Case No. 80615

IN THE SUPREME COURT OF NEVADA

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

Appellant,

vs.

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

Respondents.

APPEAL

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

APPELLANT'S APPENDIX VOL 15 OF 27

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

ORDER DENYING PLAINTIFFS/ COUNTER-DEFENDANTS' MOTION FOR DECLARATORY RELIEF REGARDING STANDING

Hearing Date: February 12, 2019
Hearing Time: 8:30 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.

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ORDER DENYING PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR DECLARATORY RELIEF REGARDING STANDING

THIS MATTER having come before the Court on February 12, 2019, with Michael J. Gayan, Esq. of Kemp, Jones & Coulthard, LLP and Scott Williams, Esq. of Williams & Gumbiner, LLP appearing on behalf of Defendant/Counter-claimant and Jeffrey W. Saab, Esq. and Devin R. Gifford, Esq. of Bremer Whyte Brown & O'Meara LLP appearing on behalf of Plaintiffs/Counter-defendants on Plaintiffs/Counterdefendants' Motion for Declaratory Relief Regarding Standing. The Court having reviewed and considered the Motion and the related opposition and reply and having heard the arguments of counsel, with good cause appearing, enters the following Order:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiffs/Counter-defendants' Motion for Declaratory Relief Regarding Standing is DENIED WITHOUT PREJUDICE

because the Court finds that genuine issues of material fact need to be explored in terms of the standing issue. Further, Defendant/Counter-claimant's Countermotion to Exclude Inadmissible Evidence is DENIED, and the conditional Countermotion for Rule 56(f) Relief is MOOT based on the Court's denial of Plaintiffs/Counter-defendants' Motion.

DATED: March 11th, 2019.

THE HONORABLE SUSAN H. JOHNSON
EIGHTH JUDICIAL DISTRICT COURT

A-16-744146-D
MR

Respectfully submitted,

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Plaintiffs, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant.	Case No. A-16-744146-D Dept. XXII **PLAINTIFFS LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; AND M.J. DEAN CONSTRUCTION, INC.'S, REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1); AND OPPOSITION TO DEFENDANT/COUNTER-CLAIMANT'S CONDITIONAL COUNTERMOTION** **Hearing Date: March 26, 2019** **Hearing Time: 8:30 a.m.**
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant, vs. LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA	

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

Counter-Defendants.

PLAINTIFFS LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; AND M.J. DEAN CONSTRUCTION, INC.'S, REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1): AND OPPOSITION TO DEFENDANT/COUNTER-CLAIMANT'S CONDITIONAL COUNTERMOTION

COME NOW Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. (hereinafter collectively referred to as "the Builders"), by and through their attorneys of record Peter C. Brown, Esq., Jeffrey W. Saab, Esq. and Devin R. Gifford, Esq. of the law firm of Bremer Whyte Brown & O'Meara LLP, and hereby file their Reply in Support of Their Motion for Summary Judgment Pursuant to NRS 11.202(1) ("Reply") and Opposition to Defendant/Counter-Claimant's Conditional Countermotion ("Opposition to Conditional Countermotion")

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This Reply and Opposition to Conditional Countermotion are made and based on the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, the Declaration of Devin R. Gifford, Esq., and all evidence and/or testimony accepted by this Honorable Court at the time of the hearing on the Motion and Conditional Countermotion.

Dated: March 15, 2019

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

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AFFIDAVIT OF DEVIN R. GIFFORD, ESQ. IN SUPPORT OF PLAINTIFFS LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; AND M.J. DEAN CONSTRUCTION, INC.'S, REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) AND OPPOSITION TO DEFENDANT/COUNTER-CLAIMANT'S CONDITIONAL COUNTERMOTION

STATE OF NEVADA)
) ss.
CLARK COUNTY)

I, **DEVIN R. GIFFORD, ESQ.** do swear under penalty of perjury of the laws of the State of Nevada as follows:

1. I am duly licensed to practice law before all Courts of the State of Nevada, and I am an associate 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") Reply in Support of Their Motion for Summary Judgment Pursuant to NRS 11.202(1) and Opposition to Defendant/Counter-Claimant's Conditional Countermotion
5. Our office performed a diligent search of the Clark County Recorder's Office of Records to see if any Notices of Completion were recorded on either of the two Towers. No Notices of Completion were located for the Towers themselves. Our office even searched the Clark County Building Department records and made numerous calls there, but no Notices of Completion for either of the Towers themselves were filed with that Department.
6. Attached as **Exhibit "F"** are true and correct copies of excerpts of the Clark County Building Department Inspection History for Tower I.
7. Attached as **Exhibit "G"** are true and correct copies of excerpts of the Clark County Building Department Inspection History for Tower II.

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8. Attached as **Exhibit "H"** are true and correct copies of the moving papers from the Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose in *Sky Las Vegas Condominiums, Inc.*, Case No., A-16-738730-D.

9. Attached as **Exhibit "I"** is a true and correct copy of the Findings of Fact, Conclusions of Law and Order dated September 26, 2016 filed in *Foster et al. v. Greystone Nevada, LLC et al.,* Eighth Judicial District Case No. A-15-728093-D

10. Attached as **Exhibit "J"** is a true and correct copy of the Nunc Pro Tunc Order Granting Lands West Builders, Inc's, Joining Parties', and Sunridge Builders, Inc.'s Joint Motion for Summary Judgment Pursuant to NRS 11.202(1) dated December 14, 2017 filed in *Byrne vs. Sunridge Builders Inc., et al.,* Case No. A-16-742143-D

11. Attached as **Exhibit "K"** is a true and correct copy of the Builders' September 28, 2016 Complaint.

FURTHER AFFIANT SAYETH NAUGHT.

DEVIN R. GIFFORD, ESQ.

Subscribed and Sworn before me
this 15 day of March, 2019.

Notary Public in and for said State and County

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

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Association opposes the Builders' Motion for Summary Judgment based on the following three reasons: (1) there are genuine issues of material fact regarding the substantial completion date of the Panorama Towers and the accrual date of the Association's construction defect claims; (2) the Association's Chapter 40 Notice operated to timely "commence" its construction defect claims within the safe harbor provision of AB 125 despite the Association not filing its Counterclaim until March 1, 2017; and (3) NRS 40.695(1) tolling occurred during the safe-harbor (time period even though the Association failed to timely file its claim within the tolling period) because the "relation back" doctrine should apply in order to justify a timely filing because the Countermotion was compulsory. If the Court denies the Association's request to apply the "relation-back doctrine" to its March 1, 2017 filing, the Association has also brought a Conditional Counterclaim arguing that there is good cause to provide additional tolling for its untimely filing.

The Association's first argument that there are genuine issues of material fact fails for the simple reason that it does not distinguish between *possible* issues of fact and *demonstrated* issues of *genuine* fact. Rather than providing any evidence, the Association merely speculates as to the substantial completion and accrual dates being anything other than what the clear evidence purports them to be. Even worse, regarding the accrual date of the Association's construction claims, the Association attempts to question the date while simultaneously assuming and admitting the date *within in its own Opposition.* This explicit contradiction shows that the Association cannot argue in good faith that the accrual date is in dispute. The Association's mere speculation as to the substantial completion and accrual dates does nothing to demonstrate that these issues are substantively related to genuine ones of material fact.

The Association's second and third arguments relate to the timeliness of its March 1, 2017 construction defect claims. Both arguments fail for the following three key reasons. First, the Association did not timely commence its action within AB 125's one-year grace period because "to commence" an action within the AB 125 one-year grace period requires the filing of a complaint

within a year of the effective date of AB 125, which the Association did not do.

Second, the tolling provision of NRS 40.695(1) does *not* save the HOA's untimely claim: the one-year grace period to commence an action under NRS 11.202(1) as amended by AB 125 cannot be tolled by NRS 40.695(1) because it is not a "statute" susceptible to tolling under the plain language of NRS 40.695(1). The Association misses the distinction between (1) tolling that occurs during the six-year statute of repose period, which would be appropriate, and (2) tolling that would occur after the six-year statute of repose but during the safe-harbor provision of AB 125, which would *not* be appropriate. The latter is not legally justified. While the tolling provision of NRS 40.695 *would* have operated to toll the six-year statute of repose period *had* the Chapter 40 Notice been brought within that six-year period, it does not provide tolling in a case such as this one in where the Chapter 40 Notice was served *after* the six-year statute of repose had expired. The Association's Chapter 40 Notice cannot operate to toll the safe-harbor provision of AB125. By the time the Association served its Chapter 40 Notice, the six-year statute of repose period had already expired. Simply stated, by the time the Association served the Chapter 40 Notice, there was nothing left to toll. This Court has previously stated that the safe harbor period itself is not subject to tolling.

Third, assuming, *arguendo*, that the statute of repose applicable to the Association's claim *were* tolled by serving the February 24, 2016 Chapter 40 Notice, the Association only had until 30 days after the NRS 40.680 mediation—which took place on September 26, 2018—to file its claim pursuant to NRS 40.695(1). Because the HOA did not file its claim within the 30-day period ending on October 26, 2018, but rather did so on March 1, 2017, the HOA's claim is time-barred.

In an outlandish attempt to overcome its untimely March 1, 2017 filing—nearly four months after the 30-day post-mediation period expired—the Association argues its NRS 40.600 *et seq.* construction defect claims should be considered compulsory counterclaims to the Builders' September 28, 2016 Complaint. This argument fails for the simple reason that the Builders' Complaint was a declaratory relief action attacking the procedural merits of the Association's claims based upon application of AB 125, the settlement agreement from the prior litigation and the deficiencies in the Association's Chapter 40 Notice. The Association's March 1, 2017 claims for

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construction defects were independent, affirmative grounds of relief completely separate from the "same transaction or occurrence" as the Builders' Complaint for declaratory relief. The Association's vastly overbroad interpretation of compulsory counterclaims would render the distinction between "compulsory" and "permissive" superficial.

Hoping the Court would agree that its March 1, 2017 claims were indeed compulsory counterclaims, the Association then presents an even more tenuous legal theory that the Relation-Back Doctrine somehow applies. The Association's purpose in raising this theory is to argue that its March 1, 2017 claims have an effective filing date of September 28, 2016, the date of the Builders' Complaint. While the Relation-Back Doctrine *can* apply to *one's own* amended pleadings, neither the Nevada Code of Civil Procedure nor any binding Nevada case law support the Association's assertion that such a doctrine applies to untimely counterclaims.

In its final attempt overcome summary judgment based on its untimely filing, the Association has asserted a Conditional Countermotion if the Court rules against its proposed characterization of compulsory counterclaims and application of its preposterous relation-back theory.

The Association's Countermotion should be denied. The tolling provision of NRS 40.695, *as a whole*, cannot apply to save the Association's late filing. The Chapter 40 Notice did not "commence" the action, nor did it operate to provide tolling since the Notice was served after the six-year statute of repose period expired.

Even if the Court rules that the tolling provision of NRS 40.695 *does* apply in this case, the Association nevertheless failed to meet the new tolling deadline of 30 days after the mediation. Beyond that, the Association has failed to demonstrate "good cause" under NRS 40.695(2) as to why it should be given an additional 4 months of tolling beyond that 30-day window. The Association, by its own admission, knew about the subject claims for *3-and-a-half years* prior to its March 1, 2017 filing. Moreover, none of the reasons offered by the Association even remotely support the position that good cause exists to toll the statute beyond the allowable limits.

The Court should therefore find that the Association's claims are time-barred by the six-year statute of repose and grant the Builders' Motion for Summary Judgment Pursuant to NRS 11.202(1).

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II. STATEMENT OF UNDISPUTED FACTS PURSUANT TO NRCP 56(C)

Pursuant to NRCP 56(c), the following facts are material to the disposition of this Motion and are not genuinely in dispute:

UNDISPUTED FACT	DOCUMENT/EVIDENCE IN SUPPORT
The Certificate of Occupancy Tower I was issued on January 16, 2008	Ex. "C"
The Certificate of Occupancy for Tower II was issued on March 26, 2008	Ex. "D"
Substantial completion of Tower I occurred on January 16, 2008	Ex. "C". *See* NRS 11.2055(1).
Substantial completion of Tower II occurred on March 26, 2008	Ex. "D". *See* NRS 11.2055(1).
The Association's NRS Chapter 40 Notice was served on February 24, 2016	Ex. "B"
The Association's NRS Chapter 40 Notice was served more than six years after the Certificates of Occupancy were issued for Towers I and II	Ex. "B", "C", and "D"
The Association's NRS Chapter 40 Notice was served more than six years after the final building inspections were performed for Towers I and II	Ex. "B", "C", "D", **"F"** and **"G"**
The Association's NRS Chapter 40 Notice was served more than six years after the substantial completion dates for Towers I and II	Ex. "B", "C", "D" **"F"** and **"G"**. *See* NRS 11.2055(1).
The Association commenced its action by filing its Counterclaim on March 1, 2017	Ex. "A". *See* NRCP 3
The Association's Counterclaim was filed on March 1, 2017, more than six years after the Certificates of Occupancy were issued for Towers I and II	Ex. "A", "C", and "D"
The Association's Counterclaim was filed on March 1, 2017, more than six years after the final building inspections were performed for Towers I and II	Ex. "A", "C", "D", **"F"** and **"G"**
The Association's Counterclaim was filed on March 1, 2017, more than six years after substantial completion of Towers I and II	Ex. "A", "C", "D", "D", **"F"** and **"G"**. *See* NRS 11.2055(1)
The Association's Counterclaim was filed on March 1, 2017, more than one year after the February 24, 2015 effective date of AB 125	Ex. "A". *See* AB 125.
The Association's Counterclaim was filed on March 1, 2017, more than 30 days after the NRS 40.680 Mediation	"A", Opp. Pg. 5.

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III.

LEGAL ARGUMENTS

A. No *Genuine* Issues of *Material* Fact are at Issue to Prevent Entry of Summary Judgment in Defendants' Favor

In its Opposition, the HOA identifies two triable issues of fact that it contends to be in dispute: (1) the dates of substantial completion for the Panorama Towers ("the Towers"); and (2) whether the HOA's claim accrued before AB 125's enactment.

An abundance of Nevada legal authority helps to answer the question of when a possible factual dispute becomes a genuine issue of material fact. The Nevada Supreme Court has held that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Wood v. Safeway, Inc.*, 121 Nev. 724, 730 (2005) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The substantive law identifies which facts are material. *Id.* Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Id*. Factual disputes that are irrelevant or unnecessary will not be counted. *Id.* Furthermore, the non-moving party in a motion for summary judgment "is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture." *Id.* at 732. The non-moving party also must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Id.*

i. There is No Genuine Issue of Material Fact that the Dates of Substantial Completion are January 16, 2008 and March 26, 2008

The Association's argument regarding the substantial completion date of the Towers is the following. First, NRS 11.2055 defines substantial completion date as the latest of three events: (1) the date the final building inspection of the improvement is conducted, (2) the date the notice of completion is issued for the improvement, or (3) the date the certificate of occupancy is issued for the improvement. NRS 11.2055. Second, that the Builders provided only the Certificates of Occupancy of the Towers in its Motion. Hence, the Association argues there must be a genuine issue of material fact because "the Builders provide [sic] only one of the three dates in their Motion."

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(Opp. Pg. 7, Ln. 16-17). Because the Association provides no guidance whatsoever as to exactly which other possible two dates it believes creates a genuine issue of material fact, it is left to the Builders to assume that the Association believes either the final building inspection dates and/or Notice of Completion dates are at issue.

Ultimately, the Association's argument on this point fails. The Association has provided no evidence whatsoever to demonstrate that there is, in fact, another date other than those provided on the Certificates of Occupancy that would impact the analysis under NRS 11.2055.

The fundamental premise in the Association's argument is thus that there *actually is* another document pursuant to NRS 11.2055 that would materially change the Court's determination as to the substantial completion dates for the Towers. NRS 11.2055 is written in the disjunctive: it is the latest of the three events. That, however, does not imply that there *actually are* three events in every case. In this case, no Notices of Completion were recorded. The Association fails to recognize that Notices of Completion are optional documents that *can* be recorded but are not necessarily recorded in every case. Critically, however, *if* one chooses to record a Notice of Completion, it *must* be filed in the office of the county recorder of the county where the property is located. These points are articulated in NRS 108.228:

> **NRS 108.228 Notice of completion: Recording; contents; verification; delivery of copy to each prime contractor and potential lien claimant; effect of failure to deliver copy to prime contractor or lien claimant.**
> **1. The owner may record a notice of completion after the completion of the work of improvement.**
> **2. The notice of completion must be recorded in the office of the county recorder of the county where the property is located and must set forth:**
> (a) The date of completion of the work of improvement.
> (b) The owner's name or owners' names, as the case may be, the address of the owner or addresses of the owners, as the case may be, and the nature of the title, if any, of the person signing the notice.
> (c) A description of the property sufficient for identification.
> (d) The name of the prime contractor or names of the prime contractors, if any.
> 3. The notice must be verified by the owner or by some other person on the owner's behalf. The notice need not be acknowledged to be recorded.

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> 4. Upon recording the notice pursuant to this section, the owner shall, within 10 days after the notice is recorded, deliver a copy of the notice by certified mail, to:
> (a) Each prime contractor with whom the owner contracted for all or part of the work of improvement.
> (b) Each potential lien claimant who, before the notice was recorded pursuant to this section, either submitted a request to the owner to receive the notice or delivered a preliminary notice of right to lien pursuant to NRS 108.245.
> 5. The failure of the owner to deliver a copy of the notice of completion in the time and manner provided in this section renders the notice of completion ineffective with respect to each prime contractor and lien claimant to whom a copy was required to be delivered pursuant to subsection 4. NRS 108.228 (Emphasis Added).

Since the Towers are located in Clark County, all Notices of Completion would be found in the public records in the Clark County Recorder's Office, pursuant to NRS 108.228(2). *Of note, the Association provided no evidence whatsoever that it even attempted a basic search to determine if such other records exist.* Conversely, as is attested to in the Builders' Affidavit, the Builders did a thorough public record search[1] for the Towers in order to confirm if there were any Notices of Completion for the Towers that would impact the substantial completion date analysis under NRS 11.2055. No Notices of Completion were recorded for construction of the Towers themselves. Had they existed, Notices of Completion would have been recorded in the Clark County Recorder's Office pursuant to NRS 108.228(2). The Builders even searched the Clark County Building Department records and made numerous calls there to make sure, but no Notices of Completion for either of the Towers themselves were filed with that Department.

Similarly, there is no dispute that the final inspection dates of the Towers occurred before the Certificate of Occupancy issuance dates. On the Certificates of Occupancy themselves, the building final inspection dates are March 16, 2007 for Tower I and July 16, 2007 for Tower II, respectively. (*See* Exhibit D from the Builders' Motion). In addition, attached are the relevant pages from the inspection history of the two Towers, clearly showing that all inspections occurred before the

[1] The Clark County Recorder's Office website is http://www.clarkcountynv.gov/recorder/Pages/default.aspx. The Recorder's Office provides an online search feature for recorded documents.

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Certificates of Occupancy were issued. (See **Exhibit "F",** Building Department Inspection History for Tower I**;** *See also,* **Exhibit "G",** Building Department Inspection History for Tower II).

The Association merely speculates as to the existence of a *potential* dispute regarding the dates of substantial completion of the Towers. Speculation alone is insufficient to overcome summary judgment. The Association, in opposing the Builders' Motion, must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 at 324 (1986).

Here, the Builders have provided evidence illustrating that the dates of substantial completion are not a genuine issue of material fact. The Builders met their burden by showing the substantial completion dates by producing the Certificates of Occupancy, which not only show the dates they were issued, but also the final building inspection dates. (*See* Exhibits "C" and "D" of the Builders' Motion). There are no Notices of Completion for the Towers, which is why they were not included in the Builders' Motion. Alternatively, the Association did not offer any evidence whatsoever to rebut the Builders' position.

Besides, even assuming the Certificates of Occupancy did not show the actual substantial completion dates for the Towers, the dates of substantial completion would have to have occurred within the six-year period immediately preceding the date when the Association's Chapter 40 Notice was served. The Association would have to show, therefore, that the substantial completion dates were after February 24, 2010, six years prior to the date of the initial Chapter 40 Notice, in order to save its construction defect claims.

ii. <u>Whether the Association's Claims Accrued Before or After Enactment of AB 125 Does Not Save the Association's Claims, so this Fact is Not Material to the Dispute</u>

In its Opposition, the Association argues that there is a material issue of genuine fact based on "whether the HOA's claim accrued before AB 125's enactment." (Opp. Pg. 7). This assertion is problematic for two key reasons. First, it is disingenuous—the Association has admitted in its own Opposition *on the very next page* that "...the HOA's window claims accrued in 2013 for purposes of

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AB 125's grace period" (Opp. Pg. 8, Ln. 18-19). Apparently, the Association does not sincerely believe there is an issue of fact on this point.

Second, this is not a *material* issue of fact because it would have no bearing whatsoever on whether the Association can prevail over summary judgment. Only disputes over facts that *might* affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. *Wood*, 121 Nev. At 731. There are only two possibilities: the accrual date either fell before AB 125's enactment, or it fell on or after AB 125's enactment. If it fell before AB 125's enactment, then the same analysis in the Builders' Motion for Summary Judgment Pursuant to NRS 11.202(1) would apply. That is, the Association's claims are time-barred because it failed to commence an action within the time allowed. If, however, the accrual date fell *after* AB 125's enactment, then the Association would not receive the benefit of the one-year grace period. AB 125, Sec, 21(6). The AB 125 one-year grace period only applies if the action accrued before the effective date of the act. *Id.* The Association's attempt to overcome summary judgment based on the accrual date should be denied.

B. <u>The Association Did Not Timely Commence Its Construction Defect Claims</u>

i. <u>The Association Did Not Commence Its Action on February 24, 2016 Because "Commencement" of an Action Under AB 125 Section 21(6) Requires the Filing of a Complaint</u>

In its Opposition, the Association argues that its construction defect action was "commenced" within AB 125's one-year grace period because it served its NRS 40.645 Notice on February 24, 2016 (Opp. Pg. 8). However, the Association's proposed application of NRS 40.695(1) to the AB 125, Sec. 21(6) one-year grace period is problematic because it relies on the faulty premise that "commencement" of an action in the context of an NRS 40.600 lawsuit means serving notice pursuant to NRS 40.645. The clear reading of NRS 40.645(1)(a), NRS 40.645(4), and NRCP 3 make clear that "commencement" of an action requires the filing of a complaint.

As a starting point in this analysis, the one-year grace period found in AB 125 Section 21(6) provides, in pertinent part:

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> The provisions of subsection 5 do not limit an **action**: (a) that accrued before the effective date, and (b) was **commenced** within 1 year after the effective date of this act...
>
> AB 125 Section 21(6) (Emphasis added).

Next, NRS 40.645(1)(a) delineates between giving written notice and commencing an action. It requires that the notice must be given before the action is commenced—hence making a clear distinction between *commencement of an action* with *notice of an action*:

> **[B]efore** a claimant **commences an action or amends a complaint** to add a cause of action for a constructional defect case against a contractor, subcontractor, supplier or design professional, the claimant:
> **(a) Must give written notice.** NRS 40.645(1)(a)

This meaningful, explicit distinction is additionally made in NRS 40.645(5), which provides, in pertinent part, that "Notice is not required pursuant to this section **before commencing an action**..." (Emphasis added). NRS 40.645 clearly delineates two separate and distinct steps: "notice" must come before "commencing an action." This interpretation is consistent with NRCP 3. An action is "commenced" when the complaint is filed. *See Volpert v. Papagna*, 85 Nev. 437, 440, 456 P.2d 848, 850 (1969) (citing NRCP 3) ("A civil action is commenced by filing a complaint with the court").

Returning to the plain language of AB 125 Section 21(6), it is clearly indicated that an **"action"** must be **"commenced"** within the one-year grace period. Combined with a plain reading of NRS 40.645 and NRCP 3, the explicit distinction between notice and commencement must require that commencement cannot be satisfied by serving a Chapter 40 Notice. If the Chapter 40 Notice could itself "commence" an action, then it would make the entire reading of NRS 40.645(a)(a) superfluous in drawing the distinction in the first place.

To draw any other conclusion would be faulty statutory interpretation. When interpreting a statutory provision, Nevada Courts look first to the plain language of the statute. *See, Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. Adv. Op. 48, 305 P.3d 898 902 (2013) (citing *Bigpound v. State*, 2780 P.3d 1244, 1248 (2012). Nevada Courts avoid statutory interpretation that renders language meaningless

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or superfluous, if the statute's language is clear and unambiguous, Nevada Courts will enforce the statute as written.

Arguing that Chapter 40 Notice commences an action would also be in direct contradiction to the tolling provisions of NRS 40.695. These tolling provisions apply specifically to toll the period for which a claim for constructional defect can be brought after serving the Chapter 40 Notice. If commencement of the action was itself satisfied by the Chapter 40 Notice, then there would be no reason for tolling—the action's effective commencement date would simply be the date of the Chapter 40 Notice.

ii. <u>The Association's Chapter 40 Notice Did Not Toll the Association's Claims Because the Safe Harbor Provision of AB 125 is Not a Statute Susceptible to Tolling Under the Plain Language of NRS 40.695(1)</u>.

Since the Association did not commence its action with its February 24, 2016 Chapter 40 Notice, the next question is whether NRS 40.695(1) applied to toll the statute of repose for the Association's constructional defect claims despite the fact that service of the Association's Chapter 40 Notice fell *outside* of the six-year statute of repose period. This analysis is in rebuttal to the following assertion made in the Association's Opposition: "Because the HOA's window claims accrued in 2013 for purposes of AB 125's grace period, and the HOA timely served its initial Chapter 40 Notice within the one-year grace period, NRS 40.695 tolled the statute of repose during the pre-litigation proceedings." (Opp. Pg. 8).

In analyzing this issue, it is first necessary to consider the distinction between the six-year statute of repose provided under AB 125 and the one-year safe harbor (also referred to as a "grace period") provision under AB 125. AB 125 was enacted on February 24, 2015 by the Nevada legislature and reduced the statute of repose to six years for all actions for constructional defect claims. In addition, AB 125 also provided a distinct "grace period" of one year to protect claimants who might be barred from asserting their claims as a result of AB 125's retroactive application.

Understanding the clear delineation between the six-year statute of repose period and the one-year grace period is critical in assessing the applicability of the tolling provision in this case. If the Association had served its Chapter 40 Notice *during* the six-year period of the substantial

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completion date (i.e. within the six-year statute of repose period), then the analysis is different than in the present case where the Association instead served its Chapter 40 Notice *after* this six-year period *but within* the one-year grace period.

The fundamental issue is therefore whether the service of a Chapter 40 Notice operates to toll the time frame for filing a claim if *the Chapter 40 Notice falls within AB 125's one-year grace period*, but not within the statute of repose period. Stated more generally, the issue can be framed as *whether the safe harbor provision of AB 125 is a provision susceptible to tolling*. Based on the foregoing analysis, it is clear that the Association is misguided in conflating tolling of the statute of repose period with tolling of AB 125's one-year grace period: the first can be tolled, but not the latter.

iii. <u>NRS 40.695 Does Not Apply to Toll the AB 125 One-Year Grace Period Because the Grace Period is Not a Statute.</u>

The plain language of NRS 40.695 exclusively applies to "...**statutes** of limitation **or** repose applicable to a claim based on a constructional defect." Thus, the parameters are clear that NRS 40.695 *only* applies to toll statutes of limitation or repose.

The second question is therefore whether AB 125's grace period is a "statute." The Meriam-Webster Dictionary defines "statute"[2] as "a law enacted by the legislative branch of government." A "bill"[3] in this context is defined as "a draft of a law presented to a legislature for enactment." A "statute" and a "bill" are two different things. A statute is not a bill and a bill is not a statute.

The Court must begin its inquiry with the statute's plain language. *Arguello v. Sunset Station*, Inc., 252 P.3d 206, 209 (2011). The Court may not look beyond the statute's language if it is clear and unambiguous on its face. See *Washoe Med. Ctr. v. Second Jud. Dist. Ct.*, 122 Nev. 1298, 1302, 148 P.3d 790, 792-793 (2006). In circumstances where the statute's language is plain, there is no room for constructive gymnastics, and the court is not permitted to search for meaning beyond the statute itself. See *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 95, 16 P.3d 1074, 1078 (2001).

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[2] https://www.meriam-webster.com/dictionary.com/statute

[3] https://merriam-webster.com/dictionary.com/bill

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As stated above NRS 40.695(1) cannot possibly be any clearer and more unambiguous—it specifically applies to "statutes." AB 125 Section 21(6) is a provision contained in a Nevada Assembly Bill. Significantly, it was not memorialized in NRS 11.202 or any of the other statutes amended by AB 125. The Association has provided no authority to support the proposition that a tolling statute can operate to toll language in an Assembly Bill. The one-year grace period provided claimants protection due to AB 125's retroactive change of the six-year repose period; it was not, however, built into the statute itself. Based on its plain language, NRS 40.695(1) does not operate to toll a provision in the Nevada Assembly Bill. Therefore, this Court should reject the Association's assumption that the grace period provided found in AB 125 Section 21(6) can be tolled by NRS 40.695.

If this Honorable Court agrees that AB 125 Section 21(6) is not a "statute" within the meaning of NRS 40.695(1) and therefore not susceptible to tolling, it must also find that the Association's action is time-barred. There is no genuine dispute as to the following facts: (1) the dates of substantial completion were January 16, 2008 and March 26, 2008; (2) the Association's Chapter 40 Notice was served on February 24, 2016 (more than six years after Substantial Completion); and (3) the Association's Counterclaim was filed on March 1, 2017 (also more than six years after Substantial Completion). The six-year statute of repose period for this case, based on the later March 26, 2008 substantial completion date, ended on March 25, 2014. Thus, the Association's Chapter 40 Notice never fell within the six-year statute of repose period but rather, outside of that period. As a result, there was nothing that could have been tolled by this point. Had the Association properly served its Chapter 40 Notice during the six-year repose period, then NRS 40.695 would have operated to toll that time period. Since it did not, the repose period was never tolled, and the Association's action for constructional defects was untimely. Consequently, the Builders are entitled to summary judgment pursuant to NRS 11.202(1).

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iv. Recent Cases Support the Builders' Position that NRS 40.695 Does Not Toll the One-Year Grace Period in AB 125 Section 21(6).

In its Opposition, the Association cites the *Lopez* and *Sky Las Vegas* ("*Sky"*) Courts' analyses to "persuasively resolve the same factual and legal scenario that exists in this action." (Opp. Pg. 12). However, these cases serve only to bolster the Builders' position that NRS 40.695 does not toll the one-year grace period and that the Association's defect claims are untimely. Furthermore, analysis of the following cases completely refutes the Association's position: (1) *Foster v. Greystone LLC*; (2) *Dykema v. Del Webb Cmtys., Inc*.; (2) and (3) *Byrne vs. Sunridge Builders Inc. and Lands West Builders Inc.*

a. Lopez v. US Home Corp.

The Association first cites *Lopez v. US Home Corp* to justify its position that NRS 40.695 applies to "toll the applicable statute of repose in a defect action brought during AB 125's one-year grace period." (Opp. Pg. 10, Ln. 18 to Pg. 11, Ln. 13). The facts of the present case are different than in *Lopez*. In *Lopez*, the Chapter 40 Notice was served *prior* to the one-year safe harbor, not during. (Opp. Pg. 11, Ln. 9-10). Therefore, the issue of whether Chapter 40 Notice tolls the one-year safe harbor provision, as the Association suggests it does, was not raised in *Lopez* and thus was not specifically addressed. Moreover, in *Lopez*, the Court was analyzing the 2003 version of NRS 40.695. (Opp. Pg. 11, Ln. 4-5). This version did not include the new maximum tolling of one year as is now provided for in NRS 40.695(1)(a). Had the post-AB 125 version of NRS 40.695 been analyzed by Judge Navarro, she would probably have held that the Plaintiffs' claims were time-barred since the complaint was filed nearly two years after service of the Chapter 40 Notice.

b. Sky Las Vegas Condominiums, Inc.

The Association cites the Order from this Honorable Court from the S*ky Las Vegas Condominiums, Inc.* case. (*See* Opp., Exh., 2). In *Sky* this Court held that service of the Chapter 40 Notice operated to toll the applicable statute of repose period until 30 days after the NRS 40.680 mediation was concluded, even though the six-year statute of repose period had already expired. In *Sky*, service of the Chapter 40 Notice was made on February 23, 2015.

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A review of the underlying moving papers for *Sky*, reveals the argument was never made that Chapter 40 Notice does not toll the six-year statute of repose period on claims which would have already been time-barred by AB 125's retroactive application. Because this particular argument was not raised in the moving papers, that issue was not addressed in the *Sky* Order that the Association attached as an exhibit to its Opposition. (*See* **Exhibit "H"**, *Sky* Motion for Summary Judgment re: Statute of Repose Moving Papers; *See also,* Opp., Exh. 2).

The Association uses the *Sky* holding to suggest that this Court has ruled that because Chapter 40 Notice was served *during* the one-year safe harbor, that the statute of repose was "automatically tolled." (Opp. Pg. 12, Ln. 6-8). This is a fallacious and self-serving interpretation of this Court's holding in *Sky*. In *Sky*, this Court disagreed with the position that the one-year grace period can by itself toll the six-year statute of repose. In truth, this Court stated that "there is nothing stated in Section 21(6) to suggest it tolls the new statute of repose period." (Opp., Exh. 2., Pg. 5, Par. 14). This Court's ruling in *Sky* is consistent with the Builders' position that the one-year safe harbor is not inherently capable of tolling.

This Court's ultimate ruling in *Sky* also supports the Builders' Motion Even though the HOA in *Sky* filed its complaint a mere two weeks after expiration of the 30-day window, this Court ruled the filing was late. In that case, the *Sky* HOA served its defect Notice on February 23, 2016, one day before the safe harbor period expired. The *Sky* HOA's claim was tolled until 30 days after mediation. The mediation occurred on June 16, 2016. The statute was tolled another 30 days, or until July 16, 2016. The *Sky* HOA had up until that date to file a lawsuit, but instead filed it on August 2, 2016, just over two weeks later. This Court's Order stated that even though the *Sky* HOA was "given the benefit of not only the one-year safe harbor provision, but also the period of time tolled to allow the NRS Chapter 40 pre-litigation process to proceed," the *Sky* HOA still filed its lawsuit late and its action was therefore time-barred. (Opp., Exh. 2., Pg. 5, Par. 14). This Court gave the *Sky* HOA the benefit of the doubt, but because its filing was two weeks late, this Court granted the Motion for Summary Judgment.

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The Association's actions in the present case are far more egregious. Whereas the complaint was filed a mere two weeks late in *Sky*, the Association here filed its Counterclaim over *four months* after the 30-day post-mediation period. Even assuming the Association is entitled to the benefit of the 30-day post-mediation tolling, which it is not, the Association still filed its action late. The Association filed its action nearly four months after expiration of the supposed tolling period, compared to the mere two weeks in *Sky*. Based upon the *Sky* holding alone, the Association's action is untimely, and the Builders are entitled to Summary Judgment.

c. <u>Foster et al. v. Greystone LLC, et al.</u>

The most analogous case, factually and in terms of the arguments raised, is *Foster v. Greystone.* Significantly, this Honorable Court ruled that NRS 40.695(1) does not toll the six-year statute of repose on (claims such as the Association's in this case) that were already time-barred by AB 125's retroactive application. On September 26, 2016, this Court issued a Findings of Fact and Conclusions of Law in response to a Motion to Dismiss a group of homeowners who had served NRS Chapter 40 Notices after the six-year statute of repose, but during the one-year grace period. In this Court's Findings of Fact and Conclusions of Law, this Court held that:

> 17. Here, Defendants move this Court to dismiss the claims asserted by Plaintiffs "newly-named" within the First Amended Complaint that was filed March 18, 2016. **Plaintiffs oppose, arguing the six-year statute of repose was tolled during the pre-litigation process as set forth in NRS 40.695**. In this Court's view, Plaintiffs' position is correct with respect to those constructional defect claims to those residences substantially completed within six (6) years of their serving the NRS 40.645 notice upon Defendants. That is, NRS 40.695(1) specifically provides the period of limitations on those claims falling within the six-year time frame is tolled. **However, concerning claims arising from deficiencies within those homes substantially completed more than six (6) years before February 18, 2015, the owners of those residences did <u>not</u> enjoy NRS 40.695's tolling effect, but were accorded a grace period of another year after AB 125's <u>enactment in which to file their causes of action</u>. In other words, NRS 40.695(1) does not toll the six-year statute of repose on those claims which already would have been time-barred by AB 125's retroactive application.** Hence, Defendants' motion seeking dismissal of claims of "newly-named" Plaintiffs within the First Amended Complaint is granted in part, denied in part. **The claims of those Plaintiffs whose homes were substantially completed prior to February 18, 2009 are time-barred**, but those arising from constructional

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> defects in residences substantially completed after February 18, 2009 are not.

(**Exhibit "I"**, Pg. 15, Ln.19 – Pg. 16, Ln. 9 - Findings of Fact, Conclusions of Law and Order dated September 26, 2016 filed in *Foster et al. v. Greystone Nevada, LLC et al.,* Eighth Judicial District Case No. A-15-728093-D) (Emphasis Added).[4]

This Court's analysis of the application of NRS 40.695(1) to the one-year grace period is consistent with that of the Builders in this case. Simply stated, in order to toll the six-year statute of repose, the Chapter 40 Notice must be served within six years of substantial completion (the repose period).

d. Dykema v. Del Webb Cmtys., Inc., 385 P.3d 977, 980 (Nev. 2016)

This Honorable Court's ruling in *Foster et al. v. Greystone Nevada, LLC* is also consistent with the Nevada Supreme Court's holding in *Dykema v. Del Webb Cmtys., Inc*.:

> **"...[B]ecause [plaintiffs] served their Chapter 40 notices within the ten-year repose period**, it was tolled for one year and [plaintiffs'] February 27, 2015, complaint against [developer] was timely filed." *Dykema v. Del Webb Cmtys., Inc.,* 385 P.3d 977, 980 (Nev. 2016) (emphasis added).

This Nevada Supreme Court holding helps to once again clarify the distinction between tolling during the statute of repose period and of the AB 125 one-year grace period. While the Dykema case was litigated before AB 125, it is nevertheless clear that the Nevada Supreme Court specifically confined the applicability of tolling to the "repose period." The analog in this case would be that the Association could have tolled the six-year repose period if it had served its Chapter 40 Notice *during* this repose period, but not during the separate, subsequent grace-period.

e. Byrne vs. Sunridge Builders Inc., et al.

In the recent case of *Janette Byrne vs. Sunridge Builders Inc. et al.*, Case No. A-16-742143-D, the Honorable Richard F. Scotti entered an Order granting summary judgment based on a similar set of facts as those in this case. In *Byrne*, substantial completion of the subject residence was

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[4] The Court's Order dismissing the newly-named Plaintiffs was reversed upon reconsideration based on the fact that the NRS 40.645 Notice was served prior to the enactment of AB 125. Here, Plaintiff's Notice was served after the enactment of AB 125, so Court's analysis applies.

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achieved on May 26, 2009. The *Byrne* claimant presented her Chapter 40 Notice on December 2, 2015, during the one-year grace period. She later commenced her action by filing her Complaint on August 22, 2016.

In *Byrne*, the defendants raised substantively the same arguments as are raised in this case by the Builders, with the key position being that service of the Chapter 40 Notice during the safe-harbor period could not operate to toll the statute of repose period because the six-year repose period had already expired.

The Honorable Richard Scotti, relying upon the Supreme Court's *Dykema* holding, wrote a concise, clear opinion granting summary judgment for the defendants, stating, in part, as follows:

> In 2015 the Nevada Legislature by AB 125 reduced the statue of repose from then (10), eight (8), and six (6) years, for known, latent, and patent deficiencies, to six (6) years of all actions for damages. The six (6) year period begins to run from the date of substantial completion of a work of improvement.
>
> The legislative history of AB 125 expresses in the actual bill, § 21, sub. 5, (although not in the statue itself), mandates that the new six (6), year statute of repose be applied retroactively. The Nevada Legislature provided a grace period of one year to protect claimants who would otherwise lose their rights by retroactive application.
>
> As explained below, Plaintiff in this action failed to commence her action within this grace period. Accordingly, her claims are barred.
>
> Contractors achieved substantial completion on May 26, 2009. Under the most lenient statue of repose of NRS 11.203(1) (ten years), claimant would have been required to file her Complaint by May 26, 2019. But AB 126 reduced that time period to six years: in this case meaning May 26, 2015. **Claimant filed her Complaint on August 22, 2016 – thirteen months after the expiration of the six-year period.**
>
> The retroactive application would have had the effect of barring claimant's claim. The so-called "grace period" gave claimant more time to avoid this harsh result. The "grace period" built into the statue reads, in pertinent part, as follows: "The provisions of subsection 5 do not limit an action: (a) that accrued before the effective date and was commenced within 1 year after the effective date of this act." AB 125, Sec. 21, Subsection 6. The effective date of AB 125 was February 24, 2015. This means that if a claimant's action accrued before February 24, 2015, and would have been otherwise limited, then the claimant could still bring an action if commenced by February 24, 2016. Claimant failed to meet this deadline.

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…

> AB 125 curtailed the statute of repose such that claimant here was required to file her Complaint much earlier than May 26,2020. Again, pursuant to AB 125, any action that accrued prior to the effective date of AB 125 (February 24,2015) was not limited by the reduced statutory period provided the claimant filed its Complaint within one-year after the effective date (February 24,2016). It is undisputed that claimant's claim accrued before the effective date of the statute. It is also undisputed that claimant failed to file her Complaint within one year of the effective date of the statute. Thus, claimant's claim was late and is barred by the new six-year statute of repose.
>
> Even if the tolling provision were to be considered after the new statute of repose was applied to claimant's claim, the claim would still be barred. As said, the six year statute of repose applied to claimant's claim accruing on May 26,2009, would have given a deadline of May 26,2015. **In this case, the tolling provision does not apply because the new six-year statute of repose would have expired before the tolling could start.** Any tolling could not start until the claimant presented her notice of construction defect. **Claimant presented her notice of construction defects on December 2, 2015. By this date the deadline for claimant to file her Complaint had already expired - so there was nothing to toll!**
>
> The Court's interpretation of the tolling provision is consistent with *Dykema v. Del Webb Communities, Inc.,* 132 Nev. Adv. Op 82, 385 P.3d977,980-81 (2016). In that case, the Nevada Supreme Court held: "[B]ecause Dykema and Turner served their Chapter 40 notices within the ten-year repose period, it was tolled for one year and Dykema's and Turner's February 27,2015, Complaint against Del Webb was timely filed." **The Nevada Supreme Court recognized that the one-year tolling only applied if the notice of claim was presented within (i.e. before) the expiration of the statute of repose. Applied here, Dykema means that a claimant receives no tolling if the applicable statute of repose expires before the notice of construction defect is presented.**

(*See* **Exhibit "J",** Pg. 2, Ln. 10 – Pg. 4, Ln. 13, Nunc Pro Tunc Order Granting Lands West Builders, Inc's, Joining Parties', and Sunridge Builders, Inc.'s Joint Motion for Summary Judgment Pursuant to NRS 11.202(1) dated December 14, 2017 filed in *Byrne vs. Sunridge Builders Inc., et al.,* Case No. A-16-742143-D) (Emphasis Added).

In the present case, substantial completion of the Towers occurred January 16, 2008 and March 26, 2008. This means the repose period for the Towers would have ended January 16, 2014 and March 26, 2014, respectively. The Association's NRS 40.645 Notice was served on February

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24, 2016, more than six years after substantial completion. Based upon the findings and analysis in *Foster*, *Byrne* and *Dykema*, the Association does not get the benefit of tolling here. Even if it did get the benefit of tolling, then, like in *Sky*, the Association is *still* late, and by several months.

Based on the foregoing, the Builders are entitled to summary judgment.

C. <u>The Association Did Not Timely Commence its Claim Pursuant to NRS 40.695(1).</u>

Even assuming that the statute of repose applicable to the Association's claim *were* tolled by serving its February 24, 2016 Chapter 40 Notice, the Association only had until 30 days after the NRS 40.680 mediation—which took place on September 26, 2016—to file its claim (pursuant to NRS 40.695(1)). Because the HOA did not file its claim in the 30-day window ending on October 26, 2016, but rather did so on March 1, 2017, the Association's claim is time-barred.

NRS 40.695(1) provides the following:

> 1. Except as otherwise provided in subsections 2 and 3, statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, are tolled from the time notice of the claim is given, **until the earlier of**:
> (a) One year after notice of the claim is given; or
> (b) **Thirty days after mediation is concluded or waived in writing pursuant to NRS 40.680.** (Emphasis Added)

Here, the Chapter 40 Notice was served on February 24, 2016. The NRS 40.680 Mediation—as the Association itself has stated in its Opposition—occurred on September 26, 2016. (Opp., Pg. 8, Ln. 23-24). Thus, by application of NRS 40.695(1), the Association had until the *earlier* of either (1) 30 days after September 26, 2016, i.e., October 26, 2016, or (2) one year from February 24, 2016, i.e. February 24, 2017, to file its lawsuit for construction defects. Based on the statute, the earlier date of October 26, 2016 would apply.

The Association had *up to and including* October 26, 2016 in which to file its lawsuit. It did not do so until March 1, 2017. The Association did not even file its lawsuit within the longer, 1-year period. Even giving the Association the benefit of *not only* the one-year grace period but also the benefit of tolling under NRS 40.695, it still delayed filing its lawsuit over four months than when it was required to do so. As explained above, this Honorable Court ruled on this exact same issue in

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Sky. There, the statute of repose was deemed tolled, but the Association did not commence its lawsuit until after that period expired.

Therefore, the Association's claim for damages alleged in the March 1, 2017 claim for construction defects is time-barred and summary judgment should be entered in favor of the Builders.

D. <u>The Association's Claims Do Not Relate Back to the Date of Filing of the Builders' September 28, 2016 Complaint.</u>

As was previously mentioned, even assuming that the Association were granted the full benefit of NRS 40.695 tolling during the AB 125 grace period, the Association still failed to timely file its lawsuit for constructional defects until after the tolling provision of NRS 40.695 had expired. In order to address this clear untimeliness issue, the Association has pursued the following argument: (1) the Association's March 1, 2017 Counterclaim for constructional defects was a "compulsory" counterclaim, and (2) because it was a "compulsory" counterclaim, the effective date of its filing should relate back in time to the Builders' September 28, 2016 Complaint, thus rendering it a timely filing. (Opp., Pg. 12-13).

Each of these two assertions, however, are not legally justified. First, the March 1, 2017 counterclaim was not compulsory because it asserts an affirmative action for relief that is completely separate and beyond the scope of the Builders' September 28, 2016 Complaint for Declaratory Relief. Second, even assuming that the March 1, 2017 Counterclaim were compulsory, the relation-back doctrine is inapplicable in providing for a timely filing of September 28, 2016.

i. <u>The Association's Claims are Not Compulsory Counterclaims Because (1) the Builders' Complaint is a Declaratory Judgment Action and Thus a Nevada Exception Applies; and (2) the Two Actions Do Not Meet Nevada's Logical Relationship Test</u>

Under NRCP 13(a), a claim is compulsory if it arises out of the transaction or occurrence set out in the plaintiff's complaint. NRCP 13(a); *See also*, *Mendenhall v. Tassinari*, 133 Nev., Adv. Op. 78, 403 P.3d 364, 370 (2017). "The definition of transaction or occurrence does not require an identity of factual backgrounds." *Id.* Rather, "the relevant consideration is whether the pertinent facts of the different claims are so logically related that issues of judicial economy and fairness mandate that all issues be tried in one suit." *Id.* at 370-371 (internal citations omitted). The Supreme Court of

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Nevada recognized "that in the most common test, courts have held that the requirement of 'same transaction or occurrence' is met when there is a logical relationship between the counterclaim and the main claim." *Id.* at 371 (internal quotation marks omitted).

a. <u>Per Nevada Case Law, Counterclaims to Actions Seeking Declaratory Relief are Presumptively Permissive</u>

The Nevada Supreme Court has already ruled on the issue of whether Counterclaims to Declaratory Relief Actions are compulsory. With a resounding *no*, the Court concluded that like the majority of courts that have addressed the claim-preclusive effect of declaratory judgments… we hold that claim preclusion does not apply where the original action sought only declaratory relief. *Boca Park Martketplace Syndications Grp. v. HIGCO, Inc*., 407 P.3d 761, 764 (2017) (internal citations omitted). In carving out an exception to the claim-preclusion doctrine for declaratory-only relief actions, the Court voiced the following:

> "Ordinarily, claim preclusion bars a second suit seeking to vindicate claims that were or could have been asserted in the first suit. But the claim-preclusion doctrine makes an exception for declaratory judgment actions, which are designed to give parties an efficient way to obtain a judicial declaration of their legal rights before positions become entrenched and irreversible damage to relationships occurs. While a party may join claims for declaratory relief and damages in a single suit, the law does not require it." *Id.* at 762.

Because the Builders' September 28, 2016 Complaint was a Declaratory Relief Action, the Builders contend that the Association's Counterclaim was not compulsory under Nevada law. *(See* **Exhibit "K"**, the Builders' Complaint).

b. <u>The Builders' Declaratory Relief Action and the Association's Construction Defect Action Do Not Meet the Logical Relationship Test</u>

Because NRCP 13(a) is identical to FRCP 13(a), it is informative to turn to Federal authority for further guidance in determining the parameters of a compulsory counterclaim. The Ninth Circuit adopted the "logical relationship test" for determining whether a counterclaim is compulsory. The test states:

> A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that same operative facts serve as the basis of both claims or the aggregate core of facts upon which the

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> claim rests activates additional legal rights otherwise dormant in the defendant. *"In re Pegasus Gold Corp.*, 394 F.3d 1189, 1196 (9th Cir. 2005) (quoting *In re Pinkstaff*, 974 F.2d 113, 115 (9th Cir. 1992) (internal citations omitted).

The operative question is therefore "whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit." *Pochiro v. Prudential Ins. Co. of America*, 827 F.2d 1246, 1249 (9th Cir. 1987). Thus, courts must determine whether there is a substantial overlap between the facts necessary to the claim and counterclaim. *Id.* at 1251.

In its Opposition, the Association states the following: "...the HOA's counterclaims are compulsory because they arise out of the same transaction and occurrence that is the subject matter of the Builders' Complaint—the defect allegations contained in the HOA's Chapter 40 Notice." (Opp. Pg. 13). Rather than explaining *how* the Association's counterclaims arise out of the same transaction and occurrence, the Association instead relies on circular logic, stating the following a few lines later: "The HOA's counterclaims are compulsory because they arise out of the same transaction and occurrence that is the subject matter of the Builders' Complaint." (Opp. Pg. 13).

The Association's cursory and circular analysis does not justify its position that its March 1, 2017 Counterclaim was compulsory. Even a basic analysis of each of the two pleadings, along with relevant analysis of Nevada case authority, clearly shows that it is improper and overly-broad to consider the Association's Counterclaim "compulsory."

The Builders' September 28, 2016 Complaint was a Declaratory Relief action. The heart of the Complaint aimed to attack the sufficiency of the Association's Chapter 40 Notice, as well as seek the Court's determination as to the rights and obligations of the parties given the presence of the settlement agreement from the prior litigation, the Eighth District Court Case No. A-09-598902-D. *(See* **Exhibit "K"**, the Builders' Complaint). The Complaint did not deal with the substantive issues contained in the Association's Counterclaim for construction defects. The factual basis behind the Association's construction defect Counterclaims are substantively and temporally distinct from those centered at the Builders' Complaint. Whereas the factual analysis needed to be undertaken to decide

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the issues in the Builders' Complaint revolve around whether the Association's *February 24, 2016* Chapter 40 Notice was sufficient and what the *current* legal relationship status is between the Association and the Builders given the presence of a prior settlement agreement, the Association's Counterclaim requires analysis into the decisions and workmanship that went into the design and construction of the Towers that occurred more than 12 years ago.

There are little, if any, related facts between the Builders' Complaint and the Association's Counterclaim that would make them so logically and factually intertwined to require them to be tried in one suit. Indeed, erroneously recognizing the Association's Counterclaim as compulsory would frustrate judicial economy and fairness by addressing the merits of alleged underlying constructional defects, which are completely attenuated from the Builders' declaratory relief claims. It is for this reason that the Association's argument on this point should be denied. Furthermore, since the March 1, 2017 claims were not compulsory, the Association's subsequent argument regarding the relation-back doctrine is inapplicable, and hence the March 1, 2017 Counterclaim is time-barred.

ii. <u>The Relation-Back Doctrine Does Not Apply to the Association's Claims.</u>

Assuming that the Court deems the Association's March 1, 2017 Counterclaim as compulsory, which it should not, the Association's final step is to somehow convince the Court that the "relation back" doctrine would apply to toll the filing date, hence making the effective filing date of the Association's Counterclaim the same date of the Builders' September 28, 2016 Complaint. This is a huge leap.

The issue can be stated as follows: whether an initial action tolls the statute of repose for a compulsory counterclaim seeking affirmative relief. Stated another way, the issue can be framed as whether a compulsory counterclaim "relates back" to the opposing party's initial complaint. The relation-back doctrine does not apply to compulsory counterclaims under Nevada state law. Rather, Nevada's rules of civil procedure provide an avenue for *amended* pleadings to relate to *that same party's* original pleadings, not the opposing party's initial complaint. NRCP 15(c). The Association's application of the "relation-back" doctrine is thus entirely inapplicable here.

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The *most* persuasive authority on this issue comes from the Nevada Supreme Court. In *Nevada State Bank v. Jamison Family Partnership*, the Supreme Court of Nevada disagreed with appellant's claim that "the district court erred when it refused to toll the statute of limitations against [appellant's] compulsory counterclaims." 106 Nev. 792, 797, 801 P.2d 1377, 1381 (1990). As a matter of first impression, the court addressed "whether a plaintiff, by instituting an action before the expiration of a statute of limitation, tolls the running of that statute against compulsory counterclaims filed by the defendant after the statute has expired." *Id.* In addressing this novel issue, the court stated, "[w]hile statutes of limitations are intended to protect a defendant against the evidentiary problems associated with defending a stale claim, these [deficiency judgment] statutes are also enacted to promote repose by giving security and stability to human affairs." *Id.* at 798, 801 P.2d at 1381 (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). Accordingly, in applying the relevant deficiency judgment statutes to the case at hand, the court explained "it is questionable whether stale claims and lost evidence represent the paramount concern addressed by a three-month statute of limitation." *Id.* at 798, 801 P.2d at 1382. "Since the statute also addresses viable concerns other than stale evidence, it should be enforced." *Id.* Notwithstanding this assertion, the Court proceeded to recognize equity as another consideration. *Id.* Ultimately, the court affirmed the district court's determination **"that a plaintiff, by instituting an action before the expiration of a statute of limitation, does not toll the running of that statute against compulsory counterclaims filed by the defendant after the statute has expired."** *Id.* at 798-99, 801 P.2d at 1382. (Emphasis added).

Importantly, the case has not been overturned. The Association stated in its Opposition that "the Nevada Supreme Court made it clear that its ruling in Jamison was specific to the facts of that case and not setting forth the general rule of law in Nevada." (Opp. Pg. 13). However, this assertion is not true. The Supreme Court did *not* base its holding to be conditional on the specific facts of that case. While it is true that in *Jamison* the substantive claims involved issues of recoupment, and that the Court found that the Defendant could still assert his claim as affirmative defense, that was not given as any reason whatsoever for narrowly interpreting the Court's holding.

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In fact, the policy concerns underlying the *Jamison* holding are relevant in this case: simply put, the Association slept on its rights to pursue its claims. The Association states, by its own admission, its claims had accrued in 2013—approximately *3-and-a-half years* prior to filing its lawsuit.[5] In addition, there was a prior litigation regarding constructional defect claims, which included numerous window-related claims involving alleged water intrusion. The Association has known about the alleged water intrusion issues involving windows, therefore, for over 10 years and it was paid handsomely, to fix those issues. The Association had more than enough time to commence its lawsuit for affirmative relief against the Builders, but simply did not.

The Association has not provided any *controlling* authority for the proposition that its counterclaim should relate back to the Builders' Complaint. The Association cites to some non-binding federal cases that are factually dissimilar, for example, *Yates v. Washoe County School District* and *Bourne Valley Court Trust v. Wells Fargo Bank*. (Opp. Pg. 12). However, it would be a legal stretch for this Court to adopt the Federal authority as the guiding principle for Nevada, over and above the Nevada Supreme Court's holding in *Jamison*. It is for these reasons that the Association's argument on this basis should denied, and that summary judgment should be entered in favor of the Builders.

IV.

OPPOSITION TO ASSOCIATION'S CONDITIONAL COUNTER-MOTION TO EXTEND THE TOLLING PERIOD TO MARCH 1, 2017

In the event the Court denies the Association's request for its Counterclaim to relate back to the date of the Builders' Complaint, the Association has also brought a Countermotion seeking to extend tolling based on NRS 40.695(2). This section requires that "the claimant demonstrates to the satisfaction of the court that **good cause** exists to toll the statutes of limitation and repose under this section for a longer period." NRS 40.695(2) (Emphasis Added).

Importantly, NRS 40.695(2) is an exception to the general tolling periods provided in this

[5] The time between when the HOA in the *Sky* case discovered the defects and filed its lawsuit was a mere 1-and-a-half years, which is 2 years shorter than in this case. (Opp., Exh. 2).

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statute. The first two prongs of NRS 40.695 allow tolling to the earlier of either (1) 30 days after mediation, or (2) one year following service of the Chapter 40 Notice. NRS 40.695(1). It should be noted that while the relevant tolling provision in this case was 30 days after the September 26, 2016 mediation, the Association *still* failed to timely bring its lawsuit even if it was granted the longer period of an entire year to serve its Chapter 40 Notice.

As argued previously, the Builders' position is that NRS 40.695 never operated to provide tolling in the first place since the Association's Chapter 40 Notice fell after the six-year repose period had expired. If NRS 40.695 tolling does not apply at all in this case, then the Association's request under NRS 40.695(2) is immaterial.

None of the four reasons the Association mentions in its Countermotion adequately show—either individually or collectively—"good cause" for application of extended NRS 40.695(2) tolling. Opp. Pgs. 14-15).

First, the Association states "the HOA has diligently prosecuted its construction defect claims against the Builders." Ironically, the fact that the Association is bringing this Countermotion under NRS 40.695(2) due to its dilatory filing undercuts this assertion. That the Association completed other steps of the litigation process has no bearing whatsoever as to whether there was good cause specific to the filing of its March 1, 2017 Counterclaim. The Association was anything but diligent—in fact, it delayed its filing for over four months beyond which NRS 40.695(1) allowed. This Court has previously dismissed litigants' claims despite exhibiting far less egregious conduct than the Association did in this case. (*See Sky* Order, Opp., Exh. 2).

Second, the Association states "the Builders cannot claim surprise or prejudice from the HOA's compulsory counterclaims because they have been on notice of these construction defect claims since February 24, 2016." Arguing what impact, the Association's late filing had on the Builders is a red-herring, as the focus of the good cause analysis is solely on the Association and the basis for which it filed its claim late. The prejudice to the Builders is irrelevant for demonstrating good cause to extend tolling pursuant to NRS 40.695(2).

Third, the Association states that "the HOA brought its compulsory counterclaims on March

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1, 2017—just (5) days after the one-year anniversary of the initial Chapter 40 Notice." (Opp., Pg. 14, Ln. 20-21). This is problematic for several reasons. NRS 40.695(1) required that the Association file its lawsuit within 30 days of the September 26, 2016 mediation, not the one-year time frame from the Chapter 40 Notice. The one-year timeframe has absolutely no bearing here, so the fact that the Association filed it "just" five days after that one-year time frame passed is irrelevant. (Opp., Pg. 14, Ln. 20-21). At some point, a line must be drawn to maintain any sense of fairness and expectation with statutes of repose. The Association's argument here does not establish good cause at all, but is again, focused on the prejudice to the Builders, which is irrelevant to show good cause under NRS 40.695(2).

Fourth, the Association attempts to argue good cause by blaming the Builders, stating: "the Builders elected to raise this statute-of-repose issue nearly two-and-a-half years after filing suit." (Opp., Pg. 15, Ln. 22-23). This argument is essentially a complaint against the Builders' litigation strategy—which is entirely irrelevant and nonsensical given the focus here is on what good cause the Association had to file its claims late. The Builders' Motion for Summary Judgment was timely. The Builders already paid the Association for construction defect claims, including those relating to allegedly leaking windows. Moreover, the Builders have likewise amounted considerable expenses litigating this subsequent case, the Association's "second-bite-at-the-apple." The Association, on the other hand, delayed its filing for months after the tolling deadline passed, hardly a "brief" period, especially given that the Association does not even get any tolling benefit. (Opp. Pg. 15, Ln. 2-3). The order in which the Builders' chose to assert its Motions and the costs incurred by the parties does not and should not have any bearing on the Court's analysis of good cause for why the Association untimely filed its claim. The Association even goes as far as to say that it would be "inequitable and wasteful" to dismiss its claims, despite *it* being the one which filed its claims late. (Opp. Pg. 15, Ln. 2-3). Again, these arguments do not show, and are in fact contrary to demonstrating, good cause for why the Association filed its claims late, which is perhaps the most poignant reason to deny the Association's request.

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Ultimately, nothing in the Association's Countermotion even addresses "good cause" to permit it to proceed on its untimely March 1, 2017 lawsuit. The reason is simple: there was no excusable neglect, inadvertence, mistake, or anything else relevant to justify its dilatory filing of claims which, by its own admissions, it had known about since 2013. It is for these reasons that the Association's Conditional Countermotion should be denied and judgment entered in favor of the Builders for summary judgment pursuant to NRS 11.202(1).

V. CONCLUSION

The Nevada Legislature has carefully crafted specific statutes and legislation, including NRS 11.202 and AB 125, which lay out statute of repose periods in which actions must be commenced. Here, it is undisputed that the Association failed to file its Counterclaim within the six-year statute of repose period. Furthermore, the six-year statute of repose expired before the Association served its Chapter 40 Notice. Thus, there can be no tolling. The Association failed to commence its action within the six-year statute of repose or within the statutory grace period provided by AB 125. The Association's defect claims are permissive claims and do not satisfy Nevada's logical relationship test. Moreover, the "Relation-Back Doctrine" does not apply to the Association's claims given the Nevada Supreme Court's ruling in *Jamison*.

The Association's Countermotion should also be denied. The Association provides no case law, legal analysis or any relevant facts supporting the position that there is good cause for its late filing.

Based on the foregoing, the Association's action for constructional defects set forth in its March 1, 2017 Counterclaim is time-barred.

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The Builders respectfully request that this Honorable Court enter an Order granting the instant Motion for Summary Judgment in favor of the Builders.

Dated: March 15, 2019.

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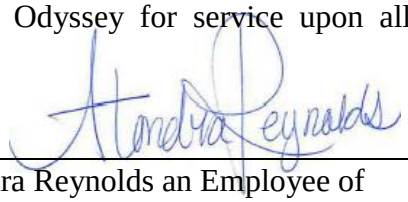
CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2019, a true and correct copy of the foregone document was electronically delivered to Odyssey for service upon all electronic service list recipients.



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Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

KEMP, JONES & COULTHARD, LLP
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Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

Defendant's Reply in Support of Conditional Countermotion for Relief Pursuant to NRS 40.695(2)

Hearing Date: March 26, 2019
Hearing Time: 8:30 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.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Builders oppose the HOA's Conditional Countermotion, but they offer no legitimate basis for this Court to decline to find good cause for an extension of the NRS 40.695 tolling period. Nevada has a strong, longstanding public policy of ensuring claims get decided on the merits. The Builders ask this Court to ignore that public policy and dispose of the HOA's legitimate, significant claims on a procedural technicality that had no impact on their ability to defend the HOA's claims. Surprisingly, the Builders claim that the lack of any prejudice to them is simply a "red-herring" in the Court's analysis. The Nevada Supreme Court disagrees. In *Scrimer v. Dist. Ct.*, 116 Nev. 507, 998 P.2d 1190

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(2000), the Nevada Supreme Court made it crystal clear that the existence of prejudice is a significant factor in a court's good-cause analysis under the analogous portion of Rule 4.

Should the Court find the HOA did not bring its defect claims prior to the expiration of the tolling period, good cause exists to extend the tolling period to March 1, 2017. For that reason, the HOA conditionally requests an order, pursuant to NRS 40.695(2), extending the tolling period as long as the Court's deems necessary to ensure the claims get resolved on their merits.

II.

STATEMENT OF FACTS

A. A *More Detailed* Timeline of Relevant Events Before the HOA Filed its Complaint.

Based on the issues and arguments raised in Builders' Opposition to the HOA's Conditional Countermotion, the HOA provides the following expanded timeline of pre-litigation and litigation-related events occurring before March 1, 2017—the date when the HOA timely filed its Answer and compulsory Counterclaims against the Builders.

When	What
Feb. 24, 2016	HOA served the Builders with its Chapter 40 Notice Towers I and II
Mar. 23, 2016	HOA received letter from Builders' counsel
Mar. 23, 2016	Counsel for HOA and Builders corresponded to coordinate pre-litigation inspections
Mar. 24, 2016	HOA sent Builders certain window pictures
Mar. 24, 2016	Builders performed inspections of Towers I and II
Mar. 29, 2016	Counsel for HOA and Builders corresponded regarding window testing
Apr. 29, 2016	HOA received letter from Builders' counsel
May 24, 2016	Builders responded to HOA's Chapter 40 Notice, **Exhibit 3**[1]

[1] In an abundance of caution, The HOA redacted all substantive portions of the Builders' Chapter 40 response due to the Builders' decision to mark the document as "intended for mediation and settlement purposes only." As explained during the hearing on October 2, 2018, the HOA strongly disputes the Builders' ability to shield this document from the Court by unilaterally designating its response to the Chapter 40 Notice, a document required by NRS 40.6472, as being subject to any mediation and/or settlement protection. For example, the Court cannot rule on any of the Builders' defenses under NRS

When	What
June 9–16, 2016	Parties corresponded to coordinate pre-litigation mediation
June 30, 2016	Parties corresponded about contractors that received the Chapter 40 Notice
June 30, 2016	HOA submitted its confidential mediation brief to the mediator
Aug. 5–11, 2016	Parties corresponded to schedule pre-litigation mediation[2]
Sept. 26, 2016	Mandatory pre-litigation mediation held, ending without resolving the HOA's construction defect claims
Sept. 28, 2016	Builders served Tender of Defense and Indemnity on the HOA, **Exhibit 5**
Sept. 28, 2016	Builders filed this action against the HOA
Oct. 2016	Builders telephonically granted HOA an extension to respond to the Complaint
Nov. 28, 2016	HOA responded to Builders' Tender of Defense and Indemnity, **Exhibit 6**
Dec. 7, 2016	HOA timely filed Motion to Dismiss (based on extensions from Builders)
Jan. 4, 2017	Builders filed opposition to HOA's Motion to Dismiss
Jan. 10, 2017	Parties stipulated to appoint Special Master
Jan. 17, 2017	HOA filed reply in support of Motion to Dismiss
Jan. 24, 2017	Hearing on HOA's Motion to Dismiss
Feb. 9, 2017	Order denying HOA's Motion to Dismiss
Mar. 1, 2017	HOA timely filed Answer and compulsory Counterclaim[3]

As noted in the timeline, the HOA cooperated with the Builders throughout the pre-litigation process and actively participated in the litigation as soon as the Builders' filed their Complaint. Of importance, the HOA timely sought dismissal of the Complaint and then, after the Court denied that motion, timely filed its Answer and compulsory Counterclaims.

40.600 through 40.695 without reviewing the response and deeming it to comply with the requirements of NRS 40.6472. *See* NEV. R. CIV. P. 40.650(2).

[2] All of the parties' pre-litigation correspondence identified in the timeline, except for the Builders' Chapter 40 response, is attached as **Exhibit 4**.

[3] After briefing and obtaining the Court's ruling its motion to dismiss, the HOA timely filed its Answer and compulsory Counterclaims.

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III.

ARGUMENT

A. Good Cause Exists to Extend the Tolling Period, as May Be Necessary, to Ensure the HOA's Claims Get Resolved on the Merits.

The Builders contend no good cause exists for this Court to exercise its discretion and extend the tolling period pursuant to NRS 40.695. *See* Reply/Opp. at 26:20–29:6. Although the Nevada Supreme Court has not yet considered what factors the trial courts should use when deciding whether good cause exists under NRS 40.695(2), it has strongly endorsed a flexible and forgiving good-cause analysis under the analogous provision of NRCP 4(e) (formerly Rule 4(i)) regarding timely service of process. *See Scrimer v. Dist. Ct.*, 116 Nev. 507, 998 P.2d 1190 (2000). When considering whether good cause exists to grant additional time, "the district court should recognize that '***good public policy dictates that cases be adjudicated on their merits.***'" *Id.* at 516–17 (quoting *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)) (emphasis added). The *Scrimer* court expressly "disavow[ed] and overrule[d]" its prior decisions endorsing "an inflexible approach" to the court's good-cause analysis. *Id.* at 517.

In mandating a more flexible approach to good-cause determinations, the *Scrimer* court listed the following relevant factors, none of which individually controls the outcome:

> (1) difficulties in locating the defendant, (2) the defendant's efforts at evading service or concealment of improper service until after the 120–day period has lapsed, (3) the plaintiff's diligence in attempting to serve the defendant, (4) difficulties encountered by counsel, (5) ***the running of the applicable statute of limitations***, (6) ***the parties' good faith attempts to settle the litigation during the 120–day period***, (7) the ***lapse of time*** between the end of the 120–day period and the actual service of process on the defendant, (8) ***the prejudice to the defendant caused by the plaintiff's delay*** in serving process, (9) ***the defendant's knowledge of the existence of the lawsuit***, and (10) any extensions of time for service granted by the district court.

Id. at 516 (emphasis added). The prejudice to a defendant has always been a significant factor in the good-cause analysis. *See id.* at 513 (discussing lack of prejudice in *Domino v. Gaughan*, 103 Nev. 582, 747 P.2d 236 (1987)), 514 (discussing existence of prejudice in *Dallman v. Merrell*, 106 Nev. 929, 803

P.2d 232 (1990)). "The determination of good cause is within the district's court discretion." *Id.* at 513 (citing *Lacey v. Wen-Neva, Inc.*, 109 Nev. 341, 849 P.2d 260 (1993)).

Here, to the extent necessary, every relevant *Scrimer* consideration weighs in favor of this Court exercising its discretion and finding good cause to briefly extend the tolling period under NRS 40.695(2). First and most importantly, Nevada's strong public policy favors resolving claims on their merits whenever possible. Under the circumstances, the Court's refusal to extend the tolling period would effectively result in a with-prejudice dismissal of the HOA's claims. Second, due to the HOA's Chapter 40 Notice, the Builders had actual knowledge of the HOA's claims many months in advance and actually requested and conducted inspections of the alleged defects before the HOA filed its claims. Third, the parties engaged in the statutorily mandated pre-litigation settlement discussions. Fourth, the Builders filed suit against the HOA to challenge various aspects of the HOA's claims identified in its pre-litigation notice. Fifth, after first being sued by the Builders, the HOA timely filed its Counterclaims against the Builders. Finally, due to the parties' significant pre-litigation efforts, the Builders have not and cannot legitimately claim prejudice from any slight delay in the HOA filing its Complaint.

The Builders do not dispute that NRS 40.695(2) gives this Court discretion to toll the statute of repose for longer than one (1) year upon a showing of good cause. The statute's plain language indicates that the Court may, for good cause, extend the tolling period for as long as necessary to effectuate Nevada's public policy of deciding claims on their merits. *See Scrimer*, 116 Nev. at 516–17; *see also* NEV. R. CIV. P. 1 (instructing courts to construe all rules to secure the "just" determination of every action). Because the HOA has diligently and consistently pursued its claims from February 24, 2016, to the present time, and due to the lack of any prejudice to the Builders, the Court should, as necessary, exercise its discretion and extend the tolling period to avoid a dismissal of the HOA's claims based on a procedural technicality rather than on the merits.

///

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V.

CONCLUSION

For the foregoing reasons, to the extent necessary, the HOA respectfully requests an order briefly extending the tolled period under NRS 40.695(2) to avoid dismissal of its claims.

DATED this 19th day of March 2019.

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

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

Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

KEMP, JONES & COULTHARD, LLP
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Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

Certificate of Service

I hereby certify that on the 19th day of March, 2019, the foregoing **Defendant's Reply in Support of Conditional Countermotion for Relief Pursuant to NRS 40.695(2)** was served on the following by Electronic Service to all parties on the Court's service list.

An employee of Kemp, Jones & Coulthard, LLP

EXHIBIT 3

BREMER WHYTE

BREMER WHYTE BROWN & O'MEARA LLP

1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
(702) 258-6665
(702) 258-6662 FAX
www.bremerwhyte.com

May 24, 2016

RECEIVED MAY 27 2016

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED AND VIA E-MAIL

INTENDED FOR MEDIATION AND SETTLEMENT PURPOSES ONLY; THEREFORE, IT IS PROTECTED FROM DISCLOSURE PURSUANT TO NRS 40.680 & NRS 48.105

CERTIFIED MAIL #70142120000181142093

Edward Song, Esq.
LEACH JOHNSON SONG & GRUCHOW
8945 W. Russell Road, Ste. 330
Las Vegas, NV 89148
esong@leachjohnson.com

CERTIFIED MAIL #70142120000181142109

Scott Williams, Esq.
LAW OFFFICE OF WILLIAMS & GUMBINER, LLP
100 Drakes Landing Road, Ste. 260
Greenbrae, CA 94904
swilliams@williamsgumbiner.com

Re: Panorama Towers Condominium Unit Owners' Association v. Panorama Towers I, LLC, Panorama Towers II, LLC and M.J. Dean Construction, Inc.

BWB&O Client: Laurent Hallier aka Laurence Hallier; Panorama Towers I, LLC; Panorama Towers II, LLC; Panorama Towers Mezz I, LLC; Panorama Towers Mezz II, LLC; and M.J. Dean Construction, Inc.

BWB&O File No.: 1287.551

Subject: Panorama Towers Condominium Unit Owners' Association February 24, 2016 Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645

Dear Mr. Song and Mr. Williams:

Please allow the following correspondence to serve as Laurent Hallier aka Laurence Hallier's; Panorama Towers I, LLC's; Panorama Towers II, LLC's; Panorama Towers Mezz I, LLC; Panorama Towers Mezz II, LLC and M.J. Dean Construction, Inc.'s (collectively "Respondents") Response to the Panorama Towers Condominium Unit Owners' Association's ("Claimant") *Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645* ("Chapter 40 Notice) dated February 24, 2016, pursuant to NRS 40.6472.

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Darlene M. Cartier, Esq.
Peter C. Brown, Esq.

dcartier@bremerwhyte.com
pbrown@bremerwhyte.com

EXHIBIT 4

BREMER WHYTE

BREMER WHYTE BROWN & O'MEARA LLP

1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
(702) 258-6665
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www.bremerwhyte.com

March 23, 2016

RECEIVED MAR 28 2016

Edward Song, Esq.
LEACH JOHNSON SONG & GRUCHOW
8945 W. Russell Road, Suite 330
Las Vegas, NV 89148

Scott Williams, Esq.
LAW OFFFICE OF WILLIAMS & GUMBINER, LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904

Re: **Panorama Towers Condominium Unit Owners' Association v. Panorama Towers I, LLC, Panorama Towers II, LLC and M.J. Dean Construction, Inc.**
BWB&O Client/Insured: Panorama Towers I, LLC, Panorama Towers II, LLC, and M.J. Dean Construction, Inc.
BWB&O File No.: 1287.551
Subject: **Notice of Retention**

Dear Counsel:

Please be advised that Bremer, Whyte, Brown & O'Meara, LLP has been retained to represent the interests of Panorama Towers I, LLC, Panorama Towers II, LLC and M.J. Dean Construction, Inc. in the above-referenced matter.

Should you have any questions regarding the above, please do not hesitate to contact the undersigned.

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Peter C. Brown, Esq.

pbrown@bremerwhyte.com
PCB:as

From: Peter Brown
To: Scott Williams
Cc: Vicki Fedoroff
Subject: RE: Panorama - site inspection
Date: Wednesday, March 23, 2016 4:26:48 PM

We are in agreement as to the scope of the site inspection.

Thank you for scheduling it on such short notice.

Peter

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Wednesday, March 23, 2016 4:25 PM
To: Peter Brown
Cc: Vicki Fedoroff
Subject: Panorama - site inspection

Peter:

Following up on our discussion, I notified Ed Song that you will be there with your experts tomorrow at 10:00 AM.

By way of formality, I believe it is fair to state that this inspection is limited to visual/photographic observations only, and that no other evidence obtained during the inspection (*e.g.*, oral statements made by those on the premises) will be admissible in any subsequent proceedings. Please let me know if you disagree with this limitation.

I am looking forward to meeting and working with you on this case.

Best,

Scott

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From:	Vicki Fedoroff
To:	Peter Brown; mrobbins@mkainc.com
Cc:	Scott Williams; Wendy Jensen; Beth Tenney
Subject:	Panorama Towers - Window Pictures
Date:	Thursday, March 24, 2016 11:24:04 AM

Good morning. Attached via dropbox please find the window pictures for Panorama Towers.

https://www.dropbox.com/sh/zuamb2eulhwjqn4/AAATff_LWQn0vi1Y2L92elgxa?dl=0

~Vicki

Williams & Gumbiner LLP
ATTORNEYS AT LAW

Victoria Fedoroff, Legal Assistant
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
TEL (415) 755-1880
Vicki@williamsgumbiner.com

From:	Peter Brown
To:	Edward Song; Scott Williams
Cc:	Vicki Fedoroff
Subject:	RE: Panorama - BWB&O File #1287.551
Date:	Tuesday, March 29, 2016 12:08:15 PM

Will do.

From: Edward Song [mailto:ESong@leachjohnson.com]
Sent: Tuesday, March 29, 2016 12:06 PM
To: Peter Brown; Scott Williams
Cc: Vicki Fedoroff
Subject: RE: Panorama - BWB&O File #1287.551

Peter,

CMA Consulting is going out to lunch right now.

Please have your guys call Richard Bonsole at 702-203-0517

From: Peter Brown [mailto:pbrown@bremerwhyte.com]
Sent: Tuesday, March 29, 2016 11:52 AM
To: Scott Williams <swilliams@williamsgumbiner.com>
Cc: Edward Song <ESong@leachjohnson.com>; Vicki Fedoroff <vfedoroff@williamsgumbiner.com>
Subject: RE: Panorama - BWB&O File #1287.551

Scott:

I am unable to get my fenestration expert out there given the lack of notice. I am going to have my architectural expert attend.

With regard the mediation privilege, I assume you mean the same thing you did last week – no discussions and anything overheard during the process is protected from disclosure. As for the information from the testing itself, that is potential fodder for the experts and the case, with my clients reserving any objections they may have with regard to the testing that was already performed this morning without anyone present for the defense.

Peter

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Tuesday, March 29, 2016 10:46 AM
To: Peter Brown
Cc: Edward Song; Vicki Fedoroff
Subject: RE: Panorama - BWB&O File #1287.551
Importance: High

Peter – Sorry for not getting back to you sooner; I'm on vacation this week. They are performing water testing today.

Ed – Can you get access for Peter and his expert to observe the water testing?

Note: Any inspection today will be subject to mediation privilege.

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
TEL (415) 755-1880 | FAX (925) 933-5837
swilliams@williamsgumbiner.com

From: Peter Brown [mailto:pbrown@bremerwhyte.com]
Sent: Monday, March 28, 2016 7:37 AM
To: Scott Williams
Subject: Panorama - BWB&O File #1287.551

Scott:

I think you said the windows in Unit #303 were going to tested this week. What day, what time?

Peter C. Brown, Esq.
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www.bremerwhyte.com

April 29, 2016

VIA E-MAIL

Edward Song, Esq.
esong@leachjohnson.com
LEACH JOHNSON SONG & GRUCHOW

Scott Williams, Esq.
swilliams@williamsgumbiner.com
LAW OFFFICE OF WILLIAMS & GUMBINER, LLP

Re: Panorama Towers Condominium Unit Owners' Association v. Panorama Towers I, LLC, Panorama Towers II, LLC and M.J. Dean Construction, Inc.
BWB&O Client: Panorama Towers I, LLC, Panorama Towers II, LLC, and M.J. Dean Construction, Inc.
BWB&O File No.: 1287.551
Subject: Panorama Towers Condominium Unit Owners' Association February 24, 2016 Notice of Contractor Pursuant to Nevada Revised Statutes, Section 40.645

Dear Mr. Song and Mr. Williams:

On March 29, 2016, we sent you correspondence relating to your client's February 24, 2016 Chapter 40 Notice. We have not received any response.

We request that you please promptly provide the information we requested relating to the alleged sewer line defect, including the date of occurrence and the date of repair. We also as that you provide us with the address of where any of the sewer line materials that were removed and replaced as part of the repair are being stored.

In addition, we request that you provide the date when any of the alleged corroded mechanical room pipes were replaced, the date(s) when this work was performed and the name and address of the contractor that performed this work. Please also confirm whether and where the removed pipes have been stored for safekeeping.

Please provide the above information no later than **May 3, 2016.**

This letter is not intended to serve as our clients' formal response to the Chapter 40 Notice. All rights are reserved and a formal response to the Chapter 40 Notice will be timely provided as per statute.

Thank you for your time and attention.

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Darlene M. Cartier, Esq.
Peter C. Brown, Esq.

dcartier@bremerwhyte.com
pbrown@bremerwhyte.com

From:	Peter Brown
To:	Scott Williams
Cc:	Francis Lynch (flynch@lhsslaw.com); Wendy Jensen; Vicki Fedoroff; Darlene Cartier; Bonnie McCormick; Amree Stellabotte; Darlene Cartier
Subject:	RE: Panorama Towers - mediator
Date:	Thursday, June 16, 2016 4:44:00 PM

Scott:

My apologies. I have been swamped with a couple of other high rise condo cases that have taken all of my attention the past week or so.

Let's touch base next week after you get some proposed dates from Bruce.

Peter

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Thursday, June 16, 2016 4:35 PM
To: Peter Brown
Cc: Francis Lynch (flynch@lhsslaw.com); Wendy Jensen; Vicki Fedoroff; Darlene Cartier; Bonnie McCormick; Amree Stellabotte
Subject: RE: Panorama Towers - mediator

Peter:

Not having received a reply to my email below, I am copying this to others in your office in the event you are out of town or my email did not get through to you.

Regards,

Scott

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From: Scott Williams
Sent: Thursday, June 9, 2016 4:56 PM
To: Peter Brown (pbrown@bremerwhyte.com) <pbrown@bremerwhyte.com>
Cc: Francis Lynch (flynch@lhsslaw.com) <flynch@lhsslaw.com>; Wendy Jensen <wjensen@williamsgumbiner.com>; Vicki Fedoroff <vfedoroff@williamsgumbiner.com>
Subject: Panorama Towers - mediator

Peter:

Following up on an earlier conversation, you suggested using Bruce Edwards as a mediator for this matter. Unless you have changed your thinking in that regard, I will contact JAMS to determine his availability for an initial mediation session. I would suggest an initial conference call before an in-person mediation session. Let me know if you disagree.

Meanwhile, note that I am copying Francis Lynch on this email. Francis will be working with me on behalf of the owners' association.

Regards,

Scott

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From: Scott Williams
To: Peter Brown (pbrown@bremerwhyte.com); Darlene Cartier
Cc: Francis Lynch (flynch@lhsslaw.com); Wendy Jensen; Vicki Fedoroff
Subject: FW: Panorama - Notice Pursuant to NRS 40.645
Date: Thursday, June 30, 2016 3:28:40 PM

See March 23 email below from Five Star Plumbing & Heating, LLC, dba Silver Star Plumbing, explaining that:

- Five Star was formed in May 2011
- Silver Star Plumbing, Inc, which evidently installed plumbing at Panorama Towers,

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From: Scott Williams
Sent: Wednesday, March 23, 2016 1:50 PM
To: silverstarpds@aol.com
Cc: Edward Song <ESong@leachjohnson.com>; Vicki Fedoroff <vfedoroff@williamsgumbiner.com>; Wendy Jensen <wjensen@williamsgumbiner.com>
Subject: Panorama - Notice Pursuant to NRS 40.645

Dear Ms. Raucci:

I am responding to your emails below to Edward Song regarding the Panorama Towers project. Please note that Mr. Song is corporate counsel to the Owners' Association, and my office will be handling the Chapter 40 claim.

We have no interest in pursuing claims against parties who were not involved with the project, and appreciate your clarification below regarding the two "Silver Star" entities. It is not uncommon that we will mistakenly serve an entity with a similar name, and when we do we endeavor to correct the error.

We will do the due diligence at our end to confirm your information below, and will let you know if we come up with any information contrary to what you have provided to us. I am assuming, however, that your information is accurate. So, unless you hear from us further, please consider this a closed matter as to Five Star Plumbing & Heating, LLC, dba Silver Star Plumbing, Drain & Sewer.

Thank you again for the clarification, and my apologies for any inconvenience at your end.

Very truly yours,

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880

swilliams@williamsgumbiner.com

From: Silver Star Plumbing, Drain & Sewer [mailto:silverstarpds@aol.com]
Sent: Wednesday, March 23, 2016 11:07 AM
To: Edward Song <ESong@leachjohnson.com>
Subject: Fwd: Notice To Contractor Pursuant to Nevada Status, Section 40.645

Just a follow up to my email I sent you on March 3, 2016 - I have had no response from you either way and I want to make sure you got the email.

Silver Star Plumbing, Drain & Sewer - 702-363-4114 / Fax 702-973-5778. WWW.Silverstarplumbinglv.com. / NV Lic Contractor #76318. Have a great Day. Call a LICENSED Plumber - **IT'S THE LAW**

-----Original Message-----
From: Silver Star Plumbing, Drain & Sewer <silverstarpds@aol.com>
To: esong <esong@leachjohnson.com>
Sent: Thu, Mar 3, 2016 9:57 am
Subject: Notice To Contractor Pursuant to Nevada Status, Section 40.645

Mr. Song, We received a notice in the mail regarding Panorama Towers Condominium Unit Owners' Association Inc. However, I believe you have the wrong company. We are a plumbing service company and at no time have we done new construction. I believe you are looking for Silver Star Plumbing Inc. NV Business ID NV19941087819 opened in 8/2/1994 and closed on 2009 (I think). The owner/president was Timothy L. Conaway located at 76 Spectrum Blvd, Las Vegas 89101. His Nevada State Contractors License # was 0038618 for a C1 Plumbing & Heating and 0063820 for a C21 Refrigeration & Air Conditioning and C21B Air Conditioning. Tim Conaway was listed as the President and Qualified Individual for both licenses. The C1 Plumbing was issued on 12/8/1994 and expired on 12/31/2009, and the C21 and C21B issued pm 6/2/2006 and expired on 6/30/2007.

Our company was opened May 11, 2011 as Five Star Plumbing & heating LLC with a dba filed 5/20/2011 as Silver Star Plumbing, Drain & Sewer. Nevada State Contractors License # 0076318 issued 8/232011 C1D Plumbing. Qualified Individual is Vincent Raucci who is also a Managing Member as well as myself Donna Raucci as a managing member.That is it. Husband and wife.

We are in now way related, connected or know Silver Star Plumbing Inc., or Timothy Conaway nor have we set foot or done work on the Panorama Towers we are strictly a plumbing service company. We need to have our names, Five Star Plumbing & Heating LLC's name and any other information about us removed from this notice. I have attached documentation such as copies of the Nevada Secretary of State Business License showing Five Star Plumbing & Heating LLC, our dba, our Nevada Contractor License information as well as Silver Star Plumbing Inc.'s Nevada Secretary of State Business License and Nevada Contractor License info.

Please let me know what other information I can provide to get this cleared up. Thank

you

Donna Raucci

Silver Star Plumbing, Drain & Sewer - 702-363-4114 / Fax 702-973-5778.
WWW.Silverstarplumbinglv.com. / NV Lic Contractor #76318. Have a great Day.
Call a LICENSED Plumber - **IT'S THE LAW**

From:	Scott Williams
To:	Peter Brown (pbrown@bremerwhyte.com); Darlene Cartier
Cc:	Francis Lynch (flynch@lhsslaw.com); Wendy Jensen; Vicki Fedoroff
Subject:	FW: RE: Panorama Towers / NRS 40
Date:	Thursday, June 30, 2016 3:34:51 PM
Attachments:	SKM_C554e16051608351.pdf SKM_C554e16051608350.pdf

See email below dated May 16 from attorney for Southern Nevada Paving, with attachments.

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From: Jeremy Beal [mailto:jbeal@bbblaw.net]
Sent: Monday, May 16, 2016 9:36 AM
To: Scott Williams <swilliams@williamsgumbiner.com>
Cc: 'Edward Song' <ESong@leachjohnson.com>; Vicki Fedoroff <vfedoroff@williamsgumbiner.com>
Subject: RE: RE: Panorama Towers / NRS 40

Scott

Per your request, I am attaching the initial subcontract between SNP and MJ Dean Construction. As you can see, SNP's scope was limited to excavation work at the Panorama Towers project. I believe that any such claims against SNP were fully addressed in the prior litigation. SNP had no involvement whatsoever in the design or installation of the sewer system.

I am also attaching a page entitled Insurance Credit Worksheet, indicating that SNP was an enrollee in the OCIP for this project, and that their scope of work was Grading and Paving.

Based on the attached documents, I ask that you withdraw your Chapter 40 notice to SNP, or in the alternative, provide us with whatever documentation you have that leads you to believe that SNP may somehow be implicated in the current defects being alleged by your client.

Thank you.

Jeremy Beal

Jeremy E. Beal
Partner | Bullard, Brown & Beal LLP
234 East Commonwealth, Second Floor | Fullerton, CA 92832
jbeal@bbblaw.net | TEL 714-578-4050 | FAX 714-578-4060
CELL 714-553-2954

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Monday, May 2, 2016 11:47 AM
To: jbeal@bbblaw.net
Cc: Edward Song; Vicki Fedoroff
Subject: RE: RE: Panorama Towers / NRS 40

Dear Mr. Beal:

I am responding to your emails below to Edward Song regarding the Panorama Towers project. Please note that Mr. Song is corporate counsel to the Owners' Association, and that my office will be handling the Chapter 40 claim.

The settlement of the prior lawsuit resulted in a release of known claims only. The recent Chapter 40 notice served in February involves claims that were unknown when the prior suit settled. One of the new claims involves the defective sewer installation described in the Chapter 40 notice.

We served your client, SNP, based on the limited information available to us suggesting that SNP played a role in the sewer installation. We have no interest in pursuing claims against parties who were not involved in the newly identified claims, and would appreciate your input regarding SNP's role, or lack thereof, in the sewer installation.

If you have SNP's contract, and can provide it to us, that would be appreciated.

Very truly yours,

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

---------- Forwarded message ----------

From: Jeremy Beal <jbeal@bbblaw.net>
Date: April 14, 2016 at 1:39:11 PM PDT
Subject: RE: Panorama Towers / NRS 40
To: 'Edward Song' <ESong@leachjohnson.com>

Edward

I just found out that SNP was provided Chapter 40 notice in the prior litigation involving the Panorama Towers that resolved several years ago. SNP was covered by the OCIP in that case, and I believe was included as a dismissed enrollee in the final settlement/release agreement executed in 2010.

Given that SNP was already brought into this case years ago, given that it appears that any claims involving their scope of work (grading) were already resolved through that prior litigation, and given that none of the current claimed defects in your recent Chapter 40 notice implicate SNP's scope of work, I would ask that you strongly consider withdrawing your Chapter 40 notice to SNP at this time.

If, instead, you feel that you have specific information that SNP's work is implicated by your client's current claims, I would ask for specifics from you as soon as possible.

Thank you.

Jeremy Beal

Jeremy E. Beal

Partner | Bullard, Brown & Beal LLP
234 East Commonwealth, Second Floor | Fullerton, CA 92832
jbeal@bbblaw.net | TEL 714-578-4050 | FAX 714-578-4060
CELL 714-553-2954

From: Jeremy Beal [mailto:jbeal@bbblaw.net]
Sent: Wednesday, April 13, 2016 12:58 PM
To: 'Edward Song'
Cc: 'Daniel E. Lopez'
Subject: RE: Panorama Towers / NRS 40

Edward

Thank you for this information. I will reach out to Peter shortly.

I was wondering, however, if you could provide me with some insight as to why you gave Chapter 40 notice to SNP? SNP was a grader on this project. It does not appear that any of the current claims articulated in your Chapter 40 notice have anything to do with grading issues. Was there a specific reason why SNP was given notice? Perhaps we could short circuit this by just getting you confirmation of SNP's scope of work?

Thank you.

Jeremy

Jeremy E. Beal

Partner | Bullard, Brown & Beal LLP

234 East Commonwealth, Second Floor | Fullerton, CA 92832
jbeal@bbblaw.net | TEL 714-578-4050 | FAX 714-578-4060
CELL 714-553-2954

From: Edward Song [mailto:ESong@leachjohnson.com]
Sent: Wednesday, April 13, 2016 10:07 AM
To: jbeal@bbblaw.net
Subject: Panorama Towers / NRS 40

Mr. Beal,

I received your voicemail.

Peter Brown is representing the development entities.

His email is: pbrown@bremerwhyte.com

Please let me know if you have any further questions.

Thanks

LJSG LEACH JOHNSON SONG & GRUCHOW

Edward J. Song, Esq.
Leach Johnson Song & Gruchow
8945 West Russell Road, Ste. 330
Las Vegas, Nevada 89148
Telephone: (702) 538-9074
Facsimile: (702) 538-9113

Reno Office:
10775 Double R Boulevard
Reno, NV 89521
Phone: (775) 682-4321
Fax: (775) 682-4301

TELEPHONE, FAX OR EMAIL, AND DELETE THE ORIGINAL MESSAGE AND ANY ATTACHMENTS.

This email has been checked for viruses by Avast antivirus software.
www.avast.com

From:	Scott Williams
To:	pbrown@bremerwhyte.com; Darlene Cartier
Cc:	flynch@lhsslaw.com; Vicki Fedoroff; Wendy Jensen; Bruce A. Edwards , Esq. (bedwards@jamsadr.com); Castillo David
Subject:	Panorama Towers - service list
Date:	Thursday, June 30, 2016 6:13:38 PM

Peter and Darlene:

Following our conversation this afternoon, attached is a list of the contractors we served with the Chapter 40 notice. The list identifies each contractor's legal representation, and if none that we are aware of, the contractor's corporate status. Please add any additional information you have so that we can prepare a service list.

Thanks,

Scott

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From:	Peter Brown
To:	Scott Williams; David Castillo
Cc:	flynch@lhsslaw.com; Vicki Fedoroff; Wendy Jensen; Darlene Cartier
Subject:	RE: Panorama Towers - mediation conference
Date:	Thursday, August 11, 2016 11:23:22 AM

Everyone:

Unfortunately, I have a whole day of pre-trial hearings already set for the 7th (there is no way the case will settle before then – it is a wrap file high rise case like Panorama and the parties have shut down all settlement discussions and will not re-schedule until after the court rules on the pre-trial motions). Darlene and I need the 6th to jointly prepare for the oral arguments on the 7th.

Does Bruce have any later dates open in September?

Peter

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Thursday, August 11, 2016 10:14 AM
To: David Castillo
Cc: flynch@lhsslaw.com; Vicki Fedoroff; Wendy Jensen; Darlene Cartier; Peter Brown
Subject: RE: Panorama Towers - mediation conference

David – I can do either date, but with Labor Day on the 5th, the 7th would be preferable. (Flight scheduling would be easier for both Bruce and I.)

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From: David Castillo [mailto:dcastillo@jamsadr.com]
Sent: Thursday, August 11, 2016 9:48 AM
To: Scott Williams <swilliams@williamsgumbiner.com>
Cc: flynch@lhsslaw.com; Vicki Fedoroff <vfedoroff@williamsgumbiner.com>; Wendy Jensen <wjensen@williamsgumbiner.com>; Darlene Cartier <dcartier@bremerwhyte.com>; pbrown@bremerwhyte.com
Subject: RE: Panorama Towers - mediation conference
Importance: High

Good Morning Counsel,

Currently Bruce does not have any available dates in August. The next available dates are September 6th and 7th. Please let me know if one of these dates will work for the parties.

Thank you.

David Castillo
Case Manager

JAMS
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111
dcastillo@jamsadr.com
Direct Dial: 415-774-2667
Fax: 415-982-5287

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Friday, August 05, 2016 3:30 PM
To: Bruce Edwards <bedwards@jamsadr.com>
Cc: flynch@lhsslaw.com; Vicki Fedoroff <vfedoroff@williamsgumbiner.com>; Wendy Jensen <wjensen@williamsgumbiner.com>; David Castillo <dcastillo@jamsadr.com>; Darlene Cartier <dcartier@bremerwhyte.com>; pbrown@bremerwhyte.com
Subject: Panorama Towers - mediation conference

Bruce:

Following our phone conversation this afternoon, I spoke with Darlene Cartier who advised that Peter Brown's trial on August 8, discussed in our last conference call, has been continued. This would hopefully enable us to schedule a mediation conference sometime in August.

Please ask David to coordinate a mutually convenient date for the conference.

Thanks,

Scott

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

From: Scott Williams
Sent: Thursday, June 30, 2016 6:13 PM
To: pbrown@bremerwhyte.com; Darlene Cartier <dcartier@bremerwhyte.com>
Cc: flynch@lhsslaw.com; Vicki Fedoroff <vfedoroff@williamsgumbiner.com>; Wendy Jensen <wjensen@williamsgumbiner.com>; Bruce A. Edwards , Esq. (bedwards@jamsadr.com)

<bedwards@jamsadr.com>; Castillo David <dcastillo@jamsadr.com>
Subject: Panorama Towers - service list

Peter and Darlene:

Following our conversation this afternoon, attached is a list of the contractors we served with the Chapter 40 notice. The list identifies each contractor's legal representation, and if none that we are aware of, the contractor's corporate status. Please add any additional information you have so that we can prepare a service list.

Thanks,

Scott

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

EXHIBIT 5

BREMER WHYTE

BREMER WHYTE BROWN & O'MEARA LLP

1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
(702) 258-6665
(702) 258-6662 FAX
www.bremerwhyte.com

September 26, 2016

VIA HAND DELIVERY

Francis I. Lynch, Esq
LYNCH HOPPER SALZANO SMITH

And/Or

Scott Williams, Esq.
LAW OFFFICE OF WILLIAMS &
GUMBINER, LLP

Re: **Panorama Towers Condominium Unit Owners' Association v. Panorama Towers I, LLC, et al.**
BWB&O Clients/Insureds: Panorama Towers I & II; M. J. Dean Construction and all related entities/persons
BWB&O File No.: 1287.551
Subject: **Tender of Defense and Indemnity**

Bremer, Whyte, Brown & O'Meara, LLP has been retained to represent Panorama Towers I & II, M.J. Dean Construction and all related entities/persons in the above-referenced matter involving alleged new claims for construction defects at the Panorama Tower I and Panorama Tower II project, located at 4525 Dean Martin Drive, Las Vegas, Nevada ("the Project").

On February 24, 2016, the Panorama Towers Condominium Unit Owners' Association, Inc. ("Association") separately served Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC, Panorama Towers II, LLC'S, Panorama Towers II, Mezz, LLC and M.J.

Dean Construction, Inc. with a "Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645" (hereinafter "Chapter 40 Notice"). The Chapter 40 Notice alleges defects involving the windows, fire blocking, mechanical room piping and problems with the main sewer line.

The Project was involved in a previous construction defect lawsuit entitled *Panorama Towers Condominium Unit Owners' Association, Inc. v. Panorama Towers I, LLC, et al.*; Eighth Judicial District Court Case No. A-09-598902 (hereinafter "Prior Litigation"), which was settled in mid-2011. The terms of the settlement in the Prior Litigation were set forth in a Confidential Settlement Agreement and Release (hereinafter "Settlement Agreement").

The Settlement Agreement included an irrevocable and unconditional release by the Association as follows:

> ...as to any and all demands, liens, claims, defects, assignments, contracts, covenants, actions, suits, causes of action, costs, expenses, attorney's fees, damages, losses, controversies, judgments, orders and liabilities of whatsoever kind and nature, at equity or otherwise, either now known with respect to the construction defect claims ever asserted in the SUBJECT ACTION or related to the alleged defect claims ever asserted in the SUBJECT ACTION.

In addition, pursuant to the Settlement Agreement, includes a warranty made by the Association (HOA) as follows:

> ...If the HOA [Association], or any person or organization on its behalf, including an insurer, ever pursues litigation related to the PROJECT which seeks to impose liability for defects that were known to the HOA at the time this Agreement was executed by the HOA, then the HOA will defend, indemnify, and hold harmless DEVELOPER, BUILDERS and DESIGN PROFESSIONALS and their insurers with respect to such litigation.

The construction defect claims set forth in the Association's Chapter 40 Notice involve construction defect claims that were known and asserted in the Prior Litigation and/or are related to the construction defect claims asserted in the Prior Litigation. **Therefore, on behalf of our clients/Respondents and pursuant to the Settlement Agreement in the Prior Litigation, we hereby tender their defense and indemnity to the Association.**

We look forward to your response to our tender.

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Peter C. Brown

pbrown@bremerwhyte.com
PCB

EXHIBIT 6

Law Offices of
LYNCH HOPPER, LLP

CORPORATE CENTER
1210 S. VALLEY VIEW BLVD, STE. 208
LAS VEGAS, NV 89102
PHONE: (702) 868-1115
FAX: (702) 868-1114

7 WATERFRONT PLAZA
500 ALA MOANA BLVD., STE. 400
HONOLULU, HI 96813
PHONE: (808) 757-9222
FAX: (808) 440-0694

FRANCIS I. LYNCH, ESQ. - LICENSED IN NV
CHARLES "DEE" HOPPER, ESQ. - LICENSED IN NV & TX

OF COUNSEL
LOREN TILLEY, ESQ. -LICENSED IN HI

11/28/16

Dear Mr. Brown:

This responds to the tender of defense submitted by your clients to the Association, as set forth in your letter dated September 26, 2016.

As we understand it, your tender is based on Paragraph 4 of the settlement agreement by which the prior lawsuit by the Association against your clients was concluded, which provides in relevant part:

> The HOA agrees to defend, to indemnify, and to hold DEVELOPERS … and their insurers harmless from any liabilities, claims, demands, damages, costs, expenses and attorney's fees incurred as a result of any person or entity, including the HOA's insurers, asserting any claim asserted by the HOA….

The Association respectfully declines your tender of defense for the following reasons. First, no "claim" has been asserted or is currently pending against your clients, so there is nothing to defend or indemnify.

Second, there will be no obligation under the above provision to defend or indemnify your clients even when the Association does file suit against them. Case law makes clear that the purpose of indemnity is to protect the indemnitee from claims by third parties, not claims by the indemnitor. And, consistent with the purpose of indemnity, the above provision obligates the Association to indemnify your clients for claims by third parties, such as the Association's members or insurers – who may "[assert] any claim asserted by the HOA" – which is a standard provision in settlement agreements used to settle construction defect suits filed by homeowners' associations.

Moreover, the contention that the Association is obligated to defend your clients is entirely inconsistent with the release contained in Paragraph 5 of the agreement. Because the release is for "known" claims only, it was expressly contemplated by the parties that the Association would have potential future claims against your clients. It would be inaccurate to interpret the settlement agreement as requiring the Association to indemnify your clients for future claims brought against them by the Association, when such future claims were expressly contemplated by the agreement.

Nonetheless, we will be tendering your clients' suit against the Association to the Association's insurer. In doing so, we will also tender your tender of defense. If for some reason the insurer decides to accept your tender of defense, we will let you know.

Sincerely,

LYNCH HOPPER, LLP

Francis I. Lynch, Esq.

Electronically Filed
8/19/2020 10:58 AM
Steven D. Grierson
CLERK OF THE COURT

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

APRIL 23, 2019

RECORDER'S TRANSCRIPT OF HEARING RE

MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

For the Plaintiff: JEFFREY SAAB, ESQ.
DEVIN GIFFORD, ESQ.

For the Defendant: MICHAEL GAYAN, ESQ.
FRANCIS LYNCH, ESQ.
SCOTT WILLIAMS, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

TUESDAY, APRIL 23, 2019 AT 9:38 A.M.

THE COURT: Okay. Let's go to Hallier. Laurent Hallier versus Panorama Towers Condominium Unit Owners Association, case number A16-744146-D.

MR. SAAB: Good morning, Your Honor. Jeff Saab on behalf of the Plaintiffs.

MR. GIFFORD: Devin Gifford, bar number 14055, on behalf of the Plaintiffs.

MR. GAYAN: Good morning, Your Honor. Michael Gayan on behalf of the Defendant and Association.

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

THE COURT: Okay. We gotta get Mr. Williams on the phone.

MR WILLIAMS: Hello.

THE COURT: Okay. Mr. Williams, are you on the phone?

MR. WILLIAMS: Yes, I am, Your Honor.

THE COURT: I –

MR. WILLIAMS: Good morning.

THE COURT: -- just – I just called the Hallier versus Panorama Towers Condominium Unit Owners Association, case number A16-744146-D. Counsel here has identified – have identified themselves but I'd like them to do it again and everyone identify who you're representing.

MR. GIFFORD: Devin Gifford on behalf of the Plaintiff's, Counter Defendants.

MR. SAAB: Jeff Saab on behalf of the same parties.

MR. GAYAN: Michael Gayan on behalf of the Defendant and Association.

MR. LYNCH: Francis Lynch on behalf of the Defendant and Association, Your Honor.

THE COURT: Okay. Mr. Williams.

MR. WILLIAMS: And Scott Williams appearing for the Homeowners Association.

THE COURT: Okay. And, Mr. Williams, can you hear everybody okay?

MR. WILLIAMS: Well, it's not great but I'll do my best.

THE COURT: Okay. Well, I'm gonna just go ahead and ask the attorneys just to remain seated, make sure that microphone is close to you or if you want to use the podium and keep the microphone close to you I'm okay with that too. So, you will not offend me if you remain seated.

Okay. This is the Plaintiff's and Counter Defendant's Motion for Summary Judgment Pursuant to NRS 11.200 – wait, 202 subsection 1 and then we've got Defendant's Conditional Countermotion for Relief Pursuant to NRS 40.695 – well, subsection 2. I don't think I've ever had a conditional countermotion. Anyway, it's the Plaintiff's show.

MR. GIFFORD: Thank you, Your Honor. Your Honor, we filed this Motion for Summary Judgment under NRS, as you said, 11.202 as amended by AB125. It states: "That no action may commence more than six years after substantial completion of the project." There's there pertinent dates as part of our motion, there's one substantial completion dates of the two towers which are January 16th and March 26th of 2008.

THE COURT: Well, now, I will say there was a rub by the – the Homeowners Association –

MR. GIFFORD: Sure.

THE COURT: -- that a genuine issue of material fact remains because you didn't assert all three of the triggering dates for substantial completion.

MR. GIFFORD: Sure. So, I'll just address that now, Your Honor. So, in our motion under Exhibit C and D we included certificates of occupancy and certificates of occupancy for the two towers themselves they actually have the issuances dates for the certificate of occupancy in addition to the building's final completion dates. Now, with regard to those with a completion, you know, I know that they – I know that counsel – they had an issue with us, you know, showing – we don't have enough information, we haven't provided that, but the problem is, Your Honor, there are no notices of completion that were recorded for these buildings themselves. If they were recorded they would have been recorded in the recorder's office as per NRS 108.228 and we looked – we scoured those records, Your Honor, they do not exist. Those are optional – those are optional documents that don't even have to necessarily exist in every case. They're used by owners to put parties on notice that the time to file a lien has begun. For the towers themselves they don't exist and the fact that these the Association's counsel hasn't provided any documents or any other arguments other than simply we haven't provided enough isn't enough under the *Wood v. Safeway* case. They have to actually show some material dispute and show some facts or some more than a scintilla of fact that – that could exist.

THE COURT: Okay. So, we have a – I'm just looking right now at Exhibit C to the motion and it has a C of O with respect to one of the towers --

MR. GIFFORD: Correct.

THE COURT: -- and it shows a building final of March 16, 2007 and an issued date of January 16 of 2008.

MR.GIFFORD: Correct. And then Exhibit D would be for the tower two and it's the same --

THE COURT: Correct.

MR. GIFFORD: -- situation.

THE COURT: Okay. Let me just get to the statute real quick.

MR. GIFFORD: Sure.

THE COURT: Okay. All right. So, the date – date of substantial completion of the improvement – by the way, I didn't have my book at home when I was reading through this last night.

MR. GIFFORD: No problem.

THE COURT: Okay. "It shall be deemed to be the date of substantial completion of the – of the improvement to the property shall be deemed to be the date on which (a) the final building inspection of the improvement is conducted, a notice of completion issued for the improvement or a certificate of occupancy is issued for the improvement whichever occurs later." Now enlighten me, isn't a notice of completion usually issued prior to the certificate of occupancy?

MR. GIFFORD: Yes. So, it's the later of three days.

THE COURT: Right.

MR. GIFFORD: And so we were trying to exercise all caution, we looked up the recorder's office, we called the recorder's office, they don't exist. And, Your Honor, even if they did in order to affect our analysis under the motion they would have to be issued after February 24, 2010 because that – that's -- in that period that wouldn't impact it. Even if they were issued after which they weren't and they don't exist they would have to be issued at that point. Even then – even if they were issued the Association still had to have filed their claims before the tolling period ended that they were granted. So, it's not a material dispute with respect to the substantial completion date. There's no dispute that those were the actual dates.

THE COURT: Okay. If we were to use the C of O issue date – by the way,

when I say certificate – C of O I mean certificate of occupancy which you got attached at Exhibit C and D to your motion --

MR. GIFFORD: Correct.

THE COURT: -- if we were to use those dates which are – one is January 16 of 2008 and March 26th of 2008. Now, one thing you had indicated in your motion is that you pointed out, well, the six years would have run anyway but the problem I'm having with that analysis is that we have to go with what the – what the statute of repose was before 2015 which would be six for latent defects – or patent defects, eight for latent defects and then ten for those defects that the contractor knew or should have known of course then it changes to the six. So, I don't – I don't consider them dead or that the statute of repose ran before AB125 came into existence –

MR. GIFFORD: Right.

THE COURT: -- okay?

MR. GIFFORD: Right.

THE COURT: Because you haven't shown me that these are all open obvious conditions which then six-year statute of repose under the old statute would have --

MR. GIFFORD: Right.

THE COURT: -- run. Okay. So, then we talk about the year grace period and then any tolling provisions after that.

MR. GIFFORD: Right.

THE COURT: Okay.

MR. GIFFORD: Right. So, no, I think the argument – and I understand your position, Your Honor, it's just that there aren't any of the notices of completion and

without – without those in existence we can't – we can't assume that they exist, you know what I mean?

THE COURT: Okay.

MR. GIFFORD: You know what I mean? So, they haven't really met their burden to refute that. All these are public records and, you know, any one of us can go on-line and look up the recorder's office records and find those and they just don't exist.

THE COURT: Okay.

MR. GIFFORD: Okay. So, moving on, Your Honor. We kind of passed that issue. Another issue that the Association had with our motion is that we didn't argue the accrual date as a material issue of fact that – so we can't – you can't [indecipherable]. But again, the accrual date if you remember in section AB125, section 21, subsection 6 says that the accrual date – if there's an accrual date – if the accrual of a parties' claims occur before the enactment of AB125 then that party would otherwise lose their rights for their claims because of the -- retroactive ability of the – of the statute repose then they actually get a grace period. Well –

THE COURT: Right.

MR. GIFFORD: -- we're not necessarily disputing that their claims accrued back in 2013. And actually the fact that we're not disputing it helps them out because the alternative is there's one or two options, right? So, there's (1) the accrual date occurred before inaction of AB125 or (2) it occurred on or after that date. If it occurred on or after that date the law says that they lose their claims, there is no grace period. If they accrued before – and then again [indecipherable] right? So, if they accrued before, which is what they're asserting in this case, then, yeah, they get the grace period but we're not disputing that there's a grace period

that's applicable. So, if that's not a material issue of dispute really that would affect the analysis anyway.

THE COURT: Okay.

MR. GIFFORD: One thing, Your Honor, is that the Association has also mentioned that, you know, their – by virtue of them serving a Chapter 40 notice that that was commencing their lawsuit, but the law –

THE COURT: No, it's not commencing the lawsuit but it does toll any limiting provisions.

MR. GIFFORD: Right. And I just wanted to clarify it because their motion although they kind of back track and say something else, but they kind of mention, well, notice – Chapter 40 notice itself commences the lawsuit and I wanted to make sure that was clear because there really is no dispute about that with your prior orders, with other cases, and even they make some judicial admissions in their oppositions. For instance, (1) they say – and this was their opposition to the MSJ regarding our – the amended Chapter 40 notice. They said: "No notice or opportunity to repair was required before commencing their own action to recover for construction defects." By way of their answer and counterclaim the Association filed such an action. So, they have these admissions in their pleadings, I don't really think there's really any dispute that commencing a lawsuit is different than serving a notice under the rule.

THE COURT: Well, I – I don't know that I – we – I know we're talking form over substance, but I view the service of the notice on February 24 of 2016 as at that point tolling because they did it on the last day –

MR. GIFFORD: Right.

THE COURT: -- it tolls until the completion of the Chapter 40 process. Now,

of course that puts the homeowners association basically on notice that, you know, they've gotta pull the trigger on filing a – instituting litigation on the last day – or that the tolling – by the last day of the tolling provisions, you know, ceasing.

MR. GIFFORD: Right. Right. And I think – you're right, I think it is form over substance, it's just I do want to have a record where it was unclear that we have – we had a Chapter 40 notice, yes, which we agree will toll the statute under the right circumstances but there's also this other element, this later element of commencing a lawsuit. We just want to make sure that that was clear in front of the Court. I don't really think there's any dispute about that.

THE COURT: Okay.

MR. GIFFORD: Okay. Now, with regard to the tolling, Your Honor. I know you've mentioned it. The Association claims that by virtue of their serving the Chapter 40 notice within the grace period they get the benefit of tolling to save their late filing of the lawsuit. This is the [indecipherable] Your Honor, because (1) NRS 40.695 provides that statutes of limitation or repose are tolled from the time notice of the claim is given. Now, the grace period that's found in AB125 that is – that is not codified in any statute that is only found in AB125. It's just part of the bill and an assembly bill is not a statute so you can't – the tolling provision of NRS 40.655 it can't apply to toll the grace period. It's a completely separate distinct element, right? And you've agreed with that in your Sky order. In the prior case you said – I quote: "The grace period does not toll the statute of repose. Nothing in section 21, subsection 6 of AB125 indicates that the grace period is subject to tolling." Your Honor, there's – there was no tolling in this case and that's one of the primary arguments that we've tried to convey in our motion is that when the Association served their Chapter 40 notice during the grace period that did not seek to toll the

statute of limitations because by that time the statute of repose –

THE COURT: Now, we're –

MR. GIFFORD: -- had already –

THE COURT: -- talking –

MR. GIFFORD: -- expired.

THE COURT: -- about – okay. Now, are we talking about statute of repose or statute of limitations here?

MR. GIFFORD: I apologize, Your Honor. I misspoke.

THE COURT: Right. Okay.

MR. GIFFORD: What I'm referring to today is the statute of repose.

THE COURT: Okay.

MR. GIFFORD: Right. So, the minute that AB125 became effective the ten year – potential ten-year statute of repose period went down to six years immediately. Now, there was no action by the – by the Association before the enactment of AB125. So, when they served their Chapter 40 notice during the grace period that did not toll the statute of repose. It couldn't have because the statute of repose had already expired. That period was already way before that. So, by serving that notice they can't toll a statute that doesn't exist. And that was the – really the point we're trying to convey. You have – you have a statute of repose that because of the – because of the shortened statute of repose it would have expired in 2014 as of February 23rd of 2015 when AB125 was enacted.

THE COURT: Well, that's if – if the six-year statute of repose – well, I don't know that I agree with that part on it, but I think the fact of the matter is it – see, if there was a statute – if the statute of repose was six years only before like – now, I'm talking about for example if they had a patent defect and they didn't act on it

within the six years well then it would have expired two years before AB125 came into existence but we're not getting – I'm getting the sense that you're not contesting at all, you're just assuming, hey, it is the ten year for purposes of this motion.

MR, GIFFORD: Correct. Yeah. No, we're not – we're not arguing it's six, ten, eight years, what I'm saying is that it doesn't really matter because the minute that AB125 became effective and no action was taken by the Association it all of the sudden became six years.

THE COURT: And then they have to safe harbor to file their lawsuit or to –

MR. GIFFORD: To file –

THE COURT: -- institute –

MR. GIFFORD: -- the lawsuit. Right. To commence their action. Right. And that's the point that we're trying to convey, they did not commence their action in that period of time. They should have. And they're arguing that they get tolling in this case because they served their Chapter 40 notice within the safe harbor. And the point is, Your Honor, that serving it in that period alone by itself does not toll the statute of repose. If you serve it during the statute of repose, yeah, you get that. In all the cases before us -- we have the *Foster* ruling and your analysis was consistent with that. In *Byrne*, Judge Scotti – I know this is not, you know, binding but Judge Scotti said the same thing. In *Lopez* – it's consistent with the Lopez ruling, it's consistent with *Dykema*. As long you serve your Chapter 40 notice during the repose period you get the tolling. And I'm not arguing they couldn't. If they had served their Chapter 40 notice the day before AB 125 was enacted assuming there was a ten-year statute of repose period, then, yeah, they would have gotten the tolling. They would have gotten it but they didn't, they missed it and they had to file their lawsuit with that one year.

THE COURT: Okay. I understand your position.

MR. GIFFORD: Okay. Now, Your Honor, even if you agree that there was tolling that was allowed in this case, even if you agree that that was their position, it doesn't really matter –

THE COURT: So, I'm gonna have to go back and read what I did before because I –

MR. GIFFORD: Right.

THE COURT: -- did an awful lot of research at the time.

MR. GIFFORD: Right. Right. And you did – and your analysis in the *Foster* case in your original ruling was that you can't toll something that had already expired and that was exactly what Judge Scotti said. It was the same exact – it was the same exact statement. And I – and I agree with that analysis, it's consistent. And agreeing with that analysis today wouldn't be inconsistent with any of those other rulings.

Now, even if they get to tolling, even you give them the benefit of the doubt the fact is they still missed their deadline for the tolling period. So, the first thing is that we have to realize, okay well, let's assume they get the tolling, let's assume they got it, what would be the applicable tolling period? Well, under 40.695, the new statute, it says that it's the earlier of thirty days after mediation or one year. So, it's a maximum of one year. Well, February 24, 2016 is when they served their Chapter 40 notice, one year would be a year from that but the mediations case was actually September 28, 2016 so thirty days after that October 28, 2016. That was the earlier of the two dates. So, that would be the applicable statute of repose – excuse me, that would be the applicable tolling period if they had gotten it. Now, during that time, September 28th to October 28th, they didn't – they didn't bring their

lawsuit. They missed it. Not only by – when they say in their briefs, oh well, we missed it by five days, no, they missed the one year rule, the one year mark by five days. They missed what would have been the tolling provision by four months. And in *Sky* you – it was the same set of facts. You said, look, even if I give you the benefit of tolling you missed by two weeks. Sorry, you're out of luck. Well, that's exactly the situation here except in this case their conduct is more egregious; they missed it by four months. So, all we're asking you to do is look at your Sky ruling and agree with that ruling. It's exactly on point with what we're here to say today.

Now, I want to address a couple of the arguments on response that the Association has made. They – they made – and I'll give them credit, it's creative I think but I think it's a little bit far-fetched. It's this relation back doctrine as applied to compulsory counterclaims. I mean, first if you were to agree with that premise, agree with that argument as a whole you would have to agree with two premises. You'd have to agree with two arguments. (1) That their affirmative claims for construction defect were (1) compulsory, compulsory against our deck relief action and (2) that because they are compulsory they relate back to the date of our filing of our complaint. Well, first of all the Association's affirmative constructive defect claims are not compulsory against our claims. There is a Nevada case specifically on point that says that – it was – it was the *Boca Park* case and it says: "That, look, counterclaims to declaratory relief actions by nature they're not compulsory, it's just by the nature of deck relief action." It doesn't preclude you from bringing later actions, it's not claim – counterclaims are not claim precluded from that point. So, there's – only that is a direct Nevada Supreme Court case on the issue. And (2) it doesn't – the factual basis behind both – our complaint, the Builder's complaint and the Association's affirmative complaints, it doesn't meet the logical relationship test

that was established by the Ninth Circuit. In that test it says: "That test is satisfied with a substantial overlap between the facts to the claim – when there is a substantial overlap between the facts of the claim and counterclaim." Now, in the Association's briefs all they say is that our claims are compulsory because they arise out of the same transaction or occurrence as the Builder's motion – as the Builder's complaint. That's all they say, they don't provide any analysis whatsoever. Well, if we think about this from a temporal standpoint, if you look at the facts of our motion – of our complaint which was a deck relief action it sought the – it sought the – it – (1) the sufficiency of the notice, the February 23, 2016 notice, and it also – it attacked – it sought the determination of the current rights and obligations of the parties based on the fact that there was a prior settlement agreement. So, we have these factual elements that would be proved at trial that exist in this – this time period and then you have their – the Association's counterclaim for a construction defect action. Those facts – in order to prove those facts they're going to have to rely on facts that occurred more than twelve years ago. Those facts where whether the building was designed as intended, whether the building was constructed as designed. Those questions are all completely isolated from is happening in the factual focus of our motion. So, just by virtue of that they don't meet the logical relationship test at all.

Now, even if you would agree that the – for some reason if the counterclaims were deemed compulsory in order to buy that argument you'd still have to agree that the Builder's claims relate back. Now, Nevada does have relation back, they have a relation back doctrine but it applies to one's own pleadings. If I were to file a complaint and I file an amended complaint, that amended complaint's date of filing would be deemed related back to the original

complaint. It doesn't cross party lines. It doesn't –

THE COURT: Wow, I never thought about that, cross party lines. Okay. Go ahead.

MR. GIFFORD: Right. So, it doesn't – so – and not only that like just from a logistical standpoint it doesn't really make sense and there's no law that really supports it, but at the same time there is a law that specifically does not support it and it's the – sorry, *Nevada State Bank v. Jamison* case. That case is directly on point. It actually couldn't even be clearer. So, it says: "Instituting an action before the expiration of the statute of limitations" – which would be the Builder's complaint, "does not toll the running of that statute against compulsory counterclaims filed by the defendant after the statute has expired." So, right there you have a very clear holding from the Nevada Supreme Court. That case has not been overturned. There's nothing in that case that limits that those – that – the applicability of that law to the facts of that case at all. It's good law and it's directly on point. So again, even if you agree that the claims are compulsory you still have to agree that – that they relate back, but that would be contradictory to what the Nevada Supreme Court clearly stated in a very clear opinion.

And again, just to go back to *Sky* for a moment. Your Honor didn't rule that those claims – it was the same set of facts whereas the Builders in that case they filed a complaint a couple days after the mediation. There was an answer and counterclaim for construction defects by the HOA; they filed that claim two weeks after that deadline. There was no – there was no ruling that those are compulsory counterclaims and they relate back to the filing. They were out of luck. So, it's – you know, ruling in that way would be consistent with what you ruled in *Sky*.

THE COURT: Did I even address that in the Sky case? I pulled it up.

MR. GIFFORD: Right. And I don't even know if it was – if it was addressed. It wasn't in your order specifically.

THE COURT: Okay.

MR. GIFFORD: So, it wouldn't – my point is that -- it's not that it would be consistent it's just that it wouldn't be inconsistent. Does that make sense?

THE COURT: Right.

MR. GIFFORD: Okay. Now, based on the foregoing, Your Honor, I think – I think it's more than appropriate to grant summary judgment in our favor because the facts are clear, the law is clear. There's no possibility that the Association can succeed on their tolling argument. Even if they could, even if they got the tolling, they still missed their filing deadline. They still missed the time in which they could have filed their lawsuit by virtue of that tolling period. They missed it by four months.

In addition, Nevada law clearly states that construction defect claims are not compulsory and they do not relate back to the Builder's complaint. The only other way the Association can succeed today is by successfully arguing with a good cause argument under NRS 40.695(2). That's the only other way they can succeed. And the problem with that is threefold. (1) They haven't – the Association hasn't provided any relevant case law or analysis in support –

MR. GAYAN: Your Honor, just – I hate to interrupt, but this – he's arguing our countermotion. I just want to make sure I get the last word on our countermotion.

MR. GIFFORD: [indecipherable]

MR. GAYAN: [indecipherable]

[Counsel was talking over each other – indecipherable conversation]

MR. GIFFORD: I apologize. I'm actually gonna – I have two more lines and I'm gonna let them argue their countermotion and then I'll respond to that.

THE COURT: Okay.

MR GIFFORD: I just was kind of setting the stage for that.

THE COURT: Go ahead.

MR. GIFFORD: (2) The good cause factor is addressed in the Association's reply brief deals with a completely separate issue of whether it is appropriate to serve someone with a complaint that's already been filed. It's under NRCP [indecipherable]. Completely inapplicable. And (3) the Association has not shown good cause as they say by diligently prosecuting this case. And by that, Your Honor, I will let that rest for now. Thank you.

MR GAYAN: Good morning, Your Honor. So, I want to take a step back. This is a 2016 case, September, 2016. We are approaching three years into the case. This is the Builder's fifth dispositive motion filed against our client over the course of the three years. The first one they asked Your Honor to compel us to amend our notice. We spent six months doing that, amended the notice. Your Honor has authored two extensive written decisions in this case on the Builder's prior dispositive motions and now we're standing here today and they're saying we were time barred from the outset. If that truly was the case and they believe that to be the case why was this not the very first motion filed? Why make us – why make the Association jump through hoops? Why make the Court waste its time? I don't – we've probably been over here – these hearings are always quite long -- and we appreciate the Court's patience, but probably fifteen to twenty hours between all the hearings we've had over the years of this case and that doesn't even count the Court's preparation time, then my client having to go amend the Chapter 40 notice, come back, litigate all of these other issues when the Builders now say we were time barred from the day this case started.

I think that's pretty telling about what the Builders actually believe about this motion. I don't know why they would have wasted all the time – their time, they don't work for free. This isn't a pro bono case; everybody's putting a lot of time and effort into the case. And so to bring a motion like this three years into the case practically – we have a special master appointed, a CMO [indecipherable] the parties are – we have a depository opened. The Builders have been demanding documents at recent special mater hearings. Mr. Lynch has been chasing down documents with the HOA's prior counsel, we've been producing documents, we've been doing inspections. It's pretty ridiculous to come in – frankly in my opinion to come in here, you know, with three years into the case after all this work has been done by the parties and by the Court and to say we were time barred at the very beginning and we shouldn't even be here and it's all been a big waste of time. So, I think that's pretty ridiculous and a window into what the Builders actually believe about this motion.

As far as the procedural problems that they have, it's in our papers – I think it's pretty clear; the Builders did not meet the Rule 56(c) requirements when they filed this motion. And those are important requirements and it's straight from the rule -- and I'm looking at the old rule, I know it's changed but this motion was filed with the old rule and I don't know that it's changed substantively a whole lot but, you know, they moved a lot of sub parts around so I don't know if it's still 56(c), I didn't check that. But, in any event, 56(c), they actually have to present with admissible evidence, admissible evidence – and that's important, I'll get to that in a minute, and demonstrate to the Court that there are no genuine issues of material fact related to the particular issue and so they're coming in here on a statute of repose. Well, let's go look at what that motion – or what that relief requires. And

we're looking at AB 125 subsection 6(a), whatever -- I can't remember, 21(a)(6) or something I think it is, and we have to look at substantial completion and we have to look at accrual and so that's what we put in our opposition and the Builder's response to their shortfalls on their own burden are way off base. My client has no obligation to come in and supply facts to refute something that they never even proved in the first place. The rule itself and all the cases interpreting it say the moving parties' initial burden is to supply all of the necessary undisputed facts and only when that happens does the burden shift to my client, the non-moving party, to respond with admissible evidence to show there is a genuine issue of material fact.

So, for the Builders to argue here today and in their papers and say that we had some obligation to put forth the evidence of when the notice of completion was done or the accrual date. They were almost saying -- that just completely misses the mark.

THE COURT: I do have a – one thing I did think about, Mr. Gayan, on this one though is they've got two of the days for these buildings. They've got the first one and the last one; the final building inspection date and the certificate of occupancy. The one that they're lacking is the notice of completion and they're just – they're telling me they can't find it. But, one thing that strikes me is that, you know, we instruct jurors, whenever they are in the jury box; you don't leave behind your everyday common sense. And it doesn't make sense to me that a notice of completion would be years after – would be the – come later, you know, years later possibly after the C of O. It seems to me that it would have come down about the same time and typically in my experience it is even a few days before the C of O is issued. So, I mean, can't I just look it and say, you know, isn't this getting into the – oh gosh, I'm losing the – what they – in fact, I'm gonna go back to my Sky motion on

the standard of review where –

MR. GAYAN: I understand what the Court is saying. [indecipherable]

THE COURT: That it's –

MR. GAYAN: [indecipherable]

THE COURT: Yeah. It's basically are we into the gossamer threads of whimsy speculation and conjecture now as to where the notice of completion would be? I mean, I can't speculate that it would have been years later when people are in the building.

MR. GAYAN: I'll – I'm happy to address it.

THE COURT: Sure.

MR. GAYAN: Gossimer threads of whimsy and conjecture, those are once the burden has shifted. The burden has not shifted, they – there's three dates that must be provided and it's the latest of those three. I'm not asking the Court to speculate about anything. And I understand the Court's urge in what we tell the jury to bring their common sense, but frankly we're here at a Rule 56 hearing. The jury is the fact finder so two – two completely separate roles I think. And once we get to a jury everybody has had a full opportunity to do discovery and if the evidence isn't there they can infer whatever they want to infer. The Court should not be inferring things and actually everything is supposed to be taken into the light most favorable to my client and I'm not saying – I'm not asking the Court to assume it was two, three, five years later. I'm not sure – you know, that's not the Court's role here today but at the same time the Court shouldn't be speculating that it was around the same time as the certificate of occupancy even though that's what's normally done.

And I'm gonna turn to what the Builders have said. So, it's not on the notice of completion date. In their reply which was too late, too late to bring up new

evidence on a motion for summary judgment, robbed my clients of any opportunity to respond to the new evidence. And I just want to point out really quick, Your Honor. It was a 17 page motion with like 50 or 60 pages of exhibits. Their reply was 30 pages with 110 pages of exhibits on a motion for summary judgment. Think about that for a minute, all of the new argument and evidence that they're trying to put in. Now, on this notice of completion issue all sorts of new documents and a Builder's affidavit from counsel. That is not admissible evidence. Further, Rule 56 requires any affidavits submitted in support of this motion for summary judgment to be based on personal knowledge. Take a look at the Builder's affidavit; it says someone in my office did this. Well, that's not personal knowledge, that's, okay, I told someone else to do something and they looked on-line and they searched records and they made some phone calls. That's not personal knowledge, that wouldn't come in at trial, that's not admissible. So, we've got a major objection to the Builder's affidavit and the new information in evidence being supplied on reply when it should have been and it was required to be by a rule in the motion to even shift the burden to my client in the first place. So, that's a major procedural error, I think it precludes summary judgment outright. Now, I understand they could fix it and we could come back here. I get that. So, at least – so my client has an opportunity to respond, maybe leave for a sur reply and continue the hearing if the Court is open to that rather than making – and re-file the whole motion. We would be open to something like that because we don't want to waste everybody's time of course, but I think it is a pretty significant issue from a procedural standpoint and them asking to throw our whole case out when the burden was never actually shifted due to the lack of sufficient evidence.

As far as the accrual goes, I understand his position that it's better for

us to assume that it's better for the Association for the Court to assume that accrual happened before AB 125's enactment. I get that. That was more of a ticky tack pointed out thing that -- it just wasn't in their motion either. Both of the thing that were acquired to determine what the statute of repose is and whether the HOA timely brought its claims, they didn't have sufficient evidence for either so it was just a deficient motion from the outset and that was really the point being made there. We obviously believed and acknowledged that the claim accrued for a statute of limitations purposes which is what the accrued, and the grace period part of AB 125, that's what it's referring to and that's in the *Alsenz* decision where they're talking about the constitutionality of retroactive statutes of repose and limitations, specifically repose and that you need a grace period. And *Alsenz* followed that older *G and H* case where – where they struck down the retroactive statute of repose because there wasn't a grace period. Fast forward a few sessions. The Legislature learned its lesson and put the grace period in and then in *Alsenz* the grace period was enforced. So in any event, just procedurally the evidence they needed to supply to support this motion was not in the motion. My client had no opportunity to respond to a properly brought Rule 56 motion. The burden then was shifted to my client and we had no obligation to help – help the Builders and supply information when that burden was not met. I just wanted to state if for the record since it was also in the reply, it's on page 4 of the reply, their purported table of undisputed facts. There's all sorts of legal conclusions based into those, we just object to anything, you know, saying that a certain date was the date of substantial completion. That's for the Court to decide based on the evidence and the evidence wasn't actually provided until the reply and then also when the HOA commenced the action. So, we just want to lodge some objections there for the record since this

a dispositive motion.

Your Honor, I'm happy to take a break and ask if you have any questions before I get to the substantive issues.

THE COUR: Did you guys want to take a break?

MR. GAYAN: No. I'm just taking a pause --

THE COURT: Oh, okay.

MR. GAYAN: -- in case you have any questions.

THE COURT: No.

MR. GAYAN: Do you want to address your conditional countermotion comment? You never had one. It only matters if the Court buys into their motion in the first place and that's why it's conditional. We don't – we don't need relief under sub part two of the tolling statute unless you think we're already time barred. Anyways, that's why it's conditional.

As far as the substance of the Builder's motion, if we get to that, they're essentially – what I understand from the papers and what I think I have heard here today is that AB 125 immediately -- upon its enactment immediately shortened all statutes of repose to six years and the HOA does not get the benefit of the grace period. That is – that's just not what – not – we don't get the full benefit of the grace period. AB 125 definitely does not stand for that proposition. And it's – I think it's in the papers but I just printed a copy here since it's easier. Yeah. This is section 21, sub 6(a). Now, sub 5 is – of section 21 here in AB 125, is the section that applies to the new six-year statute of – or essentially repose retroactively, okay? So, sub 5 is the retroactive part of the law. Sub 6 says: "The provisions of subsection 5" – which are the retroactive portions, "do not limit an action (a) that accrued before the effective date of this act and was commenced within one year after the effective

date of this act." And then the other subsection relates to contracts so I'm not sure that one applies. But, we're talking about accrual and commencement within a year. So, the way the grace period actually reads, the retroactivity and the new statute of repose, six years, does not apply if the action is commenced within one year. So, the Builder's argument that it immediately applied. No, AB 125 specifically says it does not apply if the Association's complied with the requirements for the grace period which was to commence to the action within a year and we did. And I'll get to that in more detail here in a minute. But what the Builders are trying to do is completely unconstitutional under *Alsenz*. It's cited on page 9 of our opposition, we didn't discuss the constitutionality argument fully but we did say it is a constitutional problem what they are asking the Court to do. And I'm just gonna read a short blurb from *Alsenz*. This is page 1123 of the decision, this is the conclusion: "Therefore the Legislature must allow a grace period for a claimant to file an existing cause of action, without such a grace period SB 105 is unconstitutional." So, that's essentially what the Builders are asking this Court to do, to ignore the full one-year grace period and they're arguing that there was no grace period left to toll at the time we served out Chapter 40 notice. That is just wrong. As a matter of law *Alsenz* is very clear and binding, we get the full opportunity of the grace period whenever a statute of repose is retroactively applied and shortened which is what happened here.

I think I heard the Court say the Chapter 40 tolls. So, I think – and if I'm wrong I'm happy to address that in more detail. I'm just hoping to skip over that.

THE COURT: Well, in fact I'll just – I'll just kind of read my Sky View, paragraph 11: "While the statutes – while the statute of repose's time period was shortened NRS 40.600 to 40.695 tolling provisions were not retroactively changed.

That is statutes of limitation or repose applicable to a claim based upon a constructional defect governed by Chapter 40 still toll deficiency causes of action from a time the NRS 40.645 notice is given until thirty days after mediation is completed or waived in writing."

MR. GAYAN: I have no – nothing else to say.

THE COURT: Okay.

MR. GAYAN: That is what the law is; I think that's an accurate statement of the law. So, now the Builders little trick around the tolling provision is, well, the grace period wasn't codified, it's not actually in the NRS and so it wasn't tolled because 40.695(1) only says it tolls statutes of limitations or repose. Well, that's just nonsense. I looked up the definition of statute of repose; it's any law that limits the time in which a party can bring an action against a defendant from the time the defendant acted. Any law, it doesn't matter if it was codified. And let's think about it practically, why would the Legislature codify the one-year grace period? Why would it go on the books forever when it only applies for one year? If you go back and look at SB 105 and *Alsenz* they didn't codify there either. But – so, that's kind of a ridiculous form over substance argument. It's getting way into the weeds saying that the grace period isn't technically a statute and so it can't be tolled. That's just wrong. Then let's – practically those grace periods are not codified because they're – they've got a one year fuse on them why put them on the books forever. Then from a legal standpoint, not practical but legal, the grace period is an extension of the statute of repose. It specifically relates to the statute of repose, it's required for a retroactively shortened statute of repose. It is essentially its own mini statute of repose for one year because it's required under the due process clause of the Nevada Constitution. So, it is its own little statute of repose. To say it's incapable of

being tolled at all because it's not a statute is just wrong and incorrect on a number of levels and frankly unconstitutional and in violation of *Alsenz* and Nevada law.

And, Your Honor, I'm gonna point out – I don't know if you have the papers in front of you, but the Builder's reply, Exhibit K – I thought this was interesting. And this is a copy of their complaint. I don't know if Your Honor has that –

THE COURT: I do. Right here

MR. GAYAN: -- but – okay. So, I'm looking at paragraph 30 on page 6. This is the section where the Builders are talking about the grace period, paragraph 29 is talking about the grace period and what it does and basically quotes it right there. But paragraph 30 is the interesting part and it's really near the end of the second line but I'll read the whole allegation. This is the Builder's allegation: "Plaintiffs are informed and believe and thereon allege that in order to be able to rely on AB 125, section 21(6)(a) one-year grace period" – and this is the interesting part, "Defendant was required – the HOA was required to provide a Chapter 40 notice to the Plaintiffs prior to the effective date of the act, February 24, 2015, and to commence any lawsuit with regard to any unresolved claims prior to the expiration of AB 125's one-year grace period." So, that's the first part of that. The allegation is that to take advantage of the grace period the HOA had to serve its Chapter 40 notice before AB 125 became effective. I don't see that in any of their papers here today so I don't know how you move for summary judgment on a complete – for deck relief on a completely different theory than what you've alleged in your complaint. They – they have gone away from this for some reason. I think it's an incorrect statement of the law, I don't think there's anything that would require – in AB 125 that required the HOA to – to – in order to take advantage of the grace period we had to have served

the notice before AB 125 was even enacted. How – I mean, now you're going back to *Alsenz*. The parties have to have notice of a change in the law before they can act. So, to say we have to act and predict what the Legislature is gonna do, that they might pass AB 125 so we better hurry up and get a notice out that's just absurd. So, I think that's why they've completely gone away from what they're alleging in their complaint in paragraph 30, now they're arguing something completely different. So, from a – also from a procedural standpoint I'm not sure they can actually do that, allege one thing and move for summary judgment on another.

So, Your Honor – and I apologize, this is – I know this is a fairly important issue for my client's case dispositive so I do want to make a bit of a record. But I think the statutory analysis and issues, even though it looks complicated with all the paper, it's relatively simple. I mean, the first question – I think it's really three questions and the answers to those three questions [indecipherable] but does the grace period apply from AB 125? I think the answer based on the evidence is yes. Did NRS 40.695 sub 1 did it toll when the HOA served its Chapter 40 notice? Based on what Your Honor read before, we've already talked about, that's a yes. And the last thing is did the HOA bring its claims, its defect claims, before the tolling period expired? And the answer to that is yes as well and I'll get to that one in more detail. I think we've already covered the first two but really we're down to the third question which was also a yes but it's maybe the most complicated or most factually intensive one of the questions of the bunch.

So, Your Honor, it kind of comes down to we've got the notice filed, the pre-mediation process is going on, inspections happening, correspondence being sent back and forth. That time line is in our papers. The parties were working

together as they're supposed to, behaving and cooperating during the pre-litigation process. That was all happening. Then the mediation happened that – I think that occurred on September 26, 2016 if I recall correctly. And that mediation did not resolve any of the HOA's claims and it was two days later on September 28th is when the Builders sued the HOA. And -- the Builders and Mr. Gifford here today, they put in their papers, and he told you repeatedly because they really need you to believe this, that their complaint is only for deck relief. Well, I don't know if Your Honor still has Exhibit K open --

THE COURT: I do.

MR. GAYAN: -- or handy, but I'd just like to point out how wrong that is. There are two claims for deck relief here. The first claim is deck relief, the second claim is deck relief, the third claim failure to comply with Chapter 40 also deck relief seemingly, and that was their first motion they tried here and second. The fourth claim, suppression of evidence, spoliation. And that is – and the Association actually brought a – brought a motion to dismiss and said that's not an independent claim and the Court denied the motion because there's still Nevada law out there that says this could be construed as a poorly pled negligence claim. So, this isn't for deck relief, this is for substantive relief, for spoliation. And then even worse, fifth claim breach of contract and then there's deck relief, duty to defend, duty to indemnify. But flip it over, page 18 in their prayer for relief – second prayer for relief, for general and special damages in excess of $10,000.00. They're filing claims for damages against our client. So, this is not a deck relief complaint that was filed by the Builders. Not only -- this was deck relief and damages. And so that's pretty important especially to knock the argument out of the water that they're entitled some kind of an exception under *Boca Park*. And they cite *Boca Park*. That *Boca*

Park case, that has nothing to do with the HOA's counterclaims, it has everything to do with the Builder's claims. *Boca Park* just says you can file a complaint for deck relief, get some certainty on the issues that you're seeking in your deck relief complaint and bring your complaint for damages later. You can split the two because *Boca Park* was where a party did that. I think it was a tenant or a landlord,- I think it was a tenant, sought deck relief first, one, then went and filed a complaint for damages, jury trial in front of Judge Gonzalez, won at the jury trial and at the appeal and the Supreme Court said that's fine, that's what deck relief complaints are for so you can get some certainty before you go into some big blown up, you know, litigation that lasts three or five years or whatever and spend a lot of money. The parties can get certainty. So, you can split those up. But – let me find Boca Park [indecipherable]. Just to quote in Boca Park. I hope Mr. Williams can hear me; I'm trying to speak up and into the microphone. Okay. So, Boca Park – this is right in the introductory –

THE COURT: Well, counsel, I've got a question for you.

MR. GAYAN: Yeah.

THE COURT: On the fifth claim for relief they – I mean, they've got a deck action on just about everything else but they've got a breach of contract action on the settlement agreement. So, I haven't asked the Plaintiff yet, but I just assume that these general special damages in excess of 10,000 dealt with that. I mean, I haven't seen the settlement agreement, if there's a liquidated damage clause. I mean, I don't know what's there so --

MR. GAYAN: The whole – those claims, breach of contract and – it all relates to our Chapter 40 notice and the construction defect allegations. They're claiming that the Association breached the prior settlement agreement by asserting claims in

a Chapter 40 notice and they're claiming they were damaged by it and that there was some duty to indemnify and defend in that settlement agreement and so the HOA owes them all of their defense costs and has to indemnify them for any of the HOA's damages. That's what they're arguing. So, in their mind under their – the way they've alleged it here they're not just seeking deck relief on the duty to defend and duty to indemnify that they say exists for these claims, they're actually seeking those damages in this case. They're not just asking the Court to rule on the settlement agreement and what it means, they want their money. So, as far as they're concerned the bill for my client is running as we speak right now and their damages are just going higher and higher every day – every time they file a new motion. And now, you know, they're gonna ask to – my client to pay their defense costs even though they could have brought this motion the very first, right? So, now we've wasted two and half years of time on a simple statute of repose motion that could have been brought on a – on the – at the outset. So, I don't think their settlement agreement claims will prevail in the end. I'm not asking the Court to decide that today, you haven't even seen it, but in their mind they're asking my client to pay for all their defense costs for our own claims under this prior settlement agreement and then they choose to litigate in this manner and waste everybody's time and bring this simple motion fifth when it could have been brought first. So, it's certainly a claim and they've got at least two claims for damages, their prayer for relief seeks damages. This is not simply a deck relief complaint.

So, just to close the loop on the *Boca Park* issue. The holding right up front from Justice Pickering: "So long as the first suit only sought declaratory relief a second suit for contract damages may follow." So, the Builders have combined their deck relief and damages claims into one. They're stuck. This is their one shot

at deck relief and damages; they cannot bring a damages suit second. Now, what does that have to do with today? Nothing. So, I don't know why they cited *Boca Park*, it has nothing to do with counterclaims. Mr. Gifford said it did, it doesn't. It doesn't mention counterclaims; counterclaims have nothing to do with *Boca Park*, it has nothing to do with my client's counterclaims and whether they were compulsory, it's just about whether you can split deck relief from it – from damages and you can as long as there's a very clean split which we don't have here.

Then – now that that issue is resolved hopefully, Rule 13(a), and this is in our papers, requires a party – a defendant to file counterclaims as long as they are – it arises out of the transaction or occurrence that is the subject of the opposing parties' claim. Their entire complaint relates to our Chapter 40 notice and whether they've been damaged by us even bringing those claims. Their entire complaint relates to the Chapter 40 notice and they have substantive claims for damages related to our Chapter 40 notice. How in the world can they argue that our actual Chapter 40 claims which are the entire subject of their complaint are not related to or of the same transaction or occurrence as what's going on their complaint? Our substantive claims are spot on. I don't know how the Court – how would the Court – the Court's gonna have to do the same thing, right? At some point you or a jury or somebody is gonna have to look at the prior settlement agreement and determine if our current window claims were settled and released in the prior case. Why would we – why would we go through this exercise twice? So, to say that our claims are not compulsory counterclaims I think is – or to say that they're not arising from the same transaction or occurrence is a pretty tortured reading of that language. I think they're certainly compulsory claims and that's why they were brought, served them for efficiency sake but also because I think they had to be as a counterclaim in this

case. Ultimately that's for the Court to decide, but I think there's really no other way to interpret the rule and the law on that issue.

As far as relation back, doesn't cross party lines. That's not in the law, it's not in the rules, it's a good little catch phrase but it's just not true. Sure, Rule 15 says under certain conditions amended claims can relate back. I'm sure Your Honor has heard a few of those motions over the years about whether claims and amended complaint do relate back or not and that's a big deal sometimes in those cases, but there's nothing that says it only applies in those scenarios and actually we cited two Nevada – District of Nevada Federal Court decisions on Federal Rule 13 which is, you know, Nevada just overhauled all of their rules and procedures, they pretty much mirror a lot of the federal rules and those changes that have happened over the years and those federal rule decisions said counterclaims do relate back. There's no case on point within Nevada. The Builders point to this *Jamison* case. That is very factually different from what we're talking about here. I would urge the Court to look at that more closely before deciding the relation back issue or at least before accepting the Builder's position on what *Jamison* says.

This was a deficiency judgment case and I think we maybe even had one of those on the counter today. But, in any event, this was dealing with a ninety day statute of limitations specifically for that type of claim and the Supreme Court they looked at this one and they were deciding whether the filing of the complaint tolled statutes – statute of limitations for counterclaims that had expired before the counterclaims were filed. And this is 106 Nev. 792 and then at page 798 is where the Court really discusses it and there's a couple of paragraphs of discussion here that near the end of its analysis the Court says: "In this case deficiency judgment with a ninety day statute of limitations it is questionable whether stale claims and

lost evidence represent the paramount concern addressed by a three month statute of limitation. Since the statute also addresses viable concerns other than stale evidence it should be enforced." So, I think *Jamison* – Mr. Gifford said it isn't limited to its facts. I think every appellate decision is limited to its facts for the most part. The District Courts are always looking at those to try to see what the holdings are and what it really meant, what was really decided and what's dicta, what's not. *Jamison* is specifically dealing with whether tolling applied where there's a ninety-day statute of limitations where it's clear that there are significant other considerations baked into that ninety-day deadline besides stale evidence. Here we're talking about a six-year statute of repose that just came down from eight or ten years. That's clearly a stale evidence situation where you're talking about many, many years and setting the outer – furthest outer limit to bring a claim many years in the future. Very different from the ninety-day statute of limitations that *Jamison* was dealing with. So, I don't think there is any law on point on this issue in the state of Nevada. I think federal law which is very persuasive here on how that's been interpreted is clear that counterclaims do relate back. So, compulsory counterclaims relate back and that's what we have here with the Association's defect claims. And I don't think there's any dispute that if the Association's claims, the window claims that are left based on the Court's prior rulings, I don't think there's any dispute that if they do relate back then it's within the 40.695 sub 1 tolling period. It was just two days after the mediation concluded and failed.

So, does the Court have any questions?

THE COURT: Not yet.

MR. GAYAN: Okay. So, now I'm on to the conditional countermotion. I'm happy to be the Court's first conditional countermotion. I'll make note of this. So, if

the Court after all of that decides the HOA did not timely bring its construction defect claims, we are countermoveing for relief under NRS 40.695 sub 2 which gives the Court discretion to extend the tolling period for good cause. And as stated in our papers there's no – no case right on point that interprets good cause under 40.695 and so the closest thing we found was this *Scrimer* case, I don't know how to pronounce it. *Scrimer.* It's in our papers, I'll call it *Scrimer*. And that was interpreting the good cause requirement in Rule 4 which is when a Court should extend the time for service beyond the 120 days. Well, from a practical consideration as far as stale dating claims and those types of considerations when you're talking about statute of limitations or repose, a deadline to serve is pretty similar because you're just delaying notice to the plaintiff – or to the defendants potentially a lot longer than the four months that the rule gives. So, those *Scrimer* factors I think apply here and I think the Supreme Court would apply them and I think it makes a lot of sense, and this is on page 5 of our reply on the countermotion. We list those factors and all of those factors favor extending if the Court believes that's even necessary.

THE COURT: Mr. Gayan, I'm looking at subsection 2 of 40.695. When this first came down it – it seemed to me that subsection 2 was taking into consideration those cases such as *Kitech* for example and I know you're intimately familiar with that because that involved, what, 36,000 homes over the course of three or four cases, right?

MR. GAYAN: I've heard of the case.

THE COURT: Yes. I know – and you have engaged in a lot of destructive testing or I should say the folks you hired for that. So, anyway I took subsection 2 as really applying to the one year because subsection 1 where it says that you got a

tolling from time of notice of the claim to be given until the earlier of one year after the notice is given, meaning they really want you to get this thing done, or thirty days after mediation is completed or waived in writing pursuant to NRS 40.680 and it's the earlier of. So, I think they were envisioning thirty days after the mediation or, you know, one year and then that would give the Court – if you're still doing the Chapter 40 stuff because you've got these 36,000 homes for example then you're gonna need more time than a year. In fact, how long did it take you guys to do all the destructive testing that you needed to do in the *Kitech* case?

MR. GAYAN: In the matter in front of this department it --

THE COURT: Judge Williams.

MR. GAYAN: Okay. Judge – because it was both really. I mean –

THE COURT: Okay.

MR. GAYAN: -- we were doing both. Your Honor's stayed us in that Quintero tag-a-long case against KB and Woodside. So, we were stayed. And I'm – it took a long time. And it's – that might be what the Legislature intended. I haven't researched that issue. I'm looking at the plain language of what it says, the good cause requirement for extending the tolling, but I'm glad Your Honor brought up the *Kitech* and kind of wove in in the stay argument because –

THE COURT: Because there would have been no way you guys could have done the pre-litigation process and resolved in the pre-litigation process with respect to *Kitech* if we follow the straight time frames that are set in Chapter 40. And so when this case came out I was thinking, ahh, they're giving us, you know, a little bit more leeway than 40.647 to give you a little bit more time, you know, to extend the time when we have an anomaly like *Kitech*.

MR GAYAN: That's certainly one of the scenarios that the statute probably

contemplated, it certainly applies to. But, I think the distinction is – and I looked at the DR Horton case, I think it was in this department, Arlington Ranch, and there was a decision on the stay and Your Honor brought up 40.647 and this was interpreting 2(b) the stay provision and the Supreme Court said – this is on page 929 of the DR Horton/Arlington Ranch decision. Just as it would for a statutory limitation period – I'm sorry, let me start at the beginning of the sentence. This is an issue – Your Honor probably knows the issue better than I do. This was – we had a contract that shortened that statute of limitations to two years and so there was litigation over, well, you know, what does that mean and how does – what do we do with the stay, the Chapter 40 stay provision? And so they're interpreting 40.647(2)(b) and I'll just pick it up here. It just says: "That for a statutory limitation period so that High Noon could undertake the pre-litigation process without jeopardizing its claims." So, I think the Supreme Court there is saying the whole point of the stay provision is kind of what Your Honor was just saying. We want the parties to participate in the pre-litigation process and not be rushed through it and not worry about risking their claims by not filing quickly enough. And I think the distinction here is similar so 40.647 allows a court to stay – I think maybe technically requires a court to stay if the case has been filed and a Chapter 40 hasn't been complied with fully before the plaintiffs move forward and 40.695 just tolls claims where notices have been provided but the complaint hasn't been filed. I think they're kind of book end to the same issue and protect he claimant at all costs I think is what the scheme is set up to do. Either way a claimant goes they're protected, they either get a stay so they don't get tossed on a statute of repose or limitations issue or they're tolled so they don't get thrown out for the same reason. And I think, you know, where the Supreme Court has interpreted that over the years

and, you know, come back to *Scrimer* is the whole good cause analysis. The Court has wide discretion to determine good cause. That's clear at least under *Scrimer* and I think it would apply really to 40.695 sub 2, but the discretion is not unlimited and the *Scrimer* court actually reversed and remanded because there was no prejudice to the defendant from the slight delay in bringing the claim. And we went through all the facts – or the factors from *Scrimer*, it's essentially the same thing. And Nevada public policy is called out again there by the Supreme Court with a strong, very clear public policy that claims are to be decided on their merits. So, that's kind of the foundation that all of the other factors build on and the Supreme Court adopted a more flexible approach to the good cause. They specifically and expressly disallowed any of their prior opinions that suggested it was a very rigid good cause analysis. They said it's very flexible and remembered strong public policy in deciding claims on their merits.

Going through the factors. The first three don't really apply, and I'm looking on page 5 of our reply on the countermotion, but four doesn't really apply either. Five. The running of the applicable statute of limitations, here it's repose. Six. The parties' good faith attempt to settle during the 120 day period. I think they threw that in the mix because some of the cases that I [indecipherable] here, prior decisions on this good cause issue said, look, they didn't serve because the Defendant knew about the case and they were trying to work it out. So, it's pretty ridiculous to say there's not good cause to extend the service under the scenario. And that's – it's what we have here; they got our Chapter 40 notice. We were going through the pre-litigation process, we had a pre-litigation mediation, they were fully aware of our claims long before they got the actual counterclaim. Then factor seven, lapse of time. Here there was a lapse of time before the counterclaims were

filed after the 30 day portion of 40.695 sub 1. But the outer limit is one year, we're a few days after that and, you know, I can't really speak to – that was before my time. I can't really speak to what happened or why but, you know, obviously I think they're compulsory counterclaims. You don't even need to get there. But the timing -- it's not like it was some egregious timing. The HOA filed their counterclaims timely in the ordinary course after filing a Rule 12 motion, getting the Court's decision and then answering and filing a counterclaim which was all done on time the way it should be. The HOA has been diligently prosecuting the case both pre-litigation and once the case was filed by the Builders and pre-emptively getting it started. The HOA has been participating fully the entire process.

Factor eight. The prejudice to the Defendant caused by the Plaintiff's delay. There's none. If you look at the Builder's opposition to the countermotion they can't identify any prejudice from the slight delay and the counterclaims actually being filed if they don't relate back because there is none. They – they hauled off and filed, they knew about our claims, we tried to settle our claims before they even filed. And factor nine, Defendant's knowledge of the existence of the lawsuit. They knew it was coming that's why they filed their complaint preemptively. So, I think prejudice, we've heard it in a hearing previously similar to a Rule 15 analysis, there's just simply no prejudice whatsoever to the Builders from moving forward with this case on the merits especially after all the work that everybody's been through and the Court's decided the HOA has viable window claims. Here we are today and then to say that they're somehow prejudiced. I think it's pretty clear that they're fully capable of defending this case or prosecuting this case, however you want to look at it based on what's happened so far. So, the lack of any prejudice whatsoever that – and some of the other factors, that's what caused the Nevada Supreme Court to

reverse the District Court in the *Scrimer* case and that was on a similar good cause analysis under Rule 4. I reviewed all those factors and so to the extent it's even necessary I think – although this Court has wide discretion to determine good cause based on the unique circumstances of each case. I think the circumstances here would – it would amount to abuse of discretion today to not find good cause, there's a complete lack of any prejudice first and foremost and that is strong public policy [indecipherable]. Thank you.

THE COURT: Okay. Counsel, before I hear from you I think it would be a good idea to take a break.

MR. GIFFORD: Sure.

THE COURT: Okay.

[Recessed at 10:56 a.m.]

[Reconvened at 11:07 a.m.]

THE COURT: Okay. Thank you, counsel, for indulging me.

MR. GIFFORD: Thank you, Your Honor. I'm just gonna go over and address some of the points that counsel made in his opposition and then we'll move into our opposition to their countermotion -- or conditional countermotion.

THE COURT: Okay.

MR. GIFFORD: Sure. So, you know, one of the complaints that the Association has is that this motion today should have been filed three years ago. Maybe that – maybe that should be the case or not, but the focus here today should not be on, you know, our litigation strategy, you know, and it should be on what good cause and what good reason they had to file their action after the statute of repose period expired. That should be the focus. And, yes, regrettably the Association has incurred costs so have we. We've been here for, yeah, three and a

half years and we've incurred a lot of costs too, I get it. But, that alone isn't really – doesn't really go to any sort of argument that, you know, that we were not being diligent or that we were acting in bad faith. I think they used the word dilatory. Your Honor, no, I mean, that's just not – that's just not true.

The next argument that counsel was arguing was that under Rule 56 that we hadn't met our burden. Well, Your Honor, like I said earlier, we provided the Court everything that was available and we've explained that once it was challenged – in our reply brief we explained what we did and counsel had an issue with the fact that it was somebody my office. Well, that person was under my supervision. I even looked personally; I looked at all the records myself as well. And just because our affidavit said our office, it was, yes, I did it as well. I just doubled down just to be safe. There are no other records available.

Counsel said that they had no obligation to do anything in regard to showing any sort of facts in response to NRCP 56, but the *Wood v. Safeway* case, the Nevada Supreme Court case, it says: "The non-moving party" – this is on page 732 – citation 732. "The non-moving party also must by affidavit or otherwise set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." All they've done, they being the Association, all they've done is just complain that we haven't provided all the available dates but, Your Honor, their obligation to try to pull something out and show that there's some factual dispute. They haven't done that.

One complaint that the Association had was that our reply brief was much longer than our motion. I think if you look at the conditional countermotion as well that was one page. There was no – there were no exhibits to that. Their reply in support of their conditional countermotion was seven pages and it had over fifty

pages of new documents that they brought forth. So, I don't really think that argument holds much weight.

Counsel brought up the fact that he believes that the – that the repose – the grace period itself is sort of a mini statute of limitation or repose. That is so far from the truth. It is contrary to the whole point of the grace period to begin with. The whole point of the grace period is – when AB 125 – and I know you know this, when AB 125 was enacted it was meant to – it was a very harsh ruling because it applied retroactively to claimant's claims in order to cut those off. So, the Legislature decided, look, we're gonna provide – if your claims accrued before that date you would otherwise have lost those claims by virtue of the statute of repose being shortened we're gonna provide a grace period for you to bring your claims, file those causes of action. And that was what the Legislature intended, it was a harsh result. The fact that they have a grace period to counteract the bad – the harshness of the limit – statute of repose they're not the same thing, they completely different. One is meant to counteract that statute.

THE COURT: And by the way, I will say this. I know you're trying to make it -- be kind to the Legislature saying they put that in to basically benefit -- but let's get real here, they did it because they got [indecipherable] by the Supreme Court in that previous case and so they figured to make sure that their shortening of the statute of repose was not unconstitutional, that they've given a grace period.

MR. GIFFORD: I understand, Your Honor.

THE COURT: But you're being very nice to the Legislature so I just wanted to let you know that.

MR. GIFFORD: Yeah. Trying to be respectful. Your Honor, counsel brought up paragraph 30 in our complaint. As you know, facts and arguments they develop

over time in a case, but one thing I will – I would like to say is that we're objecting to the fact that they're bringing that up in today's hearing. There was no mention of that argument anywhere in any of their moving papers, and besides under prong – you know, under that -- yeah, we're still arguing that, yeah, they had to have commenced a lawsuit with regard to any unresolved claims prior to the expiration of AB 125's grace period. There's nothing inconsistent about that or what we're saying today.

Counsel had some complaints about the fact that our complaint is not solely limited to deck relief actions. Yes, there's a breach of contract claim in there, there's a suppression of evidence claim in there but the claims themselves revolve around the occurrences that happened in – recently with respect to the notice that they served. We argued that there was deficient – we argued that there was a prior settlement agreement and by virtue of their acts today and by serving their Chapter 40 notice they would have a duty to indemnify and defend us under – under that prior agreement. It had nothing to do with the workmanship and the decisions that were made twelve years ago. That's a completely separate element. But even if – like I said before, even if the Court is inclined to agree with that argument they still have to prove the relation back doctrine but the problem is – and they – and counsel strips away the *Jamison* as not being applicable. Well, first the cases that they cite to are – yeah, they're U.S. District Court cases. Some – one of them the Yates case, the one they rely on most heavily, that's – or the [indecipherable] case. That one is being appealed right now. It was – it's on appeal right now as of February 12, 2019. And some of the cases that they cite to are unpublished opinions as well. So, I mean, we look at these U.S. District court cases which are also very factually different than our case now. They don't have the same facts at all. When we look

at the *Jamison* case, yeah, it has a little bit different facts but the *Jamison* case at least it's a – it's a strong holding, it's a Nevada Supreme Court holding and it specifically provided – let me pull out my notes here. And I believe counsel said that the *Jamison* case has nothing to do with counterclaims, compulsory – I don't know where he's understanding that because this is a direct quote from that case: "Instituting an action before the expiration of the statute of limitations does not toll the running of that statute against compulsory counterclaims filed by the defendant after the statute has expired." And counsel made one more point about *Jamison*, Your Honor. He said that – that in his – he's asserted today that – that he believes that the *Jamison* court and other decisions like it are limited to the facts of those case – well, in his moving papers specifically he says the Supreme Court specifically confined their ruling to those facts. That's not found anywhere in that ruling. That's counsel's interpretation of that – of that. And that's fine if that's how he's interpreting it, but I want to object to the fact that that's not what was in his moving papers, he made more of an objective stance where that's concerned.

Your Honor, I want to talk a little bit about the counterclaim. The Association wants you to agree that by virtue of NRS 40.695(2) that they get additional time to file their lawsuit after the statute of repose period has expired. What they're trying to get you to do is to agree that they should have extra time to file the lawsuit after the statute of repose is gone. That's not what that provision says.

I'm gonna first talk about – a little bit about the good cause arguments and then I'll come back, kind of circle back to that argument. But, the Association – the Association's counsel made – they brought up – well, first of all, NRS 40.695(2) subsection 2 provides: "That if good cause exists the Court can provide an

extension to the tolling period." Now, the standards that the Association's counsel brought forth they bring up NRCP 4(I) and the *Scrimer* case. Well, first of all it's very clear that the *Scrimer* case and NRCP 4(I) those deal with service of process on a defendant when a complaint has already been filed. The *Scrimer* court, it wasn't this soft, flexible approach, hey, you know, we'll give you – we'll give you all these factors and if you just, you know, you kind of tell us, you know, that you want some more time to serve then go ahead. No, they – they say if you don't want your complaint thrown out file a motion, get the extension of time, serve your complaint and, yeah, maybe we'll grant them, we'll analyze these factors, but that is not at all what -- the situation that we're dealing with. Their statute of limitations and repose are much stricter than that. Counsel is trying to cannibalize the – the statutes of repose and limitations by extracting portions of NRCP 4(I) factors, *Scrimer* case factors that have nothing to do with the statute of repose or limitation at all. Even counsel admitted – first he said that all the factors sway in the favor of the agreement and good cause exists. Well, they went through a list of factors and said, oh, well that one doesn't apply, that one doesn't apply. Yeah, they don't apply. All of them don't apply because it's not the right test. There isn't a test and counsel hasn't provided that test. The Court – it's gonna be your determination, Your Honor, your decision today to determine whether there's good cause to – under this rule to extend the tolling time beyond all those times, but keep in mind the rule says good cause being tolling – excuse me, the tolling can be extended beyond the one year if more time is needed.

Now, I'm glad you brought up the *Kitech* case. We're not dealing with a situation with 36,000 homeowners. We have four defects in this case, four. There's not – we have one HOA. It's not the same situation; we don't have the same policy

consideration as far that's concerned. And moreover, NRCP 40.695(2), subsection 2 it extends the tolling time that was already granted. It extends – it assumes, it implies that there's already a tolling provision that was in existence but the problem is the Association has not every got the tolling. You can't – you can't extend something that – that doesn't exist, you just can't. So, my argument is that – I mean, and it's – I think it's pretty clear, is that that statute can't apply to extending statutes of repose when it's only meant to extend tolling provisions and those tolling provision can't be extended because they – there weren't any in the first place. They had to serve their Chapter 40 notice before the expiration of the statute of repose.

THE COURT: Okay. Counsel, I'm kind of going through a little bit of the Sky – Sky case that I dealt with and – because I was thinking wait a minute, I did extend – in fact, let me get right down to that one paragraph. Okay. I indicated in the Sky case that, you know, they – they served the notice on the last day of the – of the safe harbor, okay? The second to the last day. Whatever it was. It was February 23rd. And I said, well, it does toll the statute of repose which was basically it tolls in way the grace period. Then later – and then I went through how long it got tolled and I figured it was thirty days after the mediation took place and they had filed their counterclaim, what, two weeks later. Now, what I did say -- "Sky Las Vegas Condominium Owners" – I'm looking at paragraph 14 of the conclusions of law, "argues the one year grace period operates to toll the new statute of repose period of six years." I said, no, the grace period doesn't do it but obviously NRS 40.695 does. So, I just want to make sure that I – because I was getting a little confused there. I said: "There is nothing stated in section 21(6) to suggest it tolls the new statute of repose period. To the contrary section 21(6) states the retroactive

application of the amended NRS 11.202 will not limit actions that occurred prior to the effective date of the act as if it was commenced within one year thereafter." So, that was – and then: "In this the homeowners association was given the benefit of not only the one year safe harbor but also the time tolled to allow the NRS Chapter 40 pre-litigation process to proceed." So, that was basically what I ruled.

MR. GIFFORD: Right Right. No, I understand that ruling, Your Honor, it's just that when we look at NRS 40.695 it's – you – it's a tolling provision that tolls the statute, it's not a provision that tolls the grace period itself, but your ultimate ruling in Sky what it was it wasn't that you just get to toll the repose period. That wasn't the ultimate ruling. You said in your order that given the benefit – giving them the benefit of the doubt, giving them -- that I give them the tolling, given that I give them the grace period, even then they still fail to meet the deadline of the tolling period of the thirty after the mediation. That was the ultimate holding. The fact that the – that the Chapter 40 notice was not served during – during the repose period was not actually raised in any of the moving papers but, Your Honor, you still agreed that irrespective of that – of that fact you still ruled that given the benefit of the doubt they still missed the mark. So, that ruling would be consistent with anything today because the moving papers and arguments today are only different – the only difference in the arguments is that (1) we're making that argument and it's in front of you today but it's ultimately gonna be the same ruling because they still missed the mark.

THE COURT: Okay.

MR. GIFFORD: Okay. And counsel would like the Court to think that by the Court giving them an extension to toll the time only another five days. It's not five days; it's four months because as you read Sky there was the thirty day window.

They didn't – they didn't file their complaint until March 1, 2017 way later. So, giving them an extension it wouldn't be just a simple one extension, it would actually be more like two extensions. (1) You're giving an extension from the period of a thirty day window up until the one year because the rule says you get an extension beyond the one year. Well, they've had to get an extension from thirty days to the year and then you get another extension from the year to another five days. So, that would be two extensions that they're asking to do under a provision that only pertains to extending the tolling period. That doesn't pertain directly to a statute of repose itself all so that they can file their claims late.

Counsel brought up some arguments in some of their moving papers about good cause and how they – how they can establish that and why that it's a good reason why they can file their claim after the statute of repose. Well, one of the arguments was that the HOA has diligently pursued their CD claims against the Builders by (a) serving its Chapter 40 notice during the safe harbor. Well, Your Honor, serving it the day before the safe harbor provision expired, that's not diligent. These – the HOA have already admitted they knew about these claims in 2013, they knew about these window claims in 2013. They could have served their Chapter 40 notice before AB 125 came around. You know, by the time AB 125 was enacted people around town, the Plaintiff's attorneys, they knew what was going to happen. Well, they didn't know how it would affect them but they knew something was going on. A lot of plaintiff's attorneys they would – just to be safe they would – they would serve their Chapter 40 notices, they would file their complaints right before that cutoff. The Association didn't do any of that even though they knew about this claim. They sat on their rights. So, they sat on – not only until, you know, the first day after the – after AB 125 came around they looked at the statutes and said, well,

you know, hey, that's – that could be bad for us, maybe we could should get this done. There's reason they couldn't have served their Chapter 40 notice either before. Maybe they would have had the benefit at that point yet the statute of repose was ten years of tolling. If they served it after they still could have filed their complaint within the year because there's only four defects in this case that were alleged. There's nothing stopping them from doing that but they just sat on it. They wait until the last day before – the last day before the grace period expired.

Now, they say they've been diligent in participating in the litigation. Well, Your Honor, it's their litigation, they're the ones who served the Chapter 40 notice on us. It's their obligation. You don't get kudos for showing up at your own party, you have to – you have to participate otherwise their claims would have been thrown out a long time ago. Counsel says that they were diligent in prosecuting the claims. Well, four months after what would have been the tolling period of filing your lawsuit is not diligent. They said that they've been diligent with respect to inspections and participating in those. Well, if Your Honor – and I don't want to get too much into the weeks with this – with old defects that are no longer in the case, but there were sewer complaints, there were mechanical complaints. Those issues were resolved, they were inspect – they were repaired before the Builders knew about them. We didn't even know about what was going on until way later. That's not diligent to not notify the contractors who you believe is responsible and who you're gonna sue later of what's going on. (3) There was Unit 300 repairs. Those Unit 300 repairs had already begun by the time our experts got out there to look at it. Those were already going on. There was water testing on Unit 300. Yeah, counsel informed our office that here was gonna be testing coming up. Our office – my boss he reached out to opposing counsel and said, hey, when is this – I think it was a

Monday; he reached out to opposing and asked, well, when is the water testing going to occur? And this is all in their moving papers. They actually provided these emails. And our – my boss said, well, when is the water testing on the units gonna come? They said; oh well, sorry, actually it just started, you know, it started early this morning, you better get out there. But by that time it was too late for us to grab our expert, our penetration guy and get out there.

Now, regarding the sewer and mechanical repairs, we – we requested information from counsel, we sent a letter on – and I have the letters. I think one of them may have been attached to their – to their reply brief. We sent them a letter on March 29, 2016; we asked them for information on (1) who did the sewer repairs, who did the mechanical room repairs, where those parts are. Did we get a response? No, we never got a response. We had to follow up with them with another letter on April 29th which – which I have here. Another letter on April 29th – we actually gave them a deadline this time to respond of May 3rd. Do we get a response? No. They want to indicate to you that this expanded time line -- well, which they added into their – which is basically new facts and we're objecting to the fact that there's new evidence provided in the reply. It would be just like they're objecting to us. But those expanded time line of events, those show, oh, that we corresponded with counsel. Well, yeah, we corresponded with them; they didn't necessarily correspond back with us. So, I hardly agree that that would be considered diligent prosecution of your claim.

And again, about the time line that they provide, they provide all these dates of things that happened. Again, they have to – they had to do that. Part of their obligation, they have to be vigilant for their client, they have to show up. But all of the other dates they really are – they're red herrings. The only dates that really

matter is – here's what they're contending, that they get tolling; the only dates that really matter is the thirty-day window after the mediation. Let's look and see what happened during that time. We don't have any specific dates; we don't have any written record of anything that really occurred during that thirty-day window. It wasn't like, oh, under NRCP 4(I), like they say, they didn't file a motion with the Court seeking extension of time to file their complaint. Nothing happened. It wasn't – like they said a minute ago it wasn't their obligation to give us information for our motion for summary judgment on the – on the substantial completion dates. Well, it wasn't our obligation to tell them about their affirmative claims that they had to file. There was nothing done in that thirty-day period, nothing and nothing – a written record of that. That's when they had to be vigilant, the most vigilant. Everything else are things that, yeah, the special master has a hearing, you gotta show up, if the Court has a hearing you gotta show up, if there's inspections that you are undergoing yourself, yeah, you gotta show up, it's your inspections. So, the argument that they've been diligent and vigilant and they've done everything they could is – is frankly, Your Honor, just not true.

Sorry, I have a lot of notes, Your Honor. I'm just –

THE COURT: That's okay.

MR. GIFFORD: -- making sure I've covered all my bases.

THE COURT: That's okay.

MR. GIFFORD: Thank you. And just, again, Your Honor, to reiterate, NRCP – or excuse me, NRS 40.695 subsection 2 it is – again, it's an extension of what would already have been the tolling process so that parties can complete that process if they needed it. It wasn't meant for people to just skirt the statute of repose and then ask the Court for an extension of time to file that lawsuit beyond

that statute of repose. What they're asking you to do is to make the statute of repose longer. That is not what NRS 40.695(2) says, counsel even admitted that. He didn't really research the issue of what the purpose of that statute was but he's relying on it heavily in his reply and in his conditional countermotion.

I want to make a couple of more arguments, Your Honor, about some of the other good faith arguments – or excuse me, the good cause arguments that counsel raised. They say that the Builders can't claim prejudice. Your Honor, any party that files their claims timely are absolutely prejudiced by claims getting filed back against them that were late. The whole purpose of the statute of limitations or repose – the reason they are so rigid is because prejudice is implied in those – in that reasoning. There's no good cause test so when -- it's okay to move beyond those issues. So, we are faced with liability. If the Court agrees with the Association that they can – they can file their claims late, that is absolutely prejudicial. There's no doubt about that at all.

One argument that counsel made in their conditional countermotion was that the HOA brought their claims five days after the one-year anniversary of the Chapter 40 notice. Well, Your Honor, I've already said this before that argument is irrelevant because they – that wasn't the applicable tolling period even if a tolling period had applied, it was the thirty days after. So, when they filed their claims it was four months late. Now, even if you agree, Your Honor, that somehow good cause exists, it doesn't matter because tolling never occurred and there was nothing to extend. Thank you.

THE COURT: Thank you.

MR. GAYAN: Your Honor, I'll try to be very brief. And I apologize, I'm probably the worst offender today but we're fighting for our client's figurative life here

so I apologize.

I wanted to point out – I know we've talked about Sky and those other cases quite a bit today, I just want to make a comment, I meant to make it before. These are all other District Court level of decisions; the Court isn't bound by any of them.

THE COURT: Well, Sky was mine.

MR. GAYAN: Sky was yours, but I will point out – and I'm so glad that the Builders attached the summary judgment briefing about Sky because I looked at it for the past few minutes here and the Association in that case didn't argue compulsory counterclaims and did not request any belief under 6 – 40.695 sub 2. Those are issues the Court never considered and that is a prime example of why comparing between District Court cases is often apples to oranges. I think, you know, courts can do the best with what they're given a lot of the times and if a party doesn't ask for something I don't know if the courts always have to or do sua sponte help somebody out with some – an argument that they should have made or could have made. I don't think that the Court's obligation. I know judges like to do that for pro see litigants but when there's counsel Your Honor doesn't need to go out on a limb and help people out. So, just looking at those, those are arguments that were never made, those are important arguments that we have here. And so while I think a lot of the analysis and conclusions of law that the Court did in Sky is similar from the AB 125 grace period and tolling type of arguments in general, it seems to apply to what we're talking about here today. We've got issues and arguments being made that go well beyond what the Sky Association argued and so I – I don't know that the Court is – I'll say the Court is definitely not limited by what it did in the Sky case.

I just wanted to clear up the record. There was maybe some confusion about the *Jamison* case and I know I'm gonna reply on the countermotion. I never said Jamison didn't involve counterclaims, I said the *Boca Park* case doesn't involve counterclaims, and that was maybe just confused by counsel there.

I know the Court raised this when I was up the last time, that 40.695 sub 2 seems like it's limited to where the Chapter 40 process is taking longer and that's what it should be limited to. That's just not in the statute. I think it would have been very easy for the –

THE COURT: Well –

MR. GAYAN: -- Legislature –

THE COURT: -- I –

MR. GAYAN: -- to put it in there.

THE COURT: -- can I ask you though. I – and I brought *Kitech* up because there is no way you could have been working 48 hours a day which we don't have obviously –

MR. GAYAN: They –

THE COURT: -- to get –

MR. GAYAN: -- they try to make me do that.

THE COURT: I believe it. You could have worked insensately, not gotten sleep literally for months and months. There's no way you were gonna get all that destructive testing, all of your discovery done, all the information you needed to try and resolve that case in the pre-litigation process with – dealing with 36,000 homes in four or five cases. There's just no way. And I can – and you couldn't even get to mediation, you couldn't hardly get to inspection and repair and all of that stuff. You couldn't even get to that mediation within a year. And I can understand having this

provision in there to say, yup, that's good cause, there's no way you can do it. You know, you were gonna die doing this stuff, you know. So bottom line, we had to give you an extension of time and thankfully the Legislature has given us that discretion to do that. But where I'm having a little bit of a rub, Mr. Gayan, is after – obviously you guys have got your discovery done, you got enough to get to the mediation, why wasn't your claims brought within that thirty day period? I mean, now let's get outside of the compulsory counterclaim. And you may even say, well, good cause exists because we thought that we already had everything taken care of. I get that. But why wasn't it brought after the mediation?

MR. GAYAN: Well, I will address that and I'd like to tie it into your sub 2 – 40.695 sub 2 comment and –

THE COURT: Yes, please.

MR. GAYAN: -- discussion. So, I think the *Kitech* and Chapter 40 – long Chapter 40 process scenario is certainly the most common use of extending the tolling provision under sub2 but it's certainly not limited to that. There's nothing in the statute that would say it's limited to that. So, it's any good cause. And so the good cause here is the Association was sued by the parties that – that they gave the Chapter 40 notice, they were sued two days after the mediation. So, the Association was actually defending the claims and those are affirmative claims for relief, not just deck relief. They were defending the action right after the case – right after the mediation. Within two days there it is. And our reply on the countermotion shows we got a brief extension to respond to the Builder's complaint and so counsel said he didn't know what we were doing. Well, that was before my time but pretty normal to get a little extension when you have a complaint served against you. I just asked for two weeks yesterday on another one. So, it happens all the time because

you're, you know, whoa, I didn't know that was coming, I gotta find counsel, whatever –

THE COURT: You could just be busy.

MR. GAYAN: You're usually not sitting around twiddling your thumbs waiting to be sued I'll tell you that. And I know Your Honor practices well and so it's pretty unusual to just sit around and wait for it especially two days after the mediation. There was no reason the Builders had to sue the HOA but they did. And so there it is, the Association got a brief extension and started to brief – filed a motion to dismiss on time based on the extension that they got. And so my understanding because like I said before my time, the HOA thought they were doing it right. They were getting an extension, responding to the complaint, briefing the motion to dismiss, coming in here arguing it, getting the Court's ruling and then filing their answer and counterclaim which is the normal process for responding to a complaint. It's possible – sure is it theoretically possible that the HOA could have separately filed a new action somewhere else and had it consolidated? Sure. They could have done that but we already had this case here and so answering and filing a counterclaim within the thirty days would have been out of the normal course of responding to a complaint. So, I think that's why it was done. I believe that's another basis for good cause. And when I say the HOA was diligently litigating this case, it's not just the pre-litigation. They got the complaint, they responded to it timely. They were doing everything they were supposed to be doing in the normal course of defending a case filed against them and I thought – I believe – I think they were doing what they were supposed to be doing. And I know – you know, it's separate and apart from whether it's compulsory counterclaims, it relates back and all those things but the HOA thought it was doing everything right. And one thing

Your Honor did not hear – you heard from the Builder's counsel twice today, pretty lengthy presentations, not once mention of how they are prejudiced whatsoever. They –

THE COURT: Well, they did say that there is automatic prejudice whenever you have untimely claim filed against you under the statute of repose or statute of limitation.

MR GAYAN: Well, if that was the case then no court could ever grant an extension to serve a complaint, right? You get 120 days. Well, you know, if I let you sue this party they're gonna be prejudiced. That's not the prejudice we're talking about the fact that claims exist. The Supreme Court wants claims to be heard on the merits, not tossed on a procedural technicality particularly where there is zero prejudice. He had a thirty page reply, two opportunities today to tell Your Honor how they were prejudiced or surprised by any of this. They – the fact is they weren't that's why he can't come up with anything. They have nothing. There is no harm, there's no prejudice. They are fully aware of our claims, the HOA claims, that's why they frantically sued us two days after the mediation because they wanted to attack head on. That's their strategy, that's why we're here and that's what we're doing but there's no possible way for them to claim surprise, prejudice, anything. And that is the key analysis I think for deciding this issue is whether there's actually any harm and there is none. We're going forward on the Builder's claims regardless and so we're gonna be here so why not litigate all the claims on the merits, Your Honor.

And let me just check my notes to make sure I haven't –

THE COURT: Well, I actually have a question for you --

MR. GAYAN: I'm –

THE COURT: -- after you –

MR. GAYAN: -- happy to answer.

THE COURT: -- you finish looking at your notes.

MR. GAYAN: Yeah. No, go ahead right now. Please.

THE COURT: Well, I've been thinking about this while I've been listening to you. And that gets into the start of the substantial completion and I know I'm king of going back outside of the conditional counterclaim arguments but – and I've gotten to thinking about this. Okay. If – and there's – this is not the first case where the parties have found for me two of those three elements or what you can find. This is not the first time. And what Defense counsel is telling me is that we just could not find that second factor. And I – maybe I'm thinking about this for future cases. If you always – if you've got a situation in future cases and in this one where you can't find one or maybe you can't find two and you've exercised good diligence it's just you can't find it. Doesn't that in fact extend the statute of repose because you can't have a start date?

MR. GAYAN: Your Honor, it's a – that's a good point; I think it's a good logical way to go with the issue. I'll tackle it procedurally maybe first. And I don't know what's happened in other cases, Your Honor hears a lot of cases and motions and these issues not probably unique to the Court. But I mentioned we've started discovery, we haven't actually gotten there. So, when the Builders say they've looked they mean their lawyers have looked. And we heard Mr. Gifford, you know, basically testifying here today amending his affidavit saying that, oh, I did personally search, oh, you know, but don't mind what the affidavit says, I did – I looked too. But that's not admissible either. We – are we gonna put Mr. Gifford on the stand at trial? That's not – that's not what's gonna happen. So, what would normally happen is we would do discovery, the parties would find things, the Builders would depose

my client and other people and find out if the notice of completion exists and where is it and do you know if one was ever done and then we'd actually have admissible evidence for the Court to consider on a Rule 56 motion, not this thing at the beginning of the case before any discovery on this topic has been done. They pulled, you know, oh, we looked and we found two of the three but we couldn't find the third. Well -- so Rule 56 precludes summary judgment. And, yeah, if we don't have a third one, if we get to that point in time where everybody who knows anything about this and they say definitively, no, one was never done. Okay, well, that's a different – that's a different scenario, right? Now the Court has two of the three, one doesn't exist and so you take the later of the two that exist, but we're not even there yet, we don't even know. And, you know, we haven't had a chance to respond on that issue, I haven't had a chance to look at it, brief it, whatever. That was stuck in the reply. I think that's also a bit unfair and, you know, not permitted. I hope that answered the Court's question.

THE COURT: Sure.

MR. GAYAN: But, yeah, if – I guess to specifically answer the Court's question. If the witnesses say I don't know, if everybody says I don't know if one ever existed and we – and then there's a big question mark about whether one ever existed, I don't know how they get summary judgment unless they can show it didn't exist and –

THE COURT: Well –

MR. GAYAN: -- although – who knows what the date is.

THE COURT: Mr. Gayan, I think I agree with you. If everybody says I don't know, we don't have any of them then you may not have a statute of repose. I don't know but –

MR GAYAN: And then it's when did it start.

THE COURT: -- I haven't been presented with that yet.

MR. GAYAN: Right. Right. And so I would just think it's premature and we'll see what happens and that's why discovery exists to find out the facts. The actual facts not supposed facts with what happened in some other similar cases, what was done in some other similar buildings. None of that actually matters at all.

Your Honor, the only other thing I would point out. Counsel said – he kind of pointed or insinuating and just pointing over at us and called it it's their litigation, he said it's – it's the HOA's litigation. So, you know, I'll just kind of leave that at that. It is our case, it's all related. Our notice started this whole thing. The whole case is about our notice, about our construction defect claims. They're clearly arising out of the same transaction or occurrence. We should all – they should all be considered together in front of the same court all at the same time for efficiency sake and for every other reason under Rule 1. Thank you, Your Honor.

THE COURT: Okay. Thank you. Okay. I want to – I got a chance to review your briefs but I did not get a chance to review all the cases and I would like to take this one under advisement. These cases – and you brought up some new issues and on big cases like this I assume these kinds of issues go up to the Supreme Court eventually. So, I would like to write a decision on it so I'm gonna take it under advisement.

MR. GAYAN: Thank you, Your Honor. I appreciate your patience.

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THE COURT: You bet.

[Proceedings concluded at 11:51 a.m.]

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

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

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

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

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

Third-Party Plaintiff,

Vs.

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

Third-Party Defendants.[1]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters concerning:

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

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

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

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

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

FINDINGS OF FACT AND PROCEDURAL HISTORY

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

1. Declaratory Relief—Application of AB 125;

2. Declaratory Relief—Claim Preclusion;

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

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

4. Suppression of Evidence/Spoliation;

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

6. Declaratory Relief—Duty to Defend; and

7. Declaratory Relief—Duty to Indemnify.

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

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

2. Negligence and Negligence *Per Se;*

3. Products Liability (against the manufacturers);

4. Breach of (Sales) Contract;

5. Intentional/Negligent Disclosure; and

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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