisions designed to direct water from and through the window assemblies to the exterior of the building.
>
> This is a design deficiency that exists in all (100%) of the residential tower window assemblies.
>
> As a consequence of this deficiency, water that should have drained to the exterior of the building has been entering into the metal framing components of the exterior wall and floor assemblies, including the curb walls that support the windows, and is causing corrosion damage to the metal parts and components within these assemblies. Further, this damage to the metal components of the tower structures presents an unreasonable risk of injury to a person or property resulting from the degradation of these structural assemblies.
>
> . . .

[2]According to Plaintiffs, 4525 Dean Martin Drive or "Tower I" consists of 33 floors, 308 units, 10 townhomes, 6 lofts, retail space, pool and a 5-level parking garage. 4575 Dean Martin Drive or "Tower II" has 34 floors, 308 units, 10 townhomes, 6 lofts, retail space, pool and a 5-level parking garage. *See* Plaintiffs'/Counter-Defendants' Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and their Motion for Partial Summary Judgment on Third-Claim for Relief within the Complaint for Declaratory Relief filed March 20, 2017, p. 7.

2. ***Residential tower fire blocking***—The plans called for fire blocking insulation, as required by the building code, in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. ...The purpose of this insulation is to deter the spread of fire from one tower unit to the units above or below. However, the insulation was not installed as required by the plans and building code.

This installation deficiency exists in all (100%) of the residential tower units, in which insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both.

This deficiency presents an unreasonable risk of injury to a person or property resulting from the spread of fire.

3. ***Mechanical room piping***—The piping in the two lower and two upper mechanical rooms in the two tower structures has sustained corrosion damage as described in the attached ATMG report dated November 17, 2011. ...

4. ***Sewer problem***—The main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to adjacent common areas. This deficiency has been repaired. In addition to causing damage, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter.[3]

3. The Contractors elected to inspect the constructional defects identified within the Association's NRS 40.645 Notice on March 24, 2016.[4] During the inspection, the Contractors observed windows located in Unit 300 had been already been removed and replaced. Likewise, prior to the Contractors' inspection, the majority of the alleged corroded mechanical room piping, as well as the averred defective sewer piping had also been removed, replaced and/or repaired. The Contractors were not provided notice of the removal or replacement of the alleged constructional defective windows in Unit 300 or the deficient piping in the mechanical room prior to the March 24, 2016 inspection.

. . .

[3]*See* Exhibit 1 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and Motion for Partial Summary Judgment on the Third Claim for Relief of the Complaint for Declaratory Relief filed March 20, 2017.

[4]This Court understands neither the Association's representative nor its experts attended this inspection.

4. On March 29, 2016, the Contractors' lawyer sent a letter to the attorneys for the Association, requesting "information regarding the alleged sewer line, including the date of occurrence and the date of repair. ...In addition, please confirm the current location of any sewer line materials that were removed and replaced as part of the repair." Further, counsel requested "the date(s) when that work [in replacing the pipes in the mechanical room] was done and the identity of the contractor(s). Please also confirm whether and where the removed pipes have been stored for safekeeping."[5] As there was no response from the Owners' Association to the March 29, 2016 correspondence, the Contractors' attorney followed-up with another letter sent a month later, April 29, 2016.[6] However, there was also no response to the April 29, 2016 letter.

5. The Contractors thereafter responded to the Association's NRS 40.645 notice, and the parties subsequently engaged in the NRS 40.680 pre-litigation mediation with no success on September 26, 2016.

6. Contractors filed their Complaint on September 28, 2016 against the Owners' Association, asserting the following claims:

1. Declaratory Relief—Application of AB 125;
2. Declaratory Relief—Claim Preclusion;
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.

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[5] *See* Exhibit 2 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and Motion for Partial Summary Judgment on the Third Claim for Relief of the Complaint for Declaratory Relief.

[6] *See* Exhibit 3 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and Motion for Partial Summary Judgment on the Third Claim for Relief of the Complaint for Declaratory Relief.

7. 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.

8. The Contractors now move this Court for summary judgment, or dismissal of the Counter-Claim upon the bases:

(1) the Association failed to comply with NRS 40.645(2)(b) by not

(a) listing each defect in *specific* detail,

(b) describing in reasonable detail the nature and extent that is known of the damage or injury resulting from the defects,

(c) providing verification from each owner the defect exists in his unit, and

(d) arranging for its representative and expert to be present at the inspection; and

(2) the Owners' Association failed to provide notice of defects prior to performing repairs. In this regard, the Contractors also seek partial summary judgment with respect to the Third Claim for Relief contained in their Complaint.

9. The Owners' Association opposes, arguing its NRS 40.645 notice is presumed to be valid, and further, the notice statutes are meant to require substantial as opposed to technical or strict compliance. Further, the Contractors' interpretation of AB 125 is not reasonable, leads to absurd results and violates due process. Notwithstanding these arguments, if this Court found the notice to

be deficient, the appropriate remedy would be to stay the case and provide curative instructions, as opposed to dismissal of the Counter-Claim. *See* NRS 40.647(2)(b).

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).

Sufficiency of the NRS 40.645 Notice and Adherence to NRS Chapter 40 Process

3. There is no question the provisions of NRS 40.600 to 40.695 were enacted by the Nevada Legislature with the intent to provide contractors an opportunity to repair constructional defects and avoid litigation. *See* D.R. Horton, Inc. v. District Court, 123 Nev. 468, 476, 168 P.3d

731 (2007).[7] To ensure contractors were given an opportunity to repair, the Nevada Legislature required a homeowner or claimant to give the contractor notice of constructional defects initially in "reasonable detail,"[8] and based upon that notice, allow the contractor time and opportunity to inspect and make repairs when a deficiency was verified.[9] A claimant's failure to comply with those requirements before filing a constructional defect action results in the dismissal or postponement of that action until those mandates are complied.[10]

4. In 2015, approximately one year before PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its notice of constructional deficiencies in this case, the Nevada Legislature made sweeping revisions to the state's laws relating to constructional defects with the enactment of Assembly Bill (AB) 125. Of significance here, AB 125 amended provisions governing the information required to be provided within a notice of constructional defects. It revised the statutes of repose regarding actions for damages resulting from certain deficiencies in construction. Further, it prohibited a homeowners' association from pursuing an action for constructional defects unless the litigation pertained exclusively to the association's common elements.

5. As alluded to above, NRS 40.645(2), as revised in AB 125, sets forth more stringent requirements for the constructional defect notice than what was in place prior to February 25, 2015. It now provides:

> The notice given pursuant to [NRS 40.645(1)] must:
> (a) Include a statement that the notice is being given to satisfy the requirements of this section;
> (b) Identify in *specific* detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim including, without

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[7]This case is commonly referred to as *"First Light I"* by practicing lawyers and judges.
[8]*See* NRS 40.645 in effect prior to February 25, 2015. Assembly Bill (AB) 125, which became effective on February 25, 2015, resulted in a change to NRS 40.645(2) to require "specificity" or "specific detail."
[9]*See* NRS 40.647(1).
[10]*See* NRS 40.647(2).

limitation, the exact location of each such defect, damage and injury;

(c) Describe in reasonable detail the cause of the defects if the cause is known and the nature and extent that is known of the damage or injury resulting from the defects; and

(d) Include a signed statement, by each named owner of a residence or appurtenance in the notice, that each such owner verifies that each such defect, damage and injury specified in the notice exists in the residence or appurtenance owned by him or her. If a notice is sent on behalf of a homeowners' association, the statement required by this paragraph must be signed under penalty of perjury by a member of the executive board or an officer of the homeowners' association. (Emphasis added)

6. While NRS 40.645 was revised to include more stringent requirements within the pre-litigation notice to contractors, this Court notes such notices still are presumed valid. *See* D.R. Horton, Inc., 123 Nev. at 481. A contractor who wishes to challenge the adequacy of a pre-litigation notice bears the burden of doing so with specificity. *Id.* Because each case is factually distinct, the district courts have wide discretion to consider each contractor's challenge to the reasonableness[11] of each pre-litigation notice. As noted by the Nevada Supreme Court in D.R. Horton, Inc., 123 Nev. at 481, "the district courts are well suited to determine whether a notice preserves a contractor's opportunity to repair."

7. NRS 40.647(1) also sets forth other requirements such as the claimant must allow inspection of and reasonable opportunity to the contractor to repair the defect. Further, he or his expert is required to be present at the inspection. NRS 40.647(1) specifically states:

After notice of a constructional defect is given pursuant to NRS 40.645, before a claimant may commence an action or amend a claim to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant must:

(a) Allow an inspection of the alleged constructional defect to be conducted pursuant to NRS 40.6462;

(b) Be present at an inspection conducted pursuant to NRS 40.6462 and identify the exact location of each alleged constructional defect specified in the notice

[11]The Nevada Supreme Court's decision in *D.R. Horton, Inc.*, pre-dates the enactment of AB 125, which includes the amendment to NRS 40.645(2). This Court presumes, if presented the same issues today, the high court's interpretation would have indicated the district courts have wide discretion to consider the contractor's challenge to the "specificity," rather than "reasonableness" of the pre-litigation notice.

and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert, or a representative of the expert who has knowledge of the alleged constructional defect, must also be present at the inspection and identify the exact location of each alleged constructional defect for which the expert provided an opinion; and

(c) Allow the contractor, subcontractor, supplier or design professional a reasonable opportunity to repair the constructional defect or cause the defect to be repaired if an election to repair is made pursuant to NRS 40.6472.

8. If the claimant commences an action without complying with NRS 40.647(1) or NRS 40.645, the court *shall:*

(a) Dismiss the action without prejudice and compel the claimant to comply with those provisions before filing another action; or

(b) If dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance with those provisions by the claimant.

NRS 40.647(2)(b); *also see* D.R. Horton, Inc. v. District Court, 131 Nev.Ad.Op. 86, 358 P.3d 925 (2015) [district court did not abuse its discretion in granting an *ex parte* stay under NRS 40.647(2)(b) permitting a homeowners' association to complete the NRS Chapter 40 process and in denying a motion to dismiss the underlying breach of warranty complaint pursuant to the five-year rule in NRCP 41(e)].

9. When a defect exists that creates imminent threat to health or safety, NRS 40.670 sets forth the parties' duties and rights to cure the deficiency; this statute specifically states:

1. A contractor, subcontractor, supplier or design professional who receives written notice of a constructional defect resulting from work performed by the contractor, subcontractor, supplier or design professional which creates an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable. The contractor, subcontractor, supplier or design professional shall not cure the defect by making any repairs for which such person is not licensed or by causing any repairs to be made by a person who is not licensed to make those repairs. If the contractor, subcontractor, supplier or design professional fails to cure the defect in a reasonable time, the owner of the residence may have the defect cured and may recover from the contractor, subcontractor, supplier or design professional the reasonable cost of the repairs plus reasonable attorney's fees and costs in addition to other damages recoverable by any other law.

. . .

2. A contractor, subcontractor, supplier or design professional who does not cure a defect pursuant to this section because such person has determined, in good faith and after reasonable inspection, that there is not an imminent threat to the health or safety of the inhabitants is not liable for attorney's fees and costs pursuant to this section, except that if a building inspector, building official or other similar authority employed by a governmental body with jurisdiction certifies that there is an imminent threat to the health and safety of the inhabitants of the residence, the contractor, subcontractor, supplier or design profession is subject to the provisions of subsection 1.

10. As noted above, the Contractors move for summary judgment or dismissal of the homeowners' association's counter-claim, as well as partial summary judgment of their Third Claim for Relief in the primary action, *inter alia,* upon the following bases:

(1) the homeowners' association failed to comply with NRS 40.645(2)(b) by not:

(a) listing each defect in *specific* detail,

(b) describing in reasonable detail the nature and extent that is known of the damage or injury resulting from the defects,

(c) providing verification from each owner the defect exists in his unit, and

(d) arranging for its representative and expert to be present at the inspection; and

(2) the homeowners' association failed to provide notice of defects prior to performing repairs.

This Court addresses the Contractors' challenge to the validity of the NRS 40.645 notice with respect to each of the four identified constructional defects below.

a. **Residential tower windows:** As noted above, within the NRS 40.645 notice, the Association claims there is a constructional defective design of 100 percent of "[t]he window assemblies in the [616] residential tower units" as water entering these mechanisms has no appropriate means of draining or exiting these fabrications. The Association states "there are no sill pans, proper weepage components or other drainage provisions designed to direct water from and through the window assemblies to the interior of the building." Because of this deficient design,

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"water that should have drained to the exterior of the building has been entering into the metal framing components of the exterior wall and floor assemblies, including the curb walls that support the windows, and is causing corrosion damage to the metal parts and components within these assemblies. Further, this damage to the metal components of the tower structures presents an unreasonable risk of injury to a person or property resulting from the degradation of these structural assemblies." The Contractors argue such descriptions set forth in the NRS 40.645 notice do not provide the "specific detail" of each defect, damage and injury that is the subject of the claim including, without limitation, their exact location. In this regard, the Contractors note there are in excess of 9,500 windows within the two residential towers, and these windows and their assemblies are of various types, sizes and locations.

As noted above, NRS 40.645 now requires not just *reasonable,* but *specific* detail of *each* defect, damage and injury. As there are in excess of 9,500 windows and assemblies of various types, sizes and locations, NRS 40.645 requires *each* defect, damage and injury to be detailed specifically within the pre-litigation notice. In this case, the notice does not discuss the method or extent of the Association's inspection of and its findings in the over 9,500 window assemblies which varies in type, size and location.[12] For these reasons, this Court concludes the portion of the NRS 40.645 notice, which outlines the existence of the same or similar deficiencies in over 9,500 window assemblies, is not sufficient.

b. Residential tower fire blocking: The NRS 40.645 notice indicates there is no fire blocking insulation within the ledger shelf cavities, steel stud framing hollow spaces or both at the exterior wall locations between the residential floors although such installation was required in the building plans. According to the Association, this deficiency exists in 100 percent of the residential

[12]This Court assumes the defective window assemblies in question are located exclusive within the association's common elements. If they are not, the affected unit owner must also verify, under penalties of perjury, the particular constructional defect exists within the residence or appurtenance owned by him or her. *See* NRS 40.645(2)(d).

tower units, and presents an unreasonable risk of injury in the event of fire. The Contractors argue such statement does not specifically detail the location of each defect, damage or injury.

The NRS 40.645 notice identifies the particular constructional deficiency, but it is not specific in terms of each defect's location. Notably, the notice states "...the insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, *or* from both." (Emphasis added) The "specific detail" requirement of NRS 40.645 necessitates the exact location of the defect in each unit, whether it be within the ledger shelf cavity, the steel stud framing hollow space, or in both areas. Further, the notice does not indicate the method or extent of the inspection, or specifically, how the homeowners' association knows this particular "installation deficiency" exists in all or 100 percent of all the residential tower units.[13] For these reasons, this Court concludes the portion of the NRS 40.645 notice, which addresses the lack of fire blocking insulation, is not sufficient.

c. **Mechanical Room Piping:** The NRS 40.645 notice states the piping in the two lower and two upper mechanical rooms in the towers "has sustained corrosion damage as described in the attached ATMG report dated November 17, 2011." Given the reference, this Court incorporates the information within the ATMG report within the NRS 40.645 notice. The report contains a spreadsheet, along with photographs of the particular parts that need to be replaced and when. However, this Court could not discern whether replacement of certain parts, such as "inlet carbon steel nipple "steel nipple," or the "ferrous pump bowl assembly," which needed to be replaced either "now" or in "1 – 5 years," was required because of defects in construction or as a result of normal wear and tear. This Court also could not determine whether the "welded joints of the stainless steel piping" exhibiting leaks was due to constructional defects or normal wear and tear.

[13]If this defect "exists in all (100%) of the residential tower units," one may question the standing of the Association to make such claims. If such claim for constructional defect is located within the residence, the homeowner is the real party in interest and must also verify the deficiency exists in his or her unit. *See* NRS 40.645(2)(d).

The report did indicate constructional defects with respect to "numerous" small fittings and values made of yellow brass which are experiencing dezincification, presumably at the locations identified in the spreadsheet. There were "problems" discussed with the "bolting," and particularly the finding of "mixed bolting in several flanged connections and bolts holding butterfly valves in position," but unfortunately, these items were not listed in the spreadsheets, and the number and types of such defects and their locations were not identified. For these reasons, this Court concludes the portion of the NRS 40.645 notice, which addresses the mechanical room piping, is not sufficient.

d. **Sewer problem:** The NRS 40.645 notice stated "[t]he main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to the adjacent areas. This deficiency has been repaired. In addition to causing damage, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter." Such notice does not specify the "installation error made" or what physical damage occurred. For this reason, this Court concludes this portion of the NRS 40.645 notice, addressing the sewer problem, is not sufficient.

In summary, following the requirements set forth in the newly-amended NRS 40.645, this Court concludes the Contractors met their burden to demonstrate Association's pre-litigation notice addressing all four constructional defects is deficient, and thus, they overcome the presumption of the notice's validity.

11. While it has not proposed the newly amended statutes or AB 125 are ambiguous, the Association has argued the Contractors' challenge to the validity of its NRS 40.645 notice is based solely upon their interpretation of AB 125 which it believes is unreasonable, leads to an absurd result and violates its due process rights.[14] In this regard, the Association argues, "[t]he costs

[14]The Association did not set forth how the Contractors' interpretation of AB 125 violates its due process rights, and it provided no authority in support of its position.

associated with the inspection and destructive testing for **each and every** occurrence of the defects is prohibitive."[15] The Association proposes NRS Chapter 40 requires notice to identify the specific defect, including its location, within a "typical unit," but it does not require every defect to be specifically located within "each and every unit."

In this case, the Court disagrees with the Association's assessment for several reasons. *First,* nowhere within NRS 40.645 did the 2015 Nevada Legislature include the words "typical unit." The AB 125 amendment unambiguously states the NRS 40.645 notice "must" "[i]dentify in *specific* detail *each* defect, damage and injury to *each* residence or appurtenance that is the subject of the claim including, without limitation, the *exact location* of each such defect, damage and injury." (Emphasis added) Clearly, the Legislature intended the defect and its exact location to be specifically identified to allow the contractor to make a meaningful investigation. If the 2015 Nevada Legislature intended constructional defects found in a "typical unit" be extrapolated as existing in other residences, it would have said so. Instead, by deleting such provisions from the pre-2015 NRS 40.645, the lawmakers demonstrated their intent extrapolation was no longer an acceptable practice. *Second,* requiring each defect, damage and injury to each residence to be specifically identified does not necessarily lead to absurd results, incurrence of prohibitive costs or require destructive testing. Such is especially true when one claims the deficiency is in the design of the windows and their assemblies as the Association does here. For example, if there is a defect in the unit's design, the Association or other claimant can identify the exact location by use of the building blueprints or plans.[16] Defects in the window assembly's design can be discerned through

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[15] *See* the Association's Opposition to Motion for Summary Judgment on the Counter-Claim and motion for Partial Summary Judgment on Plaintiffs'/Counter-Defendants' Third Claim for Relief in their Complaint for Declaratory Relief, p. 14. (Emphasis in original)

[16] Again, it is not clear whether these window assemblies are located within the individual units or common area. If the window assemblies are located within the individual units, the Association does not have standing to bring claims for constructional defects within the residences. Further, the individual unit owner must provide a signed statement, verifying the defect exists within his residence.

the manufacturer's plans, sketches or diagrams. Further, according to the Association, leaks and corrosion in the mechanical room piping or ruptures in the sewer system allegedly caused by constructional defects were readily apparent, meaning one did not need to destructively test to find them. Notwithstanding such premise, any destructive testing by the Association either was or could have been conducted contemporaneously with the repair and/or replacement of the plumbing systems.

12. The Contractors also argue the homeowners association did not comply with the NRS Chapter 40 process in other respects, and, notably, for not arranging for its representative or expert to be present at their inspection, which took place March 24, 2016. As discussed above, NRS 40.647(1) specifically requires the claimant not only allow an inspection but be present and "identify the exact location of each alleged constructional defect specified in the notice." Further, if the notice included an expert opinion, that expert or his representative, who has knowledge of the alleged defect must also be present and identify the exact location of each constructional defect. The homeowners' association does not dispute the Contractors' position. It had no representative or expert present at the March 24, 2016 inspection.

13. Further, the contractor must be allowed a reasonable opportunity either to repair the defect or cause the deficiency to be repaired if an election to repair is made pursuant to NRS 40.6472. In this case, the Contractors were not accorded its right to inspect and repair the defects in the mechanical room and sewer system, as the deficiencies were removed and replaced prior to the March 26, 2016 inspection. This Court understands, to this day, the Contractors have not been provided access to the defective piping, fittings and other materials. Given these facts, this Court finds the Contractors' arguments the Association did not comply with NRS Chapter 40's pre-litigation requirements have credence.

. . .

14. This Court also does not find the Association's conduct in making repairs and disposing of defective material to be excused by NRS 40.670. NRS 40.670 requires written notice be made to the contractor, subcontractor, supplier or design professional of the constructional defect that is creating an imminent threat to health and safety. Upon receiving such notice, the contractor, subcontractor, supplier or design professional must take reasonable steps to cure the defect as soon as practicable. In this case, repairs were made prior to the Contractors receiving the NRS 40.645 notice. Further, this Court questions whether there was an imminent threat to health and safety when the defects to the mechanical room were based, at least in part, upon a 2011 expert report.

15. The Association argues, *even if* its compliance with NRS Chapter 40 was found deficient, NRS 40.647(2)(b) requires this Court to stay the proceedings pending compliance with the pre-litigation process as dismissal of the action would prevent it from filing another. This Court finds the Association's position persuasive. Clearly, if this Court dismisses the Counter-Claim, the Association would be prevented from filing another action. For this reason, excepting the matter discussed below, this Court stays the proceeding pending compliance.

Statute of Limitation re: Mechanical room piping

16. Statutes of limitation foreclose lawsuits after a fixed period of time following occurrence or discovery of an injury. *See* Alenz v. Twin Lakes Village, 108 Nev. 1117, 1120, 832 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). NRS Chapter 11, which identifies various limiting periods, does not set forth a specific statute of limitations dealing with the discovery of constructional defects located within a residence or appurtenance thereto. However, the Nevada Supreme Court has held these types of claims are subject to the "catch all" statute, NRS 11.202. *See* Hartford Insurance Group v. Statewide

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

Appliances, Inc., 87 Nev. 195, 198, 484 P.2d 569, 571 (1971).[17] 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."

17. 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 v. Earnest W. Hahn, Inc., 113 Nev. 265, 272, 934 P.2d 229, 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 reasonable should have known of the facts giving rise to the damage or injury); Beazer Homes Nevada, Inc. v. District Court, 120 Nev. 575, 587, 997 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.'").

18. In this case, the Association learned of the constructional defects existing in the towers' mechanical rooms, at the latest, on or about November 17, 2011, the date of the ATMG report. Therefore, Association's action based upon constructional defects located in the mechanical rooms commenced and accrued November 17, 2011. The Association had up to four (4) years in which to serve its NRS 40.645 notice. The notice was not served until February 24, 2016, which is

[17] 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 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 through 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.

outside the four-year period. As a consequence, this Court concludes the Association's claims as they are based upon constructional defects located in the mechanical rooms are time-barred pursuant to NRS 11.202. This Court, therefore, grants summary judgment in favor of the Contractors with respect to the mechanical room constructional defect claims.

Accordingly, 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 on Defendants'/Counter-Claimants' Counter-Claim, and Motion for Partial Summary Judgment on the Third-Claim for Relief contained in Plaintiffs'/Counter-Defendants' Complaint for Declaratory Relief filed March 20, 2017 is granted in part, denied in part *without prejudice,* as set forth in more detail below;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED this Court finds and concludes the NRS 40.645 Notice of Constructional Defects served upon Plaintiffs/Counter-Defendants is deficient, and Plaintiffs/Counter-Defendants have met their burden of overcoming the presumption of the notice's validity. However, this Court declines to dismiss Defendant's/Counter-Claimant's Counter-Claim pursuant to NRS 40.647(2)(a) as such would prevent the Association from filing another action. This Court, therefore, stays the proceedings with respect to the constructional defects relating to window assemblies, fire blocking and sewer problems for a period of six (6) months or until **March 15, 2018 at 10:30 a.m.**, at which time this Court schedules a hearing to check the status of this matter; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED there remains no genuine issue of material fact concerning the time-barring effect of the four-year statute of limitations, and

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thus, Defendant's/Counter-Claimant's claims for constructional defects located in the mechanical rooms are dismissed pursuant to NRS 11.202.

DATED this 15th day of September 2017.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify, on the 15th day of September 2017, 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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Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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(Admitted Pro Hac Vice)

Counsel for Defendant

EIGHTH JUDICIAL 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.

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, and Does 1 through 1000,

Counterclaimants,

vs.

LAURENT HALLIER, an individual;

CASE NO.: A-16-744146-D

DEPT. NO.: XXII

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S MOTION FOR CLARIFICATION OF THIS COURT'S 9/15/17 ORDER

PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION,; DEAN ROOFING COMPANY; FORD CONTRACTING, INC.; INSULPRO, INC.; XTREME XCAVATION; 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,

Counterdefendants.

COMES NOW Defendant/Counterclaimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION (hereinafter "Panorama" or "the Association"), by and through its counsel of record, and respectfully moves this Court for clarification of the September 15, 2017 Findings of Fact, Conclusions of Law and Order.

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This Motion is based upon the papers and pleadings on file, the following Memorandum of Points and Authorities, and any other argument that the Court may choose to entertain.

Dated: October 10, 2017

LYNCH HOPPER, LLP

By: _____

Francis I. Lynch, Esq.
Nevada Bar No. 4145
Charles "Dee" Hopper, Esq.
Nevada Bar No. 6346
1210 S. Valley View Blvd., Suite 208
Las Vegas, Nevada 89102

NOTICE OF MOTION

NOTICE that the foregoing Motion will come upon for hearing before the above-entitled Court on the 14 day of Nov., 2017 at 10:30 a.m., or as soon thereafter as counsel can be heard.

Dated: October 10, 2017

LYNCH HOPPER, LLP

By: _____

Francis I. Lynch, Esq.
Nevada Bar No. 4145
Charles "Dee" Hopper, Esq.
Nevada Bar No. 6346
1210 S. Valley View Blvd., Suite 208
Las Vegas, Nevada 89102

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises out of constructional defects within the two residential tower structures of the Panorama Towers, located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada.

The Association served its NRS 40.645 Notice of Construction Defects upon Plaintiffs/Counterdefendants on February 24, 2016. The Notice alleged defects related to the residential tower windows, residential tower fire blocking, mechanical room piping, and the sewer system.

Plaintiffs/Counterdefendants inspected defects identified within the Notice on March 24, 2016. Plaintiffs/Counterdefendants responded to the Association's Notice and subsequently engaged in statutorily proscribed pre-litigation mediation without resolution.

Plaintiffs/Counterdefendants filed their Complaint for declaratory relief and affirmative damages on September 28, 2016, asserting claims for: 1) Declaratory Relief – Application of AB 125, 2) Declaratory Relief – Claim Preclusion, 3) Failure to Comply with NRS 40.600, *et seq.*, 4) Suppression of Evidence/ Spoliation, 5) Breach of Contract, 6) Declaratory Relief – Duty to Defend, and 7) Declaratory Relief – Duty to Indemnify.

The Association filed its Answer and Counterclaim on March 1, 2017, asserting claims for 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, 4) Breach of Contract, 5) Intentional/Negligent Non-Disclosure, and 6) Breach of the Duty of Good Faith and Fair Dealing; Violation of NRS 116.1113.

Plaintiffs/Counterdefendants subsequently moved the Court for summary judgment concerning the entirety of the Association's Counterclaim as well as Plaintiffs/Counterdefendants' third claim for relief.

Following full briefing of the summary judgment motion and oral argument at the June 20, 2017 hearing on the matter, the Court issued its Findings of Fact, Conclusions of Law and Order (hereinafter "Order") on September 15, 2017.

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The Association now respectfully seeks clarification of the Court's September 15, 2017 Order in the above captioned matter, a copy of which is attached hereto as Exhibit 1.

II. RELIEF REQUESTED

The Association respectfully seeks the Court's clarification of the Order's Conclusions of Law concerning the sufficiency of the NRS 40.645 Notice and Adherence to the NRS Chapter 40 Process. Specifically, the Association seeks clarification of the Order's Conclusions of Law on two specific questions:

1) Did the Court conclude, as a matter of law, that because Plaintiffs/Counterdefendants did not have an opportunity to inspect and repair the sewer system defect prior to the Association making its own repairs on the leaking sewer, that the sewer defect claim failed to satisfy the requirements of Chapter 40?

2) Did the Court conclude, as a matter of law, that in order for the Association's fire blocking defect claim to satisfy the requirements of Chapter 40, the alleged defect must be inspected and identified in each and every potential location in each and every unit in each building?

III. LEGAL ARGUMENT

A. Authority

It is well established that courts have general power over their own judgments. *Ex parte Lange*, 85 U.S. 163 (1873). Courts also have the specific authority to "amend, correct, resettle, modify or vacate, as the case may be, an order previously made and entered on the motion in the progress of the case or proceeding." *Trail v. Faretto,* 91 Nev. 401, 403, 536 P.2d 1026 (1975). Moreover, when ambiguity exists regarding an order, the court has the authority to clarify an order. *Rivero v. Rivero*, 216 P.3d 213, 125 Nev. 410 (2009).

Notably, the Association is not requesting reconsideration or rehearing of Plaintiffs/Counterdefendants Motion for Summary Judgment, nor does the Association seek to amend the Court's Order. The Association simply seeks clarification of the Order's Conclusions of Law as they pertain to the above two (2) questions, in order to facilitate full compliance with the Order.

B. The Need for Clarification

The Court has "stay[ed] the proceeding pending compliance." *Exhibit 1,* p. 17 at ¶15. Consequently, it is appropriate for the Association to seek clarification of the Court's findings in order to properly comply with the Court's Order. The Association maintains that ambiguities exist concerning the questions posed above, and it is within the Court's authority to resolve those ambiguities. See *Rivero v. Rivero.*

1. Sewer Problem

Concerning the Association's Notice relating to sewer system defects, the "Court conclud[ed] this portion of the NRS 40.645 notice … is not sufficient." *Exhibit 1,* p. 14 at 15-16. In arriving at this conclusion, the Court opined that "the contractor must be allowed a reasonable opportunity to either repair the defect or cause the deficiency to be repaired if an election to repair is made … [i]n this case, the Contractors were not accorded its right to inspect and repair the defects in the mechanical room and sewer system, as the deficiencies were removed and replaced prior to the March 26, 2016 inspection." *Id.,* p. 16 at ¶13. In the case of the sewer system, the Association has averred that opportunities to inspect and repair were not afforded upon the grounds that no "reasonable time" for inspections to have taken place, given that the sewer system rupture "presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter." *Id.* p. 14 at 12-13.

The Association believes that an ambiguity arises from the Court's conclusion regarding the sewer problem, which it hopes to have resolved in order to comply with the Court's findings. This Court seems to state that because the Association failed to provide an opportunity to inspect and repair, and for this reason, the sewer defect claim fails under Chapter 40. However, because of the passage of time, the Association cannot ever satisfy the inspection and repair requirement. Thus, the Association seeks clarification regarding this defect to determine whether the Court has actually deemed this defect claim dismissed. Clarification of this question would assist the Association in its attempts to satisfy this Court's ruling regarding the sufficiency of the Association's sewer defect claim under NRS 40 *et seq.*

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2. Fire Blocking

The Court has concluded that "the portion of the NRS 40.645 notice, which addresses the lack of fire blocking installation, is not sufficient." *Id.*, p. 13 at 11-13. In arriving at this conclusion, the Court notes that "[t]he specific detail requirement of NRS 40.45 necessitates the exact location of the defect in each unit..." *Id.*, p. 13 at 7-8. The Court has further determined that "AB 125 ... unambiguously states that the NRS 40.645 notice "must" "[i]dentify in *specific* detail *each* defect, damage and injury to *each* residence or appurtenance that is the subject of the claim including, without limitation, the *exact location* of each such defect, damage and injury." *Id.*, p. 15 at 8-10 (emphasis in original).

Nevertheless, the Court posited that a claimant might "identify the exact location by use of building blueprints or plans" where allegations like the Associations window claims arise. *Id.*, p. 15 at 22-23. Moreover, the Court opined that, in instances like the Associations mechanical room piping claim, the "defects were readily apparent, meaning one did not need to destructively test to find them." *Id.*, p. 16 at 3-4. Unfortunately, no such clarity is offered as it relates to instances like the Association's fire blocking claim, where the defect is neither discernible through plans, sketches, or diagrams, nor is it readily apparent like leaks in a mechanical room. As a result, the Court's conclusion in such an instance is that AB 125 would require a potential claimant to perform pre-litigation destructive testing in *each and every* location, or potential location, where fire blocking may have been omitted from the building. Clarification of this question would resolve ambiguity concerning the sufficiency of the Association's fire blocking claim under NRS 40 *et seq.*

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III. CONCLUSION

Based upon the foregoing, the Association respectfully moves this Court for clarification of the September 15, 2017 Findings of Fact, Conclusions of Law and Order with respect to the Association's two queries posed above.

Dated: October 10, 2017

LYNCH HOPPER, LLP

By: _____

Francis I. Lynch, Esq.
Nevada Bar No. 4145
Charles "Dee" Hopper, Esq.
Nevada Bar No. 6346
1210 S. Valley View Blvd., Suite 208
Las Vegas, Nevada 89102

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of October, 2017, a copy of the foregoing, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S MOTION FOR CLARIFICATION OF THIS COURT'S 9/15/17 ORDER, was electronically served through Odyssey upon all parties on the master e-file and serve list, including:

BREMER WHYTE BROWN & O'MEARA LLP
Peter C. Brown, Esq.
Darlene M. Cartier, Esq.
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144

By: _____
for Lynch Hopper, LLP

EXHIBIT 1

EXHIBIT 1

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Steven D. Grierson
CLERK OF THE COURT

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MESS, 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. 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.	Case No. A-16-744146-D Dept. No. XXII FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

Case Number: A-16-744146-D

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

This matter, concerning Plaintiffs'/Counter-Defendants' Motion for Summary Judgment on Defendants'/Counter-Claimants' Counter-Claim, and Motion for Partial Summary Judgment on the Third-Claim for Relief contained in Plaintiffs'/Counter-Defendants' Complaint for Declaratory Relief filed March 20, 2017, came on for hearing on the 20th day of June 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 appeared by and through their attorneys, PETER C. BROWN, ESQ. and JEFFREY W. SAAB, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendants/Counter-Claimants/Third-Party Plaintiffs appeared by and through their attorneys, SERGIO SALZANO, ESQ., CHARLES "DEE"

[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."

HOPPER, ESQ. and FRANCIS I. LYNCH, ESQ. of the law firm, LYNCH HOPPER. 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.[2]

2. On February 24, 2016, Defendant/Counter-Claimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its NRS 40.645 Notice of Constructional Defects upon Plaintiffs/Counter-Defendants (also identified herein as the "Contractors" or "Builders"), identifying the following deficiencies:

> 1. ***Residential tower windows***—There are two tower structures in the Development, consisting of 616 residential condominium units located above common areas and retails (sic) spaces below. The window assemblies in the residential tower units were defectively designed such that water entering the assemblies does not have an appropriate means of exiting the assemblies. There are no sill pans, proper weepage components or other drainage provisions designed to direct water from and through the window assemblies to the exterior of the building.
>
> This is a design deficiency that exists in all (100%) of the residential tower window assemblies.
>
> As a consequence of this deficiency, water that should have drained to the exterior of the building has been entering into the metal framing components of the exterior wall and floor assemblies, including the curb walls that support the windows, and is causing corrosion damage to the metal parts and components within these assemblies. Further, this damage to the metal components of the tower structures presents an unreasonable risk of injury to a person or property resulting from the degradation of these structural assemblies.
>
> . . .

[2]According to Plaintiffs, 4525 Dean Martin Drive or "Tower I" consists of 33 floors, 308 units, 10 townhomes, 6 lofts, retail space, pool and a 5-level parking garage. 4575 Dean Martin Drive or "Tower II" has 34 floors, 308 units, 10 townhomes, 6 lofts, retail space, pool and a 5-level parking garage. *See* Plaintiffs'/Counter-Defendants' Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and their Motion for Partial Summary Judgment on Third-Claim for Relief within the Complaint for Declaratory Relief filed March 20, 2017, p. 7.

2. ***Residential tower fire blocking***—The plans called for fire blocking insulation, as required by the building code, in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. ...The purpose of this insulation is to deter the spread of fire from one tower unit to the units above or below. However, the insulation was not installed as required by the plans and building code.

This installation deficiency exists in all (100%) of the residential tower units, in which insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both.

This deficiency presents an unreasonable risk of injury to a person or property resulting from the spread of fire.

3. ***Mechanical room piping***—The piping in the two lower and two upper mechanical rooms in the two tower structures has sustained corrosion damage as described in the attached ATMG report dated November 17, 2011. ...

4. ***Sewer problem***—The main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to adjacent common areas. This deficiency has been repaired. In addition to causing damage, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter.[3]

3. The Contractors elected to inspect the constructional defects identified within the Association's NRS 40.645 Notice on March 24, 2016.[4] During the inspection, the Contractors observed windows located in Unit 300 had been already been removed and replaced. Likewise, prior to the Contractors' inspection, the majority of the alleged corroded mechanical room piping, as well as the averred defective sewer piping had also been removed, replaced and/or repaired. The Contractors were not provided notice of the removal or replacement of the alleged constructional defective windows in Unit 300 or the deficient piping in the mechanical room prior to the March 24, 2016 inspection.

. . .

[3]*See* Exhibit 1 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and Motion for Partial Summary Judgment on the Third Claim for Relief of the Complaint for Declaratory Relief filed March 20, 2017.

[4]*This Court understands neither the Association's representative nor its experts attended this inspection.*

4. On March 29, 2016, the Contractors' lawyer sent a letter to the attorneys for the Association, requesting "information regarding the alleged sewer line, including the date of occurrence and the date of repair. ...In addition, please confirm the current location of any sewer line materials that were removed and replaced as part of the repair." Further, counsel requested "the date(s) when that work [in replacing the pipes in the mechanical room] was done and the identity of the contractor(s). Please also confirm whether and where the removed pipes have been stored for safekeeping."[5] As there was no response from the Owners' Association to the March 29, 2016 correspondence, the Contractors' attorney followed-up with another letter sent a month later, April 29, 2016.[6] However, there was also no response to the April 29, 2016 letter.

5. The Contractors thereafter responded to the Association's NRS 40.645 notice, and the parties subsequently engaged in the NRS 40.680 pre-litigation mediation with no success on September 26, 2016.

6. Contractors filed their Complaint on September 28, 2016 against the Owners' Association, asserting the following claims:

1. Declaratory Relief—Application of AB 125;
2. Declaratory Relief—Claim Preclusion;
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.

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[5] *See* Exhibit 2 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and Motion for Partial Summary Judgment on the Third Claim for Relief of the Complaint for Declaratory Relief.

[6] *See* Exhibit 3 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's Counter-Claim, and Motion for Partial Summary Judgment on the Third Claim for Relief of the Complaint for Declaratory Relief.

7. 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.

8. The Contractors now move this Court for summary judgment, or dismissal of the Counter-Claim upon the bases:

(1) the Association failed to comply with NRS 40.645(2)(b) by not

(a) listing each defect in *specific* detail,

(b) describing in reasonable detail the nature and extent that is known of the damage or injury resulting from the defects,

(c) providing verification from each owner the defect exists in his unit, and

(d) arranging for its representative and expert to be present at the inspection; and

(2) the Owners' Association failed to provide notice of defects prior to performing repairs. In this regard, the Contractors also seek partial summary judgment with respect to the Third Claim for Relief contained in their Complaint.

9. The Owners' Association opposes, arguing its NRS 40.645 notice is presumed to be valid, and further, the notice statutes are meant to require substantial as opposed to technical or strict compliance. Further, the Contractors' interpretation of AB 125 is not reasonable, leads to absurd results and violates due process. Notwithstanding these arguments, if this Court found the notice to

be deficient, the appropriate remedy would be to stay the case and provide curative instructions, as opposed to dismissal of the Counter-Claim. *See* NRS 40.647(2)(b).

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).

Sufficiency of the NRS 40.645 Notice and Adherence to NRS Chapter 40 Process

3. There is no question the provisions of NRS 40.600 to 40.695 were enacted by the Nevada Legislature with the intent to provide contractors an opportunity to repair constructional defects and avoid litigation. *See* D.R. Horton, Inc. v. District Court, 123 Nev. 468, 476, 168 P.3d

731 (2007).[7] To ensure contractors were given an opportunity to repair, the Nevada Legislature required a homeowner or claimant to give the contractor notice of constructional defects initially in "reasonable detail,"[8] and based upon that notice, allow the contractor time and opportunity to inspect and make repairs when a deficiency was verified.[9] A claimant's failure to comply with those requirements before filing a constructional defect action results in the dismissal or postponement of that action until those mandates are complied.[10]

4. In 2015, approximately one year before PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its notice of constructional deficiencies in this case, the Nevada Legislature made sweeping revisions to the state's laws relating to constructional defects with the enactment of Assembly Bill (AB) 125. Of significance here, AB 125 amended provisions governing the information required to be provided within a notice of constructional defects. It revised the statutes of repose regarding actions for damages resulting from certain deficiencies in construction. Further, it prohibited a homeowners' association from pursuing an action for constructional defects unless the litigation pertained exclusively to the association's common elements.

5. As alluded to above, NRS 40.645(2), as revised in AB 125, sets forth more stringent requirements for the constructional defect notice than what was in place prior to February 25, 2015. It now provides:

> The notice given pursuant to [NRS 40.645(1)] must:
> (a) Include a statement that the notice is being given to satisfy the requirements of this section;
> (b) Identify in *specific* detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim including, without

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[7]This case is commonly referred to as *"First Light I"* by practicing lawyers and judges.
[8]*See* NRS 40.645 in effect prior to February 25, 2015. Assembly Bill (AB) 125, which became effective on February 25, 2015, resulted in a change to NRS 40.645(2) to require "specificity" or "specific detail."
[9]*See* NRS 40.647(1).
[10]*See* NRS 40.647(2).

limitation, the exact location of each such defect, damage and injury;

(c) Describe in reasonable detail the cause of the defects if the cause is known and the nature and extent that is known of the damage or injury resulting from the defects; and

(d) Include a signed statement, by each named owner of a residence or appurtenance in the notice, that each such owner verifies that each such defect, damage and injury specified in the notice exists in the residence or appurtenance owned by him or her. If a notice is sent on behalf of a homeowners' association, the statement required by this paragraph must be signed under penalty of perjury by a member of the executive board or an officer of the homeowners' association. (Emphasis added)

6. While NRS 40.645 was revised to include more stringent requirements within the pre-litigation notice to contractors, this Court notes such notices still are presumed valid. *See* D.R. Horton, Inc., 123 Nev. at 481. A contractor who wishes to challenge the adequacy of a pre-litigation notice bears the burden of doing so with specificity. *Id.* Because each case is factually distinct, the district courts have wide discretion to consider each contractor's challenge to the reasonableness[11] of each pre-litigation notice. As noted by the Nevada Supreme Court in D.R. Horton, Inc., 123 Nev. at 481, "the district courts are well suited to determine whether a notice preserves a contractor's opportunity to repair."

7. NRS 40.647(1) also sets forth other requirements such as the claimant must allow inspection of and reasonable opportunity to the contractor to repair the defect. Further, he or his expert is required to be present at the inspection. NRS 40.647(1) specifically states:

> After notice of a constructional defect is given pursuant to NRS 40.645, before a claimant may commence an action or amend a claim to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant must:
>
> (a) Allow an inspection of the alleged constructional defect to be conducted pursuant to NRS 40.6462;
>
> (b) Be present at an inspection conducted pursuant to NRS 40.6462 and identify the exact location of each alleged constructional defect specified in the notice

[11]The Nevada Supreme Court's decision in *D.R. Horton, Inc.*, pre-dates the enactment of AB 125, which includes the amendment to NRS 40.645(2). This Court presumes, if presented the same issues today, the high court's interpretation would have indicated the district courts have wide discretion to consider the contractor's challenge to the "specificity," rather than "reasonableness" of the pre-litigation notice.

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and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert, or a representative of the expert who has knowledge of the alleged constructional defect, must also be present at the inspection and identify the exact location of each alleged constructional defect for which the expert provided an opinion; and

(c) Allow the contractor, subcontractor, supplier or design professional a reasonable opportunity to repair the constructional defect or cause the defect to be repaired if an election to repair is made pursuant to NRS 40.6472.

8. If the claimant commences an action without complying with NRS 40.647(1) or NRS 40.645, the court *shall:*

(a) Dismiss the action without prejudice and compel the claimant to comply with those provisions before filing another action; or

(b) If dismissal of the action would prevent the claimant from filing another action because the action would be procedurally barred by the statute of limitations or statute of repose, the court shall stay the proceeding pending compliance with those provisions by the claimant.

NRS 40.647(2)(b); *also see* D.R. Horton, Inc. v. District Court, 131 Nev.Ad.Op. 86, 358 P.3d 925 (2015) [district court did not abuse its discretion in granting an *ex parte* stay under NRS 40.647(2)(b) permitting a homeowners' association to complete the NRS Chapter 40 process and in denying a motion to dismiss the underlying breach of warranty complaint pursuant to the five-year rule in NRCP 41(e)].

9. When a defect exists that creates imminent threat to health or safety, NRS 40.670 sets forth the parties' duties and rights to cure the deficiency; this statute specifically states:

1. A contractor, subcontractor, supplier or design professional who receives written notice of a constructional defect resulting from work performed by the contractor, subcontractor, supplier or design professional which creates an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable. The contractor, subcontractor, supplier or design professional shall not cure the defect by making any repairs for which such person is not licensed or by causing any repairs to be made by a person who is not licensed to make those repairs. If the contractor, subcontractor, supplier or design professional fails to cure the defect in a reasonable time, the owner of the residence may have the defect cured and may recover from the contractor, subcontractor, supplier or design professional the reasonable cost of the repairs plus reasonable attorney's fees and costs in addition to other damages recoverable by any other law.

. . .

2. A contractor, subcontractor, supplier or design professional who does not cure a defect pursuant to this section because such person has determined, in good faith and after reasonable inspection, that there is not an imminent threat to the health or safety of the inhabitants is not liable for attorney's fees and costs pursuant to this section, except that if a building inspector, building official or other similar authority employed by a governmental body with jurisdiction certifies that there is an imminent threat to the health and safety of the inhabitants of the residence, the contractor, subcontractor, supplier or design profession is subject to the provisions of subsection 1.

10. As noted above, the Contractors move for summary judgment or dismissal of the homeowners' association's counter-claim, as well as partial summary judgment of their Third Claim for Relief in the primary action, *inter alia,* upon the following bases:

(1) the homeowners' association failed to comply with NRS 40.645(2)(b) by not:

(a) listing each defect in *specific* detail,

(b) describing in reasonable detail the nature and extent that is known of the damage or injury resulting from the defects,

(c) providing verification from each owner the defect exists in his unit, and

(d) arranging for its representative and expert to be present at the inspection; and

(2) the homeowners' association failed to provide notice of defects prior to performing repairs.

This Court addresses the Contractors' challenge to the validity of the NRS 40.645 notice with respect to each of the four identified constructional defects below.

a. **Residential tower windows:** As noted above, within the NRS 40.645 notice, the Association claims there is a constructional defective design of 100 percent of "[t]he window assemblies in the [616] residential tower units" as water entering these mechanisms has no appropriate means of draining or exiting these fabrications. The Association states "there are no sill pans, proper weepage components or other drainage provisions designed to direct water from and through the window assemblies to the interior of the building." Because of this deficient design,

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"water that should have drained to the exterior of the building has been entering into the metal framing components of the exterior wall and floor assemblies, including the curb walls that support the windows, and is causing corrosion damage to the metal parts and components within these assemblies. Further, this damage to the metal components of the tower structures presents an unreasonable risk of injury to a person or property resulting from the degradation of these structural assemblies." The Contractors argue such descriptions set forth in the NRS 40.645 notice do not provide the "specific detail" of each defect, damage and injury that is the subject of the claim including, without limitation, their exact location. In this regard, the Contractors note there are in excess of 9,500 windows within the two residential towers, and these windows and their assemblies are of various types, sizes and locations.

As noted above, NRS 40.645 now requires not just *reasonable,* but *specific* detail of *each* defect, damage and injury. As there are in excess of 9,500 windows and assemblies of various types, sizes and locations, NRS 40.645 requires *each* defect, damage and injury to be detailed specifically within the pre-litigation notice. In this case, the notice does not discuss the method or extent of the Association's inspection of and its findings in the over 9,500 window assemblies which varies in type, size and location.[12] For these reasons, this Court concludes the portion of the NRS 40.645 notice, which outlines the existence of the same or similar deficiencies in over 9,500 window assemblies, is not sufficient.

b. Residential tower fire blocking: The NRS 40.645 notice indicates there is no fire blocking insulation within the ledger shelf cavities, steel stud framing hollow spaces or both at the exterior wall locations between the residential floors although such installation was required in the building plans. According to the Association, this deficiency exists in 100 percent of the residential

[12]This Court assumes the defective window assemblies in question are located exclusive within the association's common elements. If they are not, the affected unit owner must also verify, under penalties of perjury, the particular constructional defect exists within the residence or appurtenance owned by him or her. *See* NRS 40.645(2)(d).

tower units, and presents an unreasonable risk of injury in the event of fire. The Contractors argue such statement does not specifically detail the location of each defect, damage or injury.

The NRS 40.645 notice identifies the particular constructional deficiency, but it is not specific in terms of each defect's location. Notably, the notice states "...the insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, *or* from both." (Emphasis added) The "specific detail" requirement of NRS 40.645 necessitates the exact location of the defect in each unit, whether it be within the ledger shelf cavity, the steel stud framing hollow space, or in both areas. Further, the notice does not indicate the method or extent of the inspection, or specifically, how the homeowners' association knows this particular "installation deficiency" exists in all or 100 percent of all the residential tower units.[13] For these reasons, this Court concludes the portion of the NRS 40.645 notice, which addresses the lack of fire blocking insulation, is not sufficient.

c. **Mechanical Room Piping:** The NRS 40.645 notice states the piping in the two lower and two upper mechanical rooms in the towers "has sustained corrosion damage as described in the attached ATMG report dated November 17, 2011." Given the reference, this Court incorporates the information within the ATMG report within the NRS 40.645 notice. The report contains a spreadsheet, along with photographs of the particular parts that need to be replaced and when. However, this Court could not discern whether replacement of certain parts, such as "inlet carbon steel nipple "steel nipple," or the "ferrous pump bowl assembly," which needed to be replaced either "now" or in "1 – 5 years," was required because of defects in construction or as a result of normal wear and tear. This Court also could not determine whether the "welded joints of the stainless steel piping" exhibiting leaks was due to constructional defects or normal wear and tear.

[13]If this defect "exists in all (100%) of the residential tower units," one may question the standing of the Association to make such claims. If such claim for constructional defect is located within the residence, the homeowner is the real party in interest and must also verify the deficiency exists in his or her unit. *See* NRS 40.645(2)(d).

The report did indicate constructional defects with respect to "numerous" small fittings and values made of yellow brass which are experiencing dezincification, presumably at the locations identified in the spreadsheet. There were "problems" discussed with the "bolting," and particularly the finding of "mixed bolting in several flanged connections and bolts holding butterfly valves in position," but unfortunately, these items were not listed in the spreadsheets, and the number and types of such defects and their locations were not identified. For these reasons, this Court concludes the portion of the NRS 40.645 notice, which addresses the mechanical room piping, is not sufficient.

d. **Sewer problem:** The NRS 40.645 notice stated "[t]he main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to the adjacent areas. This deficiency has been repaired. In addition to causing damage, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter." Such notice does not specify the "installation error made" or what physical damage occurred. For this reason, this Court concludes this portion of the NRS 40.645 notice, addressing the sewer problem, is not sufficient.

In summary, following the requirements set forth in the newly-amended NRS 40.645, this Court concludes the Contractors met their burden to demonstrate Association's pre-litigation notice addressing all four constructional defects is deficient, and thus, they overcome the presumption of the notice's validity.

11. While it has not proposed the newly amended statutes or AB 125 are ambiguous, the Association has argued the Contractors' challenge to the validity of its NRS 40.645 notice is based solely upon their interpretation of AB 125 which it believes is unreasonable, leads to an absurd result and violates its due process rights.[14] In this regard, the Association argues, "[t]he costs

[14]The Association did not set forth how the Contractors' interpretation of AB 125 violates its due process rights, and it provided no authority in support of its position.

associated with the inspection and destructive testing for **each and every** occurrence of the defects is prohibitive."[15] The Association proposes NRS Chapter 40 requires notice to identify the specific defect, including its location, within a "typical unit," but it does not require every defect to be specifically located within "each and every unit."

In this case, the Court disagrees with the Association's assessment for several reasons. *First,* nowhere within NRS 40.645 did the 2015 Nevada Legislature include the words "typical unit." The AB 125 amendment unambiguously states the NRS 40.645 notice "must" "[i]dentify in *specific* detail *each* defect, damage and injury to *each* residence or appurtenance that is the subject of the claim including, without limitation, the *exact location* of each such defect, damage and injury." (Emphasis added) Clearly, the Legislature intended the defect and its exact location to be specifically identified to allow the contractor to make a meaningful investigation. If the 2015 Nevada Legislature intended constructional defects found in a "typical unit" be extrapolated as existing in other residences, it would have said so. Instead, by deleting such provisions from the pre-2015 NRS 40.645, the lawmakers demonstrated their intent extrapolation was no longer an acceptable practice. *Second,* requiring each defect, damage and injury to each residence to be specifically identified does not necessarily lead to absurd results, incurrence of prohibitive costs or require destructive testing. Such is especially true when one claims the deficiency is in the design of the windows and their assemblies as the Association does here. For example, if there is a defect in the unit's design, the Association or other claimant can identify the exact location by use of the building blueprints or plans.[16] Defects in the window assembly's design can be discerned through

[15] *See* the Association's Opposition to Motion for Summary Judgment on the Counter-Claim and motion for Partial Summary Judgment on Plaintiffs'/Counter-Defendants' Third Claim for Relief in their Complaint for Declaratory Relief, p. 14. (Emphasis in original)

[16] Again, it is not clear whether these window assemblies are located within the individual units or common area. If the window assemblies are located within the individual units, the Association does not have standing to bring claims for constructional defects within the residences. Further, the individual unit owner must provide a signed statement, verifying the defect exists within his residence.

the manufacturer's plans, sketches or diagrams. Further, according to the Association, leaks and corrosion in the mechanical room piping or ruptures in the sewer system allegedly caused by constructional defects were readily apparent, meaning one did not need to destructively test to find them. Notwithstanding such premise, any destructive testing by the Association either was or could have been conducted contemporaneously with the repair and/or replacement of the plumbing systems.

12. The Contractors also argue the homeowners association did not comply with the NRS Chapter 40 process in other respects, and, notably, for not arranging for its representative or expert to be present at their inspection, which took place March 24, 2016. As discussed above, NRS 40.647(1) specifically requires the claimant not only allow an inspection but be present and "identify the exact location of each alleged constructional defect specified in the notice." Further, if the notice included an expert opinion, that expert or his representative, who has knowledge of the alleged defect must also be present and identify the exact location of each constructional defect. The homeowners' association does not dispute the Contractors' position. It had no representative or expert present at the March 24, 2016 inspection.

13. Further, the contractor must be allowed a reasonable opportunity either to repair the defect or cause the deficiency to be repaired if an election to repair is made pursuant to NRS 40.6472. In this case, the Contractors were not accorded its right to inspect and repair the defects in the mechanical room and sewer system, as the deficiencies were removed and replaced prior to the March 26, 2016 inspection. This Court understands, to this day, the Contractors have not been provided access to the defective piping, fittings and other materials. Given these facts, this Court finds the Contractors' arguments the Association did not comply with NRS Chapter 40's pre-litigation requirements have credence.

. . .

14. This Court also does not find the Association's conduct in making repairs and disposing of defective material to be excused by NRS 40.670. NRS 40.670 requires written notice be made to the contractor, subcontractor, supplier or design professional of the constructional defect that is creating an imminent threat to health and safety. Upon receiving such notice, the contractor, subcontractor, supplier or design professional must take reasonable steps to cure the defect as soon as practicable. In this case, repairs were made prior to the Contractors receiving the NRS 40.645 notice. Further, this Court questions whether there was an imminent threat to health and safety when the defects to the mechanical room were based, at least in part, upon a 2011 expert report.

15. The Association argues, *even if* its compliance with NRS Chapter 40 was found deficient, NRS 40.647(2)(b) requires this Court to stay the proceedings pending compliance with the pre-litigation process as dismissal of the action would prevent it from filing another. This Court finds the Association's position persuasive. Clearly, if this Court dismisses the Counter-Claim, the Association would be prevented from filing another action. For this reason, excepting the matter discussed below, this Court stays the proceeding pending compliance.

Statute of Limitation re: Mechanical room piping

16. Statutes of limitation foreclose lawsuits after a fixed period of time following occurrence or discovery of an injury. *See* Alenz v. Twin Lakes Village, 108 Nev. 1117, 1120, 832 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). NRS Chapter 11, which identifies various limiting periods, does not set forth a specific statute of limitations dealing with the discovery of constructional defects located within a residence or appurtenance thereto. However, the Nevada Supreme Court has held these types of claims are subject to the "catch all" statute, NRS 11.202. *See* Hartford Insurance Group v. Statewide

Appliances, Inc., 87 Nev. 195, 198, 484 P.2d 569, 571 (1971).[17] 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."

17. 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 v. Earnest W. Hahn, Inc., 113 Nev. 265, 272, 934 P.2d 229, 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 reasonable should have known of the facts giving rise to the damage or injury); Beazer Homes Nevada, Inc. v. District Court, 120 Nev. 575, 587, 997 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.'").

18. In this case, the Association learned of the constructional defects existing in the towers' mechanical rooms, at the latest, on or about November 17, 2011, the date of the ATMG report. Therefore, Association's action based upon constructional defects located in the mechanical rooms commenced and accrued November 17, 2011. The Association had up to four (4) years in which to serve its NRS 40.645 notice. The notice was not served until February 24, 2016, which is

[17] 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 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 through 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.

outside the four-year period. As a consequence, this Court concludes the Association's claims as they are based upon constructional defects located in the mechanical rooms are time-barred pursuant to NRS 11.202. This Court, therefore, grants summary judgment in favor of the Contractors with respect to the mechanical room constructional defect claims.

Accordingly, 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 on Defendants'/Counter-Claimants' Counter-Claim, and Motion for Partial Summary Judgment on the Third-Claim for Relief contained in Plaintiffs'/Counter-Defendants' Complaint for Declaratory Relief filed March 20, 2017 is granted in part, denied in part *without prejudice,* as set forth in more detail below;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED this Court finds and concludes the NRS 40.645 Notice of Constructional Defects served upon Plaintiffs/Counter-Defendants is deficient, and Plaintiffs/Counter-Defendants have met their burden of overcoming the presumption of the notice's validity. However, this Court declines to dismiss Defendant's/Counter-Claimant's Counter-Claim pursuant to NRS 40.647(2)(a) as such would prevent the Association from filing another action. This Court, therefore, stays the proceedings with respect to the constructional defects relating to window assemblies, fire blocking and sewer problems for a period of six (6) months or until **March 15, 2018 at 10:30 a.m.**, at which time this Court schedules a hearing to check the status of this matter; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED there remains no genuine issue of material fact concerning the time-barring effect of the four-year statute of limitations, and

. . .

. . .

. . .

thus, Defendant's/Counter-Claimant's claims for constructional defects located in the mechanical rooms are dismissed pursuant to NRS 11.202.

DATED this 15th day of September 2017.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify, on the 15th day of September 2017, 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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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. 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	Case No. A-16-744146-D Dept. XXII **LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC AND M.J. DEAN CONSTRUCTION, INC.'S OPPOSITION TO PANORAMA UNIT OWNERS ASSOCIATION'S MOTION FOR CLARIFICATION OF THIS COURT'S SEPTEMBER 15, 2017 ORDER**

CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION; DEAN ROOFING COMPANY; FORD CONTRACTING, 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 , inclusive,

Counter-Defendants.

COME NOW Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. (hereinafter collectively referred to as "Builders"), by and through their attorneys of record, Peter C. Brown, Esq. and Jeffrey W. Saab, Esq. of the law firm of Bremer Whyte Brown & O'Meara LLP, and hereby submits this Opposition to Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners' Association's (hereinafter " Association") Motion for Clarification of this Court's September 15, 2017 Order.

This Opposition is made and based on the pleadings and papers on file herein, the following Memorandum of Points and Authorities in support thereof, and any and all evidence and/or testimony accepted by this Honorable Court at the time of the hearing on the underlying Motion.

Dated: October 27, 2017

BREMER WHYTE BROWN & O'MEARA LLP

By:_____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Jeffrey W. Saab, Esq.
Nevada State Bar No. 11261
Attorneys for Plaintiffs/Counter-Defendants, LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN CONSTRUCTION, INC.

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I.

FACTUAL SUMMARY

This matter arises from allegations of construction defects at two towers in the Panorama Towers Condominiums project, located at 4525 Dean Martin Drive, Las Vegas, Nevada ("Tower I") and 4575 Dean Martin Drive, Las Vegas, Nevada ("Tower II") (hereinafter together referred to as "the Project"). Tower I consists of 33 floors, 308 units, 10 townhomes, 6 lofts, retail space, pool, and a 5-level parking garage. Tower II consists of 34 floors, 308 units, 10 townhomes, 6 lofts, retail space, pool, and 5-level parking garage. Plaintiffs, Laurent Hallier and Panorama Towers I, LLC (hereinafter together referred to as "Developer"), were the owner and developer entities for the Project, and Plaintiff M.J. Dean Construction, Inc. ("M.J. Dean") was the Project's general contractor. Laurent Hallier, Panorama Towers I, LLC and M.J. Dean shall hereinafter be collectively referred to as ("the Builders)."

The Builders filed their Complaint for declaratory relief and affirmative damages on September 28, 2016 asserting claims for: (i) Declaratory Relief - Application of AB 125; (ii) Declaratory Relief - Claim Preclusion; (iii) Failure to Comply with NRS 40.600 *et seq*., (iv) Spoliation of Evidence; (v) Breach of Contract; (vi) Declaratory Relief - Duty to Defend; and (vii) Declaratory Relief - Duty to Indemnify. On March 1, 2017, Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners' Association ("Association") filed its Answer and Counter-Claim asserting claims for (i) Breach of NRS 116.4113 and 116.4114 Express and Implied Warranties, Habitability, Fitness, Quality and Workmanship; (ii) Negligence and Negligence per se; (iii) Products Liability; (iv) Breach of Contract; (v) Intentional/Negligent Non-Disclosure; and (vi) Breach of the Duty of Good Faith and Fair Dealing; Violation of NRS 116.1113.

On March 20, 2017, the Builders filed a Motion for Summary Judgment as to the Association's Counter-Claim and a Motion for Partial Summary Judgment as to the Builder's Third-Claim for Relief. The Association filed its Opposition on April 26, 2017 and the Builders filed its Reply Brief on May 10, 2017.

In consideration of the above, and following oral argument on June 20, 2017, this Court issued its Findings of Fact and Conclusions of Law ("Order") on September 15, 2017. While the

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Order appears perfectly clear on its face to the Builders, the Association now seeks clarification as to this Court's ruling on two issues: (1) sewer problems; and (2) fire blocking.

A. Sewer Problems

Initially, the Association seeks clarification as to whether its claim for sewer problems was dismissed via this Court's Order. However, the Association answers is own question via its Motion for Clarification. More specifically, the Association concedes that "*it cannot ever satisfy the inspection and repair requirement*" to which the Builders are unequivocally entitled to by statute. *See* Assn Mtn. P 6; 22-23. Consequently, since this Court has already determined the Association's Chapter 40 Notice was deficient, and because the Association concedes that it will never be able to cure the Notice deficiency, the Association's alleged sewer claims cannot be resurrected and there can be no other reading of this Court's Order but that they are dismissed with prejudice.

B. Fire Blocking

The Association seeks "clarity" as to whether it is required to perform pre-litigation destructive testing at each and every location, or potential location, where fire blocking may have been omitted. In reality, this is not an effort at clarification, but rather a Motion for Reconsideration. This Court already rejected the Association's arguments on this issue, confirming the statutory requirement of the identification of each defect, damage and injury to each residence. The Order expressly stated that extrapolation was no longer allowed. *See* Order P. 15; 15-17.

The Association contends the available plans are not specific enough to allow the Association's experts to identify each and every location. Interestingly, the plans were not a problem, and indeed the Association's expert relied on them, when the Association identified this particular issue in the Chapter 40 Notice:

> **Fire Blocking**: The plans call for fire blocking insulation, as required by the building code, in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. The purpose of this insulation is to deter the spread of fire from one tower unit to the unit above or below. However, the insulation was not installed as required by the plans and the building code.
>
> This installation deficiency exists in all (100%) of the residential tower units, in which insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both.

> This deficiency presents an unreasonable risk of injury to a person or property resulting from the spread of fire.

Furthermore, the Association fails to acknowledge in its Request for Clarification that its expert, Omar Hindeyah of CMA, inspected fifteen (15) units and that he provided an affidavit in support of the Association's Opposition to the Builders' Motion for Summary Judgment. In stark contrast to the alleged 100% incident rate in the Chapter 40 Notice, by Mr. Hindeyah's own admission, the alleged fire blocking issue was not found in 100% of the inspected areas.[1] Regardless of the actual alleged incident rate, the original Chapter 40 Notice also noted that the fire blocking was allegedly missing "from the ledger shelf cavity, from the steel stud framing cavity, or from both." The Notice itself acknowledges that in some areas the fire blocking was not missing. As noted in the Builders' Motion for Summary Judgment and Reply Brief in support of same, the original Chapter 40 Notice utterly failed to comply with NRS 40.645(2)(b), and this Court agreed with the Builders.

The Association's Chapter 40 Notice did not identify in **specific** detail the alleged defect, damage and injury to **each** residence or appurtenance that is the subject of the Association's claim, including, **without limitation the exact location of each such defect, damage and injury.** Somehow Mr. Hindeyah was able to perform an inspection of fifteen (15) units where he identified an alleged fire blocking issue in some but not all of the units, and yet the Association now seeks clarification from this Court as to whether Mr. Hindeyah must similarly inspect the remaining six hundred and eleven (611) units to confirm whether the fire blocking issue exists for those units. There is nothing to clarify. This Court made its ruling that the Association's Chapter 40 Notice failed to comply with NRS 40.645(2)(b).

The comment by the Association in the Motion for Clarification about plans is irrelevant since Mr. Hindeyah never opined that the fire blocking issue pertained to every unit. Consequently, the Association must identify in **specific** detail the alleged defect, damage and injury

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[1] Affidavit of Omar Hindiyeh, ¶ 6(a) and (b), attached as Exhibit "A" to the Association's Opposition.

to **each** residence or appurtenance that is the subject of the Association's claim, including, **without limitation the exact location of each such defect, damage and injury.**

The Association contends that without detailed blueprints or plans, it would be required to conduct significant additional destructive testing. However, in consideration of just such an argument, this Court, in its Order made clear that "extrapolation was no longer an acceptable practice". *Id.* Unlike the Association's claim for sewer problems where it concedes it cannot ever cure the deficient Chapter 40 Notice, the Association makes no such concession here. Consequently, while the Court gave the Association a generous six month opportunity to correct the errors of its original Chapter 40 Notice, the Association apparently has no appetite to do so. Instead, the Association obviously wants this Court to sanction extrapolation based on a less than 100% alleged existence of fire blocking issues in fifteen (15) units (none of this information, by the way, has ever been provided to the Builders since it was not in the actual Chapter 40 Notice). If this Court were to agree with the Association's Motion for Clarification (or, in actuality, agree with the Association's thinly veiled Motion for Reconsideration), the requirement of specific identification would improperly fall on the shoulders of the Builders. That is certainly not what the Nevada Legislature intended when AB 125 was enacted.

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III.

CONCLUSION

For the reasons stated above, Builders requests that the Court's September 15, 2017 Order stand.

Dated: October 27, 2017

BREMER WHYTE BROWN & O'MEARA LLP

By:_____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Jeffrey W. Saab, Esq.
Nevada State Bar No. 11261
Attorneys for Plaintiffs/Counter-Defendants, LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN CONSTRUCTION, INC.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 27th day of October2017, I served a true and correct copy of the foregoing by electronically serving all parties via the Court's Electronic Filing System.

Amree Stellabotte, an Employee of
BREMER WHYTE BROWN & O'MEARA, LLP

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(Admitted Pro Hac Vice)

Counsel for Defendant

EIGHTH JUDICIAL 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.

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, and Does 1 through 1000,

Counterclaimants,

vs.

LAURENT HALLIER, an individual;

CASE NO.: A-16-744146-D

DEPT. NO.: XXII

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF THIS COURT'S 9/15/17 ORDER

PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION,; DEAN ROOFING COMPANY; FORD CONTRACTING, INC.; INSULPRO, INC.; XTREME XCAVATION; 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,

Counterdefendants.

COMES NOW Defendant/Counterclaimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION (hereinafter "Panorama" or "the Association"), by and through its counsel of record, and hereby replies in support of its Motion for Clarification of this Court's September 15, 2017 Findings of Fact, Conclusions of Law and Order ("Order").

This Reply is based upon the papers and pleadings on file, the following Memorandum of Points and Authorities, and any other argument that the Court may choose to entertain.

Dated: November 14, 2017

LYNCH HOPPER, LLP

By: _____

Francis I. Lynch, Esq.
Nevada Bar No. 4145
Charles "Dee" Hopper, Esq.
Nevada Bar No. 6346
1210 S. Valley View Blvd., Suite 208
Las Vegas, Nevada 89102

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arises out of constructional defects within the two residential tower structures of the Panorama Towers, located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada.

The instant motion arises out of this Court's September 15, 2017 Order concerning Plaintiff/Counterdefendant's (hereinafter "Builder") Motion for Summary Judgment on, among other things, the Association's Chapter 40 Notice. The Court's Order made findings and drew conclusions of law pertaining to the four (4) allegations of constructions defects contained in the Association's Chapter 40 Notice, ultimately determining that the claims in the Notice were insufficient as a matter of law. The Court's order unambiguously dismissed the Association's mechanical room piping claim pursuant to NRS 11.202 and stayed proceedings concerning the remaining claims pending compliance with the Court's findings and conclusions concerning Chapter 40's Notice Requirements. *Order* at p. 18-19. The Association simply seeks clarification of two (2) of those conclusions in order to comply with the Court's findings.

Builder's Opposition does not meaningfully challenge the contents of the Association's Motion and is generally non-responsive. Despite Builder's rote protestations to the contrary, the Association has not sought reconsideration of any of the Court's conclusions nor has the Association disputed the Court's Order in any way. At bottom, Builder's conclusion and request that "the Court's September 15, 2017 Order stand" belays their lack of opposition to the instant Motion. This Court can simultaneously allow the Order to "stand" while clarifying its contents, as the Association has not challenged the Order and Builder has offered not even a single argument that clarification should be withheld.

II. ARGUMENT

A. Authority

With the Builder not having opposed the proposition or offering any authority to the contrary, it is now undisputed that this Court not only retains power over its judgments but that it also has the specific discretionary authority to clarify the Order at issue here. Builder's only offering on this subject is the wholly unsupported proposition that the Association's Motion is a

"thinly veiled Motion for Reconsideration", a proposition easily overcome by the facially evident fact that the Association's Motion is absent any request for reconsideration or rehearing and is further absent even a single challenge to the Court's findings.

B. The Continuing Need for Clarification

The Court has "stay[ed] the proceeding pending compliance." *Motion's Exhibit 1,* p. 17 at ¶15. Consequently, it is appropriate for the Association to seek clarification of the Court's findings in order to properly comply with the Court's Order.

1. Sewer Problem

It is undisputed that the Court has determined that the Association's Notice concerning the ruptured sewer pipe was insufficient. Builder contends that "there can be no other reading of this Court's Order but that they are dismissed with prejudice." *Opposition* p. 4 at 10-11. Builder appears to see an order for dismissal of this claim where none exists, just as it appear to see requests for reconsideration where none exist. The Association notes Builder's efforts to draw conclusions and issue orders on behalf of the Court, but is of the impression that the Court is perfectly capable of doing so on its own.

If the Court had intended to dismiss the sewer claim with prejudice, the Association believes the Court would have issued an order to that effect, especially given that Court unambiguously dismissed the mechanical room claim. Given the absence of such an order concerning the sewer claim, the Association maintains that an ambiguity arises from the Court's conclusion regarding the sewer problem. Thus, the Association seeks clarification regarding the sewer claim to determine whether the Court has deemed it dismissed or, if not, to provide clarity concerning how the Association can comply with the Court's findings.

2. Fire Blocking

It is also undisputed that the Court has determined that the Association's Notice concerning the absence of residential fire blocking was insufficient. Builder's Opposition to the Association's request for clarification concerning this either misunderstands, or is nonresponsive to, the relief that is requested. Builder's assert that "this is not an effort at clarification, but rather a Motion for Reconsideration." *Opposition* p. 4 at 15-16. As with the sewer claims, this assertion is misguided

given the absence of any challenge to the Court's findings on the matter and the further absence of any request to rehear the issue.

Builder asserts that "The Association contends the available plans are not specific enough to allow the Association's experts to identify each and every location" where the fire blocking is, or may be, absent from the residential towers. *Id.* at 19-20. This is incorrect. No such contention was made in the Association's Motion. What the Association *did* contend was that the Court was unambiguous concerning window defects, where a claimant can "identify the exact location by use of building blueprints or plans", and concerning mechanical room piping, where "defects were readily apparent, meaning one did not need to destructively test to find them." *Motion* p. 7 at 10-14. The effect of the Association's contention was that the Court did not provide the same level of clarity in its conclusions regarding the fire blocking claim, where the defect is neither discernible through plans, sketches or diagrams, nor readily apparent as with the mechanical room leaks. Consequently, the Builder's restatement of the same arguments levied in their Motion for Summary Judgment is simply nonresponsive. No meaningful argument is made as to why this Court should not grant the Association's request for clarification concerning the fire blocking claim.

III. CONCLUSION

Based upon the foregoing, the Association respectfully moves this Court for clarification of its September 15, 2017 Findings of Fact, Conclusions of Law and Order with respect to the Association's two queries posed in the Association's Motion.

Dated: November 15, 2017

LYNCH HOPPER, LLP

By: _____

Francis I. Lynch, Esq.
Nevada Bar No. 4145
Charles "Dee" Hopper, Esq.
Nevada Bar No. 6346
1210 S. Valley View Blvd., Suite 208
Las Vegas, Nevada 89102

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of November, 2017, a copy of the foregoing, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR CLARIFICATION OF THIS COURT'S 9/15/17 ORDER, was electronically served through Odyssey upon all parties on the master e-file and serve list, including:

BREMER WHYTE BROWN & O'MEARA LLP
Peter C. Brown, Esq.
Darlene M. Cartier, Esq.
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144

By: _____
for Lynch Hopper, LLP

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, Plaintiff, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS ASSOCIATION, Defendant.	CASE NO. A-744146 DEPT. XXII

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

NOVEMBER 21, 2017

RECORDER'S TRANSCRIPT OF HEARING RE

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S MOTION FOR CLARIFICATION OF THIS COURT'S 9-15-17 ORDER

APPEARANCES:

For the Plaintiff: PETER C. BROWN, ESQ.
JEFFREY SAAB, ESQ.

For the Defendant: SERGIO SALZANO, ESQ.
DEE HOPPER, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

TUESDAY NOVEMBER 21, 2017 AT 12:06:30 A.M.

THE COURT: Okay. And that gets us to – well, maybe. Okay. Hallier versus Panorama Towers and that is case number A-16-744146-D. Would you announce your appearances for the record, please?

MR. BROWN: Good morning, Your Honor. Peter Brown on behalf of the Plaintiff builders.

MR. SAAB: Good morning, Your Honor. Jeff Saab co-counsel with Mr. Brown.

MR. SALZANO: Good morning, Your Honor. Sergio Salzano and Charles –

MR. HOPPER: Dee Hopper.

MR. SALZANO: -- Dee Hopper on behalf of the Association.

THE COURT: Okay. And, counsel, this is your Motion for Clarification of my September 15th order which as you know I – let's see, it – I'm just counting the pages. It is 20 pages.

MR. SALZANO: Yes, Your Honor.

THE COURT: Okay.

MR. SALZANO: Let me say at the outset you should be commended that you are as specific and detailed as you are in your orders. Leave it to counsel to find small issues that we feel need to be addressed in a 20 paged order. And so I will try to be brief, Your Honor.

As you know, the builders brought a Motion for Summary Judgment, we opposed it. And when they brought their Motion for Summary Judgment – and it had to do with the sufficiency of the Chapter 40 Notice that was issued in this case, they question the sufficiency of four different – the four different defect issues; the

mechanical room, sewer piping, the windows and the fire blocking. And in addition they also propose to this Court that the interpretation of AB125, the new revisions to Chapter 40, that those revisions needed to be interpreted very strictly and very literally. We of course in opposition argued that AB125 changes to Chapter 40 could be interpreted according to the reasonableness standard or substantial client standard.

This Court in your order you rejected our approach, adopted the Builder's approach and you stated – if I could just read. This is from page 12 of your order.

THE COURT: Okay. Let me get there.

MR. SALZANO: It's lines 12 to 14.

THE COURT: Okay.

MR. SALZANO: 12 to 13 [indecipherable].

THE COURT: Okay.

MR. SALZANO: "NRS 40.645 now requires not just reasonable but specific detail in each defect, damage and injury." And then if you skip to page 15 also lines 12 and 13. You stated: "Clearly the legislature intended the defect and its exact location to be specifically identified to allow the contractor to make a meaningful investigation." You went a step further and also agreed with the builder's position that under Chapter 40 extrapolation is no longer a viable method by which you can comply with the requirements of the statute. In essence you can't use extrapolation in the notices anymore as I think the way it was discussed in the hearing.

Also from the order page 15 starting on line 12 – I may have that line incorrect. It says: "If the 2015 Nevada legislature intended that the constructional defects found in a typical unit be extrapolated as existing in other residences they

would have said so, instead by deleting such provisions from the pre 2015 NRS 40.645 the lawmakers demonstrated their intent extrapolation was no longer an acceptable practice." Now we understand your ruling, we're not questioning it, we're not asking for it to be reconsidered or be heard. We would like clarification however, Your Honor, on a couple of the defect areas where you went from that approach to Chapter 40 to the conclusions of law that you then rendered on the four issue areas. And I would just mention as a matter of completeness you did give us the six month stay to attempt compliance with the guidance that you gave us in your conclusions of law.

As to the window issue, you basically said that we did not identify the locations with – with enough specificity and therefore it did not satisfy the requirements of a Chapter 40 Notice. As to the fire blocking issue, the same thing, you said: "You're not giving us the exact location so therefore it doesn't satisfy AB125 and Chapter 40 as a whole." On the mechanical room issue that's the odd one that kind of got dismissed because the statute of limitations and we'll set that one aside. And then on the sewer pipe issue we pointed out that because no opportunity to inspect the condition or to offer the repair was given to the builder prior to the Association doing its own repair that therefore we couldn't – or we didn't comply with Chapter 40 that there must be an inspection and/or repair. And in addition, there wasn't a specific description of the nature of the defect and the damage it caused. So, that's really what happened with the order.

The reason why we brought a Motion for Clarification is because on two of these issues we feel like we don't really have enough guidance to move forward. Let me explain. Setting aside the mechanical room because that was dismissed on the statute of limitations, we understand, we accept and setting aside the window

issue which was just a locations matter, if we go to the sewer pipe issue this Court told us in the order that we cannot satisfy Chapter 40 because we didn't offer an opportunity to inspect and repair. Let me read from page 16 of the order starting at line 18. "The contractor must be allowed a reasonable opportunity either to repair the defect or cause the deficiency to be repaired if an election to repair is made pursuant to NRS 40.6472. In this case the contractors were not accorded its right to inspect or repair the defects in the mechanical room and sewer system as the deficiencies were removed and replaced prior to the March 26, 2016 inspection. This Court understands to this day the contractors had not been provided access to the defective piping, fittings and other materials. Given these facts this Court finds the contractor's arguments the Association did not comply with NRS Chapter 40 – Chapter 40's pre-litigation requirements" [indecipherable].

Now, the practical effect of that is that to comply with Chapter 40 the Association is somehow is going to have to either invent or build a time machine to go back in time to invite the builder to see the pipe in the condition, in its pre repair nature. Now, the Association has looked for the pipe, we believe the piping as it was a sewer pipe was discarded after the repair was completed and so we can't recreate the unrepaired condition. Now, we realize that at some future point we might have problems with proof if you were to let this claim go forward. If you would have let it go forward we would have proof problems. We understand that, but at this juncture right now in Chapter 40 your language here seems to say unless you can somehow go back in time and present this in its pre repaired condition you can never satisfy Chapter 40. And if that's the case, Your Honor – and I would point out that in their opposition the builder seems to agree with that, the builder seems to say, yeah, what she really did was she dismissed the claim.

Now I've been practicing law for twenty years, I've never walked into a court and said, Your Honor, you need to dismiss my claim. I've never had to do that before. And, you know, I'm not gonna do it today, I am however going to ask that this Court clarify whether or not that conclusion follows naturally from the language that I cited here in the order because we just can't go back and comply because we can't go back in time and present an unrepaired condition and an opportunity to repair to the builder. You can't do it. So, if that means that dismissal is the only logical conclusion we would just ask that the Court clarify that.

With regards to the fire blocking issue. Now as to the window and the fire blocking issue, it seems like the Court's primary difficulty with the Chapter 40 Notice was that it did not identify the locations of those defects. And if you remember in oral argument I presented the Court with this idea I've had in my head for many years about blue taping where you take the little piece of blue tape when you go through – you buy a new home and you put the blue tape on all the problem areas and I try to be real cute about it, I think the Court understood. Really what it means is you're identifying the specific locations of every problem that you see or that you know about. And the builder in their Motion for Summary Judgment stated that AB125 requires us to identify, blue tape every single location in the home. We resisted that but it seems like the Court has accepted the builder's interpretation of AB125. And we – that's fine, we're not asking the Court to reconsider it. We are however asking the Court to clarify one portion of that decision.

If I can read also from your order page 15, starting at line 17. Let me make sure that I start in the right place. "Second. Requiring each defect to damage and injury to each residence to be specifically identified does not necessarily lead absurd results; incurrence of prohibited costs for required destructive testing. Such

is especially true when one claims that deficiency is in the design of the windows and their assemblies as the Association does here. For example, if there's a defect in the unit's design the Association or other claimant can identify the exact location by use of the building blueprints or plans." Now I realize that section was given in the window portion of your order.

And the – as to the windows, Your Honor, the Association believes that we can prove and identify the exact location of each of the window defects by use of the plans. And we discussed it in hearing and you gave us guidance on that issue in your order because we believe the plans will show that window defects exist at every window and it's a design defect, it's not a workmanship issue. On the other side of the coin with regards to the fire blocking issue, we went back to the plans and the plans demonstrate that the fire blocking should have been installed in each of the location where Mr. Hindeyah found it missing. And Mr. Hindeyah was an expert witness; he's doing work on behalf of the Association and he had an occasion to open up the walls in a number of units and found that this particular fire blocking which is intended to prevent fire from spreading from lower floor to a higher floor was missing in seventy-six percent of the locations. That's not seventy-six percent of the units as the builder suggests, it's seventy-six percent of the locations where it was supposed to be meaning it's in some places but it's missing for the most. So, as to the fire blocking issue, Your Honor, we cannot use the plans, we can't rely upon the plans to prove the defects which means we're gonna have to go and blue tape or find that specific defect in every location throughout the 600 units in the project.

Now, we attached a affidavit from Mr. Hindeyah explaining that that type of investigation may cost up to $8 million to accomplish. Now his affidavit that

we attached to our opposition to the Motion for Summary Judgment, that affidavit applied both to the fire blocking issue and the window issue. If we only have to do the fire blocking issue obviously there would be some cost savings but it's not gonna be even fifty percent because we still have to go into every single unit, staff it, tape it, cut it, open it up, show everybody, etcetera, etcetera. So, we're looking at significant costs perhaps 4 to $5 million to investigate the fire blocking issue in all 600 units. We're seeking clarification, Your Honor, to determine whether or not – let me back up. When you gave us that clarification as to the window issue saying that we could reply upon the plans there was no hint as to what could be done with the fire blocking issue if it couldn't be demonstrated by the plans. And the problem that we have and reason why we're seeking clarification is because it's raised as a very significant due process issue. If our client can't walk into court to present their complaint to a court of law they're being denied due process rights. If the filing fee, if the entry fee to the courthouse is 4 to $5 million then that's a due process problem.

So, we don't know if this Court has a simple way of clarifying this issue, if it's gonna require additional briefing, if it's gonna require an evidentiary hearing, I don't know. Or this – this Court could just say, yes, Mr. Salzano, I meant every exact location and it's up to you to determine what the cost is and how you're gonna accomplish that. But whatever the Court's answer is we'd just like that clarification so that we can move forward because our time is running and the clock is running and it's a lot of work. I mean, as it sits right now we would have to do I believe 23 to 24 units every single week to meet the six month deadline and that's if we started this week. That's why we're seeking clarification, Your Honor. Thank you.

MR. BROWN: Good early afternoon, Your Honor. Peter Brown on behalf of

the Plaintiff Builders.

Counsel said that he would need a time machine and I thought that was ironic because I was thinking about myself this morning. But what this reminded me of is when I was a freshman in high school I was told the first week of high school that a particular person, I'm not gonna say her name. I was told by my friends this particular person likes me. Well, I said, oh well, I don't know this person, this person went to a different high school – or a different grade school so I'm gonna go see that person. Well, during my freshman year for whatever reason I wasn't interested. Go to sophomore year. Sophomore year I see this same person over the summer, this person changed and all of the sudden I thought to myself, oh, well, this person, I started talking to her and she's in a couple of my classes and she liked me last year, well, I like her this year and so I just figured that I could do the same thing that I did in the first year. I can just be Peter Brown and she liked Peter Brown when I was a freshman so she should like Peter Brown when I'm a sophomore. Well, guess what? She didn't like Peter Brown as a sophomore. So, I decided to myself, well, I can just keep doing what I've always done because that was sufficient and that's what worked for me before or I could change, I could look at the changed circumstances and see what is gonna be required of me to try to make this particular person like me.

Your Honor, I hate to swim, hate it. I joined a swim team because my sister was part of a swim team and this particular person was part of a swim team and I joined that swim team because I decided that's one way to spend more time with this person, maybe this person is going to end up seeing that I've changed. I could have asked this person how do I change? What can I do? How can I make you like me? Well, at the beginning of my sophomore year that person would have

said to me nothing, I don't like you. You didn't like me last year and now all of the sudden you like me. I don't like you. Circumstances have changed; you can't do the same thing that you did before, you're gonna have to do something different. But she didn't have to tell me what to do, I had to figure it out. I had to look at the changed circumstances and determine for myself how am I gonna make it work in this changed circumstance.

He talked about a time machine, made me think of a time machine thinking back to when I was freshman and a sophomore. What does this all have to do with what we're talking about here today? What are they really asking you to do? They can say that they're not asking you to reconsider your ruling but I made notes here that he reargued the blue tape argument, he reargued the due process argument, he reargued the significant cost argument so in essence he's asking you to reconsider those particular arguments. But what is he also asking you to do? Just to tell him what to do. What should the HOA do in order to satisfy the new changed circumstances that they find themselves in under AB125? Your Honor, that's not the Court's role. The Court is not here to give an advisory opinion just as back when I was 12 and 13 it wasn't that person's role to give me an advisory opinion as to how to make her like me. I had to figure it out.

The statute has been written by the legislature. I noted that in your lengthy order there's absolutely no challenge of the findings of fact that pertain to NRS 40.645 and the changes to NRS 40.645 there's no challenge to your finding of fact that the contractors are not provided notice of the removal or replacement of the alleged constructional defective windows in Unit 300 or the deficient piping in the mechanical room prior to the March 24, 2016 inspection. There's no challenge or ask for reconsideration as to the Court's specific finding of fact as there was no

response from the Owners Association to the March 29, 2016 correspondence and this is regarding the sewer lines. The contractor's attorney followed up with another letter sent a month later April 29, 2016 however there was also no response to that April 29, 2016 letter. There's no challenge to that, Your Honor, no request for reconsideration. There's no challenge to or request for reconsideration of the conclusion of law, page 7. "There is no question the provision of NRS 40.600 or 40.695 were enacted by the Nevada legislature for the intent to provide contractor's an opportunity to repair constructional defects and avoid litigation." There is no challenge to the conclusion of law found on page 8, the notice given pursuant to NRS 40.645 subsection 1 must, subsection B, identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claims including without limitation the exact location of each such defect, damage and injury. There is no challenge to this Court's conclusion of law or request for reconsideration as to this Court's setting forth under NRS 40.647 on the bottom of page 8 – or 9 and the top of page 10 that the notice – the HOA must allow the contractor, subcontractor, supplier or design professional a reasonable opportunity to repair the constructional defect or cause the defect to be repaired if an election to repair is made pursuant to NRS 40.6472. There is no challenge to the conclusions of law that the Court set forth with regard to a defect that allegedly creates eminent threat to health safety. No challenge to the Court setting forth that the notice must be provided regardless of whether or not it creates an eminent threat.

Throughout the conclusions of law there is no challenge to what this Court set forth both as to findings of fact as to the sewer problem – alleged sewer problem or to the fire blocking issue. Counsel represented to you today, Your Honor, that they can't figure it out. They need your help in telling them how to

proceed with regard to these two particular issues. Your Honor, that's not your job, your job is to address motion practice like what has been done in this particular case where a Chapter 40 Notice was perceived as being deficient by my clients. We raised that issue properly and this Court ruled in my client's favor. What does not change, Your Honor, and they're correct, is that they cannot give a Chapter 40 Notice ever to my clients with regard to the sewer issues, they cannot – let's think back. We're now how many years since my client first received a Chapter 40 Notice with regard to the sewer issue? Today counsel says, well, maybe we can find some information or maybe we'll never be able to find that pipe, maybe we'll never be able to do anything. But, Your Honor, they want you to tell them it's okay to move forward with a sewer claim. Your Honor, that's not your job. We set forth – for all intense and purposes, if they can't give us notice, if they have no proof that they kept the actual portions of the sewer pipe that they repaired, if they've got no documentation, they've got no record, they've got no photos, they've got nothing. Your Honor, they've got to make the decision as to whether or not they want to proceed with that particular issue, at their peril if they want to proceed. It's not for this Court to tell them how to proceed on that particular issue.

With regard to the fire blocking, we noted in our opposition that there is no need for clarification from this Court because Exhibit A to the opposition to our Motion for Summary Judgment referenced specific information as to the fire blocking. And, Your Honor, what I'm referring for the record is on page 5 of our opposition to the Motion for Clarification. We note: "In stark contrast" – and this on page 5, line 6: "In stark contrast to the alleged 100% incident rate in the Chapter 40 Notice, by Mr. Hindeyah's own admission, the alleged fire blocking issue was not found in 100% of the inspected areas." And so you have a Chapter 40 Notice where