

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.

Electronically Filed
Sep 21 2020 06:20 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPEAL

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

APPELLANT'S APPENDIX VOL 10 OF 27

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CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

Document	Date	Vol.	Pages
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

Document	Date	Vol.	Pages
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 Boundaries. The Boundaries of each Unit created by the Declaration are the Unit
2 lines shown or described on a Plat as numbered Units, along with the identifying
3 number, and are further described as follows:

4 (e) Apertures. Where there are apertures in any boundary, including but not
5 limited to windows ... such boundaries shall be extended to include the windows
... including all frameworks, window casings and weather stripping thereof...

6 9. The term “window” refers to a manufactured product that can be installed in a
7 framed window opening. Sill pan flashing, which is not part of the “window,” can be installed by
8 a sheet metal contractor, the framing contractor, the EIFS installer or the window installer, and is
9 separately installed before the “window” or “window unit” is installed.

10 10. Pan flashings are not “frameworks, window casings [or] weather stripping.” If the
11 drafter of Section 4.2 had intended to include flashings generally, or sill pan flashings
12 specifically, it would have been a simple matter to include those terms in the above definition.
13 But without those terms in the above definition, the definition does not include the sill pan
14 flashings that should have been installed in the window assemblies in the Panorama towers.

15 11. The Builder’s motion further states that the manufacturer of the Panorama
16 Tower’s window system was Texas Wall Systems (TWS) (at 8:8-9); that TWS did not require
17 head flashings for the windows at Panorama (at 8:9-10); that the TWS shop drawings for the
18 project did not require head flashings (at 16:24-27, Ex H); and that the installation of windows
19 must conform to the manufacturer’s instructions (at 16:23-24).

20 12. In fact, the tower windows at Panorama do not appear to be TWS windows. When
21 CMA was performing repairs of the windows in Unit 300, we attempted to identify the window
22 manufacturer because identifying the manufacturer, which will enable us to obtain the
23 manufacturer’s product specifications and installation instructions, is always an important step in
24 performing repairs involving a manufactured building component.

25 13. It is standard practice for window manufacturers to place identifying markings or
26 stamps on their window products. CMA completely dismantled the frames of the windows, but
27 we were unable to identify any product markings on the windows or window components in Unit
28 300.

1
2 14. Coincidentally, an individual who was previously employed by Sierra Glass, the
3 window installer at the Panorama Towers project, and who worked on the Panorama project, was
4 employed by one of the subcontractors working on the Unit 300 repair. He informed me that
5 Sierra Glass had previously installed TWS windows on its projects, but fabricated its own
6 windows for the Panorama project. This explained why there were no manufacturer's markings
7 on the Unit 300 windows.

8 15. As noted, the Builders assert, based on the incorrect assumption that TWS
9 windows were installed in the Panorama Towers, that because the TWS instructions did not
10 require head flashings, they were not required at Panorama. Even if these were TWS windows at
11 Panorama, that would not be true.

12 16. As noted, I am an AAMA accredited and certified window installation instructor.
13 Attached for reference are excerpts from the applicable AAMA training manual, 2000 edition
14 (**Exhibit B**). The Home Rule Doctrine described in the manual states (at 9-3 to 9-4):

15 Because of the large number of specifications, codes, and standards that affect the
16 fenestration industry, conflicts between their requirements will inevitably arise.
17 When a conflict occurs, one should remember the concept of "Home Rule
Doctrine," which means "the most stringent requirement applies."

18 17. In this instance, the head flashings were required by the EIFS manufacturer, Sto.
19 Attached is the Sto installation detail showing the proper installation of head flashing over the
20 window assembly (**Exhibit C**). Regardless of whether these windows were manufactured by
21 TWS, Sierra Glass or someone else, had the manufacture not specified head flashings, the Home
22 Rule Doctrine would have required that the EIFS installer comply with the more stringent Sto
23 requirement to install head flashings.

24 18. Significantly, the head flashings that were required to be installed by the EIFS
25 installer, had they been installed, would have been part of the exterior EIFS cladding system, not
26 part of the window assembly.

27 ///

28 ///

1 19. I declare under the penalty of perjury under the laws of Nevada that the foregoing
2 is true and correct. If called as a witness, I could and would competently testify thereto.
3

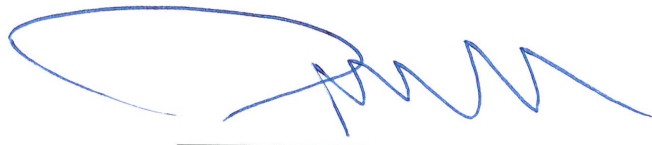
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EXHIBIT A

EXHIBIT A

EXHIBIT A

**OMAR HINDIYEH
CMA CONSULTING
PRESIDENT**

EXPERIENCE

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

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

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

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

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

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

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

EDUCATION

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

LICENSES AND CERTIFICATIONS

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

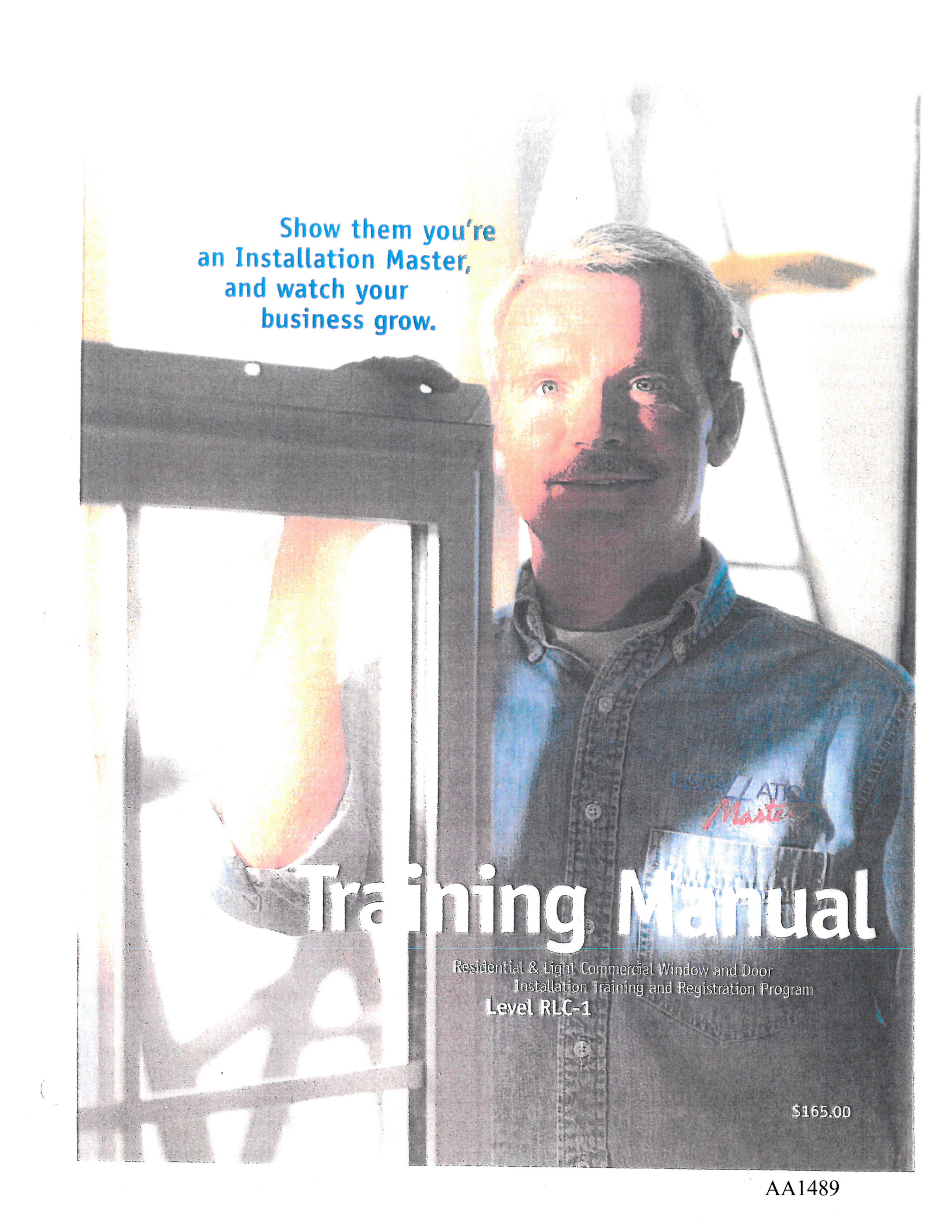
ORGANIZATIONS AND AFFILIATIONS

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

EXHIBIT B

EXHIBIT B

EXHIBIT B

A man with a mustache, wearing a blue denim button-down shirt, stands next to a dark window frame. The shirt has a patch on the left chest that says "INSTALLATION Master" in blue and red. He is looking towards the camera with a slight smile. The background is bright and out of focus, showing some structural elements.

Show them you're
an Installation Master,
and watch your
business grow.

Training Manual

Residential & Light Commercial Window and Door
Installation Training and Registration Program
Level RLC-1

\$165.00

AA1489

TABLE OF CONTENTS

INSTALLATION *Masters*

TRAINING MANUAL

CHAPTERS

1. INTRODUCTION
2. DESIGN CONSIDERATIONS
3. COMPONENTS AND MATERIALS
4. TYPES OF WINDOWS
5. TYPES OF EXTERIOR GLASS DOORS
6. ACCESSORY ITEMS AND SPECIAL FEATURES
7. PERFORMANCE REQUIREMENTS
8. SITE INSPECTIONS
9. CODES, STANDARDS, AND SPECIFICATIONS
10. MANUFACTURER'S INSTALLATION INSTRUCTIONS
11. MEASURING AND ORDERING
12. INSPECTION AND STORAGE OF WINDOWS AND DOORS
13. MATERIAL SELECTION AND USE
14. PREPARING THE OPENING FOR REPLACEMENT
15. REPLACEMENT WINDOW INSTALLATION
16. NEW CONSTRUCTION INSTALLATION
17. BAY, BOW, AND GARDEN WINDOW INSTALLATION
18. COMBINATION WINDOW INSTALLATION
19. SPECIALLY SHAPED WINDOW INSTALLATION
20. BLOCK FRAME DOOR INSTALLATION
21. MOUNTING FLANGE DOOR INSTALLATION
22. SCREEN INSTALLATION
23. FINAL CLEANING
24. QUALITY CONTROL
25. PRODUCT MAINTENANCE

APPENDICES

1. GLOSSARY
2. ABBREVIATIONS AND ACRONYMS

This training manual was developed by AAMA as a training tool for use in the AAMA INSTALLER TRAINING PROGRAM for residential and light commercial window and exterior door installers in the fenestration industry. Much of the information contained in this manual is based on techniques and best practices developed by nationally recognized associations and is published for use in the AAMA INSTALLER TRAINING PROGRAM. AAMA disclaims all liability for the use, application or adaptation of the information contained in this manual.

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Phone: (847) 303-5664 Fax: (847) 303-5774
E-Mail: webmaster@aamanet.org

CODES, STANDARDS, AND SPECIFICATIONS: CHAPTER 9

9.1.4 Standards

There are numerous groups that work diligently to develop standards for the fenestration industry (see Table 9-2).

AAMA

American Architectural
Manufacturers Association
1827 Walden Office Square, Suite 104
Schaumburg, IL 60173-4268
847/303-5664

ANSI

American National
Standards Institute, Inc.
11 West 42nd Street, 13th Floor
New York, NY 10036
212/642-4900

ASTM

American Society for
Testing and Materials
100 Barr Harbor Drive
West Conshohocken, PA 19428
610/832-9500

NFRC

National Fenestration Rating Council
1300 Spring Street, Suite 500
Silver Spring, MD 20910
301/589-6372

SIGMA

Sealed Insulating Glass
Manufacturers' Association
401 North Michigan Avenue, Suite 2200
Chicago, IL 60611
312/644-6610

WDMA

Window and Door
Manufacturers Association
1400 East Touhy Avenue, Suite 470
Des Plaines, IL 60018
847/299-5200

Table 9-2 Agencies Developing Standards

Agencies and departments within the federal government also develop standards to protect the health, safety, and welfare of citizens. Many of their standards address fenestration product requirements which have been adopted as code and must be obeyed.

- **CPSC** — Consumer Product Safety Commission (CPSC) is a federal agency that regulates product safety. Safety glazing regulation 16 CFR Part 1201 became law on July 6, 1977, and mandates glazing in all doors designed primarily for human passage.
- **OSHA** — Occupational Safety and Health Administration (OSHA) is a division of the U.S. Department of Labor that develops and enforces safety requirements for the protection of employees in the workplace.
- **ADA** — Americans With Disabilities Act (ADA) became law in 1990 and was implemented by the Department of Justice on July 26, 1991. These regulations have had far-reaching effects upon the glazing trade, especially regarding access to, and use of, buildings by the disabled.

9.2 HOME RULE DOCTRINE

Because of the large number of specifications, codes, and standards that affect the fenestration industry, conflicts between their requirements will inevitably arise. When a conflict occurs, one should

remember the concept of "Home Rule Doctrine," which means "the most stringent requirement applies." Our governmental structure allows the lowest governing body to have final control of the code, as long as their requirement is more stringent than state or federally adopted regulations.

An example of "Home Rule Doctrine" might be maximum sill height for an egress window (see Figure 9-3). The UBC (Uniform Building Code) allows a maximum of 44 inches. A state code may reduce this to 42 inches. The county code may be 40 inches, and the local code even lower, to 38 inches. In this case, the 38-inch maximum would be enforced because it is the most stringent. The Homeowners' Association's CC&Rs (Covenants, Conditions, and Restrictions) could reduce the sill height even more.

9.3 ACCESSIBILITY

The Fair Housing Amendments Act of 1988 requires that public buildings and multifamily dwellings include certain features of accessible design. Therefore, installers of doors must have an awareness of Fair Housing Act design and construction requirements. Multifamily dwellings are generally considered to be buildings consisting of four or more dwelling units.

9.3.1 Windows

The Fair Housing Act Amendment requirement does not apply to windows.

9.3.2 Doors

When installing exterior glass doors in multiple family dwellings, consider this list of pointers and cautions:

- Doors must be wide enough to enable a person in a wheelchair to maneuver through easily.

- Doors must have a minimum clear-opening width of 32 inches (measured from face of door to the stop with door open 90 degrees) for wheelchair access.
- Exterior door thresholds and sliding door tracks must not exceed 3/4" in height. Thresholds and changes in level at these locations are beveled with a slope no greater than 1:2.
- In single-story dwelling units, changes in height within the unit of 1/4" to 1/2" must be beveled with a slope no greater than 1:2. Those greater than 1/2" must be ramped or have other means of access.
- Minimum clear width for accessible route inside the unit is 36 inches.
- All types of doors are covered - hinged, sliding, and folding.
- Doors leading to any outdoor amenities the dwelling may have—balcony, patio, deck—should be covered. If a deck or patio has doorways leading into two or more separate rooms, all these doors must be accessible.
- Requirements apply to public and common-use doors, doors leading into an individual dwelling unit, and all doors within the dwelling unit itself.
- Doors in public or common-use areas, when installed, must be in conformance with ANSI Standards.
- Hallways, passages, and corridors must be wide enough to allow room to maneuver a wheelchair throughout.

9.4 EGRESS REQUIREMENTS

Egress refers to a means of exiting a building. All three Model Codes include specific requirements for egress. They include requirements for emergency egress (doors and windows) and standard egress (doors). This section briefly discusses emergency egress, which is titled "Access

Shingle	Before wall covering
Stucco, Brick, and Stone	Before wall covering
Horizontal or Vertical Board Siding	Before or After wall covering
Plywood Siding	After wall covering
Specialty Design	As determined by the architect

Table 16-3 Trim Application

4. Use a top-quality exterior primer to seal all sides and ends of the trim before installing. Unsealed trim will tend to soak up water and decay.
5. Attach bottom trim first, jambs second and head last (if needed).
6. Butter sealant along end grain of jamb trim before installing.
7. Do not penetrate mounting flange, if existent.
8. Seal the joints between the trim, siding, and window using the proper sealant and joint designs.
9. Finish with two coats of top-quality exterior paint. *For detailed information on Priming and Painting, see Chapter 13, Section 13.7.*

16.9.2 Drip Caps

A drip cap is often used at the head of windows to help direct water away (see *Figure 16-75*). Whenever adding a drip cap, the top surface should extend beyond the

outboard face of the window and/or trim, slope to the exterior, and have a pronounced drip edge. The drip cap can be made of wood, vinyl, aluminum, and other materials.

Some drip caps are provided as an integral part of the frame, while others are site-built and applied. When field-applying a drip cap, make sure to integrate it with a piece of rigid head flashing, both above and below the drip cap. The rigid head flashing above the drip cap and/or brick mold should be set in a bead of sealant. When using rigid head flashing under the drip cap, the sealant is omitted in order to allow for any residual water to escape from behind the drip cap. In both cases, the top edge of the rigid head flashing is sealed to the flexible flashing and/or weather resistant barrier. (See *Section 16.9.3 for instructions relative to the application of rigid head flashing.*)

16.9.3 Rigid Head Flashing

When using head trim, brick mold, and /or drip caps, a piece of rigid head flashing is recommended. The head flashing is applied over the head trim to promote shedding of water off the top of the window head. The upstanding leg of this flashing must be integrated with the weather resistant barrier as indicated in *Section 16.7.5*.

To apply the head flashing, follow the instructions below:

1. Cut the rigid head flashing the full length of the width of the window head trim or drip cap, plus enough to allow for capping the ends. (Approximately 1" to 1 1/2" longer than trim, depending on the height of the down turned leg of the flashing.) (See *Figure 16-74*.)
2. Cut the ends of the head flashing and fold over to cover the exposed ends of any head trim or brick mold. The folded

ends will help restrict water from blowing under the head flashing.

3. Prior to installation of the rigid head flashing, apply a bead of sealant on top of the drip cap or brick mold. Locate the bead where it will allow the head flashing to be set in sealant.
4. Apply another bead of sealant to the top edge of the head flashing prior to attaching it to the header/sheathing. Install the head flashing under the flap of the weather resistant barrier.
5. Attach the head flashing with galvanized screws or nails. Seal over the heads of any fasteners that penetrate the flashing (see Figure 16-75).
6. Trim the weather resistant barrier to lie flat against the upstanding leg of the flashing.
7. Place a bead of sealant along the lower portion of the upstanding leg of the rigid flashing.
8. Release the weather resistant barrier and trim to lay against the upstanding leg of the flashing. Compress the flap of the weather resistant barrier into the sealant previously applied to the rigid head flashing.
9. Apply sheathing tape over the diagonal cuts previously made in the flap of the weather resistant barrier at the head.

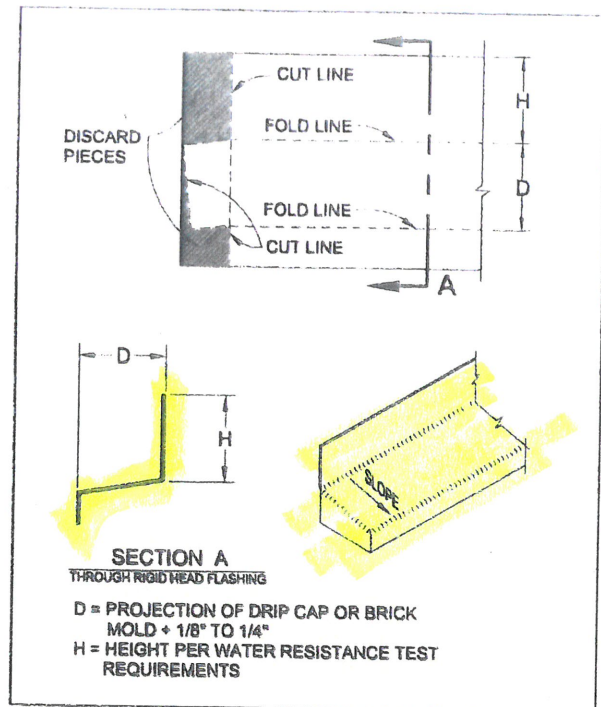


Figure 16-74 Cut and Fold Rigid Head Flashing

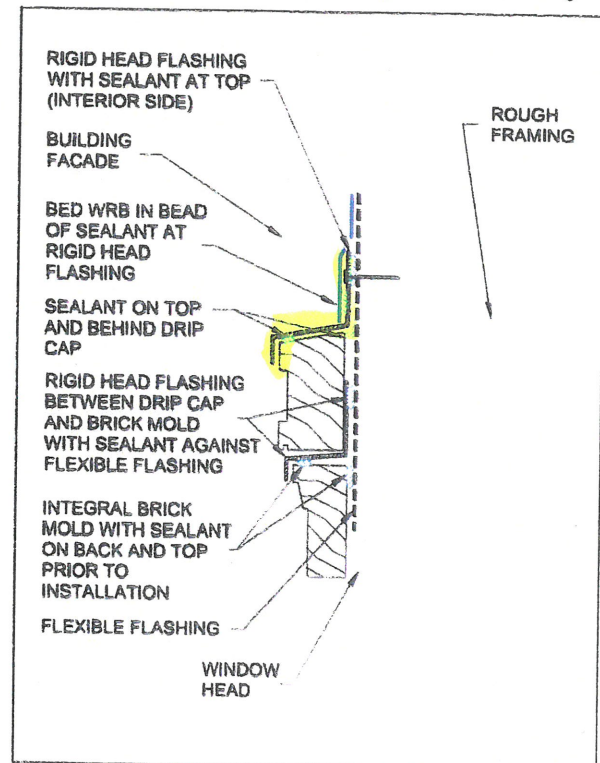


Figure 16-75 Seal Drip Cap and Rigid Head Flashing

EXHIBIT C

EXHIBIT C

EXHIBIT C



Sto EIFS
Commercial Window Head

Detail No.: 1.23a

Date: April 2000

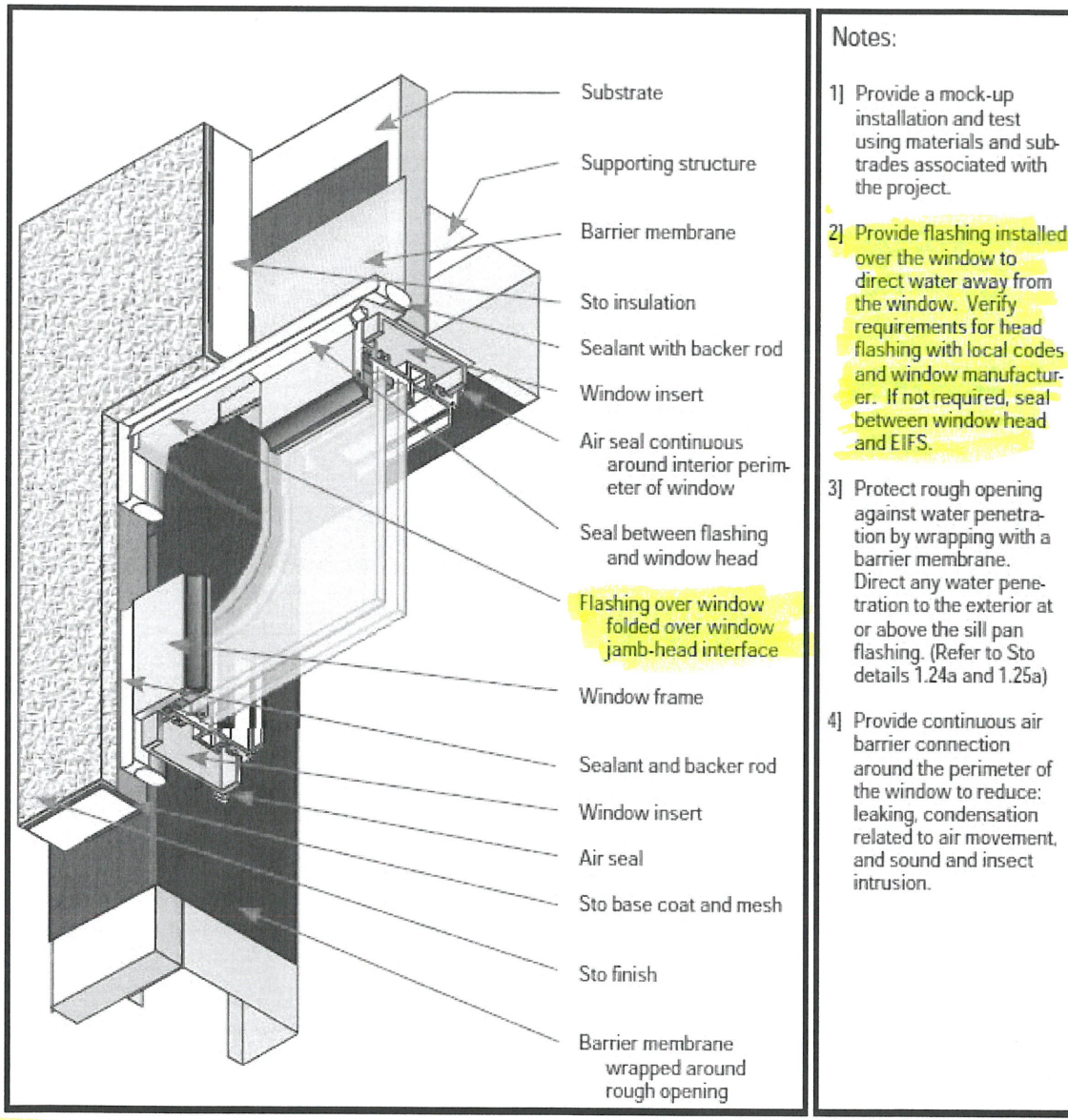


Exhibit 04 – Head Flashing Detail from Sto

Exhibit 3

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m.gayan@kempjones.com
*Counsel for Defendant Panorama Towers
Condominium Unit Owners' Association*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

Case No.: A-16-744146-D
Dept. No.: XXII

**Declaration of Michael Gayan, Esq. in
Support of Defendant's Opposition to
Plaintiffs/ Counter-Defendants' Motion
for Declaratory Relief Regarding
Standing and Countermotions to Exclude
Inadmissible Evidence and for Rule 56(f)
Relief**

///

///

**Declaration of Michael Gayan, Esq. in Support of Defendant's Opposition to Plaintiffs/
Counter-Defendants' Motion for Declaratory Relief Regarding Standing and Countermotions
to Exclude Inadmissible Evidence and for Rule 56(f) Relief**

I, Michael Gayan, state as follows:

1. I am a partner in the law firm of Kemp, Jones & Coulthard, LLP, over 18 years of age, competent to testify to the matters set forth herein, and licensed to practice law in the State of Nevada.

2. Along with Lynch Hopper, LLP and Williams & Gumbiner, LLP, Kemp, Jones & Coulthard, LLP serves as counsel for the Panorama Towers Unit Owners' Association ("Association") in the above-captioned action.

3. Although this case has been pending since September 28, 2016, the action was stayed for most of all of the time from the action's commencement through the hearing on October 2, 2018. At that hearing, the Court lifted the stay and allowed discovery to proceed.

4. Special Master hearings occurred on October 8, 2018, and October 31, 2018. At the second hearing, the Special Master issued the first Case Agenda establishing the various discovery deadlines. Under the Case Agenda, expert reports will not be completed until September 2019 with expert depositions occurring from November 2019 through January 2020.

5. To date, little if any discovery has occurred. Plaintiffs have not made their initial disclosures or produced any documents. From a discovery standpoint, the case is in its infancy.

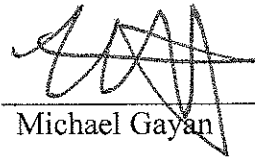
6. The Association awaits Plaintiffs' disclosures and document productions. Thereafter, the Association intends to conduct the following discovery to develop the evidence necessary to fully respond to Plaintiffs' motion regarding standing: (a) propound written discovery to Plaintiffs; (b) depose Plaintiffs and/or their Rule 30(b)(6) representatives on various design and construction topics related to the design and construction of the windows; (c) depose other parties and/or non-parties regarding similar issues related to the design and construction of the windows; (d) designate one or

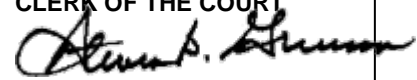
1 more experts on the subject; and (e) depose experts designated by Plaintiffs and any other
2 counterdefendants. None of these witnesses have not been disclosed, so I cannot identify them by name.

3 7. Until the Association completes this discovery, it cannot present by affidavits, discovery
4 responses, or other relevant evidence, all of the facts essential to the Association's opposition to
5 Plaintiffs' motion regarding standing regarding the window-related design defects.

6 8. I declare under the penalty of perjury under the laws of Nevada that the foregoing is true and
7 correct.

8 DATED this 16th day of November, 2018.

9
10 
Michael Gayan



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*Counsel for Defendant Panorama Towers
Condominium Unit Owners' Association*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

vs.

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

Case No.: A-16-744146-D
Dept. No.: XXII

**Errata to Defendant's Opposition to
Plaintiffs/ Counter-Defendants' Motion
for Declaratory Relief Regarding
Standing and Countermotions to Exclude
Inadmissible Evidence and for Rule 56(f)
Relief**

Hearing Date: December 13, 2018
Hearing Time: 9:00 a.m.

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

Counterclaimants,

vs.

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

Counterdefendants.

Defendant/Counterclaimant Panorama Towers Condominium Unit Owners' Association, by
and through its attorneys of record, hereby files this Errata to its Opposition to Plaintiffs/ Counter-
Defendants' Motion for Declaratory Relief Regarding Standing and Countermotions to Exclude
Inadmissible Evidence and for Rule 56(f) Relief filed on November 16, 2018 ("Opposition"). Attached
hereto as **Exhibit 1** is the Declaration of Dennis Kariger. This Declaration replaces the document
attached to the Opposition as Exhibit 1.

///

///

///

1 DATED this 19th day of November, 2018.

2 Respectfully submitted,

3 /s/ Scott Williams, Esq.

4 SCOTT WILLIAMS, ESQ.
5 (California Bar # 78588)
6 WILLIAMS & GUMBINER LLP
7 1010 B. Street, Suite 200
8 San Rafael, CA 94901
9 Telephone:(415) 755-1880
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11 *Admitted Pro Hac Vice*

12 WILLIAM L. COULTHARD, ESQ. (#3927)
13 MICHAEL J. GAYAN, ESQ., (#11135)
14 3800 Howard Hughes Parkway, 17th Floor
15 Las Vegas, Nevada 89169

16 *Counsel for Defendant Panorama Towers*
17 *Condominium Unit Owners' Association*

18 **Certificate of Service**

19 I hereby certify that on the 19th day of November, 2018, the foregoing **Errata to Defendant's**
20 **Opposition to Plaintiffs/Counter-Defendants' Motion for Declaratory Relief Regarding**
21 **Standing and Countermotions to Exclude Inadmissible Evidence and for Rule 56(f) Relief** was
22 served on the following by Electronic Service to all parties on the Court's service list.

23 /s/ Angela Embrey

24 An employee of Kemp, Jones & Coulthard, LLP

EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

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*Counsel for Defendant Panorama Towers
Condominium Unit Owners' Association*

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

Case No.: A-16-744146-D
Dept. No.: XXII

**Declaration of Dennis Kariger in Support
of Defendant's Opposition to Plaintiffs/
Counter-Defendants' Motion for
Declaratory Relief Regarding Standing**

///

///

Declaration of Dennis Kariger in Support of Defendant's Opposition to Plaintiffs/ Counter-Defendants' Motion for Declaratory Relief Regarding Standing

I, Dennis Kariger, state as follows:

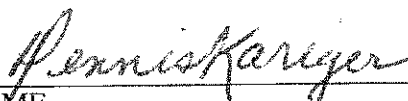
1. I am a resident and member of the Panorama Towers Condominium Unit Owner's Association ("Association"). I currently serve as the President on the Association's Board of Directors ("Board") and have done so since approximately 2013. If called as a witness, I could and would testify to the matters stated herein based on my own personal knowledge.

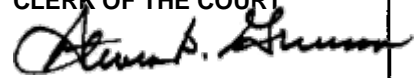
2. In or about early 2015, the Board became aware of water damage in the exterior wall(s) of Unit 300. After reviewing the matter in detail, the Board determined to treat the failed and/or missing window components as common elements and assumed responsibility for the repairs required in Unit 300. Those repairs cost the Association approximately \$206,058.

3. The windows and their associated components have been treated as common elements for the purposes of the Association's maintenance and repair protocol since declarant transition occurred in 2008.

4. I declare under the penalty of perjury under the laws of Nevada that the foregoing is true and correct.

DATED this 15th day of November, 2018.


NAME



FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

Vs.

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

Defendant.

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

Counter-Claimant,

Vs.

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

Counter-Defendants.

Case No. A-16-744146-D

Dept. No. XXII

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

1 **PANORAMA TOWERS**
2 **CONDOMINIUM UNIT OWNERS'**
3 **ASSOCIATION, a Nevada non-profit**
4 **corporation,**

5 **Third-Party Plaintiff,**

6 **Vs.**

7 **SIERRA GLASS & MIRROR, INC.; F.**
8 **ROGERS CORPORATION; DEAN**
9 **ROOFING COMPANY; FORD**
10 **CONSTRUCTING, INC.; INSULPRO,**
11 **INC.; XTREME EXCAVATION;**
12 **SOUTHERN NEVADA PAVING, INC.;**
13 **FLIPPINS TRENCHING, INC.;**
14 **BOMBARD MECHANICAL, LLC; R.**
15 **RODGERS CORPORATION; FIVE**
16 **STAR PLUMBING & HEATING, LLC**
17 **dba SILVER STAR PLUMBING; and**
18 **ROES 1 through 1000, inclusive,**

19 **Third-Party Defendants.¹**

20 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

21 This matter, concerning Plaintiffs'/Counter-Defendants' Motion for Summary Judgment on
22 Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims filed August 3, 2018,
23 came on for hearing on the 2nd day of October 2018 at the hour of 10:30 a.m. before Department
24 XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN
25 H. JOHNSON presiding; Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA
26 TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION,
27 INC. appeared by and through their attorney, PETER C. BROWN, ESQ. of the law firm, BREMER
28 WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant/Third-Party Plaintiff
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and

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

1 through their attorneys, MICHAEL J. GAYAN, ESQ. and WILLIAM L. COULTHARD, ESQ. of
2 the law firm, KEMP JONES & COULTHARD, and FRANCIS I. LYNCH, ESQ. of the law firm,
3 LYNCH HOPPER.² Having reviewed the papers and pleadings on file herein, heard oral arguments
4 of the lawyers and taken this matter under advisement, this Court makes the following Findings of
5 Fact and Conclusions of Law:

6
7 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

8 1. As this Court previously found in its September 15, 2017 Findings of Fact,
9 Conclusions of Law and Order, this case arises as a result of alleged constructional defects within
10 both the common areas and the 616 residential condominium units located within two tower
11 structures of the PANORAMA TOWERS located at 4525 and 4575 Dean Martin Drive in Las
12 Vegas, Nevada.

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

17
18 1. ***Residential tower windows***—There are two tower structures in the Development,
19 consisting of 616 residential condominium units located above common areas and retails
20 (sic) spaces below. The window assemblies in the residential tower units were defectively
21 designed such that water entering the assemblies does not have an appropriate means of
22 exiting the assemblies. There are no sill pans, proper weepage components or other drainage
provisions designed to direct water from and through the window assemblies to the exterior
of the building.

23 This is a design deficiency that exists in all (100%) of the residential tower window
24 assemblies.

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

1 As a consequence of this deficiency, water that should have drained to the exterior of the
2 building has been entering into the metal framing components of the exterior wall and floor
3 assemblies, including the curb walls that support the windows, and is causing corrosion
4 damage to the metal parts and components within these assemblies. Further, this damage to
5 the metal components of the tower structures presents an unreasonable risk of injury to a
6 person or property resulting from the degradation of these structural assemblies.

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

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

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

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

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

3. The Contractors elected to inspect the constructional defects identified within the Association's NRS 40.645 Notice on March 24, 2016.⁴ During the inspection, the Contractors observed windows located in Unit 300 had been already been removed and replaced. Likewise, prior to the Contractors' inspection, the majority of the alleged corroded mechanical room piping, as well as the averred defective sewer piping had also been removed, replaced and/or repaired. The Contractors were not provided notice of the removal or replacement of the alleged constructional

³See Exhibit 1 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims filed August 3, 2018.

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

1 defective windows in Unit 300 or the deficient piping in the mechanical room prior to the March 24,
2 2016 inspection.

3 4. On March 29, 2016, the Contractors' lawyer sent a letter to the attorneys for the
4 Association, requesting "information regarding the alleged sewer line, including the date of
5 occurrence and the date of repair. ...In addition, please confirm the current location of any sewer
6 line materials that were removed and replaced as part of the repair." Further, counsel requested "the
7 date(s) when that work [in replacing the pipes in the mechanical room] was done and the identity of
8 the contractor(s). Please also confirm whether and where the removed pipes have been stored for
9 safekeeping."⁵ As there was no response from the Owners' Association to the March 29, 2016
10 correspondence, the Contractors' attorney followed-up with another letter sent a month later, April
11 29, 2016.⁶ However, there was also no response to the April 29, 2016 letter.

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

15 6. The Contractors filed their Complaint on September 28, 2016 against the Owners'
16 Association, asserting the following claims, mostly dealing with their perception the NRS 40.645
17 notice was deficient:

- 18 1. Declaratory Relief—Application of AB 125;
- 19 2. Declaratory Relief—Claim Preclusion;
- 20 3. Failure to Comply with NRS 40.600, *et seq.*;
- 21 4. Suppression of Evidence/Spoliation;

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27 ⁵See Exhibit 2 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on
Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims.

28 ⁶See Exhibit 3 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on
Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims.

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

6. Declaratory Relief—Duty to Defend; and

7. Declaratory Relief—Duty to Indemnify.

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

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

2. Negligence and Negligence *Per Se*;

3. Products Liability (against the manufacturers);

4. Breach of (Sales) Contract;

5. Intentional/Negligent Disclosure; and

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

8. The Contractors moved this Court for summary judgment, or dismissal of the Counter-Claim on March 20, 2017 upon the bases:

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

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

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

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

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

(2) the Owners' Association failed to provide notice of defects prior to performing repairs.

In this regard, the Contractors also sought partial summary judgment with respect to the Third Claim for Relief contained in their Complaint.

...

1 9. The Owners' Association opposed, arguing its NRS 40.645 notice is presumed to be
2 valid, and further, the notice statutes are meant to require substantial as opposed to technical or strict
3 compliance. Further, in the Association's view, the Contractors' interpretation of AB 125 was not
4 reasonable, led to absurd results and violated due process. Notwithstanding these arguments, if this
5 Court found the notice to be deficient, the appropriate remedy would be to stay the case and provide
6 curative instructions as opposed to dismissal of the Counter-Claim. *See* NRS 40.647(2)(b).
7

8 10. This Court heard the matter on June 20, 2017, and thereafter, on September 15, 2017,
9 issued its 20-page Findings of Fact, Conclusions of Law and Order, granting Plaintiffs'/Counter-
10 Defendants' motion in part. This Court also ordered Defendant's/Counter-Claimant's claim for
11 constructional defects located in the mechanical rooms were dismissed as time-barred pursuant to
12 the statute of limitations set forth in NRS 11.202. Further, this Court found and concluded the NRS
13 40.645 Notice of Constructional Defects served February 24, 2016 was deficient, and Plaintiffs/
14 Counter-Defendants met their burden of overcoming the presumption of the notice's validity.
15 However, this Court declined to dismiss Defendant's/Counter-Claimant's Counter-Claim pursuant to
16 NRS 40.647(2)(a) as such would prevent the Association from filing another action. This Court
17 stayed the proceedings with respect to constructional defects relating to window assemblies, fire
18 blocking and sewer problems for a period of six (6) months.
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21 11. On April 5, 2018, the Association served the Contractors with an Amended NRS
22 Chapter 40 Notice of Constructional Defects.⁷ Within this amendment, Defendant/Counter-
23 Claimant incorporated by reference information contained in the February 24, 2016 Notice. It set
24 forth the constructional defects as follows:
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26 ...

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28 ⁷*See* Exhibit 7 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on
Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims.

1. Residential tower windows

There are two residential tower structures in the Development, consisting of 616 condominium units located above common areas and retail spaces below. The window assemblies in the residential tower units were defectively designed such that water entering the assemblies does not have an appropriate means of exiting the assemblies.

The window assemblies were built in accordance with the project plans, which contained two significant design deficiencies that are identified in specific detail in the accompanying report prepared by the Association's architect, Karim Allana, which is attached hereto as "Exhibit A" and incorporated by reference:

- 1) Contrary to applicable requirements of the 2000 International Building Code, ASTM and ICBO standards, and the EIFS manufacturer's installation instructions, the plans failed to specify pan flashings at the rough openings for the windows.
- 2) Contrary to applicable requirements of the 2000 International Building Code, ASTM and ICBO standards, and the EIFS manufacturer's installation instructions, the plans failed to specify head flashings at the rough openings for the windows.

Because these flashings were not called for in the plans and specifications, they were not installed.

This is a design deficiency that exists in all (100%) of the residential tower window assemblies. The location of each of the windows installed in accordance with this defective design is marked on the exterior plan elevations for the two towers and attached hereto as "Exhibit B."

As a consequence of this deficiency, water that should have drained to the exterior of the building has been entering the metal framing components of the exterior wall and floor assemblies, including the curb walls that support the windows, and is causing corrosion damage to the metal parts and components within these assemblies as described and identified in Exhibit A. The resulting damage to the metal components of the tower structures present an unreasonable risk of injury to a person or property resulting for the degradation of these structural assemblies.

2. Residential tower exterior wall insulation

The plans called for insulation/fire blocking, as required by the building code, in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. The purpose of this insulation is to act as a fire block provision to deter the spread of fire from one tower unit to the units above or below, and to prevent condensation from occurring within the exterior wall assemblies. However, the insulation was not installed as required by the plans and building code.

The installation deficiency exists in the majority of the locations where it is required for the 616 residential tower units, in which insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both. From November of 2015, through January of 2016, 15 units in the Development were inspected. Units were selected from different towers and with different exposures to obtain a mixed sampling. Of the ledger shelf cavities, inspected, 76% had no fire blocking insulation (sic) and many of the steel stud framing cavities had questionable and/or a lack of proper fire blocking provisions. ...

This deficiency presents an unreasonable risk of injury to a person or property resulting from the spread of fire, and from the accumulation of additional moisture in the wall assemblies, thereby exacerbating the window drainage deficiency described above.

3. Sewer problem

The main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to adjacent common areas.

The rupture of the sewer line caused raw sewage to be deposited on the common area of the development in the location of the rupture. In addition to causing damage in the vicinity of the rupture, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter.

Because the Association had previously settled a suit against the Builders and had not yet discovered the window and insulation claims, it was assumed by the Association that this isolated incident would not be the subject of the Chapter 40 claim. The association therefore repaired the ruptured sewer line without giving notice to the Builders.

12. The Contractors now move this Court for summary judgment with respect to the amended NRS 40.645 notice as, in their view, it does not cure the deficiencies identified in the initial one. Specifically, with respect to the window assemblies, of which there are over 9,500 within the towers, the Contractors quotes this Court in its September 25, 2017 Order and argue the Association did not provide specific detail of each defect, damage and injury within the revised notice. Concerning the insulation claims, the Contractors again quoted this Court, and noted the “specific detail” requirement of NRS 40.645 necessitates the exact location of the defect in each unit, whether it be within the ledger shelf cavity, the steel stud framing hollow space, or in both areas. Further, there is nothing specified how the Association knows this particular “installation deficiency” exists in all or 100 percent of all the residential tower units. Lastly, the Contractors argue the Association does not dispute Plaintiffs/Counter-Defendants have been divested of their statutory right to inspect and repair the sewer deficiencies.

13. The Association opposes, arguing, *first*, summary judgment is precluded as the requirement for it to provide notice of constructional defects is eviscerated once the Contractors initiated a legal action. *See* NRS 40.645(4). *Second*, and notwithstanding the first point, the amended notice provided April 5, 2018 is sufficient and consistent with this Court’s September 15, 2017 Findings of Fact, Conclusions of Law and Order. With respect to window defects, they are

1 design deficiencies within the assemblies such that water entering them does not have an appropriate
2 means of exiting. That is, the architectural and exterior insulation finishing system ("EIFS" herein)
3 shop drawings of the project, and investigation photographs taken during destructive testing of some
4 window assemblies showed the windows' and EIFS assemblies did not have pan or head flashings.
5 The flashings are required by the material manufacturers and building code, and the defects were
6 universal. Concerning the fire blocking insulation and sewer system, the Association noted notice
7 methodology similar to that with respect to the window deficiencies was not available; the plans and
8 drawings do call for the presence of fire blocking insulation, but such is absent in some limited
9 testing. The sewer pipes were repaired prior to notice being given to the Contractors.

11 CONCLUSIONS OF LAW

12 1. As this Court previously stated in its September 15, 2017 Findings of Fact,
13 Conclusions of Law and Order, summary judgment is appropriate and "shall be rendered forthwith"
14 when the pleadings and other evidence on file demonstrates no "genuine issue as to any material fact
15 [remains] and that the moving party is entitled to a judgment as a matter of law." See NRCP 56(c);
16 Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026 (2005). The substantive law controls
17 which factual disputes are material and will preclude summary judgment; other factual disputes are
18 irrelevant. Id., 121 Nev. at 731. A factual dispute is genuine when the evidence is such that a
19 rational trier of fact could return a verdict for the non-moving party. Id.

20 2. While the pleadings and other proof must be construed in a light most favorable to
21 the non-moving party, that party bears the burden "to do more than simply show that there is some
22 metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in
23 the moving party's favor. Matsushita Electric Industrial Co. v. Zenith Radio, 475, 574, 586 (1986),
24 cited by Wood, 121 Nev. at 732. The non-moving party "must, by affidavit or otherwise, set forth
25 specific facts demonstrating the evidence of a genuine issue for trial or have summary judgment
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1 entered against him.” Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992),
2 cited by Wood, 121 Nev. at 732. The non-moving party “is not entitled to build a case on the
3 gossamer threads of whimsy, speculation, and conjecture.” Bulbman, 108 Nev. at 110, 825 P.2d
4 591, quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

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

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7 3. Again, the provisions of NRS 40.600 to 40.695 were enacted by the Nevada
8 Legislature with the intent to provide contractors an opportunity to repair constructional defects and
9 avoid litigation. See D.R. Horton, Inc. v. District Court, 123 Nev. 468, 476, 168 P.3d 731 (2007).⁸
10 To ensure contractors were given an opportunity to repair, the Nevada Legislature required a
11 homeowner or claimant to give the contractor notice of constructional defects initially in “reasonable
12 detail,”⁹ and based upon that notice, allow the contractor time and opportunity to inspect and make
13 repairs when a deficiency was verified.¹⁰ A claimant’s failure to comply with those requirements
14 before filing a constructional defect action results in the dismissal or postponement of that action
15 until those mandates are complied.¹¹
16

17 4. In 2015, the Nevada Legislature made sweeping revisions to the state’s laws relating
18 to constructional defects with the enactment of Assembly Bill (AB) 125. Of significance here, AB
19 125 amended provisions governing the information required to be provided within a notice of
20 constructional defects. Further, NRS 40.645(2), as revised in AB 125, sets forth more stringent
21 requirements for the constructional defect notice than what was in place prior to February 25, 2015.
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26 ⁸This case is commonly referred to as “*First Light I*” by practicing lawyers and judges.

27 ⁹See NRS 40.645 in effect prior to February 25, 2015. Assembly Bill (AB) 125, which became effective on
February 25, 2015, resulted in a change to NRS 40.645(2) to require “specificity” or “specific detail.”

28 ¹⁰See NRS 40.647(1).

¹¹See NRS 40.647(2).

1 It now provides:

2 The notice given pursuant to [NRS 40.645(1)] must:

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

5 (b) Identify in *specific* detail each defect, damage and injury to each
6 residence or appurtenance that is the subject of the claim including, without
7 limitation, the exact location of each such defect, damage and injury;

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

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

17 (Emphasis added)

18 5. While NRS 40.645 was revised to include more stringent requirements within the
19 pre-litigation notice to contractors, such notices still are presumed valid. *See D.R. Horton, Inc.*, 123
20 Nev. at 481. A contractor who wishes to challenge the adequacy of a pre-litigation notice bears the
21 burden of doing so with specificity. *Id.* Because each case is factually distinct, the district courts
22 have wide discretion to consider each contractor's challenge to the reasonableness¹² of each pre-
23 litigation notice. As noted by the Nevada Supreme Court in *D.R. Horton, Inc.*, 123 Nev. at 481, "the
24 district courts are well suited to determine whether a notice preserves a contractor's opportunity to
25 repair."

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

...
...

¹²The Nevada Supreme Court's decision in *D.R. Horton, Inc.*, pre-dates the enactment of AB 125, which includes the amendment to NRS 40.645(2). This Court presumes, if presented the same issues today, the high court's interpretation would have indicated the district courts have wide discretion to consider the contractor's challenge to the "specificity," rather than "reasonableness" of the pre-litigation notice.

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

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

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

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

17 7. As noted above, the Contractors move for summary judgment, arguing the amended
18 NRS 40.645 notice still is deficient, meaning the constructional defects even now are not identified
19 with specificity. This Court addresses the Contractors' challenge to the validity of the amended
20 NRS 40.645 notice with respect to each of the remaining three identified constructional defects
21 below.

22 a. **Residential tower windows:** As noted above, within the amended NRS 40.645
23 notice, the Association claims there is a constructional defective design of 100 percent of the
24 window assemblies in the 616 residential tower units as water entering these mechanisms has no
25 appropriate means of draining or exiting these fabrications. Specifically, the Association states the
26 window assemblies were built in accordance with the project plans; however, the plans failed to
27 specify pan and head flashings at the rough openings for the windows. "Because these flashings
28 were not called for in the plans and specifications, they were not installed."¹³ The location of each
of the windows installed in accordance with this defective design is marked on the exterior plan

¹³See Exhibit D attached to the Association's Opposition to the Contractors' Motion for Summary Judgment
filed September 4, 2018, p. 3.

1 elevations for the two towers.¹⁴ As a consequence, “water that should have drained to the exterior of
2 the building has been entering the metal framing components of the exterior wall and floor
3 assemblies, including the curb walls that support the windows, and is causing corrosion damage to
4 the metal parts and components within these assemblies as described and identified in Exhibit A.”¹⁵
5 “The resulting damage to the metal components of the tower structures presents an unreasonable risk
6 of injury to a person or property resulting from the degradation of these structural assemblies.”
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8 The Contractors maintain the amended notice is not sufficient as the Association did not
9 physically inspect all 9,500 tower windows for the omission of the head and/or sill pan flashing, and
10 is attempting to rely upon extrapolation of a few photographs as proof the alleged defective
11 condition exists. Further, the Contractors complain the omission of the head flashing is a new issue,
12 or that not previously raised in the original NRS 40.645 notice. This Court disagrees with
13 Contractors’ position regarding the sufficiency of the amended notice. While NRS 40.645 now
14 requires *specific* detail of *each* defect, damage and injury, the Association is not necessarily required
15 to physically inspect each of the 9,500 windows for deficiencies particularly when they all are
16 alleged to be defectively designed. In this case, the Association claims all window assemblies were
17 built according to the plans and specifications. Further, the plans did not call for the installation of
18 pan and head flashings in all 9,500 windows which is causing water to drain into the metal framing
19 components of the exterior wall as opposed to outside of the building. The amended NRS 40.645
20 notice identifies each defect, damage and injury to the windows. This Court, therefore, concludes
21 the amended notice sufficiently identifies the defects, damage and injury with respect to the 9,500
22 windows located in the two residential towers.
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27 ¹⁴See Exhibit B of Exhibit D attached to the Association’s Opposition to the Contractors’ Motion for Summary
Judgment.

28 ¹⁵See Exhibit D attached to the Association’s Opposition to the Contractors’ Motion for Summary Judgment,
pp. 3-4.

1 This Court appreciates the identification of the omission of head flashings may be raised for
2 the time in the amended notice, but the issue—meaning the drainage problem—is not new. The
3 omission of the head flashing simply explains why there is drainage into the metal framing
4 components of the exterior wall.

5 **b. Residential tower fire blocking:** The original NRS 40.645 notice indicates there is
6 no fire blocking insulation within the ledger shelf cavities, steel stud framing hollow spaces or both
7 at the exterior wall locations between the residential floors although such installation was required in
8 the building plans. While the Association originally claimed this deficiency existed in 100 percent
9 of the residential tower units, the fact is this defect is not universal and appears to be a workmanship
10 issue. Within the amended notice, the Association admitted it inspected 15 of the 616 units and
11 determined the defect exists in only 76 percent of the small sample. Notwithstanding the deficiency
12 cannot be shown to exist in every unit, the damage and injury to each residence and common areas
13 are not detected. It follows the exact location of each defect, damage and injury is not identified.
14 For these reasons, this Court concludes the portion of the amended NRS 40.645 notice, which
15 addresses the lack of fire blocking insulation, is not sufficient.

16 **c. Sewer problem:** The deficiency relayed in the amended NRS 40.645 notice is the
17 same as that stated in the original. As set forth in the original notice, “[t]he main sewer line
18 connecting the Development to the city sewer system ruptured due to installation error during
19 construction, causing physical damage to the adjacent areas. This deficiency has been repaired. In
20 addition to causing damage, the defective installation presented an unreasonable risk of injury to a
21 person or property resulting from the disbursement of unsanitary matter.” Neither notice specified
22 the “installation error made” or although the amended does note raw sewage seeped into the
23 common areas and there was damage in the vicinity of the rupture. This Court concludes this
24 portion of the NRS 40.645 notice, addressing the sewer problem, is not sufficient. Further, and
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1 notwithstanding that premise, the Contractors were never notified of the sewer issue prior to
2 renovation, and thus, were not accorded the right to inspect and repair.

3 In summary, following the requirements set forth in the newly-amended NRS 40.645, this
4 Court concludes the Contractors met their burden to demonstrate Association's pre-litigation notice
5 addressing all the fire blocking/insulation and sewer issues remains deficient, and thus, they
6 overcome the presumption of the notice's validity on these points. On the other hand, this Court
7 also finds the amended notice to be valid with respect to the windows' deficiencies.
8

9 8. The Association has argued the Motion for Summary Judgment should nevertheless
10 be denied in its entirety as it was not required to provide notice before commencing an action as the
11 Contractors had already filed an action against them. They cite NRS 40.645(4) to support their
12 position. NRS 40.645(4) provides in salient part:
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14 Notice is not required pursuant to this section before commencing an action if:
15 (a) The contractor, subcontractor, supplier or design professional has filed an
16 action against the claimant;

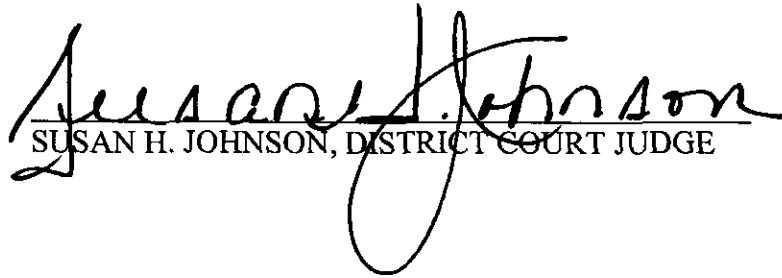
17 In this Court's view and given the history of this matter, the Association misapplies this statutory
18 provision. Here, the Contractors did not file any lawsuit or action against the Association until after
19 the original NRS 40.645 notice was sent. Further, the lawsuit was filed to challenge the validity of
20 the claimant's notice. The claimant, or in this case, the Association is not excused from producing a
21 sufficient notice after its original is challenged. If anything, such a premise would nullify the
22 holding of D.R. Horton, Inc., 123 Nev. 468, 168 P.3d 731, and produce absurd results by
23 encouraging claimants to provide an invalid and conclusory notice, and then be excused from the
24 requirement to produce a specified notice when the contractor or developer challenges its validity.

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

26 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** Plaintiffs'/Counter-
27 Defendants' Motion for Summary Judgment on Defendant's/Counter-Claimant's April 5, 2018
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1 Amended Notice of Claims filed August 3, 2018 is granted in part, denied in part. It is granted with
2 respect to the insufficiency of the amended notice concerning the fire blocking/insulation and sewer
3 issues. It is denied concerning the validity of the amended notice of windows' deficiencies as
4 relayed above.

5 DATED this 29th day of November 2018.

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8 SUSAN H. JOHNSON, DISTRICT COURT JUDGE
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CERTIFICATE OF SERVICE

I hereby certify, on the 30th day of November 2018, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to the following counsel of record, and that first-class postage was fully prepaid thereon:

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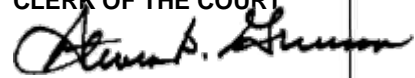
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Attorneys for Plaintiffs and Counter-Defendants,
LAURENT HALLIER; PANORAMA TOWERS I, LLC;
PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN
CONSTRUCTION, INC.

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**
) **LAURENT HALLIER, PANORAMA**
) **TOWERS I, LLC, PANORAMA**
) **TOWERS I MEZZ, LLC, AND M.J.**
) **DEAN CONSTRUCTION, INC.'S**
) **MOTION FOR RECONSIDERATION**
) **OF THEIR MOTION FOR SUMMARY**
) **JUDGMENT ON**
) **DEFENDANT/COUNTER-CLAIMANT**
) **PANORAMA TOWER CONDOMINIUM**
) **UNIT OWNERS' ASSOCIATION'S**
) **APRIL 5, 2018 AMENDED NOTICE OF**
) **CLAIMS**

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

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 file their **Motion For Reconsideration of Their Motion For Summary Judgment on**
16 **Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners’ Association’s**
17 **April 5, 2018 Amended Notice Of Claims** (“Motion”).

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

21 Dated: December 17, 2018

BREMER WHYTE BROWN & O’MEARA LLP

22 By: 
23
24

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.

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
RECONSIDERATION OF THEIR MOTION FOR SUMMARY JUDGMENT ON
DEFENDANT/COUNTER-CLAIMANT PANORAMA TOWER CONDOMINIUM UNIT
OWNERS' ASSOCIATION'S APRIL 5, 2018 AMENDED NOTICE OF CLAIMS** will come
on for hearing before the above-entitled Court on the _____ day of **January 29, 2019**
at _____
a.m., or as soon thereafter as counsel may be heard. **@8:30 am**

Dated: December 17, 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.

**AFFIDAVIT OF PETER C. BROWN, ESQ. IN SUPPORT OF PLAINTIFFS/COUNTER-
DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA
TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S MOTION FOR
RECONSIDERATION OF THEIR MOTION FOR SUMMARY JUDGMENT ON
DEFENDANT/COUNTER-CLAIMANT PANORAMA TOWER CONDOMINIUM UNIT
OWNERS' ASSOCIATION'S APRIL 5, 2018 AMENDED NOTICE OF CLAIMS**

STATE OF NEVADA)
) ss.
CLARK COUNTY)

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

1. I am duly licensed to practice law before all Courts of the State of Nevada, and I am a partner with the law firm Bremer Whyte Brown & O'Meara, LLP.
2. I am one of the attorneys representing Plaintiffs/Counter-Defendants in this matter.
3. I know the following facts to be true of my own knowledge, and if called to testify I could competently do so.
4. This Declaration is submitted in support of Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc.'s (hereinafter collectively referred to as "the Builders") Motion for Reconsideration of Their Motion for Summary Judgment on Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners' Association's April 5, 2018 Amended Notice Of Claims ("Motion").
5. On or about February 24, 2016, the Defendant/Counter-Claimant, Panorama Tower Condominium Unit Owners' Association (hereinafter "Association"), through its counsel, separately served Laurent Hallier (the principal of Panorama Towers I, LLC), M.J. Dean Construction, Inc. ("M.J. Dean") and others with a "Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645" ("Original Chapter 40 Notice"). Other than the addressee's name, the Chapter 40 Notices served on Mr. Hallier and M.J. Dean are the same.
6. The Association's February 24, 2016 Chapter 40 Notice alleged defects and damages involving: (1) residential tower windows; (2) residential tower fire blocking; (3) mechanical

- 1 room piping; and (4) sewer piping.
- 2 7. The Association's revised Chapter 40 Notice ("Amended Chapter 40 Notice"), served on
- 3 April 5, 2018, alleged defects pertaining to: (1) Residential Tower Windows; (2) Residential
- 4 Tower Exterior Wall Insulation; and (3) a Sewer Problem.
- 5 8. The Builders' Motion came before Department XXII on October 2, 2018 (the "October 2,
- 6 2018 Hearing") at the hour of 10:30 a.m. Since the date of the October 2, 2018 hearing, new
- 7 evidence was obtained confirming that the omission of head flashings is a new issue, raised
- 8 for the first time in the Association's Amended Chapter 40 Notice.
- 9 9. Attached as **Exhibit "A"** a true and correct copy of the Builders' Motion For Summary
- 10 Judgment on Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners'
- 11 Association's April 5, 2018 Amended Notice Of Claims.
- 12 10. Attached as **Exhibit "B"** is a true and correct copy of this Court's November 30, 2018
- 13 Findings of Fact, Conclusions of Law and Order.
- 14 11. Attached as **Exhibit "C"** is a true and copy of the Affidavit of Simon Loadsman, the
- 15 Builders' fenestration expert.
- 16 12. Attached as **Exhibit "D"** is a true and correct copy of the Association's Amended Chapter
- 17 40 Notice dated April 5, 2018.
- 18 13. Attached as **Exhibit "E"** is a true and correct copy of the Affidavit of Omar Hindiye,
- 19 Exhibit 2 to the Association's Opposition to the Builders' Motion for Declaratory Relief
- 20 Regarding Standing (attachments not included).
- 21 FURTHER AFFIANT SAYETH NAUGHT.

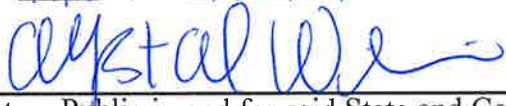
22

23 
PETER C. BROWN, ESQ.

24

25 Subscribed and Sworn before me

26 this 14th day of December, 2018.

27 
Notary Public in and for said State and County

28



1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

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

14 On November 30, 2018, Department XXII filed its Findings of Fact, Conclusions of Law and
15 Order ("2018 Order"). According to the 2018 Order, the Court determined that the lack of head
16 flashings alleged in the Association's Amended Chapter 40 Notice was not a new issue. The Court
17 commented that the drainage problem is not new, concluding that the omission of head flashings
18 merely explains why there is drainage into the metal framing components of the exterior wall.
19 Respectfully, the Builders believe that ruling is clearly erroneous because head flashings do not form
20 part of a window assembly's drainage system. The February 24, 2016 Chapter 40 Notice ("Original
21 Chapter 40 Notice") alleged that the residential tower windows lacked an appropriate drainage
22 system provisions designed to direct water via "an appropriate means of exiting" the window
23 assemblies to the exterior of the building. Head flashings are not designed to drain (i.e., capture
24 water that has already gotten behind the window and allow it to exit through a window assembly);
25 rather, head flashings are used solely to prevent water from entering the system.

26 Consequently, the Builders respectfully request that, based on the new evidence and
27 arguments presented, this Honorable Court reconsider its decision with respect to the omission of
28

1 head flashings and agree that indeed this is a new issue.

2 **II.**

3 **LEGAL STANDARD**

4 **A. Motion for Reconsideration**

5 Motions for Reconsideration of prior Court rulings are within the Court's discretion. The
6 Nevada Civil Practice Manual § 11.19 (2018) states in relevant part:

7 "A court has the inherent authority to reconsider its prior orders. *Trail v.*
8 *Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975) ("[A] court may, for
9 sufficient cause shown, amend, correct, resettle, modify or vacate, as the
10 case may be, an order previously made and entered on the motion in the
progress of the cause or proceeding"); see also *Barry v. Lindner*, 119 Nev.
661, 670, 81 P.3d 537, 543 (2003) (NRC 54(b) permits district court to
revise orders any time before entry of final judgment)."

11 The Nevada Supreme Court in *Masonry & Tile Contractors v. Jolley, Urga & Wirth Ass'n* stated "A
12 district court may reconsider a previously decided issue if substantially different evidence is
13 subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors v. Jolley,*
14 *Urga & Wirth Ass'n*, 113 Nev. 737, 741 (1997).

15 **III.**

16 **LEGAL ARGUMENTS**

17 **A. The Court's Determination that the Lack of Head Flashing is Not a New Defect is**
18 **Clearly Erroneous Because, by the Language of the Original Chapter 40 Notice,**
19 **Practical Application, and the Association's Own Recent Admission, the Lack of Head**
Flashing is Clearly a New Issue

20 According to the 2018 Order, the Court determined that the lack of head flashings was not a
21 new issue. In their Motion for Summary Judgment on Defendant/Counter-Claimant Panorama
22 Tower Condominium Unit Owners' Association's April 5, 2018 Amended Notice of Claims, the
23 Builders argued that since the lack of head flashings was only first raised in the Amended Chapter
24 40 Notice, it was time-barred. (See **Exhibit "A"**, Builders' Motion for Summary Judgment Re:
25 Amended Chapter 40 Notice, Pg. 15). Based on new information not previously presented to this
26 Court, as specified in detail below, the Builders assert that the Court's ruling that the head flashing

1 issue is not new is clearly erroneous. On that basis, the Builders respectfully request that this Court
2 reconsider its ruling and agree that the lack of head flashings is an entirely new issue.

3 i. **All Experts Agree that Head Flashings Are Not Drainage Components that Direct**
4 **Water Through Window Assemblies, Either by Forcing or Allowing the Water's**
5 **Escape, Which is the Only Allegation Pertaining to the Residential Tower Windows**
6 **Issue in the Association's Original Chapter 40 Notice**

7 In its 2018 Order, the Court determined that the drainage problem is not new, stating that the
8 "omission of head flashing simply explains why there is drainage into the metal framing components
9 of the exterior wall." (See **Exhibit "B"**, November 30, 2018 Findings of Fact, Conclusions of Law
10 and Order, Pg. 15). Respectfully, the Builders believe this ruling is clearly erroneous because head
11 flashings do not form part of a window assembly's drainage system. The Association's sole position
12 in its Original Chapter 40 Notice was that any water that gets behind the window assembly has no
13 means of "exiting" the system. The sole focus of the Association's initial position was the alleged
14 inability of the window assembly to direct or allow the water to exit the assembly. Again, the
15 Association's focus was on the *escape* of water. Head flashings have nothing to do with water
16 escaping a system once it is within a system, and no expert would or does suggest otherwise.

17 The Original Chapter 40 Notice states, in part:

18 **"1. Residential Tower Windows: The window assemblies in the**
19 **residential tower units were defectively designed such that water entering the**
20 **assemblies does not have an appropriate means of exiting the**
21 **assemblies. There are no sill pans, proper weepage components or other**
22 **drainage provisions designed to direct water from and through the window**
23 **assemblies to the exterior of the building."**

24 (**Exhibit "B"**, November 30, 2018 Findings of Fact, Conclusions of Law and Order, Pg. 3) (emphasis
25 added).

26 Based on the language in the original Chapter 40 Notice, the omission of head flashings *must*
27 be a new issue. Head flashings do not fall within the purview of "sill pans, proper weepage
28 components or other drainage provisions designed to direct water from and through the window
assemblies to the exterior of the building." (See **Exhibit "C"**, Affidavit of Simon Loadman,
Window Fenestration Expert). Both the Association's and the Builders' experts agree that head
flashings cannot be confused with sill pans, weepage components or other drainage provisions that

1 direct water to escape the window assemblies once water has actually entered the window
2 assemblies.

3 Head flashings cannot be confused with sill pans. Whereas sill pans are designed to capture
4 water and direct it through a window assembly (like the language above describes), head flashings
5 are not designed to capture and direct water *through* window assemblies. (See **Exhibit “C”**,
6 Affidavit of Simon Loadsman, Window Fenestration Expert; See also, **Exhibit “D”**, Amended
7 Chapter 40 Notice, Exhibit A, pg. 7, last line of the discussion section). Head flashings are simply
8 designed to prevent water from entering the window assembly, not drain water from within it. *Id.*

9 Head flashings likewise cannot be classified as weepage components, which are generally
10 characterized as components with holes or openings to allow water to drain. (See **Exhibit “C”**,
11 Affidavit of Simon Loadsman, Window Fenestration Expert). If head flashings contained holes, like
12 weepage components did, then obviously they would not keep water out as intended. The window
13 heads at the Panorama Towers already have barrier provisions in place to keep water out, including
14 sealant joints and backer rods. These systems are intended to perform in a similar manner as head
15 flashings would, in that they are used to prevent water from entering the building. No evidence has
16 been presented that the alleged lack of head flashings has resulted in water intrusion.

17 The Head Flashing Detail from Sto (1.23a) included in the Association’s Amended Chapter
18 40 Notice, which was created years before the development of Panorama and is merely a
19 demonstrative document used to illustrate how a head flashing *would* be installed *if* required, even
20 suggests that head flashings are installed to simply “direct water away from the window.” (See
21 **Exhibit “D”**, Association’s Amended Chapter 40 Notice, Exhibit A, pg. 13, note 2; See also, pg. 7
22 – the Association’s expert quotes this phrase in his discussion of defect allegation 1.02).

23 The Association’s own expert agrees that head flashings are not designed to drain
24 accumulated water through window assemblies, which again is the only allegation in the
25 Association’s Original Chapter 40 Notice pertaining to the residential tower windows. The unsigned
26 expert report prepared by Allana Buick & Bers, Inc., the Association’s new expert who came up with
27 the idea of tossing the new head flashing issue into the Amended Chapter 40 Notice, admits that
28

1 head flashings are designed simply to prevent water from entering the system. (See **Exhibit “D”**,
2 Association’s Amended Chapter 40 Notice, Exhibit A, pg. 7, last line of the discussion section).

3 Because head flashings cannot be confused with sill pans, weepage components or other
4 drainage provisions intending to evacuate water from within a system, it is inconceivable that the
5 lack of head flashings could have been part of the Original Chapter 40 Notice’s allegations. (See
6 **Exhibit “B”**, November 30, 2018 Findings of Fact, Conclusions of Law and Order, Pg. 15).

7 **ii. Through Its Expert’s Affidavit, Incorporated Into the Association’s Opposition to**
8 **the Builders’ Pending Motion for Declaratory Relief Regarding Standing, Which is**
9 **New Evidence that Neither the Court Nor Any Other Party Could Have Considered**
10 **at the time of the October 2, 2018 Hearing, the Association Has Made a Judicial**
11 **Admission that the Omission of Head Flashings is a New Issue**

12 As noted above, the Court has discretion to reconsider a prior issue if new evidence is
13 subsequently introduced. *Masonry & Tile Contractors*, 113 Nev. at 741. On October 22, 2018,
14 twenty days *after* the October 2, 2018 Hearing, the Builders filed a Motion for Declaratory Relief
15 Regarding Standing. On November 16, 2018, nearly a month *after* the October 2, 2018 hearing, the
16 Association filed its Opposition to the Builders’ Motion for Declaratory Relief Regarding Standing.
17 Attached to its Opposition as Exhibit 2 is the declaration of one of the Association’s experts, Omar
18 Hindiyeh. In that declaration, Mr. Hindeyah claims that “head flashings... had they been installed,
19 would have been part of the exterior EIFS cladding system, **not part of the window assembly.**”
20 (See **Exhibit “E”**, Affidavit of Omar Hindiyeh, Exhibit 2 to the Association’s Opposition to the
21 Builders’ Motion for Declaratory Relief Regarding Standing, Pg. 5, Par. 18, Ln. 24-26). (emphasis
22 added).

23 The entire focus of the Association’s Original Chapter 40 Notice involved the window
24 assemblies: “The **window assemblies...** were defectively designed such that water entering the
25 **assemblies** does not have an appropriate means of exiting the **assemblies.**” (**Exhibit “B”**, November
26 30, 2018 Findings of Fact, Conclusions of Law and Order, Pg. 3) (emphasis added). The
27 Association’s own expert contends under oath that head flashings are not part of the window
28 assemblies, a tacit admission by the Association that the lack of head flashings is an entirely new
issue outside the scope of the Original Chapter 40 Notice.

1 Per citation in the 2018 Order, the Court notes that “district courts are well suited to determine
2 whether a notice preserves a contractor’s opportunity to repair.” (**Exhibit “B,”** November 30, 2018
3 Findings of Fact, Conclusions of Law and Order, Pg. 12). Since the construction community (and,
4 most importantly, the Association’s own expert) agrees that head flashings are not intended to
5 evacuate water from within a system, no reasonable contractor would have understood the Original
6 Chapter 40 Notice to suggest that the Association was alleging there were problems with a lack of
7 head flashings. No contractor, therefore, would have been adequately placed on notice of the lack
8 of head flashings when the Association only gave notice that water was unable to escape the window
9 assemblies.

10 In light of this *new evidence*, which was provided *after* the October 2, 2018 hearing, the Court
11 has discretion to reconsider its ruling in regard to whether it believes the omission of head flashings
12 is a new issue. Based on the foregoing analysis and newly obtained admission from the Association’s
13 expert, the Builders submit that the omission of head flashings is a new issue.

14 **IV.**

15 **CONCLUSION**

16 Based on the foregoing, the Builders respectfully request that based upon the new evidence
17 and arguments presented, this Honorable Court reconsider its decision with respect to the omission
18 of head flashings and agree that indeed this is a new issue.

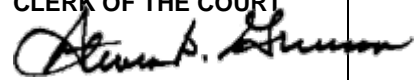
19 Dated: December 17, 2018

BREMER WHYTE BROWN & O’MEARA LLP

20
21 By: 

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

EXHIBIT "A"



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JEFFREY W. SAAB, ESQ.
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LAURENT HALLIER, PANORAMA TOWERS I, LLC,
PANORAMA TOWERS I MEZZ, LLC, and M.J. DEAN
CONSTRUCTION, INC.

DISTRICT COURT
CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

PANORAMA TOWERS CONDOMINIUM
UNIT OWNERS' ASSOCIATION, a Nevada
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Counter-Claimant,

vs.

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

) 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**
) **MOTION FOR SUMMARY JUDGMENT**
) **ON DEFENDANT/COUNTER-**
) **CLAIMANT PANORAMA TOWER**
) **CONDOMINIUM UNIT OWNERS'**
) **ASSOCIATION'S APRIL 5, 2018**
) **AMENDED NOTICE OF CLAIMS**

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

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

18 This Motion is made and based upon the pleadings and papers on file herein, the following
19 Memorandum of Points and Authorities in support thereof, the Declaration of Peter C. Brown,
20 Esq., Declaration of Michelle Robbins, AIA, and any and all evidence and/or testimony accepted
21 by this Honorable Court at the time of the hearing on this Motion.

22 Dated: August 3, 2018

BREMER WHYTE BROWN & O’MEARA LLP

23 By: 

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

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 SUMMARY JUDGMENT ON DEFENDANT/COUNTER-CLAIMANT APRIL 5, 2018 AMENDED CHAPTER 40 NOTICE will come on for hearing before the above-entitled Court on the 06 day of September, 2018 at 9:00 a.m., or as soon thereafter as counsel may be heard.

Dated: August 3, 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
Attorneys for Plaintiffs/Counter-Defendants
LAURENT HALLIER, PANORAMA
TOWERS I, LLC, PANORAMA
TOWERS I MEZZ, LLC, and M.J. DEAN
CONSTRUCTION, INC.

1 damages involving: (1) residential tower windows; (2) residential tower fire blocking; (3)
2 mechanical room piping; and (4) sewer piping.

3 8. On or about March 24, 2016, Builders, via their experts, visually inspected the
4 defects alleged in the Association's February 24, 2016 Chapter 40 Notice.

5 9. During Builders' March 24, 2016, inspection, Builders observed that work was
6 being performed on the windows in Unit 300 and that the windows had been removed and replaced
7 prior to Builders' inspection. The Association did not provide notice to Builders of the allegedly
8 defective windows in Unit 300 prior to the removal and replacement of the windows, including but
9 not limited to, a Chapter 40 Notice.

10 10. During Builders' March 24, 2016, inspection, Builders also observed that the
11 majority of the allegedly defective (i.e. corroded) mechanical room piping had been removed and
12 replaced prior to Builders' inspection. The Association did not provide notice to Builders of the
13 allegedly defective mechanical room piping prior to the removal and replacement of the piping,
14 including, but not limited to, a Chapter 40 Notice.

15 11. During Builders' March 24, 2016, inspection, Builders also became aware that the
16 allegedly defective sewer piping had also been repaired prior to Builders' inspection. The
17 Association did not provide notice to Builders of the allegedly defective sewer piping prior to the
18 repair work being performed, including, but not limited to, a Chapter 40 Notice.

19 12. On March 29, 2016, Builders sent correspondence to the Association (via its
20 counsel) requesting information and documents relating to (1) the sewer line defect allegations
21 identified in the Association's February 24, 2016 Chapter 40 Notice, including the date of
22 occurrence and date of repair of the alleged defects, and requesting the current location of any
23 sewer line materials that were removed and replaced as part of the Association's repair; and (2) the
24 mechanical room piping defect allegations identified in the Association's February 24, 2016
25 Chapter 40 Notice, including the date when the allegedly corroded pipes were replaced, the date the
26 repair work was performed, the identity of the contractor(s) which performed the repair work, and
27 also requesting that the Association confirm where and whether the removed mechanical room pipe
28 materials had been stored for safekeeping. The Association did not respond to Builders' March 29,

1 2016 correspondence.

2 13. Attached as **Exhibit “2”** is a true and correct copy of Builders’ March 29, 2016
3 correspondence to the Association.

4 14. On April 29, 2016, Builders sent follow up correspondence to the Association (via
5 its counsel) again requesting the Association promptly provide information and documents
6 requested in Builders’ March 29, 2016 correspondence. Builders requested a response from the
7 Association no later than May 3, 2016. However, the Association did not respond to Builders’
8 April 29, 2016 correspondence.

9 15. Attached as **Exhibit “3”** is a true and correct copy of Builders’ April 29, 2016
10 correspondence to the Association.

11 16. On May 24, 2016, Builders served the Association with Builders’ Response to the
12 Association’s February 24, 2016 Chapter 40 Notice.

13 17. On September 26, 2016, Builders and the Association participated in a pre-litigation
14 mediation regarding the claims and defects included in the Association’s February 24, 2016
15 Chapter 40 Notice, as required by NRS 40.680, but were unable to reach a resolution. As a result,
16 the mandatory pre-litigation process concluded.

17 18. On February 24, 2015, the Nevada Legislature enacted the Homeowner Protection
18 Act of 2015 (aka Assembly Bill 125) (hereinafter referred to as “AB 125”).

19 19. Attached as **Exhibit “4”** is a true and correct copy of AB 125.

20 20. On March 30, 2017, Builders filed a Motion for Partial Summary Judgment on the
21 Association’s Third Claim for Relief, which came on for hearing on June 20, 2017.

22 21. On September 15, 2017, this Court issued its Findings of Fact and Conclusions of
23 Law.

24 22. Pursuant to same, the Court afforded the Association an opportunity to correct the
25 deficiencies in its February 24, 2016 Chapter 40 Notice.

26 23. Attached as **Exhibit “5”** is a true and correct copy of this Court’s September 15,
27 2017 Order.

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24. On October 10, 2017 the Association filed a Motion for Clarification of the Court's September 15, 2017 Order.

25. On October 27, 2017 Builders filed an Opposition to the Association's Motion for Clarification.

26. The Association's Motion for Clarification came on for hearing on November 21, 2017.

27. The Court denied the Association's Motion for Clarification and the Order was entered on February 1, 2018.

28. Attached as **Exhibit “6”** is a true and correct copy of the Order denying the Association’s Motion for Clarification.

29. On April 5, 2018, served Builders with an Amended Chapter 40 Notice.

30. Attached as **Exhibit “7”** is a true and correct copy of the Association’s April 5, 2018 Amended Ch. 40 Notice.

31. Attached as Exhibit “8” is a true and correct copy of the Declaration of Michelle Robbins, AIA.



Peter C. Brown, Esq.

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, 10 townhomes, 6 lofts, retail space, pool, and a 5-level parking garage. Tower II consists of 34 floors, 308 units, 10 townhomes, 6 lofts, retail space, pool, and 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 “Builders.”

As set forth in detail below, Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners’ Association (“Association”), despite being afforded an opportunity to correct the deficiencies in its February 24, 2016 Chapter 40 Notice, have again failed in the April 5, 2108 Amended Chapter 40 Notice to comply with the express and mandatory requirements of Chapter 40 facilitating the need for the instant Motion for Summary Judgment.

II. PROCEDURAL HISTORY

A. The Association’s Initial Chapter 40 Notice

On or about February 24, 2016, the Association, through its counsel, served Builders with a “Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645” (hereinafter “Initial Chapter 40 Notice”). The Association’s Initial Chapter 40 Notice alleges defects and damages involving: (1) residential tower windows; (2) residential tower fire blocking; (3) mechanical room piping; and (4) sewer piping.

On or about March 24, 2016, Builders attended a visual inspection of the alleged defects in the Association’s Initial Chapter 40 Notice. During the inspection, Builders observed that work was being performed on the windows in Unit 300 and that the windows had been removed and replaced prior to Builders’ inspection. Builders also observed that the majority of the allegedly defective (i.e. corroded) mechanical room piping had been removed and replaced prior to Builders’

1 inspection. In addition, Builders became aware that the allegedly defective sewer piping had also
2 been repaired prior to Builders' inspection. The Association did not provide the statutory required
3 notice to Builders of the allegedly defective windows in Unit 300, the allegedly defective
4 mechanical room piping or the allegedly defective sewer piping prior to removing and replacing
5 and/or repairing the windows and piping, including, but not limited to, a Chapter 40 Notice.

6 On March 29, 2016, Builders sent correspondence to the Association requesting
7 information and documents relating to (1) the sewer line defect allegations identified in the
8 Association's Initial Chapter 40 Notice, including the date of occurrence and date of repair of the
9 alleged defects, and requesting the current location of any sewer line materials that were removed
10 and replaced as part of the Association's repair; and (2) the mechanical room piping defect
11 allegations identified in the Association's Initial Chapter 40 Notice, including the date when the
12 allegedly corroded pipes were replaced, the date the repair work was performed, the identity of the
13 contractor(s) who performed the repair work, and also requesting the Association confirm whether
14 and where the removed mechanical room pipe materials had been stored for safekeeping. The
15 Association did not respond to Builders' March 29, 2016 correspondence.

16 On April 29, 2016, Builders sent follow up correspondence to the Association again
17 requesting the Association promptly provide the information and documents requested in Builders'
18 March 29, 2016 correspondence. Builders requested a response from the Association by May 3,
19 2016. However, the Association did not respond to Builders' April 29, 2016 correspondence.

20 On May 24, 2016, Builders served the Association with Builders' Response to the
21 Association's Initial Chapter 40 Notice.¹ On September 26, 2016, Builders and the Association
22 participated in a pre-litigation mediation regarding the claims and defects included in Association's
23 Initial Chapter 40 Notice, as required by NRS 40.680, but were unable to reach a resolution. As a
24 result, the mandatory pre-litigation process concluded.

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27 ¹ Builders' Response to the Association's Initial Chapter 40 Notice is identified as "Intended for Mediation and
28 Settlement Purposes Only." As a result, a copy of the Response has not been included as an Exhibit to Builders'
Motion.

1 **B. Builders' Complaint for Declaratory Relief**

2 On September 28, 2016, Builders filed a Complaint against the Association, asserting the
3 following claims for relief: (1) Declaratory Relief – Application of AB 125; (2) Declaratory Relief
4 – Claim Preclusion; (3) Failure to Comply with NRS 40.600 et seq.; (4) Suppression of
5 Evidence/Spoliation; (5) Breach of Contract; (6) Declaratory Relief – Duty to Defend; and (7)
6 Declaratory Relief - Duty to Indemnify. In response, the Association filed a Motion to Dismiss
7 Builders' Complaint. The Motion was heard on January 24, 2017, and the Court denied the
8 Association's Motion.²

9 On March 1, 2017, the Association filed its Answer to Builders' Complaint as well as a
10 Counter-Claim against Builders and other named "counter-defendants." The parties stipulated to
11 deem the case complex and to appoint Floyd Hale as Special Master.³ Discovery has not
12 commenced, and no trial date has been set.

13 **C. Builders' March 30, 2017 Motion for Summary Judgment**

14 On March 30, 2017, Builders filed a Motion for Partial Summary Judgment on the
15 Associations' Third-Claim for Relief. On September 15, 2017, this Court issued its Findings of
16 Fact and Conclusions of Law allowing the Association, in part, an opportunity to remedy
17 deficiencies in its Initial Chapter 40 Notice. On October 10, 2017, the Association filed a Motion
18 for Clarification of this Court's September 15, 2017 Findings of Fact of Conclusions of Law. The
19 Association's Motion was denied.

20 **D. The Association's April 5, 2018 Chapter 40 Notice**

21 On or about April 5, 2018, the Association, through its counsel, served Builders with a
22 "Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645" (hereinafter
23 "Amended Chapter 40 Notice"). The Association's Amended Chapter 40 Notice alleges defects
24 and damages involving: (1) residential tower windows; (2) residential tower exterior wall
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27 ² The Order denying the Association's Motion as well as the Notice of Entry of Order was filed on February 9, 2017.

28 ³ 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.

insulation; and (3) sewer problems. Despite the fact that the Association was given an opportunity to fix the errors in the Initial Chapter 40 Notice, the Amended Notice still fails to comply with the express requirements set forth in NRS 40.600 et seq. Furthermore, the Amended Notice improperly includes new defect allegations which are both untimely and not contemplated or allowed by this Court's September 15, 2017 Order.

III. SUMMARY OF UNDISPUTED FACTS

The following facts relevant to this Motion are undisputed:

	Fact	Source	Exhibit
1.	On or about February 24, 2016, the Association, through its counsel, served Builders with a "Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645" (hereinafter "Initial Chapter 40 Notice").	The Association's Initial Chapter 40 Notice Affidavit of Peter C. Brown, Esq. ¶ 5	Exhibit "1"
2.	The Association's Initial Chapter 40 Notice alleges defects and damages involving: (1) residential tower windows; (2) residential tower fire blocking; (3) mechanical room piping; and (4) sewer piping.	The Association's Initial Chapter 40 Notice Affidavit of Peter C. Brown, Esq. ¶ 5	Exhibit "1" p. 1 - 2
3.	On March 24, 2016, Builders attended a visual inspection of the alleged defects in the Association's Initial Chapter 40 Notice.	Affidavit of Peter C. Brown, Esq. ¶ 8	N/A
4.	During Builders' March 24, 2016, inspection, Builders observed that work was being performed on the windows in Unit 300 and that the windows had been removed and replaced prior to Builders' inspection. The Association did not provide notice to Builders of the allegedly defective windows in Unit 300 prior to the removal and replacement of the windows, including, but not limited to, a Chapter 40 Notice.	Affidavit of Peter C. Brown, Esq. ¶ 9	N/A
5.	During Builders' March 24, 2016 inspection, Builders also observed that the majority of the allegedly defective (i.e. corroded) mechanical room piping had been removed and replaced prior to Builders' inspection. The Association did not provide notice to Builders of the allegedly defective mechanical room piping prior to the removal and replacement of this piping, including, but not limited to, a Chapter 40 Notice.	Affidavit of Peter C. Brown, Esq. ¶ 10	N/A
6.	During Builders' March 24, 2016	Affidavit of Peter C.	N/A

	Fact	Source	Exhibit
	inspection, Builders also became aware that the allegedly defective sewer piping had also been repaired prior to Builders' inspection. The Association did not provide notice to Builders of the allegedly defective sewer piping prior to this repair work being performed, including, but not limited to, a Chapter 40 Notice.	Brown, Esq. ¶ 11	
7.	On March 29, 2016, Builders sent correspondence to the Association (via its counsel) requesting information and documents relating to (1) the sewer line defect allegations identified in the Association's Chapter 40 Notice, including the date of occurrence and date of repair of the alleged defects, and requesting the current location of any sewer line materials that were removed and replaced as part of the Association's repair; and (2) the mechanical room piping defect allegations identified in the Association's Chapter 40 Notice, including the date when the allegedly corroded pipes were replaced, the date the repair work was performed, the identity of the contractor(s) which performed the repair work, and also requesting the Association confirm whether and where the removed mechanical room pipe materials have been stored for safekeeping. The Association did not respond to Builders' March 29, 2016 correspondence.	Affidavit of Peter C. Brown, Esq. ¶ 12	Exhibit "2"
8.	On April 29, 2016, Builders sent follow up correspondence to the Association (via its counsel) again requesting the Association promptly provide information and documents requested in Builders' March 29, 2016 correspondence. Builders requested a response from the Association no later than May 3, 2016. The Association did not respond to Builders' April 29, 2016 correspondence.	Affidavit of Peter C. Brown, Esq. ¶ 13	Exhibit "3"
9.	On February 24, 2015, the Nevada Legislature enacted the Homeowner Protection Act of 2015 (aka Assembly Bill 125) (hereinafter referred to as "AB 125").	Assembly Bill No. 125 – Committee on Judiciary February 6, 2016	Exhibit "4"

	Fact	Source	Exhibit
10.	On March 30, 2017, Builders filed a Motion for Partial Summary Judgment on the Association's Third Claim for Relief, which came on for hearing on June 20, 2017. On September 15, 2017, the Court issued its Findings of Fact and Conclusions of Law. Pursuant to same, the Association was afforded an opportunity to correct deficiencies in its February 24, 2016 Initial Chapter 40 Notice.	Affidavit of Peter C. Brown, Esq. ¶¶ 22-24.	Exhibits "5"
11.	On October 10, 2017, the Association filed a Motion for Clarification of the Court's September 15, 2017 Order. Builders opposed the Motion and it was ultimately denied by the Court.	Affidavit of Peter C. Brown, Esq. ¶¶ 25-28.	Exhibit "6"
12.	On April 5, 2018, the Association served Builders with a revised Chapter 40 Notice which contained the same deficiencies as the Initial Notice, but which also included untimely new issues which could have and should have been identified as part of the Initial Chapter 40 Notice.	Affidavit of Peter C. Brown, Esq. ¶¶ 29-30.	Exhibit "7" See also Chapter 40 Notice Comparison/Analysis below, Section 1, pg. 18, Section 2, pg. 19. See Also Exhibit "8" and Declaration of Michelle Robbins, AIA.
13.	The Associations revised Chapter 40 Notice does not cure deficiencies in its Initial Chapter 40 Notice with respect to alleged window claims. More specifically, pursuant to the Court's September 25, 2017 Findings of Fact and Conclusions of Law, "NRS 40.645 now requires not just reasonable, but specific detail of each defect, damage and injury. As there are in excess of 9,500 windows and assemblies of various types, sizes and locations, NRS 40.645 requires each defect, damage and injury to be detailed specifically within the pre-litigation notice. In this case, the notice does not discuss the method or extent of the Association's inspection of and its findings in the over 9,500 window assemblies which varies in type, size and location.12 For these reasons, this Court concludes the portion of the NRS 40.645 notice, which outlines the existence of the same or similar deficiencies in over 9,500	Affidavit of Peter C. Brown, Esq. ¶¶ 30-31.	Exhibit "5" pg. 12, ¶¶ 12-21. See Also, Exhibit "8", Declaration of Michelle Robbins, AIA.

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	Fact	Source	Exhibit
	window assemblies, is not sufficient.”		
14.	The Associations Amended Chapter 40 Notice does not cure the deficiencies in its Initial Chapter 40 Notice with respect to alleged insulation claims. More specifically, pursuant to the Court’s September 25, 2017 Findings of Fact and Conclusions of Law “The NRS 40.645 notice identifies the particular constructional deficiency, but it is not specific in terms of each defect's location. Notably, the notice states “.. the insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both.” (Emphasis added) The "specific detail" requirement of NRS 40.645 necessitates the exact location of the defect in each unit, whether it be within the ledger shelf cavity, the steel stud framing hollow space, or in both areas. Further, the notice does not indicate the method or extent of the inspection, or specifically, how the homeowners' association knows this particular "installation deficiency" exists in all or 100 percent of all the residential tower	Affidavit of Peter C. Brown, Esq. ¶¶ 30-31.	Exhibit “5” pg. 13, ¶¶ 3-13. See Also, Exhibit “8”, Declaration of Michelle Robbins, AIA

	Fact	Source	Exhibit
	<p>units.¹³ For these reasons, this Court concludes the portion of the NRS 40.645 notice, which addresses the lack of fire blocking insulation, is not sufficient.”</p> <p>Despite being given a second chance, the Association failed to cure these deficiencies in its Amended Chapter 40 Notice.</p>		
15.	<p>The Court’s September 15, 2017 Findings of Fact and Conclusions of Law did not allow the Association to incorporate new, untimely defects into its Amended Chapter 40 Notice. More specifically, the Court noted that “In 2015, approximately one year before PANORAMA TOWERS CONDOMINIUM UNIT OWNERS’ ASSOCIATION served its notice of constructional deficiencies in this case, the Nevada Legislature made sweeping revisions to the state’s laws relating to constructional defects with the enactment of Assembly Bill (AB) 125.” As a consequence, all new claims raised in the Association’s April 5, 2018 Amended Chapter 40 Notice, e.g., the omission of head flashing, are untimely and therefore time barred.</p>	Affidavit of Peter C. Brown, Esq. ¶¶ 30-31.	See Exhibit “8”, Declaration of Michelle Robbins, AIA
16.	<p>The Association does not dispute that Builders has been divested of its statutory right to inspect and repair the alleged sewer deficiencies. The Association will never be able to cure this deficiency.</p>	Affidavit of Peter C. Brown, Esq. ¶¶ 29-30.	See Ex. “7” pg. 5 ¶¶ 1-8.

IV. LEGAL STANDARD

Nevada Rule of Civil Procedure 56(c) provides in pertinent part that,

. . . judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file,

1 together with the affidavits, if any, show that there is no genuine
2 issue as to any material fact and that the moving party is entitled to a
judgment as a matter of law.

3 Summary judgment is proper when, reviewing the evidence in the light most favorable to
4 the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to
5 judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 728, 121 P.3d 1026, 1029
6 (2005).

7 Summary judgment is appropriate under NRCP 56 when the
8 pleadings, depositions, answers to interrogatories, admissions, and
9 affidavits, if any, that are properly before the court demonstrate that
10 no genuine issue of material fact exists, and the moving party is
11 entitled to judgment as a matter of law. The substantive law controls
12 which factual disputes are material and will preclude summary
judgment; other factual disputes are irrelevant. A factual dispute is
genuine when the evidence is such that a rational trier of fact could
return a verdict for the nonmoving party.

13 *Id.* at 1031 (internal citations omitted).

14 A party opposing summary judgment must set forth facts demonstrating the existence of a
15 genuine issue for the Court or have summary judgment entered against it. Bulbman, Inc. v. Nevada
16 Bell, 108 Nev. 105, 110 (1992); Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 294, 662 P.2d
17 610, 617 (1983). In addition, a party opposing summary judgment cannot simply rest upon
18 allegations in the pleadings; rather, it must affirmatively set forth facts demonstrating the existence
19 of a material issue of fact. Garvey v. Clark County, 91 Nev. 127, 130, 532 P. 2d 269, 271 (1978);
20 Adamson v. Bowker, 85 Nev. 115, 118-20, 450 P. 2d 796, 799-800 (1969). By its very terms, the
21 summary judgment standard provides that the mere existence of some alleged factual dispute
22 between the parties will not defeat an otherwise properly supported motion for summary judgment.
23 Wood v. Safeway, Inc., 121 P.3d at 1030. Conclusory allegations are insufficient to satisfy such a
24 burden. The non-moving party must produce evidence to support its claim. Bird v. Casa Royale
25 West, 97 Nev. 67, 69-70, 624 P.2d 17 (1981).

26 **V. LEGAL ARGUMENT**

27 **A. The Association Failed to Comply with NRS 40.645(2)(b)**

28 On February 24, 2015, the Nevada Legislature enacted the Homeowner Protection Act of

2015 (aka Assembly Bill 125) (hereinafter referred to as “AB 125”). (**Exhibit “4”**). AB 125 resulted in significant changes to Chapter 40 including, but not limited to, the requirements for a Chapter 40 Notice. Specifically, pursuant to NRS 40.645(2), as amended by AB 125, Section 8, a Chapter 40 Notice must:

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

(b) Identify in **specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim, including, without limitation, the exact location of each such defect, damage and injury;**

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

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

(**Exhibit “4,”** p. 11 – 12 (emphasis added)).

As discussed more fully below, the Association’s Amended Chapter 40 Notice fails to comply with NRS 40.645(2)(b) in that the Association’s Amended Chapter 40 Notice does not identify in **specific** detail the alleged defect, damage and injury to each residence or appurtenance that is the subject of the Association’s claim, including, **without limitation, the exact location of each such defect, damage and injury.** The Association also did not comply with NRS 40.6452(c) by failing to describe in reasonable detail the nature and extent that is known of the **alleged damage resulting from the alleged defects.**

In addition, the Association utterly fails to give any convincing explanation as to why it never provided Chapter 40 Notice to Builders of the alleged sewer line issue. Merely stating that the Association did not foresee future Chapter 40 litigation is certainly not sufficient. What the Court is left with is an admission by the Association that the sewer line issue was never the subject of a timely Chapter 40 Notice. Nevertheless, the Association contends that since a new Chapter 40 Notice is being issued for window and fire blocking issues, then the Court should allow the Association to include the sewer line claim, ignoring the Association’s failure to comply with NRS

40.600 et seq. when the sewer line issue first allegedly arose.

Finally, the Association attempts to shoehorn in new untimely allegations which could and/or should have been identified in its Initial Chapter 40 Notice.

1. Residential Tower Windows

Summary of Initial Notice	Analysis
<p>The Association's Initial Chapter 40 Notice provides the following vague description of the alleged window "defect and resulting damages":</p> <p>Windows: There are two tower structures in the Development consisting of 616 residential condominium units located above common areas and retail spaces below. The window assemblies were defectively designed such that water entering the assemblies does not have appropriate means of exiting the assemblies. There are no sill pans, proper weepage components or other drainage provisions designed to direct water from and through the window assemblies to the exterior of the building.</p> <p>This is a design deficiency that exists in all (100%) of the residential tower assemblies.</p> <p>As a consequence of this deficiency, water that should have drained to the exterior of the building has been entering the metal framing components of the exterior wall and floor assemblies, including the curb wall that supports the windows, and is causing corrosion damage to the metal parts and components within these assemblies. Further, this damage to the metal components of the tower structures presents an unreasonable risk of injury to a person or property resulting from the degradation of these structural assemblies.</p> <p>(Exhibit "1," p. 1 - 2).</p>	<p>The Association's Initial Notice provided no specific details regarding the location of the alleged defects, as required by NRS 40.645(2)(b), and gives only an overly-broad reference that the defect exists in 100% of all the residential tower assemblies.</p> <p>The purpose of requiring a claimant to provide specific details regarding an alleged defect is to allow a contractor to inspect the alleged defect. There are in excess of 9,500 windows in the two Towers, and these window and assemblies are of various types, sizes and locations,</p> <p>The lack of information in the Association's Initial Chapter 40 Notice placed an unreasonable burden on Builders to try to ascertain the specific nature and location of the allegedly defective condition and resulting damages.</p> <p>Even as it relates to the repairs that had already been performed to the windows in Unit 300, the Association failed to provide any information to Builders regarding the specific details of any defects or the alleged damages. (Exhibit "2" and Exhibit "3")</p>

Summary of Amended Notice	Analysis
<p>There are two residential tower structures in the Development consisting of 616 residential condominium units located above common areas and retail spaces below. The window assemblies were defectively designed such that water entering the assemblies does not have appropriate means of exiting the</p>	<p>The Association's Amended Notice, like the Initial Notice, provides no specific details regarding the location of the alleged defects, as required by NRS 40.645(2)(b) other than an overly-broad, unsupported reference that defects exists in 100% of all the residential tower assemblies.</p>

Summary of Amended Notice	Analysis
<p>assemblies.</p> <p>The window assemblies were built in accordance with the project plans, which contained two significant design deficiencies that are identified in specific detail in the accompany report prepared by the Association's Architect, Karim Allana.</p> <p>Moreover, the Association contends that since the plans failed to specify head flashings and pan flashings, they were not installed.</p> <p>The Association contends that this deficiency exists in 100% of the residential tower windows and that water has been entering the metal frame components of the exterior walls and floor assemblies, including the curb walls that support the windows and causing corrosion damage to the metal components.</p>	<p>The Amended Notice and corresponding report prepared by Mr. Allana, reference an "investigation" of windows. However, other than a document review, Mr. Allana relies primarily on generic photographs taken by Omar Hindiyeh. It is telling that nowhere in the Amended Chapter 40 Notice is there ever a representation that all of towers' windows were inspected for the omission of the head and/or sill pan flashing. This is because the Association has never inspected all of the windows and is attempting to rely on extrapolation of a few photographs as proof of the alleged defective condition being throughout the entirety of the Project.</p> <p>Moreover, the alleged omission of the head flashing is a <u>new issue</u>. The Association provides no explanation as to why this new issue was not raised in its Initial Chapter 40 Notice and/or what subsequent investigation, if any, brought this alleged defect to light.</p> <p>Other than providing a few examples, the Association, once again, fails to identify with specificity where alleged water intrusion and corrosion has occurred in the 616 units at issue.</p>

2. Residential Tower Fire Blocking

Summary of Initial Notice	Analysis
<p>The Association's Initial Chapter 40 Notice describes the alleged fireblocking "defect and resulting damages" as follows:</p> <p>Fire Blocking:</p> <p>The plans call for fire blocking insulation, as required by the building code, in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. The purpose of this insulation is to deter the spread of fire from one tower unit to the unit above or below. However, the insulation was not installed as required by the plans and the building code.</p> <p>This installation deficiency exists in all (100%) of the residential tower units, in which insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both.</p>	<p>The Association fails to provide Builders with specific details regarding the location of the alleged fire blocking defect or the resulting damages. The Association's Initial Chapter 40 Notice states that insulation was omitted from either or both the ledger shelf cavity or the steel stud framing cavity or both, yet the Association fails to identify even a single specific location where this alleged condition occurred. See Exhibit "8"</p>

Summary of Initial Notice	Analysis
<p>This deficiency presents an unreasonable risk of injury to a person or property resulting from the spread of fire. (Exhibit “1,” p. 2).(emphasis added)</p>	
Summary of Amended Notice	Analysis
<p>The plans called for insulation/fire blocking as required by code in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations. The insulation was not installed as required by plans and building code. The installation deficiency exists in the “majority” of the where it is required for the majority of the 616 residential tower units. From November of 2015, through January 26, 2016, a total of 15 units were inspected.</p> <p>This deficiency presents an unreasonable risk of injury to person or property resulting from the spread of fire, and from the accumulation of additional moisture in the wall assemblies, thereby exacerbating the window drainage deficiency described above.</p>	<p>Pursuant to the Amended Notice, the Association investigated 15 of the 615 units (2.439%) from November of 2015 through January of 2016. The Association has done no additional investigation of the subject units since January of 2016 even though the Court afforded the Association an opportunity to do so. This is problematic for two reasons: (i) the Association has failed to identify damage and injury to <u>each</u> residence or appurtenance that is the subject of the Association’s claim, including, <u>without limitation</u>, the exact location of <u>each</u> such defect, damage and injury; and (ii) had the Association conducted a thorough investigation, it would have identified the installation of the fire blocking. More specifically, Mr. Hindiye and Mr. Allana fail to acknowledge that the fire blocking could have been installed in 2 different locations, both of which are code compliant. Unfortunately, Mr. Hindiye only inspected the top of the face. Inspection of the second location could have been performed via a simple borescope.</p> <p>In addition to failing to conduct a thorough investigation and then extrapolating, the Association now asserts a new issue. More specifically, that the lack of insulation will contribute to the accumulation of moisture exacerbating the alleged window deficiencies. This is a <u>new issue</u> for which the Association provides no explanation as to why it was not identified in its Initial Chapter 40 Notice. Moreover, the Association does not identify with specificity all of the locations where the accumulation occurred and/or any damage as a result of same. See Exhibit 8.</p>

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Summary of Amended Notice	Analysis
<p>The main sewer line connecting the Development to the City sewer system ruptured due to an installation error during construction, causing physical damage to adjacent common areas. The rupture caused raw sewage to be deposited on the common area of the development in the location of the rupture. In addition to causing damage in the vicinity of the rupture, the defective installation presented an unreasonable risk of injury to person or property resulting from the disbursement of unsanitary matter.</p> <p>The defective installation error during construction caused physical damage to adjacent common areas.</p> <p>It was assumed by the Association that this isolated incident would not be the subject of a Chapter 40 claim.</p>	<p>The alleged defect is the same, but the language in support of same has been modified. More specifically, the Association now contends that as a result of the defective condition, raw sewage seeped into the common areas and that there was damage in the vicinity of the rupture.</p> <p>Modification of the description of the alleged defect is of no consequence as Builders will never be able to exercise its statutory right to inspect and repair the alleged deficiency.</p>


VI. CONCLUSION

As demonstrated above, there are no genuine issues of material fact. The Association was given an opportunity to correct the deficiencies in the Initial Chapter 40 Notice, yet failed, once again, to comply with the **mandatory** requirements set forth in Chapter 40 thereby denying Builders of its statutory rights under NRS 40.6472. In addition to trying to backdoor some untimely new issues into the Amended Notice, the Association simply offers a regurgitation of its Initial February 24, 2016, Chapter 40 Notice. Consequently, Builders are entitled to Summary Judgment.

Dated: August 3, 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
Attorneys for Plaintiffs/Counter-Defendants
LAURENT HALLIER, PANORAMA
TOWERS I, LLC, PANORAMA
TOWERS I MEZZ, LLC, and M.J. DEAN
CONSTRUCTION, INC.

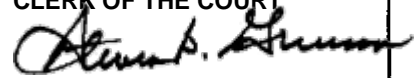
CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 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.



Lexi Kim, an Employee of
BREMER, WHYTE, BROWN & O'MEARA, LLC

EXHIBIT "B"



FFCO

**DISTRICT COURT
CLARK COUNTY, NEVADA**

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

Plaintiffs,

Vs.

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

Defendant.

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

Counter-Claimant,

Vs.

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

Counter-Defendants.

Case No. A-16-744146-D

Dept. No. XXII

**FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER**

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

1 PANORAMA TOWERS
2 CONDOMINIUM UNIT OWNERS'
3 ASSOCIATION, a Nevada non-profit
4 corporation,

5 Third-Party Plaintiff,

6 Vs.

7 SIERRA GLASS & MIRROR, INC.; F.
8 ROGERS CORPORATION; DEAN
9 ROOFING COMPANY; FORD
10 CONSTRUCTING, INC.; INSULPRO,
11 INC.; XTREME EXCAVATION;
12 SOUTHERN NEVADA PAVING, INC.;
13 FLIPPINS TRENCHING, INC.;
14 BOMBARD MECHANICAL, LLC; R.
15 RODGERS CORPORATION; FIVE
16 STAR PLUMBING & HEATING, LLC
17 dba SILVER STAR PLUMBING; and
18 ROES 1 through 1000, inclusive,

19 Third-Party Defendants.¹

20 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

21 This matter, concerning Plaintiffs'/Counter-Defendants' Motion for Summary Judgment on
22 Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims filed August 3, 2018,
23 came on for hearing on the 2nd day of October 2018 at the hour of 10:30 a.m. before Department
24 XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN
25 H. JOHNSON presiding; Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA
26 TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION,
27 INC. appeared by and through their attorney, PETER C. BROWN, ESQ. of the law firm, BREMER
28 WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant/Third-Party Plaintiff
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and

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

1 through their attorneys, MICHAEL J. GAYAN, ESQ. and WILLIAM L. COULTHARD, ESQ. of
2 the law firm, KEMP JONES & COULTHARD, and FRANCIS I. LYNCH, ESQ. of the law firm,
3 LYNCH HOPPER.² Having reviewed the papers and pleadings on file herein, heard oral arguments
4 of the lawyers and taken this matter under advisement, this Court makes the following Findings of
5 Fact and Conclusions of Law:

6
7 **FINDINGS OF FACT AND PROCEDURAL HISTORY**

8 1. As this Court previously found in its September 15, 2017 Findings of Fact,
9 Conclusions of Law and Order, this case arises as a result of alleged constructional defects within
10 both the common areas and the 616 residential condominium units located within two tower
11 structures of the PANORAMA TOWERS located at 4525 and 4575 Dean Martin Drive in Las
12 Vegas, Nevada.

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

17
18 1. ***Residential tower windows***—There are two tower structures in the Development,
19 consisting of 616 residential condominium units located above common areas and retails
20 (sic) spaces below. The window assemblies in the residential tower units were defectively
21 designed such that water entering the assemblies does not have an appropriate means of
22 exiting the assemblies. There are no sill pans, proper weepage components or other drainage
provisions designed to direct water from and through the window assemblies to the exterior
of the building.

23 This is a design deficiency that exists in all (100%) of the residential tower window
24 assemblies.

25
26 ²SCOTT A. WILLIAMS, ESQ. of the law firm, WILLIAMS & GUMBINER, also appeared telephonically on
27 behalf of PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION. Via Minute Order filed
28 January 13, 2017, this Court granted the Motion to Associate Counsel filed January 3, 2017 given non-opposition by
Plaintiffs/Counter-Defendants. However, no formal proposed Order granting the motion was ever submitted to the Court
for signature.

1 As a consequence of this deficiency, water that should have drained to the exterior of the
2 building has been entering into the metal framing components of the exterior wall and floor
3 assemblies, including the curb walls that support the windows, and is causing corrosion
4 damage to the metal parts and components within these assemblies. Further, this damage to
5 the metal components of the tower structures presents an unreasonable risk of injury to a
6 person or property resulting from the degradation of these structural assemblies.

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

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

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

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

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

3. The Contractors elected to inspect the constructional defects identified within the Association's NRS 40.645 Notice on March 24, 2016.⁴ During the inspection, the Contractors observed windows located in Unit 300 had been already been removed and replaced. Likewise, prior to the Contractors' inspection, the majority of the alleged corroded mechanical room piping, as well as the averred defective sewer piping had also been removed, replaced and/or repaired. The Contractors were not provided notice of the removal or replacement of the alleged constructional

³See Exhibit 1 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims filed August 3, 2018.

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

1 defective windows in Unit 300 or the deficient piping in the mechanical room prior to the March 24,
2 2016 inspection.

3 4. On March 29, 2016, the Contractors' lawyer sent a letter to the attorneys for the
4 Association, requesting "information regarding the alleged sewer line, including the date of
5 occurrence and the date of repair. ...In addition, please confirm the current location of any sewer
6 line materials that were removed and replaced as part of the repair." Further, counsel requested "the
7 date(s) when that work [in replacing the pipes in the mechanical room] was done and the identity of
8 the contractor(s). Please also confirm whether and where the removed pipes have been stored for
9 safekeeping."⁵ As there was no response from the Owners' Association to the March 29, 2016
10 correspondence, the Contractors' attorney followed-up with another letter sent a month later, April
11 29, 2016.⁶ However, there was also no response to the April 29, 2016 letter.

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

15 6. The Contractors filed their Complaint on September 28, 2016 against the Owners'
16 Association, asserting the following claims, mostly dealing with their perception the NRS 40.645
17 notice was deficient:

- 18 1. Declaratory Relief—Application of AB 125;
- 19 2. Declaratory Relief—Claim Preclusion;
- 20 3. Failure to Comply with NRS 40.600, *et seq.*;
- 21 4. Suppression of Evidence/Spoliation;

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27 ⁵See Exhibit 2 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on
Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims.

28 ⁶See Exhibit 3 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on
Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims.

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

6. Declaratory Relief—Duty to Defend; and

7. Declaratory Relief—Duty to Indemnify.

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

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

2. Negligence and Negligence *Per Se*;

3. Products Liability (against the manufacturers);

4. Breach of (Sales) Contract;

5. Intentional/Negligent Disclosure; and

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

8. The Contractors moved this Court for summary judgment, or dismissal of the Counter-Claim on March 20, 2017 upon the bases:

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

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

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

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

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

(2) the Owners' Association failed to provide notice of defects prior to performing repairs.

In this regard, the Contractors also sought partial summary judgment with respect to the Third Claim for Relief contained in their Complaint.

...

1 9. The Owners' Association opposed, arguing its NRS 40.645 notice is presumed to be
2 valid, and further, the notice statutes are meant to require substantial as opposed to technical or strict
3 compliance. Further, in the Association's view, the Contractors' interpretation of AB 125 was not
4 reasonable, led to absurd results and violated due process. Notwithstanding these arguments, if this
5 Court found the notice to be deficient, the appropriate remedy would be to stay the case and provide
6 curative instructions as opposed to dismissal of the Counter-Claim. *See* NRS 40.647(2)(b).
7

8 10. This Court heard the matter on June 20, 2017, and thereafter, on September 15, 2017,
9 issued its 20-page Findings of Fact, Conclusions of Law and Order, granting Plaintiffs'/Counter-
10 Defendants' motion in part. This Court also ordered Defendant's/Counter-Claimant's claim for
11 constructional defects located in the mechanical rooms were dismissed as time-barred pursuant to
12 the statute of limitations set forth in NRS 11.202. Further, this Court found and concluded the NRS
13 40.645 Notice of Constructional Defects served February 24, 2016 was deficient, and Plaintiffs/
14 Counter-Defendants met their burden of overcoming the presumption of the notice's validity.
15 However, this Court declined to dismiss Defendant's/Counter-Claimant's Counter-Claim pursuant to
16 NRS 40.647(2)(a) as such would prevent the Association from filing another action. This Court
17 stayed the proceedings with respect to constructional defects relating to window assemblies, fire
18 blocking and sewer problems for a period of six (6) months.
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21 11. On April 5, 2018, the Association served the Contractors with an Amended NRS
22 Chapter 40 Notice of Constructional Defects.⁷ Within this amendment, Defendant/Counter-
23 Claimant incorporated by reference information contained in the February 24, 2016 Notice. It set
24 forth the constructional defects as follows:
25

26 ...

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28 ⁷*See* Exhibit 7 attached to Plaintiffs'/Counter-Defendants Motion for Summary Judgment on
Defendant's/Counter-Claimant's April 5, 2018 Amended Notice of Claims.

1. Residential tower windows

There are two residential tower structures in the Development, consisting of 616 condominium units located above common areas and retail spaces below. The window assemblies in the residential tower units were defectively designed such that water entering the assemblies does not have an appropriate means of exiting the assemblies.

The window assemblies were built in accordance with the project plans, which contained two significant design deficiencies that are identified in specific detail in the accompanying report prepared by the Association's architect, Karim Allana, which is attached hereto as "Exhibit A" and incorporated by reference:

- 1) Contrary to applicable requirements of the 2000 International Building Code, ASTM and ICBO standards, and the EIFS manufacturer's installation instructions, the plans failed to specify pan flashings at the rough openings for the windows.
- 2) Contrary to applicable requirements of the 2000 International Building Code, ASTM and ICBO standards, and the EIFS manufacturer's installation instructions, the plans failed to specify head flashings at the rough openings for the windows.

Because these flashings were not called for in the plans and specifications, they were not installed.

This is a design deficiency that exists in all (100%) of the residential tower window assemblies. The location of each of the windows installed in accordance with this defective design is marked on the exterior plan elevations for the two towers and attached hereto as "Exhibit B."

As a consequence of this deficiency, water that should have drained to the exterior of the building has been entering the metal framing components of the exterior wall and floor assemblies, including the curb walls that support the windows, and is causing corrosion damage to the metal parts and components within these assemblies as described and identified in Exhibit A. The resulting damage to the metal components of the tower structures present an unreasonable risk of injury to a person or property resulting for the degradation of these structural assemblies.

2. Residential tower exterior wall insulation

The plans called for insulation/fire blocking, as required by the building code, in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. The purpose of this insulation is to act as a fire block provision to deter the spread of fire from one tower unit to the units above or below, and to prevent condensation from occurring within the exterior wall assemblies. However, the insulation was not installed as required by the plans and building code.

The installation deficiency exists in the majority of the locations where it is required for the 616 residential tower units, in which insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both. From November of 2015, through January of 2016, 15 units in the Development were inspected. Units were selected from different towers and with different exposures to obtain a mixed sampling. Of the ledger shelf cavities, inspected, 76% had no fire blocking insulation (sic) and many of the steel stud framing cavities had questionable and/or a lack of proper fire blocking provisions. ...

This deficiency presents an unreasonable risk of injury to a person or property resulting from the spread of fire, and from the accumulation of additional moisture in the wall assemblies, thereby exacerbating the window drainage deficiency described above.

3. Sewer problem

The main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to adjacent common areas.

The rupture of the sewer line caused raw sewage to be deposited on the common area of the development in the location of the rupture. In addition to causing damage in the vicinity of the rupture, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter.

Because the Association had previously settled a suit against the Builders and had not yet discovered the window and insulation claims, it was assumed by the Association that this isolated incident would not be the subject of the Chapter 40 claim. The association therefore repaired the ruptured sewer line without giving notice to the Builders.

12. The Contractors now move this Court for summary judgment with respect to the amended NRS 40.645 notice as, in their view, it does not cure the deficiencies identified in the initial one. Specifically, with respect to the window assemblies, of which there are over 9,500 within the towers, the Contractors quotes this Court in its September 25, 2017 Order and argue the Association did not provide specific detail of each defect, damage and injury within the revised notice. Concerning the insulation claims, the Contractors again quoted this Court, and noted the “specific detail” requirement of NRS 40.645 necessitates the exact location of the defect in each unit, whether it be within the ledger shelf cavity, the steel stud framing hollow space, or in both areas. Further, there is nothing specified how the Association knows this particular “installation deficiency” exists in all or 100 percent of all the residential tower units. Lastly, the Contractors argue the Association does not dispute Plaintiffs/Counter-Defendants have been divested of their statutory right to inspect and repair the sewer deficiencies.

13. The Association opposes, arguing, *first*, summary judgment is precluded as the requirement for it to provide notice of constructional defects is eviscerated once the Contractors initiated a legal action. *See* NRS 40.645(4). *Second*, and notwithstanding the first point, the amended notice provided April 5, 2018 is sufficient and consistent with this Court’s September 15, 2017 Findings of Fact, Conclusions of Law and Order. With respect to window defects, they are

1 design deficiencies within the assemblies such that water entering them does not have an appropriate
2 means of exiting. That is, the architectural and exterior insulation finishing system ("EIFS" herein)
3 shop drawings of the project, and investigation photographs taken during destructive testing of some
4 window assemblies showed the windows' and EIFS assemblies did not have pan or head flashings.
5 The flashings are required by the material manufacturers and building code, and the defects were
6 universal. Concerning the fire blocking insulation and sewer system, the Association noted notice
7 methodology similar to that with respect to the window deficiencies was not available; the plans and
8 drawings do call for the presence of fire blocking insulation, but such is absent in some limited
9 testing. The sewer pipes were repaired prior to notice being given to the Contractors.

11 CONCLUSIONS OF LAW

12 1. As this Court previously stated in its September 15, 2017 Findings of Fact,
13 Conclusions of Law and Order, summary judgment is appropriate and "shall be rendered forthwith"
14 when the pleadings and other evidence on file demonstrates no "genuine issue as to any material fact
15 [remains] and that the moving party is entitled to a judgment as a matter of law." See NRCP 56(c);
16 Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026 (2005). The substantive law controls
17 which factual disputes are material and will preclude summary judgment; other factual disputes are
18 irrelevant. Id., 121 Nev. at 731. A factual dispute is genuine when the evidence is such that a
19 rational trier of fact could return a verdict for the non-moving party. Id.

20 2. While the pleadings and other proof must be construed in a light most favorable to
21 the non-moving party, that party bears the burden "to do more than simply show that there is some
22 metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in
23 the moving party's favor. Matsushita Electric Industrial Co. v. Zenith Radio, 475, 574, 586 (1986),
24 cited by Wood, 121 Nev. at 732. The non-moving party "must, by affidavit or otherwise, set forth
25 specific facts demonstrating the evidence of a genuine issue for trial or have summary judgment
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1 entered against him.” Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992),
2 cited by Wood, 121 Nev. at 732. The non-moving party “is not entitled to build a case on the
3 gossamer threads of whimsy, speculation, and conjecture.” Bulbman, 108 Nev. at 110, 825 P.2d
4 591, quoting Collins v. Union Fed. Savings & Loan, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

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

6
7 3. Again, the provisions of NRS 40.600 to 40.695 were enacted by the Nevada
8 Legislature with the intent to provide contractors an opportunity to repair constructional defects and
9 avoid litigation. See D.R. Horton, Inc. v. District Court, 123 Nev. 468, 476, 168 P.3d 731 (2007).⁸
10 To ensure contractors were given an opportunity to repair, the Nevada Legislature required a
11 homeowner or claimant to give the contractor notice of constructional defects initially in “reasonable
12 detail,”⁹ and based upon that notice, allow the contractor time and opportunity to inspect and make
13 repairs when a deficiency was verified.¹⁰ A claimant’s failure to comply with those requirements
14 before filing a constructional defect action results in the dismissal or postponement of that action
15 until those mandates are complied.¹¹
16

17 4. In 2015, the Nevada Legislature made sweeping revisions to the state’s laws relating
18 to constructional defects with the enactment of Assembly Bill (AB) 125. Of significance here, AB
19 125 amended provisions governing the information required to be provided within a notice of
20 constructional defects. Further, NRS 40.645(2), as revised in AB 125, sets forth more stringent
21 requirements for the constructional defect notice than what was in place prior to February 25, 2015.
22

23 ...

24 ...

25
26 ⁸This case is commonly referred to as “*First Light I*” by practicing lawyers and judges.

27 ⁹See NRS 40.645 in effect prior to February 25, 2015. Assembly Bill (AB) 125, which became effective on
February 25, 2015, resulted in a change to NRS 40.645(2) to require “specificity” or “specific detail.”

28 ¹⁰See NRS 40.647(1).

¹¹See NRS 40.647(2).

1 It now provides:

2 The notice given pursuant to [NRS 40.645(1)] must:

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

5 (b) Identify in *specific* detail each defect, damage and injury to each
6 residence or appurtenance that is the subject of the claim including, without
7 limitation, the exact location of each such defect, damage and injury;

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

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

18 5. While NRS 40.645 was revised to include more stringent requirements within the
19 pre-litigation notice to contractors, such notices still are presumed valid. *See D.R. Horton, Inc.*, 123
20 Nev. at 481. A contractor who wishes to challenge the adequacy of a pre-litigation notice bears the
21 burden of doing so with specificity. *Id.* Because each case is factually distinct, the district courts
22 have wide discretion to consider each contractor's challenge to the reasonableness¹² of each pre-
23 litigation notice. As noted by the Nevada Supreme Court in *D.R. Horton, Inc.*, 123 Nev. at 481, "the
24 district courts are well suited to determine whether a notice preserves a contractor's opportunity to
25 repair."

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

...
...

¹²The Nevada Supreme Court's decision in *D.R. Horton, Inc.*, pre-dates the enactment of AB 125, which includes the amendment to NRS 40.645(2). This Court presumes, if presented the same issues today, the high court's interpretation would have indicated the district courts have wide discretion to consider the contractor's challenge to the "specificity," rather than "reasonableness" of the pre-litigation notice.

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

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

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

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

17 7. As noted above, the Contractors move for summary judgment, arguing the amended
18 NRS 40.645 notice still is deficient, meaning the constructional defects even now are not identified
19 with specificity. This Court addresses the Contractors' challenge to the validity of the amended
20 NRS 40.645 notice with respect to each of the remaining three identified constructional defects
21 below.

22 a. **Residential tower windows:** As noted above, within the amended NRS 40.645
23 notice, the Association claims there is a constructional defective design of 100 percent of the
24 window assemblies in the 616 residential tower units as water entering these mechanisms has no
25 appropriate means of draining or exiting these fabrications. Specifically, the Association states the
26 window assemblies were built in accordance with the project plans; however, the plans failed to
27 specify pan and head flashings at the rough openings for the windows. "Because these flashings
28 were not called for in the plans and specifications, they were not installed."¹³ The location of each
of the windows installed in accordance with this defective design is marked on the exterior plan

¹³See Exhibit D attached to the Association's Opposition to the Contractors' Motion for Summary Judgment
filed September 4, 2018, p. 3.

1 elevations for the two towers.¹⁴ As a consequence, “water that should have drained to the exterior of
2 the building has been entering the metal framing components of the exterior wall and floor
3 assemblies, including the curb walls that support the windows, and is causing corrosion damage to
4 the metal parts and components within these assemblies as described and identified in Exhibit A.”¹⁵
5 “The resulting damage to the metal components of the tower structures presents an unreasonable risk
6 of injury to a person or property resulting from the degradation of these structural assemblies.”
7

8 The Contractors maintain the amended notice is not sufficient as the Association did not
9 physically inspect all 9,500 tower windows for the omission of the head and/or sill pan flashing, and
10 is attempting to rely upon extrapolation of a few photographs as proof the alleged defective
11 condition exists. Further, the Contractors complain the omission of the head flashing is a new issue,
12 or that not previously raised in the original NRS 40.645 notice. This Court disagrees with
13 Contractors’ position regarding the sufficiency of the amended notice. While NRS 40.645 now
14 requires *specific* detail of *each* defect, damage and injury, the Association is not necessarily required
15 to physically inspect each of the 9,500 windows for deficiencies particularly when they all are
16 alleged to be defectively designed. In this case, the Association claims all window assemblies were
17 built according to the plans and specifications. Further, the plans did not call for the installation of
18 pan and head flashings in all 9,500 windows which is causing water to drain into the metal framing
19 components of the exterior wall as opposed to outside of the building. The amended NRS 40.645
20 notice identifies each defect, damage and injury to the windows. This Court, therefore, concludes
21 the amended notice sufficiently identifies the defects, damage and injury with respect to the 9,500
22 windows located in the two residential towers.
23
24
25

26
27 ¹⁴See Exhibit B of Exhibit D attached to the Association’s Opposition to the Contractors’ Motion for Summary
Judgment.

28 ¹⁵See Exhibit D attached to the Association’s Opposition to the Contractors’ Motion for Summary Judgment,
pp. 3-4.

1 This Court appreciates the identification of the omission of head flashings may be raised for
2 the time in the amended notice, but the issue—meaning the drainage problem—is not new. The
3 omission of the head flashing simply explains why there is drainage into the metal framing
4 components of the exterior wall.

5 **b. Residential tower fire blocking:** The original NRS 40.645 notice indicates there is
6 no fire blocking insulation within the ledger shelf cavities, steel stud framing hollow spaces or both
7 at the exterior wall locations between the residential floors although such installation was required in
8 the building plans. While the Association originally claimed this deficiency existed in 100 percent
9 of the residential tower units, the fact is this defect is not universal and appears to be a workmanship
10 issue. Within the amended notice, the Association admitted it inspected 15 of the 616 units and
11 determined the defect exists in only 76 percent of the small sample. Notwithstanding the deficiency
12 cannot be shown to exist in every unit, the damage and injury to each residence and common areas
13 are not detected. It follows the exact location of each defect, damage and injury is not identified.
14 For these reasons, this Court concludes the portion of the amended NRS 40.645 notice, which
15 addresses the lack of fire blocking insulation, is not sufficient.

16 **c. Sewer problem:** The deficiency relayed in the amended NRS 40.645 notice is the
17 same as that stated in the original. As set forth in the original notice, “[t]he main sewer line
18 connecting the Development to the city sewer system ruptured due to installation error during
19 construction, causing physical damage to the adjacent areas. This deficiency has been repaired. In
20 addition to causing damage, the defective installation presented an unreasonable risk of injury to a
21 person or property resulting from the disbursement of unsanitary matter.” Neither notice specified
22 the “installation error made” or although the amended does note raw sewage seeped into the
23 common areas and there was damage in the vicinity of the rupture. This Court concludes this
24 portion of the NRS 40.645 notice, addressing the sewer problem, is not sufficient. Further, and
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1 notwithstanding that premise, the Contractors were never notified of the sewer issue prior to
2 renovation, and thus, were not accorded the right to inspect and repair.

3 In summary, following the requirements set forth in the newly-amended NRS 40.645, this
4 Court concludes the Contractors met their burden to demonstrate Association's pre-litigation notice
5 addressing all the fire blocking/insulation and sewer issues remains deficient, and thus, they
6 overcome the presumption of the notice's validity on these points. On the other hand, this Court
7 also finds the amended notice to be valid with respect to the windows' deficiencies.
8

9 8. The Association has argued the Motion for Summary Judgment should nevertheless
10 be denied in its entirety as it was not required to provide notice before commencing an action as the
11 Contractors had already filed an action against them. They cite NRS 40.645(4) to support their
12 position. NRS 40.645(4) provides in salient part:
13

14 Notice is not required pursuant to this section before commencing an action if:
15 (a) The contractor, subcontractor, supplier or design professional has filed an
16 action against the claimant;

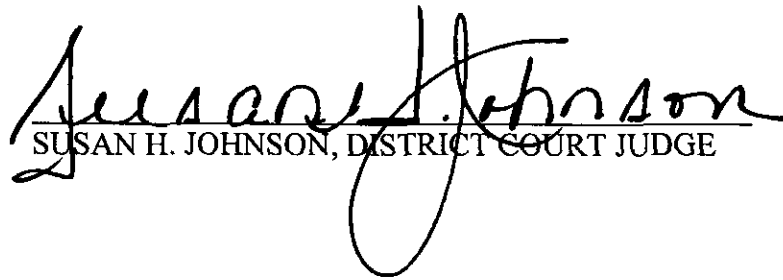
17 In this Court's view and given the history of this matter, the Association misapplies this statutory
18 provision. Here, the Contractors did not file any lawsuit or action against the Association until after
19 the original NRS 40.645 notice was sent. Further, the lawsuit was filed to challenge the validity of
20 the claimant's notice. The claimant, or in this case, the Association is not excused from producing a
21 sufficient notice after its original is challenged. If anything, such a premise would nullify the
22 holding of D.R. Horton, Inc., 123 Nev. 468, 168 P.3d 731, and produce absurd results by
23 encouraging claimants to provide an invalid and conclusory notice, and then be excused from the
24 requirement to produce a specified notice when the contractor or developer challenges its validity.
25

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

27 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** Plaintiffs'/Counter-
28 Defendants' Motion for Summary Judgment on Defendant's/Counter-Claimant's April 5, 2018

1 Amended Notice of Claims filed August 3, 2018 is granted in part, denied in part. It is granted with
2 respect to the insufficiency of the amended notice concerning the fire blocking/insulation and sewer
3 issues. It is denied concerning the validity of the amended notice of windows' deficiencies as
4 relayed above.

5 DATED this 29th day of November 2018.

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8 SUSAN H. JOHNSON, DISTRICT COURT JUDGE
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CERTIFICATE OF SERVICE

I hereby certify, on the 30th day of November 2018, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to the following counsel of record, and that first-class postage was fully prepaid thereon:

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Laura Banks, Judicial Executive Assistant

EXHIBIT "C"

1 **AFFIDAVIT OF SIMON LOADSMAN 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 **RECONSIDERATION OF THEIR MOTION FOR SUMMARY JUDGMENT ON**
5 **DEFENDANT/COUNTER-CLAIMANT PANORAMA TOWER CONDOMINIUM UNIT**
6 **OWNERS' ASSOCIATION'S APRIL 5, 2018 AMENDED NOTICE OF CLAIMS**

5 STATE OF NEVADA)
6 CLARK COUNTY) ss.

7 I, **SIMON LOADSMAN**, do swear under penalty of perjury of the laws of the State of
8 Nevada as follows:

- 9 1. I am a partner of Reid Loadsmen Fenestration Consultants & Associates, LLC, an expert
10 consulting firm which specializes in the field of construction defects. I have worked as a
11 forensic expert in the field of fenestration for over 10 years. I have an extensive history in
12 the fenestration industry, including designing, manufacturing, and installing window
13 systems. I have been retained by Plaintiffs/Counter-Defendants as a consultant to evaluate
14 the alleged window-related deficiencies contained within Defendant/Counter-Claimant
15 Panorama Tower Condominium Unit Owners' Association's ("Association") Chapter 40
16 Notice of Defects and amendment thereto.
- 17 2. This Affidavit is submitted in support of Plaintiffs/Counter-Defendants Laurent Hallier,
18 Panorama Towers I, LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction,
19 Inc.'s (the "Builders") Motion for Reconsideration of Their Motion for Summary Judgment
20 on Defendant/Counter-Claimant Panorama Tower Condominium Unit Owners'
21 Association's April 5, 2018 Amended Notice of Claims.
- 22 3. In my opinion, head flashings do not fall within the purview of "sill pans, proper weepage
23 components or other drainage provisions designed to direct water from and through the
24 window assemblies to the exterior of the building."
- 25 4. In my opinion, head flashings cannot be confused with sill pans. Whereas sill pans are
26 designed to capture water and direct it through a window assembly, head flashings are not
27 designed to capture and direct water *through* window assemblies. Head flashings are simply
28

1 designed to prevent water from entering the window assembly, not drain water from within
2 it.

3 5. Head flashings likewise cannot be classified as weepage components, which are generally
4 characterized as components with holes or openings to allow water to drain.

5 FURTHER AFFIANT SAYETH NAUGHT.

6
7 
8 SIMON LOADSMAN

9 Subscribed and Sworn before me
10 this 17 day of December, 2018.


11 
12 Notary Public in and for said State and County



EXHIBIT "D"

Francis I. Lynch, Esq. (Nevada Bar No. 4145)
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Facsimile:(415) 419-5469
(Admitted Pro Hac Vice)

Counsel for Defendant/Counter-claimant

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

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

vs.

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

Defendant.

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

Counter-claimant,

CASE NO: A-16-744146-D

DEPT. NO: XXII

**PANORAMA TOWERS CONDOMINIUM
UNIT OWNERS' ASSOCIATION'S
AMENDED NOTICE OF CLAIMS
PURSUANT TO NRS § 40.645**

1 vs.

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

Counter-defendants.

18 PLEASE TAKE NOTICE that Defendant and Counter-claimant Panorama Towers
19 Condominium Unit Owners' Association, a Nevada non-profit corporation (the "Association"),
20 hereby provides amended notice of claims for constructional defects (as the term is defined and used
21 is NRS § 40.600 – 40.695) against Plaintiff and Counter-defendants as captioned and identified
22 above (the "Builders"). Said claims include those arising directly from the defects described herein
23 as well as any and all other rights of claim or causes of action under any other statutory or common
24 law rights which the Association may have against the Builders, and each of them individually,
25 jointly and severally.

26 **AMENDED CHAPTER 40 NOTICE**

27 This Amended Notice is being given to satisfy the requirements of NRS 40.645. The
28 Association intends to pursue claims against the Counter-defendants identified above pursuant to
Nevada Revised Statutes (NRS) 40.600 *et seq.*, arising from defects in the design and construction of
the Panorama Towers condominium development located at 4525 Dean Martin Drive, Las Vegas,
Nevada (the "Development").

1 By virtue of this Amended Notice, you, and each of you, must also take notice that you have
2 certain timely obligations to the Association herein above described, as well as to persons, firms or
3 corporations with whom or which you may have contracted to perform the work complained of at
4 the Development, all under the provisions of NRS § 40.646 – 40.649, inclusive.

5 This Amended Notice incorporates by reference and amends the previous Notice dated
6 February 24, 2016, including the Verification signed under penalty of perjury by a member of the
7 executive board and/or an officer of the Association verifying that each such defect, damage and
8 injury specified in the Notice exists, with respect to the following claims:

9 **1. Residential tower windows**

10 There are two residential tower structures in the Development, consisting of 616
11 condominium units located above common areas and retail spaces below. The window assemblies in
12 the residential tower units were defectively designed such that water entering the assemblies does
13 not have an appropriate means of exiting the assemblies.

14 The window assemblies were built in accordance with the project plans, which contained two
15 significant design deficiencies that are identified in specific detail in the accompanying report
16 prepared by the Association's architect, Karim Allana, which is attached hereto as "Exhibit A" and
17 incorporated by reference:

- 18 1) Contrary to applicable requirements of the 2000 International Building Code, ASTM and
19 ICBO standards, and the EIFS manufacturer's installation instructions, the plans failed to
20 specify pan flashings at the rough openings for the windows.
- 21 2) Contrary to applicable requirements of the 2000 International Building Code, ASTM and
22 ICBO standards, and the EIFS manufacturer's installation instructions, the plans failed to
23 specify head flashings at the rough openings for the windows.

24 Because these flashings were not called for in the plans and specifications, they were not
25 installed.

26 This is a design deficiency that exists in all (100%) of the residential tower window
27 assemblies. The location of each of the windows installed in accordance with this defective design is
28 marked on the exterior plan elevations for the two towers and attached hereto as "Exhibit B".

1 As a consequence of this deficiency, water that should have drained to the exterior of the
2 building has been entering the metal framing components of the exterior wall and floor assemblies,
3 including the curb walls that support the windows, and is causing corrosion damage to the metal
4 parts and components within these assemblies as described and identified in Exhibit A. The resulting
5 damage to the metal components of the tower structures presents an unreasonable risk of injury to a
6 person or property resulting from the degradation of these structural assemblies.

7 **2. Residential tower exterior wall insulation**

8 The plans called for insulation/fire blocking, as required by the building code, in the ledger
9 shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors
10 in the two tower structures. The purpose of this insulation is to act as a fire block provision to deter
11 the spread of fire from one tower unit to the units above or below, and to prevent condensation from
12 occurring within the exterior wall assemblies. However, the insulation was not installed as required
13 by the plans and building code.

14 This installation deficiency exists in the majority of the locations where it is required for the
15 616 residential tower units, in which insulation was omitted either from the ledger shelf cavity, from
16 the steel stud framing cavity, or from both. From November of 2015, through January of 2016, 15
17 units in the Development were inspected. Units were selected from different towers and with
18 different exposures to obtain a mixed sampling. Of the ledger shelf cavities inspected, 76% had no
19 fire blocking insulation and many of the steel stud framing cavities had questionable and/or a lack
20 of proper fire blocking provisions. *See* Affidavit of Omar Hindiyeh In Support of Panorama's
21 Opposition to Hallier's Motion for Partial Summary Judgment attached hereto as "Exhibit C".

22 This deficiency presents an unreasonable risk of injury to a person or property resulting from
23 the spread of fire, and from the accumulation of additional moisture in the wall assemblies, thereby
24 exacerbating the window drainage deficiency described above.

25 **3. Sewer problem**

26 The main sewer line connecting the Development to the city sewer system ruptured due to
27 installation error during construction, causing physical damage to adjacent common areas.

1 The rupture of the sewer line caused raw sewage to be deposited on the common area of the
2 development in the location of the rupture. In addition to causing damage in the vicinity of the
3 rupture, the defective installation presented an unreasonable risk of injury to a person or property
4 resulting from the disbursement of unsanitary matter.

5 Because the Association had previously settled a suit against the Builders and had not yet
6 discovered the window and insulation claims, it was assumed by the Association that this isolated
7 incident would not be the subject of a Chapter 40 claim. The Association therefore repaired the
8 ruptured sewer line without giving notice to the Builders.

9
10 DATED: April 5, 2018

LYNCH HOPPER, LLP

11
12 /s/ Francis Lynch
13 Francis I. Lynch, Esq.
14 Attorneys for Defendant and Counter-Claimant

15 **CERTIFICATE OF SERVICE**

16 The undersigned hereby certifies that on the 5th day of April, 2018, a copy of the foregoing,
17 PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S AMENDED
18 NOTICE OF CLAIMS PURSUANT TO NRS § 40.645, was electronically served through Odyssey
19 upon Counsel for Plaintiffs/Counter-defendants and sent by certified mail, return receipt requested,
20 to:

21
22 BREMER WHYTE BROWN & O'MEARA LLP
23 Peter C. Brown, Esq.
24 Darlene M. Cartier, Esq.
25 1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144

26
27 By: 
28

EXHIBIT A

EXHIBIT A

EXHIBIT A

March 14, 2018

Preliminary Defect Report

Panorama Towers Condominium Unit Owner's Association



Allana Buick & Bers, Inc.
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Palo Alto, CA 94303
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www.abbae.com

ALLANA BUICK & BERS

Making Buildings Perform Better

Prepared for:

Mr. Francis Lynch
Lynch Hopper LLP.
1210 South Valley View BLVD
Suite 208
Las Vegas NV 89102

ABBAE PN# 18-5172.01

Mediation/Settlement Communications
Evidence Codes 1119 and 1152



Table of Contents

Table of Contents 1

Executive Summary 2

Building Construction and Governing Codes 2

Limitations 3

Defect List 4

1.0 Windows and Doors 4

 1.01 Omission of pan flashing at window assemblies 4

 1.02 Omission of head flashings at window assemblies 6

Exhibits 9



Executive Summary

Allana Buick and Bers, Inc. (**ABBAE**) was retained by Mr. Francis Lynch of Lynch Hopper LLP. to further investigate the deficiencies associated with the Exterior Insulation and Finish System (EIFS) at the Panorama Towers. The towers consist of two high-rise buildings with a total of 616 residential units and is located at 4525 Dean Martin Drive, Las Vegas Nevada.

ABBAE's investigation focused on reviewing construction documents and testing reports performed by construction consulting groups that were present on site during the investigation. As ABBAE was not previously involved in the investigation process; this report is based on the review of the available reports, photographs by others, architectural, and shop drawings related to the overlooked issues associated with the Exterior Insulation and Finish System (EIFS). ABBAE also performed a limited visual survey of the exterior of the tower buildings in order to determine what Exterior Insulation and Finish System (EIFS) has been utilized on the high-rises.

After an additional review of the ESR reports, construction drawings, shop drawings, and various Exterior Insulation and Finish System (EIFS) details, ABBAE is able to determine that the high-rise towers were installed using the STO Exterior Insulation and Finish System (EIFS).

Building Construction and Governing Codes

Owner: Hallier Properties LLC

Architect: KLAI JUBA Architects

Civil Engineer: LOCHSA Engineering

Structural Engineer: LOCHSA Engineering

Mechanical, Electrical, Plumbing Engineer: JBA Consulting Engineers

Applicable Codes and Occupancy per Architectural Drawings

Code: 2000 IBC with Clark County Amendments

Occupancy Group: R-2

Construction Type: 1-A

Provided by Lynch Hopper LLP., ABBAE reviewed the architectural drawings dated December 11, 2006, EIFS shop drawings consisting of Structural EIFS details dated December 3rd 2004, and shop drawings dated on August 15 and September 15 of 2006. In addition, ABBAE reviewed the reports from Paoli & Co, CMA Consulting, and Allen Group Architects, Inc. and photographs from CMA's repairs and investigations.



Limitations

This investigation is based on limited visual observations, destructive testing documentation performed by other consulting groups, and available construction documents.

Key Words

This Statement of Claims (SOC) is organized by individual observed deficiencies herein referred to as "Defect." Each major category is listed in the Table of Contents. The sub-category of each issue is organized as follows:

- **Defect**
- **Codes and Standards**
- **Resultant Damage**

The following is a brief explanation of each sub-category:

Defect: The defects noted are specific in nature where investigated, and the location of the defects is noted where observed. Defects listed in this report are not an exhaustive list of all defects that may be found on this project; they are not based on complete investigation of all the issues; nor do they represent an exhaustive review of the construction documents. Photographs of each of the defects are included in this report and follow the defect list.

Codes and Standards: The construction defects were interpreted in accordance with the requirements of 2000 International Building Code and ICBO ICC-ES Reports for the Sto Exterior Insulation and Finishing Systems (EIFS). The architectural construction drawings, Sto Exterior Insulation and Finishing Systems (EIFS) and Tower EIFS shop drawings were available for review. Please see Appendix A for more information.

Resultant Damage: Resultant damage already includes water damage, and may include loss of life expectancy, and loss of fire rating and/or diminished resale value of the property. Due to the limited nature of our destructive and non-invasive testing, the resultant damages section includes both damage that were observed during destructive testing as well as projected damages based on ABBAE's experience.



Defect List

1.0 Exterior Insulation and Finish System

1.01 Omission of pan flashings at EIFS system rough openings (window assemblies)

1.02 Omission of head flashings at EIFS system rough openings (window assemblies)

1.0 Windows and Doors

1.01 Omission of pan flashing at window assemblies

Discussion:

Based on our investigation, ABBAE determined that pan flashings are omitted at the Exterior Insulation and Finish System (EIFS) rough window openings on the two (2) towers. Based on as-built shop drawings and visual review, we were able to confirm that this defect is universal and occurs at all windows of the high-rise buildings. These critical pan flashings are required by the material manufacturers and building code and its omission, is a code violation.

Upon the review of the EIFS shop drawings (dated 09/15/2006), Details 1, Sheet F4.01 (Exhibit 01), the design is defective as it does not depict a pan flashing. In lieu of a pan flashing, a sill flashing is shown. In order to confirm that the windows were built as depicted in the shop drawings, limited destructive testing was performed by CMA Consulting from August 2013 to July 2016, where some windows were disassembled to confirm if the construction followed the design intent. The sill condition shows a sill flashing running from outside and terminating approximately half (1/2") inch in from the exterior of the window system at the window "rock and roll" bracket. The lack of a complete pan flashing can also be visually confirmed by observing the window sill from the inside of the units. Based on review of EIFS shop drawings, visual and destructive testing, we were able to confirm that the windows were in fact incorrectly built to the design intent, per the shop drawings. Photos from CMA's investigation observations are attached herein as Exhibit 05 and Exhibit 06.

Sto drawing detail 1.24a (Exhibit 02) and ICBO reports calls for a use of the window pan flashing. Additionally, the following statement is made in the "Notes:" section of the Sto detail: "2. Protect rough opening against water penetration by wrapping with a barrier membrane Direct any water penetration to the exterior at or above the sill pan flashing."

The omission of the sill pan flashing, in observed construction, resulted in leaks, damage, staining and rust under the window and sill flashing assembly.

Codes and Standards:

2000 International Building Code, Section 1403.2 Weather Protection:

"Exterior walls shall provide the building with a weather resistant exterior wall envelope. The exterior wall envelope shall include flashings, described in Section 1405.3. The exterior wall envelope shall be designed and constructed in such a manner as to prevent the accumulation of water within the wall assembly by providing a water-resistive barrier behind the exterior veneer, as described in section 1404.2 and a means for draining water that enters the assembly to the exterior of the veneer..."

- The installed Sto Exterior Insulation and Finish System (EIFS) does not have the code required weather resistive barrier.



2000 International Building Code (IBC) allows for a "barrier" system without a weather resistive barrier as an exception in section 1403.2 Weather Protection, Exceptions 2.:

"Compliance with the requirements for means of drainage, and the requirements of Section 1405.2 and Section 1405.3, shall not be required for an exterior wall envelope that has demonstrated to resist wind-driven rain through testing of the exterior wall envelope, including joints, penetrations and intersections with dissimilar materials, in accordance with ASTM E331...The exterior wall envelope design shall be considered to resist wind-driven rain where the results of testing indicate that water did not penetrate control joints in the exterior wall envelope, joints at the perimeter of openings penetration, or intersection of terminations with dissimilar materials."

- This exception requires that all systems without weather barriers be tested for air and water infiltration per ASTM E331

ASTM E331, Scope 1.2:

"This test method is applicable to any curtain-wall area or to windows, skylights, or doors alone."

ASTM E331, Scope 1.3:

"This test method addresses water penetration through a manufactured assembly. Water that penetrates the assembly, but does not result in a failure as defined herein..."

ICBO ES Report ER-3906, October 1, 2001, Figure 2, Page 6, "STO EIFS at Window Sill":

Window sill detail shows a continuous pan flashing with back leg going from the back of the window assembly to the exterior past the sill and adhered with sealant to the EIFS assembly.

ICBO ES Report ER-3906, October 1, 2001, Section 4.1 Findings:

"Construction is as set forth in this report and the manufacturer's instructions."

ICBO ES Report ER-3906, October 1, 2001, Section 4.5 Findings:

"Installation is by applicators trained by STO Corporation."

ICC Evaluation Report, AC24 Acceptance Criteria for Exterior Insulation and Finis Systems, Approved June 2003

Section 2.2.1 (EIFS Wall Covering Assembly with Drainage): "An EIFS wall covering assembly with drainage is a nonbearing exterior wall covering assembly applied to a solid substrate. It includes a water-resistive coating that may be trowled-, spray- or rolled-applied over the surface of a sheathing substrate, or a weather-resistive barrier as defined in Sections 1402 and 2506.4 of the UBC or a water-resistive barrier as defined in Sections 1404.2 and 2510.6 of the IBC or weather-resistant sheathing paper as defined in Sections R703.2 of the IRC; a drainage medium, or other means of drainage..."

Section 5.7 (Exterior Wall Construction): "Plans, details, and specifications, concerning proper installation of the EIFS, that are applicable to the specific building under consideration, must be a part of documents submitted to the building official for approval. When installed on framed walls of Type V, Group R, Division 1 or Division 3 Occupancies (UBC), Type V, Group R1, R2, R3, R4 Occupancies (IBC), or building under the IRC, EIFS wall covering assemblies with drainage, defined in Section 2.2 are required."

Section 7.0 (Application): "Application instructions bearing the date of publication must be submitted. Instructions must include the information noted in Section 7.1 through 7.6. Installation details need to be consistent with assemblies tested under Section 6.10.3, as applicable."

Section 7.1.1 (Application): Flashing and/or sealing around heads, sills and jambs of windows and doors, and at the top of exposed walls.

STO EIFS Details, April, 2000:

Detail 1.24a: Detail shows a continuous sill pan flashing with a back leg and end dam underneath the window assembly.



STO EIFS Details, April, 2000, Detail 1.24a, Attention Section (bottom of the page)

"Sto products are intended for use by qualified professional contractors...They should be installed in accordance with those specifications and Sto's instructions..."

Tower 2 EIFS Shops, Detail 3, Sheet F6.02:

Detail shows a sill condition at the window assembly without a window sill pan flashing.

Resultant Damage:

Omission of window sill pan flashings may result in water intrusion into occupied and concealed building spaces; resulting in damage to building components, finishes and personal property.

1.02 Omission of head flashings at window assemblies

Discussion:

ABBAAE reviewed the architectural drawings, EIFS shop drawings and investigation photographs taken by other consulting groups during the destructive testing of the window assemblies and was able to determine the windows and EIFS assembly does not have window head flashings. Based on as-built shop drawings and visual review, we were able to confirm that this defect is universal and occurs at all windows of the high-rise buildings. These critical window head flashings are required by the material manufacturers and building code and its omission is a code violation.

Based on the review of the EIFS shop drawings detail 4, sheet F4.01 (Exhibit 03), the design is defective as it does not depict a window head flashing; which is required by the Sto Exterior Insulation and Finish System details and installation guide. In order to confirm that the windows were built as depicted in the shop drawings, limited destructive testing was performed by CMA Consulting from August 2013 to July 2016, where some windows were disassembled to confirm if the construction followed the design intent. The photographs showing the removal of the window assembly, confirm the omission of the window head flashing; therefore, we are able to confirm that the EIFS and window assemblies were in fact incorrectly built to the design intent, per the shop drawings. Photos from CMA's investigation and ABB's observations are attached herein as Exhibit 07 through Exhibit 09.

Sto drawing detail 1.23a (Exhibit 04) and ICBO reports calls for a use of the window head flashing. Additionally, the following statement is made in the Sto detail "Notes:" section: "2. Provide flashing installed over the window to direct water away from the window..."

The omission of the window head flashings prevents water from properly being shed from the exterior surface of the towers, resulting in water intrusion beyond the exterior of the building's surface.

Codes and Standards:

2000 International Building Code, Section 1403.2 Weather Protection:

"Exterior walls shall provide the building with a weather resistant exterior wall envelope. The exterior wall envelope shall include flashings, described in Section 1405.3. The exterior wall envelope shall be designed and constructed in such a manner as to prevent the accumulation of water within the wall assembly by providing a water-resistive barrier behind the exterior veneer, as described in section 1404.2 and a means for draining water that enters the assembly to the exterior of the veneer..."

- The installed Sto Exterior Insulation and Finish System (EIFS) does not have the code required weather resistive barrier.

2000 International Building Code (IBC) allows for a "barrier" system without a weather resistive barrier as an exception in section 1403.2 Weather Protection, Exceptions 2.:



"Compliance with the requirements for means of drainage, and the requirements of Section 1405.2 and Section 1405.3, shall not be required for an exterior wall envelope that has demonstrated to resist wind-driven rain through testing of the exterior wall envelope, including joints, penetrations and intersections with dissimilar materials, in accordance with ASTM E331...The exterior wall envelope design shall be considered to resist wind-driven rain where the results of testing indicate that water did not penetrate control joints in the exterior wall envelope, joints at the perimeter of openings penetration, or intersection of terminations with dissimilar materials."

- This exception requires that all systems without weather barriers be tested for air and water infiltration per ASTM E331

ASTM E331, Scope 1.2:

"This test method is applicable to any curtain-wall area or to windows, skylights, or doors alone."

ASTM E331, Scope 1.3:

"This test method addresses water penetration through a manufactured assembly. Water that penetrates the assembly, but does not result in a failure as defined herein..."

ICBO ES Report ER-3906, October 1, 2001, Figure 2, Page 6, "STO EIFS at Window Head":

Window head detail shows a head flashing.

ICBO ES Report ER-3906, October 1, 2001, Section 4.1 Findings:

"Construction is as set forth in this report and the manufacturer's instructions."

ICBO ES Report ER-3906, October 1, 2001, Section 4.5 Findings:

"Installation is by applicators trained by STO Corporation.

ICC Evaluation Report, AC24 Acceptance Criteria for Exterior Insulation and Finis Systems, Approved June 2003

Section 2.2.1 (EIFS Wall Covering Assembly with Drainage): "An EIFS wall covering assembly with drainage is a nonbearing exterior wall covering assembly applied to a solid substrate. It includes a water-resistive coating that may be trowled-, spray- or rolled-applied over the surface of a sheathing substrate, or a weather-resistive barrier as defined in Sections 1402 and 2506.4 of the UBC or a water-resistive barrier as defined in Sections 1404.2 and 2510.6 of the IBC or weather-resistant sheathing paper as defined in Sections R703.2 of the IRC; a drainage medium, or other means of drainage..."

Section 5.7 (Exterior Wall Construction): "Plans, details, and specifications, concerning proper installation of the EIFS, that are applicable to the specific building under consideration, must be a part of documents submitted to the building official for approval. When installed on framed walls of Type V, Group R, Division 1 or Division 3 Occupancies (UBC), Type V, Group R1, R2, R3, R4 Occupancies (IBC), or building under the IRC, EIFS wall covering assemblies with drainage, defined in Section 2.2 are required."

Section 7.0 (Application): "Application instructions bearing the date of publication must be submitted. Instructions must include the information noted in Section 7.1 through 7.6. Installation details need to be consistent with assemblies tested under Section 6.10.3, as applicable."

Section 7.1.1 (Application): Flashing and/or sealing around heads, sills and jambs of windows and doors, and at the top of exposed walls.

STO EIFS Details, April, 2000:

Detail 1.23a: Detail shows a window head flashing with note: "Flashing over window folder over window jamb-head interface"

STO EIFS Details, April, 2000, Detail 1.23a, Attention Section (bottom of the page)



“Sto products are intended for use by qualified professional contractors, they should be installed in accordance with those specifications and Sto’s instructions...”

Tower 2 EIFS Shops, Detail 4, Sheet F4.01:

Detail shows a window head condition without the head flashing

Resultant Damage:

Omission of window head flashings may result in water intrusion into occupied and concealed building spaces; resulting in damage to building components, finishes and personal property.



Exhibits

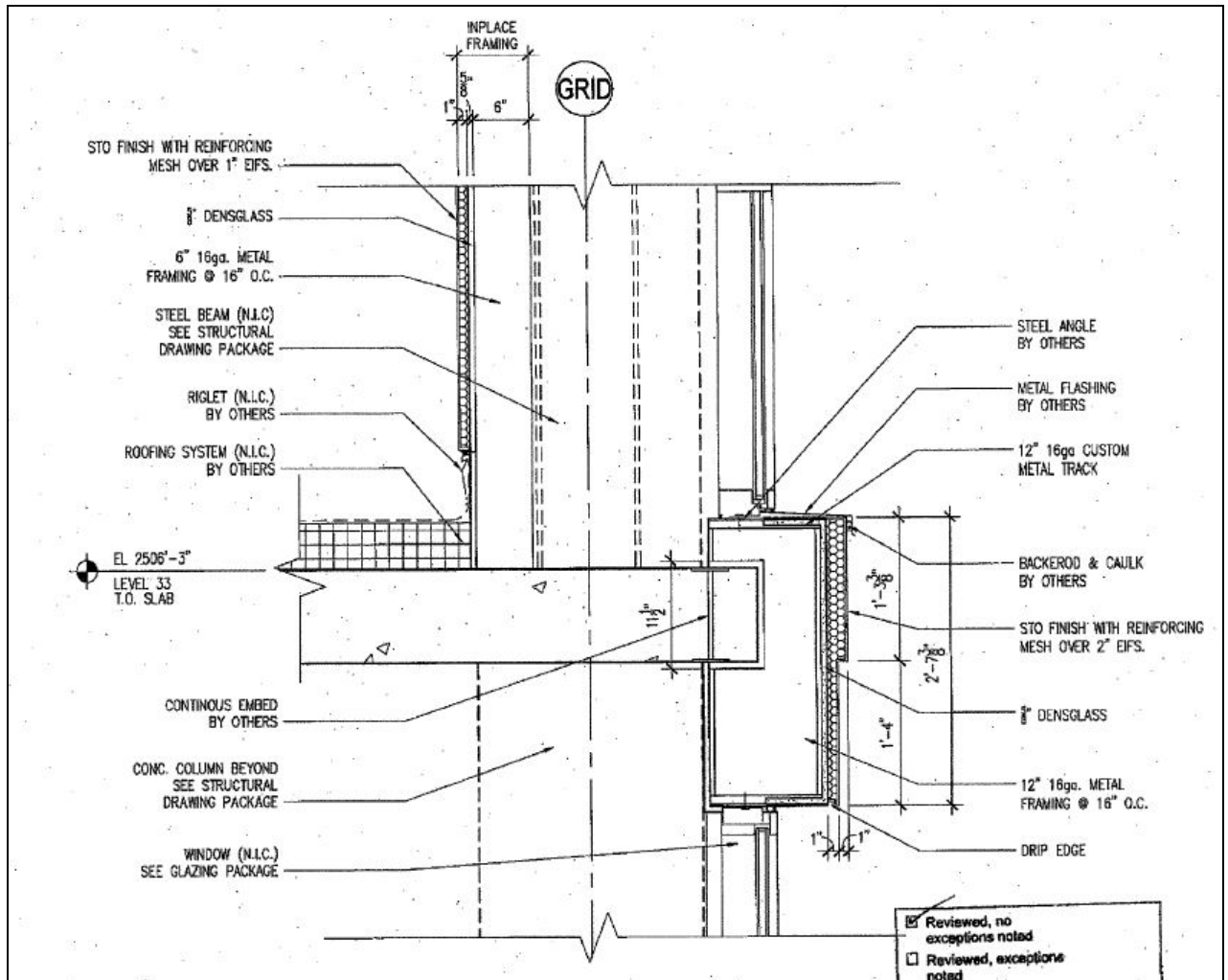


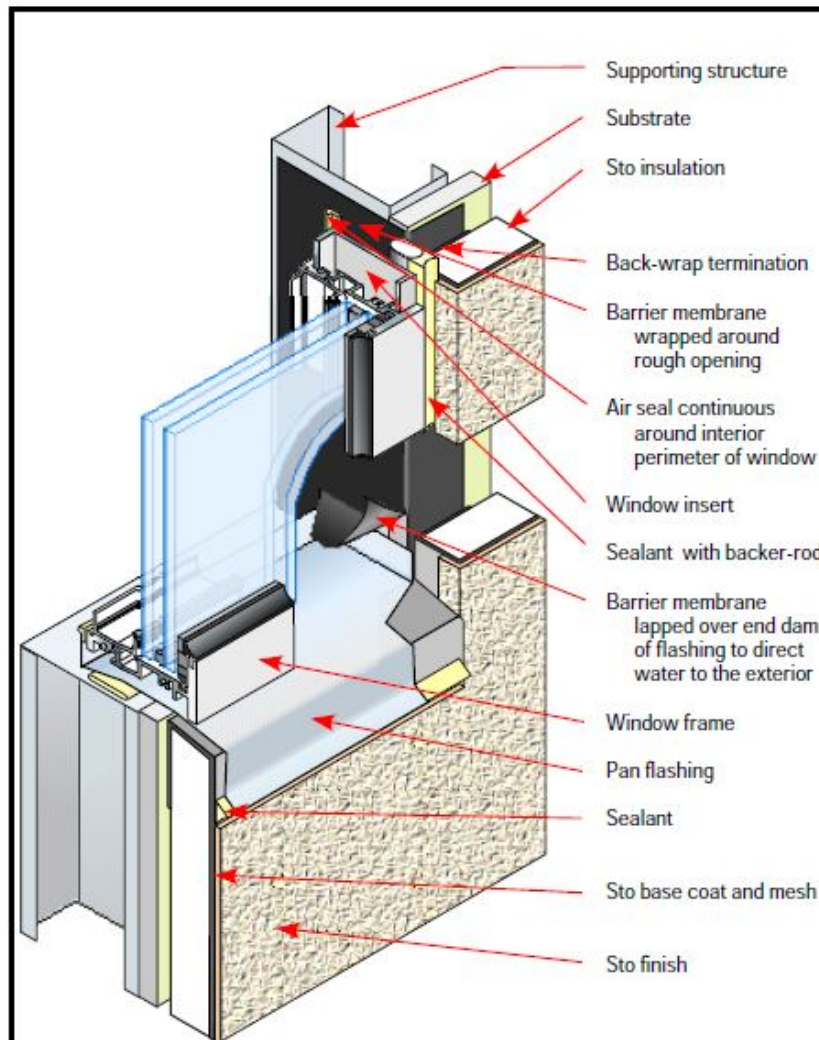
Exhibit 1 – Construction Drawings: EIFS Shop Drawing Detail 1 Showing no Sill Pan Flashing



Sto EIFS
Commercial Window Jamb

Detail No.: 1.24a

Date: April 2000



Notes:

- 1) Provide a mock-up installation and test using materials and substrates associated with the project.
- 2) Protect rough opening against water penetration by wrapping with a barrier membrane. Direct any water penetration to the exterior at or above the sill pan flashing. (Refer to Sto details 1.23a and 1.25a.)
- 3) Provide continuous air barrier connection around the perimeter of the window to reduce: leaking, condensation related to air movement, and sound and insect intrusion.
- 4) Provide window insert to optimize sealant configuration.

Exhibit 02 – Sill Pan Flashing Detail from Sto

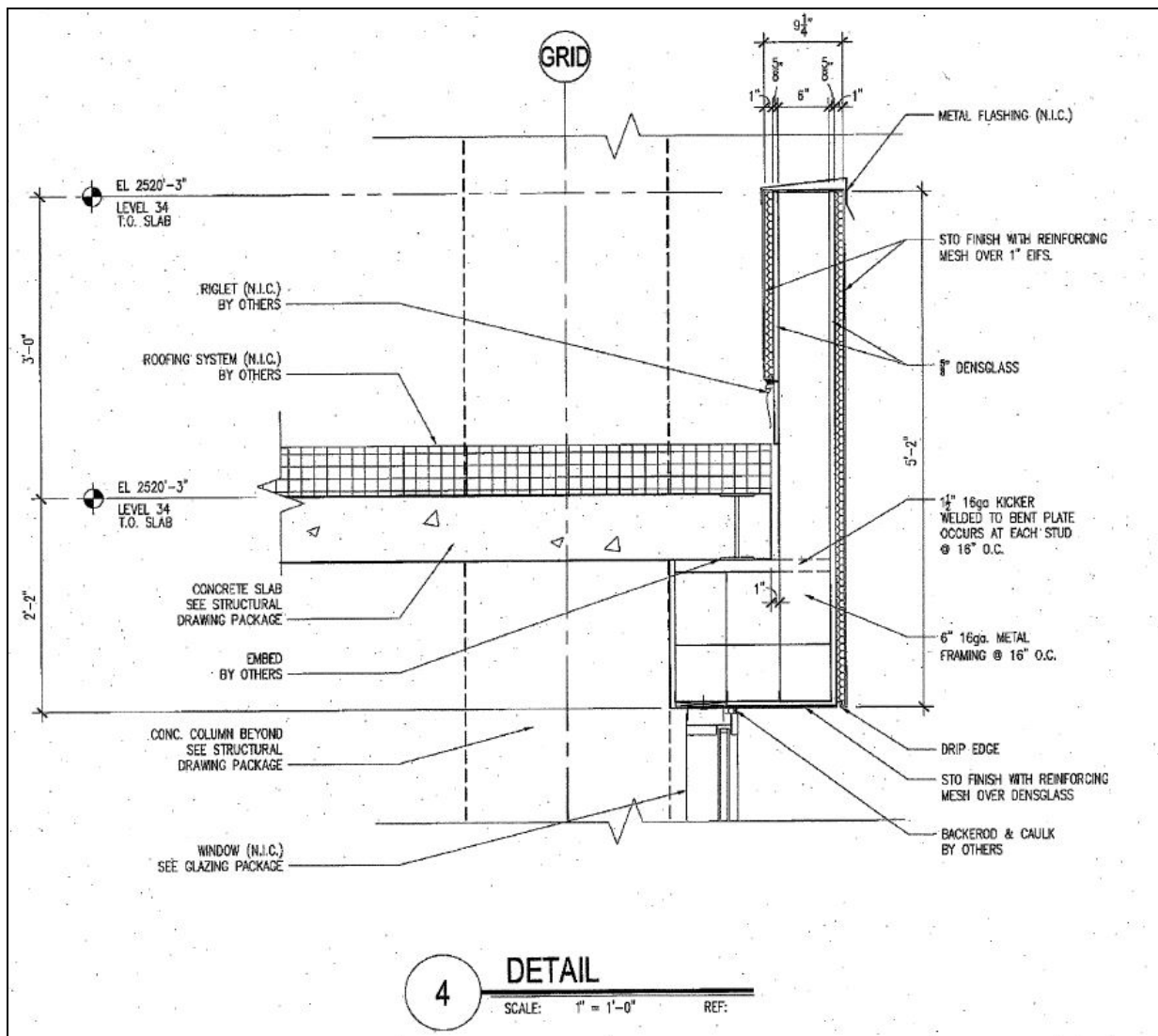


Exhibit 03 – Construction Drawings: EIFS Shop Drawing Detail 4 Showing no Head Flashing



Sto EIFS
Commercial Window Head

Detail No.: 1.23a

Date: April 2000

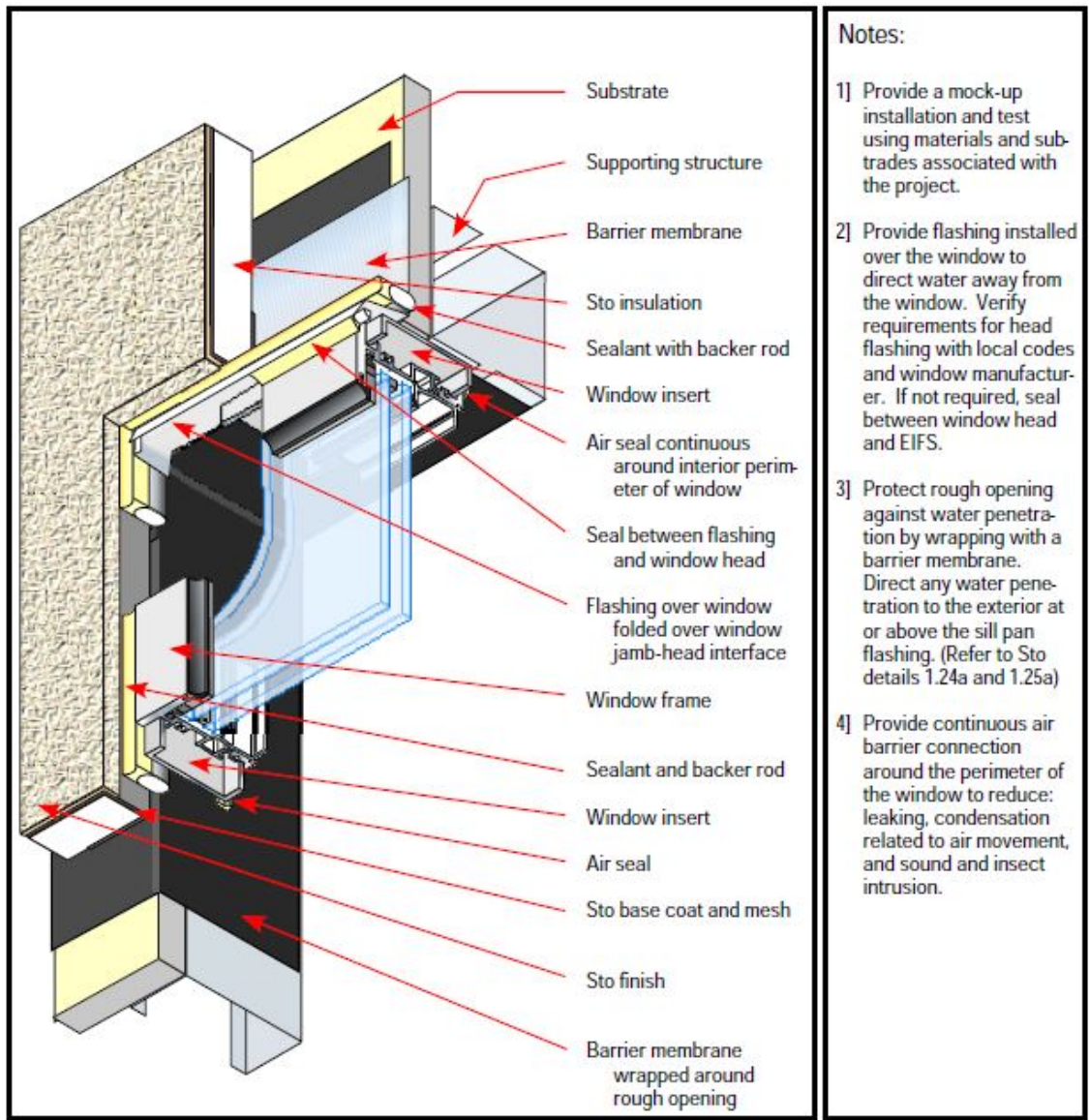


Exhibit 04 – Head Flashing Detail from Sto



CMA Consulting - Investigations Catalog



Exhibit 5 – CMA Consulting Photograph: Depicting Omission of Sill Pan Flashing



CMA Consulting - Investigations Catalog



Exhibit 6 – CMA Consulting Photograph: Depicting Omission of Sill Pan Flashing



CMA Consulting - Investigations Catalog



Exhibit 7 – CMA Consulting Photograph: Depicting Omission of Head Flashings



Exhibit 8 – ABBAE Photograph: View of the Tower Window System Showing Omission of Head Flashing



Exhibit 9 – ABBAE Photograph: View of the Tower Window System Showing Omission of Head Flashing

EXHIBIT B

EXHIBIT B

EXHIBIT B

EXHIBIT B

Tower 1 – East Side Windows

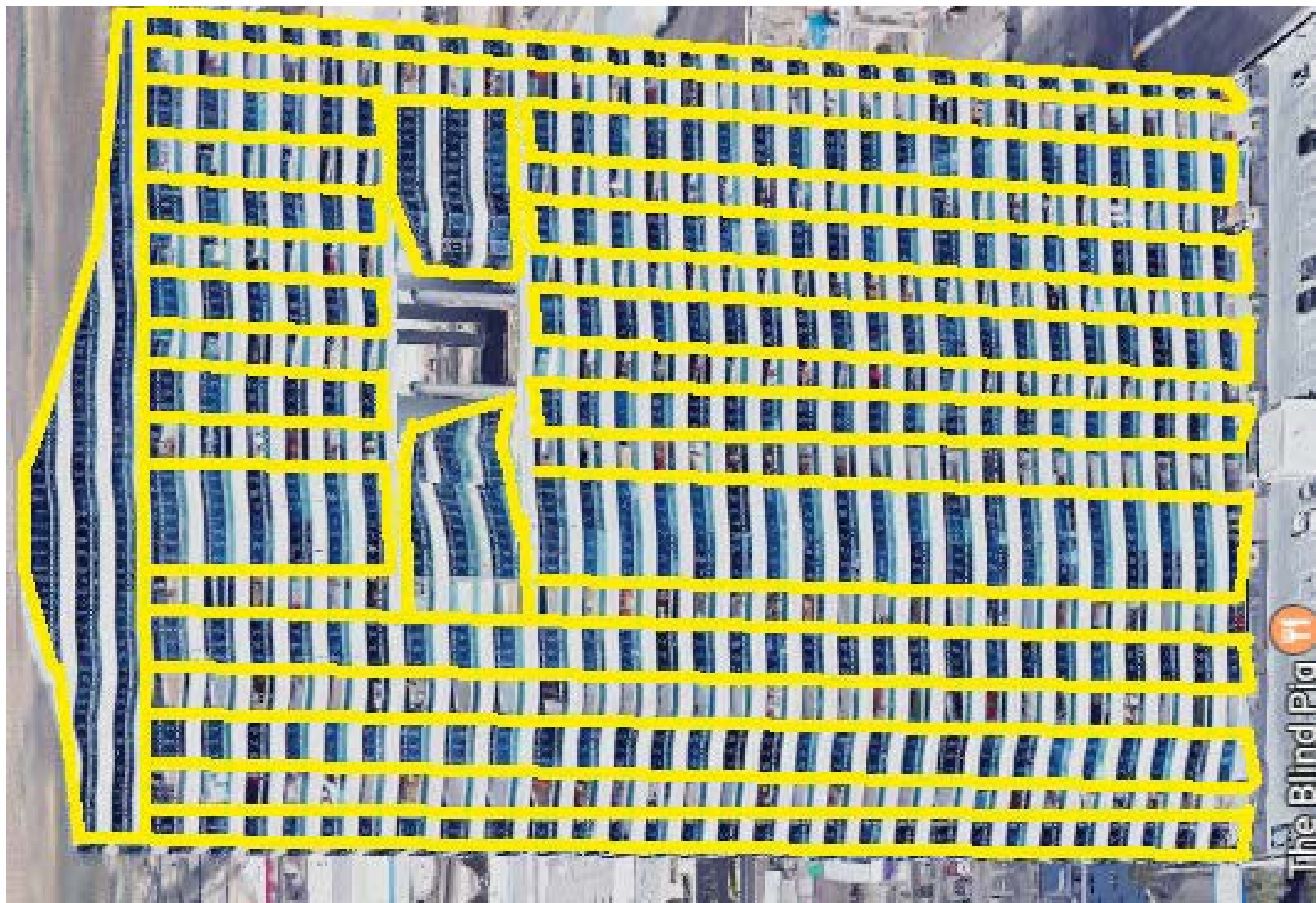


EXHIBIT B

Tower 1 – North Side Windows



EXHIBIT B

Tower 1 – South Side Windows



EXHIBIT B

Tower 1 – West Side Windows

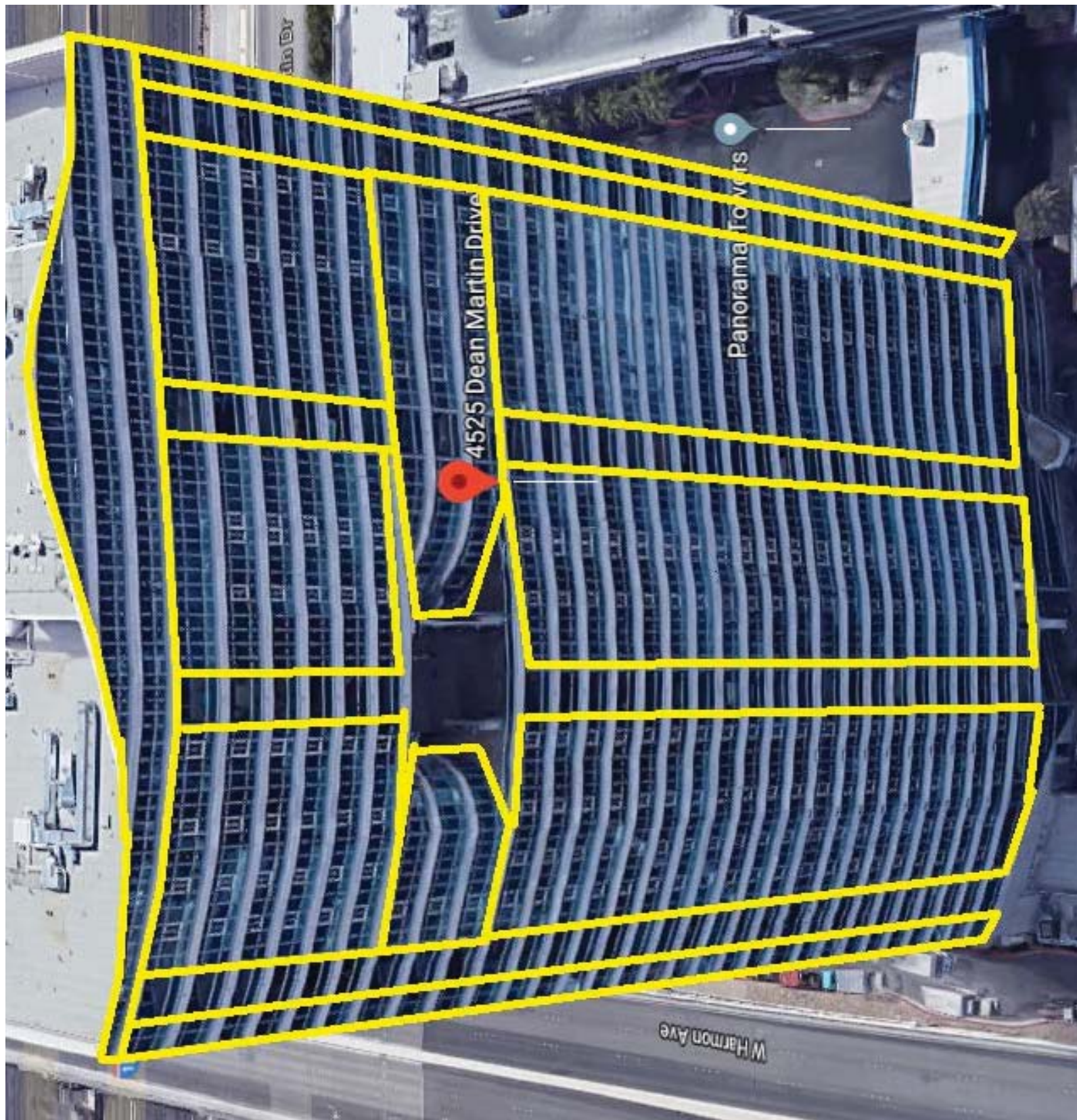


EXHIBIT B

Tower 2 – East Side Windows



EXHIBIT B

Tower 2 – North Side Windows



EXHIBIT B

Tower 2 – South Side Windows

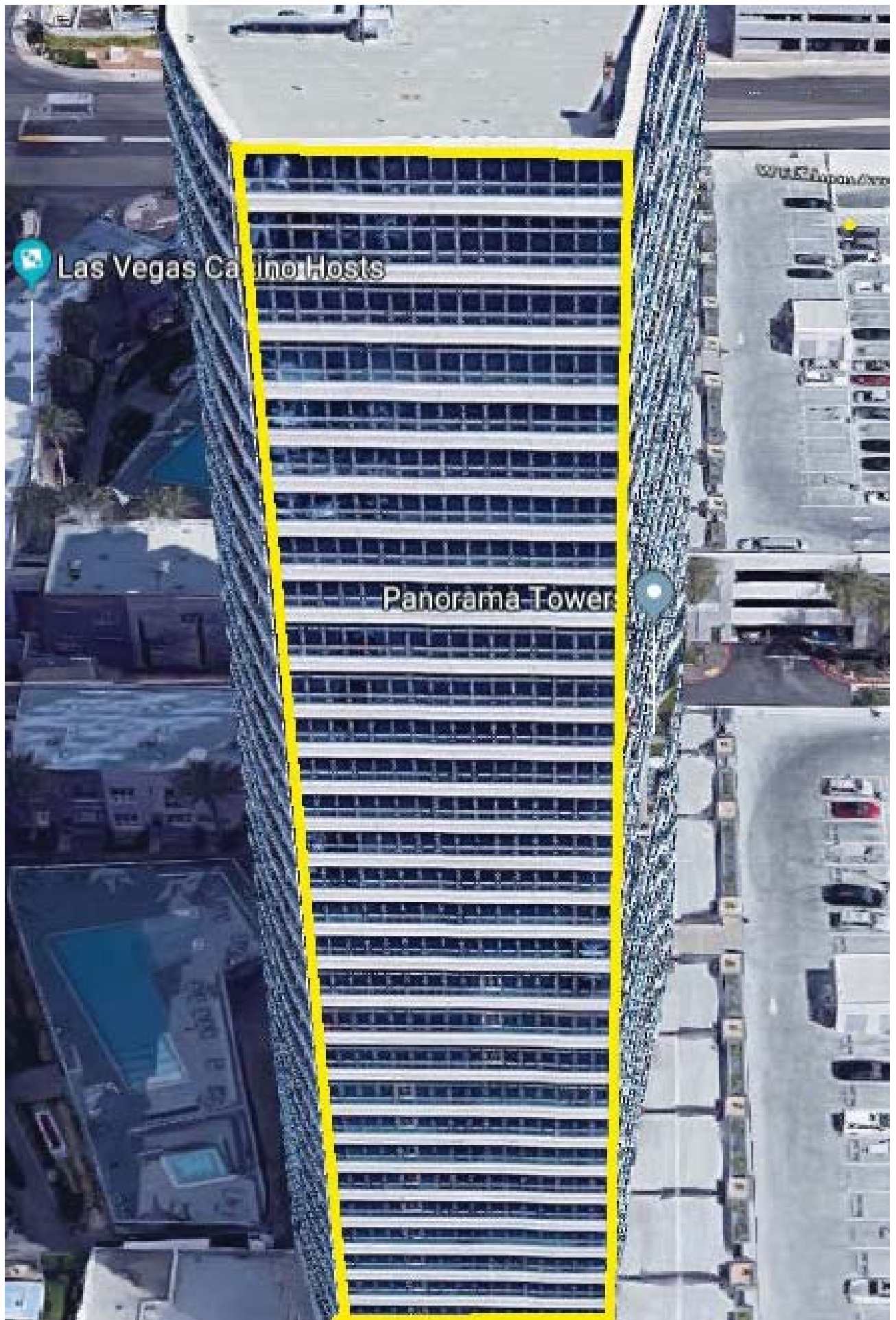


EXHIBIT B

Tower 2 – West Side Windows

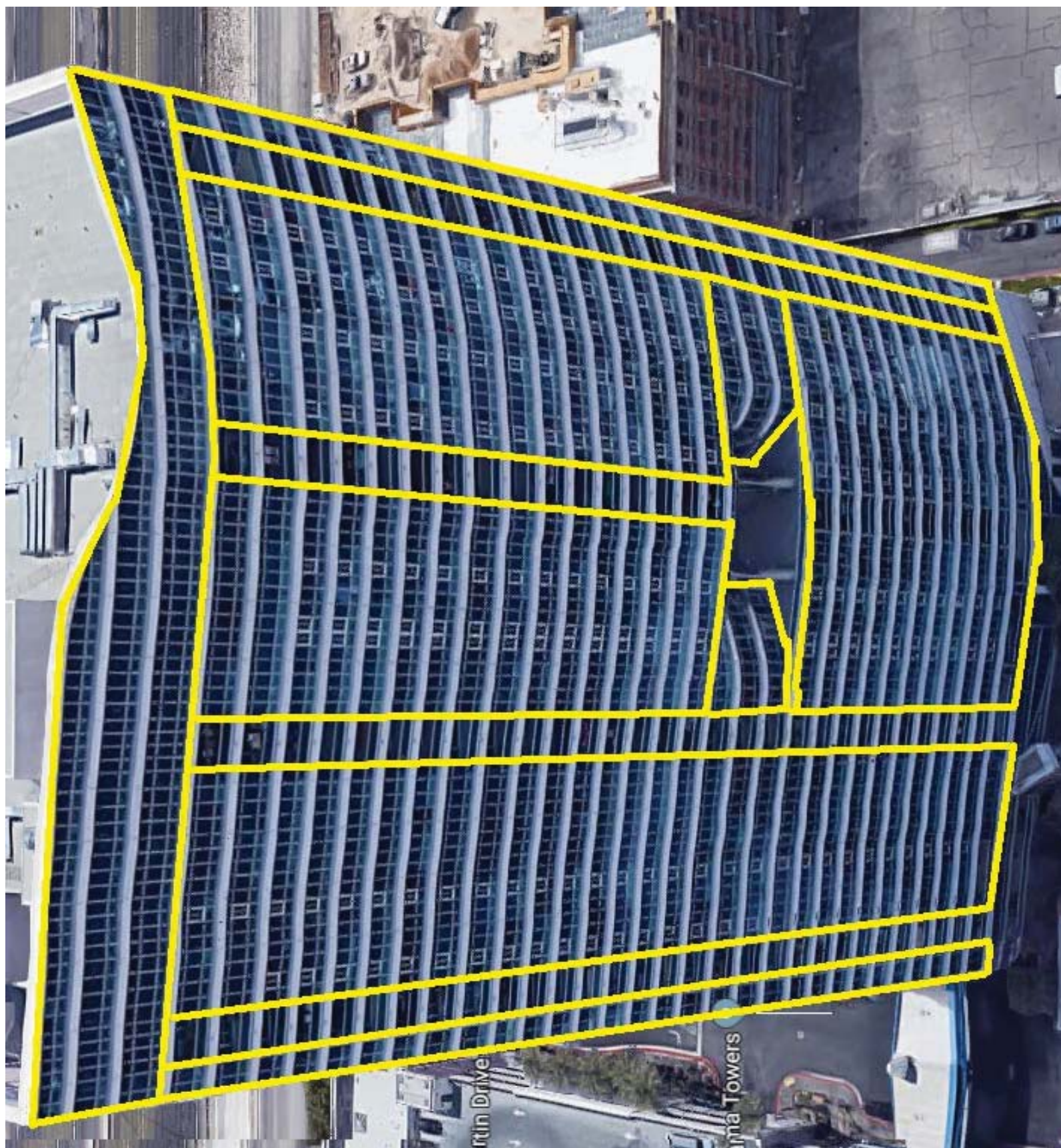


EXHIBIT C

EXHIBIT C

EXHIBIT C

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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
liability company; M.J. DEAN
3 CONSTRUCTION, INC., a Nevada Corporation;
SIERRA GLASS & MIRROR, INC.; F.
4 ROGERS CORPORATION;; DEAN ROOFING
COMPANY; FORD CONTRACTING, INC.;
5 INSULPRO, INC.; XTREME XCAVATION;
SOUTHERN NEVADA PAVING, INC.;
6 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)
) ss:
15 COUNTY OF CLARK)

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 Avtar Singh Nat

7 NOTARY PUBLIC

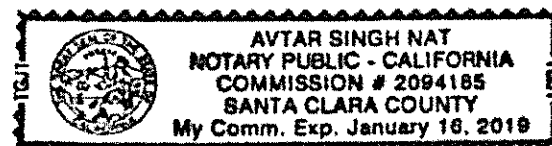


EXHIBIT "E"

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15

16 EIGHTH JUDICIAL DISTRICT COURT
17 CLARK COUNTY, NEVADA
18

19 LAURENT HALLIER, an individual;
20 PANORAMA TOWERS I, LLC, a Nevada
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21 TOWERS I MEZZ, LLC, a Nevada limited
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22 CONSTRUCTION, INC., a Nevada Corporation,

23 Plaintiffs,

24 vs.

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

27 Defendant.
28

CASE NO.: A-16-744146-D

DEPT. NO.: XXII

**DECLARATION OF OMAR HINDIYEH
IN SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR DECLARATORY RELIEF
REGARDING STANDING**

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

4 Counterclaimants,

5 vs.

6 LAURENT HALLIER, an individual;
7 PANORAMA TOWERS I, LLC, a Nevada
8 limited liability company; PANORAMA
9 TOWERS I MEZZ, LLC, a Nevada limited
10 liability company; M.J. DEAN
11 CONSTRUCTION, INC., a Nevada Corporation;
12 SIERRA GLASS & MIRROR, INC.; F.
13 ROGERS CORPORATION; DEAN ROOFING
14 COMPANY; FORD CONTRACTING, INC.;
15 INSULPRO, INC.; XTREME XCAVATION;
16 SOUTHERN NEVADA PAVING, INC.;
17 FLIPPINS TRENCHING, INC.; BOMBARD
18 MECHANICAL, LLC; R. RODGERS
19 CORPORATION; FIVE STAR PLUMBING &
20 HEATING, LLC, dba Silver Star Plumbing; and
21 ROES 1 through 1000, inclusive,

22 Counterdefendants.

23
24
25
26
27
28
**DECLARATION OF OMAR HINDIYEH IN SUPPORT OF DEFENDANT'S
OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY RELIEF
CONCERNING STANDING**

I, Omar Hindiyyeh, state as follows:

1. I received a Bachelor of Science degree in civil engineering from San Jose State University in 1978. I am a licensed general contractor in California (license no. 757672) and in Nevada (license no. 53133). I am the owner and president of CMA Consulting (CMA), formed in 1985, which specializes in construction management and forensic investigation services.

Attached is copy of my CV, which includes my licenses, certifications and professional affiliations (**Exhibit A**).

2. Among other things, I am and an accredited and certified window installation instructor for the American Architectural Manufacturers Association (AAMA) (there are only three of us in the State of California). AAMA promulgates standards and guidelines for window

1 installation that are generally accepted nationwide and are often adopted by the building code
2 bodies that draft the building codes.

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

5 4. CMA Consulting was retained by the Panorama Towers Condominium Unit
6 Owners' Association (the Association) in August 2013, to investigate and repair leakage
7 conditions in one of the units of the Panorama development, Unit 300, located on the third story
8 of Tower 1, 4525 Dean Martin Drive, Las Vegas. When the Association retained CMA,
9 numerous walls of Unit 300 had already been opened by another contractor and the mold
10 conditions in the wall assemblies had been remediated.

11 5. I was personally involved in all phases of CMA's investigation and repair of Unit
12 300, which took place over the period August 2013 through July 2016, at a total cost of \$206,058
13 (exclusive of demolition and mold remediation) to the Association.

14 6. The conditions in Unit 300 that required repair included, but were not limited to,
15 water leakage due the improper design of the exterior wall window assemblies, which lack
16 adequate drainage provisions, such as sill pan flashing and weepage components. The absence of
17 these basic drainage components results in water entering the window cavity assemblies, causing
18 corrosion to the metal framing components of the exterior wall assemblies, including the curb
19 walls that support the windows, thereby compromising the structural integrity of the exterior
20 walls, rather than being diverted to the exterior of the building and draining onto the wall
21 assemblies below.

22 7. Plaintiffs (the Builders) state in their motion that "pan flashing comprises part of a
23 window system and thus falls within the Unit Boundaries and outside the scope of the 'Common
24 Elements,' as defined in the" CC&Rs (at 8:1-4).

25 8. While it is true that sill pan flashings can be considered part of the "window
26 system," they are not included as part of the window "apertures," as defined in the CC&Rs.
27 Section 4.2 of the CC&Rs states in relevant part:
28

1 Boundaries. The Boundaries of each Unit created by the Declaration are the Unit
2 lines shown or described on a Plat as numbered Units, along with the identifying
3 number, and are further described as follows:

4 ...
5 (e) Apertures. Where there are apertures in any boundary, including but not
6 limited to windows ... such boundaries shall be extended to include the windows
7 ... including all frameworks, window casings and weather stripping thereof...

8 9. The term “window” refers to a manufactured product that can be installed in a
9 framed window opening. Sill pan flashing, which is not part of the “window,” can be installed by
10 a sheet metal contractor, the framing contractor, the EIFS installer or the window installer, and is
11 separately installed before the “window” or “window unit” is installed.

12 10. Pan flashings are not “frameworks, window casings [or] weather stripping.” If the
13 drafter of Section 4.2 had intended to include flashings generally, or sill pan flashings
14 specifically, it would have been a simple matter to include those terms in the above definition.
15 But without those terms in the above definition, the definition does not include the sill pan
16 flashings that should have been installed in the window assemblies in the Panorama towers.

17 11. The Builder’s motion further states that the manufacturer of the Panorama
18 Tower’s window system was Texas Wall Systems (TWS) (at 8:8-9); that TWS did not require
19 head flashings for the windows at Panorama (at 8:9-10); that the TWS shop drawings for the
20 project did not require head flashings (at 16:24-27, Ex H); and that the installation of windows
21 must conform to the manufacturer’s instructions (at 16:23-24).

22 12. In fact, the tower windows at Panorama do not appear to be TWS windows. When
23 CMA was performing repairs of the windows in Unit 300, we attempted to identify the window
24 manufacturer because identifying the manufacturer, which will enable us to obtain the
25 manufacturer’s product specifications and installation instructions, is always an important step in
26 performing repairs involving a manufactured building component.

27 13. It is standard practice for window manufacturers to place identifying markings or
28 stamps on their window products. CMA completely dismantled the frames of the windows, but
we were unable to identify any product markings on the windows or window components in Unit
300.