

**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.

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**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

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**APPELLANT'S APPENDIX VOL 7 OF 27**

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**CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX**

<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Pages</b>
Chapter 40 Notice	2/24/16	1	1–51
Complaint	9/28/16	1	52–73
Defendant’s Motion to Dismiss Complaint	12/7/16	1	74–85
Plaintiffs’ Opposition to Motion to Dismiss; Appendix	1/4/17	1–2	86–222
Defendant’s Reply in Support of Motion to Dismiss	1/17/17	2	223–230
Recorder’s Transcript of Proceedings	1/24/17	2	231–260
Order Denying Motion to Dismiss	2/9/17	2	261–262
Answer and Counterclaim	3/1/17	2	263–296
Plaintiffs’ Motion for Summary Judgment on Defendant’s Counter-Claim and Plaintiffs’ Motion for Partial Summary Judgment on Their Third Claim for Relief	3/20/17	2–4	297–400
Defendant’s Opposition to Motion for Summary Judgment	4/26/17	4	401–439
Plaintiffs’ Reply in Support of Motion for Summary Judgment	5/10/17	4	440–449
Recorder’s Transcript of Proceedings	6/20/17	4	450–496
Findings of Fact, Conclusions of Law, and Order	9/15/17	4	497–516
Defendant’s Motion for Clarification	10/10/17	4	517–546
Plaintiffs’ Opposition to Motion for Clarification	10/27/17	4	547–554
Defendant’s Reply in Support of Motion for Clarification	11/15/17	4	555–560
Recorder’s Transcript of Proceedings	11/21/17	4–5	561–583
Order Denying Motion for Clarification	2/1/18	5	584–585
Recorder’s Transcript of Proceedings	3/15/18	5	586–593
Amended Chapter 40 Notice of Claims	4/5/18	5	594–641
Recorder’s Transcript of Proceedings	4/12/18	5	642–650

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 Counter-motion	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

Order Denying 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	7/24/19	25	4313–4315
Defendant's (1) Opposition to Plaintiffs/Counter-Defendants' Motion to Certify Judgment as Final Under Rule 54(b) and (2) Response to Plaintiffs' Opposition to Defendant's July 16, 2019 Oral Motion to Postpone the Court's Ruling on the 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	8/1/19	25	4316–4333
Plaintiffs' Reply in Support of Motion to Certify Judgment as Final under Rule 54(b)	8/5/19	25	4334–4343
Recorder's Transcript of Proceedings	8/6/19	25	4344–4368
Order re: Defendant's Motion for Reconsideration 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)	8/9/19	25	4369–4376
Order Re: Motion to Certify Judgment as Final Under NRCP 54(b)	8/12/19	25	4377–4389
Notice of Entry of Order Re: Motion to Certify Judgment as Final Under NRCP 54(b)	8/13/19	25	4390–4405

Defendant's Motion to 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)	9/9/19	25–26	4406–4476
Plaintiffs' Opposition to Motion to 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)	9/26/19	26	4477–4496
Defendant's Reply in Support of Motion to 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)	10/10/19	26	4497–4508
Recorder's Transcript of Proceedings	10/17/19	26	4509–4525
Order Re: Defendant's Motion to Alter or Amend Court's Findings of Fact, Conclusions of Law and Order Entered May 23, 2019	1/14/20	26	4526–4534
Notice of Entry of Order Re: Defendant's Motion to Alter or Amend Court's Findings of Fact, Conclusions of Law and Order Entered May 23, 2019	1/16/20	26	4535–4546
Plaintiffs/Counter-Defendants' First Supplement to Motion for Attorneys' Fees; Exhibits	2/6/20	26–27	4547–4753
Plaintiffs' Opposition to Defendant's Renewed Motion to Retax and Settle Costs	2/10/20	27	4754–4771
Notice of Appeal	2/13/20	27	4772–4817
Defendant's Opposition to Plaintiffs/Counter-Defendants' First Supplement to Their Motion for Attorneys' Fees	2/20/20	27	4818–4833

## **ALPHABETICAL TABLE OF CONTENTS TO APPENDIX**

<b>Document</b>	<b>Date</b>	<b>Vol.</b>	<b>Pages</b>
Amended Chapter 40 Notice of Claims	4/5/18	5	594–641
Answer and Counterclaim	3/1/17	2	263–296
Assembly Bill 421	6/3/19	16	2429–2443
Chapter 40 Notice	2/24/16	1	1–51
Complaint	9/28/16	1	52–73
Defendant’s (1) Opposition to Plaintiffs/Counter-Defendants’ Motion to Certify Judgment as Final Under Rule 54(b) and (2) Response to Plaintiffs’ Opposition to Defendant’s July 16, 2019 Oral Motion to Postpone the Court’s Ruling on the 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	8/1/19	25	4316–4333
Defendant’s Motion for Clarification	10/10/17	4	517–546
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
Defendant’s Motion to 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)	9/9/19	25–26	4406–4476

Defendant's Motion to Dismiss Complaint	12/7/16	1	74–85
Defendant's Motion to Retax and Settle Costs	5/31/19	16	2418–2428
Defendant's Opposition to Motion for Attorneys' Fees	7/1/19	24	4053–4070
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
Defendant's Opposition to Motion for Reconsideration	1/22/19	11	1639–1659
Defendant's Opposition to Motion for Summary Judgment	4/26/17	4	401–439
Defendant's Opposition to Motion for Summary Judgment	9/4/18	6–7	840–1077
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
Defendant's Opposition to Plaintiffs/Counter-Defendants' First Supplement to Their Motion for Attorneys' Fees	2/20/20	27	4818–4833
Defendant's Reply in Support of Countermotion	3/19/19	15	2270–2316
Defendant's Reply in Support of Counter-Motions to Exclude Inadmissible Evidence and for Rule 56(f) Relief	1/29/19	11	1857–1862
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
Defendant's Reply in Support of Motion for Clarification	11/15/17	4	555–560

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 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)	10/10/19	26	4497–4508
Defendant's Reply in Support of Motion to Dismiss	1/17/17	2	223–230
Defendant's Reply in Support of Motion to Retax and Settle Costs	7/9/19	24	4078–4103
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
Errata to: Plaintiffs/Counter-Defendants' Motion for Declaratory Relief Regarding Standing	2/5/19	12–14	1948–2051
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
Findings of Fact, Conclusions of Law and Order	5/23/19	15–16	2377–2395
Findings of Fact, Conclusions of Law, and Order	9/15/17	4	497–516
Findings of Fact, Conclusions of Law, and Order	11/30/18	10	1508–1525
Notice of Appeal	2/13/20	27	4772–4817

Notice of Entry of Order	5/28/19	16	2396–2417
Notice of Entry of Order Re: Defendant’s Motion to Alter or Amend Court’s Findings of Fact, Conclusions of Law and Order Entered May 23, 2019	1/16/20	26	4535–4546
Notice of Entry of Order Re: Motion to Certify Judgment as Final Under NRCPP 54(b)	8/13/19	25	4390–4405
Order Denying 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	7/24/19	25	4313–4315
Order Denying Motion for Clarification	2/1/18	5	584–585
Order Denying Motion to Dismiss	2/9/17	2	261–262
Order Denying Plaintiffs/Counter-Defendants’ Motion for Declaratory Relief Regarding Standing	3/11/19	15	2231–2233
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 re: Defendant’s Motion for Reconsideration 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)	8/9/19	25	4369–4376
Order Re: Defendant’s Motion to Alter or Amend Court’s Findings of Fact, Conclusions of Law and Order Entered May 23, 2019	1/14/20	26	4526–4534



Order Re: Motion to Certify Judgment as Final Under NRCP 54(b)	8/12/19	25	4377–4389
Plaintiffs/Counter-Defendants’ First Supplement to Motion for Attorneys’ Fees; Exhibits	2/6/20	26–27	4547–4753
Plaintiffs/Counter-Defendants’ Motion for Summary Judgment Pursuant to NRS 11.202(1)	2/11/19	14	2052–2141
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/Counter-Defendants’ Opposition to Motion to Retax	6/21/19	22	3664–3733
Plaintiffs/Counter-Defendants’ Reply in Support of Motion for Attorneys’ Fees	7/9/19	24	4172–4198
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
Plaintiffs’ Motion for Attorneys’ Fees; Appendices I–II	6/16/19	16–22	2506–3663
Plaintiffs’ Motion for Declaratory Relief Regarding Standing; Appendices I–III.	10/22/18	7–9	1180–1450
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

Plaintiffs’ Motion for Summary Judgment on Defendant’s April 5, 2018 Amended Notice of Claims	8/3/18	5–6	651–839
Plaintiffs’ Motion for Summary Judgment on Defendant’s Counter-Claim and Plaintiffs’ Motion for Partial Summary Judgment on Their Third Claim for Relief	3/20/17	2–4	297–400
Plaintiffs’ Motion to Certify Judgment as Final Under Rule 54(b) (On Order Shortening Time)	7/22/19	25	4277–4312
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’ 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
Plaintiffs’ Opposition to Defendant’s Renewed Motion to Retax and Settle Costs	2/10/20	27	4754–4771
Plaintiffs’ Opposition to Motion for Clarification	10/27/17	4	547–554
Plaintiffs’ Opposition to Motion to 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)	9/26/19	26	4477–4496
Plaintiffs’ Opposition to Motion to Dismiss; Appendix	1/4/17	1–2	86–222

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

1     ~~16-1~~ 4. Notice is not required pursuant to this section before  
2     commencing an action if:

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

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

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

11    40.646 1. Except as otherwise provided in subsection 2, not  
12    later than 30 days after the date on which a contractor receives  
13    notice of a constructional defect pursuant to NRS 40.645, the  
14    contractor shall forward a copy of the notice by certified mail, return  
15    receipt requested, to the last known address of each subcontractor,  
16    supplier or design professional whom the contractor reasonably  
17    believes is responsible for a defect specified in the notice.

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

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

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

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

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



1 —(a) The contractor shall, in addition to the notice provided  
2 pursuant to subsection 1, upon receipt of a request for an inspection,  
3 forward a copy of the request to or notify each subcontractor,  
4 supplier or design professional who may be responsible for the  
5 alleged defect of the request not later than 5 working days after  
6 receiving such a request; and  
7 —(b) Not later than 20 days after receiving notice from the  
8 contractor of such a request, the subcontractor, supplier or design  
9 professional shall inspect the alleged constructional defect in  
10 accordance with subsection 2 of NRS 40.6462 and provide the  
11 contractor with a written statement indicating:  
12 —(1) Whether the subcontractor, supplier or design  
13 professional has elected to repair the defect for which the contractor  
14 believes the subcontractor, supplier or design professional is  
15 responsible; and  
16 —(2) If the subcontractor, supplier or design professional elects  
17 to repair the defect, an estimate of the length of time required for the  
18 repair, and at least two proposed dates on and times at which the  
19 subcontractor, supplier or design professional is able to begin  
20 making the repair.  
21 —5.† If a subcontractor, supplier or design professional elects to  
22 repair the constructional defect, the contractor or claimant may hold  
23 the subcontractor liable for any repair which does not eliminate the  
24 defect.

25 **Sec. 10.** NRS 40.6462 is hereby amended to read as follows:  
26 40.6462 †1. Except as otherwise provided in subsection 2,  
27 after† After notice of a constructional defect is given to a contractor  
28 pursuant to NRS 40.645, the claimant shall, upon reasonable notice,  
29 allow the contractor and each subcontractor, supplier or design  
30 professional who may be responsible for the alleged defect  
31 reasonable access to the residence or appurtenance that is the subject  
32 of the notice to determine the nature and extent of a constructional  
33 defect and the nature and extent of repairs that may be necessary. To  
34 the extent possible, the persons entitled to inspect shall coordinate  
35 and conduct the inspections in a manner which minimizes the  
36 inconvenience to the claimant.

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



\* A B 1 2 5 R 1 \*

1       **Sec. 11.** NRS 40.647 is hereby amended to read as follows:  
2       40.647 1. ~~{Except as otherwise provided in NRS 40.6452,~~  
3 ~~after}~~ *After* notice of a constructional defect is given pursuant to  
4 NRS 40.645, before a claimant may commence an action or amend a  
5 complaint to add a cause of action for a constructional defect against  
6 a contractor, subcontractor, supplier or design professional, the  
7 claimant must:

8       (a) Allow an inspection of the alleged constructional defect to be  
9 conducted pursuant to NRS 40.6462; ~~{and}~~

10       (b) *Be present at an inspection conducted pursuant to NRS*  
11 *40.6462 and identify the exact location of each alleged*  
12 *constructional defect specified in the notice and, if the notice*  
13 *includes an expert opinion concerning the alleged constructional*  
14 *defect, the expert, or a representative of the expert who has*  
15 *knowledge of the alleged constructional defect, must also be*  
16 *present at the inspection and identify the exact location of each*  
17 *alleged constructional defect for which the expert provided an*  
18 *opinion; and*

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

23       2. If a claimant commences an action without complying with  
24 subsection 1 or NRS 40.645, the court shall:

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

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

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

34       40.6472 1. Except as otherwise provided in NRS ~~{40.6452,}~~  
35 40.670 and 40.672, a written response must be sent by certified  
36 mail, return receipt requested, to a claimant who gives notice of a  
37 constructional defect pursuant to NRS 40.645:

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

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

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



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

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

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

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

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

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

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

28 40.648 1. If the response provided pursuant to NRS 40.6472  
29 includes an election to repair the constructional defect:

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

35 (b) The repairs must be performed:

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

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

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



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

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

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

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

12 (a) ~~If the notice was sent pursuant to subsection 4 of NRS~~  
13 ~~40.645 and there are four or fewer owners named in the notice, for~~  
14 ~~the named owners, not later than 105 days after the date on which~~  
15 ~~the contractor received the notice.~~

16 ~~(b) If the notice was sent pursuant to subsection 4 of NRS~~  
17 ~~40.645 and there are five or more owners named in the notice, for~~  
18 ~~the named owners, not later than 150 days after the date on which~~  
19 ~~the contractor received the notice.~~

20 ~~(c) If the notice was sent pursuant to subsection 4 of NRS~~  
21 ~~40.645, not later than 105 days after the date on which the~~  
22 ~~contractor provides a disclosure of the notice to the unnamed~~  
23 ~~owners to whom the notice applies pursuant to NRS 40.6452.~~

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

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

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

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

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

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





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

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

7 40.650 1. If a claimant unreasonably rejects a reasonable  
8 written offer of settlement made as part of a response pursuant to  
9 paragraph (b) of subsection 2 of NRS 40.6472 and thereafter  
10 commences an action governed by NRS 40.600 to 40.695, inclusive,  
11 *and sections 2 and 3 of this act*, the court in which the action is  
12 commenced may:

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

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

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

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

20 (a) Comply with the provisions of NRS 40.6472;

21 (b) Make an offer of settlement;

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

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

26 (e) Participate in mediation,

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

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

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

43 (b) *A claimant may include in a notice given pursuant to NRS*  
44 *40.645 only claims for the constructional defects that were denied*  
45 *by the insurer.*



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

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

12 4. Nothing in this section prohibits an offer of judgment  
13 pursuant to Rule 68 of the Nevada Rules of Civil Procedure or NRS  
14 17.115 ~~if the offer of judgment includes all damages to which the~~  
15 ~~claimant is entitled pursuant to NRS 40.655.~~ *or section 3 of this*  
16 *act.*

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

18 40.655 1. Except as otherwise provided in NRS 40.650, in a  
19 claim governed by NRS 40.600 to 40.695, inclusive, *and sections 2*  
20 *and 3 of this act*, the claimant may recover only the following  
21 damages to the extent proximately caused by a constructional  
22 defect:

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

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

29 ~~—(c)—~~ (b) The reduction in market value of the residence or  
30 accessory structure, if any, to the extent the reduction is because of  
31 structural failure;

32 ~~—(d)—~~ (c) The loss of the use of all or any part of the residence;

33 ~~—(e)—~~ (d) The reasonable value of any other property damaged  
34 by the constructional defect;

35 ~~—(f)—~~ (e) Any additional costs reasonably incurred by the  
36 claimant ~~for constructional defects proven by the claimant,~~  
37 including, but not limited to, any costs and fees incurred for the  
38 retention of experts to:

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

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

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

45 ~~—(g)—~~ (f) Any interest provided by statute.



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

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

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

12       ~~{5.—}~~ 4. As used in this section, "structural failure" means  
13 physical damage to the load-bearing portion of a residence or  
14 appurtenance caused by a failure of the load-bearing portion of the  
15 residence or appurtenance.

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

17       40.695 1. Except as otherwise provided in ~~{subsection}~~  
18 *subsections 2 ~~{~~ and 3*, statutes of limitation or repose applicable to  
19 a claim based on a constructional defect governed by NRS 40.600 to  
20 40.695, inclusive, *and sections 2 and 3 of this act* are tolled from  
21 the time notice of the claim is given, until ~~{30}~~ *the earlier of:*

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

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

25       2. *Statutes of limitation and repose may be tolled under this*  
26 *section for a period longer than 1 year after notice of the claim is*  
27 *given only if, in an action for a constructional defect brought by a*  
28 *claimant after the applicable statute of limitation or repose has*  
29 *expired, the claimant demonstrates to the satisfaction of the court*  
30 *that good cause exists to toll the statutes of limitation and repose*  
31 *under this section for a longer period.*

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

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

35       11.202 1. ~~{A.}~~ *No* action may be commenced against the  
36 owner, occupier or any person performing or furnishing the design,  
37 planning, supervision or observation of construction, or the  
38 construction of an improvement to real property ~~{at any time}~~ *more*  
39 *than 6 years* after the substantial completion of such an  
40 improvement, for the recovery of damages for:

41       (a) Any deficiency in the design, planning, supervision or  
42 observation of construction or the construction of such an  
43 improvement; ~~{which is the result of his or her willful misconduct~~  
44 ~~or which he or she fraudulently concealed;}~~



- 1 (b) Injury to real or personal property caused by any such  
2 deficiency; or  
3 (c) Injury to or the wrongful death of a person caused by any  
4 such deficiency.  
5 2. The provisions of this section do not apply ~~to~~ :  
6 (a) *To a claim for indemnity or contribution.*  
7 (b) *In an action brought against:*  
8 ~~the~~ (1) The owner or keeper of any hotel, inn, motel, motor  
9 court, boardinghouse or lodging house in this State on account of his  
10 or her liability as an innkeeper.  
11 ~~the~~ (2) Any person on account of a defect in a product.  
12 **Sec. 18.** NRS 11.2055 is hereby amended to read as follows:  
13 11.2055 1. Except as otherwise provided in subsection 2, for  
14 the purposes of *this section and* NRS 11.202 , ~~to 11.206,~~  
15 ~~inclusive,~~ the date of substantial completion of an improvement to  
16 real property shall be deemed to be the date on which:  
17 (a) The final building inspection of the improvement is  
18 conducted;  
19 (b) A notice of completion is issued for the improvement; or  
20 (c) A certificate of occupancy is issued for the improvement,  
21 ~~whichever occurs later.~~  
22 2. If none of the events described in subsection 1 occurs, the  
23 date of substantial completion of an improvement to real property  
24 must be determined by the rules of the common law.  
25 **Sec. 19.** NRS 113.135 is hereby amended to read as follows:  
26 113.135 1. Upon signing a sales agreement with the initial  
27 purchaser of residential property that was not occupied by the  
28 purchaser for more than 120 days after substantial completion of the  
29 construction of the residential property, the seller shall:  
30 (a) Provide to the initial purchaser a copy of NRS 11.202 ~~to~~  
31 ~~11.206, inclusive,~~ , 11.2055 and 40.600 to 40.695, inclusive ~~to~~ ,  
32 *and sections 2 and 3 of this act;*  
33 (b) Notify the initial purchaser of any soil report prepared for the  
34 residential property or for the subdivision in which the residential  
35 property is located; and  
36 (c) If requested in writing by the initial purchaser not later than  
37 5 days after signing the sales agreement, provide to the purchaser  
38 without cost each report described in paragraph (b) not later than 5  
39 days after the seller receives the written request.  
40 2. Not later than 20 days after receipt of all reports pursuant to  
41 paragraph (c) of subsection 1, the initial purchaser may rescind the  
42 sales agreement.  
43 3. The initial purchaser may waive his or her right to rescind  
44 the sales agreement pursuant to subsection 2. Such a waiver is



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

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

4 116.3102 1. Except as otherwise provided in this chapter, and  
5 subject to the provisions of the declaration, the association:

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

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

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

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

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

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

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

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

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

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

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

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





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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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



1     4. The provisions of NRS 40.647, as amended by section 11 of  
2 this act, apply only to an inspection conducted pursuant to NRS  
3 40.6462, as amended by section 10 of this act, on or after the  
4 effective date of this act.

5     5. Except as otherwise provided in subsection 6, the period of  
6 limitations on actions set forth in NRS 11.202, as amended by  
7 section 17 of this act, applies retroactively to actions in which the  
8 substantial completion of the improvement to the real property  
9 occurred before the effective date of this act.

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

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

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

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

21    8. As used in this section:

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

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

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

29    **Sec. 23.** This act becomes effective upon passage and  
30 approval.

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### LEADLINES OF REPEALED SECTIONS

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**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.**



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**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.**

③



EXHIBIT F

# 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 Ocegüera, 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

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 Ocegüera, 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

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.

6-4 of 18

EXHIBIT I

# EXHIBIT I

EXHIBIT I

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 ~~[(c)]~~, *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 ~~(1)~~, *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:~~

~~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 : ~~[for 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 . ~~for subsection 4 of NRS 40.682.]~~

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

~~—(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

EXHIBIT J

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9 (Admitted Pro Hac Vice)

10 *Counsel for Defendant*

11 EIGHTH JUDICIAL DISTRICT COURT  
12 CLARK COUNTY, NEVADA  
13

14 LAURENT HALLIER, an individual;  
15 PANORAMA TOWERS I, LLC, a Nevada  
limited liability company; PANORAMA  
16 TOWERS I MEZZ, LLC, a Nevada limited  
liability company and M.J. DEAN  
17 CONSTRUCTION, INC., a Nevada Corporation,

18 Plaintiffs,

19 vs.

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

22 Defendant.

23  
24 PANORAMA TOWERS CONDOMINIUM  
UNIT OWNERS' ASSOCIATION, a Nevada  
25 non-profit corporation, and Does 1 through 1000,

26 Counterclaimants,

27 vs.

28 LAURENT HALLIER, an individual:

CASE NO.: A-16-744146-D

DEPT. NO.: XXII

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

9 Counterdefendants.

10  
11  
12 **AFFIDAVIT OF OMAR HINDIYEH IN SUPPORT OF**  
13 **PANORAMA'S OPPOSITION TO**  
**HALLIER'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

14 STATE OF NEVADA            )  
15 COUNTY OF CLARK         ) ss:

16 I, Omar Hindiye, being first duly sworn, state as follows:

17 1. I received a Bachelor of Science degree in civil engineering from San Jose State  
18 University in 1978. I am a licensed general contractor in California (license no. 757672) and in  
19 Nevada (license no. 53133). I am the owner and president of CMA Consulting (CMA), formed in  
20 1985, which specializes in construction management and forensic investigation services. A copy  
21 of my CV, which includes my licenses, certifications and professional affiliations, is attached  
22 hereto as Exhibit 1.

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

25 3. CMA Consulting was retained by the Panorama Towers Condominium Unit  
26 Owners' Association in August, 2013, to investigate and repair leakage conditions in one of the  
27 units of the Panorama development, Unit 300, located on the third story of Tower 1, 4525 Dean  
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

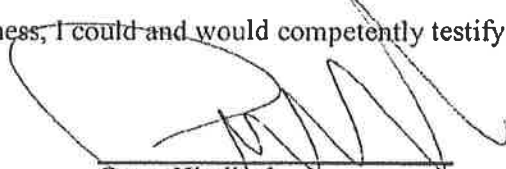
16 9. CMA estimates that the foregoing expenses – for the work and materials provided  
17 by a contractor, storage of the occupant’s property, and charges for CMA’s services – would  
18 amount to an average cost of \$13,145 per unit. There are 616 “standard” units in the two towers,  
19 which would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

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

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

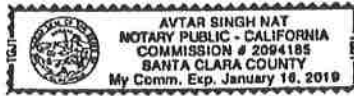
28 12. I declare under the penalty of perjury under the laws of Nevada that the foregoing

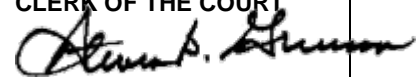
1 is true and correct. If called as a witness, I could and would competently testify thereto.

2  
3  
4   
Omar Hindiye

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

6   
7 NOTARY PUBLIC





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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.

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

Counter-Claimant,

vs.

LAURENT HALLIER, an individual;  
PANORAMA TOWERS I, LLC, a Nevada  
limited liability company; PANORAMA  
TOWERS I MEZZ, LLC, a Nevada limited  
liability company; and M.J. DEAN

) Case No. A-16-744146-D

) Dept. XXII

) **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**



1 CONSTRUCTION, INC., a Nevada Corporation; )  
2 SIERRA GLASS & MIRROR, INC.; F. )  
3 ROGERS CORPORATION; DEAN ROOFING )  
4 COMPANY; FORD CONTRACTING, INC.; )  
5 INSULPRO, INC.; XTREME EXCAVATION; )  
6 SOUTHERN NEVADA PAVING, INC.; )  
7 FLIPPINS TRENCHING, INC.; BOMBARD )  
8 MECHANICAL, LLC; R. RODGERS )  
9 CORPORATION; FIVE STAR PLUMBING & )  
10 HEATING, LLC, dba SILVER STAR )  
11 PLUMBING; and ROES 1 through , inclusive, )  
12 Counter-Defendants. )  
13

14 COME NOW Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC,  
15 Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. (hereinafter collectively referred  
16 to as “Builders”), by and through their attorneys of record Peter C. Brown, Esq. and Jeffrey W.  
17 Saab, Esq. of the law firm of Bremer Whyte Brown & O’Meara LLP, and hereby submit this Reply  
18 in Support of Motion for Summary Judgment on Defendant/Counter-Claimant Panorama Tower  
19 Condominium Unit Owners’ Association’s (hereinafter “the Association”) April 5, 2018 Amended  
20 Notice of Claims.

21 Dated: September 25, 2018

BREMER WHYTE BROWN & O’MEARA LLP

22 By: \_\_\_\_\_

23 Peter C. Brown, Esq.  
24 Nevada State Bar No. 5887  
25 Jeffrey W. Saab, Esq.  
26 Nevada State Bar No. 11261  
27 Attorneys for Plaintiffs/Counter-Defendants,  
28 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-

1 barred claims.

2 Although already firmly rejected by this Court in its prior rulings, the Association once  
3 again throws itself abject before the bench, crying poor and beseeching that this Court rewrite NRS  
4 40.645 as if the AB125 amendments did not exist. It is no surprise that the Association cites to a  
5 2007 decision in support of this portion of its Opposition. *See* Opposition, page 25, fn. 53, citing  
6 D.R. Horton Inc. v. Eighth Judicial District Ct., 168 P.3d 731 (2007). The Association would  
7 prefer a return to the “good old days” before AB125. However, this Court has rightly shown it is  
8 not swayed by the mist of misguided nostalgia. Accordingly, this Court has already correctly  
9 rejected the Association’s call, reminiscent of Cher circa-1989, to “turn back time.”

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

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

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

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

### 13 **ARGUMENT**

#### 14 **I. NRS 40.645(4)(a) IS INAPPLICABLE**

##### 15 **A. This Court Has Already Concluded that the Association was Required to** 16 **Provide the Builders with a Chapter 40 Notice that Complied with NRS 40.600** 17 **Et. Seq.**

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

26 The Builders' Complaint did not exist when the Association served its Chapter 40 Notice in  
27 2016. It was not even a glimmer in the eye of the Builders when they were served with what was  
28 clearly a deficient Chapter 40 Notice (as borne out by this Court's extensive September 15, 2017

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

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

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

18 Even if NRS 40.645(4)(a) was potentially applicable (and the Association's service of the  
19 2016 Notice precludes its application), the Association is barred from raising such an argument  
20 under the doctrines of laches and waiver. In Nevada, the defense of laches is available where delay  
21 by one party results in a disadvantage to the other such that granting relief to the delaying party  
22 would be inequitable. Building & Constr. Trades v. Public Works, 108 Nev. 605, 839 P.2d 633,  
23 637 (1992). The Builders filed their Complaint on September 28, 2016. The Association filed its  
24 Answer on March 1, 2017. The Association did not raise NRS 40.645(4)(a) as an affirmative  
25 defense in its Answer. Nor has it ever sought to amend its Answer to assert such a defense. The  
26 Association did not raise this argument in its Opposition to the Builders' initial Motion for  
27 Summary Judgment. The Association did not raise this issue in its Motion for Clarification.  
28 Rather, the Association, without explanation, waited almost a full two years to assert any position

1 related to NRS 40.645(4)(a). Such a delay is without any justification. The parties have been  
2 proceeding since September 28, 2016 under the current procedural format. Motions have been  
3 filed and opposed, hearings have been attended, significant work has been conducted by the  
4 Builders from the position of “Plaintiffs” in this case, all based on an actual Chapter 40 Notice that  
5 was served on the Builders in February of 2016. Allowing the Association to make a NRS  
6 40645(4)(a) argument after all this time is prejudicial to the Builders by way of the attorney’s fees  
7 and costs that have been expended, as well as other factors including this Court’s and the Builders’  
8 reliance on the Association’s position (until September 4, 2018, the filing date of its Opposition)  
9 both during hearings and in pleadings that it would live and/or die by the final determination of the  
10 validity of both its original Chapter 40 Notice and its April 5, 2018 Amended Notice. *See Memory*  
11 *Gardens v. Pet Ponderosas*, 88 Nev. 1, 4, 492 P.2d 123, 124 (1972). *See also State v. Rosenthal*,  
12 107 Nev. 772, 819 P.2d 1296 (1991).

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

22 **C. The Association’s Interpretation of NRS 40.645(4)(A) is Misguided.**

23 NRS 40.645(4)(a) states:

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

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

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

9 The Association references the legislative history of NRS 40.645(4)(a), but conveniently  
10 does not point out the specific types of situation that provision was designed to deal with. Scott  
11 Canepa, Esq., one of the preeminent plaintiff construction defect attorneys, explained that the  
12 provision was necessary because "[t]here is no exception for homeowners who are already in  
13 litigation with contractors." *See* Opposition, Exhibit F, page 42. The operative phrase is "already  
14 in litigation." What did that mean? Situations where a contractor has sued for non-payment before  
15 a Chapter 40 Notice has been served. Situations where a lien claim has been filed before a Chapter  
16 40 Notice has been served. The Builders are unaware of any case in Nevada where the position  
17 advanced by the Association, that the filing of a complaint by a contractor after Chapter 40 Notice  
18 has been issued and the entire pre-litigation discovery/mediation process has been completed, has  
19 ever been argued much less approved by the presiding judge.

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

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

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

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

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

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

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



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

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

18       As for the Association’s sewer pipe claim, the Association will never be able to comply  
19 with its statutory requirements, a fact which the Association acknowledges. See Opposition, pg.  
20 21, lines 16-19. And yet the Association offers the weakest of explanations as to why it should still  
21 be allowed to advance this issue – that it assumed this “isolated incident would not be the subject of  
22 a Chapter 40 claim.” See Motion, pg. 22, lines 10-12. So, the Association assumes the sewer issue  
23 will never be part of Chapter 40 claim and, consequently, no notice was given to the Builders.  
24 Since no notice was provided, the evidence was not preserved. But once the Association decided to  
25 improperly serve a deficient Chapter 40 Notice of other issues years later, the sewer claim is  
26 thrown into that Chapter 40 Notice. This is a perversion of the “throw the baby out with  
27 bathwater” concept with, in this case, the “sewer claim” being tossed in with the other claims.

28 ///

1           **B.     The Association Must Comply with this Court’s Interpretation of AB125.**

2           The Association contends that Builders’ interpretation of AB125 is unreasonable, leads to  
3 an absurd result and violates due process. However, it is not Builders’ interpretation of AB125 that  
4 the Association must comply with, but rather this Court’s, as clearly set forth in the September 15,  
5 2017 Findings of Fact and Conclusions of Law. The Association offers nothing other than a  
6 regurgitation of earlier arguments which this Court has already considered and rejected.  
7 Consequently, the Association is disingenuous when it contends that its Amended Chapter 40  
8 Notice was generated with the Court’s “guidance” when the Association turns a blind eye to the  
9 same.

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

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

13           Regardless of the Association’s reference to plans and specifications, the Amended Chapter  
14 40 Notice fails to satisfy the express statutory requirements to identify the **exact location of each**  
15 **defect, damage and injury** (NRS 40.645(2)(b)); and 2) the nature and extent that is known of the  
16 **alleged damages resulting from the alleged defect** (NRS 40.645(2)(c)). As noted above under  
17 Section II, this is true for both the window allegation and the fire-blocking/moisture accumulation  
18 claim. The Builders incorporate all arguments from Section II above into this portion of the Reply  
19 Brief.

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

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

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

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

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

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

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

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

27       ///

28       ///

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9 || Dated: September 25, 2018

By:

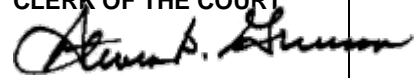
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**LAURENT HALLIER, PANORAMA  
TOWERS I, LLC, PANORAMA  
TOWERS I MEZZ, LLC, and M.J. DEAN  
CONSTRUCTION, INC.**

**CERTIFICATE OF SERVICE**

I hereby certify that on this 25<sup>th</sup> 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, an Employee of  
BREMER, WHYTE, BROWN & O'MEARA, LLP



TRAN

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:

For the Defendant:

PETER C. BROWN, ESQ.

SCOTT WILLIAMS, ESQ.

MICHAEL GAYAN, ESQ.

WILLIAM COULTHARD, ESQ.

FRANCIS I. LYNCH, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

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

2  
3 THE COURT: Okay. That leaves Hallier versus Panorama Towers  
4 Condominium Unit Owners Association, and that is case number A16-744146-D.

5 MR WILLIAMS: Hello.

6 THE COURT: Who am I talking to, Keri?

7 MR. WILLIAMS: Scott Williams here.

8 THE COURT: Okay. Mr. Williams, this is Judge Johnson, Department 22,  
9 The Eighth Judicial District Court. And this is -- I just called the Hallier versus  
10 Panorama Towers Condominium Unit Owners Association, case number A16-  
11 744146-D. And counsel who is present, would you please identify yourselves for the  
12 record?

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

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

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

19 THE COURT: Okay.

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

22 THE COURT: Okay. Mr. Williams.

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

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



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

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

5 Your Honor, as I get older and look back over my life unlike many  
6 people I look back at decisions I've made, actions I've taken and I say to myself like  
7 many people do if I'd only known then what I know now I certainly would have done  
8 something different. But unfortunately -- or some might say fortunately, but  
9 unfortunately there is no time machine. You cannot re-write history and go back and  
10 change the decisions that you've made and yet that is what the association is asking  
11 this Court to do via its opposition to the motion for summary judgment on the  
12 amended Chapter 40 notice. For the first time in this case on September 4, 2018  
13 the association said that this Court should allow the association to rely on NRS  
14 40.645 subsection 4, subsection A and that consequently no notice is required in  
15 this case.

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

1 and settlement purposes and protected from disclosure by NRS 40.680 and NRS  
2 48.105. But I can represent to the Court, Your Honor, that on May 24, 2016 the very  
3 issues that this Court brought to the attention of the association in its September,  
4 2017 order were brought to the attention of the association in its failure as part of the  
5 Chapter 40 notice to comply with NRS 40.645 subsection 3. I will also represent to  
6 the Court that the issues with regard to the mechanical room issues and the sewer  
7 line issues were also raised back in May of 2016. But despite that being provided to  
8 the association two years and three months prior to its opposition date of September  
9 4, 2018 the association is asking this Court to allow it to rely upon NRS 40.645.4A  
10 and they're also asking you to allow them to rely upon that one year and eleven  
11 months after completion of the mediation process in this particular case.

12           They're asking this Court to go back in time and wipe clear from history  
13 all of those actions as though they didn't exist, they didn't happen, that the parties  
14 didn't fully proceed through the pre-litigation process in response to their Chapter 40  
15 notice which was issued on February 24, 2016. In addition to that, Your Honor, the  
16 basis for their request to the Court after all time to allow them to rely upon NRS  
17 40.645.4A is that my client had the audacity to file a complaint on September 28,  
18 2016. At no time in all of the intervening year and months of litigation regarding the  
19 original Chapter 40 notice and of the amended Chapter 40 notice did the association  
20 ever raise this particular defense or ask the Court to allow them to rely upon that? It  
21 was not mentioned the association's motion to dismiss which was filed on December  
22 7, 2016 one year, nine months prior to their request in their opposition.

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

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

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

6 MR. BROWN: Yes --

7 THE COURT: -- wasn't it?

8 MR. BROWN: -- indeed --

9 THE COURT: Okay.

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

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

14 MR. BROWN: Yes, Your Honor.

15 THE COURT: Okay.

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

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

1 client's original motion for summary judgment that if it was granted that they be  
2 provided an opportunity to amend the Chapter 40 notice to fix the errors that were in  
3 the original Chapter 40 notice. They requested that, you granted it and they waited  
4 until the last day in which to provide that amended Chapter 40 notice. And that was  
5 five months prior to the position that they raised for the first time in their September  
6 4, 2018 opposition to the current motion.

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

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

1 judgment which they didn't, they should have raised it in the motion for clarification  
2 which they didn't and, Your Honor, they should have come before the Court  
3 notwithstanding the fact that they asked for it and you gave them generously six  
4 months in which to fix their Chapter 40 notice. They could have come to you at any  
5 time during that time period and said, Your Honor, we don't want to do that, we  
6 actually believe that we don't have to give notice and here are the reasons and to  
7 put forth this particular theory, but they didn't do it, Your Honor. Notwithstanding the  
8 fact that this particular provision of the statute existed at all times both prior to the  
9 issuance of the original Chapter 40 notice and throughout the entire time period up  
10 to including the September 4, 2018 opposition filed in response to the instant motion  
11 for summary judgment and also up and till the present day it exists, Your Honor. It  
12 is never -- it's not a new statute that wasn't available to them and they did not rely  
13 upon it. They voluntarily and with full knowledge of the facts as set forth under the  
14 case of Udeveco, U-d-e-v-e-c-o, Inc. v. Wagner 100 Nev. 185, 189, 678 P.2d 679,  
15 682 (1984) they waived their right to bring that particular issue.

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

1 the homeowner has not paid the contractor what the contractor contends it is owed  
2 for the work that has been performed and the contractor makes that claim, or there  
3 are liens that are placed upon the home and you're going through lien litigation.  
4 What has never occurred -- and, Your Honor, I'm unaware of any case in the history  
5 of Chapter 40 since the institution or the inclusion of that particular provision of the  
6 statute after the 2003 legislative session where any homeowners association or  
7 plaintiff has made the argument -- single family home plaintiffs made the argument  
8 that they do not need to give a notice and that their original notice can be completely  
9 disregarded as though he did not exist which is what they're asking you to sanction  
10 today. Now, Your Honor, why do they want this particular approach to be approved  
11 by this Court? Because they simply cannot satisfy the requirements that this Court  
12 clearly set forth in your extensive order in September of 2017. You gave them  
13 generous guidance, a clear cut map as to how they potentially could satisfy NRS  
14 40.645 and yet in their opposition the association contends that it is the builder's  
15 interpretation of the AB125 amendment to Chapter 40, but in fact it is this Court's  
16 interpretation as set forth in your order, Your Honor, as to what the association was  
17 required to do.

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

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

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

12           THE COURT: Do you got a page?

13           MR. BROWN: Your Honor, for ease what we've done -- and this is on page  
14 18 through 22 of our motion. We've set forth the language of the initial notice for  
15 each of the three disputed defects as well as the amended notice. And if you were  
16 to go to page 21 of the motion you will see on the left column where it talks about  
17 the sewer problems, that is original language talking about an installation error  
18 during construction and again talk about the defective installation present an  
19 unreasonable risk of injury. When you go to the second page -- or the next page,  
20 page 22 in the second column it has the supposed amended language. But, Your  
21 Honor, the only thing that has occurred is that the last paragraph is a supposed  
22 explanation by the association that because they did not assume that this isolated  
23 incident years and years and years ago would ever be part of a Chapter 40 notice.  
24 They didn't give notice to my client.

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

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

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

3 MR. BROWN: Lines 14 through 15 specifically identified the problem with the  
4 original Chapter 40 notice as such: "Notice does not specify the installation error  
5 made or what physical damage occurred." That is the guidance that this Court  
6 provided to the association; that is the guidance that the association disregarded in  
7 its amended notice. There is no change, Your Honor, they've done nothing to  
8 provide additional information to my client. But in addition to that, Your Honor, you  
9 already noted in this particular order on page 16 and then page -- the top -- top of  
10 page 17 in addressing the failure of the association to originally provide notice to my  
11 client pursuant to NRS 40.647.2. Because if you will recall, Your Honor, another  
12 supposed explanation on the part of the association as to why they didn't give notice  
13 to my client is because it was an emergency situation and so they couldn't give  
14 notice to my client. Well, Your Honor, not only did they not give notice even though  
15 they did the repairs, Your Honor, they never gave my notice -- my client notice of the  
16 repairs. And what the Court noted on the bottom of page 16: "Is given these facts  
17 this Court finds the contractor's arguments that the association did not comply with  
18 NRS Chapter 40's pre-litigation requirements have credence." And then at the top  
19 of page 7, paragraph 14 you noted: "This Court also does not find the association's  
20 conduct in making repairs and disposing of defective material to be excused by NRS  
21 40.670."

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



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

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

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

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

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

12           As part of this, Your Honor, please note that this particular issue was  
13 also based upon the investigation of 15 of the 616 units -- or 606 units. And this  
14 Court has already identified that extrapolation is not allowed. And that's noted on  
15 page 15 of the -- page 14 and page 15 of this Court's order where the Court in  
16 responding to the argument that what is being required is unreasonable leading to  
17 an absurd result in violating due process rights the Court was encouraged to adopt a  
18 standard whereby a typical unit could be utilized to identify the defect and that the  
19 typical unit then could be extrapolated. And what the Court wrote in September of  
20 2017 on page 15 is as follows: "In this case the Court disagrees with the  
21 association's assessment for several reasons. First, nowhere within NRS 40.645  
22 did the 2013 Nevada legislature include the words "typical unit." The AB125  
23 amendment unambiguously states: "The NRS 40.645 notice must identify in specific  
24 detail each of each defect, damage and injury to each residence or appurtenance  
25 that is of subject of the claim including without limitation the exact location of each

1 such defect, damage and injury.” And then two lines down, Your Honor, you wrote:  
2 “If the 2015 Nevada legislature intended constructional defects found in a typical unit  
3 be extrapolated as existing in other residences it would have said so.”

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

12 THE COURT: You mean their opposition.

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

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

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

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

13 MR. BROWN: Yes, Your Honor.

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

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

18 THE COURT: Okay. Are you on page 2?

19 MR. BROWN: Yes, Your Honor.

20 THE COURT: Okay.

21 MR. BROWN: Lines 5 through 8.

22 THE COURT: Got it. All right.

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

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

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

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

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

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

18           THE COURT: Isn't it 301?

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

20           THE COURT: Okay. I couldn't remember.

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

1 performed. And so, again, for this particular defect, Your Honor, you've got a  
2 foundation for the claim of fifteen units and then one additional unit -- it's either Unit  
3 300 or Unit 301. But what they've not done, Your Honor, notwithstanding what this  
4 Court directed them -- and again, this is in your order --

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

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

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

11 MR. BROWN: -- to that exhibit. And for the record, that Exhibit A is a March  
12 14, 2018 preliminary defect report from Allana, A-l-l-a-n-a, Buick and Bers, B-e-r-s.

13 THE COURT: Okay. Where in the report?

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

18 THE COURT: Page 6?

19 MR. BROWN: Yes, Your Honor.

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

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

23 THE COURT: Right.

24 MR. BROWN: -- right above that.

25 THE COURT: Oh, okay.



1 MR. BROWN: Result in damage.

2 THE COURT: Got it.

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

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

22 MR. BROWN: Yes.

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

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

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

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

16 MR. BROWN: Yes, Your Honor.

17 THE COURT: Okay.

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

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

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

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

8 THE COURT: Okay.

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

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

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

1 there are no pan sill flashings.

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

3 THE COURT: Did I --

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

6 THE COURT: Okay.

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

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

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

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

12 MR. BROWN: No. They --

13 THE COURT: I could --

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

16 THE COURT: Right.

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

1 40 notice which this Court noted nor the amended Chapter 40 notice satisfies that,  
2 Your Honor. They don't satisfy NRS 40.645 subsection B or C, Your Honor.

3 THE COURT: Okay. I've got a question. On -- you had talked about  
4 location. Now, one thing she says on page four, first paragraph under discussion  
5 1.01, omission of pan flashing at window assemblies, it does say: "Based on as-  
6 built shop drawings and visual review we were able to confirm that this defect is  
7 universal and occurs at all windows of the high rise building." So, haven't they  
8 identified the location?

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

11 THE COURT: Okay.

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

13 THE COURT: Okay.

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

15 THE COURT: Right.

16 MR. BROWN: -- and they attempted to do that. Whether this Court agrees  
17 with their reliance upon the plans and specifications, is a completely separate issue  
18 from whether or not they've also satisfied the other prong of NRS 40.645 subsection  
19 2 that requires them to identify with the specificity the exact location of the damage  
20 arising from the absence of the pan flashing or the absence of the head flashing.  
21 They've got to do both in the notice. That's what NRS 40.645 subsection 2 requires.

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

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

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

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

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

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

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

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

24 THE COURT: Right.

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



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

4 THE COURT: Sure.

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

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

7 MR. BROWN: I know.

8 THE COURT: -- pan flashing and stuff.

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

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

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

19 THE COURT: Okay.

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

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

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

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

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

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

7 THE COURT: Got a page?

8 MR. BROWN: Go to page 4.

9 THE COURT: Okay.

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

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

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

24           THE COURT: You mean the Defendant.

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

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

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

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

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

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

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

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

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

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



1           There is -- I started this off by saying that many times in life we want to  
2 turn back the clock. That's what they want to do, Your Honor, they want to turn  
3 back. And it's not so much that they want to amend what their original Chapter 40  
4 notice says because they could never satisfy the statute the way that it must be  
5 satisfied because they don't want to do what the statute requires. They instead are  
6 asking this Court to do something unique that I despite research and talking to many  
7 attorneys that have never seen occur anywhere in the state of Nevada asking this  
8 Court to say, all right, because a complaint was filed that allows the original Chapter  
9 40 notice to vanish, it never existed. And because the complaint was filed  
10 notwithstanding your directive to the association in your over twenty page order  
11 disregard that, never happened. We don't even need to do the amended Chapter  
12 40 notice. What they want you to do is to say let's start fresh, let's go back to high  
13 school and fix all the errors that --

14           THE COURT: Oh boy --

15           MR BROWN: -- we made in high school.

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

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

1           The motion, Your Honor, must be granted because they have not taken  
2 your guidance and done anything with it. They have said we don't want to follow  
3 your guidance. Follow us, Your Honor, follow us down this pathway to where we  
4 can disregard all that we've done and act as though two different Chapter 40 notices  
5 never existed. Unheard of, unheard of anyone ever asking for that in the history of  
6 40.600 litigation as far as I know, Your Honor, but that's what they're asking this  
7 Court to do. Do you have any questions, Your Honor?

8           THE COURT: No, I don't

9           MR. BROWN: Thank you.

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

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

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

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

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

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

18          MR. WILLIAMS: Hello --

19          THE COURT: Mr. Williams --

20          MR. WILLIAMS: -- Scott Williams here.

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

25          MR. WILLIAMS: Okay. Thank you.

1 THE COURT: You bet.

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

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

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

24 MR. GAYAN: And I will try.

25 THE COURT: Okay.

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

8 THE COURT: Got it.

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

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

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

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

16 MR. GAYAN: Okay.

17 THE COURT: Okay.

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

19 THE COURT: So, we got it.

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

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

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

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

4 THE COURT: Yes, I --

5 MR. GAYAN: A few --

6 THE COURT: -- have.

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

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

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

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

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

17           THE COURT: Of --

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

19           THE COURT: Okay. Did you --

20           MR. GAYAN: And --

21           THE COURT: -- attach that?

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

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



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

8 THE COURT: I understand.

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

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

1 unrelated to the Chapter 40 notice itself. They are based upon a contract that was  
2 executed between the HOA and the builder relative to the previous settlement and  
3 they asked for damages.” They’re asking for money damages indemnity and  
4 defense in this case. This is not just a deck relief case; this is a breach of contract  
5 case.

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

9 MR. GAYAN: Sure.

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

14 MR. GAYAN: Okay.

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

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

19 THE COURT: I --

20 MR. GAYAN: -- according --

21 THE COURT: -- think he --

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

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

1 that the builder cannot challenge the notice.

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

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

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

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

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

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

2 MR. GAYAN: It just moved up.

3 THE COURT: -- before 2015.

4 MR. GAYAN: That's right.

5 THE COURT: Right.

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

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

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

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

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

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

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

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

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

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

2 THE COURT: I'll listen --

3 MR. GAYAN: -- has to --

4 THE COURT: -- to what --

5 MR GAYAN: -- be on the record.

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

7 MR. GAYAN: Okay. Your Honor, let's take a look at 40.650 sub 2. "If a  
8 contract" -- and these -- this is describing the effect and the title -- the second part of  
9 the title: "Effect of failing to take certain actions concerning defects." And this is  
10 dealing with a contractor. "If a contractor, subcontractor, supplier or design  
11 professional fails to (a) comply with the provisions of NRS 40 -- or excuse me,  
12 "40.647(2)" -- we'll come back to that in a second. "make an offer of settlement,  
13 make a good faith response to the claim asserting no liability, agree to a mediator or  
14 accept the appointment of a mediator pursuant to NRS 40.680 or participate in  
15 mediation then the limitations on damages and defenses to liability provided in NRS  
16 40.600 to 40.695 do not apply and the claimant may commence an action or  
17 amended complaint to add a cause of action for a constructional defect without  
18 satisfying any other requirement of Chapter 40." Okay. So, why is that important?  
19 Well, first sub part 2(a) says Mr. Brown's client needs to comply with 40.647(2).  
20 Well, what statute is that? That's the statute discussing what his response has to  
21 do. We take a look. 647, response to notice of defect. "The contractor has to  
22 provide a response in writing within ninety days." This is sub 1(a). And then sub  
23 2(a): "The written response must respond to each constructional defect in the notice  
24 and must state whether the contractor has elected to repair or cause the defect to  
25 be repaired." All right, and then the next part: "May include a settlement offer."



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

5           So that being the case, I don't know how the Court could even decide  
6 (1) if any of the Chapter 40 defenses are still available to Mr. Brown or (2) determine  
7 whether we can proceed with our case for the defects unless you see the Chapter  
8 40 response. How do you know if he's complied with this? How do you know? The  
9 Court doesn't know. He's hidden it from the Court by calling it a settlement  
10 communication. It's a statutory response to our notice. That would be like if my  
11 client had put mediation and settlement communication on the notice to prevent him  
12 from ever asking for deck relief. That's ridiculous, of course that can't be done. You  
13 can't shield it from the Court and hide it from the whole proceeding and then come in  
14 and ask for summary judgment against my client saying our notice is defective and  
15 he's entitled to notice. And frankly Mr. Brown's objections -- he discussed the  
16 content of that response at the last hearing and I'm happy to provide a page and line  
17 on that where he took umbrage with something that Mr. Salzano -- and he said, well,  
18 now that Mr. Salzano is talking about it we did object to all of their defects and we  
19 explained why we objected to all of those defects. That's in the last transcript. He's  
20 -- Mr. Brown started talking about his settlement and mediation protected document  
21 which frankly -- and I'll file a motion if we have to, but I would ask that this hearing  
22 be held in abeyance for the Court's decision while we sort this out because I think  
23 this is a critical document that has to be in the record. If we're gonna have summary  
24 judgment entered against my client on this and we're gonna have to take an appeal  
25 this document has to be in the record. And frankly based on the statute I just read

1 40.650 I don't know how the Court could possibly determine if Mr. Brown's defenses  
2 are still available to him or if we're even required to continue with this charade  
3 before we commence other defects claims.

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

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

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

4           And so if he's disclaimed and the whole purpose of the scheme is to  
5 protect the homeowners and ensure a reasonable opportunity to repair for the  
6 builder and he's already disclaimed and said he's not gonna repair the defect what  
7 are we doing here? What are we doing? And he was successful in shielding that  
8 document from the Court at the last hearing and so I'm not making any comments  
9 about the Court, but I don't think you had a full record the last time. I think you need  
10 that document and I don't think it's protected by any settlement protections that are  
11 cited on the document, 48.150. It doesn't fit under anything there because actually  
12 48.150 only protects communications that involve an offer to resolve a claim. He  
13 told us to go fly a kite. He didn't offer to resolve anything, he disclaimed. How is  
14 that a protected settlement communication? There's no settlement protection in the  
15 new Chapter 40 either. He's got nothing to protect us from the document. It's a  
16 statutorily required response that the Court needs to evaluate to determine whether  
17 his defenses are left and whether the HOA can commence with their lawsuit about  
18 the defects and get to the substance of the case.

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

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

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

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

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

14 THE COURT: Mr. Brown.

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

23 THE COURT: Okay. Go ahead.

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

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

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

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

10 THE COURT: I was gonna say --

11 MR. GAYAN: -- D --

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

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

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

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

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

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

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

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

13 THE COURT: Isn't the --

14 MR. GAYAN: -- prove it.

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

20 MR. GAYAN: Right.

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

22 MR. GAYAN: The similarly situated.

23 THE COURT: Right.

24 MR. GAYAN: It's all gone.

25 THE COURT: Right.



1 MR. GAYAN: It's a ghost.

2 THE COURT: Right.

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

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

15 MR. GAYAN: Right. I completely agree. And so we've done that. And if you  
16 take a hard look at our amended notice including the expert report -- and I'll get into  
17 it a little bit more, we say where the defect is. The top of every window, the bottom  
18 of every window. That's the design -- or the window assembly defect. That's where  
19 it is. Where's the damage? Down because gravity pulls water down. So, it's in the  
20 metal right below every window. What else can we say? So we've said where it is,  
21 where the defect is and where the damage is. And frankly, you know, take a look at  
22 the other part of the notice requirement. Mr. Brown is just skating right by this one.  
23 40.645 Sub 2(c). Mr. Brown's just living in Sub B, he loves Sub B but he hates Sub  
24 C. He's not talking about Sub C. Sub C says -- so Sub B is the specific detail about  
25 the defect, yada, yada, and then the exact location, right? Sub C says: "Describe in

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

3 THE COURT: With respect to cause.

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

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

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

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

17 MR. GAYAN: I'm --

18 THE COURT: -- you know that.

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

25 THE COURT: You know --

1 MR. GAYAN: -- the Court today.

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

6 MR. GAYAN: Yeah.

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

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

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

22 MR. GAYAN: Right.

23 THE COURT: -- anyway.

24 MR. GAYAN: Right.

25 THE COURT: Okay.

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

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

10 THE COURT: It's Exhibit D?

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

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

15 MR. GAYAN: Okay. So, Exhibit D and the preliminary language on page 2.  
16 But I guess get to page 3; this is where the heart of the issue is for the window  
17 assemblies so residential tower windows. We're talking about the residential tower.  
18 Is there -- there is some -- this is a mixed used tower; there's a few retail spaces  
19 below. So we're talking about the residential part of this, I think that's been clear all  
20 along. And as the Court acknowledged we're alleging defective design. The  
21 flashing that was required to be there, the head flashing and the sill pan flashing  
22 both missing, their required by the code. And that's gone into here. You see the  
23 2000 international building code, ASTM and ICBO standards and the EIFS  
24 manufacturer's installation instructions. All of those things require the -- both of  
25 these types of flashing, not in the plans. So, we looked at the drawings, the initial

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

12               So, another thing I'd like to just mention and Your Honor doesn't  
13 necessarily need to flip there, but Mr. Brown's claim that head flashing is some kind  
14 of a new issue is just absurd. He filed his motion last year asking for more details  
15 about the defects and now we've provided more details and he calls them new  
16 issues and new defects. That is just absurd. And it -- and I'm just gonna read  
17 straight from our initial notice which is what the Court considered the last time as it  
18 relates to tower windows. The notice says: "The window assemblies in the  
19 residential tower units were defectively designed such that water entry and the  
20 assemblies does not have an appropriate means of exiting the assemblies. There  
21 are no sill pans, proper weepage components or other drainage provisions designed  
22 to direct water from and through the window assemblies to the exterior of the  
23 building." Well, guess what a head flashing is? "It's another drainage provision."  
24 So, now Mr. Brown is here saying you gave me more detail. The detail I demanded  
25 -- I have to be specific about every defect, about every location, about every

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

10 Now, the top of page 4 of our amended notice, back to Exhibit D. Mr.  
11 Brown spent a lot of time on this and he was really focused on the expert report and  
12 parsing out words from the expert report attached to this notice but he never actually  
13 came back to this part of our notice. First paragraph, line 1: "As a consequence of  
14 this deficiency water that should have drained to the exterior of the building has  
15 been entering the metal framing components of the exterior wall and floor  
16 assemblies including the curb walls that support the windows and is causing, now  
17 happening, corrosion damage to the metal parts and components within these  
18 assemblies as described and identified in Exhibit A the resulting damage to the  
19 metal components of the tower structures presents an unreasonable risk of injury to  
20 a person or property straight from the statute." You guys -- you spent a lot of time  
21 with Mr. Brown on that language, it's right here. He never brought you to it and I  
22 wanted to make sure you saw it. It is in the notice; that is what we're alleging.  
23 We're alleging this situation creates an unreasonable risk of personal property. You  
24 know why? Unit 300 had water coming all the way in the unit. They opened the wall  
25 cavity, there's mold all over the place. I think mold is pretty significant.

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

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

4           MR. GAYAN: I --

5           THE COURT: -- as an example.

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

7           THE COURT: Okay.

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

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

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

22           MR. GAYAN: Yes.

23           THE COURT: -- I mean --

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



1 THE COURT: Okay.

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

18 THE COURT: I see it.

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

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

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

12           So, that's the sill pan flashing. Then -- oh, and just -- Your Honor, just  
13 to make sure this isn't lost. It's kind of buried in the middle of the paragraph on page  
14 4 of the report. Hopefully you kept your thumb in there. It's the -- let's see, fourth  
15 line up on the far right and then there's a sentence that starts with "the lack."

16           THE COURT: Okay.

17           MR. GAYAN: Sorry --

18           THE COURT: Which --

19           MR. GAYAN: -- second --

20           THE COURT: -- paragraph?

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

23           THE COURT: The lack of complete?

24           MR. GAYAN: Yeah. "The lack --

25           THE COURT: Okay.

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

6 THE COURT: You mean his client to verify.

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

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

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

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

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

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

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

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

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

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

13 THE COURT: 40.670 doesn't?

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

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

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

21 MR. GAYAN: Yeah.

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

24 MR. GAYAN: Right.

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

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

2 THE COURT: Okay.

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

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

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

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

6 THE COURT: Exhibit A?

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

8 THE COURT: Okay. I'm there.

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

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



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

21 THE COURT: Is it 616 units?

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

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

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

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

1 Honor.

2 THE COURT: No.

3 MR. GAYAN: Thank you.

4 THE COURT: Thank you. Mr. Brown.

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

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

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

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

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

18 THE COURT: Page 2?

19 MR. BROWN: Page 12.

20 THE COURT: Page 12.

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

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

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

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

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

4 MR. BROWN: Yes.

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

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

16 MR. GAYAN: Your Honor --

17 THE COURT: Okay.

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

19 THE COURT: Well, understand. Your objection?

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

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

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

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

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

1 Counsel is correct that the standing issue is not yet in front of the Court  
2 and so it's not germane to the Court's assessment of the arguments being made in  
3 this particular case. Counsel stated that his third affirmative defense, the one that is  
4 referenced, and one would hope every answer that a party files to a pleading. "The  
5 failure to state a claim upon which relief can be granted." Your Honor, respectfully  
6 that is a far cry from what is the specific defense which is being raised with regard to  
7 40.645 subsection 4 but I've heard the Court's position on that particular argument.  
8 Unless the Court has any questions I don't feel the need to add to what were our  
9 original positions on that, Your Honor.

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



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

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

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

8           THE COURT: Well, they're --

9           MR. BROWN: Counsel --

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

13          MR. BROWN: That's this apple.

14          THE COURT: Okay.

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

16          THE COURT: Okay.

17          MR. BROWN: The damage allegedly arising from that. And counsel wants to  
18 talk about look at our notice -- at our notice on page 4, it says: "As a consequence  
19 of this deficiency water that should have drained to the exterior of the building has  
20 been entering the metal framing components of the exterior wall and floor  
21 assemblies including the curb walls that support the windows and is causing  
22 corrosion damage to the metal parts and components within these assemblies." If  
23 they had put a period there -- they might have although we'd still say it's not  
24 sufficient they might have a colorable argument. But they added as described and  
25 identified in Exhibit A which is their expert's report and their expert's report says in

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

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

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

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

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

19 MR. BROWN: Three days.

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

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

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

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

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

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

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

14 MR. BROWN: Understood.

15 THE COURT: Okay.

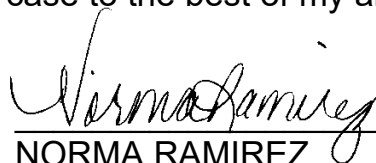
16 MR. BROWN: Thank you, Your Honor.

17 THE COURT: All right.

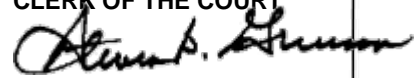
18 [Proceedings concluded at 12:32:23 p.m.]

19 \* \* \* \* \*

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

22   
23 \_\_\_\_\_

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



**MOT**

PETER C. BROWN, ESQ.  
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Nevada State Bar No. 11261  
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Attorneys for Plaintiffs and Counter-Defendants,  
LAURENT HALLIER; PANORAMA TOWERS I, LLC;  
PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN  
CONSTRUCTION, INC.

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

LAURENT HALLIER, an individual;  
PANORAMA TOWERS I, LLC, a Nevada  
limited liability company; PANORAMA  
TOWERS I MEZZ, LLC, a Nevada limited  
liability company; and M.J. DEAN  
CONSTRUCTION, INC., a Nevada Corporation,

Plaintiffs,

vs.

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

Defendant.

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**

1 LAURENT HALLIER, an individual; )  
PANORAMA TOWERS I, LLC, a Nevada )  
2 limited liability company; PANORAMA )  
TOWERS I MEZZ, LLC, a Nevada limited )  
3 liability company; and M.J. DEAN )  
CONSTRUCTION, INC., a Nevada Corporation; )  
4 SIERRA GLASS & MIRROR, INC.; F. )  
ROGERS CORPORATION; DEAN ROOFING )  
5 COMPANY; FORD CONTRACTING, INC.; )  
INSULPRO, INC.; XTREME EXCAVATION; )  
6 SOUTHERN NEVADA PAVING, INC.; )  
FLIPPINS TRENCHING, INC.; BOMBARD )  
7 MECHANICAL, LLC; R. RODGERS )  
CORPORATION; FIVE STAR PLUMBING & )  
8 HEATING, LLC, dba SILVER STAR )  
PLUMBING; and ROES 1 through , inclusive, )  
9  
Counter-Defendants. )

10  
11 COME NOW Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC,  
12 Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. (hereinafter collectively referred  
13 to as “the Builders”), by and through their attorneys of record Peter C. Brown, Esq., Jeffrey W. Saab,  
14 Esq. and Devin R. Gifford, Esq. of the law firm of Bremer Whyte Brown & O’Meara LLP, and  
15 hereby files their Motion for Declaratory Relief Regarding Standing (“Motion”).

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

19 Dated: October 22, 2018

BREMER WHYTE BROWN & O’MEARA LLP

20  
21 By: 

22 Peter C. Brown, Esq.  
Nevada State Bar No. 5887  
23 Jeffrey W. Saab, Esq.  
Nevada State Bar No. 11261  
24 Devin R. Gifford, Esq.  
Nevada State Bar No. 14055  
25 Attorneys for Plaintiffs/Counter-Defendants  
LAURENT HALLIER, PANORAMA  
26 TOWERS I, LLC, PANORAMA  
TOWERS I MEZZ, LLC, and M.J. DEAN  
27 CONSTRUCTION, INC.  
28

**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

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.



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

4 STATE OF NEVADA                     )  
5 CLARK COUNTY                     ) ss.

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


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

- 1 8. Attached as **Exhibit "A"** is a true and correct copy of the Association's initial Chapter 40  
2 Notice dated February 24, 2016.
- 3 9. Attached as **Exhibit "B"** is a true and correct copy of the Association's Amended Chapter  
4 40 Notice dated April 5, 2018.
- 5 10. Attached as **Exhibit "C"** is a true and correct copy of AB 125.
- 6 11. Attached as **Exhibit "D"** is a true and correct copy of the Declaration of Covenants,  
7 Conditions and Restrictions and Grant and Reservation of Easements for Panorama Towers  
8 dated November 7, 2006.
- 9 12. Attached as **Exhibit "E"** is a true and copy of the American Architectural Manufacturers  
10 Association (AAMA AG-13) Glossary.
- 11 13. Attached as **Exhibit "F"** is a true and correct copy of the Affidavit of Simon Loadman in  
12 support of Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC,  
13 Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc.'s Motion for Declaratory  
14 Relief Regarding Standing ("Motion").
- 15 14. Attached as **Exhibit "G"** are true and correct excerpts of the 200 International Building  
16 Code.
- 17 15. Attached as **Exhibit "H"** are true and correct copies of Texas Wall System Shop Drawings  
18 for the Project.

19 FURTHER AFFIANT SAYETH NAUGHT.

20  
21   
22 PETER C. BROWN, ESQ.

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

25   
26 Notary Public in and for said State and County



# 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

1 the Motion.<sup>1</sup>

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

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

7 On March 30, 2017, the Builders filed a Motion for Partial Summary Judgment on the  
8 Associations' Third-Claim for Relief. On September 15, 2017, this Court issued its Findings of Fact  
9 and Conclusions of Law allowing the Association, in part, an opportunity to remedy deficiencies in  
10 its Initial Chapter 40 Notice. On April 5, 2018, the Association served an Amended Notice of Claims  
11 Pursuant to NRS 40.645. (See **Exhibit "B"**, Amended Ch. 40 Notice). Despite the fact that the  
12 Association was given an opportunity to fix the errors in the Initial Chapter 40 Notice, the Builders  
13 maintain the Amended Notice still fails to comply with the express requirements set forth in NRS  
14 40.600 et seq. Furthermore, the Amended Notice improperly includes new defect allegations which  
15 are both untimely and not contemplated or allowed by this Court's September 15, 2017 Order. The  
16 parties appeared before the Court on October 2, 2018, regarding "Plaintiffs/Counter-Defendants  
17 Laurent Hallier, Panorama Towers I, LLC, Panorama Tower I Mezz, LLC and M.J. Dean  
18 Construction, Inc.'s Motion for Summary Judgment on Defendant/Counter-Claimant Panorama  
19 Tower Condominium Unit Owners' Association's April 5, 2018 Amended Notice of Claims." The  
20 parties await the Court's ruling on said Motion.

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

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

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27 <sup>1</sup> The Order denying the Association's Motion as well as the Notice of Entry of Order was filed on February 9, 2017.

28 <sup>2</sup> 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.

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

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

14 Consequently, the Builders respectfully request this Honorable Court’s declaration that the  
15 Association lacks standing to assert claims against the Builders for window-related defect allegations  
16 1.01 and 1.02.

## 17 II.

### 18 LEGAL STANDARD

#### 19 A. Declaratory Relief

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

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

26 NRS 30.040(1) provides, in part:

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

determined any question of construction or 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 by 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*, 5<sup>th</sup> 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.

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

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

12           The Builders have a legally protectable interest.

13                   iv.    **The Issue Involved Must Be Ripe for Adjudication**

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

22           As noted by the Nevada Supreme Court in *County of Clark ex rel. University Med. Ctr. v.*  
23 *Upchurch by & Through Upchurch*, a court should consider whether speedy resolution of the issue  
24 might promote economy in the litigation process or might lead to meaningful pre-trial settlement.  
25 *County of Clark ex rel. University Med. Ctr. v. Upchurch by & Through Upchurch*, 114 Nev. 749,  
26 752, 961 P.2d 754, 756 (1998). Here, resolution of the controversy surrounding the Association's



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**

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

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

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

13 “Boundaries. The Boundaries of each Unit created by the Declaration are  
14 the Unit lines shown or described on a Plat as numbered Units, along with  
15 their identifying number, and are further described as follows:

16 (a) Upper Boundaries...

17 ...

18 ...

19 (e) Apertures. **Where there are apertures in any boundary, including,**  
20 **but not limited to, windows, doors, bay windows and skylights, such**  
21 **boundaries shall be extended to include the windows, doors and other**  
22 **fixtures located in such apertures, including all frameworks, window**  
23 **casings and weather stripping thereof, except that exterior surfaces**  
24 **made of glass or other transparent materials and exteriors of any and all**  
25 **doors facing interior Common Element hallways shall not be included in**  
26 **the boundaries of the Unit and shall therefore be Common Elements...**  
27 **(Exhibit “D”, CC&R's, Pgs. 37-38, Sec.'s 4.2(a)-(e)) (emphasis added).**

28 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).

1 The Association's Amended Chapter 40 Notice includes defects associated with Project  
2 windows, specifically, residential unit windows. (See **Exhibit "B"**, Amended Ch. 40 Notice, Pgs.  
3 11 & 13). Defect 1.01 alleges a lack of sill pan flashing at the base of the window assemblies. (See  
4 **Exhibit "B"**, Amended Ch. 40 Notice, Pg. 11). This defect allegation pertains directly to the  
5 window frameworks, which do not fall within the purview of the Common Elements. The American  
6 Architectural Manufacturers Association ("AAMA") agrees. In the AAMA Glossary, panning,  
7 when "used for weatherability... is not considered cosmetic, but rather part of the window system."  
8 (See **Exhibit "E"**, American AAMA AG-13, "Pan/Panning," Pg. 38; See also, **Exhibit "F"**,  
9 Affidavit of Simon Loadsman). "Window system" is synonymous with "window assembly." (See  
10 **Exhibit "F"**, Affidavit of Simon Loadsman).

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

14 "A type of flashing used at the base of a rough opening to divert water to  
15 the exterior or the exterior surface of a concealed WRB. Pan flashings have  
16 upturned legs at the rear interior edge (back dam) and right and left sides  
17 (end dams), to form a three-sided pan that has the front open for drainage.  
18 They are intended to collect and drain water toward the exterior, including  
19 water that may enter through the window unit or around the window  
(between the rough opening and the fenestration). Pan flashing can be made  
20 from self-adhered flashing or from rigid or semi-rigid material, such as  
21 metal or a semi-rigid polymer." (See **Exhibit "E"**, American AAMA AG-  
22 13, "Pan/Panning," Pg. 38)

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

26 Since window pan flashings form part of the window framework/assembly/system, they are  
27 contained within the "Unit Boundaries" defined by the CC&R's. (**Exhibit "D"**, CC&R's Pgs. 37-  
28 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

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).

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

9  
10 **iii. Head Flashings Were Not Required on the Project and Thus Any Claims**  
11 **Regarding Same Fall Solely Within the Discretion of the Individual Unit**  
12 **Owners**

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

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

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

### 14 **III.**

### 15 **CONCLUSION**

16 Based on the foregoing, the Court should declare that the Association lacks standing to assert  
17 defect allegations and 1.01 and 1.02. Sill pan flashings comprise part of the window system, which  
18 fall within the Unit Boundaries, and thus outside the scope of the Common Elements. Since pan  
19 flashings fall outside the scope of the Common Elements, the Association lacks standing to assert  
20 repairs to same per NRS 116.3102(1)(d), as amended by AB 125. In addition, local codes and the  
21 STO details defer the decision to incorporate head flashings to the manufacturer of the window  
22 system. Since the manufacturer of the window system, TWS, did not require head flashings at the  
23 Unit windows, the lack of head flashing does not constitute a code violation. Since head flashings  
24 are not mandated, their addition would be an unnecessary upgrade, and outside the scope of the  
25 ///

26 ///

27

28



1 Association's responsibilities. Thus, the Association also lacks standing to assert defect allegation  
2 1.02.

3 Dated: October 22, 2018

BREMER WHYTE BROWN & O'MEARA LLP

4  
5  
6 By: 

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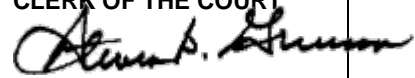
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TOWERS I, LLC, PANORAMA

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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]**



1 TOWERS I MEZZ, LLC, a Nevada limited )  
liability company; and M.J. DEAN )  
2 CONSTRUCTION, INC., a Nevada Corporation; )  
SIERRA GLASS & MIRROR, INC.; F. )  
3 ROGERS CORPORATION; DEAN ROOFING )  
COMPANY; FORD CONTRACTING, INC.; )  
4 INSULPRO, INC.; XTREME EXCAVATION; )  
SOUTHERN NEVADA PAVING, INC.; )  
5 FLIPPINS TRENCHING, INC.; BOMBARD )  
MECHANICAL, LLC; R. RODGERS )  
6 CORPORATION; FIVE STAR PLUMBING & )  
HEATING, LLC, dba SILVER STAR )  
7 PLUMBING; and ROES 1 through , inclusive, )  
Counter-Defendants. )

10 Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers  
11 I Mezz, LLC and M.J. Dean Construction, Inc. (hereinafter collectively referred to as “the Builders”),  
12 by and through their attorneys of record Peter C. Brown, Esq. and Jeffrey W. Saab, Esq. of the law  
13 firm of Bremer Whyte Brown & O’Meara LLP, hereby submits its Appendix of Exhibits [Volume I  
14 of III] to their Motion for Declaratory Relief Regarding Standing.

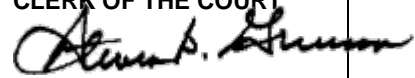
Exhibit No.	Brief Description	# of Pages (including exhibit page)	Location of exhibit within Motion
A	Association’s initial Chapter 40 Notice dated February 24, 2016	52	Pages 5 & 6
B	Association’s Amended Chapter 40 Notice dated April 5, 2018	49	Pages 5, 7, 8, 14,16 & 17

20 Dated: October 22, 2018

BREMER WHYTE BROWN & O’MEARA LLP

22 By: 

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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

LAURENT HALLIER, an individual;	)	Case No. A-16-744146-D
PANORAMA TOWERS I, LLC, a Nevada	)	Dept. XXII
limited liability company; PANORAMA	)	
TOWERS I MEZZ, LLC, a Nevada limited	)	<b>APPENDIX TO</b>
liability company; and M.J. DEAN	)	<b>PLAINTIFFS/COUNTER-</b>
CONSTRUCTION, INC., a Nevada Corporation,	)	<b>DEFENDANTS' MOTION FOR</b>
	)	<b>DECLARATORY RELIEF REGARDING</b>
Plaintiffs,	)	<b>STANDING [Volume II of III]</b>
	)	
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	)	

1 TOWERS I MEZZ, LLC, a Nevada limited )  
liability company; and M.J. DEAN )  
2 CONSTRUCTION, INC., a Nevada Corporation; )  
SIERRA GLASS & MIRROR, INC.; F. )  
3 ROGERS CORPORATION; DEAN ROOFING )  
COMPANY; FORD CONTRACTING, INC.; )  
4 INSULPRO, INC.; XTREME EXCAVATION; )  
SOUTHERN NEVADA PAVING, INC.; )  
5 FLIPPINS TRENCHING, INC.; BOMBARD )  
MECHANICAL, LLC; R. RODGERS )  
6 CORPORATION; FIVE STAR PLUMBING & )  
HEATING, LLC, dba SILVER STAR )  
7 PLUMBING; and ROES 1 through , inclusive, )  
Counter-Defendants. )

10 Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers  
11 I Mezz, LLC and M.J. Dean Construction, Inc. (hereinafter collectively referred to as “the Builders”),  
12 by and through their attorneys of record Peter C. Brown, Esq. and Jeffrey W. Saab, Esq. of the law  
13 firm of Bremer Whyte Brown & O’Meara LLP, hereby submits its Appendix of Exhibits [Volume  
14 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

21 Dated: October 22, 2018

BREMER WHYTE BROWN & O’MEARA LLP

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TOWERS I MEZZ, LLC, and M.J. DEAN  
CONSTRUCTION, INC.

# 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.





54 Under existing law, if a residence or appurtenance is covered by a  
55 homeowner's warranty that is purchased by or on behalf of the claimant, the  
56 claimant must diligently pursue a claim under the contract. (NRS 40.650) Section  
57 14 of this bill: (1) prohibits a claimant from filing a notice of constructional defect  
58 or pursuing a claim for a constructional defect unless the claimant has submitted a  
59 claim under the homeowner's warranty and the insurer has denied the claim; and  
60 (2) provides that a claim for a constructional defect may include only the claims  
61 that have been denied under the homeowner's warranty. Section 14 further  
62 provides that statutes of limitation or repose are tolled from the time the claimant  
63 submits a claim under the homeowner's warranty until 30 days after the insurer  
64 denies the claim, in whole or in part.

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

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

77 Existing law generally limits the period in which an action for damages caused  
78 by a deficiency in construction of improvements to real property may be  
79 commenced after substantial completion of the improvement. These periods of  
80 limitation are known as statutes of repose, and the period set forth in each statute of  
81 repose during which an action must be commenced is: (1) for a known deficiency,  
82 10 years after substantial completion of the improvement; (2) for a latent  
83 deficiency, 8 years after substantial completion of the improvement; and (3) for a  
84 patent deficiency, 6 years after substantial completion of the improvement.  
85 However, if a deficiency was a result of willful misconduct or was fraudulently  
86 concealed, an action may be commenced at any time after substantial completion of  
87 the improvement. (NRS 11.202-11.205) Sections 17-19 and 22 of this bill provide  
88 that the statute of repose for all actions for damages caused by a deficiency in  
89 construction of improvement to real property is 6 years after substantial completion  
90 of the improvement. Sections 17-19 and 22 also eliminate existing provisions of  
91 law that allow such actions to be commenced within 2 years after the date of an  
92 injury which occurs during the final year of the particular period of limitation.  
93 Section 21 of this bill: (1) provides that the revised statutes of repose set forth in  
94 sections 17-19 apply retroactively under certain circumstances; and (2) establishes  
95 a 1-year grace period during which a person may commence an action under the  
96 existing statutes of repose, if the action accrued before the effective date of this bill.

97 Existing law authorizes a homeowners' association to institute, defend or  
98 intervene in litigation or in arbitration, mediation or administrative proceedings in  
99 its own name on behalf of itself or two or more units' owners on matters affecting  
100 the common-interest community. (NRS 116.3102) In *D.R. Horton, Inc. v. Eighth*  
101 *Judicial District Court*, 125 Nev. 449 (2009), the Nevada Supreme Court held that  
102 existing law grants standing to a homeowners' association to pursue constructional  
103 defect claims on behalf of units' owners with respect to constructional defects in  
104 individual units. Sections 5 and 20 of this bill provide that an association may not  
105 pursue a constructional defect claim on behalf of itself or units' owners, unless the  
106 claim pertains exclusively to the common elements of the association.



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

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

3     **Sec. 2. 1.** *In any action or other proceeding involving a*  
4     *constructional defect asserted by a claimant and governed by NRS*  
5     *40.600 to 40.695, inclusive, and sections 2 and 3 of this act:*

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

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

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

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





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

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

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

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

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

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

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

40 2. For any wrap-up insurance policy or other consolidated  
41 insurance program that covers a subcontractor who performs  
42 work on residential construction for which a contract is entered  
43 into on or after the effective date of this act, for claims, actions or  
44 causes of action for a constructional defect governed by NRS  
45 40.600 to 40.695, inclusive, and sections 2 and 3 of this act:



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

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

9 (1) The policy limits;

10 (2) The scope of policy coverage;

11 (3) The policy term;

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

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

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

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

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

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

30 (2) Are presumptively made in good faith if:

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

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

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

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





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

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

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

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

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

38 3. As used in this section:

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



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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

25 (1) The principal amount of the judgment; and

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

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

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

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

40 (b) The sanctions set forth in subsection 4:

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

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

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



\* A B 1 2 5 R 1 \*