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 7 OF 27

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

Plaintiffs' Motion for Summary Judgment on Defendant's April 5, 2018 Amended Notice of Claims	8/3/18	5–6	651–839
Defendant's Opposition to Motion for Summary Judgment	9/4/18	6–7	840–1077
Plaintiffs' Reply in Support of Motion for Summary Judgment	9/25/18	7	1078–1092
Recorder's Transcript of Proceedings	10/2/18	7	1093–1179
Plaintiffs' Motion for Declaratory Relief Regarding Standing; Appendices I–III.	10/22/18	7–9	1180–1450
Defendant's Opposition to Motion for Declaratory Relief; Countermotions to Exclude Inadmissible Evidence and for Rule 56(f) Relief	11/16/18	9–10	1451–1501
Errata to Defendant's Opposition to Motion for Declaratory Relief and Countermotions to Exclude Inadmissible Evidence and for Rule 56(f) Relief	11/19/18	10	1502–1507
Findings of Fact, Conclusions of Law, and Order	11/30/18	10	1508–1525
Plaintiffs' Motion for Reconsideration of their Motion for Summary Judgment on Defendant's April 5, 2018 Amended Notice of Claims	12/17/18	10–11	1526–1638
Defendant's Opposition to Motion for Reconsideration	1/22/19	11	1639–1659
Plaintiffs' Reply in Support of Motion for Declaratory Relief Regarding Standing and Oppositions to Counter-Motions to Exclude Inadmissible Evidence and for Rule 56(f) Relief; Appendix	1/22/19	11	1660–1856
Defendant's Reply in Support of Counter-Motions to Exclude Inadmissible Evidence and for Rule 56(f) Relief	1/29/19	11	1857–1862

Plaintiffs/Counter-Defendants' Reply in Support of Motion for Reconsideration of their Motion for Summary Judgment on Defendant's April 5, 2018 Amended Notice of Claims	2/4/19	11–12	1863–1908
Errata to: Plaintiffs' Reply in support of Motion for Declaratory Relief Regarding Standing and Oppositions to Defendant's Counter-Motions to Exclude Inadmissible Evidence and for Rule 56(f) Relief	2/5/19	12	1909–1947
Errata to: Plaintiffs/Counter-Defendants' Motion for Declaratory Relief Regarding Standing	2/5/19	12–14	1948–2051
Plaintiffs/Counter-Defendants' Motion for Summary Judgment Pursuant to NRS 11.202(1)	2/11/19	14	2052–2141
Recorder's Transcript of Proceedings	2/12/19	14	2142–2198
Defendant's Opposition to Motion for Summary Judgment and Conditional Countermotion for Relief Pursuant to NRS 40.695(2)	3/1/19	14	2199–2227
Order Denying Plaintiffs/Counter-Defendants' Motion for Reconsideration of Their Motion for Summary Judgment on Defendant/Counter-Claimant's April 5, 2018 Amended Notice of Claims	3/11/19	14	2228–2230
Order Denying Plaintiffs/Counter-Defendants' Motion for Declaratory Relief Regarding Standing	3/11/19	15	2231–2233
Plaintiffs' Reply in Support of Their Motion for Summary Judgment Pursuant to NRS 11.202(1); Opposition to Conditional Countermotion; Appendix	3/15/19	15	2234–2269

Defendant's Reply in Support of Countermotion	3/19/19	15	2270–2316
Recorder's Transcript of Proceedings	4/23/19	15	2317–2376
Findings of Fact, Conclusions of Law and Order	5/23/19	15–16	2377–2395
Notice of Entry of Order	5/28/19	16	2396–2417
Defendant's Motion to Retax and Settle Costs	5/31/19	16	2418–2428
Assembly Bill 421	6/3/19	16	2429–2443
Defendant's Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) or, in the Alternative, Motion to Stay the Court's Order	6/3/19	16	2444–2474
Defendant's Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1)	6/13/19	16	2475–2505
Plaintiffs' Motion for Attorneys' Fees; Appendices I–II	6/16/19	16–22	2506–3663
Plaintiffs/Counter-Defendants' Opposition to Motion to Retax	6/21/19	22	3664–3733
Plaintiffs/Counter-Defendants' Opposition to Defendant's Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) or, in the alternative, Motion to Stay the Court's Order; Appendix	6/21/19	22–24	3734–4042

Plaintiffs' Opposition to Defendant's Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1)	7/1/19	24	4043–4052
Defendant's Opposition to Motion for Attorneys' Fees	7/1/19	24	4053–4070
Defendant's Reply in Support of Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1)	7/9/19	24	4071–4077
Defendant's Reply in Support of Motion to Retax and Settle Costs	7/9/19	24	4078–4103
Defendant's Reply in Support of Defendant's Motion for Reconsideration, or in the Alternative, Motion to Stay the Court's Order	7/9/19	24	4104–4171
Plaintiffs/Counter-Defendants' Reply in Support of Motion for Attorneys' Fees	7/9/19	24	4172–4198
Recorder's Transcript of Proceedings	7/16/19	24	4199–4263
Plaintiffs' Opposition to Defendant's July 16, 2019 Oral Motion to Postpone to the Court's Ruling on the Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Summary Judgment	7/19/19	24–25	4264–4276
Plaintiffs' Motion to Certify Judgment as Final Under Rule 54(b) (On Order Shortening Time)	7/22/19	25	4277–4312

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

Plaintiffs' Reply in Support of Motion for Declaratory Relief Regarding Standing and Oppositions to Counter-Motions to Exclude Inadmissible Evidence and for Rule 56(f) Relief; Appendix	1/22/19	11	1660–1856
Plaintiffs' Reply in Support of Motion for Summary Judgment	5/10/17	4	440–449
Plaintiffs' Reply in Support of Motion for Summary Judgment	9/25/18	7	1078–1092
Plaintiffs' Reply in Support of Motion to Certify Judgment as Final under Rule 54(b)	8/5/19	25	4334–4343
Plaintiffs' Reply in Support of Their Motion for Summary Judgment Pursuant to NRS 11.202(1); Opposition to Conditional Countermotion; Appendix	3/15/19	15	2234–2269
Recorder's Transcript of Proceedings	1/24/17	2	231–260
Recorder's Transcript of Proceedings	6/20/17	4	450–496
Recorder's Transcript of Proceedings	11/21/17	4–5	561–583
Recorder's Transcript of Proceedings	3/15/18	5	586–593
Recorder's Transcript of Proceedings	4/12/18	5	642–650
Recorder's Transcript of Proceedings	10/2/18	7	1093–1179
Recorder's Transcript of Proceedings	2/12/19	14	2142–2198
Recorder's Transcript of Proceedings	4/23/19	15	2317–2376
Recorder's Transcript of Proceedings	7/16/19	24	4199–4263
Recorder's Transcript of Proceedings	8/6/19	25	4344–4368
Recorder's Transcript of Proceedings	10/17/19	26	4509–4525

~~[6.]~~ *4.* Notice is not required pursuant to this section before commencing an action if:

(a) The contractor, subcontractor, supplier or design professional has filed an action against the claimant; or

(b) The claimant has filed a formal complaint with a law enforcement agency against the contractor, subcontractor, supplier or design professional for threatening to commit or committing an act of violence or a criminal offense against the claimant or the property of the claimant.

Sec. 9. NRS 40.646 is hereby amended to read as follows:

40.646 1. Except as otherwise provided in subsection 2, not later than 30 days after the date on which a contractor receives notice of a constructional defect pursuant to NRS 40.645, the contractor shall forward a copy of the notice by certified mail, return receipt requested, to the last known **address of each subcontractor,** supplier or design professional **whom the contractor reasonably** believes is responsible for a defect specified in the notice.

2. If a contractor does not provide notice as required pursuant to **subsection 1, the contractor** may not commence an action against the **subcontractor, supplier** or design professional related to the constructional defect unless the contractor demonstrates that, after making a good faith effort, the contractor was unable to identify the subcontractor, supplier or design professional whom the contractor believes is responsible for the defect within the time provided pursuant to subsection 1.

3. ~~[Except as otherwise provided in subsection 4, not]~~ *Not* later than 30 days after receiving notice from the contractor pursuant to this section, the subcontractor, supplier or design professional shall inspect the alleged constructional defect in accordance with ~~[subsection 1 of]~~ NRS 40.6462 and provide the contractor with a written statement indicating:

(a) Whether the subcontractor, supplier or design professional has elected to repair the defect for which the contractor believes the subcontractor, supplier or design professional is responsible; and

(b) If the subcontractor, supplier or design professional elects to repair the defect, an estimate of the length of time required for the repair, and at least two proposed dates on and times at which the subcontractor, supplier or design professional is able to begin making the repair.

4. ~~If the notice of a constructional defect forwarded by the contractor was given pursuant to subsection 4 of NRS 40.645 and the contractor provides a disclosure of the notice of the alleged common constructional defects to the unnamed owners to whom the notice may apply pursuant to NRS 40.6452:~~

~~(a) The contractor shall, in addition to the notice provided pursuant to subsection 1, upon receipt of a request for an inspection, forward a copy of the request to or notify each subcontractor, supplier or design professional who may be responsible for the alleged defect of the request not later than 5 working days after receiving such a request; and~~

~~(b) Not later than 20 days after receiving notice from the contractor of such a request, the subcontractor, supplier or design professional shall inspect the alleged constructional defect in accordance with subsection 2 of NRS 40.6462 and provide the contractor with a written statement indicating:~~

~~(1) Whether the subcontractor, supplier or design professional has elected to repair the defect for which the contractor believes the subcontractor, supplier or design professional is responsible; and~~

~~(2) If the subcontractor, supplier or design professional elects to repair the defect, an estimate of the length of time required for the repair, and at least two proposed dates on and times at which the subcontractor, supplier or design professional is able to begin making the repair.~~

~~5.]~~ If a subcontractor, supplier or design professional elects to repair the constructional defect, the contractor or claimant may hold the subcontractor liable for any repair which does not eliminate the defect.

Sec. 10. NRS 40.6462 is hereby amended to read as follows:

40.6462 ~~[1. Except as otherwise provided in subsection 2, after]~~ ***After*** notice of a constructional defect is given to a contractor pursuant to NRS 40.645, the claimant shall, upon reasonable notice, allow the contractor and each subcontractor, supplier or design professional who may be responsible for the alleged defect reasonable access to the residence or appurtenance that is the subject of the notice to determine the nature and extent of a constructional defect and the nature and extent of repairs that may be necessary. To the extent possible, the persons entitled to inspect shall coordinate and conduct the inspections in a manner which minimizes the inconvenience to the claimant.

~~[2. If notice is given to the contractor pursuant to subsection 4 of NRS 40.645, the contractor and each subcontractor, supplier or design professional who may be responsible for the defect do not have the right to inspect the residence or appurtenance of an owner who is not named in the notice unless the owner requests the inspection in the manner set forth in NRS 40.6452. If the owner does not request the inspection, the owner shall be deemed not to have provided notice pursuant to NRS 40.645.]~~

Sec. 11. NRS 40.647 is hereby amended to read as follows:

40.647 1. ~~[Except as otherwise provided in NRS 40.6452, after]~~ ***After*** notice of a constructional defect is given pursuant to NRS 40.645, before a claimant may commence an action or amend a complaint 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; ~~[and]~~

(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 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.

2. 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.

Sec. 12. NRS 40.6472 is hereby amended to read as follows:

40.6472 1. Except as otherwise provided in NRS ~~[40.6452,]~~ 40.670 and 40.672, a written response must be sent by certified mail, return receipt requested, to a claimant who gives notice of a constructional defect pursuant to NRS 40.645:

(a) By the contractor not later than 90 days after the contractor receives the notice; and

(b) If notice was sent to a subcontractor, supplier or design professional, by the subcontractor, supplier or design professional not later than 90 days after the date that the subcontractor, supplier or design professional receives the notice.

2. The written response sent pursuant to subsection 1 must respond to each constructional defect in the notice and:

(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.

EXHIBIT F

EXHIBIT F

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Second Session
May 8, 2003

The Committee on Judiciary was called to order at 7:39 a.m., on Thursday, May 8, 2003. Chairman Bernie Anderson presided in Rooms 3138 and 4100 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

Note: *These minutes are compiled in the modified verbatim style. Bracketed material indicates language used to clarify and further describe testimony. Actions of the Committee are presented in the traditional legislative style.*

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. John Oceguera, Vice Chairman
Mrs. Sharron Angle
Mr. David Brown
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Jerry D. Claborn
Mr. Marcus Conklin
Mr. Jason Geddes
Mr. Don Gustavson
Mr. William Horne
Mr. Garn Mabey
Mr. Harry Mortenson
Ms. Genie Ohrenschall
Mr. Rod Sherer

GUEST LEGISLATORS PRESENT:

Senator Michael Schneider, District No. 11, Clark County

the law in the state of Nevada. It will cause homeowners insurance rates to rise. You can imagine what would happen if homeowners with construction defects, code violations that haven't resulted in injury or damage, have to disclose that to their homeowners insurance carrier. Their rates are going to go up because the casualty carriers are going to conclude that if we have a home that has construction defects, there is a greater likelihood of a risk of loss in that home than a home that doesn't have construction defects. This makes sense; it stands to reason.

[Scott Canepa continued.] Senate Bill 241 misleads jurors with respect to building inspection. Section 24 says that the passing of inspections shall be prima facie evidence, or on-face-value proof, that the home was built in compliance with the code. Yet, what we know from practical experience in litigating these cases in southern Nevada is that inspectors only do spot inspections. Inspectors have testified in depositions that they cannot control what happens after they do the inspection. In fact, they testified that things have been changed to be in violation of the code after they have left. Inspections do not guarantee the absence of defects. Inspectors and local governments have legal immunity from suit even if they admit that they negligently failed to inspect the home or they negligently inspected and approved it even though it was defective.

The next one is an excerpt from a deposition of an official with the Clark County Building Department that supports the position I just advanced wherein he said that the fact that a building has passed an inspection is not a guarantee in any respect that the building does not have serious life, safety, and health defects.

The mandatory right to repair in S.B. 241 is unfair; this is Sections 27 through 31. The mandatory right to repair says that under S.B. 241, the contractor has the right to make the repair under all circumstances, to enter the property. The homeowner has no right to say no unless they forfeit their claim and there is no exception for violent contractors. The State Contractors' Board records are replete with evidence of contractors who have assaulted homeowners, who have put pipe bombs under homeowner's cars, and who have done other acts of violence against homeowners. This law would require those homeowners to allow that contractor back in their house unless they want to forfeit their claim. I hear chuckling in the back. We are going to provide proof to you of the statements that I just made in the form of a separate document that will identify the places on the Web site from the State Contractors' Board, where you can see for yourself the allegations made by the homeowners and the criminal cases that have trailed thereafter.

[Scott Canepa continued.] There is no exception for homeowners who are already in litigation with contractors. The slap statute that was amended in 1997 to prevent homeowners who speak out against their bad construction practices, we think is against public policy. It forces a homeowner to allow a contractor who has sued them in a court of law back into their home; there should be an exception for that. There is no exception for failed, flimsy, or fraudulent repairs and no exception for contractors who have already refused to repair the problem. Why are we forcing homeowners under S.B. 241 to once again go through all of these steps when they have already been refused by the contractor? There should be an exception for that.

Regarding the State Contractors' Board involvement (Exhibit W), this goes to Assemblyman Carpenter's concerns. First of all, the State Contractors' Board lacks the necessary expertise in complex cases. One of the handouts that we have given you is a document that was prepared by the Contractors' Board at the behest of Senator Townsend in connection with hearings on bills on the Senate side. What you will see in many cases is when the State Contractors' Board is given an issue that is too complex for them, they capitulate and merely tell the homeowner they need to proceed to court. The State Contractors' Board lacks necessary resources. There is no judicial review of the Board's decision on this subject. Senate Bill 241, Section 29, is internally inconsistent. It says on the one hand that the Board has to follow the procedures under NRS Chapter 624, which requires due process of law, and on the other hand says that there is no judicial review of their decision.

Finally, Mr. Wadhams told you a few moments ago that this does not affect homeowner's rights, yet under S.B. 241 the findings of the State Contractors' Board are admissible in court against the homeowner, even though the homeowner has no right to challenge that finding and there is no judicial review of that finding. This Committee processed Assembly Bill 220, which is conceptually inconsistent with this process because under A.B. 220, the findings of the investigators on claims that do not make it to a hearing are not discoverable, you can't discover all of the papers, the documents, and their comments. Conceptually that is inconsistent.

Finally, the State Contractors' Board lacks jurisdictions over non-licensees. This section is a bust for this reason alone. Most real estate developers are not licensees; they are not licensed contractors.

Section 50 unreasonably restricts contingent fee contracts. Section 32 unreasonably limits the tolling of the time bar statutes. Section 36 arbitrarily limits remedies in new homes. Section 43 seeks to prevent legitimate claims

EXHIBIT G

EXHIBIT G

MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Second Session
May 16, 2003

The Committee on Judiciary was called to order at 7:50 a.m., on Friday, May 16, 2003. Chairman Bernie Anderson presided in Room 3138 of the Legislative Building, Carson City, Nevada, and, via simultaneous videoconference, in Room 4401 of the Grant Sawyer State Office Building, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Guest List. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

Note: *These minutes are compiled in the modified verbatim style. Bracketed material indicates language used to clarify and further describe testimony. Actions of the Committee are presented in the traditional legislative style.*

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mrs. Sharron Angle
Mr. David Brown
Ms. Barbara Buckley
Mr. John C. Carpenter
Mr. Jerry D. Claborn
Mr. Marcus Conklin
Mr. Jason Geddes
Mr. Don Gustavson
Mr. William Horne
Mr. Garn Mabey
Mr. Harry Mortenson
Ms. Genie Ohrenschall
Mr. Rod Sherer

COMMITTEE MEMBERS ABSENT:

Mr. John Oceguera, Vice Chairman (excused)

What we have for you is a statement (Exhibit H) in terms of bullet points and goals that we have tried to achieve. Attached to that is a fairly lengthy document that has our suggested method of carrying into law those goals. You and the bill drafter will note that in numerous places we have indicated conceptual ideas that will require help from the bill drafters. With that said, I would like to read into the record the goals that we have agreed upon. We would suggest an amendment to Senate Bill 241 that would amend NRS Chapter 40, as opposed to creating a new chapter in construction defect legislation, that would accomplish the following:

A. Establishes a mandatory pre-litigation opportunity to repair for contractors and subcontractors.

B. Preserves the right of an unsatisfied or ignored homeowner to access the legal system.

C. Removes the procedural distinction between complex and non-complex cases.

D. Provides for a repair in 105 days for 4 homes or less cases and 150 days for 5 or more homes.

E. Refines and clarifies the definition of a construction defect.

F. Allows access to the [State] Contractor's Board for advice for those who choose to use that board but without making it mandatory.

G. Preserves the court's discretion to determine class actions in construction defect cases.

H. Clarifies that offers of judgment are acceptable in construction defect cases if they include all of the damages recoverable by the claimant under NRS 40.655.

I. Clarifies that a homeowner who has been sued by a builder for any reason, including defamation, is not required to provide notice to a contractor in order to commence an action.

J. Provides that contractors and subcontractors maintain their right to repair after the commencement of litigation as long as the new defect is separate and unrelated from the initial defect. This notice doesn't abate or slow down the underlying case.

K. Pre-litigation mediation is maintained and refined.

EXHIBIT H

EXHIBIT H

4. *If a claimant fails to give proper notice pursuant to this section, the Court shall dismiss the claim without prejudice and compel the claimant to follow the notice provisions set forth herein. However, in the event a dismissal without prejudice would result in a claimant's inability to satisfy the notice requirements of this section within the time remaining under the applicable statute of limitations or statute of repose, the Court shall stay all proceedings pending claimant's compliance with this section.*

5. *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.*

6. *A homeowner association may send notice of a claim against a contractor or a subcontractor, supplier or design professional under NRS 40.600, et seq. If the claimant is a representative of a homeowner's association or a homeowner's association, the association shall send any response made by the contractor to each member of the association within 10 days of the receipt thereof.*

7. ***An expert opinion concerning the cause of the defects and the nature and extent of the damage or injury resulting from the defects including an expert opinion based on a representative sample of the components of the residences and appurtenances involved in the notice satisfies the requirements of this section.***

Exceptions to the notice requirement

A claimant is not required to provide a contractor with notice pursuant to this chapter before commencing a cause of action for constructional defect if:

1. The contractor has a lawsuit pending against the claimant regarding the residence; or

2. The claimant has filed a formal complaint with the police because the contractor has threatened to commit or committed an act of violence or criminal offense against the claimant or the property of the claimant.

Special written notice requirement for constructional defect common to residences in a community

1. Where a contractor receives notice from a claimant or claimants pursuant to this chapter and, after reasonable investigation or inspection of the subject matter of the notice, reasonably concludes that a constructional defect may exist in other residences or appurtenances within the claimant's immediate development, the contractor may provide each owner of a residence or appurtenance the contractor believes contains the potential constructional defect with a notice as prescribed in this section. The notice of potential constructional defect shall, at a minimum, specify:

(a) The nature of the potential defect, and

(b) A description of how and where to respond to the notice.

2. The contractor shall send the notice prescribed in this section to the claimant or claimants by registered mail, return receipt, to the claimant's home address.

3. A claimant or claimants shall not be allowed to commence any action for constructional defect against a contractor who sends notice under this section, or a subcontractor, supplier or design professional that may be responsible for the potential constructional defect until such time as the claimant or claimants have satisfied the requirements of this Chapter.

G 4 of 18

EXHIBIT I

EXHIBIT I

Senate Bill No. 241–Committee on Commerce and Labor

CHAPTER.....

AN ACT relating to real property; requiring notice, a right to inspect and a right to repair to be provided to a contractor before an action for constructional defects may be commenced; establishing the State Contractors' Board as a resource to answer questions and assist in resolving disputes concerning matters which may affect or relate to constructional defects; making various other changes concerning constructional defects; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 40 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 15, inclusive, of this act.

Sec. 2. ***"Amend a complaint to add a cause of action for a constructional defect" means any act by which a claimant seeks to:***

1. Add to the pleadings a defective component that is not otherwise included in the pleadings and for which a notice was not previously given; or

2. Amend the pleadings in such a manner that the practical effect is the addition of a constructional defect that is not otherwise included in the pleadings.

The term does not include amending a complaint to plead a different cause for a constructional defect which is included in the same action.

Sec. 3. ***"Design professional" means a person who holds a professional license or certificate issued pursuant to chapter 623, 623A or 625 of NRS.***

Sec. 4. ***"Subcontractor" means a contractor who performs work on behalf of another contractor in the construction of a residence or appurtenance.***

Sec. 5. ***"Supplier" means a person who provides materials, equipment or other supplies for the construction of a residence or appurtenance.***

Sec. 6. ***1. Except as otherwise provided in subsection 2, not later than 60 days after a contractor receives a notice pursuant to subsection 4 of NRS 40.645 which alleges common constructional defects to residences or appurtenances within a single development and which complies with the requirements of subsection 4 of NRS 40.645 for giving such notice, the contractor may respond to the named owners of the residences or***

appurtenances in the notice in the manner set forth in section 9 of this act.

2. The contractor may provide a disclosure of the notice of the alleged common constructional defects to each unnamed owner of a residence or appurtenance within the development to whom the notice may apply in the manner set forth in this section. The disclosure must be sent by certified mail, return receipt requested, to the home address of each such owner. The disclosure must be mailed not later than 60 days after the contractor receives the notice of the alleged common constructional defects, except that if the common constructional defects may pose an imminent threat to health and safety, the disclosure must be mailed as soon as reasonably practicable, but not later than 20 days after the contractor receives the notice.

3. The disclosure of a notice of alleged common constructional defects provided by a contractor to the unnamed owners to whom the notice may apply pursuant to subsection 2 must include, without limitation:

(a) A description of the alleged common constructional defects identified in the notice that may exist in the residence or appurtenance;

(b) A statement that notice alleging common constructional defects has been given to the contractor which may apply to the owner;

(c) A statement advising the owner that he has 30 days within which to request the contractor to inspect the residence or appurtenance to determine whether the residence or appurtenance has the alleged common constructional defects;

(d) A form which the owner may use to request such an inspection or a description of the manner in which the owner may request such an inspection;

(e) A statement advising the owner that if he fails to request an inspection pursuant to this section, no notice shall be deemed to have been given by him for the alleged common constructional defects; and

(f) A statement that if the owner chooses not to request an inspection of his residence or appurtenance, he is not precluded from sending a notice pursuant to NRS 40.645 individually or commencing an action or amending a complaint to add a cause of action for a constructional defect individually after complying with the requirements set forth in NRS 40.600 to 40.695, inclusive, and sections 2 to 15, inclusive, of this act.

4. If an unnamed owner requests an inspection of his residence or appurtenance in accordance with subsection 3, the contractor must provide the response required pursuant to section

9 of this act not later than 45 days after the date on which the contractor receives the request.

5. If a contractor who receives a notice pursuant to subsection 4 of NRS 40.645 does not provide a disclosure to unnamed owners as authorized pursuant to this section, the owners of the residences or appurtenances to whom the notice may apply may commence an action for the constructional defect without complying with any other provision set forth in NRS 40.600 to 40.695, inclusive, and sections 2 to 15, inclusive, of this act. This subsection does not establish or prohibit the right to maintain a class action.

6. If a contractor fails to provide a disclosure to an unnamed owner to whom the notice of common constructional defects was intended to apply:

(a) The contractor shall be deemed to have waived his right to inspect and repair any common constructional defect that was identified in the notice with respect to that owner; and

(b) The owner is not required to comply with the provisions set forth in NRS 40.645 or section 11 of this act before commencing an action or amending a complaint to add a cause of action based on that common constructional defect.

Sec. 7. *1. Except as otherwise provided in subsection 2, not later than 30 days after the date on which a contractor receives notice of a constructional defect pursuant to NRS 40.645, the contractor shall forward a copy of the notice by certified mail, return receipt requested, to the last known address of each subcontractor, supplier or design professional whom the contractor reasonably believes is responsible for a defect specified in the notice.*

2. If a contractor does not provide notice as required pursuant to subsection 1, the contractor may not commence an action against the subcontractor, supplier or design professional related to the constructional defect unless the contractor demonstrates that, after making a good faith effort, he was unable to identify the subcontractor, supplier or design professional who he believes is responsible for the defect within the time provided pursuant to subsection 1.

3. Except as otherwise provided in subsection 4, not later than 30 days after receiving notice from the contractor pursuant to this section, the subcontractor, supplier or design professional shall inspect the alleged constructional defect in accordance with subsection 1 of section 8 of this act and provide the contractor with a written statement indicating:

(a) Whether the subcontractor, supplier or design professional has elected to repair the defect for which the contractor believes

the subcontractor, supplier or design professional is responsible; and

(b) If the subcontractor, supplier or design professional elects to repair the defect, an estimate of the length of time required for the repair, and at least two proposed dates on and times at which the subcontractor, supplier or design professional is able to begin making the repair.

4. If the notice of a constructional defect forwarded by the contractor was given pursuant to subsection 4 of NRS 40.645 and the contractor provides a disclosure of the notice of the alleged common constructional defects to the unnamed owners to whom the notice may apply pursuant to section 6 of this act:

(a) The contractor shall, in addition to the notice provided pursuant to subsection 1, upon receipt of a request for an inspection, forward a copy of the request to or notify each subcontractor, supplier or design professional who may be responsible for the alleged defect of the request not later than 5 working days after receiving such a request; and

(b) Not later than 20 days after receiving notice from the contractor of such a request, the subcontractor, supplier or design professional shall inspect the alleged constructional defect in accordance with subsection 2 of section 8 of this act and provide the contractor with a written statement indicating:

(1) Whether the subcontractor, supplier or design professional has elected to repair the defect for which the contractor believes the subcontractor, supplier or design professional is responsible; and

(2) If the subcontractor, supplier or design professional elects to repair the defect, an estimate of the length of time required for the repair, and at least two proposed dates on and times at which the subcontractor, supplier or design professional is able to begin making the repair.

5. If a subcontractor, supplier or design professional elects to repair the constructional defect, the contractor or claimant may hold the subcontractor liable for any repair which does not eliminate the defect.

Sec. 8. *1. Except as otherwise provided in subsection 2, after notice of a constructional defect is given to a contractor pursuant to NRS 40.645, the claimant shall, upon reasonable notice, allow the contractor and each subcontractor, supplier or design professional who may be responsible for the alleged defect reasonable access to the residence or appurtenance that is the subject of the notice to determine the nature and extent of a constructional defect and the nature and extent of repairs that may be necessary. To the extent possible, the persons entitled to*

inspect shall coordinate and conduct the inspections in a manner which minimizes the inconvenience to the claimant.

2. If notice is given to the contractor pursuant to subsection 4 of NRS 40.645, the contractor and each subcontractor, supplier or design professional who may be responsible for the defect do not have the right to inspect the residence or appurtenance of an owner who is not named in the notice unless the owner requests the inspection in the manner set forth in section 6 of this act. If the owner does not request the inspection, the owner shall be deemed not to have provided notice pursuant to NRS 40.645.

Sec. 9. *1. Except as otherwise provided in NRS 40.670 and 40.672 and section 6 of this act, a written response must be sent by certified mail, return receipt requested, to a claimant who gives notice of a constructional defect pursuant to NRS 40.645:*

(a) By the contractor not later than 90 days after the contractor receives the notice; and

(b) If notice was sent to a subcontractor, supplier or design professional, by the subcontractor, supplier or design professional not later than 90 days after the date that the subcontractor, supplier or design professional receives the notice.

2. The written response sent pursuant to subsection 1 must respond to each constructional defect in the notice and:

(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 his 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. 10. *1. If the response provided pursuant to section 9 of this act includes an election to repair the constructional defect:*

(a) The repairs may be performed by the contractor, subcontractor, supplier or design professional, if he is properly licensed, bonded and insured to perform the repairs and, if he 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 section 6 of this act.

(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) 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 section 9 of this act 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. 11. *1. Except as otherwise provided in section 6 of this act, after notice of a constructional defect is given pursuant to NRS 40.645, before a claimant may commence an action or amend a complaint 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 section 8 of this act; and

(b) 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 section 9 of this act.

2. 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.

Sec. 12. *1. A claimant and any contractor, subcontractor, supplier and design professional may submit a question or dispute to the State Contractors' Board concerning any matter which may affect or relate to a constructional defect, including, without limitation, questions concerning the need for repairs, the appropriate method for repairs, the sufficiency of any repairs that have been made and the respective rights and responsibilities of homeowners, claimants, contractors, subcontractors, suppliers and design professionals.*

2. If a question or dispute is submitted to the State Contractors' Board pursuant to this section, the State Contractors' Board shall, pursuant to its regulations, rules and procedures, respond to the question or investigate the dispute and render a decision. Nothing in this section authorizes the State Contractors' Board to require the owner of a residence or appurtenance to participate in any administrative hearing which is held pursuant to this section.

3. Not later than 30 days after a question or dispute is submitted to the State Contractors' Board pursuant to subsection 1, the State Contractors' Board shall respond to the question or render its decision. The response or decision of the State Contractors' Board:

(a) Is not binding and is not subject to judicial review pursuant to the provisions of chapters 233B and 624 of NRS; and

(b) Is not admissible in any judicial or administrative proceeding brought pursuant to the provisions of this chapter.

4. The provisions of this chapter do not preclude a claimant or a contractor, subcontractor, supplier or design professional from pursuing any remedy otherwise available from the State Contractors' Board pursuant to the provisions of chapter 624 of NRS concerning a constructional defect.

5. If an action for a constructional defect has been commenced, the court shall not stay or delay any proceedings before the court pending an answer to a question or decision concerning a dispute submitted to the State Contractors' Board.

6. The State Contractors' Board shall adopt regulations necessary to carry out the provisions of this section and may charge and collect reasonable fees from licensees to cover the cost of carrying out its duties pursuant to this section.

Sec. 13. *1. If a contractor, subcontractor, supplier or design professional receives written notice of a constructional*

defect, the contractor, subcontractor, supplier or design professional may present the claim to an insurer which has issued a policy of insurance that covers all or any portion of the business of the contractor, subcontractor, supplier or design professional.

2. If the contractor, subcontractor, supplier or design professional presents the claim to the insurer pursuant to this section, the insurer:

(a) Must treat the claim as if a civil action has been brought against the contractor, subcontractor, supplier or design professional; and

(b) Must provide coverage to the extent available under the policy of insurance as if a civil action has been brought against the contractor, subcontractor, supplier or design professional.

3. A contractor, subcontractor, supplier or design professional is not required to present a claim to the insurer pursuant to this section, and the failure to present such a claim to the insurer does not relieve the insurer of any duty under the policy of insurance to the contractor, subcontractor, supplier or design professional.

Sec. 14. *1. If a settlement conference is held concerning a claim for a constructional defect, the special master, if any, or the judge presiding over the claim may order a representative of an insurer of a party to attend the settlement conference. If a representative of an insurer is ordered to attend the settlement conference, the insurer shall ensure that the representative is authorized, on behalf of the insurer, to:*

(a) Bind the insurer to any settlement agreement relating to the claim;

(b) Enter into any agreement relating to coverage that may be available under the party's policy of insurance which is required to carry out any settlement relating to the claim; and

(c) Commit for expenditure money or other assets available under the party's policy of insurance.

2. If a representative of an insurer who is ordered to attend a settlement conference pursuant to subsection 1 fails to attend the settlement conference or attends but is substantially unprepared to participate, or fails to participate in good faith, the special master or the judge may, on his own motion or that of a party, issue any order with regard thereto that is just under the circumstances.

3. In lieu of or in addition to any other sanction, the special master or the judge may require the insurer to pay any reasonable expenses or attorney's fees incurred by a party because of the failure of the insurer or its representative to comply with the provisions of this section or any order issued pursuant to this section, unless the special master or the judge finds that the

failure to comply was substantially justified or that any other circumstances make the award of such expenses or fees unjust.

4. Any insurer which conducts business in this state and which insures a party against liability for the claim shall be deemed to have consented to the jurisdiction of the special master or the judge for the purposes of this section.

5. The authority conferred upon the special master or the judge pursuant to this section is in addition to any other authority conferred upon the special master or the judge pursuant to any other statute or any court rule.

Sec. 15. ***Not later than 15 days before the commencement of mediation required pursuant to NRS 40.680 and upon providing 15 days' notice, each party shall provide to the other party, or shall make a reasonable effort to assist the other party to obtain, all relevant reports, photos, correspondence, plans, specifications, warranties, contracts, subcontracts, work orders for repair, videotapes, technical reports, soil and other engineering reports and other documents or materials relating to the claim that are not privileged.***

Sec. 16. NRS 40.600 is hereby amended to read as follows:

40.600 As used in NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, of this act,*** unless the context otherwise requires, the words and terms defined in NRS 40.605 to 40.630, inclusive, ***and sections 2 to 5, inclusive, of this act*** have the meanings ascribed to them in those sections.

Sec. 17. NRS 40.610 is hereby amended to read as follows:

40.610 "Claimant" means ~~[an]~~ ***:***

1. An owner of a residence or appurtenance ~~[or a]~~ ***;***

2. A representative of a homeowner's association that is responsible for a residence or appurtenance and is acting within the scope of his duties pursuant to chapter 116 or 117 of NRS ~~[.]~~ ***; or***

3. Each owner of a residence or appurtenance to whom a notice applies pursuant to subsection 4 of NRS 40.645.

Sec. 18. NRS 40.615 is hereby amended to read as follows:

40.615 "Constructional defect" ~~[includes]~~ ***means*** a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance ~~[. The term includes]~~ ***and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance:***

1. Which is done in violation of law, including, without limitation, in violation of local codes or ordinances;

2. Which proximately causes physical damage to the residence, an appurtenance or the real property to which the

residence or appurtenance is affixed ~~[that is proximately caused by a constructional defect.]~~ ***;***

3. Which is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry for that type of design, construction, manufacture, repair or landscaping; or

4. Which presents an unreasonable risk of injury to a person or property.

Sec. 19. NRS 40.635 is hereby amended to read as follows:

40.635 NRS 40.600 to 40.695, inclusive ~~[.]~~ ***, and sections 2 to 15, inclusive, of this act:***

1. Apply to any claim that arises before, on or after July 1, 1995, as the result of a constructional defect, except a claim for personal injury or wrongful death, if the claim is the subject of an action commenced on or after July 1, 1995.

2. Prevail over any conflicting law otherwise applicable to the claim or cause of action.

3. Do not bar or limit any defense otherwise available ***,*** except as otherwise provided in those sections.

4. Do not create a new theory upon which liability may be based ~~[.]~~ ***, except as otherwise provided in those sections.***

Sec. 20. NRS 40.645 is hereby amended to read as follows:

40.645 ***1.*** Except as otherwise provided in this section and NRS 40.670 ***,*** ~~[:~~

~~1. For a claim that is not a complex matter, at least 60 days]~~ before a claimant commences an action ***or amends a complaint to add a cause of action for a constructional defect*** against a contractor ~~[for damages arising from a constructional defect,]~~ ***, subcontractor, supplier or design professional*** the claimant ~~[must]~~ ***:***

(a) Must give written notice by certified mail, return receipt requested, to the contractor, at the contractor's ~~[last known address, specifying]~~ ***address listed in the records of the State Contractors' Board or in the records of the office of the county or city clerk or at the contractor's last known address if his address is not listed in those records; and***

(b) May give written notice by certified mail, return receipt requested, to any subcontractor, supplier or design professional known to the claimant who may be responsible for the constructional defect, if the claimant knows that the contractor is no longer licensed in this state or that he no longer acts as a contractor in this state.

2. The notice given pursuant to subsection 1 must:

(a) Include a statement that the notice is being given to satisfy the requirements of this section;

(b) Specify in reasonable detail the defects or any damages or injuries to each residence or appurtenance that is the subject of the claim ~~[. The notice must describe]~~ ***; and***

(c) Describe in reasonable detail the cause of the defects if the cause is known, the nature and extent that is known of the damage or injury resulting from the defects and the location of each defect within each residence or appurtenance to the extent known.

3. 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 of the common constructional defects within the residences or appurtenances to which the expert opinion applies.

4. Except as otherwise provided in subsection 5, one notice may be sent relating to all similarly situated owners of residences or appurtenances within a single development that allegedly have common constructional defects if:

(a) An expert opinion ***is obtained*** concerning the cause of the ***common constructional*** defects and the nature and extent of the damage or injury resulting from the ***common constructional*** defects ***;***

(b) That expert opinion concludes that based on a ***valid and reliable*** representative sample of the components of the residences and appurtenances ~~[involved]~~ ***included*** in the ~~[action satisfies the requirements of this section. During the 45-day period after the contractor receives the notice, on his written request, the contractor is entitled to inspect the property that is the subject of the claim to determine the nature and cause of the defect, damage or injury and the nature and extent of repairs necessary to remedy the defect. The contractor shall, before making the inspection, provide reasonable notice of the inspection and shall make the inspection at a reasonable time. The contractor may take reasonable steps to establish the existence of the defect.~~

~~2. 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.~~

~~3. Within 60 days after the contractor receives the notice, the contractor shall make a written response to the claimant. The response:~~

~~(a) Must be served to the claimant by certified mail, return receipt requested, at the claimant's last known address.~~

~~(b) Must respond to each constructional defect set forth in the claimant's notice, and describe in reasonable detail the cause of the~~

~~defect, if known, the nature and extent of the damage or injury resulting from the defect, and, unless the response is limited to a proposal for monetary compensation, the method, adequacy and estimated cost of any proposed repair.~~

~~(c) May include:~~

~~(1) A proposal for monetary compensation, which may include a contribution from a subcontractor.~~

~~(2) If the contractor or his subcontractor is licensed to make the repairs, an agreement by the contractor or subcontractor to make the repairs.~~

~~(3) An agreement by the contractor to cause the repairs to be made, at the contractor's expense, by another contractor who is licensed to make the repairs, bonded and insured.~~

~~The repairs must be made within 45 days after the contractor receives written notice of acceptance of the response, unless completion is delayed by the claimant or by other events beyond the control of the contractor, or timely completion of the repairs is not reasonably possible. The claimant and the contractor may agree in writing to extend the periods prescribed by this section.~~

~~4. Not later than 15 days before the mediation required pursuant to NRS 40.680 and upon providing 15 days' notice, each party shall provide the other party, or shall make a reasonable effort to assist the other party to obtain, all relevant reports, photos, correspondence, plans, specifications, warranties, contracts, subcontracts, work orders for repair, videotapes, technical reports, soil and other engineering reports and other documents or materials relating to the claim that are not privileged.~~

~~5. If the claimant is a representative of a homeowner's association, the association shall submit any response made by the contractor to each member of the association.~~

~~6. As used in this section, "subcontractor" means a contractor who performs work on behalf of another contractor in the construction of a residence or appurtenance.~~~~]~~ ***notice, it is the opinion of the expert that those similarly situated residences and appurtenances may have such common constructional defects; and***

(c) A copy of the expert opinion is included with the notice.

5. A representative of a homeowner's association may send notice pursuant to this section on behalf of an association that is responsible for a residence or appurtenance if the representative is acting within the scope of his duties pursuant to chapter 116 or 117 of NRS.

6. Notice is not required pursuant to this section before commencing an action if:

(a) The contractor, subcontractor, supplier or design professional has filed an action against the claimant; or

(b) The claimant has filed a formal complaint with a law enforcement agency against the contractor, subcontractor, supplier or design professional for threatening to commit or committing an act of violence or a criminal offense against the claimant or the property of the claimant.

Sec. 21. 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 ~~[made]~~ pursuant to ~~[NRS 40.645 or 40.682 or does not permit the contractor or independent contractor a reasonable opportunity to repair the defect pursuant to an accepted offer of settlement]~~ ***paragraph (b) of subsection 2 of section 9 of this act*** and thereafter commences an action governed by NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, 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 section 9 of this act;***

(b) Make an offer of settlement;

~~[(b)]~~ ***(c)*** Make a good faith response to the claim asserting no liability;

~~[(c) Complete, in a good and workmanlike manner, the repairs specified in an accepted offer;]~~

(d) Agree to a mediator or accept the appointment of a mediator pursuant to NRS 40.680 ***;*** ~~[or subsection 4 of NRS 40.682;]~~ 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 to 15, inclusive, 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 to 15, inclusive, 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.*** 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.

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.

Sec. 22. 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 to 15, inclusive, 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) The reduction in market value of the residence or accessory structure, if any, to the extent the reduction is because of structural failure;

(d) The loss of the use of all or any part of the residence;

(e) The reasonable value of any other property damaged by the constructional defect;

(f) Any additional costs reasonably incurred 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) 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 to 15, inclusive, of this act,*** the claimant may not recover from the contractor, as a result of the constructional defect, anything other than that which is provided pursuant to NRS 40.600 to 40.695, inclusive ~~[.]~~ ***, and sections 2 to 15, inclusive, of this act.***

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

5. 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. 23. NRS 40.660 is hereby amended to read as follows:

40.660 An offer of settlement ***made pursuant to paragraph (b) of subsection 2 of section 9 of this act*** that is not accepted within ~~[:~~

~~1. In a complex matter, 45 days; or~~

~~2. In a matter that is not a complex matter, 25 days,]~~

35 days after the offer is received by the claimant is considered rejected if the offer contains a clear and understandable statement notifying the claimant of the consequences of his failure to respond or otherwise accept or reject the offer of settlement. An affidavit certifying rejection of an offer of settlement under this section may be filed with the court.

Sec. 24. NRS 40.665 is hereby amended to read as follows:

40.665 In addition to any other method provided for settling a claim pursuant to NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, of this act,*** a contractor may, pursuant to a written agreement entered into with a claimant, settle a claim by repurchasing the claimant's residence and the real property upon which it is located. The agreement may include provisions which reimburse the claimant for:

1. The market value of the residence as if no constructional defect existed, except that if a residence is less than 2 years of age and was purchased from the contractor against whom the claim is brought, the market value is the price at which the residence was sold to the claimant;

2. The value of any improvements made to the property by a person other than the contractor;

3. Reasonable attorney's fees and fees for experts; and

4. Any costs, including costs and expenses for moving and costs, points and fees for loans.

Any offer of settlement made that includes the items listed in this section shall be deemed reasonable for the purposes of subsection 1 of NRS 40.650.

Sec. 25. NRS 40.667 is hereby amended to read as follows:

40.667 1. Except as otherwise provided in subsection 2, a written waiver or settlement agreement executed by a claimant after a contractor has corrected or otherwise repaired a constructional defect does not bar a claim for the constructional defect if it is determined that the contractor failed to correct or repair the defect properly.

2. The provisions of subsection 1 do not apply to any written waiver or settlement agreement described in subsection 1, unless:

(a) The claimant has obtained the opinion of an expert concerning the constructional defect;

(b) The claimant has provided the contractor with a written notice of the defect pursuant to NRS 40.645 ~~[or 40.682]~~ and a copy of the expert's opinion; and

(c) The claimant and the contractor have complied with the requirements for inspection and repair as provided in NRS 40.600 to 40.695, inclusive ~~[.]~~ ***, and sections 2 to 15, inclusive, of this act.***

3. ***The provisions of this section do not apply to repairs which are made pursuant to an election to repair pursuant to section 9 of this act.***

4. If a claimant does not prevail in any action which is not barred pursuant to this section, the court may:

(a) Deny the claimant's attorney's fees, fees for an expert witness or costs; and

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

Sec. 26. NRS 40.670 is hereby amended to read as follows:

40.670 1. A contractor ***, subcontractor, supplier or design professional*** who receives written notice of a constructional defect resulting from work performed by the contractor ***,*** ~~[or his agent, employee or]~~ 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 he 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 any other damages recoverable under any other law.

2. A contractor ***, subcontractor, supplier or design professional*** who does not cure a defect pursuant to this section because he has determined, in good faith and after a 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 professional*** is subject to the provisions of subsection 1.

Sec. 27. NRS 40.672 is hereby amended to read as follows:

40.672 Except as otherwise provided in NRS 40.670, if a contractor ***, subcontractor, supplier or design professional*** receives written notice of a constructional defect ~~[that is not part of a~~

~~complex matter]~~ not more than 1 year after the close of escrow of the initial purchase of the residence, the contractor ***, subcontractor, supplier or design professional*** shall make the repairs within 45 days after ~~[the contractor receives]~~ ***receiving*** the written notice unless completion is delayed by the claimant or by other events beyond the control of the contractor, ***subcontractor, supplier or design professional,*** or timely completion of repairs is not reasonably possible. The contractor ***, subcontractor, supplier or design professional*** and claimant may agree in writing to extend the period prescribed by this section. If ~~[the]~~ ***a*** contractor ***or subcontractor*** fails to comply with this section, he is immediately subject to discipline pursuant to NRS 624.300.

Sec. 28. NRS 40.680 is hereby amended to read as follows:

40.680 1. Except as otherwise provided in this chapter, before ***a claimant commences*** an action ~~[based on a claim governed by NRS 40.600 to 40.695, inclusive, may be commenced in court,]~~ ***or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional,*** the matter must be submitted to mediation, unless mediation is waived in writing by the contractor ***, subcontractor, supplier or design professional*** and the claimant.

2. The claimant and ~~[contractor]~~ ***each party alleged to have caused the constructional defect*** must select a mediator by agreement. If the claimant and ~~[contractor]~~ ***the other parties*** fail to agree upon a mediator within ~~[45]~~ ***20*** days after a mediator is first selected by the claimant, ~~[either]~~ ***any*** party may petition the American Arbitration Association, the Nevada Arbitration Association, Nevada Dispute Resolution Services or any other mediation service acceptable to the parties for the appointment of a mediator. A mediator so appointed may discover only those documents or records which are necessary to conduct the mediation. The mediator shall convene the mediation within ~~[60]~~ ***30*** days after the matter is submitted to ***him and shall complete the mediation within 45 days after the matter is submitted to*** him, unless the parties agree to extend the time. ~~[Except in a complex matter, the claimant shall, before]~~

3. Before the mediation begins ~~[,]~~ ***:***

(a) The claimant shall deposit $50 with the mediation service ***;*** and ~~[the contractor]~~

(b) Each other party shall deposit with the mediation service ***, in equal shares,*** the remaining amount estimated by the mediation service as necessary to pay the fees and expenses of the mediator for the first session of mediation ~~[, and the contractor]~~ ***and*** shall deposit additional amounts demanded by the mediation service as incurred for that purpose. ~~[In a complex matter, each party shall share equally in the deposits estimated by the mediation service.]~~

4. Unless otherwise agreed, the total fees for each day of mediation and the mediator must not exceed $750 per day.

~~[3.]~~ ***5.*** If the parties do not reach an agreement concerning the matter during mediation or if ~~[the contractor]~~ ***any party who is alleged to have caused the constructional defect*** fails to pay the required fees and appear, the claimant may commence ~~[his]~~ ***an*** action ***or amend a complaint to add a cause of action for the constructional defect*** in court and:

(a) The reasonable costs and fees of the mediation are recoverable by the prevailing party as costs of the action.

(b) ~~[Either]~~ ***Any*** party may petition the court in which the action is commenced for the appointment of a special master.

~~[4.]~~ ***6.*** A special master appointed pursuant to subsection ~~[3]~~ ***5*** may:

(a) Review all pleadings, papers or documents filed with the court concerning the action.

(b) Coordinate the discovery of any books, records, papers or other documents by the parties, including the disclosure of witnesses and the taking of the deposition of any party.

(c) Order any inspections on the site of the property by a party and any consultants or experts of a party.

(d) Order settlement conferences and attendance at those conferences by any representative of the insurer of a party.

(e) Require any attorney representing a party to provide statements of legal and factual issues concerning the action.

(f) Refer to the judge who appointed him or to the presiding judge of the court in which the action is commenced any matter requiring assistance from the court.

The special master shall not, unless otherwise agreed by the parties, personally conduct any settlement conferences or engage in any ex parte meetings regarding the action.

~~[5.]~~ ***7.*** Upon application by a party to the court in which the action is commenced, any decision or other action taken by a special master appointed pursuant to this section may be appealed to the court for a decision.

~~[6.]~~ ***8.*** A report issued by a mediator or special master that indicates that ~~[either]~~ ***a*** party has failed to appear before him or to mediate in good faith is admissible in the action, but a statement or admission made by ~~[either]~~ ***a*** party in the course of mediation is not admissible.

Sec. 29. NRS 40.688 is hereby amended to read as follows:

40.688 1. If a claimant attempts to sell a residence that is or has been the subject of a claim governed by NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, of this act,*** he shall disclose, in writing, to any prospective purchaser of the residence, not less than 30 days before the close of escrow for the sale of

the residence or, if escrow is to close less than 30 days after the execution of the sales agreement, then immediately upon the execution of the sales agreement or, if a claim is initiated less than 30 days before the close of escrow, within 24 hours after giving written notice to the contractor pursuant to ~~[subsection 1 of]~~ NRS 40.645 ***:*** ~~[or subsection 1 of NRS 40.682:]~~

(a) All notices given by the claimant to the contractor pursuant to NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, of this act*** that are related to the residence;

(b) All opinions the claimant has obtained from experts regarding a constructional defect that is or has been the subject of the claim;

(c) The terms of any settlement, order or judgment relating to the claim; and

(d) A detailed report of all repairs made to the residence by or on behalf of the claimant as a result of a constructional defect that is or has been the subject of the claim.

2. Before taking any action on a claim pursuant to NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, of this act,*** the attorney for a claimant shall notify the claimant in writing of the provisions of this section.

Sec. 30. NRS 40.6882 is hereby amended to read as follows:

40.6882 ~~["Complainant"]~~ ***As used in NRS 40.6884 and 40.6885, unless the context otherwise requires, "complainant"*** means a person who makes a claim or files an action against a design professional pursuant to NRS 40.600 to 40.695, inclusive ~~[.]~~ ***, and sections 2 to 15, inclusive, of this act.***

Sec. 31. NRS 40.692 is hereby amended to read as follows:

40.692 ~~[If, after complying with the procedural requirements of NRS 40.645 and 40.680, or NRS 40.682, a claimant proceeds with an action for damages arising from a constructional defect:~~

~~1. The claimant and each contractor who is named in the original complaint when the action is commenced are not required, while the action is pending, to comply with the requirements of NRS 40.645 or 40.680, or NRS 40.682, for any constructional defect that the claimant includes in an amended complaint, if the constructional defect:~~

~~(a) Is attributable, in whole or in part, to such a contractor;~~

~~(b) Is located on the same property described in the original complaint; and~~

~~(c) Was not discovered before the action was commenced provided that a good faith effort had been undertaken by the claimant.~~

~~2. The]~~ ***A*** claimant ***who commences an action for a constructional defect*** is not required to give written notice of a defect pursuant to ~~[subsection 1 of NRS 40.645 or subsection 1 of~~

~~NRS 40.682]~~ ***NRS 40.645*** to any person who ~~[is joined to or]~~ intervenes in the action as a party after it is commenced. If such a person becomes a party to the action:

~~[(a)]~~ ***1.*** For the purposes of ~~[subsection 1 of NRS 40.645 or subsection 1 of NRS 40.682,]~~ ***NRS 40.645,*** the person shall be deemed to have been given notice of the defect by the claimant on the date on which the person becomes a party to the action; and

~~[(b)]~~ ***2.*** The provisions of NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, of this act*** apply to the person after that date.

Sec. 32. NRS 40.695 is hereby amended to read as follows:

40.695 1. Except as otherwise provided in subsection 2, statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, ***and sections 2 to 15, inclusive, of this act*** are tolled from the time notice of the claim is given, until 30 days after mediation is concluded or waived in writing pursuant to NRS 40.680 ***.*** ~~[or subsection 4 of NRS 40.682.]~~

2. Tolling under this section applies ~~[:~~

~~(a) Only to a claim that is not a complex matter.~~

~~(b) To]~~ ***to*** a third party regardless of whether the party is required to appear in the proceeding.

Sec. 33. NRS 40.613, 40.682, 40.6881 and 40.6883 are hereby repealed.

Sec. 34. The amendatory provisions of this act apply only to claim for a constructional defect that arises before, on or after August 1, 2003, unless the claimant:

1. Has commenced an action concerning the claim in accordance with NRS 40.600 to 40.695, inclusive, before August 1, 2003; or

2. Has given notice of the claim to the contractor, subcontractor, supplier or design professional pursuant to NRS 40.600 to 40.695, inclusive, before August 1, 2003, including notice on behalf of named and unnamed claimants.

Sec. 35. 1. This section and section 12 of this act become effective upon passage and approval for the purpose of adopting regulations and on August 1, 2003, for all other purposes.

2. Sections 1 to 11, inclusive, and 13 to 34, inclusive, of this act become effective on August 1, 2003.

EXHIBIT J

EXHIBIT J

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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
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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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, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, 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 APRIL 5, 2018 AMENDED NOTICE OF CLAIMS**
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 Jeffrey W. Saab, Esq. of the law firm of Bremer Whyte Brown & O'Meara LLP, and hereby submit this Reply in Support of Motion for Summary Judgment on Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners' Association's (hereinafter "the Association") April 5, 2018 Amended Notice of Claims.

Dated: September 25, 2018

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

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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.

INTRODUCTION

In its Opposition, the Association relies on the following arguments:

- No Chapter 40 Notice is required per NRS 40.645(4)(a);
- The Association's Amended Notice of Claims complies with the statutory requirements of NRS 40.600 and with this Court's interpretation of the Chapter 40 requirements as set forth in this Court's September 15, 2017 Findings of Fact and Conclusions of Law;
- The Builders' Motion for Summary Judgment lacks authority, leads to an absurd and unreasonable result, violates due process and ignores this Court's guidance on the matter;
- There are unresolved questions of fact which preclude the relief sought by the Builders. More specifically, whether the absence of a headwall flashing in the design of the windows is a new defect; and
- Triable issues fact exists regarding the Builders' affirmative claims precluding the relief sought by the Builders.

As discussed more fully below, the desperation of the Association to escape the errors it made in its original Chapter 40 Notice practically leaps off each page of its Opposition. Recognizing that it can never satisfy the requirements of NRS 40.645, as amended by AB125, the Association is attempting to rewrite history by arguing for the first time, after literally years of motion practice and two prior rulings by this Court, that Chapter 40 Notice was never required and that two documents, each conspicuously titled "Notice" by the Association, should be completely disregarded by this Court.

Furthermore, the Association contends, and asks this Court to agree and sanction, that it is free to ignore every requirement of NRS 40.645 notwithstanding this Court's prior rulings, including raising new claims (e.g. missing headwall flashings and alleged moisture accumulation pertaining to missing fire-blocking) in its April 5, 2018 Amended Notice over two (2) years after the AB125 mandated February 24, 2016 deadline for provided notice of claims in order for claims to not be time-barred if they arose from construction that was substantially completed more than six (6) years from the notice date. Even if this Court were to give any consideration to the Association's argument regarding NRS 40.645(4)(a), that would not mean the Association is relieved of all other statutory requirements or that the Association is free to raise clearly time-

barred claims.

Although already firmly rejected by this Court in its prior rulings, the Association once again throws itself abject before the bench, crying poor and beseeching that this Court rewrite NRS 40.645 as if the AB125 amendments did not exist. It is no surprise that the Association cites to a 2007 decision in support of this portion of its Opposition. *See* Opposition, page 25, fn. 53, citing D.R. Horton Inc. v. Eighth Judicial District Ct., 168 P.3d 731 (2007). The Association would prefer a return to the "good old days" before AB125. However, this Court has rightly shown it is not swayed by the mist of misguided nostalgia. Accordingly, this Court has already correctly rejected the Association's call, reminiscent of Cher circa-1989, to "turn back time."

Because the Association cannot prevail in its effort to convince this Court to ignore the requirements of NRS 40.645, as amended by AB125, it is no surprise that the Association's Opposition completely ignores two very specific elements of that statutory provision: 1) that the Association must identify the exact location of each defect, damage and injury (NRS 40.645(2)(b)); and 2) that the Association must identify the nature and extent that is known of the alleged damages resulting from the alleged defect (NRS 40.645(2)(c)). Regarding the alleged fire-blocking issue, the Association throws up its hands in defeat as to any effort to satisfy the statutory requirements, instead asking this Court to allow the Association to identify the locations post-litigation when the Association will ostensibly be performing repairs to the windows. *See* Opposition, page 24, lines 4-7. (That assumes, of course, that the Association's window claim survives the instant and future motion practice.) As for the window claim, the Association conveniently ignores that it must identify both the existence and the exact location of resultant damage arising from the defect allegation. There has been zero attempt to satisfy that statutory requirement in the Amended Chapter 40 Notice. (How the Association hopes to recover for the window defect allegation without this evidence is a tale for another day and another motion).

Finally, the fact that the HOA continues to seek recovery for the sewer issue is both perplexing and, frankly, offensive. The Association does not dispute that it never gave notice to the Builders of the sewer issue. The Association does not dispute that it repaired the issue without first giving the Builders an opportunity to do so. The Association does not dispute that it failed to

preserve any evidence of the sewer issue. As per its Opposition, the Association contends none of that matters. Why? Because the Builders had the unmitigated audacity to file a Complaint. According to the logic espoused by the Association, the Builders' decision to file a Complaint irrevocably opened the door to the Association making a Chapter 40 claim, sans notice, sans evidence, on an issue that arose and was unilaterally repaired by the Association years before the Builders' Complaint was filed. Under that line of thinking, any HOA could make a claim, even time-bared claims, if a contractor ever decided to sue the HOA for any reason whatsoever. That is simply not the way a Chapter 40 claim is supposed to be litigated nor is it contemplated or allowed by statute. To countenance any such suggestion by the Association would be a gross injustice.

Based on the above, and as more fully discussed below, the Association, despite clear instructions from this Court, has failed to satisfy the express requirements set forth by NRS 40.600, et. seq. Consequently, the Builders' Motion should be granted.

ARGUMENT

I. NRS 40.645(4)(a) IS INAPPLICABLE

A. This Court Has Already Concluded that the Association was Required to Provide the Builders with a Chapter 40 Notice that Complied with NRS 40.600 Et. Seq.

Pursuant to its September 15, 2017 Findings of Fact and Conclusions of Law, this Court found and concluded that the original NRS 40.645 Notice of Construction Defects served upon the Builders was deficient. *See* Ex. 5 to Builder's Motion, p. 19; 12-18. The fact that the original Notice, served long before the Builders filed their Complaint, was deemed grossly deficient by this Court demonstrates that: (a) statutory notice was indeed required; and (b) the Association failed to provide statutorily-compliant notice. Consequently, the Association's argument that notice to Builders is not required is in direct conflict with this Court's September 15, 2017 Findings of Fact and Conclusions of Law.

The Builders' Complaint did not exist when the Association served its Chapter 40 Notice in 2016. It was not even a glimmer in the eye of the Builders when they were served with what was clearly a deficient Chapter 40 Notice (as borne out by this Court's extensive September 15, 2017

Finding of Fact and Conclusions of Law) for defects that the Builders contend are barred by the terms of the Settlement Agreement between the parties (the focus of future motion practice should the instant Motion not be granted in full). The Builders fully participated in the pre-litigation process (to the extent that was possible given the failure of the Association to preserve evidence of alleged sewer and mechanical room issues, the Association's failure to identify each location of an alleged defect and the alleged damage arising from same, the Association's decision to commence and complete window repairs in Unit 300, etc.), including providing a response to the deficient Chapter 40 Notice and participating in a pre-litigation mediation.

The Association accuses the Builders of not participating in good faith during mediation. Given that the Association has chosen to blatantly violate the confidentiality of the mediation process, the Builders have no choice but to respond as follows: the Association fails to mention the presentation during the mediation of a lengthy and detailed power point by counsel for the Builders that addressed every fault and failure related to the Association's claim. The Association apparently believes that good faith only is found when someone agrees to cut the Association a check despite there being myriad reasons why the Association is not entitled to a penny for its unwarranted claims.

B. The Association is Barred from Utilizing NRS 40.645(4)(a) as a Defense.

Even if NRS 40.645(4)(a) was potentially applicable (and the Association's service of the 2016 Notice precludes its application), the Association is barred from raising such an argument under the doctrines of laches and waiver. In Nevada, the defense of laches is available where delay by one party results in a disadvantage to the other such that granting relief to the delaying party would be inequitable. Building & Constr. Trades v. Public Works, 108 Nev. 605,839 P.2d 633, 637 (1992). The Builders filed their Complaint on September 28, 2016. The Association filed its Answer on March 1, 2017. The Association did not raise NRS 40.645(4)(a) as an affirmative defense in its Answer. Nor has it ever sought to amend its Answer to assert such a defense. The Association did not raise this argument in its Opposition to the Builders' initial Motion for Summary Judgment. The Association did not raise this issue in its Motion for Clarification. Rather, the Association, without explanation, waited almost a full two years to assert any position

related to NRS 40.645(4)(a). Such a delay is without any justification. The parties have been proceeding since September 28, 2016 under the current procedural format. Motions have been filed and opposed, hearings have been attended, significant work has been conducted by the Builders from the position of "Plaintiffs" in this case, all based on an actual Chapter 40 Notice that was served on the Builders in February of 2016. Allowing the Association to make a NRS 40645(4)(a) argument after all this time is prejudicial to the Builders by way of the attorney's fees and costs that have been expended, as well as other factors including this Court's and the Builders' reliance on the Association's position (until September 4, 2018, the filing date of its Opposition) both during hearings and in pleadings that it would live and/or die by the final determination of the validity of both its original Chapter 40 Notice and its April 5, 2018 Amended Notice. *See* Memory Gardens v. Pet Ponderosas, 88 Nev. 1, 4, 492 P.2d 123, 124 (1972). *See also* State v. Rosenthal, 107 Nev. 772, 819 P.2d 1296 (1991).

Likewise, the Association is barred from utilizing NRS 40.645(4)(a) as a defense under the doctrine of waiver. The Association waived its right voluntarily and with full knowledge of the facts. Udevco, Inc. v. Wagner, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984). More specifically, in addition to waiting nearly two years to raise NRS 40.645(4)(a) as a defense, the Association served the Builders with an Amended Chapter 40 Notice hoping to cure the deficiencies identified by this Court in the Association's original Chapter 40 Notice. Consequently, the Association's conduct, i.e. serving the Builders with an Amended Notice, is a clear indication of the Association's knowing and voluntary waiver of NRS 40.645(4)(a), which was in effect prior to the date of both the Association's Chapter 40 Notice and its Amended Chapter 40 Notice.

C. The Association's Interpretation of NRS 40.645(4)(A) is Misguided.

NRS 40.645(4)(a) states:

> "*Notice is not required pursuant to this section before commencing an action if:*
> *(a) The contractor, subcontractor, supplier or design professional has filed an action against the claimant*."

However, the Builders' lawsuit was in response to the Association's deficient Chapter 40 Notice that had already been served. The filing of the Complaint after actual service of a Chapter 40

Notice, as well as after completion of a pre-litigation discovery phase and pre-litigation mediation, did not magically make the Association's deficient Chapter 40 Notice disappear as if it had never existed. Furthermore, the Association's reliance on NRS 40.645(4)(a) is misguided in that the Builders' lawsuit was reactive, not proactive. Not a single cause of action in the Complaint would have been pled but for the Association's deficient, unlawful and wrong-headed Chapter 40 Notice. It is telling that the Association does not cite to any case law supportive of its novel interpretation of NRS 40.645(4)(a), i.e., that said provision still applies even if a claimant has already served a full-throated Chapter 40 Notice before a complaint is filed by a contractor.

The Association references the legislative history of NRS 40.645(4)(a), but conveniently does not point out the specific types of situation that provision was designed to deal with. Scott Canepa, Esq., one of the preeminent plaintiff construction defect attorneys, explained that the provision was necessary because "[t]here is no exception for homeowners who are already in litigation with contractors." *See* Opposition, Exhibit F, page 42. The operative phrase is "already in litigation." What did that mean? Situations where a contractor has sued for non-payment before a Chapter 40 Notice has been served. Situations where a lien claim has been filed before a Chapter 40 Notice has been served. The Builders are unaware of any case in Nevada where the position advanced by the Association, that the filing of a complaint by a contractor after Chapter 40 Notice has been issued and the entire pre-litigation discovery/mediation process has been completed, has ever been argued much less approved by the presiding judge.

The Association attempts to further muddy the waters by contending that the Builders' Complaint seeks more than declaratory relief regarding the Association's deficient Chapter 40 Notice. As noted above, and addressed more fully below, all the causes of action are responsive to the problems raised and created by the original Chapter 40 Notice that was served before the filing of the Complaint.

D. Regardless of the Application of NRS 40.645(4)(a), the Association's New Claims are Time-Barred.

AB125 set February 24, 2016 as the deadline for bringing claims. Claims raised after February 24, 2016 must pertain to construction defect allegations arising from construction that

was substantially completed no later than six (6) years from the notice date. Even if this Court were to give any consideration to the Association's argument regarding NRS 40.645(4)(a), that would not mean the Association is relieved of all other statutory requirements or that the Association is free to raise clearly time-barred claims. It is without dispute that on April 5, 2018, the date the Association first gave notice of alleged head flashing and fire-blocking/moisture accumulation defects, the substantial completion of both towers at the subject property was well over six (6) years prior to that date.

II. THE ASSOCIATION MISINTERPRETS AND/OR MISREPRESENTS THIS COURT'S SEPTEMBER 15, 2017 FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. The Amended Notice is Inconsistent and Does Not Comply with this Court's Order.

With respect to the window claims, the Association contends that general reference to the plans and specifications is sufficient to satisfy the requirements of NRS.40.645. However, such a representation is clearly contrary to this Court's September 15, 2017 Findings of Fact and Conclusions of Law. The Court expressly stated that "*NRS 40.645 now requires not just reasonable, but specific detail of each defect, damage and injury*." Moreover, this Court noted that the Association's Initial Notice "*does not discuss the method or the extent of the Association's inspection of and its findings in the over 9,500 window assemblies with varies in type, size and location*." Consequently, the Builders are unclear as to how a general reference to the plans and/or specifications identifies the statutorily required specific detail and the method and extent of the Association's inspection and/or its findings resulting from same. Moreover, the Association's reference to the plans and specifications does not attempt to identify in specific detail, or any detail for that matter, *each defect, damage and injury* to the 9,500 window assemblies, which vary in type, size and location. In addition, the Association's Amended Chapter 40 Notice completely ignores that the Association must identify the exact location of each defect, **damage** and injury (NRS 40.645(2)(b)); and 2) that the Association must identify the nature and extent that is known of the **alleged damages resulting from the alleged defect** (NRS 40.645(2)(c)). Nowhere in the

Amended Notice does the Association identify the exact location of the alleged damages (i.e. water intrusion and corrosion of structural steel).

The Association also contends that it is unable to comply with NRS 40.645 because destructive testing to locate the precise location of absent fire-blocking is cost prohibitive. Initially, the Court has already addressed this issue and argument by way its September 15, 2017 Findings of Fact and Conclusions of Law. Pursuant to same, "*the "specific detail" requirement of NRS 40.645 necessitates the exact location of the defect in each unit, with it be in the ledger shelf cavity, the steel stud framing hollow space, or in both areas.*" See Ex. 5 to Motion pg. 13: 6-9. The Association offers nothing new in its Opposition, opting rather to reargue what amounts to an untimely Motion for Reconsideration which, of course, is improper. As noted above, the Association, in conjunction with its overall novel approach to the issue of Chapter 40 Notice, somehow believes the Court will allow the Association to seek recovery for the fire-blocking defect allegation so long as locations are identified when the window repairs are being conducted post-litigation. *See* Opposition, page 24, lines 4-7. So, not only does the Association believe that it can forgo the statutory requirement of providing a proper Chapter 40 Notice, it also is of the delusional impression that it is fine to wait until repairs are being performed to the windows before it needs to identify the exact location of every instance the fire-blocking is missing.

As for the Association's sewer pipe claim, the Association will never be able to comply with its statutory requirements, a fact which the Association acknowledges. *See* Opposition, pg. 21, lines 16-19. And yet the Association offers the weakest of explanations as to why it should still be allowed to advance this issue – that it assumed this "isolated incident would not be the subject of a Chapter 40 claim." *See* Motion, pg. 22, lines 10-12. So, the Association assumes the sewer issue will never be part of Chapter 40 claim and, consequently, no notice was given to the Builders. Since no notice was provided, the evidence was not preserved. But once the Association decided to improperly serve a deficient Chapter 40 Notice of other issues years later, the sewer claim is thrown into that Chapter 40 Notice. This is a perversion of the "throw the baby out with bathwater" concept with, in this case, the "sewer claim" being tossed in with the other claims.

/ / /

B. The Association Must Comply with this Court's Interpretation of AB125.

The Association contends that Builders' interpretation of AB125 is unreasonable, leads to an absurd result and violates due process. However, it is not Builders' interpretation of AB125 that the Association must comply with, but rather this Court's, as clearly set forth in the September 15, 2017 Findings of Fact and Conclusions of Law. The Association offers nothing other than a regurgitation of earlier arguments which this Court has already considered and rejected. Consequently, the Association is disingenuous when it contends that its Amended Chapter 40 Notice was generated with the Court's "guidance" when the Association turns a blind eye to the same.

III. THERE ARE NO ISSUES OF MATERIAL FACT WHICH PRECLUDE THE RELIEF SOUGHT BY BUILDERS.

A. The Amended Chapter 40 Notice Fails to Comply with NRS 40.645.

Regardless of the Association's reference to plans and specifications, the Amended Chapter 40 Notice fails to satisfy the express statutory requirements to identify the **exact location of each defect, damage and injury** (NRS 40.645(2)(b)); and 2) the nature and extent that is known of the **alleged damages resulting from the alleged defect** (NRS 40.645(2)(c)). As noted above under Section II, this is true for both the window allegation and the fire-blocking/moisture accumulation claim. The Builders incorporate all arguments from Section II above into this portion of the Reply Brief.

This Court, in its September 15, 2017 Findings of Fact and Conclusions of Law, clearly ruled that the Association could not ignore the statutory requirements. And yet the Association admits that it did just that. There is nothing in the Amended Chapter 40 Notice that identifies either the exact location or the alleged damages resulting from each alleged incidence of water intrusion and alleged corrosion to the structural steel. As noted previously, the Association does even make an attempt to satisfy these requirements regarding the fire-blocking issue, instead taking the position that this statutorily required information will be uncovered when repairs are being made to the windows post-litigation.

B. The Headwall Flashing Defect is New. Regardless, the Association Has Still Failed to Comply with the Specific Detail Requirement of NRS 40.645.

In another desperate attempt to defeat the Builders' Motion, the Association contends that there is a triable issue regarding whether the omission of the headwall flashing is a new defect. It is undisputed that the plans never required the installation of headwall flashing. It is undisputed the Association included no reference to headwall fleshing in its Initial Chapter 40 Notice (as compared to a specific reference to pan flashing). Nor did the Association do any destructive testing following the generation of its Initial Chapter 40 Notice and prior to the issuance of the Amended Chapter 40 Notice to support this new issue. The Association completely ignores the fact, raised in the Builders' Motion, that the lack of head flashing would be apparent following even the most rudimentary review of the plans and specifications. Consequently, the Association admits, via its silence on the issue, that the lack of head flashing could have been raised in the original Chapter 40 Notice. Even if this Court were to determine that the headwall flashing was not a new issue, the Association's position still fails for the reason noted above, i.e., the Association's refusal to comply with "*the "specific detail" requirement of NRS 40.645 necessitates the exact location of the defect in each unit.* See Ex. 5 to Builder's Motion, pg. 13: 6-9

C. The Fire-Blocking "Moisture Accumulation" Defect is New. Regardless, the Association Has Still Failed to Comply with the Specific Detail Requirement of NRS 40.645.

At no time prior to the issuance of the Association's Amended Chapter 40 Notice did the Association ever allege that the window and the fire-blocking claims are linked. *See* Opposition, pg. 22, lines 9-10. At no time prior to the issuance of the Association's Amended Chapter 40 Notice did the Association ever allege that the alleged lack of fire-blocking allows "the accumulation of additional moisture in the wall assemblies, thereby exacerbating the window drainage deficiency." *See* Motion, pg. 20, lines 14-16. Even if this Court were to determine that moisture accumulation was not a new issue, the Association's position still fails for the reason noted above, i.e., the Association's refusal to comply with "*the "specific detail" requirement of NRS 40.645 necessitates the exact location of the defect in each unit.*"

D. The Builders' Claims are Derivative in Nature and All Flow from the Association's Deficient Chapter 40 Notice

The Association's argument regarding the Builders' claims for such things as negligence and breach of contract is a red herring. Such claims, while derivative, do not preclude the relief sought by Builders. More specifically, the issue currently before the Court is the Association's failure to comply with 40.645, and not, for example, the Association's negligence and/or whether the Association is in breach of the Settlement Agreement. Consequently, derivative, yet collateral, issues which are not currently before the Court do not preclude the Court from granting the Builders the relief sought via the instant Motion.

Furthermore, none of the claims would have been raised in the Builders' Complaint but for the Association's preceding deficient, unlawful and wrong-headed Chapter 40 Notice. But for the improper Notice, the Builders would never have needed to seek declaratory relief regarding the application of AB125. But for the improper Notice, the Builders would never have needed to seek declaratory relief regarding claim preclusion. But for the improper Notice, the Builders would never have needed to assert a claim regarding the Association's failure to comply with Chapter 40. But for the improper Notice which included, in part, defect allegations where the Association failed to preserve the evidence, the Builders would never have needed to assert a claim for suppression of evidence/spoliation of evidence. But for the improper Notice, the Builders would never have needed to file a claim for breach of contract regarding the Association's assertion of claims that are barred by the terms of the Settlement Agreement between the parties. But for the improper Notice, that was served despite the Association's duty to defend the Builders for any claims that are asserted in violation of the terms of the Settlement Agreement between the parties, the Builders would never have needed to file a claim for breach of contract – duty to defend. But for the improper Notice, that was served despite the Association's duty to indemnify the Builders for any claims that are asserted in violation of the terms of the Settlement Agreement between the parties, the Builders would never have needed to file a claim for breach of contract – duty to indemnify.

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CONCLUSION

The Association was given a generous opportunity to correct the deficiencies in its Initial Chapter 40 Notice, yet failed, once again, to comply with the **mandatory** requirements set forth in NRS 40.600 *et seq*. In addition to trying to sneak untimely new issues into its Amended Notice, the Association simply offers a regurgitation of its original February 24, 2016, Chapter 40 Notice. The Amended Notice fails to satisfy, and in some instances does not even attempt to satisfy, the requirements of NRS 40.645(2)(b) and (c). Consequently, the Builders are entitled to Summary Judgment.

Dated: September 25, 2018

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2018, a true and correct copy of the foregoing document was electronically served through Odyssey upon all parties on the master e-file and serve list.

Crystal Williams

Crystal Williams, an Employee of
BREMER, WHYTE, BROWN & O'MEARA, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, Plaintiff, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS ASSOCIATION, Defendant.	CASE NO. A-16-744146-D DEPT. XXII

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

OCTOBER 2, 2018

RECORDER'S TRANSCRIPT OF HEARING RE

PLAINTIFF'S/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC AND M.J. DEAN CONSTRTUCTION, INC'S MOTION FOR SUMMARY JUDGMENT ON DEFENDANT/COUNTERCLAIMANT PANORAMA TOWER CONDOMINIUM UNIT OWNERS' ASSOCIATION'S APRIL 5, 2018 AMENDED NOTICE OF CLAIMS / STATUS CHECK RE: STAY [PER 9-15-17 ORDER]

APPEARANCES:

For the Plaintiff:	PETER C. BROWN, ESQ. SCOTT WILLIAMS, ESQ.
For the Defendant:	MICHAEL GAYAN, ESQ. WILLIAM COULTHARD, ESQ. FRANCIS I. LYNCH, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

TUESDAY, OCTOBER 2, 2018 AT 8:39:41 A.M.

THE COURT: Okay. That leaves Hallier versus Panorama Towers Condominium Unit Owners Association, and that is case number A16-744146-D.

MR WILLIAMS: Hello.

THE COURT: Who am I talking to, Keri?

MR. WILLIAMS: Scott Williams here.

THE COURT: Okay. Mr. Williams, this is Judge Johnson, Department 22, The Eighth Judicial District Court. And this is -- I just called the Hallier versus Panorama Towers Condominium Unit Owners Association, case number A16-744146-D. And counsel who is present, would you please identify yourselves for the record?

MR. BROWN: Thank you, Your Honor. Peter Brown on behalf of the Plaintiffs and Counter-Defendants, the builders.

MR. GAYAN: Good morning, Your Honor. Michael Gayan on behalf of Defendant, Panorama Towers Condominium Unit Owners Association.

MR. LYNCH: Good morning, Your Honor. Francis Lynch on behalf of the association. I brought my paralegal [indecipherable].

THE COURT: Okay.

MR. COULTHARD: Good morning, Your Honor. Bill Coulthard also on behalf of the Panorama Towers Condominium Unit Owners Association.

THE COURT: Okay. Mr. Williams.

MR. WILLIAMS: Yes. Good morning, Your Honor. And thanks for taking the call. Scott Williams on behalf of the association.

THE COURT: Okay. And we're here on Plaintiff's/Counter-Defendant's

Motion for Summary Judgment concerning the amended notice of claims. Mr. Brown.

MR. BROWN: Thank you, Your Honor. Peter Brown again on behalf of the Plaintiffs and Counter-Defendants builder entities.

Your Honor, as I get older and look back over my life unlike many people I look back at decisions I've made, actions I've taken and I say to myself like many people do if I'd only known then what I know now I certainly would have done something different. But unfortunately -- or some might say fortunately, but unfortunately there is no time machine. You cannot re-write history and go back and change the decisions that you've made and yet that is what the association is asking this Court to do vie its opposition to the motion for summary judgment on the amended Chapter 40 notice. For the first time in this case on September 4, 2018 the association said that this Court should allow the association to rely on NRS 40.645 subsection 4, subsection A and that consequently no notice is required in this case.

Despite that the fact that it has been two years and seven months since the time that the association issued its initial Chapter 40 notice, two years and six months since my client performed its 40.600 et seq. inspection at which inspection there was no expert present for the association, there was no representative of either the association or of any of the unit owners. There was no sewer evidence preserved, there was no mechanical room in evidence preserved. This request that this Court allow the association to rely upon NRS 40.6454A is being made two years and three months after my client's Chapter 40 response. And, Your Honor, you may note in many of the pleadings that we filed that I have not attached a copy of my client's Chapter 40 response because it is noted as being intended for mediation

and settlement purposes and protected from disclosure by NRS 40.680 and NRS 48.105. But I can represent to the Court, Your Honor, that on May 24, 2016 the very issues that this Court brought to the attention of the association in its September, 2017 order were brought to the attention of the association in its failure as part of the Chapter 40 notice to comply with NRS 40.645 subsection 3. I will also represent to the Court that the issues with regard to the mechanical room issues and the sewer line issues were also raised back in May of 2016. But despite that being provided to the association two years and three months prior to its opposition date of September 4, 2018 the association is asking this Court to allow it to rely upon NRS 40.645.4A and they're also asking you to allow them to rely upon that one year and eleven months after completion of the mediation process in this particular case.

They're asking this Court to go back in time and wipe clear from history all of those actions as though they didn't exist, they didn't happen, that the parties didn't fully proceed through the pre-litigation process in response to their Chapter 40 notice which was issued on February 24, 2016. In addition to that, Your Honor, the basis for their request to the Court after all time to allow them to rely upon NRS 40.645.4A is that my client had the audacity to file a complaint on September 28, 2016. At no time in all of the intervening year and months of litigation regarding the original Chapter 40 notice and of the amended Chapter 40 notice did the association ever raise this particular defense or ask the Court to allow them to rely upon that? It was not mentioned the association's motion to dismiss which was filed on December 7, 2016 one year, nine months prior to their request in their opposition.

THE COURT: Mr. Brown, I don't mean to interrupt you, but enlighten me. Didn't the original complaint that was brought by your client wasn't it challenging the Chapter 40 notice?

MR. BROWN: It was challenging -- Your Honor, the causes of action in that complaint include a request for application of AB125 because we believe that all the claims are time barred. A cause of action based upon claim preclusion with regards to the settlement agreement between the parties.

THE COURT: So, it was a deck action --

MR. BROWN: Yes --

THE COURT: -- wasn't it?

MR. BROWN: -- indeed --

THE COURT: Okay.

MR. BROWN: -- Your Honor. Yes. And it also had other declaratory relief requests with regards to their failure to defend and indemnify my client based upon the settlement agreement.

THE COURT: Okay. Was there also a challenge to the Chapter 40 notice?

MR. BROWN: Yes, Your Honor.

THE COURT: Okay.

MR. BROWN: That was the third cause of action which was the basis for the original motion for summary judgment which the Court granted in part which was the failure to comply with Chapter 40 and that was the basis for the original motion for summary judgment.

So, in the motion to dismiss, Your Honor, this issue was never raised. NRS 40.645.4 -- subsection 4A. Nine months ago when the Court asked for clarification of your September order which in effect was actually a request for reconsideration. They didn't raise this particular defense. They went ahead and filed and served a amended Chapter 40 notice on April 5, 2018 which they did after this Court granted the association's request that as part of the decision on my

client's original motion for summary judgment that if it was granted that they be provided an opportunity to amend the Chapter 40 notice to fix the errors that were in the original Chapter 40 notice. They requested that, you granted it and they waited until the last day in which to provide that amended Chapter 40 notice. And that was five months prior to the position that they raised for the first time in their September 4, 2018 opposition to the current motion.

As we point out in our reply brief, Your Honor, since this was an issue raised for the first time that we believe that this particular claim is barred by both the doctrine of latches and the doctrine of waiver. And with regard to the doctrine of latches we note the case of *Building and Construction Trades v. Public Works* 108 Nev. 605 839 P.2nd 633, 1992. And that case stands for the premise that where a delay by one party results in a disadvantage to the other then the requested relief cannot be granted because it would be inequitable, Your Honor. This case has existed for two years and seven months based upon a Chapter 40 notice that was presented to my clients by the association and exists in the litigation status of where my client are the Plaintiffs and the Counter-Defendants without any raising of this particular defense for over two years and seven months.

So, we believe, Your Honor, that the doctrine of latches bars the association for bringing this tardy defense which is not part -- by the way, Your Honor, it is not an affirmative defense that they raised in their answer to the complaint filed by my client. In addition, Your Honor, we point out that the doctrine of waiver applies and that there's been a knowing and voluntary waiver. If the association intended to raise this, Your Honor, they should have raised that at the beginning of the formal litigation after my client filed the complaint which they didn't, they should have raised it in the opposition to the original motion for summary

judgment which they didn't, they should have raised it in the motion for clarification which they didn't and, Your Honor, they should have come before the Court notwithstanding the fact that they asked for it and you gave them generously six months in which to fix their Chapter 40 notice. They could have come to you at any time during that time period and said, Your Honor, we don't want to do that, we actually believe that we don't have to give notice and here are the reasons and to put forth this particular theory, but they didn't do it, Your Honor. Notwithstanding the fact that this particular provision of the statute existed at all times both prior to the issuance of the original Chapter 40 notice and throughout the entire time period up to including the September 4, 2018 opposition filed in response to the instant motion for summary judgment and also up and till the present day it exists, Your Honor. It is never -- it's not a new statute that wasn't available to them and they did not rely upon it. They voluntarily and with full knowledge of the facts as set forth under the case of *Udeveco*, U-d-e-v-e-c-o, *Inc. v. Wagner* 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) they waived their right to bring that particular issue.

Furthermore, Your Honor, NRS 40.645.4A doesn't apply to the situation at hand. It doesn't apply to a case in which a Chapter 40 has already been issued. They cite to you the statutory history but what they don't do, Your Honor, in citing that statutory history is they don't bring to your attention the fact that Scott Canepa explained what was the basis for it in 2003 his representation to the legislature as to why this particular provision should be put into the statute. And he talked -- he said -- and this is on page 42 of Exhibit F to the opposition. "There is no exception for homeowners who are already in litigation with contractors." And the operative language there is already. And one of the types of cases that we've seen in this jurisdiction is the type of case where a contractor has sued a homeowner because

the homeowner has not paid the contractor what the contractor contends it is owed for the work that has been performed and the contractor makes that claim, or there are liens that are placed upon the home and you're going through lien litigation. What has never occurred -- and, Your Honor, I'm unaware of any case in the history of Chapter 40 since the institution or the inclusion of that particular provision of the statute after the 2003 legislative session where any homeowners association or plaintiff has made the argument -- single family home plaintiffs made the argument that they do not need to give a notice and that their original notice can be completely disregarded as though he did not exist which is what they're asking you to sanction today. Now, Your Honor, why do they want this particular approach to be approved by this Court? Because they simply cannot satisfy the requirements that this Court clearly set forth in your extensive order in September of 2017. You gave them generous guidance, a clear cut map as to how they potentially could satisfy NRS 40.645 and yet in their opposition the association contends that it is the builder's interpretation of the AB125 amendment to Chapter 40, but in fact it is this Court's interpretation as set forth in your order, Your Honor, as to what the association was required to do.

When we look at what NRS 40.645 subsection 2 requires it states: "That a Chapter 40 must include a statement that the notice is being given to satisfy the requirements of this section. I identify in specific detail three things; each defect, each damage and each injury to each residence or appurtenance that is the subject to the claim including without limitation the exact location of each such defect, damage and injury." Later we're gonna talk about how they believe that what my clients believe that the AB125 amendments to NRS 4600 require is an abuse of process will lead to an absurd result and that it's severely prejudicial to them. And

yet, Your Honor, what they're asking this Court to do is to give them the limitations that they request whereas the statute specifically says without limitation the exact location. This Court cannot re-write the statute. As much as they dislike the way that the statute has been amended the association improperly is asking you to disregard that and, Your Honor, is improperly asking you as a ninth month old motion for reconsideration buried in their opposition to this particular motion reconsideration of your September, 2017 order.

When you look at each of the three issues -- Your Honor, I want to first take the sewer line because I believe that that one is easy for this Court -- most easy for this Court to deal with. When you look at the description of the defect it has not changed one iota from the original notice to the amended notice.

THE COURT: Do you got a page?

MR. BROWN: Your Honor, for ease what we've done -- and this is on page 18 through 22 of our motion. We've set forth the language of the initial notice for each of the three disputed defects as well as the amended notice. And if you were to go to page 21 of the motion you will see on the left column where it talks about the sewer problems, that is original language talking about an installation error during construction and again talk about the defective installation present an unreasonable risk of injury. When you go to the second page -- or the next page, page 22 in the second column it has the supposed amended language. But, Your Honor, the only thing that has occurred is that the last paragraph is a supposed explanation by the association that because they did not assume that this isolated incident years and years and years ago would ever be part of a Chapter 40 notice. They didn't give notice to my client.

This Court in its findings of fact and conclusions of law -- and this is

Exhibit 5 to our motion. If you would go to page 14.

THE COURT: I had actually pulled it up on the computer. Go ahead.

MR. BROWN: Lines 14 through 15 specifically identified the problem with the original Chapter 40 notice as such: "Notice does not specify the installation error made or what physical damage occurred." That is the guidance that this Court provided to the association; that is the guidance that the association disregarded in its amended notice. There is no change, Your Honor, they've done nothing to provide additional information to my client. But in addition to that, Your Honor, you already noted in this particular order on page 16 and then page -- the top -- top of page 17 in addressing the failure of the association to originally provide notice to my client pursuant to NRS 40.647.2. Because if you will recall, Your Honor, another supposed explanation on the part of the association as to why they didn't give notice to my client is because it was an emergency situation and so they couldn't give notice to my client. Well, Your Honor, not only did they not give notice even though they did the repairs, Your Honor, they never gave my notice -- my client notice of the repairs. And what the Court noted on the bottom of page 16: "Is given these facts this Court finds the contractor's arguments that the association did not comply with NRS Chapter 40's pre-litigation requirements have credence." And then at the top of page 7, paragraph 14 you noted: "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."

So, Your Honor, you have already addressed this particular claim with regards to the sewer line. In the motion for clarification the Court asked -- or the association asked you for clarification as to whether or not the sewer line was dismissed from the case. You denied that request for clarification. The association

has provided this Court with no additional information and more importantly has provided my client with no additional information, with regard to the sewer claim the facts remain. Whatever occurred no notice was provided to my client. My client had no opportunity to inspect, my client had no opportunity to contemplate or offer a repair. The association did not keep any of the materials. And if you recall, Your Honor, from the original motion for summary judgment -- and we noted in this motion as well that my office sent the association two separate letters in the months following -- like the second or third month following the receipt of the original Chapter 40 notice asking the association to identify the location and the whereabouts of the sewer line component so that my client could inspect them. And to date over two and half years later, there still has never been an explanation as to where those sewer line components were, Your Honor. So with regard to the amended notice as to the sewer line, you gave the association guidance, the association did not follow your guidance. And it's not a surprise to me, Your Honor, because they can't. They never gave notice originally, never preserved the elements of the sewer line. There's no way that they can give notice, Your Honor. It's a fatal flaw. And that particular aspect of the amended Chapter 40 notice should be deemed sufficient just as it was sufficient by this Court -- deemed by this Court in the original Chapter 40 notice.

So that is the first issue, the second is the fire blocking. And again if you would go back, Your Honor, to the -- page 19 and 20 of the motion we again provide the original language from the fire blocking issue and then the amended notice language on page 20. In the original, Your Honor, the allegation was that -- and this is on the bottom of page 19, that the installation deficiency existed in all one hundred percent of the residential tower units and then provided -- this is where the

installation omitted either from the ledger shelf cavity, from the steel stud framing cavity or from both locations. The Court -- on page 13 of the Court's order in September gave guidance again. And this is on page 13, lines 3 through 14. The Court said that NRS 40.645 criticized the original notice because it was not specific in terms of each defects location. And you noted that the notice stated that the installation was omitted either from the ledger shelf cavity, from the streel stud framing cavity or from both. That language -- this Court noted: "Did not satisfy the specific detail requirement of NRS 40.645 which necessitated the exact location of a 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 to the inspection or specifically how the homeowners association knows this particular installation deficiency exists in all or one hundred percent of the residential tower units." When we actually had the hearing on this, Your Honor, what was supplied in support of the opposition to the original motion for summary judgment was an affidavit from Omar Hindiyeh, the original expert, retained on behalf of the association. And in that Mr. Hindiyeh's affidavit admitted that it wasn't even a hundred percent, he said that it was in seventy-six of some uncertain areas -- seventy-six percent. So, he himself discounted and countered the representation made that it was in one hundred percent of the units. So, their own expert undermined their contention. But as this Court correctly noted they've given three different types of conditions that may exist and they didn't identify where it existed in any of the particular units.

If you look, Your Honor, now on page 20 of our opposition, the difference is that they continue to say that it should have been within the ledger shelf cavities and the steel stud framing cavities but now they say although it's a

distinction without a difference that the installation deficiency exists in the majority of the locations. And we left out the word location and where it is required for the 616 residential tower units. Again, Your Honor, saying that it's in the majority does not satisfy the specific detail requirement of NRS 40.645 which necessitates the exact location of the defect in each unit. And so the notice and in our reply brief in support of this particular motion, Your Honor, we felt that they just threw up their hands and they threw up their hands because later in the motion they again throw themselves prostrate before the Court saying, please, you can't make us do what the statute requires us to do, it's gonna cost us all this money. And they're asking this Court to sympathize with them and disregard the statute which requires them to identify in specific detail the exact location of every defect, damage and injury.

As part of this, Your Honor, please note that this particular issue was also based upon the investigation of 15 of the 616 units -- or 606 units. And this Court has already identified that extrapolation is not allowed. And that's noted on page 15 of the -- page 14 and page 15 of this Court's order where the Court in responding to the argument that what is being required is unreasonable leading to an absurd result in violating due process rights the Court was encouraged to adopt a standard whereby a typical unit could be utilized to identify the defect and that the typical unit then could be extrapolated. And what the Court wrote in September of 2017 on page 15 is as follows: "In this case the Court disagrees with the association's assessment for several reasons. First, nowhere within NRS 40.645 did the 2013 Nevada legislature include the words "typical unit." The AB125 amendment unambiguously states: "The NRS 40.645 notice must identify in specific detail each of each defect, damage and injury to each residence or appurtenance that is of subject of the claim including without limitation the exact location of each

such defect, damage and injury." And then two lines down, Your Honor, you wrote: "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."

Your Honor, you could not be clearer in your interpretation of AB125 and so the amended notice which doesn't even attempt to do anything other than rely upon the same fifteen units that were the basis for the position in the original notice and that all that they do is say, well, we're now asking you to have sympathy for our association with regard to the alleged cost associated with doing this investigation that this Court should disregard AB125's amendment to NRS 40.645 and allow us to rely upon the findings for fifteen units, Your Honor. And then they go so far -- I don't know if you caught this, but they say in their motion --

THE COURT: You mean their opposition.

MR. BROWN: In their opposition, Your Honor, that when the repairs are being done to the windows -- I'm gonna grab this because I want to make sure I have this correct for the record. On page 22 of the opposition, for the first time they state at page 9: "It is also important to note that the window assembly claims and the fire blocking claims are linked. It was during the repairs and investigation described in Exhibit J that the absence of fire blocking was observed in the first place." And here's what I want to point out, Your Honor. "The repair work that will ultimately be required to remedy the defectively designed window assemblies will also expose the ledger shelf cavities where fire blocking has been observed to be missing." So, their position -- and that's on page 22 and they reiterated on page 24 on line 4 where it says -- again criticizing the builder's interpretation of the statute. It says: "It is also duplicative given that the repair work that is required for all the residential tower windows would ultimately confirm the absence of fire blocking in

each and every location where it should have been installed but it wasn't." And so something that I've never seen in a Chapter 40 case is the position of a plaintiff that we will figure out the location of each defect when we're doing the repairs years from now and that should be sufficient to allow our amended Chapter 40 notice today to be sanctioned by this Court as being in compliance with NRS 40.645, but NRS 40.645 says you're not identifying years from now, you're identifying it in the notice in order to give my clients, the builder entities, proper notice of every defect, every damage, every injury in the exact location.

Also, Your Honor, I note that although they criticize this kind of broadly the affidavit from one of the experts retained on behalf of my client, they do not offer any response -- and this is Exhibit 8 to the motion, page 2, lines 5 through 8.

THE COURT: Okay. Hold on a second. It's page -- it's Exhibit 8 --

MR. BROWN: Yes, Your Honor.

THE COURT: -- of your motion? Okay. Okay.

MR. BROWN: The association failed to investigate for fire blocking at the EIFS, and that's e-i-f-s, framing cavity at the exterior edge of the slab, the investigation of the EIFS framing cavity.

THE COURT: Okay. Are you on page 2?

MR. BROWN: Yes, Your Honor.

THE COURT: Okay.

MR. BROWN: Lines 5 through 8.

THE COURT: Got it. All right.

MR. BROWN: The association failed to investigate for fire blocking at the EIFS framing cavity at the exterior edge of the slab. The investigation of the EIFS framing cavity at the exterior edge of the slab could have been performed without

destructive testing by way of a borescope. This is in stark contrast, Your Honor, to the Atlanta is burning, the world's coming to an end, a tsunami is hitting the coast position of the Plaintiff that if you force us to do this we've got to move all the furniture, people have to be relocated, we've got to take every bit of scrap of furniture, we've gotta move carpets, we've gotta move this and that. Every single unit has gonna have to be destructively investigated to such an extent millions upon millions of dollars. The same argument they made to you, Your Honor, when they tried to change your mind with regard to the window issues originally they're making now. But they don't challenge what the expert of my client says you just put a borescope in and you can see whether or not it's there.

Your Honor, with regard to this particular issue they've changed the wording, they think that by taking out what was the offensive language but then substituting the word majority when it's still based upon investigation of fifteen units which this Court has expressly said cannot be extrapolated as part of a notice, and that they still have done nothing to identify in each unit whether or not this particular defect -- they can take it out of the notice, Your Honor, but the defect remains the same that it's either in one area or in another area or it's missing in one of the two or both according to their original notice and a sworn affidavit from Mr. Hindiyeh which again they're asking this Court to act as though it doesn't exist. So, with regard to that particular portion of the amended notice, Your Honor, they simply cannot satisfy NRS 40.645, the language doesn't do it, Your Honor, and nothing that they provided to you in their opposition to this particular motion explains that away.

Now, if you move to the next issue, the window issue. And the -- for the record the description of the -- this issue is found on page 18 and page 19. And what I want to focus on, Your Honor, is what they have conspicuously left out both

from the original notice and from the amended notice -- because they have spent a significant amount of time -- they hired a brand new expert and that expert went out and did an investigation, issued a report the day before what was the original cutoff date for when they were supposed to provide an amended notice. I noticed that with interest, Your Honor, and kind of explained to me why I was asked for an amendment to -- or to extend the time for them to give an amended Chapter 40 notice. And that expert provides -- and there's reports that are attached to the notice that identifies the different windows where they contend that the missing flashing is an issue. But what they don't do, Your Honor, and they don't even attempt to do which is what NRS 40.645 subsection 2 requires is identify in specific detail three things; each defect, each incidence of damage, each incidence of injury. And when you look at both of the notices they contend that as a consequence of this alleged deficiency water -- and this is the exact same allegation is causing corrosion damage to the metal parts and components within these assemblies.

We still only have, Your Honor, an investigation from the Plaintiffs based upon -- for this particular issue fifteen units and then one additional unit, Unit 300. If you recall, Your Honor, was one where when my client showed up for --

THE COURT: Isn't it 301?

MR. BROWN: It's either Unit 300 or 301.

THE COURT: Okay. I couldn't remember.

MR. BROWN: But on that particular unit my client showed up to the investigation with a zero notice that repairs had actually commenced in that particular unit. That they'd already been mostly completed and again all of the alleged evidence of if there was evidence of corrosion. If there was evidence of water staining had already been taken away by the repairs that have been

performed. And so, again, for this particular defect, Your Honor, you've got a foundation for the claim of fifteen units and then one additional unit -- it's either Unit 300 or Unit 301. But what they've not done, Your Honor, notwithstanding what this Court directed them -- and again, this is in your order --

THE COURT: I think it's pages 11 and 12.

MR. BROWN: You again said to them that they must identify each defect, damage and injury and they did not do that, Your Honor. And again, they cannot extrapolate. And here's why they can't do it, Your Honor. I want you to look at what is Exhibit 7 to our motion and then find Exhibit A --

THE COURT: Hold on a second, let me get there.

MR. BROWN: -- to that exhibit. And for the record, that Exhibit A is a March 14, 2018 preliminary defect report from Allana, A-l-l-a-n-a, Buick and Bers, B-e-r-s.

THE COURT: Okay. Where in the report?

MR. BROWN: I want you to look, Your Honor, at page 6. And this is reference to what has been newly identified as 1.01, the omission of pan flashing at the window assemblies. And on page 6 in the very last two lines of the opinion from Allana Buick and Bers under result in damage --

THE COURT: Page 6?

MR. BROWN: Yes, Your Honor.

THE COURT: Okay. Is that under discussion or where is it?

MR. BROWN: It is -- if you see on that page where it says 1.02 omission of head flashing as a window assemblies discussion --

THE COURT: Right.

MR. BROWN: -- right above that.

THE COURT: Oh, okay.

MR. BROWN: Result in damage.

THE COURT: Got it.

MR. BROWN: That is the very last two lines of the opinion from this expert following his investigation. And he says: "Omission of window sill pan flashings may result in water intrusion into occupied and concealed building spaces resulting in damage to building components, finishes and personal property. Similarly, Your Honor, if you jump two pages to page 8 and you'll see again the very last two lines of a subsection identified as result in damage. And this is under the newly identified defect 1.02, omission of head flashings at window assemblies. The exact same opinion. Omission of window head flashings may result in water intrusion into occupied and concealed building spaces resulting in damage to building components, finishes and personal property. By their own newly retained expert they have admitted that they cannot provide in their amended Chapter 40 notice the exact location of what each damage and injury to each residence or appurtenance without limitation the exact location of each such damage and injury. That is what the statute requires and their own expert admits that they cannot provide that, Your Honor.

THE COURT: Mr. Brown, now they indicated that they did look at the plans to find that the plans do not show that there's pan sill flash -- sill -- window sill pan flashings is what I understood to be and they're also saying that there was no head -- window head flashings.

MR. BROWN: Yes.

THE COURT: But it -- and it may result in water intrusion. Didn't they change the definition of constructional defect -- and I know --

MR BROWN: Oh yes, Your Honor. In order for there to be a recovery in this

case for this particular claim, Your Honor, they added the and. And so it's not just that a defect is arising out of poor workmanship or a failure to comply with plan specifications or codes. There's the and. It must have damage arising from that defect. I don't have the exact language in front of me, Your Honor, but I presume that you're reading it.

THE COURT: Well, yeah. It says: "Constructional defect means a defect in the design, construction, manufacture, repair or landscaping of a new residence of an alteration of/or addition to an existing residence or an appurtenance and includes without limitation he design, construction, manufacture, repair or landscaping of a new residence." Miss Recorder, I can give you the statute so -- "of an alteration of or addition to an existing residence or an appurtenance which presents an unreasonable risk of injury to a person or property or which is not completed in a good and workman like manner and proximately causes physical damage to the residence and appurtenance or real property to which the residence or appurtenance is" -- okay. So, you're using the and from section two?

MR. BROWN: Yes, Your Honor.

THE COURT: Okay.

MR. BROWN: It's -- and in effect, Your Honor, this notice is already void as per the statute because they are saying that it may but they provide zero evidence to my client as to where this proximate damage exists. And that's required by the statute as part of the notice, Your Honor, every location without limitation of where the damage exists in every unit.

THE COURT: Well, the concern that I have -- and I know that it was certainly a concern of all of the three original -- well, I shouldn't say original. At least original for me, since 2007 the judges, where it says presents an unreasonable risk of injury

to a person or property. I know one thing that we've always been concerned about is for example if you've got inadequate electrical to where, yeah, it may not have done anything yet but it could cause a fire. Now, your concern right now is where the defect is. Doesn't window sill pan flashings -- or the window sill, isn't that where the pan flashings are supposed to be?

MR. BROWN: That's where they contend that there should have been one, Your Honor.

THE COURT: Okay.

MR. BROWN: And the facts ultimately will show why they're not there. But Your Honor having done construction defect litigation for my entire career I will tell you that there's no uniformity of where the water damage is going to occur at a window because it's different with regards to -- it's impacted by the installation, it's impacted upon -- by the nature of how the weather hits a particular window, Your Honor, and that's why when you have destructive testing and things are opened up you will see a cornucopia of areas where there may be -- and there could be one window where there's evidence of some type of staining and right next to it the exact same type of window with the exact same type of flashing, the exact same type of window product that's utilized, the same -- the contractor has put them in. It's completely devoid of evidence of staining. The next one there may be staining but it's completely different from the area where it's found over here.

And so, Your Honor, my client -- the statute says my client does not have to guess at where this may be occurring. My client doesn't have to open up every window and do the work for the association.

THE COURT: Well, I'm getting from -- on this that -- that this expert looked at the plans -- didn't just do destructive testing but actually looked at the plans and

there are no pan sill flashings.

MR. BROWN: And that's -- that's not -- Your Honor --

THE COURT: Did I --

MR. BROWN: -- that's not my -- my client's objection to the amended Chapter 40 notice.

THE COURT: Okay.

MR BROWN: Because they can identify -- you originally gave them guidance and said: "Look at the plans." And he has looked at the plans. And this particular expert did not do any of his own destructive testing -- and this is on page 2 of what has previously been identified as Exhibit 7 to the motion. He identifies what he did. And he did look at the plans; he looked at photographs that were taken by others. He performed a limited visual survey of the exterior of the tower buildings in order to determine what exterior insulation and finish system had been utilized. So, he didn't look at the windows themselves, he just looked at the EIFS system.

But, Your Honor, the criticism of the amended Chapter 40 notice is not the identification of the sill pan flashing pursuant to the plans. There's a separate criticism that I -- my clients have with regard to the identification for the first time of the head flashing as being a new defect that's asserted for the first time in the amended Chapter 40 notice. But overall leaving that aside for a second, the criticism with regard to the amended Chapter 40 notice is that it doesn't satisfy providing in specific detail not just the defect but the damage because they have to identify that as well, Your Honor, pursuant to the statute. That's how it's written, that's required. And they already come before you, Your Honor, saying that's gonna cost us millions of dollars. And they're right; they quoted you from one hearing saying, yeah, it's onerous. But that's what the legislature wrote. And so they have

to satisfy not just the identification of where the sill pan flashing doesn't exist or where, even though it's a new defect, the head flashing doesn't exist. They must pursuant to the statute identify where the alleged damage -- because that's part of their Chapter 40 notice. They know that they cannot recover for this particular defect unless there is damage arising from it under the new interpretation of what constitutes a defect. And so they -- they don't even give it the college try, Your Honor, they just say, well, there may be damage. That's not sufficient, Your Honor, they must without limitation identify the exact location of each such -- and there's three things; defect, damage and injury. And they don't do it, Your Honor.

THE COURT: And they don't indicate that it presents an unreasonable risk of injury to a person or property, right?

MR. BROWN: No. They --

THE COURT: I could --

MR. BROWN: -- no, they do, Your Honor. They identify that. Whether or not we agree with it. I mean, that's another motion down the road --

THE COURT: Right.

MR. BROWN: -- Your Honor. They do that but they don't satisfy the definition of a construction defect. In order for the association to recover requires them to prove that there is damage arising from that particular defect. And so that's why the builders believe that in conjunction with that change to the definition of a defect that the legislature said that as part of the notice you must identify not just the defect but the damage arising from it because you're going to have to prove both of those ultimately in order to recover. So, you've got to put both of those in your notice from the outset in order for the recipient of a Chapter 40 notice to have the opportunity to do -- offer a repair if you provided that information. And neither the original Chapter

40 notice which this Court noted nor the amended Chapter 40 notice satisfies that, Your Honor. They don't satisfy NRS 40.645 subsection B or C, Your Honor.

THE COURT: Okay. I've got a question. On -- you had talked about location. Now, one thing she says on page four, first paragraph under discussion 1.01, omission of pan flashing at window assemblies, it does say: "Based on as-built shop drawings and visual review we were able to confirm that this defect is universal and occurs at all windows of the high rise building." So, haven't they identified the location?

MR. BROWN: There's -- we're talking -- I'm not gonna say apples and oranges, Your Honor --

THE COURT: Okay.

MR. BROWN: -- we're talking about two different apples, okay?

THE COURT: Okay.

MR. BROWN: One apple is identifying the pan flashing or the head flashing --

THE COURT: Right.

MR. BROWN: -- and they attempted to do that. Whether this Court agrees with their reliance upon the plans and specifications, is a completely separate issue from whether or not they've also satisfied the other prong of NRS 40.645 subsection 2 that requires them to identify with the specificity the exact location of the damage arising from the absence of the pan flashing or the absence of the head flashing. They've got to do both in the notice. That's what NRS 40.645 subsection 2 requires.

So, our objection to the amended Chapter 40 notice is that regardless of whether they satisfy the first prong by looking at the plans and specifications they don't even try to satisfy the second prong. And, Your Honor, you've already told them in your September order they cannot extrapolate. And the basis for their

opinion that there may be water is the investigation of Unit 300 or Unit 301 and 15 other units out of a total of 616 units, Your Honor. You've already told them they can't extrapolate their alleged finding of water damage which they don't even specify in the notice, oh by the way, we found water damage in this window and this window and this window in Unit 301 or in these other 15 units. They don't even do that, they just say, oh, we investigated 15 units. We investigated and we repaired one unit. They don't do anything with regard to the rest, Your Honor. And you've already told them they cannot do that.

So, regardless of whether the first prong is satisfied by looking at the plans and specifications, looking at the plans and specifications cannot identify where the damage exists. And their own expert admits that because under the subsection of result and damage for both 1.01 and 1.02 he admits it may. He doesn't know. And if he doesn't know then there's nothing in the Chapter 40 amended that provides my client with what is required by NRS 40.645 subsection 2.

THE COURT: Okay. I've got a question. Okay. Under 40.615 -- and I've got the new statute right in front of me. Now, of course I went through and read way too fast for my court recorder the first paragraph, but it talks about two elements -- of course there's two elements to subsection 2. The first element is: "Which presents an unreasonable risk of injury to a person or property or subsection 2 which is not completed in a good and workman like manner" --and in this case I'm getting that it's a design problem, "and proximately causes physical damage to the residence and appurtenance and so forth." I get what you're saying with respect to subsection 2 but my concern is also subsection 1. Have they satisfied in the notice: "Which presents an unreasonable risk of injury to a person or property when they say omission of the window sill pan flashings may result in water intrusion into the

occupied and concealed building spaces resulting in damage to the building components, finishes and personal property." I mean, aren't they indicating that it does create an unreasonable risk of injury?

MR. BROWN: Well, Your Honor, that particular subsection as yourself pointed out earlier that you and the other two construction defect judges w hen you first saw this your concern was as to elements such as electrical claims.

THE COURT: Well, actually that was before this statute was re-done because we used to have defense lawyers saying you have to have a damage, it's not a construction defect unless you got a damage. And the concern that we had was, okay, so let's say that the firewall is inadequate or the electrical is inadequate. And so there is an unreasonable risk of injury by fire because you don't have those components. And the position taken by some defense lawyers, Bob Carlson, was that you had to have a damage. Basically the building had to burn down before you could bring a Chapter claim. And so I will just tell you that was a rub Judge Earl and I certainly had and I bet Judge Williams would say he did too. So, that -- I'm just gonna tell you then of course they changed the statute. But the concern I have from your perspective on this issue is are we ignoring which presents an unreasonable risk of injury to a person or property and then of course it says or and then you've your subsection two?

MR. BROWN: Your Honor, my interpretation of that particular statutory provision was that the second one, the second new portion of the -- the second section of the new statutory provision took into consideration what would have been the laundry of standard construction deficiencies.

THE COURT: Right.

MR. BROWN: The first one was indeed to cover those type of areas that you

just described. And so when you look at the allegation with regard to the fire blocking not -- no surprise to me that they're saying that that presents an unreasonable risk of injury --

THE COURT: Sure.

MR. BROWN: -- for that. Here, Your Honor -- and I'm --

THE COURT: Now, I'm talking about the --

MR. BROWN: I know.

THE COURT: -- pan flashing and stuff.

MR. BROWN: Right. And I'm hesitant -- I'm showing my cards a little bit, Your Honor, but I will tell you that down the road there will be a motion that is going to say if that is what you want to rely upon then you had better provide some type of structural analysis that this alleged water intrusion which your own expert says may have occurred so consequently it may have caused corrosion.

THE COURT: Well, it's just says may result in water intrusion. It just says it might result in water intrusion into the occupied and concealed building spaces. So, that gets into does that equate to which presents an unreasonable risk of injury to a person or property.

MR. BROWN: No, Your Honor, I don't believe that it does because --

THE COURT: Okay.

MR. BROWN: -- I believe that that particular section does -- was intended to cover the types of things that you have identified as being ones that are like a fire going through the building. Something like that having to do with an electrical thing. If they want to try to make the argument that this poses an unreasonable risk of injury then they've got to do something more than (1) just say it might lead to water intrusion. And their own expert -- and I keep relying upon their own expert's report

but it is attached as an exhibit in support of their amended Chapter 40 notice and so I can't disregard that and I don't believe the Court can disregard that their own expert said may, this may occur. And so down the road, Your Honor, if they want to rely upon that particular provision of the statute their going to have to prove ultimately to a jury as to whether or not -- and maybe to you, Your Honor, because I foresee it being a motion following some discovery that they're not going to have the necessary evidence or anything to support an expert opinion that the alleged water intrusion which allegedly causes corrosion, allegedly creates a weakness in the structural framing which is steel, structural steel framing of this building such that that would constitute an unreasonable risk of danger. That's -- that's a motion down the road, Your Honor. But ultimately I want to make sure that whether or not the Court today believes that the notice satisfies that aspect of the statute is completely separate and apart from what my clients contend is the equally important requirement that they identify in specific detail not just the defect but the damage. And since they've not done that by their own admission, Your Honor, then the notice is insufficient because my client is -- the revised statute doesn't require my client to go out and do the work for them. My client does not have to go out and say, well, gosh, the 616 units I will now find your damage. It doesn't require my client to do that, it requires them to identify to my client first. That's the burden on the association.

The -- another portion -- so we've talked about, Your Honor, the three areas of the amended Chapter 40 notice and why the builders do not believe that the amended notice satisfies what is required by the statute. I want to touch on three other areas of their opposition. One we've already talked somewhat about is their position that if they're required to do what the statute tells them they have to do

it would be unreasonable, it was be absurd and it would violate due process. That was raised in the original opposition to the original motion for summary judgment; it was raised in the motion for clarification. And they say in their opposition it wasn't raised at to the fire blocking issues but indeed it was, Your Honor. And when I went back and looked at the motion for clarification and the oppositions, Your Honor, they specifically talked about that and the Court denied their motion for clarification. And if this is indeed a motion for reconsideration of your motion -- your ruling on the motion for clarification, Your Honor, it's seven months late. And I want to point out, Your Honor what they're asking you to do is to disregard NRS 40.645 subsection 2B that says: "Without limitation the exact location." They're asking you to approve limitations and the statute says that this Court cannot do that.

Next, Your Honor, I want to talk about the -- what we contend are the new defects. The Chapter 40 notice which was issued on February 24, 2016, Your Honor, for the purposes of this motion and the purposes of the oral argument, my client is not waiving its position which is set forth in the first cause of action in its complaint per application of AB125 that it contends that all of these claims are time barred given that the certificate of occupancy for tower one was in January 16th of 2008, for tower two March 31st of 2008 which would mean given the amendment to NRS 40.600 et seq. that claims if they were not brought within the time frame allowed by AB125 will be time barred as of January 16th of 2014 for tower one and January 2, 2000 -- or March 31, 2014 for tower two. Why do we believe that there are new defects? When you look at -- going back, Your Honor, to the motion on page 18 and 19. In the summary of the initial notice what is specifically identified is there are no sill pans -- and that's the pan flashing. But then down in the amended notice it's changed -- and this is at the bottom of page 18. It says: "The window

assemblies are defectively designed." And then it says: "There are two significant design deficiencies." And then they identify for the first time: "The plans fail to specify head flashings and pan flashings." So, head flashings is identified for the first time in the amended notice. Now, how do we know that that is something that is absolutely new? If you look at Exhibit 7 to the amended notice of claims -- that's Exhibit 7 to our motion which is the amended notice of claims.

THE COURT: Got a page?

MR. BROWN: Go to page 4.

THE COURT: Okay.

MR. BROWN: What has now been identified as 1.01, omission of plan flashing. So, the same thing that was in the original notice. If you go down to the end of the first section it says -- there's a two line paragraph: "The omission of the sill pan flashing in observed construction resulted in leaks, damage, staining and rust under the window and sill flashing assembly." What is the observed construction? The observed construction was the fifteen units that were destructively tested and the unit 300. That's in comparison to go to page 6 where it talks about the omission of head flashing at window assemblies. Again, go to the end of the discussion section, two line paragraph. It talks about the omission of the window head flashings prevents water from properly [indecipherable] from the exterior surface. Other towers resulting in water intrusion beyond the exterior of the building surface. What is conspicuously left out? The records to an observed construction. That's because this new expert, Allana Buick and Bers, was retained by the association after the Court issued its September, 2017 order. This new expert looked at the plans and for the first time identified what is now being alleged as a new defect, the defect pertaining to the head flashing. These plans, Your

Honor, have been available to the association and its experts not just since the issuance of the Chapter 40 notice in this case but going back years and years and years to the original litigation involving the Panorama Towers, Your Honor. And so these plans are not hidden from them, they're readily available. And in fact, as the parties will both agree the plans continue to remain available at the document depository where they were originally deposited throughout the years from when the original litigation was resolved to when this new Chapter 40 notice was provided.

So, you have an expert who is retained after the Court issues its order in 2017 who is identifying for the first time the absence of head flashing. His report proves that the first one was based on the observed construction which is the fifteen units and Unit 300. His report proves that the identification of the omission of head flashings was not based upon that because it doesn't say observed construction; it just says that it's based upon the other analysis that he did which was review of the plans. So, consequently, Your Honor, this is a new defect which has never been identified before the amended Chapter 40 notice. And, Your Honor, this Court (1) did not tell the association that when you amend your notice you can add new defects. You gave them guidance to attempt to follow, to provide support for what hadn't been identified. This is a new defect, Your Honor, and this is years after the February, 2015 -- or February, 2016 Chapter 40 notice which purportedly was done I order to comply with the safe harbor provision of AB125. If this Court were to allow this particular defect to come into the case, Your Honor, then what is to preclude the Plaintiff from following through on their position taken in their original Chapter 40 notice --

THE COURT: You mean the Defendant.

MR. BROWN: Sorry. Thank you. I got through quite a ways without doing

that before I did this time. What is to preclude the Defendant, association, from following through on what they stated in their original Chapter 40 notice which was, oh by the way, we're not done investigating and if we find more defects we're gonna add them. That's what they said in the original Chapter 40 notice notwithstanding the fact that they served it on February 24, 2016 which depending upon another motion down the road may or not be timely, Your Honor. But regardless this is a brand new defect which has been identified for the first time, Your Honor, and this Court can't allow that to be added. They may have identified that it's not in the plans but they did so years after the safe harbor expired and there's nothing that allows them to add new defects following that time period if those defects would be otherwise time barred which they absolutely would be.

Similarly, Your Honor, if you look at the allegation -- this is going back to page 20 of our motion. And when we reference the amended notice for the fire blocking issue they contend that -- and this is on page 20, lines 13 through 16. They assert for the first time ever that the absence of the fire blocking wherever it may occur allows for the accumulation of additional moisture in the wall assemblies thereby by exacerbating the window drainage deficiency described above. That is new language that has never been added, that is a new defect allegation, Your Honor, and again it cannot be added. It's not as though there were some new evidence that was unknown to them, this is just an opinion on the part of their new expert that somehow the absence of this fire blocking although it could have been identified in the original Chapter 40 notice as this being an incident arising from that. That didn't do that, Your Honor, and so this is also a new defect allegation which is untimely and this Court should not allow.

The last point I want to make, Your Honor, is that the assertion by the

association that my client's complaint because it seeks affirmative claims somehow makes them be allowed to apply NRS 40.645 subsection 4A. And as we pointed out in the reply brief, Your Honor, the complaint was entirely responsive to what we contend is unlawful, unfounded and non-statutory compliant Chapter 40 notice. Every cause of action that is asserted in that complaint is in response, the cause of action for application of AB125, is because we believe that the claims are all time barred. The cause of action for claim preclusion is because we believe that the settlement agreement between the parties bars the claims that are being raised in this particular case. The cause of action for the failure to comply with Chapter 40 is what we've been arguing, Your Honor, and that was the basis for the original motion and the motion is the basis for this particular motion all again related to the original Chapter 40 notice and the association's attempt to amend. The evidence of the spoliation claim is not adjudicated by this particular motion, Your Honor, but it again arises from the fact that they didn't provide my client notice and they didn't preserve the evidence.

And then the final claims, Your Honor, are based upon breach of contract, again the settlement agreement and the failure on the part of the association to defend and indemnify my client. These are all responsive to the association's Chapter 40 notice.

THE COURT: And they're listed on page 5 of my original order.

MR. BROWN: Yes. And the association claims that if the Court rules that the current notice is not compliant and ultimately if the Court rules that they cannot be compliant after however many amendments this Court allows them to make that that somehow precludes them from defending against these particular claims. No, Your Honor, they're still going to be an assessment of whether or not the claims that

were raised fall within the purview of a settlement agreement, specific language that talks about things that are related to the original claims that were released. We're still going to be able to have evidence with regard to whether or not the claims are time barred, we're still gonna have evidence as to whether or not there's spoliation of evidence and we're still gonna have evidence as to whether or not my client's claim for breach of contract and an indemnity defense pursuant to the settlement agreement is a valid one. You -- whether this Court rules in my client's favor on the instant motion or any further motion attempting to -- further attempt to amend the Chapter 40 notice they're still able to raise whatever defenses they may need to raise with regard to those particular claims regardless of how the Court rules on this particular motion.

Your Honor, there's simply is no way that the association's amended notice satisfies NRS 40.645 as amended by AB125. We've talked about that -- the two apple scenario and one apple even if they satisfy it they don't satisfy the second. They don't like that, Your Honor. No plaintiff's attorney in this town or throughout the state of Nevada that does construction defect likes AB125 and its impact upon Chapter 40 but the association can't change the statute. They can lobby and if there is perhaps a change in the legislature maybe there will be a change in the statute, but that's not something that this Court can do and it's inappropriate for them to ask you to disregard the without limitation language to ask you to -- it's not that they're praying upon your sympathy, Your Honor, I don't want to say that, but they are asking you to get them out of what they believe is a deep hole created by the amendment which requires such specificity. They're hoping that somehow you can carve out an exception but, Your Honor, you can't re-write the statute and you already noted that in your original order.

There is -- I started this off by saying that many times in life we want to turn back the clock. That's what they want to do, Your Honor, they want to turn back. And it's not so much that they want to amend what their original Chapter 40 notice says because they could never satisfy the statute the way that it must be satisfied because they don't want to do what the statute requires. They instead are asking this Court to do something unique that I despite research and talking to many attorneys that have never seen occur anywhere in the state of Nevada asking this Court to say, all right, because a complaint was filed that allows the original Chapter 40 notice to vanish, it never existed. And because the complaint was filed notwithstanding your directive to the association in your over twenty page order disregard that, never happened. We don't even need to do the amended Chapter 40 notice. What they want you to do is to say let's start fresh, let's go back to high school and fix all the errors that --

THE COURT: Oh boy --

MR BROWN: -- we made in high school.

THE COURT: -- do you really need to go there, Mr. Brown?

MR. BROWN: I do. I do, Your Honor, because that's what I think this is, they want you to fix their errors for them. They want you to give them a chance to start this case afresh and we have been in this case for over two years. My client has filed motions, responded to motions. My clients have dealt with this case as it's been presented to them by the association. They cannot start anew, they can't disregard what they did in February, 2016, they can't disregard that they didn't preserve evidence, they can't disregard that they've never identified with exact specificity the location of the defects, they cannot satisfy what the legislature via the amendments to NRS 40.600 specifically NRS 40.645 required them to do.

The motion, Your Honor, must be granted because they have not taken your guidance and done anything with it. They have said we don't want to follow your guidance. Follow us, Your Honor, follow us down this pathway to where we can disregard all that we've done and act as though two different Chapter 40 notices never existed. Unheard of, unheard of anyone ever asking for that in the history of 40.600 litigation as far as I know, Your Honor, but that's what they're asking this Court to do. Do you have any questions, Your Honor?

THE COURT: No, I don't

MR. BROWN: Thank you.

THE COURT: Before you get started, counsel, I'm inclined to go ahead and allow some other folks. I tried to take care of them earlier.

MR. GAYAN: Your Honor, I was gonna suggest that.

THE COURT: Yeah, because I figured you were gonna be, well, as enlightening as Mr. Brown is.

[Matter trailed at 10:06:48 a.m.]

[Matter recalled at 10:44:42 a.m.]

THE MARSHAL: Come to order, court is back in session.

MR. WILLIAMS: Hello --

THE COURT: Mr. Williams --

MR. WILLIAMS: -- Scott Williams here.

THE COURT: -- Mr. Williams, this is Judge Johnson again. We did take a little bit of a break so that we could accommodate lawyers with smaller matters that I had called initially earlier but they weren't here yet. So, in any event, I am now listening to the defense counsel.

MR. WILLIAMS: Okay. Thank you.

THE COURT: You bet.

MR. GAYAN: All right. Good morning, Your Honor. I realized this case has been going on for some time and we're new to the events here so I appreciate the Court's patience. You were very patient with Mr. Brown. In fact, I checked and I think he took longer than the entire first summary judgment hearing. So, I'm gonna try to be a little more brief than that, but since he's asking to throw out my client's entire case I feel like I need to make a record. So, I'm going to try to be thorough but I'll try not to repeat myself as much as I can and hopefully get through this before too long. So, I really the Court's patience.

So, I think it's pretty clear from the arguments and the papers and from what I heard from the Court's questions and comments during Mr. Brown's argument I think there's two main issues here. The first one is what application if any is there for NRS 40.645 sub 4. Does it apply? Does it not? And I'll get into that in more detail later.

THE COURT: Yeah. I'm just gonna tell you that I -- I'm inclined not to go with that argument and I'll tell you why, is because it says: "Notice is not required pursuant to this section before commencing an action." Meaning you don't have to file a Chapter 40 notice if the contractor, supplier, etcetera, has filed an action against the claimant. In this case the notice was sent over to the builders and then that is when they filed their complaint for their deck actions and so forth that I've got listed on page 5 of my order. So, this is not a situation where the builders filed an initial complaint for whatever reason before the notice was given. The notice was given first so I see this as a non-starter unless you can convince me otherwise.

MR. GAYAN: And I will try.

THE COURT: Okay.

MR. GAYAN: And I -- but I appreciate the clarification from the Court. I certainly understand the Court's position. I'm gonna dig into the statute because Mr. Brown repeatedly stated nobody can change the statutes, they are what they are. The homeowners can't change them, the Court can't change them and neither can Mr. Brown. And we're gonna look at -- I'm gonna take the Court through what the statutes are and I meant to bring a printout copy of the new Chapter 40. Hopefully you got it.

THE COURT: Got it.

MR. GAYAN: Okay. And I thought being you you would have it, but I was going to bring one and just forgot.

THE COURT: And I might note, I think that the Plaintiff -- boy, this is -- this screws me up, guys. But he also attached AB125 as Exhibit -- was it two? Exhibit -- hold on.

MR. GAYAN: As long as we have it somewhere.

THE COURT: Yeah. It's in here. It's Exhibit -- it's Exhibit 4.

MR. GAYAN: Okay.

THE COURT: Okay.

MR. GAYAN: Great. So, it's --

THE COURT: So, we got it.

MR. GAYAN: -- in the record. So, that's one issue. I'm gonna come back to it in more detail in a bit. And I think the other main issue and question for the Court today -- and I think the Court -- I think most of it [indecipherable] asking questions about the window assemblies and what type of notice was required for those, whether we provided it in sufficient detail on the defect, the damage and the injury including the exact locations. And frankly we'll look at [indecipherable], I'm sure

you're very familiar with it. But you told us we could rely on the plans, that's exactly what we did and we gave as good a detail as could possibly be given under the circumstances. And Mr. Brown still says -- he said it in his papers, he said it again here today, the HOA can never satisfy the Chapter 40 notice requirements under his interpretation of that law. And that is the best evidence I think, the best indicator that his interpretation is wrong because Chapter 40 is not meant to be some insurmountable pre-litigation procedure that forever bars homeowners and homeowner associations from getting to court. That's not what it is. And that's part of our due process argument. I'm not gonna spend a lot of time on it; I think Mr. Salzano did the last time and I think it's in the record. But Mr. Brown's argument that it's a burden that can never be met. That's exactly what we're talking about. With due process violation the homeowners association is a citizen of the state, it has a right to access the court and resolve any grievances it has against whoever it wants to. And Mr. Brown is using Chapter 40 to preclude that from ever happening and that was why he filed this case. But we'll -- we'll come back to that in a little bit.

And what I noticed -- Mr. Brown is a very good story teller, he recounts a lot of stories in his arguments. He did the last time, he did here today. I understand that was his former profession and maybe it's his current profession too. But in any event, the story that he put together today is just wrong. It's just wrong on a lot of different levels, a lot of different facts and the statutes. And so we're -- I'd like to just make a record here today and kind of walk the Court through what the evidence actually is that we have and what the statutes actually say. So, without further ado, I'm gonna just -- and I know this isn't in -- specifically in the papers but this is a Rule 56 motion so Mr. Brown is the moving party and Rule 56(c) and the case law interpreting it means he has to satisfy two burdens before any burden

shifts to my client to even respond. So, in order for him to obtain summary judgment or at a minimum to shift the burden to my client to do anything -- and this is in *Nutton versus Sunset Station*. I'm sure the Court has heard of it.

THE COURT: Yes, I --

MR. GAYAN: A few --

THE COURT: -- have.

MR. GAYAN: -- times. Yeah. So, that's still good law. And Judge Tao lays out in painstaking detail what's required for a Rule 56 motion and what Rule 56(c) requires. (1) He says: "Prove the absence of genuinely contested material facts." That's the first thing that Mr. Brown has to do. Second thing, he has to prove that he's entitled to judgment as a matter of law based on undisputed, admissible evidence. Now I'm gonna come back to that, but I think it's key here that Mr. Brown needs admissible evidence to prove that he's entitled to judgment as a matter of law to this Court here today. And I don't think he's met either of those. I think the evidence in the record shows first that there are clearly disputes of material fact. And these are genuine issues of material fact about new defects, about whether we identified the exact location. And, you know, with all due respect to the Court, I know you presided over construction defect matters for quite some time but what we have is the association's expert saying here it all is, here are all the locations. Mr. Brown's expert saying in a very summary fashion -- and I'll get into that in more detail later. She basically just says we don't meet the statute. She doesn't actually give any opinions about anything; she just says in a conclusory fashion we don't satisfy the statute. And frankly I don't think Ms. Robbins' declaration is admissible evidence. And I'll get into that a little bit later. And I don't think it actually says much of anything in there that would support Mr. Brown's motion. So, under *Nutton* and

Rule 56(c) I don't think Mr. Brown has shifted the burden to my client to do anything. But be that as it may, the association has responded and as the burden of production did shift to us -- and we provided admissible evidence, expert testimony based on someone who actually reviewed the notices, the plans, as-built manufacturing installation instructions, visited the sites something Ms. Robinson never did. He reviewed all of this; destructive testing results, visual inspections, everything. So, he actually has personal knowledge of what's going on out at the Panorama Towers something that Ms. Robbins does not have. We provided that. We provided other evidence, admissible evidence to support our position to show that there are genuine issues of material fact remaining for trial.

So, those -- I think that's a threshold issue for the Court to consider here. He is asking for summary judgment and he has to meet that burden under *Nutton*. He has not done that. Second -- well, before I leave that. So, really the only evidence we have in Mr. Brown's motion is the two page declaration from Ms. Robbins which doesn't even say she reviewed either of our notices if you take a close look at what she says. So, I'm not sure she ever even looked at the notices so how could she testify about the notices? I'm not sure. She never visited the site, how can she refute what our expert says about these defects on the window assembly being visible from just walking around and looking? She can't. She never went there. So, I'm not sure she has the personal knowledge sufficient to make her testimony admissible at the time of trial and it shouldn't be admissible now and I think the Court should not even consider it. The only other evidence we have is an affidavit from Mr. Brown. We don't have anything from a client; we haven't heard anything from his client. We haven't heard from the builder that the builder didn't understand our notice that the builder didn't know where to look. That the builder

didn't know what the plans said, didn't know what the defect was, didn't understand what the damage allegations were. We don't have anything. All we have is Mr. Brown coming in here writing a lot of pages, spending a lot of time with the Court talking about what the problems are with the defects. Well, the fact is Mr. Brown's testimony is not admissible evidence; it's not admissible at all. We don't have a single sentence, no statement period on the record from his client saying they don't understand our notice. I think that's pretty critical. So, there's a complete lack of admissible evidence to support the motion and it should be denied on that basis alone. Another reason to deny the motion -- and this is one we touched on earlier is the NRS 40.645. And I'd like -- sub 4.

Mr. Brown spent a lot of time and a lot of effort saying that we never raised this issue until September 4th of 2018 in our opposition. And that is just completely false. Mr. Brown was here for the last hearing and Mr. Salzano spent quite a bit of time talking about it at the last hearing and this was June 20, 2017. And I'll give the Court some page and line just in case it matters. Page 21. Mr. Salzano starts talking about it at 21, line 19 --

THE COURT: Of --

MR. GAYAN: -- in the hearing transcript from the last time.

THE COURT: Okay. Did you --

MR. GAYAN: And --

THE COURT: -- attach that?

MR. GAYAN: -- I'm not sure it's in the -- I'm not sure it's attached to anything so this is maybe more for the Court feels it's important and wants to go look, but I will read a couple of things.

THE COURT: I'll go ahead and allow it, Mr. Brown.

MR. BROWN: May I just place on the record an objection? I'm going to raise the same objection that I did during that hearing when Mr. Salzano tried to raise issues that we're not in the moving papers and I objected to new arguments raised by Mr. Salzano because there were nowhere to be found in the moving papers. I'm objecting to the same representation made here by counsel in his attempt to put into the record a transcript which is not found in his opposition and so I could not respond to it in the reply brief, Your Honor. So, I object to it on those grounds.

THE COURT: I understand.

MR. GAYAN: He was here; you allowed this argument the last time. He made the same objection like he just said. You allowed it; Mr. Salzano went on for several pages and had some exchanges with the Court about it. So, it's in the record, we're here on summary judgment. I appreciate the Court's indulgence.

Anyway, Mr. Salzano, page 21, line 19 says: "Under NRS 645 subsection 4(a)" -- and again, I'm sure you've read this many times, "notice is not required pursuant to this section before commencing an action if (a) the contractor, subcontractor, supplier or design professional has filed an action against the plaintiff." And then -- close quote. And then he goes on and there's some argument about what it means and whether there's some practical exceptions to that some of what the Court said at the outset here today. And ultimately Mr. Salzano did point out that this isn't the case for just deck relief. That's what Mr. Brown is moving on today but this case is not just about deck relief. Mr. Salzano pointed out page 24, line 18: "But they sue us for spoliation, they sue us for breach of contract." That's the settlement agreement. "They sue us for an application of a duty to defend from a settlement agreement. And application of a duty to indemnify." Also from the settlement agreement. "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." They're asking for money damages indemnity and defense in this case. This is not just a deck relief case; this is a breach of contract case.

THE COURT: Well, I understand but the fact is your clients -- you know, through you all filed the notice before they filed any complaint whether it was for deck relief or anything else --

MR. GAYAN: Sure.

THE COURT: -- is my point. And so that's what my problem is is that I see this as a non-starter. If your client had never filed a notice I doubt that Mr. Brown would have filed on behalf of his client any complaint alleging these seven causes of action.

MR. GAYAN: Okay.

THE COURT: That's -- that's what my problem is.

MR. GAYAN: Fair enough. But Mr. Brown -- we're still here today two and a half years later and he's demanding notice. He's saying we still haven't given him notice. So --

THE COURT: I --

MR. GAYAN: -- according --

THE COURT: -- think he --

MR. GAYAN: -- to Mr. Brown we have not provided notice.

THE COURT: Well, he's -- in my view he's just criticizing the notice saying it doesn't comply. That is -- I mean, I think that we all agree that when a plaintiff homeowner provides a notice -- if -- it is presumed to be valid but that doesn't mean

that the builder cannot challenge the notice.

MR. GAYAN: Absolutely, Your Honor. I totally agree with that. And if the builder doesn't want NRS 40.645 sub 4 to come into play they can wait and see if the homeowner files an action and if the homeowner does it can assert this failure to comply with the notice provisions as an affirmative defense and that's what almost every contractor does in this jurisdiction. So, Mr. Brown -- and I'm just gonna point this out. He said it many times today as well. And I'm gonna quote from him at the last hearing. He says: "The statute if it unambiguous then the Court is not to read beyond that." Page 5, lines 15 and 16 of the last transcript. So, let's take a look at what the statute actually says: "Notice is not required pursuant to this section before commencing an action if (a) the contractor, subcontractor, supplier or design professional has filed an action against the claimant." And there's something else that doesn't matter in there.

So, I understand the Court's concern that you believe that this is intended to mean if the homeowner gets sued on a lien or something else that -- that's not what it says. And it doesn't say anything about the timing of the notice or the lawsuit; it just says if a lawsuit is filed notice is not required. And we're here today because Mr. Brown says he still doesn't have notice. And under this statute I think it's pretty clear on its face it's not ambiguous. Mr. Brown hasn't said it was an ambiguous statute at all and so according to him if it's unambiguous the Court shouldn't be reading anything else into it. And he did get into the legislative history; we mentioned it on our brief. I understand that but our position is it's unambiguous, the Court doesn't need to go beyond what the statute actually says, shouldn't be twisting it in certain ways. And Mr. Brown is here arguing for a very exact application of the other statute against my client but he doesn't want a very exact

application of 645.4(a) because what it says, notice is not required once he files suit. And he chose to file suit, he didn't need to. Two days after the mediation ended he filed suit. That wasn't anything he ever had to do. Maybe he -- his presentation at the mediation was so convincing the homeowners association would not have filed the case. Who knows but here we are. He filed the case, he instituted it. And I know we've joked about it but it's confusing for the Court and for everybody, Mr. Brown included, that he's the plaintiff and we're the defendant but that's the position that he chose. His client elected to do that. There was nothing requiring him to do that and there's nothing in the statute that accepts his conduct from what it's providing. He's filed suit against my client and now he's demanding notice. He can't demand notice. Once he files the lawsuit he cannot demand notice anymore. That statute is crystal clear and unambiguous. And I understand the Court's hesitation to enforce it as written but Mr. Brown admitted it's unambiguous, he's never argued it; not in the papers not here today. And so an unambiguous statute I think the case law is very clear, the Court should apply it at written, the end. And if you go to the legislative history it does say if the builder is sued for any reason it's over, it's over. They don't get notice, they can't demand notice anymore.

So, I don't want to beat a dead horse but I think my position is very clear, clear as the statute I hope, and I think Mr. Brown cannot demand notice. He can't continue to demand notice. I understand it wasn't a focal point of the last hearing so the Court -- it wasn't squarely before the Court and I think that's -- that's fair based on Mr. Brown's objections that Mr. Salzano kind of brought it up at the hearing but it's certainly squarely before the Court today. Now, Mr. Brown's arguments about latches and waivers, those are --

THE COURT: Well -- by the way, just so that we are all clear, this is nothing

new by AB125; it's just a different subsection. It was subsection six --

MR. GAYAN: It just moved up.

THE COURT: -- before 2015.

MR. GAYAN: That's right.

THE COURT: Right.

MR. GAYAN: And Mr. Brown criticizes the association for not citing any case law to support his position. Well, I don't think we have to, I think the statute says what it says. He has no cases to support his position to say that he can haul off and file, sue the association, force us to defend a case that he initiated and then still come in and demand a notice. And I understand the Court's concerns about them challenging the notice, but I think it's pretty obvious what every other builder does for the most part they assert it as an affirmative defense and they raise it once they're in the case and the case gets stayed and you go fix the notice if there's a problem, right? Well, there's a reason they do it that way. Because of this statute that's why. So, they can't come running in to court and suing homeowners without consequences. Mr. Brown wants consequences for my client but none for his own. So the statute is clear, it should apply, he should not be able to demand anymore notice, we should be able to move forward with the case and get to the merits of the case. These are real issues going on out the towers, we should be able to address them and that's what the courts are here for instead of fiddling around with pre-litigation notice requirements. Now, I understand this is important, I'm not belittling the process or the statutes but the homeowners have a right to get into court once they meet the requirements and believe they've met that. And Mr. Brown has waived that requirement by filing suit on behalf of his client.

Now, he argued about latches and waiver. Frankly those -- hopefully

the Court doesn't give much credence to that. This is affirmative defense number three in our answer, failure to state a claim on which relief could be granted. We've asserted this defense, this is a defense. Failure -- 12(b)(5), and 12(b)(5) defenses are non-waivable under Rule 12. So we haven't waived anything, there's no latches. He hasn't been prejudiced by anything. Latches and waiver are when you sit around and you don't bring a claim for however long but then you have -- the Court has equitable tools to deal with that if there's severe prejudice to the other side because someone waited around forever after they knew about it. So, that's not what we're talking about, we're talking about a defense that was in our answer, affirmative defense three. We don't have to be specific about every reason he failed to state a claim upon which relief can be granted. That's not required. So, for him to say that we waived it or we waited too long to raise it that's just not supported by the law, the rules, anything. But if the Court has any questions on that I'm happy to address that further, but frankly this is a non-waivable issue.

It's in our papers but I'm just gonna mention here today. AB125 the title of the act is the homeowner protection act of 2015. So, I think the Court should keep that in mind with what we're doing here. But this statutory scheme is still even as amended intended to protect homeowners. I just think that's getting a little bit lost in the type of minutia that we're getting into here today, but this entire scheme is intended to protect the homeowner. And the only other thing it's designed to do is to ensure a reasonable opportunity for Mr. Brown's client to determine and make a business decision about whether they want to elect to repair before facing these claims in Court. That's it, I think t hat's it. So, I would just urge the Court to -- I know lawyers we often, you know, point judges to all sorts of little details but I would urge the Court to maybe take a step back and consider what this whole scheme is

about, who it's designed to protect and what it's designed to preserve Mr. Brown's client and it's only a reasonable opportunity to repair after he's received notice.

Now, I'm -- let's dig into the statute one more time here. And I'd like to take a look at NRS 40.650. And if you'll look at sub -- sub two because I think something that has not come up here today and that it -- everybody danced around the issue at the last hearing is the builder's response to the Chapter 40 notice. And Mr. Brown has shielded that from the Court under a claim of some of settlement or mediation protection. I don't think it applies. In a minute here I'm gonna ask the Court to attach to the record -- I think it has to be part of the record is summary judgment is being considered by the Court. And I'll -- before I present anything I'll explain why.

THE COURT: Mr. Brown, did you have an objection?

MR. BROWN: Yes, Your Honor. There is zero reference in the opposition to whatever criticisms or comments that counsel wants to make to the document that my client provided as a response to the Chapter 40 notice. If counsel wants to ask this Court to attach as an exhibit to the record a copy of a document which has been specifically identified as being protected from disclosure then he's going to have to file a motion, Your Honor, and not expect me to respond to his attempt to violate what I had deemed to be a protected document. He cannot just ask this Court to unilaterally make a determination that it's going to take a document which I have specifically stated as protected from disclosure and use it as part of an argument that (1) wasn't raised in the opposition and (2) he wants to now argue in open court as to his criticisms of whatever the response was to their Chapter 40 notice, Your Honor. It's inappropriate.

MR. GAYAN: I'm happy to continue the hearing today. We can supplement

that. But I'd like to read the statute and explain to the Court why this document --

THE COURT: I'll listen --

MR. GAYAN: -- has to --

THE COURT: -- to what --

MR GAYAN: -- be on the record.

THE COURT: -- he has to say, but I understand the position. Go ahead.

MR. GAYAN: Okay. Your Honor, let's take a look at 40.650 sub 2. "If a contract" -- and these -- this is describing the effect and the title -- the second part of the title: "Effect of failing to take certain actions concerning defects." And this is dealing with a contractor. "If a contractor, subcontractor, supplier or design professional fails to (a) comply with the provisions of NRS 40 -- or excuse me, "40.647(2)" -- we'll come back to that in a second. "make an offer of settlement, make a good faith response to the claim asserting no liability, agree to a mediator or accept the appointment of a mediator pursuant to NRS 40.680 or participate in mediation then the limitations on damages and defenses to liability provided in NRS 40.600 to 40.695 do not apply and the claimant may commence an action or amended complaint to add a cause of action for a constructional defect without satisfying any other requirement of Chapter 40." Okay. So, why is that important? Well, first sub part 2(a) says Mr. Brown's client needs to comply with 40.647(2). Well, what statute is that? That's the statute discussing what his response has to do. We take a look. 647, response to notice of defect. "The contractor has to provide a response in writing within ninety days." This is sub 1(a). And then sub 2(a): "The written response must respond to each constructional defect in the notice and must state whether the contractor has elected to repair or cause the defect to be repaired." All right, and then the next part: "May include a settlement offer."

That's 2(b) and 2(c): "May disclaim liability for the constructional defect and state reasons for such a disclaimer." Then if we go to sub part four of the statute: "If the contractor has elected not to repair the constructional defect the claimant may bring a cause of action for the constructional defect."

So that being the case, I don't know how the Court could even decide (1) if any of the Chapter 40 defenses are still available to Mr. Brown or (2) determine whether we can proceed with our case for the defects unless you see the Chapter 40 response. How do you know if he's complied with this? How do you know? The Court doesn't know. He's hidden it from the Court by calling it a settlement communication. It's a statutory response to our notice. That would be like if my client had put mediation and settlement communication on the notice to prevent him from ever asking for deck relief. That's ridiculous, of course that can't be done. You can't shield it from the Court and hide it from the whole proceeding and then come in and ask for summary judgment against my client saying our notice is defective and he's entitled to notice. And frankly Mr. Brown's objections -- he discussed the content of that response at the last hearing and I'm happy to provide a page and line on that where he took umbrage with something that Mr. Salzano -- and he said, well, now that Mr. Salzano is talking about it we did object to all of their defects and we explained why we objected to all of those defects. That's in the last transcript. He's -- Mr. Brown started talking about his settlement and mediation protected document which frankly -- and I'll file a motion if we have to, but I would ask that this hearing be held in abeyance for the Court's decision while we sort this out because I think this is a critical document that has to be in the record. If we're gonna have summary judgment entered against my client on this and we're gonna have to take an appeal this document has to be in the record. And frankly based on the statute I just read

40.650 I don't know how the Court could possibly determine if Mr. Brown's defenses are still available to him or if we're even required to continue with this charade before we commence other defects claims.

THE COURT: Okay. Can I ask you something? If we -- it -- I think what I have -- what I have decided before was I had issues with the notice. I think that the contractor has a right to challenge the validity of the notice. And we're here now because I accorded your client an opportunity to amend the notice, okay? And we're here on I think that. So, I guess my problem with your argument so far about the contractor not abiding by Chapter 40 is that don't we need to decide -- I mean, I appreciate your arguments on 40.645 subsection 4, but let's take a step back from that for a moment. Don't we need to go with whether or not the notice is valid or not -- if it's sufficient or not before we have to worry about the contractor's response?

MR GAYAN: No, no. And I'll tell you why. Because he's already disclaimed liability for all four of these defects. That's done in writing. That's why I'd like the Court to see it. He's disclaimed liability and under 40.647(2) sub 2(c) it allows him to disclaim liability and he's done that. But under sub 4 once he's done that we're done, we move along, we can commence an action. So, he's in here disclaiming liability for all the defects. Not saying he didn't have enough information to decide and I can't even make my election under 40.647(2). He's not -- the response does not say that. It contains his objections and why he thinks our notice is, you know, a standard Chapter 40 response. But he in fact disclaims. We had contractors that respond and they -- they rolled the dice and they say you know what? We don't have enough information; we can't even provide an intelligent response. Well, that's not what Mr. Brown's client did, he disclaimed. He visited the property and disclaimed on the window assemblies and everything else and disclaimed. So, once

he disclaims under this statute -- and I think he's complied with the statute. I'm not saying under 40.650 sub 2(a) that he's not complied with the response requirement. I think he has complied with the response requirement. But he's disclaimed.

And so if he's disclaimed and the whole purpose of the scheme is to protect the homeowners and ensure a reasonable opportunity to repair for the builder and he's already disclaimed and said he's not gonna repair the defect what are we doing here? What are we doing? And he was successful in shielding that document from the Court at the last hearing and so I'm not making any comments about the Court, but I don't think you had a full record the last time. I think you need that document and I don't think it's protected by any settlement protections that are cited on the document, 48.150. It doesn't fit under anything there because actually 48.150 only protects communications that involve an offer to resolve a claim. He told us to go fly a kite. He didn't offer to resolve anything, he disclaimed. How is that a protected settlement communication? There's no settlement protection in the new Chapter 40 either. He's got nothing to protect us from the document. It's a statutorily required response that the Court needs to evaluate to determine whether his defenses are left and whether the HOA can commence with their lawsuit about the defects and get to the substance of the case.

And so I -- I'm happy to not publish it today. If the Court would like a motion on that I'm happy to file a motion, but I think that's a document that absolutely has to be in the record that the Court needs to take a look before it renders a decision. Now, one other wrinkle to this whole issue. He hasn't even responded to the amended notice, he hasn't responded at all. So, same issues there. We don't even have a written response to the amended notice. He asked for a stay right away and what did he do during the stay? He prepared this motion. He

didn't prepare his written response, he didn't ask to come inspect again. And we gave all sorts of new information in the report attached and you guys -- you and Mr. Brown went through it a little bit and we'll go through it some more. But he didn't get this new information and say, oh wow, we'll now -- now, oh, your guy says you can actually see the missing flashings without doing any DT, you can just walk along and see this metal that's supposed to hang out around the windows to keep the water out, you can't see it. So, it's pretty easy to see from a visual inspection. He didn't ask to come back out and take a look, he didn't do a written response, he used the stay to prepare this basically renewed motion for summary judgment asking for our whole case to be thrown out. Frankly it's got no merit on the window assembly issue and all of those issues. And I'll get in to the fire blocking and the sewer a little bit. But we recognize there are some issues with those and that's why I said I think the main issues are this 645 sub 4 and the window assembly.

But in any event, we've got no written response from Mr. Brown so same issue. I'm not sure how the Court can decide whether he's complied with the statutory obligations to provide a written response to our Chapter 40 notice whether he's provided a compliant response. And if he doesn't provide a compliant response all of his Chapter 40 defenses are gone which includes demanding notice from us. So, I don't know how we're even here. I think he's put the cart before the horse. He's skipped steps; he's shielding his response from the Court because I think it hurts him. He's disclaimed liability, what's left. He said we're not repairing; move along, nothing to seek here. So, I don't understand why we're still here and why we're fighting about this. Why he can even demand a better notice once he disclaims liability. Like I said, he never said I don't have enough information to make my election, he said I disclaim liability for this defect in its entirety. So, I think

this is a complete sideshow that we should -- the motion should be denied and we should move along to the substance of the case and Mr. Brown can make all of his defenses before the jury. I think it's also worth noting, the Panorama Tower entities they're assuming my client had been liquidated. That was something -- so, I'm not sure who's making repairs, if Mr. Brown is pretending that repairs might still be made that some entity might make an election but I don't think there's any entity left to even make an election to do anything.

All right. So, you know, I'm gonna point out something and I understand this obviously is not binding. There's no order from the last time we did this with Your Honor and Mr. Pisanelli and KB Homes and Mr. Coulthard and I were down here for however many days for an evidentiary hearing on whether our notice was good enough on this yellow brass stuff. You probably have very un-fond memories of it all.

THE COURT: Mr. Brown.

MR. BROWN: I object, Your Honor, to counsel's reference to any other ruling by this Court and any other case, Your Honor. It is not part of the opposition. I received notice of counsel's association as for the Defendant yesterday afternoon. And so here counsel is today who is now asking this Court to take I guess judicial notice of a ruling that you made in other case. It's nowhere in the opposition, Your Honor. This is sandbagging at its finest to bring up issues that are nowhere to be found in the moving papers, Your Honor. We object to any reference to any other ruling by this Court, Your Honor.

THE COURT: Okay. Go ahead.

MR. GAYAN: I'm not asking for judicial notice. I'm reminding the Court of what it wrote the last time it considered a similar issue.

MR. BROWN: Objection, Your Honor. This is not part of the moving record.

THE COURT: I understand. I'm gonna go ahead and allow it. Understand, guys, I really listen to what you guys have to say concerning your objections and keeping stuff out particularly when we have a jury, but I can ferret thing out myself so -- but nevertheless you're making your objection for the record. I'll go ahead and listen to you, counsel.

MR. GAYAN: Thank you, Your Honor. And just for the record, this was in the matter styled as KB Home Nevada, Inc. versus Adams, et al. In this department case number A11-647351 --

THE COURT: I was gonna say --

MR. GAYAN: -- D --

THE COURT: -- if Mr. Pisanelli was involved it's been quite a while. I don't think I've seen Mr. Pisanelli in this court for quite a while.

MR. GAYAN: It was quite a while ago. But in any event, the order is dated July 31, 2012 and it was issued after a preliminary injunction hearing, testimony from several witnesses. And it was all over whether the notice was sufficient to allow the homeowner to proceed. And I'm not gonna get into all sorts of details, but the Court had some conclusions of law that I think are germane to what we're talking about here today. And I don't think your conclusion -- the Court conclusions have changed since 2012. I don't think --

THE COURT: Okay. Well, just understand 2012 is before AB125 so things may have changed. I don't know. I haven't looked at that decision in years.

MR. GAYAN: I'll read it to you and you can decide and I'm sure Mr. Brown will comment. But certainly not in -- not in the new statute. I don't think there's anything in the new statute that moves the needle on this issue. It says: "If the

contractor decided not to avail himself of the opportunity to repair" -- which is disclaiming like Mr. Brown's client did, "the claimant would have the right to sue and petition the Court to exact the appropriate penalty." And then the next line: "The burden of verifying a defect is upon the contractor not the claimant." Emphasis on not in your order. I don't think there's anything in the new Chapter 40 that changes that. There's nothing. If you take a look -- and Mr. Brown spent a lot of time on this at the last hearing but mentioned it at least a few times that Chapter 40 -- the new Chapter 40 has removed the expert opinion requirements and removed the valid and reliable sampling language. That's all gone, that's all gone. And nothing has replaced it. And there's no language that says a homeowner needs an expert opinion. There's nothing that says you need a valid and reliable sample for anything. There's nothing that says you can't extrapolate. It doesn't exactly say any of that, it just says -- like Mr. Brown said probably fifty times, you have to specify the defect, the damage and the injury including its exact location. So, I'm just gonna put that out there since were here on summary judgment and my client's facing having their whole case thrown out or at least big parts of it that I don't think what Mr. Brown is asking for is found anywhere in the statute as far as expert reports, this and that in extreme level of detail.

I understand they got tighter with that language and they do require more specificity. And I would say, yes, maybe as far as extrapolation goes you can't just say the defect is in twenty-five percent of the homes because I don't know which homes, right, and so maybe that doesn't meet it. So I acknowledge that, I'm not arguing something different from that. But certainly -- the language certainly does not preclude a homeowner or an association from saying this defect is everywhere. It's everywhere. And it's a lot like the yellow brass defect, we said it was

categorical, the Court agreed and if we say it's everywhere then they know where to look. Everywhere. We've done that. Go look at every window. If you look at our notice in the report we provided pictures of all four sides of both buildings. Look at all the windows. Those are the windows. They know which windows. I mean, come on. He said we've had the plans all these years so -- so have they. They made the as-built plans. We didn't make them, he drew them up. His client drew them up. They know what windows we're talking about, they know which windows. It's every window in the pictures and we've provided and it's every window assembly. It's the top, the head flashings at the top of every window. The sill pan flashing, the bottom of every window. I don't know how much more exact we can get on that issue.

But in any event, the point about -- talking about the Court's prior order, the burden on verifying is on his client. We don't have to --

THE COURT: Isn't the --

MR. GAYAN: -- prove it.

THE COURT: --isn't the issue of verification when it got down to -- because they had specific language in NRS 40.645 about extrapolation that, you know, it can be extrapolated out to the un -- you know, the unnamed claimants and then that would be where the developer would send a notice to everybody, do you want to be part of this? And then they would go and verify whether or not the claim --

MR. GAYAN: Right.

THE COURT: -- whether or not the defect was in the unclaimed --

MR GAYAN: The similarly situated.

THE COURT: Right.

MR. GAYAN: It's all gone.

THE COURT: Right.

MR. GAYAN: It's a ghost.

THE COURT: Right.

MR. GAYAN: Including any language about experts or valid and reliable samples. All gone. Completely gone. So, who's living in the past now? I think Mr. Brown is living in the past. He wants to go back to New York and high school or wherever he wants to go. But that language is gone, the word expert is not in this statute. It's not required for a notice, it's not required at all. But we've still done it, we've done it. We took the opportunity, we heard the Court's feedback and frankly the Court's order in this case was very specific saying go to the plans, go to the manufacturers installation.

THE COURT: Well, I didn't just limit it to that, I had just indicated you just don't have to destructively test, do bazillions and millions and millions of dollars in order -- I mean, to -- especially in this case when you had a lot of design claims of design defects.

MR. GAYAN: Right. I completely agree. And so we've done that. And if you take a hard look at our amended notice including the expert report -- and I'll get into it a little bit more, we say where the defect is. The top of every window, the bottom of every window. That's the design -- or the window assembly defect. That's where it is. Where's the damage? Down because gravity pulls water down. So, it's in the metal right below every window. What else can we say? So we've said where it is, where the defect is and where the damage is. And frankly, you know, take a look at the other part of the notice requirement. Mr. Brown is just skating right by this one. 40.645 Sub 2(c). Mr. Brown's just living in Sub B, he loves Sub B but he hates Sub C. He's not talking about Sub C. Sub C says -- so Sub B is the specific detail about the defect, yada, yada, and then the exact location, right? Sub C says: "Describe in

reasonable detail the cause of the" -- so reasonable detail is still in the statute. It's not gone.

THE COURT: With respect to cause.

MR. GAYAN: With respect to cause. "If the cause is known and the nature and extent that is known of the damage or injury result." We don't -- we don't have to, it's if its known. We've told them what we know. He knows everything we know and now the burden is on him to go verify before he decides whether to repair. And oh by the way, he's already disclaimed so he doesn't want to repair. So, we're kind of going in a circle but I think we're at the end, we're at the end. Once he disclaims and says I don't want to repair I'm not sure what we're doing with all of this.

Now, just to point out -- and this is in the Court's order so it's in the record but I guess since we're here talking about it I'll just reference it with a little more specificity. This is page 15 of the Court's findings of facts and conclusions of law entered in this case. Page 15. And this is where the Court is kind of dealing with the issue -- like Your Honor just said a minute ago, you don't have to spend millions of dollars to DT every single window. I'm gonna start on line 17 with second is in italics there. "Second. Requiring each defect, damage and injury to each residence to be specifically identified does not necessarily lead to absurd results, occurrence of prohibited costs or required destructive testing. Such is especially true when one claims the deficiency is the design of the windows and their assemblies as to these -- as the association does here. For example, if there's a defect in the units design the association or other claimant can identify the exact location by use of the building blueprints or plans. Defects from the window assembly [indecipherable] through the manufacturers plans, sketches or diagrams." And I'll end there. And because the Court addressed it in its order I'll just say this

now. We're only talking about common elements here; we're not talking about getting inside of the units so there's no standing issue. The HOA understands these windows are all part of the common elements. Mr. Brown has certainly not argued otherwise in his papers so that is not a concern here today, but standing he hasn't raised it. But it's pretty clear Unit 300, the unit that had the window repaired, the HOA paid for all of those repairs. That's a crystal clear signal that these are common elements, this is not inside the unit. And I think common sense tells you they have to be common elements too even without diving into the CC & R's. I can't Imagine any high rise building association wanting each individual unit owner maintaining their own windows in who knows what fashion. So --

THE COURT: Oh well, you know that we have seen CC & R's that have been, well, frankly goofy where they indicate that the line of the common -- of the individual unit is twenty feet above a roof line or I've seen it on the door that if you -- the paint is outside of the door where it's common area elements but if you take a hammer and nick, that little nick area is an individual unit. So, we've seen some goofy things. I think --

MR. GAYAN: I'm --

THE COURT: -- you know that.

MR. GAYAN: -- I'm sure Your Honor has seen pretty much everything. And I can't speak to the CC & R's personally but I've talked to Mr. Lynch, he's talked to Mr. Saab who's general counsel for this association, they've looked at it and they said, of course these are all common elements of what we're talking about here today. Fire blocking, insulation, window assemblies, all this stuff, these are common elements. But it's not anything before --

THE COURT: You know --

MR. GAYAN: -- the Court today.

THE COURT: -- I have to tax my memory here. But I don't recall there being really a discussion that these were common area elements, but I thought we were talking about individual units on a lot of this stuff. But in any event, I'm listening. I mean --

MR. GAYAN: Yeah.

THE COURT: -- I see what you're saying but I have to see what CC & R's say to say whether or not the outer window is a common element which makes sense in a high rise. I get it. But again, I've seen goofy things. And the inside being an individual unit so --

MR. GAYAN: Sure. Understood. Because it's not part of Mr. Brown's motion, it's not there today. I only mentioned it because the Court dropped a footnote or two in its prior order about standing. And I agree it's in the papers and in the prior hearing attorneys are little fast and loose with the term unit which is, you know, it's a defined term. So, we're talking about residences and units versus appurtenances and I think these are all appurtenances to what we're talking about here because these are all common elements, but in any event not before the Court today. He's not saying that we don't have standing so I don't want to go down the rabbit hole. And I'm sure if Mr. Brown think that it has merit he'll raise it later.

THE COURT: Okay. Well, that was probably why I put it in some footnotes that I just wanted to make sure what I understood. So --

MR. GAYAN: Right.

THE COURT: -- anyway.

MR. GAYAN: Right.

THE COURT: Okay.

MR. GAYAN: Fair enough. But I just wanted the Court to understand that that's not an issue, it's certainly not an issue for today in any event.

So, just going back. I just read the Court's order. It talked about going to the plans and blue prints, manufacturer's installation instructions. So, Mr. Lynch's office heard the Court oud and clear and that is exactly what they did. And if we take a look at the amended notice -- and this is Exhibit -- I'm gonna use the one attached to my brief. But it's Exhibit D to the opposition. And Mr. Brown kind of skipped over what that notice actually says and focused on the expert report attached to it to try to make most of his points, really all of his points. But I --

THE COURT: It's Exhibit D?

MR. GAYAN: Exhibit D to the opposition. But, yeah, I would urge the Court to take a hard look at the actual notice document too not just the expert report. I don't want to start before Your Honor gets there.

THE COURT: Yeah. Let me get there to Exhibit D. Okay.

MR. GAYAN: Okay. So, Exhibit D and the preliminary language on page 2. But I guess get to page 3; this is where the heart of the issue is for the window assemblies so residential tower windows. We're talking about the residential tower. Is there -- there is some -- this is a mixed used tower; there's a few retail spaces below. So we're talking about the residential part of this, I think that's been clear all along. And as the Court acknowledged we're alleging defective design. The flashing that was required to be there, the head flashing and the sill pan flashing both missing, their required by the code. And that's gone into here. You see the 2000 international building code, ASTM and ICBO standards and the EIFS manufacturer's installation instructions. All of those things require the -- both of these types of flashing, not in the plans. So, we looked at the drawings, the initial

drawings. And I think what's critical -- if you look at the expert reports, our expert actually looked at the as-built plans which is pretty important because that tells you how we built them, right? The Court's very familiar with as-built plans. But those are put together by Mr. Brown's side of the table here -- side of the room. And they show that there is no head flashing and no sill plan flashing according to all the experts, according to our expert in violation of code and the manufacturer's installation instructions. So, that's what we have. And those as-built plans are for every single window. The top of every window and the bottom of every window. Head flashing is a little -- well, we'll get to it [indecipherable]. I'm getting ahead of myself here. I want the Court to follow along. We're talking about pan flashings and head flashings.

So, another thing I'd like to just mention and Your Honor doesn't necessarily need to flip there, but Mr. Brown's claim that head flashing is some kind of a new issue is just absurd. He filed his motion last year asking for more details about the defects and now we've provided more details and he calls them new issues and new defects. That is just absurd. And it -- and I'm just gonna read straight from our initial notice which is what the Court considered the last time as it relates to tower windows. The notice says: "The window assemblies in the residential tower units were defectively designed such that water entry and 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." Well, guess what a head flashing is? "It's another drainage provision." So, now Mr. Brown is here saying you gave me more detail. The detail I demanded -- I have to be specific about every defect, about every location, about every

damage. So, he demands specificity and when we give him more specificity he calls it a new defect and the whole thing should be thrown out. I mean, it's just -- it really is absurd, Your Honor. The same with this moisture in the wall related to the insulation in the fire blocking. That's more detail on the damage that's known. That can happen. He wants more detail. We give him more detail and he calls them new defects. That is ridiculous. So, of course we're gonna give more detail. The Court ordered us to give more detail or go home. Those were our options. So, we have him more detail and now Mr. Brown doesn't like the more detail which is pretty obvious from his presentation here today.

Now, the top of page 4 of our amended notice, back to Exhibit D. Mr. Brown spent a lot of time on this and he was really focused on the expert report and parsing out words from the expert report attached to this notice but he never actually came back to this part of our notice. First paragraph, line 1: "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, now happening, corrosion damage to the metal parts and components within these assemblies as described and identified in Exhibit A the resulting damage to the metal components of the tower structures presents an unreasonable risk of injury to a person or property straight from the statute." You guys -- you spent a lot of time with Mr. Brown on that language, it's right here. He never brought you to it and I wanted to make sure you saw it. It is in the notice; that is what we're alleging. We're alleging this situation creates an unreasonable risk of personal property. You know why? Unit 300 had water coming all the way in the unit. They opened the wall cavity, there's mold all over the place. I think mold is pretty significant.

Now, Mr. Brown wants to say, well, you know, the statute just applies to electrical and fires if the building is gonna burn down. Where is that in the statute?

THE COURT: Oh, I don't think he said that. I just used it --

MR. GAYAN: I --

THE COURT: -- as an example.

MR. GAYAN: He did, he absolutely said that.

THE COURT: Okay.

MR. GAYAN: He said it's only to these very extreme situations where -- that -- are considered an unreasonable risk. We can't say that water getting in the walls is an unreasonable risk that, oh, you know, that's not allowed. Well, you know what? That's for the jury to decide I think. I don't even think the Court need to think too much about that frankly. We say it is, he says it isn't. Okay, at a minimum there's a triable issue of fact there, right, so I don't think the Court needs to decide whether it is or it isn't today at all. That's ultimately for the jury if we get there. So, I just wanted to point the Court right to the notice, what it says. Checks all the boxes for 645.

Now, as far as the -- the actual report attached here. And I apologize; I'll try to go through it quickly. But Mr. Brown was pointing the Court to certain language he didn't like but I [indecipherable] to page 4 of the expert report which is Exhibit A to Exhibit D. If you'll follow that.

THE COURT: Okay. Is that the same report that he was --

MR. GAYAN: Yes.

THE COURT: -- I mean --

MR. GAYAN: Yes. It's the same report. It's been a long argument. So, this is the defect list. This is what it says at the top. Are you at page 40, Your Honor?

THE COURT: Okay.

MR. GAYAN: Okay. Great. So, the first one here we have defect 1.01 the omission of pan flashing at window assemblies. And I would encourage the Court to look at this and what we're actually saying before deciding whether we've complied with NRS 40.645. But we're pointing our specific plans -- specific sheets of plans attaching certain ones to the notice to tell the builder exactly what we're talking about so there can be no confusion and describing that the pan flashing is required and it's not there. And I -- maybe just if the Court would leave its thumb on page 4 and flip to pages 9 and 10. I'd like to look at these first. This is related to the pan flashing. Just so what -- what information we gave them. So, page 9 these are the plans. This is the ship drawing, the as-built. This the as-built prepared by Mr. Brown's client. And it's kind of hard to see but Your Honor do you see the little notch that comes out on the right side there? That's the sill and then there's supposed to be pan flashing -- sill pan flashing on the top of that rectangle block. And if you flip to the -- page 10 these are the EIFS manufacture installation instructions. And the fourth arrow from the bottom of this diagram says pan flashing. Do you see that?

THE COURT: I see it.

MR. GAYAN: So, it points the arrow right there. So, it's flashing right along the sill of the window and then, Your Honor, you can see how the flashing bends down and out a little bit to guide the water out and away from the building. Well, if you look at the ship drawing on page 9 that's not there and that's what our expert is saying. So, we've done exactly what the Court suggested. Not that it was the only way to do things but that's what we -- my client elected to do. We've got the manufacturer's installation instructions that show the pan flashing and where it's

supposed to be and we have the as-built plans that show that that is missing.

And, Your Honor, we also have -- pages 13 and 14 are actual photographs from the site that show the sill pan missing in actual construction. Additional units, those fifteen units we've talked about, it was -- look there, they're missing from all fifteen. So, I know there's no extrapolation but we don't have to extrapolate, we're saying it's in all one hundred percent of locations. Every window sill in the residential tower is missing this sill pan flashing and that is what's causing water to get into the interior cavity of the wall and corrode the metal components in the walls. I don't know what more we could possibly say. Mr. Brown knows exactly where to look. The bottom of the window and under the window that's where water goes, it goes down.

So, that's the sill pan flashing. Then -- oh, and just -- Your Honor, just to make sure this isn't lost. It's kind of buried in the middle of the paragraph on page 4 of the report. Hopefully you kept your thumb in there. It's the -- let's see, fourth line up on the far right and then there's a sentence that starts with "the lack."

THE COURT: Okay.

MR. GAYAN: Sorry --

THE COURT: Which --

MR. GAYAN: -- second --

THE COURT: -- paragraph?

MR. GAYAN: -- second paragraph. Second paragraph, fourth line up from the bottom. Right at the far right of the line that says --

THE COURT: The lack of complete?

MR. GAYAN: Yeah. "The lack --

THE COURT: Okay.

MR. GAYAN: -- of a complete pan flashing can also be visually confirmed by observing the window sill from the inside of the units." So, Mr. Brown can verify pretty easily if he actually wanted to. He could go around and look at some units and see that there is no sill pan flashings in any of the actual locations. We say it's in a hundred percent; it's for him to verify.

THE COURT: You mean his client to verify.

MR. GAYAN: His client. Sure. Well, you know, that's -- one other thing. I talked about admissible evidence but we don't even know who showed up for the builder if anyone other than a lawyer showed up at the Chapter 40 inspection. We don't have any of that information. I tried to get it but it's kind of a mystery. So, Mr. Brown puts things in his affidavit about what the builder saw at his inspection, but I don't know who -- I don't think the Court knows. Nobody knows who attended for the builder and actually looked at anything. So, to me it's unclear whether any representative for the builder was actually there and that's not -- certainly not in the record. So, in any event it can be confirmed through visual inspections pretty easily by Mr. Brown if wants to -- if his client wants to verify this defect and actually do something about it but they've already disclaimed so I'm not sure what the point would be.

Then flipping to page 6 of the report, Your Honor. And this is the head flashings. I've already kind of talked about that. He claims it's new. We already said that the window assemblies are defective and they're missing at various components to keep water out. Here's another component. This is the more detail he wanted and now he does not like it. So, pages 11 and 12 are kind of the same thing. It's another [indecipherable] another shop drawing and another manufacturer installation instruction. And this one is a little bit harder to see. It's kind of -- on

page 12, it's kind of the middle arrow and it's pointing to the top of the glass pane. I don't know if Your Honor can see that but it shows exactly where the head flashing is supposed to be. And if you look at the shop drawing on page 11 it's just simply not there and that's what the caption for the -- page 11 diagram says. EIFS shop drawing detail number 4 showing no head flashing. Now, in addition to that level of detail we have various photos. Pages 15, 16 and 17 all photographs with captions saying that these pictures show the omission of head flashing, all three say showing omission of head flashing. So, there it is. And interestingly the last two photographs, pages 16 and 17 just show the outside of the building. Apparently you can see it just looking at it. So, Mr. Brown's client could pretty easily go out there and look at the window and dispute it if he didn't think it was a real defect or whatever he wants to do [indecipherable] repair which he's already disclaimed he is not going to repair.

So, I think it's pretty obvious that the homeowners association has followed the Court's guidance, heard what Your Honor said, went back and looked at the plans and looked at the details, looked at the manufacturer's instructions, looked at the code, cited it all, provided pictures of it, everything. And then Exhibit B to the notice these are the photographs that I had mentioned before. It's just all the residential windows, there they are. They know where the residential windows are. Here are pictures showing the residential windows. And if they don't like the fact that we say it's all locations I don't know what they do about that. They could say I don't want to repair and let's go litigate because I don't think your case has any substance. Fine, let's go litigate that. But Mr. Brown doesn't even want to let us get to that point.

Your Honor, as far as the installation and the fire blocking I don't want

to spend a lot of time on that. You know, I don't think my -- I don't think my client did a whole lot to amend that part of that notice for the reasons that they already said that that part of the -- that defect does require opening up the wall and then taking a look. They're not gonna spend $4 million before they get -- you know, they're even able to file a claim. So, they just did not do that. And one thing I will point out that didn't happen the last time they inspected several units and did open up and did identify there's actually thirteen unit where they found missing fire blocking installation at the ledger shelf cavity. So, I don't think the Court can grant summary judgment for the units that we actually inspected and found it to be missing. I don't know what more detail we could provide on that.

THE COURT: Have you identified that in your opposition? I can't remember.

MR. GAYAN: I don't believe we have and I asked Mr. Lynch if that information has been provided to Mr. Brown previously. I don't know. We could certainly provide it before he does the second inspection if he actually asks for one before he responds in writing. But, you know, that information is there. Mr. Brown hasn't disputed it. He keeps talking about the seventy-six percent, right? That's the seventy-six percent; it's thirteen out of seventeen. That's where the seventy-six percent comes from. So, Mr. Brown doesn't dispute the seventy-six percent, he just saying we can't extrapolate it. Okay, fine, if we can't extrapolate it -- and I'm not gonna argue that we can here today, at a minimum we've got thirteen units where we opened it up and found that there's no fire blocking installation at the ledger shelf cavity. I'm not sure how Mr. Brown can say that there's -- summary judgment is appropriate for those thirteen units. So, if the Court wants to throw out that defect for every other unit for those thirteen, okay. You know, we object but we understand the Court's prior ruling and interpretation of Chapter 40 in its current state. And so,

you know, there's not a whole lot we can do about that but the thirteen units is where we do have it. And there's I believe eight units where it's missing from the steel stud framing. So, at a minimum we should be able to pursue for the handful of units that we actually inspected and verified. I'm happy to provide that information with Mr. Brown if it hasn't already been provided to him. But I don't believe summary judgment is appropriate for the units that we tested.

As far as the sewer defect goes that kind of is what it is. Mr. Salzano makes all of those arguments the last time. I'm not gonna rehash it all, I'll go through it briefly. But frankly the sewer line broke right around Christmas, they called the fire department. It had to get fixed right away, it was a major problem. And frankly I don't think anything in Chapter 40 requires that we give them notice before we fix that type of a problem. You just --

THE COURT: 40.670 doesn't?

MR GAYAN: It's just not in there. It says if you give a notice that involves an eminent health and safety threat then this is what you do. Well, guess what? They didn't. They had to fix it right away.

So, let's just think about it practically, Your Honor. So, let's say we did give a notice.

THE COURT: Oh, I understand practically speaking. You may have issues. But --

MR. GAYAN: Yeah.

THE COURT: -- again I'm concerned though about following the statute and unfortunately the statute doesn't talk about like you gotta fix it now. You know --

MR. GAYAN: Right.

THE COURT: -- it just talks about -- I --

MR. GAYAN: That's my point, it's not in there.

THE COURT: Okay.

MR. GAYAN: That's my point. That's all -- the only point I'm gonna make on the sewer -- and we'll -- if we have to have the Supreme Court weigh in on that that's fine. But I challenge Mr. Brown and the Court to find anywhere in Chapter 40 -- the new Chapter 40 that says we have to give notice before we go fix a sewer line that spilling raw sewage all over the place on Christmas day. I don't think it's required. It's a health hazard, the fire department was out. They -- it had to get fixed right away. So, let's think about reality though just for the record here. We are thirty-two months removed from the HOA's initial Chapter 40 notice. Imagine if it took thirty-two months to fix the broken sewer line. It's absurd.

So, I understand the statute that Your Honor cited, I just don't think the statute specifically prohibits this situation where the HOA fixes an eminent health defect or situation and then provides notice later, I don't. Now, as far as whether there's evidence to prove the claim later. I understand that might be a major issue for my client about actually proving it at trial if they didn't save any of the records or any of the evidence. I get it. I understand why Mr. Brown asserted a spoliation claim although I'm not sure that's a claim. But whatever the case I understand why he would bring an spoliation type of motion if the sewer defects were allowed to proceed by the Court. I get it. And maybe we can't prove it at trial and maybe we drop it before trial because we have no evidence of it. I don't know, I don't have all of the details. But like I said, I challenge the Court and Mr. Brown to find anywhere in Chapter 40 that says we cannot go fix such a problem and provide notice after the fact. I don't think it's there. And that's all I'll say on that issue.

Now, you know, beyond that we do say there's unresolved disputed

issues and material fact. I think I kind of touched on that, Your Honor. I would encourage the Court to take a very close look at Michelle Robbins' declaration. That's Exhibit 8 to the motion that Mr. Brown had you take a look at earlier. And I said it before, I don't know -- she hasn't looked at either notice, she doesn't say she has.

THE COURT: Exhibit A?

MR. GAYAN: Yeah, Exhibit 8 to the motion.

THE COURT: Okay. I'm there.

MR. GAYAN: Okay. So, here's some things from that document. Like I said, she doesn't say she reviewed either notice so I'm not sure how she could say whether the notice has enough information in it or not which she tries to say. But look in paragraph two it's no listed as one of the documents she reviewed. She didn't review either notice apparently according to her. And this is all we have, a page and a half document from her. She also doesn't say she ever visited the towers even though our amended says, hey look, you can just go walk around and look and see that this stuff is missing on the window assemblies. You could just look around. She didn't do that before or after the last hearing.

Somehow -- and this is interesting. If you look at her statement she now says there's 28,000 windows, you were told the last time 9500. I don't know how the number of windows tripled since the last hearing but apparently Ms. Robbins thinks it did. No explanation for that. That's rather curious. There's a couple of things she also does not say that she could have easily said. She does not dispute that the window assembly design is defective. She never says that. You don't need to read it while we're sitting here but never says it. She doesn't say it's not a defect. She also does not say that the builder is unable to identify the

locations of all the missing head and sill pan flashing. She doesn't actually say that, all she says is -- she basically parrots the statute and says we didn't provide -- in a conclusory fashion she says we didn't provide enough information about the exact location. That's all she said. I don't think an expert can just have these conclusory type statements. I don't think those are helpful for the Court. And with this being the only purportedly admissible evidence to support Mr. Brown's position other than his interpretation of the statutes, there's some serious issues with this document. So, she doesn't say they can't -- the builder cannot identify the locations. Mr. Brown doesn't even say that. He hasn't said it. She also says -- does not say that the head flashing or the sill pan flashing was actually installed in any window in the entire tower. She doesn't dispute anything that our expert says. She doesn't say that they don't have enough information to make a decision, she just says, oh, you didn't give the exact location. Well, frankly that's a legal conclusion for Your Honor and maybe it's a factual decision. I don't know, maybe we have a mini trial on this issue. But there are certain disputed issues of fact between their expert and our expert to what we think about exact location. So, if Your Honor thinks there's disputed facts here you certainly cannot grant summary judgment and we can have a little phase I trial and we'll bring in some experts and we can talk about it. But this window assembly issue is -- it's a big deal. It's a big deal for the HOA. They've spent $200,000 to fix a single unit and they've got 600 units. So --

THE COURT: Is it 616 units?

MR. GAYAN: 616. So, if they have to pay over time $200,000 per unit that association is -- the buildings are gonna be empty, nobody is gonna pay those HOA fees.

So, this is a big deal to the association. This -- you know, Mr. Brown's

down in the details and I get it. I get it, he's gotta fight for his client. But this is a big deal for our client and if they can't get into Court to have this issue addressed this is a major issue for those homeowners and that association. And to say that we have not met the burden -- we've pointed to the design drawings that his client -- Mr. Brown's clients prepared and they show that these flashing components are not there on any windows. Frankly I don't know how that does not satisfy the new Chapter 40 even though it's more onerous. In some respects I think it's more lenient in other respects. Like I said, all those expert requirements and stuff that's -- that' gone. They don't even -- we don't even -- we wouldn't even have needed to do everything we've done. I think we've gone above and beyond. Mr. Brown's client knows exactly what we're talking about, which windows, all the residential windows top and the bottom flashing is not there. Out expert says it, it's in all locations. That's all we need to do, the builder has the burden of verifying. And frankly they went out and looked and they've disclaimed on the window assembly and every other defect.

So, back to my overarching argument, I'm not sure what we're even doing here frankly if they've already decided they're not repairing anything. So, why do they need better notice? The whole purpose is to give them the reasonable opportunity to repair. They had that. I understand the Court's prior ruling. We fixed that, we've complied with exactly what you said was at least one option for us to meet the statutory requirements of identifying the exact location for the window assemblies. We did that and I -- I just think, you know, we satisfied the statute, we satisfied the Court's interpretation of the statute. We haven't satisfied Mr. Brown's interpretation of the statute but I don't expect we ever will and that's why we're here today [indecipherable] dispute. And I'm happy to answer any questions, Your

Honor.

THE COURT: No.

MR. GAYAN: Thank you.

THE COURT: Thank you. Mr. Brown.

MR. BROWN: Peter Brown again on behalf of the Plaintiff, Counter-Defendant builder entities. I was reminded, Your Honor, when I was listening to counsel many times where I don't think, Your Honor, that it matters how many times to me they remake a Star is Born. I don't like the story, it's not enjoyable to me and so it doesn't matter whether it is Judy Garland, whether it is Barbra Streisand or it's Lady Gaga. It's the same story it just doesn't get any better. And I was reminded of that when I heard counsel who yesterday gives notice to my office that he is associating in that what you're hearing today is the same story just a different story teller. And does the different story teller change this Court's perception of what were the original fallacies and errors and problems with the Chapter 40 notice which my clients contend have not been corrected via the amended Chapter 40 notice.

There are a couple of comments I want to clarify by reference to specific documentation. (1) I note with amusement that counsel wanted to rely upon the homeowner protection act for an overall plea to this Court to keep in mind that AB125, the homeowner protection act, is intended to protect the homeowners. That's quite different from the position taken by I presume counsel prior to the new law firm writing on page 15 of its opposition, line 9 where it specifically states: "During the 2015 legislative session the Nevada Legislature enacted the dubiously named homeowner protection act of 2015." So, on the one hand you have one set of the three law firms currently representing the association criticizing the homeowner protection act, the title of it. And you have the newest counsel today

saying, Your Honor, remember that title because that title says it all, my client is supposed to be protected.

Another comment that counsel made is that I today and in my moving papers said that they would never be able to comply with NRS 40.645. Your Honor, the only time that in our moving papers we reference the word never is on page 10 of our reply brief in response to the sewer pipe claim. On page 10, line 18 we did write: "As for the association's sewer pipe claim the association will never be able to comply with its statutory requirements a fact which the association acknowledges." And then I reference see opposition, page 21, lines 16 to 19. I have never said today nor did the moving papers say that it is impossible for the association to comply with NRS 40.645 with regards to their other alleged defects. They can comply; they can identify with specificity the exact location of the defect and the damage and in the injury.

I thought it was interesting that counsel when referencing NRS 40.645 talked about in reference to the statute -- and this, Your Honor, is on page 12 of the exhibit -- our exhibit, I think it's two, an assembly bill number 125 and I think it's the association's Exhibit 4. And I wrote this down because I thought it was --

THE COURT: Page 2?

MR. BROWN: Page 12.

THE COURT: Page 12.

MR. BROWN: And counsel was trying to draw your attention away from subsection B and get the Court to agree that only what applied was subsection C. And I noted that counsel said when he was referencing subsection B he said: "Identify in specific detail each defect, yada, yada, yada, to each residence or appurtenance." And then he quickly jumped to subsection C. The yada, yada,

yada, is exactly the pertinent provisions of that section of the statute that talks about damage and injury which is modified by the word each. And it goes back to the argument that we've been making from the very beginning with regards to this amended notice, Your Honor, that there must be specificity without limitation as to the exact location of each, not just defect but also the damage and the injury. So, as much as counsel would like the Court to disregard that in his reference -- I would -- I guess I would call it a Seinfeld reference to those two particular words. That statute doesn't allow the Court to do that. I also note that in the same reference to the statute counsel said that nowhere, nowhere is the term expert identified. On page 15 on referencing the amendment to NRS 40.647 talking about the inspection that must be conducted: "The claimant must (a) allow the inspection (b) be present at the inspection which we know the claimant was not present at the original inspection." But then also it says: "If the notice includes an expert opinion concerning the alleged constructional defect the expert or representative of the expert who has acknowledged the alleged constructional defect must also be present at the inspection and identify the exact location of each alleged constructional defect."

Your Honor, that obviously references the association's expert and in both the original notice as well as in the amended notice there's an expert report that is attached. So, there is no burden upon my client to identify that and the Court properly noted -- correctly noted that what counsel's referencing was the section of the statute having to do with similarly situated units or residences that no longer applies and does not apply to this particular claim. What does apply is this particular section that requires an expert to be present and that expert must identify the exact location of the defect.

MR. GAYAN: Your Honor, I'm just --

THE COURT: Well, wait just a moment. Mr. Brown, that does say that if the notice includes an expert opinion. I mean, there is one here but --

MR. BROWN: Yes.

THE COURT: -- I'm just saying that's if it includes.

MR. BROWN: Oh, absolutely, Your Honor. And it did, their notice did -- did include that. And so their expert must attend any inspection and their expert must identify the location of the defect. And so I'm bringing this up, Your Honor, because counsel said nowhere in the amended statute is the word expert even utilized. And in fact it is utilized and it puts the burden on the association not the burden on my client and not, Your Honor, as counsel would have this Court do. I doubt this Court's ruling from the KB Home v. Adams case which was a decision that was rendered in -- on July 31, 2012. I've already made my objection to the fact that counsel raised this during this hearing and it's not part of the moving papers and it is prior to the adoption of AB125's amendment to the statute.

MR. GAYAN: Your Honor --

THE COURT: Okay.

MR. GAYAN: -- if I could state my objection.

THE COURT: Well, understand. Your objection?

MR. GAYAN: My objection is his argument about NRS 40.647.1. First of all, it's not even in his moving papers. He dropped that argument about our expert not being present at the inspection. That's not in front of the Court today and frankly he's misrepresenting what I said about that. The Court gathered the substance of my argument was that an expert is not required in 645.

THE COURT: Okay. I'm listening to Mr. Brown now. Go ahead.

MR. BROWN: Your Honor, I'm just responding to what he brought up. If he hadn't brought it up, Your Honor, I wouldn't have needed to clarify his erroneous representation.

Counsel -- and I've heard this now, Your Honor, for years and it is the old song of the Plaintiff's attorneys that because it was the absolute statutory right of a contractor to disclaim liability to not offer to repair. The action of the statutory right that what we've heard for years and it has been routinely rejected by the courts is the argument, well, if they're not gonna do the repairs then why do we waste our time on this notice? Well, the statute requires the notice; the statute requires my client to provide a response which my clients did. Something else that counsel did not reference is he's making the argument that as soon as my notice -- response to the notice is provided then unless I offer to cut a check, unless I offer to make the repairs that they can go directly to litigation that completely sets aside the other statutory requirement that the parties must mediate unless they stipulate to not go to mediation. Well, we did mediate in this particular case, Your Honor.

And so he references in conjunction with that argument that given that the Panorama Tower entities no longer exist -- and what counsel is referencing is one entity which was -- originally received notice which we've brought to the attention of the original counsel was an entity that had gone through bankruptcy but not the other Panorama entity. But the general contractor for this particular project is very much in existence, Your Honor. In fact, I was just reading in the Weekly this weekend -- in the business section of the Weekly where MJ Dean was awarded as contractor of the year for its ongoing work at the Resorts World Complex. So, MJ Dean is absolutely in existence and so that particular argument was also not founded on actual facts.

Counsel is correct that the standing issue is not yet in front of the Court and so it's not germane to the Court's assessment of the arguments being made in this particular case. Counsel stated that his third affirmative defense, the one that is referenced, and one would hope every answer that a party files to a pleading. "The failure to state a claim upon which relief can be granted." Your Honor, respectfully that is a far cry from what is the specific defense which is being raised with regard to 40.645 subsection 4 but I've heard the Court's position on that particular argument. Unless the Court has any questions I don't feel the need to add to what were our original positions on that, Your Honor.

Counsel in my mind simply punted on the sewer claim. At some point, Your Honor, it has to be put to rest because we have asked for documentation and evidence of that particular claim thirty days after we received the original notice and a subsequent letter was sent out. And in every motion after that we've talked about that, Your Honor, and there has never been any provision. And in the Chapter 40 notice that my client originally received there is reference to this alleged defective installation presenting an unreasonable risk of injury due to the disbursement of unsanitary matter. As a justification -- alleged justification for why notice wasn't given to my client -- but as the Court properly noted that there is a provision that says if you're going to allege that something is -- needs an immediate repair then you still have to give notice. And they've never given notice, Your Honor; they cannot correct what has been the failure on their part to rectify that situation. And I've now heard this is the third law firm which has said to this Court with no support at all whatsoever for the premise that, well, maybe we'll find something, Your Honor. Maybe after years of litigation we'll finally provide Mr. Brown's client with some evidence to support this particular claim. There's nothing in the amended notice,

Your Honor, that has satisfied what you told them they had to satisfy; what was the cause of the injury? And again that is on page 15 of your -- I think it's page 15 where you specifically gave them instruction as to what they needed to do. You gave the guidance and the guidance was: "Such notice does not specify the installation error made or what physical damage occurred." And they've never satisfied that, Your Honor, in the amended notice. So, you gave them guidance and they did not follow that.

Counsel has as much as agreed, Your Honor, that with regard to every unit other than the ones that were actually inspected that he would not be surprised if the Court ruled that the amended Chapter 40 notice does not satisfy NRS 40.645 because they have again failed despite your guidance to provide clarification as to the exact location of where this alleged lack of fire blocking exists in the units. And I will represent to the Court, Your Honor, that at no time has my client been provided with any specific information even as to the units where it is allegedly missing that were inspected. If you recall Mr. Omar Hindiyeh he just said, yes, we inspected these and it was found in some places. He doesn't identify where. He's not saying in every single instance, in every single ledger shelf, cavity shelf, that it's missing. He just says where we open it up in some instances we did not find it. So, they did not follow your guidance, Your Honor, and I believe that for lack of any other argument other than the words of counsel himself that this Court should grant the motion because it is undisputed that no additional information has been provided as to the location of the missing fire block insulation in any of the units other than the ones that were destructively tested. But even then, Your Honor, we don't believe that they provided that information but counsel has admitted to you that they did not cover that with regard to the amended notice.

On the windows two apples; counsel spent all this time talking about this apple. We're not talking about the apple of whether or not there is missing flashing either at the sill pan or at the head, we're talking about the failure on the part of the association to follow your guidance and to comply with NRS 40.645 which requires them to identify with specificity without limitation the exact location of every damage and injury. Not yada, yada, yada but damage and injury and they did not do that, Your Honor.

THE COURT: Well, they're --

MR. BROWN: Counsel --

THE COURT: -- they're telling me every window. They're saying that by the specs and plans, the as-builts, the whatever the particular defect in question is located in every window.

MR. BROWN: That's this apple.

THE COURT: Okay.

MR. BROWN: That's the apple, the flashing.

THE COURT: Okay.

MR. BROWN: The damage allegedly arising from that. And counsel wants to talk about look at our notice -- at our notice on page 4, it 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." If they had put a period there -- they might have although we'd still say it's not sufficient they might have a colorable argument. But they added as described and identified in Exhibit A which is their expert's report and their expert's report says in

both of those instances that I've pointed out to you it maybe there. It may, could be. Who knows. Didn't look to see. May, may. They don't satisfy what the statute requires.

Your Honor, counsel -- last points. Counsel contends that the head flashing and the moisture accumulation are not new. Well, there isn't even an argument that they can make that, Your Honor, if you look at the original notice with regard to the insulation that, oh, you can see in there. We were talking about how it's tied to the window issue. You can see where we're saying that it's tied to the water accumulation. They can't and they didn't make that argument, Your Honor. It's a brand new assertion which is time barred It has to be it was not part of the original Chapter 40 notice. Whether that Chapter 40 notice is timely is another motion, but let's presume for the purposes of today's argument that it was nothing this Court said to counsel and nothing in your order said and oh by the way, when you're fixing this particular notice you can add new allegations because that is a completely new issue having to do with a location which was never identified ever in the original notice with regard to that particular defect. And as far as the head flashing, Your Honor -- again, we pointed it out because they rely -- as described in Exhibit A they're relying entirely upon what their new expert says in Exhibit A and in Exhibit A there's the distinction that he makes that for the sill pan flashing it's based on the observed construction, the DT that they did in those units and in Unit 13 -- or 300. But when you get to the head flashing it just says it's based upon review of the plans. And we know that that new expert didn't review the plans until sometime shortly before the amended Chapter 40 notice was applied -- well, was provided. So, that, Your Honor, is a brand new defect. Now, they may have perfectly identified where it is but that doesn't mean that it's a timely alleged defect. There is

nothing in the original notice that have anything to do with head flashings. That's a new defect, Your Honor.

Counsel spent a lot of time trying to place the entire burden on my client not just for this particular motion but a burden on making sure that the Chapter 40 notice is filed, a burden that the defects are where they're supposed to be or where they allege them to be. Your Honor, there's nothing in the new statute that puts that burden on my client with regard to identifying where the defects -- it's all the burden on the Plaintiff. My client has relied upon the best evidence and the only evidence that we need, Your Honor, is their original Chapter 40 notice, your over twenty page order and their attempt to respond. Counsel talked about, oh well, I have not even responded to their notice. Counsel's anew, counsel wasn't here as part of the other motions where we talked about what was going to happen. And we talked about giving them six months in order to do a new amended notice. And we talked about the fact that depending upon what the notice said we would be filing a renewed motion. So, counsel is getting up to speed and has done a great job today. I want to say that for he just frankly got into this case yesterday. I don't think that's the case although I got notice yesterday at 3:00

THE COURT: He's telling me three -- [indecipherable] three days.

MR. BROWN: Three days.

THE COURT: Or maybe it's three hours. I don't know but he's got three.

MR. BROWN: Whatever three it is. Very impressive that he got up to speed as much as possible. But there's no way that counsel can know the history of this case as this Court does, as I do, and as other counsel who've all been on this case for a long time, Your Honor.

There -- the motion really was not opposed with regard to the sewer

claim. Counsel has admitted the motion was not opposed to what would be the vast majority of the 616 units with regard to the insulation claim. And their only argument as with regard to the window claim is that they've identified where the flashing was supposed to be. They believe it should have been there but they've made no effort whatsoever to identify the exact location of what the statute requires is the exact location of the damage and the injury. And their own expert that they rely on in their notice, see Exhibit A, says "may." That is not specific, Your Honor, that does not satisfy the statute. Thank you.

THE COURT: All right. Guys, I want to write a decision on this one, okay? So, I'll take this under advisement.

MR. BROWN: Very good. Thank you, Your Honor.

THE COURT: Okay. By the way, this is also a status check regarding the stay. Whatever my decision is we're lifting the stay today.

MR. BROWN: Understood.

THE COURT: Okay.

MR. BROWN: Thank you, Your Honor.

THE COURT: All right.

[Proceedings concluded at 12:32:23 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

MOT

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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.	Case No. A-16-744146-D Dept. XXII **PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR DECLARATORY RELIEF REGARDING STANDING**

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 "the Builders"), by and through their attorneys of record Peter C. Brown, Esq., Jeffrey W. Saab, Esq. and Devin R. Gifford, Esq. of the law firm of Bremer Whyte Brown & O'Meara LLP, and hereby files their Motion for Declaratory Relief Regarding Standing ("Motion").

This Motion is made and based upon the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, the Declaration of Peter C. Brown, Esq., and all evidence and/or testimony accepted by this Honorable Court at the time of the hearing on this Motion.

Dated: October 22, 2018

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
Devin R. Gifford, Esq.
Nevada State Bar No. 14055
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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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE COUNSEL:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that **PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S MOTION FOR DECLARATORY RELIEF REGARDING STANDING** will come on for hearing before the above-entitled Court on the 13 day of Dec., 2018 at 9:00 a.m., or as soon thereafter as counsel may be heard.

Dated: October 22, 2018

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
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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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AFFIDAVIT OF PETER C. BROWN, ESQ. IN SUPPORT OF PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S MOTION FOR DECLARATORY RELIEF REGARDING STANDING

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, **PETER C. BROWN, ESQ.**, do swear under penalty of perjury of the laws of the State of Nevada as follows:

1. I am duly licensed to practice law before all Courts of the State of Nevada, and I am an attorney with the law firm Bremer Whyte Brown & O'Meara, LLP.
2. I am one of the attorneys representing Plaintiffs/Counter-Defendants in this matter.
3. I know the following facts to be true of my own knowledge, and if called to testify I could competently do so.
4. This Declaration is submitted in support of Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc.'s Motion For Declaratory Relief Regarding Standing.
5. On or about February 24, 2016, the Defendant/Counter-Claimant, Panorama Tower Condominium Unit Owners' Association (hereinafter "Association"), through its counsel, separately served Laurent Hallier (the principal of Panorama Towers I, LLC), M.J. Dean Construction, Inc. ("M.J. Dean") and others with a "Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645" ("Chapter 40 Notice"). Other than the addressee's name, the Chapter 40 Notices served on Mr. Hallier and M.J. Dean are the same.
6. The Association's February 24, 2016 Chapter 40 Notice alleges defects and damages involving: (1) residential tower windows; (2) residential tower fire blocking; (3) mechanical room piping; and (4) sewer piping.
7. The Association's revised Chapter 40 Notice ("Amended Chapter 40 Notice"), served on April 5, 2018, alleges defects pertaining to: (1) Residential Tower Windows; (2) Residential Tower Exterior Wall Insulation; and (3) a Sewer Problem.

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8. Attached as **Exhibit "A"** is a true and correct copy of the Association's initial Chapter 40 Notice dated February 24, 2016.

9. Attached as **Exhibit "B"** is a true and correct copy of the Association's Amended Chapter 40 Notice dated April 5, 2018.

10. Attached as **Exhibit "C"** is a true and correct copy of AB 125.

11. Attached as **Exhibit "D"** is a true and correct copy of the Declaration of Covenants, Conditions and Restrictions and Grant and Reservation of Easements for Panorama Towers dated November 7, 2006.

12. Attached as **Exhibit "E"** is a true and copy of the American Architectural Manufacturers Association (AAMA AG-13) Glossary.

13. Attached as **Exhibit "F"** is a true and correct copy of the Affidavit of Simon Loadsman in support of Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc.'s Motion for Declaratory Relief Regarding Standing ("Motion").

14. Attached as **Exhibit "G"** are true and correct excerpts of the 200 International Building Code.

15. Attached as **Exhibit "H"** are true and correct copies of Texas Wall System Shop Drawings for the Project.

FURTHER AFFIANT SAYETH NAUGHT.

PETER C. BROWN, ESQ.

Subscribed and Sworn before me
this 22nd day of October, 2018.

Crystal Williams
Notary Public in and for said State and County

CRYSTAL WILLIAMS
Notary Public-State of Nevada
Appointment No. 14-13546-1
My Appointment Expires 3-4-2022

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This case involves alleged construction defects at two towers in the Panorama Towers Condominium 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 ("Units"), 10 townhomes, 6 lofts, retail space, pool, and a 5-level parking garage. Tower II consists of 34 floors, 308 units ("Units"), 10 townhomes, 6 lofts, retail space, pool, and a 5-level parking garage. Laurent Hallier and Panorama Towers I, LLC (hereinafter together referred to as "Developer") were the owner and developer entities for the Project. 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 be collectively referred to as "the Builders."

A. Association's Initial Chapter 40 Notice, Dated February 24, 2016

On or about February 24, 2016, the Association, through its counsel, served the Builders with a "Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645." (*See* **Exhibit "A"**, Chapter 40 Notice). The Association's Initial Chapter 40 Notice alleges defects and damages regarding: (1) residential tower windows; (2) residential tower fire blocking; (3) mechanical room piping; and (4) sewer piping. (*See* **Exhibit "A"**, Ch. 40 Notice, Pgs. 1-2).

B. The Builders' Complaint for Declaratory Relief

On September 28, 2016, the Builders filed a Complaint against the Association, asserting the following claims for relief: (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. In response, the Association filed a Motion to Dismiss the Builders' Complaint. The Motion to Dismiss was heard on January 24, 2017 and the Court denied

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the Motion.[1]

On March 1, 2017, the Association filed its Answer to the Builders' Complaint as well as a Counter-Claim against the Builders and other named "counter-defendants." The parties stipulated to deem the case complex and to appoint Floyd Hale as Special Master.[2] Pursuant to a recent hearing on October 2, 2018, the stay of litigation has been lifted.

C. Association's Amended Chapter 40 Notice, Dated April 5, 2018

On March 30, 2017, the Builders filed a Motion for Partial Summary Judgment on the Associations' Third-Claim for Relief. On September 15, 2017, this Court issued its Findings of Fact and Conclusions of Law allowing the Association, in part, an opportunity to remedy deficiencies in its Initial Chapter 40 Notice. On April 5, 2018, the Association served an Amended Notice of Claims Pursuant to NRS 40.645. (*See* **Exhibit "B"**, Amended Ch. 40 Notice). Despite the fact that the Association was given an opportunity to fix the errors in the Initial Chapter 40 Notice, the Builders maintain the Amended Notice still fails to comply with the express requirements set forth in NRS 40.600 et seq. Furthermore, the Amended Notice improperly includes new defect allegations which are both untimely and not contemplated or allowed by this Court's September 15, 2017 Order. The parties appeared before the Court on October 2, 2018, regarding "Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Tower I Mezz, LLC and M.J. Dean Construction, Inc.'s Motion for Summary Judgment on Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners' Association's April 5, 2018 Amended Notice of Claims." The parties await the Court's ruling on said Motion.

Contained within the Amended Chapter 40 Notice are defect allegations pertaining to: (1) Residential Tower Windows; (2) Residential Tower Exterior Wall Insulation; and (3) a Sewer Problem. (*See* **Exhibit "B",** Amended Ch. 40 Notice, Pgs. 3-5). The Association lacks standing to allege the window-related deficiencies.

The first of the two window defect allegations, Defect 1.01, relates to a lack of pan flashing.

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[1] The Order denying the Association's Motion as well as the Notice of Entry of Order was filed on February 9, 2017.

[2] The Order deeming the case complex and appointing Floyd Hale as Special Master and the Notice of Entry of Order was filed on January 10, 2017.

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(*See* **Exhibit "B",** Amended Ch. 40 Notice, Pg. 11). When installed, pan flashing comprises part of a window system and thus falls within the Unit Boundaries and outside the scope of the "Common Elements," as defined in the Declaration of Covenants, Conditions & Restrictions ("Declaration" or "CC&R's") for the Project. Since pan flashings fall outside the scope of the Common Elements, the Association lacks standing to assert claims regarding same per NRS 116.3102(1)(d), as amended by AB 125.

In addition, local codes and the STO details defer the decision to incorporate head flashings to the manufacturer of the window system. Since the manufacturer of the window system, Texas Wall Systems ("TWS"), did not require head flashings at the Unit windows, the lack of head flashings does not constitute a code violation. Since head flashings are not mandated, their identification as an alleged defect constitutes an unnecessary upgrade and falls outside the scope of the Association's repair responsibilities. Thus, the Association also lacks standing to assert defect allegation 1.02.

Consequently, the Builders respectfully request this Honorable Court's declaration that the Association lacks standing to assert claims against the Builders for window-related defect allegations 1.01 and 1.02.

II.

LEGAL STANDARD

A. Declaratory Relief

Nevada follows the Uniform Declaratory Judgments Act, NRS 30.010 et seq. *See Kress v. Corey,* 65 Nev. 1, 25, 189 P.2d 352, 363-64 (1948). NRS 30.030 "Scope" provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

NRS 30.040(1) provides, in part:

> Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have

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> determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The Nevada Supreme Court in *Kress v. Corey* set out a four-part test to determine whether declaratory relief is appropriate in any given matter: (1) there must exist a justiciable controversy; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination. *Kress v. Corey,* 65 Nev. 1, 25, 189 P.2d 352, 363-64 (1948).

B. AB 125 Changes to NRS 40.600 *et seq.* and NRS 116.3102(1)(d)

After the enactment of Assembly Bill 125 ("AB 125"), numerous changes were made to Nevada Revised Statutes, including, but not limited to NRS 40.600 *et seq.,* and NRS 116.3102. (*See* **Exhibit "C"**, 2015 Nev. AB 125, Sec. 20). NRS 116.3102(1)(d), as amended, currently provides, in relevant part:

> "1. Except as otherwise provided in this chapter, and subject to the provisions of the declaration, the association:
>
> > (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.** (Emphasis added.)

The above limitation affects constructional defect notices pursuant to NRS 40.600 to 40.695, inclusive, but not limited to, notices that were issued and claims that can be advanced ny a homeowner's association after the effective date of AB 125, February 24, 2015. (**Exhibit "C"**, 2015 Nev. AB 125, Sec. 21(7)).

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III.

LEGAL ARGUMENTS

A. Declaratory Relief is Appropriate in this Matter

An analysis of the four-part test specified in *Kress v. Corey* reveals that Declaratory Relief is appropriate.

i. There Must Exist a Justiciable Controversy

In this case there is a clear dispute between the Builders and the Association. First, the Builders maintain that the Amended Notice still fails to comply with the express requirements set forth in NRS 40.600 et seq., because it improperly includes new defect allegations which are both untimely and not contemplated or allowed by this Court's September 15, 2017 Order. Moreover, and with specific reference to the instant Motion, the Builders contend that the Association lacks standing to raise issues that are exclusive of the common elements, as defined in the CC&R's. By virtue of its asserting window-related deficiencies, it is clear that the Association's contrasting position is that it does indeed have standing to do so.

There exists a justiciable controversy.

ii. The Controversy Must Be Between Persons Whose Interests Are Adverse

Adverse interests must be competing interests and not merely a controversy with reference to oneself. (*See Nevada Civil Practice Manual*, 5th Volume (2005), Section 31.03; *See Planned Parenthood Ass'n v. Fitzpatrick,* 401 F. Supp. 554 (D. Penn. 1975). Here, there is no doubt that the Builders and the Association have competing interests. The instant litigation is proof. The Builders filed a Complaint against the Association, asserting numerous claims for relief, as outlined above. The Association filed a Motion to Dismiss, followed by an Answer to the Builders' Complaint and a Counter-Claim, alleging various causes of action. The Builders contend that the Association lacks standing to assert defect allegations pertaining to the separate interests of the Unit Owners. By virtue of its Amended Chapter 40 Notice, which alleges window-related defects, the Association obviously disagrees.

Thus, the interests of the parties are adverse.

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iii. The Party Seeking Declaratory Relief Must Have A Legally Protectable Interest

Here, the Builders have a legally protectable interest with regard to the pending claims and alleged constructional deficiencies. The Builders have a strong interest in ensuring that the Association does not assert claims for which it does not have standing. Permitting the Association to do so would be contrary to the express language in the CC&R's and existing Nevada law, and it would expose the Builders to potentially far greater exposure than Chapter 40 currently allows. A primary purpose for the enactment of AB 125, specifically the amendment to NRS 116.3102(1)(d), was to protect from claims by homeowner's associations for defective conditions affecting a homeowner's separate interest. The Builders are seeking the exact relief to which the Nevada legislature has agreed they are entitled.

The Builders have a legally protectable interest.

iv. The Issue Involved Must Be Ripe for Adjudication

As a general rule, if a party can show that harm is likely to occur in the future, a ripe case or controversy may exist. There is no doubt that a controversy is presently at issue. The Builders are presently faced with responding to the Association's Amended Chapter 40 Notice but contend that the Association lacks standing to assert certain claims therein. Without resolution of the standing issue, the Builders will face heightened exposure which they otherwise should not face. Absent clarity at this time, the Builders will also be faced with far greater legal fees and expert costs than they would otherwise face if the Association's claims did not include the non-common element, window-related deficiencies.

As noted by the Nevada Supreme Court in *County of Clark ex rel. University Med. Ctr. v. Upchurch by & Through Upchurch*, a court should consider whether speedy resolution of the issue might promote economy in the litigation process or might lead to meaningful pre-trial settlement. *County of Clark ex rel. University Med. Ctr. v. Upchurch by & Through Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998). Here, resolution of the controversy surrounding the Association's

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standing to assert claims related to the Unit Owners' separate interests will greatly aid the parties in clarifying their respective strategic plans and managing their respective discovery objectives.

This issue is ripe for adjudication.

Based upon the foregoing, Declaratory Relief is appropriate.

B. This Court Should Grant Builder's Motion for Declaratory Relief Because the Association Lacks Standing pursuant to NRS 116.3102(1)(d) to Assert Claims Exclusive of the Common Elements

i. Window Flashings Form Part of the Window System and Therefore Do Not Form Part of the Common Elements

NRS 116.3102(1)(d) as amended by AB 125, provides, in part:

> "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**." (emphasis added).

Under the operating Declaration of Covenants, Conditions & Restrictions for Panorama Towers I and II, Section 1.39, "Common Elements" are defined as "**all portions** of the [Project] **other than the Units." (Exhibit "D"**, CC&R's, Pg. 16 of Exhibit, Sec. 1.39). The CC&R's provide examples of Common Elements, which may include, but are not limited to:

> "(a) The Buildings, including, the foundation, columns, girders, beams, supports, perimeter and supporting walls, chimneys, chimney chases, roofs, stairs, patios, balconies, entrances and exits, basements, lobbies, offices, meeting rooms, mail rooms, mechanical rooms, elevator shafts, and the mechanical installations of a building consisting of the equipment and materials making up the elevators, and all other central services such as power, light, gas, hot and cold water, sewer, and heating and central air conditioning which exist for use by one or more of the Owners, including the pipes, vents, ducts, flues, cable conduits, wires, telephone wire, and other similar utility installations used in connection therewith, **but excluding, however, the Units**;" **(Exhibit "D"**, CC&R's, Pg. 16, Sec. 1.39(a)) (emphasis added).

Section 1.128 of the CC&R's provides that the term "Unit" shall mean a "unit" as defined in the "Act." **(Exhibit "D",** CC&R's Pg. 28, Section 1.128**)**. To define "Act," the CC&R's refer to Chapter 116 of the Nevada Revised Statutes. **(Exhibit "D",** CC&R's Pg. 11, Recitals, Section (B)). NRS 116.093 defines "unit" as a physical portion of the common-interest community **designated**

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for separate ownership or occupancy, the boundaries of which are described pursuant to paragraph (e) of subsection 1 of NRS 116.2105. (*See* NRS 116.093). NRS 116.2105(1) provides: that the **declaration** (i.e., CC&R's) must contain:

> "(e) [i]n a condominium or planned community, a **description of the boundaries of each unit** created by the declaration, including the unit's identifying number or, in a cooperative, a description, which may be by plats, of each unit created by the declaration, including the unit's identifying number, its size or number of rooms, and its location within a building if it is within a building containing more than one unit." (NRS 115.2105(1)(e); emphasis added).

Article 4 of the CC&R's "Unit and Boundary Descriptions" describe the boundaries of a "unit," satisfying NRS 116.2105(1)(e). Section 4.2 of the CC&R's provides:

> "Boundaries. The Boundaries of each Unit created by the Declaration are the Unit lines shown or described on a Plat as numbered Units, along with their identifying number, and are further described as follows:
>
> (a) Upper Boundaries...
>
> ...
>
> ...
>
> (e) Apertures. **Where there are apertures in any boundary, including,** but not limited to, **windows**, doors, bay windows and skylights, **such boundaries shall be extended to include the windows**, doors **and other fixtures located in such apertures, including all frameworks, window casings and weather stripping thereof,** except that **exterior surfaces made of glass or other transparent materials** and exteriors of any and all doors facing interior Common Element hallways **shall not be included in the boundaries of the Unit and shall therefore be Common Elements**..." (**Exhibit "D"**, CC&R's, Pgs. 37-38, Sec.'s 4.2(a)-(e)) (emphasis added).

Based on the foregoing, windows, including their fixtures, frameworks, window casings and weather stripping are part of the Units. By definition within the CC&R's, therefore, windows, including their fixtures, frameworks, window casings and weather stripping, are not part of the Common Elements. As noted above, the only portion of the window "aperture" that is not part of the Units, and therefore is a Common Element, is the "exterior surface made of glass or other transparent material." (*See* **Exhibit "D"**, CC&R's, Pg. 16, Sec. 1.39).

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The Association's Amended Chapter 40 Notice includes defects associated with Project windows, specifically, residential unit windows. *(See* **Exhibit "B"**, Amended Ch. 40 Notice, Pgs. 11 & 13). Defect 1.01 alleges a lack of sill pan flashing at the base of the window assemblies. *(See* **Exhibit "B"**, Amended Ch. 40 Notice, Pg. 11). This defect allegation pertains directly to the window frameworks, which do not fall within the purview of the Common Elements. The American Architectural Manufacturers Association ("AAMA") agrees. In the AAMA Glossary, panning, when "used for weatherability… is not considered cosmetic, but rather part of the window system." (*See* **Exhibit "E"**, American AAMA AG-13, "Pan/Panning," Pg. 38; *See also,* **Exhibit "F"**, Affidavit of Simon Loadsman). "Window system" is synonymous with "window assembly." (*See* **Exhibit "F"**, Affidavit of Simon Loadsman).

With regard to pan flashing, when installed there is no doubt it forms part of the window framework/assembly/system. The AAMA Glossary defines "Pan Flashing (aka Sill Pan)" as the following:

> "A type of flashing used at the base of a rough opening to divert water to the exterior or the exterior surface of a concealed WRB. Pan flashings have upturned legs at the rear interior edge (back dam) and right and left sides (end dams), to form a three-sided pan that has the front open for drainage. They are intended to collect and drain water toward the exterior, including water that may enter through the window unit or around the window (between the rough opening and the fenestration). Pan flashing can be made from self-adhered flashing or from rigid or semi-rigid material, such as metal or a semi-rigid polymer." (*See* **Exhibit "E"**, American AAMA AG-13, "Pan/Panning," Pg. 38)

There is no doubt that pan flashing forms part of a window framework/assembly/system, as it is installed directly underneath the glass and turns upward behind the glass, to form a dam. (*See* **Exhibit "F"**, Affidavit of Simon Loadsman).

Since window pan flashings form part of the window framework/assembly/system, they are contained within the "Unit Boundaries" defined by the CC&R's. (**Exhibit "D"**, CC&R's Pgs. 37-38, Sec.'s 4.2(a)-(e)). Since they fall within the "Unit Boundaries," pan flashings do not fall within the "Common Elements." (*See* **Exhibit "D"**, CC&R's, Pg. 16, Sec. 1.39). Since pan flashings do not fall within the "Common Elements," the Association lacks standing to litigate claims related to

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pan flashings. (*See* NRS 116.3102(1)(d)). Only Unit Owners have standing to assert defect claims relating to their separate interests (non-Common Elements), which include the Unit windows and their pan flashings.

ii. Repairs and Maintenance to Units, Including the Window Framework/Assembly/System, Fall Within the Sole Responsibility of the Unit Owners, Not the Association

Repairs and maintenance to the "Units" fall solely within the "Unit" owner's responsibilities, not the Association's. Section 6.4 of the CC&R's provides a Unit Owner is responsible for the following:

> "6.4 Units and Limited Common Elements. Each Owner shall maintain, repair, replace, finish and restore or cause to be so maintained, repaired, replaced and restored, at such Owner's sole expense **all portions of such Owner's Unit** and any Limited Common Elements balconies appurtenant thereto, whether structural or nonstructural, ordinary or extraordinary, foreseen or unforeseen, including inspection, maintenance, repair and replacement of windows, window coverings, interior nonstructural walls, the interior side of any entrance door and all other doors within or affording access to a Unit, and the electrical (including wiring), plumbing (including fixtures and connections), heating and air conditioning equipment, fixtures and outlets, appliances, carpets and other floor coverings, all interior surfaces and the entire interior of the Unit lying within the boundaries of the Unit or the Limited Common Elements or other property belonging to the Owner. Such maintenance, repairs replacements, restoration for finish shall be performed by the Owner of such Unit at the Owner's sole cost and expense, except as otherwise expressly provided to the contrary herein. Failure to repair, maintain, replace or finish as required could result in damage to the Unit. Notwithstanding the classification of any windows, doors and balconies located in or adjacent to the Units as Common Elements, the maintenance of such windows, doors and balconies (to the extent that same are reasonably accessible from the applicable Unit), other than exterior windows on any Tower, shall be the sole responsibility of the Owner of the Unit in which, or adjacent to which, the same are located. Notwithstanding the foregoing, the obligation to maintain and repair any heating or air conditioning equipment, plumbing or electrical fixtures or other items of property which service only a particular Unit or Units shall be the responsibility of the applicable Unit Owners, individually, and not the Association, without regard to whether such items are included within the boundaries of the Units. Owners shall not make any structural changes to the Limited Common Elements, and further no Owner shall make any aesthetic changes to the Limited Common Elements without first obtaining the approval of the Board. *(See* **Exhibit "D"**, CC&R's, Pg. 45, Sec. 6.4) (emphasis added).

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The operating Declaration of Covenants, Conditions & Restrictions makes it clear that the Unit Owner is responsible for maintaining, repairing and restoring specific issues within his or her Unit, which include the window frameworks/window systems. Conversely, the Association neither has the right nor the obligation to repair the window frameworks/systems in the individual units. The window frameworks/window systems are expressly within the Unit Boundaries and do not fall within the Common Elements. Since the Association is precluded by statute from asserting defect claims arising out of non-common elements (i.e., Units, per the CC&R's), the Association cannot maintain standing to assert window defect 1.01.

iii. Head Flashings Were Not Required on the Project and Thus Any Claims Regarding Same Fall Solely Within the Discretion of the Individual Unit Owners

Defect 1.02 alleges a lack of head flashing at unit windows. (*See* **Exhibit "B"**, Amended Chapter 40 Notice, Pg. 13). The Association relies upon the Sto EIFS Commercial Window Head detail to contend that head flashing should have been installed on the Project. These STO Reports are computer-generated depictions generated on or about April 2000. (*See e.g.,* **Exhibit "B"**, Amended Chapter 40 Notice, Pg. 19). The Association's expert's report highlights Note 2 on the Sto detail, which provides: "Provide flashing installed over the window to direct water away from the window." (*See* **Exhibit "B"**, Amended Chapter 40 Notice, Pg. 19). The second sentence in that same Note 2, however, also says: "**Verify requirements for head flashing with local codes and window manufacturers. If not required, seal between window head and EIFS."** (*See* **Exhibit "B"**, Amended Chapter 40 Notice, Pg. 19) (emphasis added).

According to the 2000 International Building Code ("2000 IBC"), a local code that the Association's expert also cites in his report, the installation of exterior windows and doors must conform to the manufacturer's structions. *(See* **Exhibit "G",** 2000 IBC, Pg. 6, Sec. 1405.12.1). The window manufacturer, TWS, provided shop drawings for the Project which omitted head flashings at the exterior windows, meaning TWS did not require head flashings. (*See* **Exhibit "H"**, TWS Shop Drawings, Pg. 2, Sheet 2D.28, Detail 1). If the manufacturer, TWS, required head flashings,

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it would have included them in its shop drawings. In contrast to the Association's expert's report, which suggests that "window head flashings are required by the material manufacturers and building code and its omission is a code violation," head flashings in this case were not required by the manufacturer and their exclusion does not constitute a code violation. (*See* **Exhibit "B"**, Amended Chapter 40 Notice, Pg. 13; *cf.* **Exhibit "G",** 2000 IBC, Sec. 1405.12.1; *cf. also*, **Exhibit "H"**, TWS Shop Drawings, Pg. 2, Sheet 2D.28, Detail 1). No repair to the head flashings is required. The Association's primary source, the STO detail, which was generated online five years prior to the creation of the Project-specific TWS, specifically states that head flashing requirements should be verified by the manufacturer. (*See* **Exhibit "B"**, Amended Chapter 40 Notice, Pg. 19; *cf.* **Exhibit "H"**, TWS Shop Drawings, Pg. 2, Sheet 2D.28) (see highlighted date - noting the date of the drawing was July 29, 2005). Based upon the foregoing, head flashings were not required on the Project. Any unnecessary upgrades to the windows, including the incorporation of head flashings, would have to be made by the Unit owner at their discretion.

III.

CONCLUSION

Based on the foregoing, the Court should declare that the Association lacks standing to assert defect allegations and 1.01 and 1.02. Sill pan flashings comprise part of the window system, which fall within the Unit Boundaries, and thus outside the scope of the Common Elements. Since pan flashings fall outside the scope of the Common Elements, the Association lacks standing to assert repairs to same per NRS 116.3102(1)(d), as amended by AB 125. In addition, local codes and the STO details defer the decision to incorporate head flashings to the manufacturer of the window system. Since the manufacturer of the window system, TWS, did not require head flashings at the Unit windows, the lack of head flashing does not constitute a code violation. Since head flashings are not mandated, their addition would be an unnecessary upgrade, and outside the scope of the

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Association's responsibilities. Thus, the Association also lacks standing to assert defect allegation 1.02.

Dated: October 22, 2018

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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	Case No. A-16-744146-D Dept. XXII **APPENDIX TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR DECLARATORY RELIEF REGARDING STANDING [Volume I of III]**

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.

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 "the 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, hereby submits its Appendix of Exhibits [Volume I of III] to their Motion for Declaratory Relief Regarding Standing.

Exhibit No.	Brief Description	# of Pages (including exhibit page)	Location of exhibit within Motion
A	Association's initial Chapter 40 Notice dated February 24, 2016	52	Pages 5 & 6
B	Association's Amended Chapter 40 Notice dated April 5, 2018	49	Pages 5, 7, 8, 14,16 & 17

Dated: October 22, 2018

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By:_____

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Plaintiffs, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant. 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	Case No. A-16-744146-D Dept. XXII **APPENDIX TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR DECLARATORY RELIEF REGARDING STANDING [Volume II of III]**

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.

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 "the 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, hereby submits its Appendix of Exhibits [Volume II of III] to their Motion for Declaratory Relief Regarding Standing.

Exhibit No.	Brief Description	# of Pages (including exhibit page)	Location of exhibit within Motion
C	AB 125	27	Pages 5 & 9
D	Declaration of Covenants, Conditions and Restrictions and Grant and Reservation of Easements for Panorama Towers dated November 7, 2006	142	Pages 5 & 12-15
E	American Architectural Manufacturers Association (AAMA AG-13) Glossary	64	Pages 5 & 14

Dated: October 22, 2018

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

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EXHIBIT "C"

EXHIBIT "C"

ASSEMBLY BILL NO. 125–COMMITTEE ON JUDICIARY

FEBRUARY 6, 2015

Referred to Committee on Judiciary

SUMMARY—Revises provisions relating to constructional defects. (BDR 3-588)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

EXPLANATION – Matter in *bolded italics* is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to constructional defects; enacting provisions governing the indemnification of a controlling party by a subcontractor for certain constructional defects; enacting provisions governing wrap-up insurance policies or consolidated insurance programs covering certain claims for constructional defects; authorizing the parties to a claim for a constructional defect to agree to have a judgment entered before the filing of a civil action under certain circumstances; revising the definition of "constructional defect"; revising provisions governing the information required to be provided in a notice of constructional defect; removing provisions authorizing claimants to give notice of common constructional defects in residences or appurtenances; requiring a claimant to pursue a claim under a homeowner's warranty under certain circumstances; revising provisions governing the damages recovered by a claimant; revising the statutes of repose regarding actions for damages resulting from certain deficiencies in construction; revising provisions governing the tolling of statutes of limitation and repose regarding actions for constructional defects; prohibiting a homeowners' association from pursuing an action for a constructional defect unless the action pertains exclusively to the common elements of the association; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Under existing law, before an owner of a residence or appurtenance or certain other persons may commence a civil action against a contractor, subcontractor, supplier or design professional for certain defects in the residence or appurtenance, the claimant must provide notice of the defect to the contractor. Not later than 30 days after the date on which the contractor receives the notice, the contractor must forward a copy of the notice to each subcontractor, supplier or design professional whom the contractor reasonably believes is responsible for a defect specified in the notice. The subcontractor, supplier or design professional who receives the notice must inspect the alleged constructional defect and may elect to repair the defect. (NRS 40.645, 40.646, 40.647)

Section 2 of this bill establishes the circumstances under which a provision in a residential construction contract requiring a subcontractor to indemnify, defend or otherwise hold harmless a controlling party for the negligence or intentional acts or omissions of the controlling party is void and unenforceable. **Section 2** also enacts provisions governing: (1) when a subcontractor's duty to defend a controlling party arises; (2) the manner in which a controlling party may pursue indemnification from a subcontractor when the controlling party is named as an additional insured in the commercial general liability insurance policy of the subcontractor; and (3) wrap-up insurance policies or consolidated insurance programs that cover two or more contractors or subcontractors who perform work on residential construction for risks associated with the construction.

Existing law establishes a procedure by which the parties in a civil action may agree to have a judgment entered in the action in accordance with the terms and conditions of an offer of judgment. A court is prohibited from awarding costs or attorney's fees to a party who rejects such an offer of judgment and fails to obtain a more favorable judgment at trial. (NRS 17.115; N.R.C.P. 68) **Section 3** of this bill establishes a similar procedure under which a person who has given notice of a constructional defect and a contractor, subcontractor, supplier or design professional who has received such a notice may agree to have a judgment entered before a civil action for the constructional defect is commenced.

Section 6 of this bill amends the existing definition of "constructional defect" to provide that a constructional defect is a defect: (1) which presents an unreasonable risk of injury to a person or property; or (2) which is not completed in a good and workmanlike manner and proximately causes physical damage to the residence or appurtenance.

Section 8 of this bill amends the provision of existing law requiring certain information to be included in a notice of constructional defect to require the notice to: (1) state in specific detail, rather than in reasonable detail, each defect, damage and injury to each residence or appurtenance that is subject to the notice; (2) state the exact location of each defect, damage and injury, rather than describe in reasonable detail the location of the defect; and (3) include a statement signed by the owner of the residence or appurtenance in the notice that the owner verifies that each defect, damage and injury exists in the residence or appurtenance.

Sections 5, 8-13 and 22 of this bill remove a provision of existing law which authorizes one notice to be sent concerning similarly situated owners of residences or appurtenances within a single development that allegedly have common constructional defects.

Section 11 of this bill requires a claimant and an expert who provided an opinion concerning an alleged constructional defect, or a representative of the expert who has knowledge of the alleged defect, to: (1) be present when a contractor, subcontractor, supplier or design professional conducts the required inspection of the alleged defect; and (2) identify the exact location of the alleged defect.

Under existing law, if a residence or appurtenance is covered by a homeowner's warranty that is purchased by or on behalf of the claimant, the claimant must diligently pursue a claim under the contract. (NRS 40.650) **Section 14** of this bill: (1) prohibits a claimant from filing a notice of constructional defect or pursuing a claim for a constructional defect unless the claimant has submitted a claim under the homeowner's warranty and the insurer has denied the claim; and (2) provides that a claim for a constructional defect may include only the claims that have been denied under the homeowner's warranty. **Section 14** further provides that statutes of limitation or repose are tolled from the time the claimant submits a claim under the homeowner's warranty until 30 days after the insurer denies the claim, in whole or in part.

Section 15 of this bill removes the provision of existing law that provides that a claimant may recover reasonable attorney's fees as part of the claimant's damages in a cause of action for constructional defects. **Section 15** also provides that certain costs recoverable as damages must have been incurred for constructional defects proven by the claimant.

Existing law provides that the statutes of limitation and repose applicable to a claim for constructional defects are tolled from the time that a claimant gives notice of a claim for constructional defects until 30 days after the mediation required by existing law is concluded or waived. (NRS 40.695) **Section 16** of this bill provides that the period for which the statutes of limitation and repose are tolled may not exceed 1 year. **Section 16** further authorizes a court to extend the tolling period if the claimant demonstrates good cause for such an extension.

Existing law generally limits the period in which an action for damages caused by a deficiency in construction of improvements to real property may be commenced after substantial completion of the improvement. These periods of limitation are known as statutes of repose, and the period set forth in each statute of repose during which an action must be commenced is: (1) for a known deficiency, 10 years after substantial completion of the improvement; (2) for a latent deficiency, 8 years after substantial completion of the improvement; and (3) for a patent deficiency, 6 years after substantial completion of the improvement. However, if a deficiency was a result of willful misconduct or was fraudulently concealed, an action may be commenced at any time after substantial completion of the improvement. (NRS 11.202-11.205) **Sections 17-19 and 22** of this bill provide that the statute of repose for all actions for damages caused by a deficiency in construction of improvement to real property is 6 years after substantial completion of the improvement. **Sections 17-19 and 22** also eliminate existing provisions of law that allow such actions to be commenced within 2 years after the date of an injury which occurs during the final year of the particular period of limitation. **Section 21** of this bill: (1) provides that the revised statutes of repose set forth in **sections 17-19** apply retroactively under certain circumstances; and (2) establishes a 1-year grace period during which a person may commence an action under the existing statutes of repose, if the action accrued before the effective date of this bill.

Existing law authorizes a homeowners' association to 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. (NRS 116.3102) In *D.R. Horton, Inc. v. Eighth Judicial District Court*, 125 Nev. 449 (2009), the Nevada Supreme Court held that existing law grants standing to a homeowners' association to pursue constructional defect claims on behalf of units' owners with respect to constructional defects in individual units. **Sections 5 and 20** of this bill provide that an association may not pursue a constructional defect claim on behalf of itself or units' owners, unless the claim pertains exclusively to the common elements of the association.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 40 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *1. In any action or other proceeding involving a constructional defect asserted by a claimant and governed by NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act:*

(a) Except as otherwise provided in paragraph (b), any provision in a contract entered into on or after the effective date of this act for residential construction that requires a subcontractor to indemnify, defend or otherwise hold harmless a controlling party from any liability, claim, action or cause of action resulting from a constructional defect caused by the negligence, whether active or passive, or intentional act or omission of the controlling party is against public policy and is void and unenforceable.

(b) Except as otherwise provided in paragraph (c), a provision in a contract entered into on or after the effective date of this act for residential construction is not against public policy and is not void and unenforceable under paragraph (a) to the extent that the provision requires a subcontractor to indemnify, defend or otherwise hold harmless a controlling party from any liability, claim, action or cause of action resulting from a constructional defect arising out of, related to or connected with the subcontractor's scope of work, negligence, or intentional act or omission.

(c) A provision in a contract entered into on or after the effective date of this act for residential construction is against public policy and is void and unenforceable under paragraph (a) to the extent that it requires a subcontractor to defend, indemnify or otherwise hold harmless a controlling party from any liability, claim, action or cause of action resulting from a constructional defect arising out of, related to or connected with that portion of the subcontractor's work which has been altered or modified by another trade or the controlling party.

(d) Except as otherwise provided in paragraph (e), if a provision of a contract entered into on or after the effective date of this act for residential construction that requires a subcontractor to indemnify, defend or otherwise hold harmless a controlling party is not against public policy and is not void and unenforceable under this subsection, the duty of the subcontractor to defend the controlling party arises upon presentment of a notice pursuant to subsection 1 of NRS 40.646 containing a particular claim, action or cause of action from which it can be reasonably inferred that an alleged constructional defect was caused by or

attributable to the subcontractor's work, negligence, or wrongful act or omission.

(e) If a controlling party gives a notice to a subcontractor pursuant to NRS 40.646 that contains a claim, action or cause of action from which it can be reasonably inferred that an alleged constructional defect was caused by or attributable to the subcontractor's work, negligence, or wrongful act or omission, the claim, action or cause of action is covered by the subcontractor's commercial general liability policy of insurance issued by an insurer, and the controlling party is named as an additional insured under that policy of insurance:

(1) The controlling party, as an additional insured, must pursue available means of recovery of its defense fees and costs under the policy before the controlling party is entitled to pursue a claim against the subcontractor.

(2) Upon the final settlement of or issuance of a final judgment in an action involving a claim for a constructional defect, if the insurer has not assumed the controlling party's defense and reimbursed the controlling party for the defense obligation of the subcontractor, or if the defense obligation is not otherwise resolved by the settlement or final judgment, the controlling party has the right to pursue a claim against the subcontractor for reimbursement of that portion of the attorney's fees and costs incurred by the controlling party which are attributable to the claims, actions or causes of action arising out of, related to or connected with the subcontractor's scope of work, negligence, or intentional act or omission.

(3) The provisions of subparagraphs (1) and (2) do not prohibit a controlling party from:

(I) Following the requirements of NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act relating to providing notice of an alleged constructional defect or any other procedures set forth in those provisions; or

(II) Filing a third-party complaint against the subcontractor if a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a controlling party which arises out of, relates to or is otherwise connected with the subcontractor's scope of work, negligence, or wrongful act or omission.

2. For any wrap-up insurance policy or other consolidated insurance program that covers a subcontractor who performs work on residential construction for which a contract is entered into on or after the effective date of this act, for claims, actions or causes of action for a constructional defect governed by NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act:

(a) The controlling party obtaining the wrap-up insurance policy or other consolidated insurance program shall disclose the total amount or method of calculation of any credit or compensation for the premium required from a subcontractor or other participant for that wrap-up insurance policy in the contract documents.

(b) Except as otherwise provided in paragraph (c), the contract documents must disclose, if and to the extent known:

(1) The policy limits;

(2) The scope of policy coverage;

(3) The policy term;

(4) The basis upon which the deductible or occurrence is triggered by the insurer;

(5) If the policy covers more than one work of improvement, the number of units, if any, indicated on the application for the insurance policy; and

(6) A good faith estimate of the amount of available limits remaining under the policy as of a date indicated in the disclosure obtained from the insurer.

(c) The disclosure requirements of subparagraphs (1) to (4), inclusive, of paragraph (b) may be satisfied by providing the participant with a copy of the binder or declaration.

(d) The disclosures made pursuant to subparagraphs (5) and (6) of paragraph (b):

(1) May be based upon information available at the time the disclosure is made and are not inaccurate or made in bad faith solely because the disclosures do not accurately reflect the actual number of units covered by the policy or the amount of insurance available, if any, when a later claim is made.

(2) Are presumptively made in good faith if:

(I) The disclosure pursuant to subparagraph (5) of paragraph (b) is the same as that contained in the application to the wrap-up insurance policy insurer; and

(II) The disclosure pursuant to subparagraph (6) of paragraph (b) was obtained from the wrap-up insurance policy insurer or broker.

➥ The presumptions stated in subparagraph (2) may be overcome only by a showing that the insurer, broker or controlling party intentionally misrepresented the facts identified in subparagraph (5) or (6) of paragraph (b).

(e) Upon the written request of any participant in the wrap-up insurance policy or consolidated insurance program, a copy of the insurance policy must be provided, if available, that shows the coverage terms and items in subparagraphs (1) to (5), inclusive, of paragraph (b). If the policy is not available at the time of the

request, a copy of the insurance binder or declaration of coverage may be provided in lieu of the actual policy.

(f) Any party receiving a copy of the policy, binder or declaration shall not disclose it to third parties other than the participant's insurance broker or attorney unless required to do so by law. The participant's insurance broker or attorney may not disclose the policy, binder or declaration to any third party unless required to do so by law.

(g) If the controlling party obtaining the wrap-up insurance policy or other consolidated insurance program does not disclose the total amount or method of calculation of the premium credit or compensation to be charged to the participant before the time the participant submits its bid, the participant is not legally bound by the bid unless that participant has the right to increase the bid up to the amount equal to the difference between the amount the participant included, if any, for insurance in the original bid and the amount of the actual bid credit required by the controlling party obtaining the wrap-up insurance policy or other consolidated insurance program. This paragraph does not apply if the controlling party obtaining the wrap-up insurance policy or other consolidated insurance program did not require the subcontractor to offset the original bid amount with a deduction for the wrap-up insurance policy or program.

(h) The subcontractor's monetary obligation for enrollment in the wrap-up insurance policy or consolidated insurance program ceases upon the subcontractor's satisfaction of its agreed contribution percentage, which may have been paid either as a lump sum or on a pro rata basis throughout the subcontractor's performance of the work.

(i) In the event of an occurrence, the dollar amount required to be paid by a subcontractor as a self-insured retention or deductible must not be greater than the amount that the subcontractor would have otherwise been required to pay as a self-insured retention or deductible under a commercial general liability policy of comparable insurance in force during the relevant period for that particular subcontractor and within the specific market at the time the subcontract is entered into.

3. As used in this section:

(a) "Controlling party" means a person who owns real property involved in residential construction, a contractor or any other person who is to be indemnified by a provision in a contract entered into on or after the effective date of this act for residential construction.

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

(c) "Wrap-up insurance policy" is an insurance policy, or series of policies, written to cover risks associated with the construction, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance, and covering two or more of the contractors or subcontractors that work on that construction, repair or landscaping.

Sec. 3. *1. At any time after a claimant has given notice pursuant to NRS 40.645 and before the claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant or any contractor, subcontractor, supplier or design professional who has received notice pursuant to NRS 40.645 or 40.646 may serve upon one or more other parties a written offer to allow judgment to be entered without action in accordance with the terms and conditions of the offer of judgment.*

2. Except as otherwise provided in subsection 7, if, within 10 days after the date of service of an offer of judgment, the party to whom the offer was made serves written notice that the offer is accepted, the party who made the offer or the party who accepted the offer may file the offer, the notice of acceptance and proof of service with the clerk of the district court. Upon receipt by the clerk, the clerk shall enter a judgment according to the terms of the offer. Any judgment entered pursuant to this section shall be deemed a compromise settlement. The judgment, the offer, the notice of acceptance and proof of service, with the judgment endorsed, become the judgment roll.

3. If the offer of judgment is not accepted pursuant to subsection 2 within 10 days after the date of service, the offer shall be deemed rejected by the party to whom it was made and withdrawn by the party who made it. The rejection of an offer does not preclude any party from making another offer pursuant to this section. Evidence of a rejected offer is not admissible in any proceeding other than a proceeding to determine costs and fees.

4. Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment in an action for a constructional defect, the court:

(a) May not award to the party any costs or attorney's fees;

(b) May not award to the party any interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment;

(c) Shall order the party to pay the taxable costs incurred by the party who made the offer; and

(d) May order the party to pay to the party who made the offer any or all of the following:

(1) A reasonable sum to cover any costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.

(2) Any applicable interest on the judgment for the period from the date of service of the offer to the date of entry of the judgment.

(3) Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee.

5. To determine whether a party who rejected an offer of judgment failed to obtain a more favorable judgment:

(a) If the offer provided that the court would award costs, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs.

(b) If the offer precluded a separate award of costs, the court must compare the amount of the offer with the sum of:

(1) The principal amount of the judgment; and

(2) The amount of taxable costs that the claimant who obtained the judgment incurred before the date of service of the offer.

6. Multiple parties may make a joint offer of judgment pursuant to this section.

7. A party may make to two or more other parties pursuant to this section an apportioned offer of judgment that is conditioned upon acceptance by all the parties to whom the apportioned offer is made. Each party to whom such an offer is made may serve upon the party who made the offer a separate written notice of acceptance of the offer. If any party rejects the apportioned offer:

(a) The action must proceed as to all parties to whom the apportioned offer was made, whether or not the other parties accepted or rejected the offer; and

(b) The sanctions set forth in subsection 4:

(1) Apply to each party who rejected the apportioned offer.

(2) Do not apply to any party who accepted the apportioned offer.

8. The sanctions set forth in subsection 4 do not apply to: