Case No. 80615

IN THE SUPREME COURT OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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 16 OF 27

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Docket 80615 Document 2020-34741

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NRS 11.2055(2) states "[i]f none of the events described in subsection 1 occurs, the date of substantial completion of an improvement to real property must be determined by the rules of the common law."

12. While the statute of repose's time period was shortened, NRS 40.600 to 40.695's tolling provisions were not retroactively changed. That is, statutes of limitation or repose applicable to a claim based upon a constructional defect governed by NRS 40.600 to 40.695 *still* toll deficiency causes of action from the time the NRS 40.645 notice is given until the earlier of one (1) year after notice of the claim or thirty (30) days after the NRS 40.680 mediation is concluded or waived in writing. *See* NRS 40.695(1). Further, statutes of limitation and repose may be tolled under NRS 40.695(2) for a period longer than one (1) year after notice of the claim is given but only if, in an action for a constructional defect brought by a claimant after the applicable statute of limitation or repose has expired, the claimant demonstrates to the satisfaction of the court good cause exists to toll the statutes of limitation and repose for a longer period.

13. In this case, the Owners' Association argues the Builders have not provided sufficient information to determine when the statute of repose started to accrue, and without it, this Court cannot decide the motion for summary judgment. Specifically, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposes the Builders have identified only one date addressed within NRS 11.2055(1), and to establish the date of accrual, this Court needs all three as the defining date is the one which occurs last. This Court disagrees with the Association's assessment the date of substantial completion has not been established for at least a couple of reasons. *First,* the Builders did not provide just one date; they identified two events addressed in NRS 11.2055, i.e. the date of the final building inspection and when the Certificate of Occupancy was issued as identified in Exhibits C and D of their motion. Those dates are March 16, 2007 and January 16, 2008, respectively, for Tower I, and July 16, 2007 and March 26, 2008, respectively, for

Tower II. *Second,* this Court does not consider the Builders' inability or failure to provide the date of the third event, i.e. when the notice of completion was issued, as fatal to the motion, especially given the common-law "catch-all" provision expressed in NRS 11.2055(2) that applies if none of the events described in NRS 11.2055(1) occurs. This Court concludes the dates of substantial completion are January 16, 2008 (Tower I) and March 16, 2008 (Tower II), respectively, as these dates are the latest occurrences. Given this Court's decision, the dates of substantial completion obviously accrued before the enactment of AB 125. Applying the aforementioned analysis to the facts here, this Court concludes the statute of repose applicable to the Association's constructional defects claim is six (6) years, but, as it accrued prior to the effective date of AB 125 or February 24, 2015, the action is not limited if it was commenced within one (1) year after, or by February 24, 2016.

14. In this case, the Association served its NRS 40.645 constructional defect notice on February 24, 2016, or the date the one-year "safe harbor" was to expire. The service of the NRS 40.645 notice operated to toll the applicable statute of repose until the earlier of one (1) year after notice of the claim or thirty (30) days after the NRS 40.680 mediation is concluded or waived in writing. *See* NRS 40.695(1). The NRS 40.680 mediation took place and was concluded on September 26, 2016. Applying the earlier of the two expiration dates set forth in NRS 40.695, the statute of repose in this case was tolled thirty (30) days after the mediation or until October 26, 2016, which is earlier than the one (1) year after the notice was served. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION had up to and including October 26, 2016 to institute litigation or its claims would be time-barred.

15. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION filed its Counter-Claim against the Builders on March 1, 2017, over four (4) months after October 26, 2016. As noted above, in the Builders' view, the constructional defect claims relating to the

windows, therefore, are time-barred. The Association disagrees, arguing its Counter-Claim was compulsory, and it relates back to the date of the Complaint's filing, September 28, 2016. Alternatively, the Association counter-moves this Court for relief, and to find good cause exists to toll the statute of repose for a longer period given its diligence in prosecuting the constructional defect claims against the Builders. The Court analyzes both of the Association's points below.

16. NRCP 13 defines both compulsory and permissive counter-claims. A counter-claim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. *See* NRCP 13(a). The purpose of NRCP 13(a) is to make an "actor" of the defendant so circuity of action is discouraged and the speedy settlement of all controversies between the parties can be accomplished in one action. *See* Great W. Land & Cattle Corp. v. District Court, 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970). In this regard, the compulsory counter-claimant is forced to plead his claim or lose it. *Id.* A counter-claim is permissive if it does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. *See* NRCP 13(b).

17. Here, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposes its counter-claims are compulsory as they arise out of the same transaction or occurrence that is the subject matter of the Builders' claims. This Court disagrees. The Builders' claims are for breach of the prior settlement agreement and declaratory relief regarding the sufficiency of the NRS 40.645 notice and application of AB 125. The Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its windows in the two towers. If this Court ruled against the Builders on their Complaint,

the Association would not have lost their claims if they had not pled them as counter-claims in the instant lawsuit. In this Court's view, the Association had two options: it could make a counter-claim which is permissive or assert its constructional defect claims in a separate Complaint. Here, it elected to make the permissive counter-claim. The counter-claim does not relate back to the filing of the Complaint, September 28, 2016.

18. However, even if this Court were to decide the counter-claim was compulsory, meaning the Association was forced to plead its claims in the instant case or lose them, the pleading still would not relate back to the date of the Complaint' filing. As noted in Nevada State Bank v. Jamison Family Partnership, 106 Nev. 792, 798, 801 P.2d 1377, 1381 (1990), statutes of limitation and repose were enacted to "'promote repose by giving security and stability to human affairs....They stimulate to activity and punish negligence.'" *Citing* Wood v. Carpenter, 101 U.S. 135, 139, 25 L.Ed.2d 807 (1879). Indeed, the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations or repose and to create a final deadline for filing suit that is not subject to any exceptions except perhaps those clearly specified by the state's legislature. Without a statute of repose, professionals, contractors and other actors would face never-ending uncertainty as to liability for their work. As stated by the Supreme Court in Texas in Methodist Healthcare System of San Antonio, Ltd., LLP v. Rankin, 53 Tex.Sup.Ct.J. 455, 307 S.W.3d 283, 287 (2010), "'while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.'" *Quoting* Galbraith Engineering Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 866 (Tex. 2009). For the reasons articulated above, the Nevada Supreme Court held the lower court did not err by finding a plaintiff, by instituting an action before the expiration of a statute of limitation, does not toll the running of that statute against compulsory counter-claims filed

. . .

by a defendant after the statute has expired. In short, whether the Association's counter-claims are compulsory or permissive, the filing of the Builders' Complaint did not toll the statute of repose.

19. The next question is whether good cause exists for this Court to toll the statute of repose for a longer period as so authorized in NRS 40.695(2). The Association proposes there is good cause given their diligence in prosecuting their constructional defect claims, and, as they are seeking tolling of only five (5) days after the one (1) year anniversary of the original NRS 40.645 notice, the Builders' ability to defend the deficiency causes of action has not been adversely impacted. In making this argument, the Association seems to assume the tolling under NRS 40.695 ended February 24, 2017, or one (1) year after it served the NRS 40.645 notice when, in actuality, the tolling ended October 26, 2016, or thirty (30) days after the NRS 40.680 mediation. *See* 40.695(1). The Association does not show this Court good cause exists for its failure to institute litigation before October 26, 2016. Whether the Builders' ability to defend the Association's claim is not adversely affected is, therefore, not relevant to the issue of good cause. Accordingly, this Court declines tolling the statute of repose for a period longer than one (1) year after the NRS 40.645 notice was made. The Builders' Motion for Summary Judgment is granted, and the Association's Conditional Counter-Motion for Relief is denied.

20. As this Court decides the six-year statute of repose bars the Association's constructional defect claims, it does not analyze the statute of limitations issue presented.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Plaintiffs'/Counter-Defendants' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019 is granted; and

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. . .

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

IT IS FURTHER ORDERED, ADJUDGED AND DECREED Defendant's/Counter-Claimant's Conditional Counter-Motion for Relief Pursuant to NRS 40.695(2) filed March 1, 2019 is denied.

DATED this 23rd day of May 2019.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CERTIFICATE OF SERVICE

I hereby certify, on the 23rd day of May 2019, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to the following counsel of record, and that first-class postage was fully prepaid thereon:

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DEPARTMENT XXII

File Into Existing Case

Case Number	Location	Description	Case Type
A-16-744146-D	Department 22	Laurent Hallier, Plaintiff(s...	Chapter 40

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File Into Existing Case

Case Number	Location	Description	Case Type
A-16-744146-D	Department 22	Laurent Hallier, Plaintiff(s...	Chapter 40

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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 **NOTICE OF ENTRY OF ORDER AS TO PLAINTIFF'S COUNTER-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(L) FILED FEBRUARY 11, 2019 AND DEFENDANT'S COUNTER-CLAIMANT'S CONDITIONAL COUNTER-MOTION FOR RELIEF PURSUANT TO NRS 40.695(2) FILED MARCH 1, 2019**

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PLEASE TAKE NOTICE that an Order was entered in reference to the above-captioned matter on May 23, 2019 a copy of which is attached hereto.

Dated: May 28, 2019

BREMER WHYTE BROWN & O'MEARA LLP

By:_____

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

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of May 2019, a true and correct copy of the foregone document was electronically delivered to Odyssey for filing and service upon all electronic service list recipients.

Kimberley Chapman, an Employee of
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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 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

Case Number: A-16-744146-D

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

Third-Party Plaintiff,

Vs.

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

Third-Party Defendants.[1]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

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.

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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.

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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

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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:
>
> > (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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NRS 11.2055(2) states "[i]f none of the events described in subsection 1 occurs, the date of substantial completion of an improvement to real property must be determined by the rules of the common law."

12. While the statute of repose's time period was shortened, NRS 40.600 to 40.695's tolling provisions were not retroactively changed. That is, statutes of limitation or repose applicable to a claim based upon a constructional defect governed by NRS 40.600 to 40.695 *still* toll deficiency causes of action from the time the NRS 40.645 notice is given until the earlier of one (1) year after notice of the claim or thirty (30) days after the NRS 40.680 mediation is concluded or waived in writing. *See* NRS 40.695(1). Further, statutes of limitation and repose may be tolled under NRS 40.695(2) for a period longer than one (1) year after notice of the claim is given but only if, in an action for a constructional defect brought by a claimant after the applicable statute of limitation or repose has expired, the claimant demonstrates to the satisfaction of the court good cause exists to toll the statutes of limitation and repose for a longer period.

13. In this case, the Owners' Association argues the Builders have not provided sufficient information to determine when the statute of repose started to accrue, and without it, this Court cannot decide the motion for summary judgment. Specifically, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposes the Builders have identified only one date addressed within NRS 11.2055(1), and to establish the date of accrual, this Court needs all three as the defining date is the one which occurs last. This Court disagrees with the Association's assessment the date of substantial completion has not been established for at least a couple of reasons. *First,* the Builders did not provide just one date; they identified two events addressed in NRS 11.2055, i.e. the date of the final building inspection and when the Certificate of Occupancy was issued as identified in Exhibits C and D of their motion. Those dates are March 16, 2007 and January 16, 2008, respectively, for Tower I, and July 16, 2007 and March 26, 2008, respectively, for

Tower II. *Second,* this Court does not consider the Builders' inability or failure to provide the date of the third event, i.e. when the notice of completion was issued, as fatal to the motion, especially given the common-law "catch-all" provision expressed in NRS 11.2055(2) that applies if none of the events described in NRS 11.2055(1) occurs. This Court concludes the dates of substantial completion are January 16, 2008 (Tower I) and March 16, 2008 (Tower II), respectively, as these dates are the latest occurrences. Given this Court's decision, the dates of substantial completion obviously accrued before the enactment of AB 125. Applying the aforementioned analysis to the facts here, this Court concludes the statute of repose applicable to the Association's constructional defects claim is six (6) years, but, as it accrued prior to the effective date of AB 125 or February 24, 2015, the action is not limited if it was commenced within one (1) year after, or by February 24, 2016.

14. In this case, the Association served its NRS 40.645 constructional defect notice on February 24, 2016, or the date the one-year "safe harbor" was to expire. The service of the NRS 40.645 notice operated to toll the applicable statute of repose until the earlier of one (1) year after notice of the claim or thirty (30) days after the NRS 40.680 mediation is concluded or waived in writing. *See* NRS 40.695(1). The NRS 40.680 mediation took place and was concluded on September 26, 2016. Applying the earlier of the two expiration dates set forth in NRS 40.695, the statute of repose in this case was tolled thirty (30) days after the mediation or until October 26, 2016, which is earlier than the one (1) year after the notice was served. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION had up to and including October 26, 2016 to institute litigation or its claims would be time-barred.

15. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION filed its Counter-Claim against the Builders on March 1, 2017, over four (4) months after October 26, 2016. As noted above, in the Builders' view, the constructional defect claims relating to the

windows, therefore, are time-barred. The Association disagrees, arguing its Counter-Claim was compulsory, and it relates back to the date of the Complaint's filing, September 28, 2016. Alternatively, the Association counter-moves this Court for relief, and to find good cause exists to toll the statute of repose for a longer period given its diligence in prosecuting the constructional defect claims against the Builders. The Court analyzes both of the Association's points below.

16. NRCP 13 defines both compulsory and permissive counter-claims. A counter-claim is compulsory if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. *See* NRCP 13(a). The purpose of NRCP 13(a) is to make an "actor" of the defendant so circuity of action is discouraged and the speedy settlement of all controversies between the parties can be accomplished in one action. *See* Great W. Land & Cattle Corp. v. District Court, 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970). In this regard, the compulsory counter-claimant is forced to plead his claim or lose it. *Id.* A counter-claim is permissive if it does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. *See* NRCP 13(b).

17. Here, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposes its counter-claims are compulsory as they arise out of the same transaction or occurrence that is the subject matter of the Builders' claims. This Court disagrees. The Builders' claims are for breach of the prior settlement agreement and declaratory relief regarding the sufficiency of the NRS 40.645 notice and application of AB 125. The Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its windows in the two towers. If this Court ruled against the Builders on their Complaint,

the Association would not have lost their claims if they had not pled them as counter-claims in the instant lawsuit. In this Court's view, the Association had two options: it could make a counter-claim which is permissive or assert its constructional defect claims in a separate Complaint. Here, it elected to make the permissive counter-claim. The counter-claim does not relate back to the filing of the Complaint, September 28, 2016.

18. However, even if this Court were to decide the counter-claim was compulsory, meaning the Association was forced to plead its claims in the instant case or lose them, the pleading still would not relate back to the date of the Complaint' filing. As noted in Nevada State Bank v. Jamison Family Partnership, 106 Nev. 792, 798, 801 P.2d 1377, 1381 (1990), statutes of limitation and repose were enacted to "'promote repose by giving security and stability to human affairs....They stimulate to activity and punish negligence.'" *Citing* Wood v. Carpenter, 101 U.S. 135, 139, 25 L.Ed.2d 807 (1879). Indeed, the key purpose of a repose statute is to eliminate uncertainties under the related statute of limitations or repose and to create a final deadline for filing suit that is not subject to any exceptions except perhaps those clearly specified by the state's legislature. Without a statute of repose, professionals, contractors and other actors would face never-ending uncertainty as to liability for their work. As stated by the Supreme Court in Texas in Methodist Healthcare System of San Antonio, Ltd., LLP v. Rankin, 53 Tex.Sup.Ct.J. 455, 307 S.W.3d 283, 287 (2010), "'while statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time.'" *Quoting* Galbraith Engineering Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 866 (Tex. 2009). For the reasons articulated above, the Nevada Supreme Court held the lower court did not err by finding a plaintiff, by instituting an action before the expiration of a statute of limitation, does not toll the running of that statute against compulsory counter-claims filed . . .

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by a defendant after the statute has expired. In short, whether the Association's counter-claims are compulsory or permissive, the filing of the Builders' Complaint did not toll the statute of repose.

19. The next question is whether good cause exists for this Court to toll the statute of repose for a longer period as so authorized in NRS 40.695(2). The Association proposes there is good cause given their diligence in prosecuting their constructional defect claims, and, as they are seeking tolling of only five (5) days after the one (1) year anniversary of the original NRS 40.645 notice, the Builders' ability to defend the deficiency causes of action has not been adversely impacted. In making this argument, the Association seems to assume the tolling under NRS 40.695 ended February 24, 2017, or one (1) year after it served the NRS 40.645 notice when, in actuality, the tolling ended October 26, 2016, or thirty (30) days after the NRS 40.680 mediation. *See* 40.695(1). The Association does not show this Court good cause exists for its failure to institute litigation before October 26, 2016. Whether the Builders' ability to defend the Association's claim is not adversely affected is, therefore, not relevant to the issue of good cause. Accordingly, this Court declines tolling the statute of repose for a period longer than one (1) year after the NRS 40.645 notice was made. The Builders' Motion for Summary Judgment is granted, and the Association's Conditional Counter-Motion for Relief is denied.

20. As this Court decides the six-year statute of repose bars the Association's constructional defect claims, it does not analyze the statute of limitations issue presented.

Therefore, based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Plaintiffs'/Counter-Defendants' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019 is granted; and

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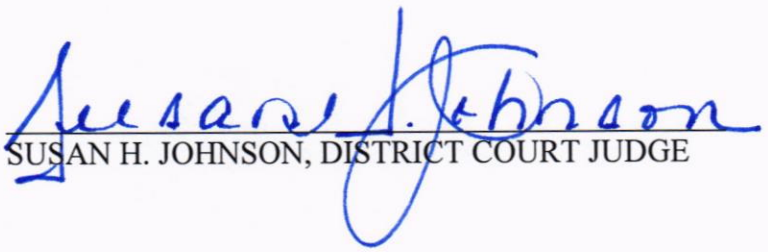
IT IS FURTHER ORDERED, ADJUDGED AND DECREED Defendant's/Counter-Claimant's Conditional Counter-Motion for Relief Pursuant to NRS 40.695(2) filed March 1, 2019 is denied.

DATED this 23rd day of May 2019.



SUSAN H. JOHNSON, DISTRICT COURT JUDGE

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CERTIFICATE OF SERVICE

I hereby certify, on the 23rd day of May 2019, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER to the following counsel of record, and that first-class postage was fully prepaid thereon:

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File Into Existing Case

Case Number	Location	Description	Case Type
A-16-744146-D	Department 22	Laurent Hallier, Plaintiff(s...	Chapter 40

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▸ **Party:** MJ Dean Construction Inc - Counter Defendant	
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File Into Existing Case

Case Number	Location	Description	Case Type
A-16-744146-D	Department 22	Laurent Hallier, Plaintiff(s...	Chapter 40

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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 **DEFENDANT'S MOTION TO RE-TAX AND SETTLE COSTS** **HEARING REQUESTED**

Case Number: A-16-744146-D

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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Defendant Panorama Towers Condominium Unit Owners' Association (the "HOA"), by and through its counsel of record, hereby submits this Motion to Re-Tax and Settle Costs identified in the Verified Memorandum of Costs and Disbursements and the Errata thereo filed by Plaintiffs Laurent Hallier, Panorama Towers I. LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc. (collectively, the "Builders") on May 28, 2019.

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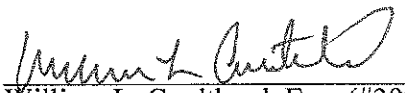
This Motion is made and based upon the following Points and Authorities, any exhibits attached thereto, the pleadings and papers on file herein, the oral argument of counsel, and such other or further information as this Honorable Court may request.

DATED: May 31, 2019

KEMP, JONES & COULTHARD, LLP



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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Builders filed a Verified Memorandum of Costs and Disbursements (the "Memorandum") on May 28, 2019, claiming entitlement to the recovery of costs as a prevailing party in this action.[1] The Builders' request, however, is deficient in several regards. First, the Memorandum is premature because the Builder's Complaint still contains numerous unresolved claims. This means no final judgment has been entered in this case and no prevailing party can be determined based on the outcome of all claims. Second, the Builders attempt to recover a significant amount of costs that could and would have been avoided had they raised the repose issue sooner than 30 months into the action. Third, the Memorandum contains numerous instances of costs which are not recoverable under NRS 18.005, et seq. Fourth, the Builders identify costs which are unsupported, unreasonable, unnecessary, and therefore unrecoverable. Finally, the Memorandum identifies more than $30,000 in "Expert Witness Fees"[2], surpassing the statutory cap on such fees set forth by NRS 18.005(5). Because the Builders fail to provide the Court with any evidence that "the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee"[3], such fees should be subject to the statutory cap if they are allowed at all.

II.

ARGUMENT

A. The Builders' Memorandum is premature.

As the Court is aware, the Builders filed this suit against the HOA, which has resulted in Plaintiff/Defendant identity confusion throughout this case.

The Court has not entered a final judgment resolving all of the claims in this case, which precludes the filing of the Memorandum. The Court's order granting the Builders' Motion for Summary

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[1] *See* Memorandum, May 28, 2019, on file and the Errata thereto filed on May 29, 2019.

[2] *Id.* at 2:16-20.

[3] NRS 18.005(5)

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Judgment, based upon the expiration of the statute of repose in NRS 11.202(1), resulting in the dismissal of the HOA's counterclaim, did not dispose of all claims in this case. Remaining are the additional claims asserted by the Builders in their Complaint against the HOA. NRS 18.110 allows "[t]he party in whose favor judgment is rendered" to seek recovery of certain costs, as approved by the court. The statute presumes a final judgment. Because no final judgment has been entered in this case, the Builders' Memorandum is premature.

NRS 18.110 also presumes a single prevailing party. The Court cannot determine the prevailing party until all claims have been resolved. In order to be considered a "prevailing party," the causes of action litigated must be reduced to a final judgment. In *Eberle v. State ex rel. Nell. J. Redfield Trust*, 108 Nev. 587,590, 836 P.2d 67, 69 (Nev. 1992), the Nevada Supreme Court held that **"a party cannot be considered a prevailing party in an action that has not proceeded to judgment."** (emphasis added)[4].

In order to determine who the prevailing party is, there must first be a resolution of *all claims* submitted to this Court for adjudication. Indeed, several surrounding jurisdictions have reached the same conclusion. For example, in *Reyher v. State Farm Mut. Auto Ins. Co.*, (Colo. Ct. App. 2012), the Colorado Court of appeals held that "a determination of whether a party is a prevailing party under Colorado Rule of Civil Procedure 54(d) **'must await resolution of claims' that remain pending and unresolved in the trial court."**[5] Additionally, the California Court of Appeals reversed an award of attorney's fees "because any prevailing-party determination **must be made upon the final resolution of *all* claims,** including those remanded to the trial court."[6]

---

[4] *See also, Bentley v. State, Office of State Engineer*, 2016 WL 3856572, Slip Copy, at 11 (Nev. 2016) (holding that "'[t]o be a prevailing party, a party need not succeed on every issue,' **but the action must proceed to judgment.)** (quoting *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev.Adv.Op. 10, 343 P.3d 608, 615 (Nev. 2015)). (Emphasis added).

[5] (Emphasis added) (citing *Matter of Water Rights of Bd. of County Com'rs of County of Arapahoe*, 891 P.2d 981, 984 (Colo. 1995) (En Banc). Colorado Rule of Civil Procedure ("CRCP") 54(d) is analogous to NRS 18.020 in that CRCP 54(d) permits a prevailing party to recoup costs.

[6] *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.*, 2017 WL 5712140, Slip Copy, at 1 (Cal. Ct. App. 2017) (Emphasis added).

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Because unresolved claims remain in this case, the Court cannot determine which party has prevailed.

B. The Builders may not recover unnecessary, avoidable, unreasonable, or undocumented costs.

Even assuming, *arguendo,* that the Court determines the Builders are the "prevailing party" before entry of a final judgment, then the costs the Builders seek to recover must be re-taxed. A prevailing party is entitled to recover only such costs as are **reasonably**, **necessarily**, and actually incurred in litigation.[7] While the determination of allowable costs is within the sound discretion of the trial court, "statutes permitting the recovery of costs are to be strictly construed because they are in derogation of the common law."[8] The prevailing party must provide sufficient documentation that the costs were reasonable.[9]

In addition to the issues with the Builders' purported costs detailed below, the Builders fail to differentiate the costs which were reasonably, necessarily, and actually incurred in litigation for the sole claim that the Builders prevailed upon. It would be inequitable for this Court to award fees to the Builders for the numerous claims and defenses for which the Builders have not yet prevailed. Without sufficient evidence, or indeed any evidence at all, before this Court justifying such costs as reasonable and necessary, or differentiating which costs were incurred before this action commenced from those incurred in connection with its claims and defenses, the Builders' request for such costs must be denied in its entirety.

1. The Builders are not entitled to costs that precede the Complaint.

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[7] *See* NRS 18.020; NRS 18.005; *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015); *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385-86 (1998) (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994)).

[8] *Berosini*, 114 Nev. at 1352, 971 P.2d at 385.

[9] *See Village Builders 96 v. U.S. Laboratories*, 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005). ("[D]ocumentation is precisely what is required under Nevada law to ensure that the costs awarded are only those costs actually incurred.").

A review of the invoices submitted by the Builders reveals that a substantial amount of the fees and costs claimed were incurred before the Builders filed this suit on September 28, 2016. Several of these fees and costs are more properly associated with this matter's pre-litigation process.

Even the catch-all provision contained in NRS 18.005, which permits recovery of "[a]ny other **reasonable and necessary expense** incurred in connection with **the action**, including reasonable and necessary expenses for computerized services for legal research"[10] fails to justify the inclusion of those costs which are incurred during pre-litigation, before the **action** has commenced. Such costs precede the action itself and cannot be reasonably and/or necessarily incurred within the action.

2. The Builders are not entitled to unnecessary costs that could, and should, have been avoided.

The Builders seek costs following the Court's Order dated May 23, 2019, granting their Motion for Summary Judgment based upon the applicable statute of repose. As the Court is no doubt aware, this motion was preceded by a litany of separate and unrelated potentially dispositive motions filed by the Builders in the years since their Complaint was filed. Since April 26, 2017, when the first of the Builders' many motions for summary judgment were filed, the Court's time has been consumed by addressing the Builders' motions.

Had the Builders, instead of saving their statute of repose motion for last, started with this motion, two years of litigation and related expenses could and should have been avoided. Moreover, because the statute of repose motion required no expert testimony whatsoever, the Builders could have avoided $42,995 in claimed expert fees entirely by filing the statute of repose motion first, or even partially by filing the statute of repose motion at virtually any earlier point in the intervening years since the Complaint was filed. Consequently, such costs were not reasonably or necessarily incurred in the litigation. Given that these costs could have been avoided in their entirety and were incurred only based upon the Builders' chosen legal strategy, all costs unrelated to the statue of repose motion were entirely unnecessary and must be rejected.

/ / /

[10] NRS 18.005(17) (Emphasis added)

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3. The Builders are not entitled to undocumented costs.

Several of the fees and costs claimed by the Builders are not supported by invoices or other documentation, including several hundred dollars' worth of unsupported fees like "Local Travel Costs" and "Attorney Service Fees".[11]

Recovery for these costs is inappropriate for two reasons. First, without the underlying back-up documentation, it is impossible to determine whether these expenses were actually or necessarily incurred, and an award of costs related to them would be improper.[12] Second, based on the lack of documentation, the HOA is unable to ascertain whether or which of these costs were incurred prior to the filing date of the Complaint, and are therefore unrecoverable, and is similarly unable to ascertain whether and which of these costs were incurred in connection with the lone claim upon which the Builders prevailed as opposed to those claims which remain unresolved.

4. The Builders are not entitled to mediator fees, special master fees, or any other costs not permitted by NRS 18.005.

The Memorandum is brought pursuant to NRS 18 and subject to NRS 18's limitations. NRS 18.005 sets forth the allowable costs a prevailing party may recover. Under the statute, allowable costs are limited specifically to:

> 1. Clerks' fees.
>
> 2. Reporters' fees for depositions, including a reporter's fee for one copy of each deposition.
>
> 3. Jurors' fees and expenses, together with reasonable compensation of an officer appointed to act in accordance with NRS 16.120.
>
> 4. Fees for witnesses at trial, pretrial hearings and deposing witnesses, unless the court finds that the witness was called at the instance of the prevailing party without reason or necessity.
>
> 5. Reasonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee.

---

[11] *See* Memorandum at 3:12-20.

[12] *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015) ("**Without evidence to determine whether a cost was reasonable and necessary, a district court may not award costs.**") (emphasis added).

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6. Reasonable fees of necessary interpreters.

7. The fee of any sheriff or licensed process server for the delivery or service of any summons or subpoena used in the action, unless the court determines that the service was not necessary.

8. Compensation for the official reporter or reporter pro tempore.

9. Reasonable costs for any bond or undertaking required as part of the action.

10. Fees of a court bailiff or deputy marshal who was required to work overtime.

11. Reasonable costs for telecopies.

12. Reasonable costs for photocopies.

13. Reasonable costs for long distance telephone calls.

14. Reasonable costs for postage.

15. Reasonable costs for travel and lodging incurred taking depositions and conducting discovery.

16. Fees charged pursuant to NRS 19.0335.

17. Any other reasonable and necessary expense incurred in connection with the action, including reasonable and necessary expenses for computerized services for legal research.

NRS 18.005. Here, the Builders seek "Special Master Fees" totaling $5,385.06[13] and "Mediator Fees (JAMS)" totaling $3,714.59[14]. Neither the special master fees nor mediator fees identified by the Builders are costs that are recoverable under NRS 18.05 and must be rejected.

Under NRS 18.005(5), costs include "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee."

Here, the Builders identify more than $40,000 in "Expert Witness Fees" incurred by four separate "expert" witnesses. None of these witnesses offered trial testimony. None of these witnesses were deposed. None of these witnesses produced an expert report, and none of these witnesses offered evidence or testimony that was in any way relevant to the Court's May 23, 2019 Order. Not only do the Builders fail to demonstrate, or even offer the argument, that the circumstances surrounding their

[13] *See* Memorandum, at 2:22.

[14] *Id.* at 3:1.

experts' testimony were of such necessity as to require fees that are exponentially larger than those allowed by statute, the Builders fail to demonstrate that such experts were necessary at all.

Nevada law establishes that an expert must testify in order to recover more than $1,500 in expert fees.[15] Here, the experts in question have not offered deposition testimony, trial testimony, or indeed any testimony at all beyond that which was attached as an exhibit to a motion completely unrelated to the claim upon which the Builders purport to have prevailed. Such testimony was clearly not of such necessity so as to require fees that exceed the proscribed statutory cap. Moreover, such testimony may not even qualify as a recoverable item of cost at all.[16]

III.

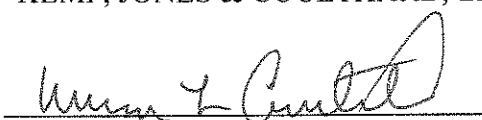
CONCLUSION

Based on the foregoing arguments, the HOA respectfully requests an order re-taxing Plaintiffs' costs.

DATED: May 31, 2019

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP



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[15] *See* NRS 18.005(5); *Pub. Emps.' Ret. Sys. Of Nev. v. Gitter,* 133 Nev., 126, 134, 393 P.3d 673, 681 (2017); *Khoury v. Seastrand*, 132 Nev., Adv. Op. 52, 377 P.3d 81, 95 (2016).

[16] *See Mikel v. Kerr*, 64 P.R.D. 93 (1973), add'd, 499 F.2d 1178 (10th Cir. 1974) (Fees for expert witness who did not appear in court except by affidavit attached as an exhibit to motion for summary judgment and who did not attend a deposition hearing were properly disallowed as an item of costs.)

Certificate of Service

I hereby certify that on the 31st day of May, 2019, the foregoing **Defendant's Motion to Re-Tax and Settle Costs** was served on the following by Electronic Service to all parties on the Court's service list.

An employee of Kemp, Jones & Coulthard, LLP

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Assembly Bill No. 421–Committee on Judiciary

CHAPTER.....

AN ACT relating to construction; revising provisions relating to the information required to be included in a notice of a constructional defect; removing provisions requiring the presence of an expert during an inspection of an alleged constructional defect; establishing provisions relating to a claimant pursuing a claim under a builder's warranty; removing certain provisions governing the tolling of statutes of limitation and repose regarding actions for constructional defects; revising provisions relating to the recovery of damages proximately caused by a constructional defect; increasing the period during which an action for the recovery of certain damages may be commenced; revising the prohibition against a unit-owners' association pursuing an action for a constructional defect unless the action pertains exclusively to the common elements of the association; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant: (1) is required to give written notice to the contractor; and (2) if the contractor is no longer licensed or acting as a contractor in this State, is authorized to give notice to any subcontractor, supplier or design professional known to the claimant who may be responsible for the constructional defect. Existing law also requires that such a notice identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim. (NRS 40.645) **Section 2** of this bill instead requires that such a notice specify in reasonable detail the defects or any damages or injuries to each residence or appurtenance that is the subject of the claim.

Existing law requires that after notice of a constructional defect is given by a claimant to a contractor, subcontractor, supplier or design professional, the claimant and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert or his or her representative with knowledge of the alleged defect must: (1) be present when a contractor, subcontractor, supplier or design professional conducts an inspection of the alleged constructional defect; and (2) identify the exact location of each alleged constructional defect. (NRS 40.647) **Section 3** of this bill removes the requirement that an expert who provided an opinion concerning the alleged constructional defect or his or her representative be present at an inspection and revises certain other requirements.

Existing law provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant: (1) the claimant is prohibited from sending notice of a constructional defect or pursuing a claim for a constructional defect unless the claimant has submitted a claim under the homeowner's warranty and the insurer has denied the claim; and (2) notice of a constructional defect may only include claims that were denied by the insurer. (NRS 40.650) **Section 4** of this bill removes such provisions, and **section 1.5** of this bill replaces the term "homeowner's warranty" with

"builder's warranty" and clarifies that such a warranty is not a type of insurance. **Section 4** provides that if a residence or appurtenance that is the subject of a claim is covered by a builder's warranty, the claimant is required to diligently pursue a claim under the builder's warranty. **Section 5.5** of this bill makes conforming changes.

Existing law also provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant, statutes of limitation or repose are tolled from the time the claimant submits a claim under the homeowner's warranty until 30 days after the insurer rejects the claim, in whole or in part. (NRS 40.650) **Section 4** removes this provision.

Existing law establishes the damages proximately caused by a constructional defect that a claimant is authorized to recover, including additional costs reasonably incurred by the claimant for constructional defects proven by the claimant. (NRS 40.655) **Section 5** of this bill removes the requirement that such costs be limited to constructional defects proven by the claimant.

Existing law prohibits an action for the recovery of certain damages 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, from being commenced more than 6 years after the substantial completion of such an improvement. (NRS 11.202) **Section 7** of this bill increases such a period to 10 years after the substantial completion of such an improvement. **Section 7** also: (1) authorizes such an action to be commenced at any time after the substantial completion of such an improvement if any act of fraud caused a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; and (2) exempts lower-tiered subcontractors from such an action in certain circumstances.

Existing law prohibits a unit-owners' association from instituting, defending or intervening in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners relating to an action for a constructional defect unless the action pertains exclusively to common elements. (NRS 116.3102) **Section 8** of this bill requires that such an action for a constructional defect pertain to: (1) common elements; (2) any portion of the common-interest community that the association owns; or (3) any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association.

Existing law authorizes a unit-owners' association to enter the grounds of a unit to conduct certain maintenance or remove or abate a public nuisance, or to enter the grounds or interior of a unit to abate a water or sewage leak or take certain other actions in certain circumstances. (NRS 116.310312) **Section 8.5** of this bill provides that such provisions do not give rise to any rights or standing for a claim for a constructional defect.

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

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

Section 1. (Deleted by amendment.)

Sec. 1.5. NRS 40.625 is hereby amended to read as follows:

40.625 ~~[~~"Homeowner's~~]~~ ***"Builder's*** warranty" means a warranty ~~[~~or policy of insurance:

~~1. Issued]~~ ***issued*** or purchased by or on behalf of a contractor for the protection of a claimant ***.*** ~~[~~; or

~~2. Purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive.~~

~~➥]~~ The term ~~[~~includes~~]~~ ***:***

1. Includes a warranty contract issued by ***or on behalf of a contractor whose liability pursuant to the warranty contract is subsequently insured by*** a risk retention group that operates in compliance with chapter 695E of NRS and insures all or any part of the liability of a contractor for the cost to repair a constructional defect in a residence.

2. Does not include a policy of insurance for home protection as defined in NRS 690B.100 or a service contract as defined in NRS 690C.080.

Sec. 2. NRS 40.645 is hereby amended to read as follows:

40.645 1. Except as otherwise provided in this section and NRS 40.670, before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant:

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

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

2. The notice given pursuant to subsection 1 must:

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

(b) ~~[~~Identify~~]~~ ***Specify*** in ~~[~~specific~~]~~ ***reasonable*** detail ~~[~~each defect, damage and injury~~]~~ ***the defects or any damages or injuries*** to each residence or appurtenance that is the subject of the claim ***;*** ~~[~~, including, without limitation, the exact location of each such defect, damage and injury;~~]~~

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

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

3. A representative of a homeowners' association may send notice pursuant to this section on behalf of an association if the representative is acting within the scope of the representative's duties pursuant to chapter 116 or 117 of NRS.

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

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

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

Sec. 3. NRS 40.647 is hereby amended to read as follows:

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

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

(b) Be present ***or have a representative of the claimant present*** at an inspection conducted pursuant to NRS 40.6462 and ***, to the extent possible, reasonably*** identify the ~~[exact location of each alleged constructional defect]~~ ***proximate locations of the defects, damages or injuries*** specified in the notice ***;*** ~~[and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert, or a representative of the expert who has knowledge of the alleged constructional defect, must also be present at the inspection and identify the exact location of each alleged constructional defect for which the expert provided an opinion;]~~ and

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

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

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

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

Sec. 4. NRS 40.650 is hereby amended to read as follows:

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

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

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

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

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

(a) Comply with the provisions of NRS 40.6472;

(b) Make an offer of settlement;

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

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

(e) Participate in mediation,

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

3. If a residence or appurtenance that is the subject of the claim is covered by a ~~[homeowner's]~~ ***builder's*** warranty ~~[that is purchased~~

~~by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive:~~

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

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

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

~~(d) Statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, are tolled from the time notice of the claim under the homeowner's warranty is submitted to the insurer until 30 days after the insurer rejects the claim, in whole or in part, in writing.~~**]** ***, a claimant shall diligently pursue a claim under the builder's warranty.***

4. Nothing in this section prohibits an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure or NRS 40.652.

Sec. 5. NRS 40.655 is hereby amended to read as follows:

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

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

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

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

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

(e) Any additional costs reasonably incurred by the claimant **,** ~~[for constructional defects proven by the claimant,]~~ including, but

not limited to, any costs and fees incurred for the retention of experts to:

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

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

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

(f) Any interest provided by statute.

2. If a contractor complies with the provisions of NRS 40.600 to 40.695, inclusive, the claimant may not recover from the contractor, as a result of the constructional defect, any damages other than damages authorized pursuant to NRS 40.600 to 40.695, inclusive.

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

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

Sec. 5.5. NRS 40.687 is hereby amended to read as follows:

40.687 Notwithstanding any other provision of law:

1. A ~~[claimant shall, within 10 days after commencing an action against a contractor, disclose to the contractor all information about any homeowner's warranty that is applicable to the claim.~~

~~2. The]~~ contractor shall, no later than 10 days after a response is made pursuant to this chapter, disclose to the claimant any information about insurance agreements that may be obtained by discovery pursuant to rule 26(b)(2) of the Nevada Rules of Civil Procedure. Such disclosure does not affect the admissibility at trial of the information disclosed.

~~[3.]~~ ***2.*** Except as otherwise provided in subsection ~~[4,]~~ ***3,*** if ~~[either party]~~ ***the contractor*** fails to provide the information required pursuant to subsection 1 ~~[or 2]~~ within the time allowed, the ~~[other party]~~ ***claimant*** may petition the court to compel production of the information. Upon receiving such a petition, the court may order the ~~[party]~~ ***contractor*** to produce the required information and may award the ~~[petitioning party]~~ ***claimant*** reasonable attorney's fees and costs incurred in petitioning the court pursuant to this subsection.

~~[4.]~~ ***3.*** The parties may agree to an extension of time ***for the contractor*** to produce the information required pursuant to this section.

~~[5.]~~ ***4.*** For the purposes of this section, "information about insurance agreements" is limited to any declaration sheets, endorsements and contracts of insurance issued to the contractor from the commencement of construction of the residence of the claimant to the date on which the request for the information is made and does not include information concerning any disputes between the contractor and an insurer or information concerning any reservation of rights by an insurer.

Sec. 6. (Deleted by amendment.)

Sec. 7. NRS 11.202 is hereby amended to read as follows:

11.202 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]~~ ***10*** years after the substantial completion of such an improvement, for the recovery of damages for:

(a) ~~[Any]~~ ***Except as otherwise provided in subsection 2, 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.

2. ***Except as otherwise provided in this subsection, an action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for any act of fraud in causing a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement. The provisions of this subsection do not apply to any lower-tiered subcontractor who performs work that covers up a defect or deficiency in another contractor's trade if the lower-tiered subcontractor does not know, and should not reasonably know, of the existence of the alleged defect or deficiency at the time of performing such work. As used in this subsection, "lower-tiered subcontractor" has the meaning ascribed to it in NRS 624.608.***

3. The provisions of this section do not apply:

(a) To a claim for indemnity or contribution.

(b) In an action brought against:

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

(2) Any person on account of a defect in a product.

Sec. 8. NRS 116.3102 is hereby amended to read as follows:

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

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

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

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

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

(1) Common elements ~~[.]~~ ***;***

(2) Any portion of the common-interest community that the association owns; or

(3) Any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association.

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

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

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

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

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

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

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

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

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

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

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

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

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

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

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

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

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or

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

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

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

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

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

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

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

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

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

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

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

5. Notwithstanding any provision of this chapter or the governing documents to the contrary, an association may not impose any assessment pursuant to this chapter or the governing documents on the owner of any property in the common-interest community

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

Sec. 8.5. NRS 116.310312 is hereby amended to read as follows:

116.310312 1. A person who holds a security interest in a unit must provide the association with the person's contact information as soon as reasonably practicable, but not later than 30 days after the person:

(a) Files an action for recovery of a debt or enforcement of any right secured by the unit pursuant to NRS 40.430; or

(b) Records or has recorded on his or her behalf a notice of a breach of obligation secured by the unit and the election to sell or have the unit sold pursuant to NRS 107.080.

2. If an action or notice described in subsection 1 has been filed or recorded regarding a unit and the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association, including its employees, agents and community manager, may, but is not required to, enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions if the unit's owner refuses or fails to take any action or comply with any requirement imposed on the unit's owner within the time specified by the association as a result of the hearing:

(a) Maintain the exterior of the unit in accordance with the standards set forth in the governing documents, including, without limitation, any provisions governing maintenance, standing water or snow removal.

(b) Remove or abate a public nuisance on the exterior of the unit which:

(1) Is visible from any common area of the community or public streets;

(2) Threatens the health or safety of the residents of the common-interest community;

(3) Results in blighting or deterioration of the unit or surrounding area; and

(4) Adversely affects the use and enjoyment of nearby units.

3. If:

(a) A unit is vacant;

(b) The association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031; and

(c) The association or its employee, agent or community manager mails a notice of the intent of the association, including its employees, agents and community manager, to maintain the exterior of the unit or abate a public nuisance, as described in subsection 2, by certified mail to each holder of a recorded security interest encumbering the interest of the unit's owner, at the address of the holder that is provided pursuant to NRS 657.110 on the Internet website maintained by the Division of Financial Institutions of the Department of Business and Industry,

➥ the association, including its employees, agents and community manager, may enter the grounds of the unit to maintain the exterior of the unit or abate a public nuisance, as described in subsection 2, if the unit's owner refuses or fails to do so.

4. If a unit is in a building that contains units divided by horizontal boundaries described in the declaration, or vertical boundaries that comprise common walls between units, and the unit is vacant, the association, including its employees, agents and community manager, may enter the grounds and interior of the unit to:

(a) Abate a water or sewage leak in the unit and remove any water or sewage from the unit that is causing damage or, if not immediately abated, may cause damage to the common elements or another unit if the unit's owner refuses or fails to abate the water or sewage leak.

(b) After providing the unit's owner with notice but before a hearing in accordance with the provisions of NRS 116.31031:

(1) Remove any furniture, fixtures, appliances and components of the unit, including, without limitation, flooring, baseboards and drywall, that were damaged as a result of water or mold damage resulting from a water or sewage leak to the extent such removal is reasonably necessary because water or mold damage threatens the health or safety of the residents of the common-interest community, results in blighting or deterioration of the unit or the surrounding area and adversely affects the use and enjoyment of nearby units, if the unit's owner refuses or fails to remediate or remove the water or mold damage.

(2) Remediate or remove any water or mold damage in the unit resulting from the water or sewage leak to the extent such remediation or removal is reasonably necessary because the water or

mold damage threatens the health or safety of the residents of the common-interest community, results in blighting or deterioration of the unit or the surrounding area and adversely affects the use and enjoyment of nearby units, if the unit's owner refuses or fails to remediate or remove the water or mold damage.

5. After the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association may order that the costs of any maintenance or abatement or the reasonable costs of remediation or removal conducted pursuant to subsection 2, 3 or 4, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

6. A lien described in subsection 5 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.

7. Except as otherwise provided in this subsection, a lien described in subsection 5 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.

8. A person who purchases or acquires a unit at a foreclosure sale pursuant to NRS 40.430 or a trustee's sale pursuant to NRS 107.080 is bound by the governing documents of the association and shall maintain the exterior of the unit in accordance with the governing documents of the association. Such a unit may only be removed from a common-interest community in accordance with the governing documents pursuant to this chapter.

9. Notwithstanding any other provision of law, an association, its directors or members of the executive board, employees, agents or community manager who enter the grounds or interior of a unit pursuant to this section are not liable for trespass.

10. ***Nothing in this section gives rise to any rights or standing for a claim for a constructional defect made pursuant to NRS 40.600 to 40.695, inclusive.***

11. As used in this section:

(a) "Exterior of the unit" includes, without limitation, all landscaping outside of a unit, the exterior of all property exclusively owned by the unit owner and the exterior of all property that the unit owner is obligated to maintain pursuant to the declaration.

(b) "Remediation" does not include restoration.

(c) "Vacant" means a unit:

(1) Which reasonably appears to be unoccupied;

(2) On which the owner has failed to maintain the exterior to the standards set forth in the governing documents of the association; and

(3) On which the owner has failed to pay assessments for more than 60 days.

Secs. 9 and 10. (Deleted by amendment.)

Sec. 11. 1. The provisions of NRS 40.645 and 40.650, as amended by sections 2 and 4 of this act, respectively, apply to a notice of constructional defect given on or after October 1, 2019.

2. The provisions of NRS 40.647, as amended by section 3 of this act, apply to an inspection conducted pursuant to NRS 40.6462 on or after October 1, 2019.

3. The provisions of NRS 40.655, as amended by section 5 of this act, apply to any claim for which a notice of constructional defect is given on or after October 1, 2019.

4. The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019.

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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 **DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) OR, IN THE ALTERNATIVE, MOTION TO STAY THE COURT'S ORDER** **HEARING REQUESTED**

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

Counterclaimants,

vs.

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

Counterdefendants.

Defendant Panorama Towers Condominium Unit Owners' Association (the "HOA"), by and through its counsel of record, hereby respectfully submits this Motion for Reconsideration of the Court's Findings of Fact, Conclusions of Law, and Order (the "Order") Granting Plaintiffs Laurent Hallier, Panorama Towers I LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc.'s (collectively, the "Builders") Motion for Summary Judgment Pursuant to NRS 11.202(1) or, in the alternative, Motion to Stay the Court's Order.

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/ / /

This Motion is made and based upon the following Points and Authorities, any exhibits attached thereto, the pleadings and papers on file herein, the oral argument of counsel, and such other or further information as this Honorable Court may request.

DATED: June 3, 2019

LYNCH & ASSOCIATES LAW GROUP

By: /s/ Francis I. Lynch

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The HOA respectfully seeks reconsideration of the Court's Order filed on May 23, 2019, granting the Builders' motion for summary judgment on the ground that the HOA's claims are barred by the six-year statute of repose provided by NRS 11.202(1).

The Court ruled in the Order that the HOA's Chapter 40 notice tolled the applicable statue of repose to October 26, 2016, 30 days after the mediation on September 26, 2016 (Order, ¶14). The Court further ruled:

1) The HOA's counterclaim filed on March 1, 2017, was not compulsory because it did not arise out of the same transaction or occurrence as the Builders' complaint and, therefore, did not relate back to the date the Builders' complaint was filed on September 26, 2016 (Order, ¶¶16-17);
2) Even if the HOA's counterclaim was compulsory, it would still not relate back based on the holding in *Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792 (1990) (Order, ¶18); and
3) The HOA failed to establish good cause for the Court to extend the tolling of the statute of repose pursuant to NRS 40.695(2).

The HOA seeks reconsideration of the above three itemized holdings and will address each in order.

Alternatively, in light of the Nevada Legislature's passage of Assembly Bill 421, which immediately and retroactively extends the statute of repose to 10 years, the HOA respectfully requests a stay of the Order pending the potential enactment or rejection of Assembly Bill 421.

II.

STATEMENT OF FACTS

For context, the relevant chronology of events, as established by the parties' submittals in connection with the Builders' motion, is as follows:

January 16, 2008 Certificate of occupancy issued for Panorama Tower I

March 26, 2008	Certificate of occupancy issued for Tower II
February 24, 2015	AB125 enacted, including reduction of statute of repose and provision of a one-year grace period
February 24, 2016	The HOA served the Builders with its Chapter 40 notice for Towers I and II pursuant to NRS 40.645
September 26, 2016	The parties participated in a mandatory pre-litigation mediation pursuant to NRS 40.680, without resolving the HOA's construction defect claims
September 28, 2016	The Builders filed this action against the HOA
March 1, 2017	After first filing a motion to dismiss the Builders' complaint, and obtaining a ruling on that motion, the HOA timely filed (i) an answer to the Builders' complaint and (ii) a counterclaim for construction defects
February 11, 2019	After filing a litany of other motions, the Builders moved for summary judgment based on AB125's new, shorter statute of repose

III.

ARGUMENT

A. Standard of Review

The Nevada Supreme Court has held that a Court has the inherent authority to reconsider prior orders.[1] Furthermore, EDCR 2.24 empowers litigants to move a court for reconsideration of any order. Pursuant to EDCR 2.24(b), a motion requesting reconsideration must be filed within 10 days after service of the written notice of the order or judgment (unless shortened or enlarged by order of the court). Additionally, reconsideration is always appropriate when new issues of fact or law, or some error of law or fact, support or require a contrary result.[2] In general, a request for reconsideration should direct the Court's attention to some newly discovered evidence or

[1] *See Trail v. Faretto*, 991 Nev. 401, 546 P.2d 1026 (1975).

[2] *See Moore v. City of Las Vegas*, 92 Nev. 402, 551 P.2d 244 (1976).

intervening change in the controlling law.[3] As the Builders' themselves have previously argued, "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous."[4]

B. The HOA's counterclaim for construction defects arose out of the same transaction or occurrence as the Builders' Claims, which made it compulsory.

As noted by the Court (Order, ¶16), a counterclaim is compulsory under NRCP 13(a) if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim.[5] However, the Court disagreed that the HOA's counterclaim was compulsory, stating (Order, ¶17):

> The Builders' claims are for breach of the prior settlement agreement and declaratory relief regarding the sufficiency of the NRS 40.645 notice and application of AB125. The Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its windows in the two towers.

With due respect, the HOA believes this analysis is incorrect. The Court focused on the legal causes of action alleged in the respective pleadings, not the underlying *transaction or occurrence* on which the pleadings are based. In addressing this issue, the Nevada Supreme Court has held and explained as follows:

> The definition of transaction or occurrence ***does not require an identity of factual backgrounds***. Instead, 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.[6]

The *Mendenhall* court favorably quoted a law review article that noted "[i]n 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."[7]

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[3] *See Matter of Ross*, 99 Nev. 657, 659, 688 P.2d 1089, 1091 (1983); *Kona Enterprise, Inc. v. Estate of Bishop*, 229 F.3d 877 (9th Cir. 2000).

[4] *Masonry & Tile Contractors v. Jolley, Urga & Wirth Ass'n*, 113 Nev. 737, 741 (1997).

[5] *See Mendenhall v. Tassinari,* 403 P.3d 364 (Nev. 2017).

[6] *Mendenhall*, 403 P.3d at 370-371 (emphasis added) (internal citations omitted).

[7] *Id.*

The federal courts follow a similar logical relationship test. For example, the Second Circuit held as follows:

> In determining whether a claim "arises out of the transaction . . . that is the subject matter of the opposing party's claim", this Circuit generally has taken a broad view, not requiring "an absolute identity of factual backgrounds . . . but ***only a logical relationship between them***." This approach looks to the logical relationship between the claim and the counterclaim, and attempts to determine 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."[8]

Here, the Builders' Complaint, filed on September 28, 2016, makes the following allegations relevant to this Motion:

- The dates on which certificates of occupancy were issued for the two Panorama towers, and the alleged dates of substantial completion of the towers (¶¶23-27).
- There was a prior suit by the HOA against the Builders for construction defects that was settled pursuant to a release that did not extend to unknown defects (¶¶45-51).
- Claim preclusion applies because the construction defects alleged by the HOA in the counterclaim were litigated in the prior construction defect action (¶¶52, 59-60, 71-80).
- That the HOA filed a Chapter 40 notice on February 24, 2016 (¶9).
- That the HOA's Chapter 40 notice alleged the following defects: "(1) residential tower windows, (2) residential tower fire blocking, (3) mechanical room piping, and (4) sewer piping" (¶10).
- Whether the itemized defects at issue presented an "unreasonable risk of injury to person or property" (¶¶35-36).
- Details regarding the piping claim, including the report by the HOA's mechanical expert and the fact that the piping claim was repaired (¶¶12-13, 16, 18, 19).
- Details regarding the sewer claim (¶¶17, 18, 19).
- That the Builders responded to the HOA's Chapter 40 notice on May 24, 2016 (¶20).
- That the parties participated in a pre-litigation mediation regarding the defects in question on September 26, 2016 (¶21).

[8] *U.S. v. Aquavella*, 615 F.2d 12 (2d Cir. 1979) (emphasis added) (internal citations omitted).

The HOA's counterclaim, filed on March 1, 2017, includes allegations emanating from the same or logically related underlying transaction or occurrence to that alleged in the Builders' Complaint; specifically, the HOA alleges the following relevant facts:

- That there was a prior lawsuit by the HOA against the Builder for construction defects that was settled pursuant to a release that did not extend to unknown defects (¶28).
- That the HOA filed a Chapter 40 notice on February 24, 2016 (¶32).
- Descriptions of the defects at issue; specifically, (1) residential tower windows, (2) residential tower fire blocking, (3) mechanical room piping, and (4) sewer piping (¶29).
- That the parties participated in a pre-litigation mediation regarding the defects in question on September 26, 2016 (¶33).

Under the holdings in *Mendenhall* and *Aquavella*, the HOA's counterclaim is based on the same transaction or occurrence as the Builders' Complaint because the competing claims are logically related. For example, the Builders' allegation of and claim for relief related to claim preclusion based on the prior lawsuit will require the parties and the Court to delve into entire scope of the prior litigation, specifically all defects alleged and litigated before entering into the settlement agreement. The Builders' allegations and claims involve far more than simply "breach of the prior settlement agreement . . . ." (Order, ¶17). Here, in the words of *Mendenhall*, "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." And in the words of *Aquavella*, 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."

And, to remove any doubt, the Builders have expressly confirmed in their Complaint that the respective claims arose out of the same transaction or occurrence. Specifically, the Builders allege in their First Claim for Relief (for declaratory relief), that because the HOA intends to file a complaint against the Builders for the construction defects alleged in the HOA's Chapter 40 notice, a justiciable controversy exists regarding the "defects alleged" in the Chapter 40 notice (¶¶62-67). The Builders then assert (¶68, italics added):

> 68. All the rights and obligations of the parties hereto ***arose out of what is actually one transaction or one series of transactions, happenings or events***, all of which can be settled and determined in a judgment in this one action.

The Builders then incorporated these same allegations into every other claim for relief.[9] The Builders cannot now disavow their own admission that all of the parties' rights arise out of a single transaction or occurrence in order to obtain summary judgment against the HOA. The HOA therefore respectfully requests that the Court reconsider and reverse its ruling to the contrary.

C. The *Jamison* holding does not preclude the application of the relation back doctrine to the HOA's counterclaim.

The Court stated in the Order (¶18) that, even if it were to consider that the counterclaim was compulsory, the pleading would not relate back to the filing of the Builders' complaint based on the holding in *Jamison, supra*, 106 Nev. 792, 801 P.2d 1377. The HOA did not have a prior opportunity to brief the *Jamison* case because the Builders cited it for the first time in their reply brief.

In *Jamison*, the Nevada Supreme Court held in one, limited instance—distinguishable from the facts presented here—that the filing of a complaint prior to the expiration of a statute of limitations, did not toll the running of that statute against a compulsory counterclaim that was filed after the statute expired. The Supreme Court decided whether to affirm the trial court's decision to dismiss defendant's counterclaims for deficiency judgments that were brought after the expiration of the 90-day statute of limitation for deficiency judgment actions. The *Jamison* court analyzed the reasoning for jurisdictions that favor tolling of limitations for compulsory counterclaims and found that that analysis did not go far enough for the particular case in question. The court observed:

> Those jurisdictions in favor of tolling generally reason that a primary purpose for a statute of limitations—to afford parties needed protection against the evidentiary problems associated with defending stale claims—is negated where the evidence to support the compulsory counterclaim will be similar or identical to the evidence used to support the complaint. "Thus, once a party files

[9] *See* Compl., ¶¶ 71, 81, 91, 94, 99, 107.

> an affirmative action, he cannot thereafter profess to be surprised . . . or prejudiced by . . . compulsory counterclaims that stem from that action."
>
> However, this analysis does not go far enough. While statutes of limitations are intended to protect a defendant against the evidentiary problems associated with defending a stale claim, these statutes are also enacted to "promote repose by giving security and stability to human affairs . . . . They stimulate to activity and punish negligence." ***In this case, 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.***[10]

In other words, the *Jamison* court acknowledged that preventing stale claims and lost evidence obviously would not have been the Legislature's concern in enacting a 3-month statute of limitations. On the other hand, preventing stale claims and lost evidence are two of the primary concerns in enacting most statutes of limitation and repose. And, as the *Jamison* court observed, a party who files an affirmative action cannot claim surprise or prejudice when the opposing party files a compulsory counterclaim arising from the same transaction or occurrence.[11]

On that basis, *Jamison* should not be interpreted as a blanket rule applicable to all limitations periods and extended to bar the HOA's counterclaims. The HOA therefore requests that the Court reconsider its ruling in terms of the applicability of *Jamison* to the circumstances involved here.

D. The Court misapplied the good cause analysis under NRS 40.695(2).

In its Order, the Court found the "Association did not show this Court good cause exists for its failure to institute litigation before October 26, 2016."[12] Based on that decision, the Court held the lack of any impact on "the Builders' ability to defect the Association's claim . . . is irrelevant to the issue of good cause."[13] The Court's good-cause analysis seems to focus entirely on the HOA's conduct rather than any other factors. But the Court's ability to extend the tolling

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[10] *Jamison*, 106 Nev. at 798, 801 P.2d at 1381–82 (emphasis added) (internal citations omitted).

[11] *Id.* (quoting *Allie v. Ionata*, 503 So.2d 1237, 1240 (Fla. 1987)).

[12] Order, ¶ 19.

[13] *Id.*

under NRS 40.695 is not premised on or limited to whether the HOA can demonstrate good cause for its conduct. The statute is much broader and grants the Court greater discretion, similar to the good-cause analysis under NRCP 4(e). In addition to espousing a strong public policy of adjudicating cases on their merits, the Nevada Supreme Court held it to be an abuse of the district court's discretion to refuse to find good cause for additional time to serve a complaint where there was no prejudice to the defendant.[14] The *Scrimer* court's holding requires a good-cause finding here because the Builders' will suffer absolutely no prejudice from allowing the HOA's claims to process, particularly when the Builders received detailed pre-litigation notice of those claims in February 2016.

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 HOA respectfully requests that the Court reconsider its ruling to the contrary.

E. Alternatively, the Court should stay its Order until AB421 is signed by the Governor, vetoed, or enacted without signature.

On May 24, 2019, exactly one day after the Court issued its Order, the Nevada State Senate voted to pass Assembly Bill 421 ("AB421"). AB421, as amended, makes several revisions to NRS 40.600 *et seq.* and NRS Chapter 11.[15]

Notably, AB421 amends NRS 11.202 to lengthen the statute of repose applicable to this action to 10 years.[16] As the Legislative Counsel's Digest explains:

> Existing law prohibits an action for the recovery of certain damages 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, from being commenced more than 6 years after the substantial completion to such an improvement. (NRS 11.202) **Section 7** of this bill ***increases such a period to 10 years after the substantial completion*** of such an improvement.[17]

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[14] *See Scrimer v. Dist. Ct.*, 116 Nev. 507, 998 P.2d 1190 (2000).

[15] *See* AB 421, as enrolled, attached hereto as **Exhibit A.**

[16] *Id.* at § 7.

[17] *Id.* at p.2 (emphasis added).

AB421 also makes clear that the new "period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019."[18]

As of the filing of this motion, AB421 has passed both houses of the Nevada State Legislature,[19] has been enrolled, and has been delivered to the Governor. Consequently, there exist only three outcomes for AB421: (1) it is approved by the Governor, in which case it is signed and becomes law, (2) it is not approved by the Governor, in which case it is returned with his objections to the House from which it originated, or (3) it is not signed and not returned with the Governor's objections within five days (Sundays excepted and exclusive of the day on which it was received), in which case it shall become law in like manner as if it were signed.[20]

At bottom, AB421 is mere days away from either becoming law or being disapproved. Should AB421 become law, it will substantively alter the controlling law upon which the Court relied in the issuance of its Order. For that reason, the HOA requests a stay of the Order until such a time as AB421 is signed and enacted, vetoed, or enacted without signature. Should AB421 become law, the HOA anticipates filing another motion for reconsideration based on a change in the controlling law.

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[18] *Id.* at § 11.

[19] *See NV AB421, 80th Legislature,* Nevada Electronic Legislative Information System. Retrieved June 3, 2019, from https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6799/Votes, attached hereto as **Exhibit B**.

[20] Nev. Const. art. 4, § 35.

III.

CONCLUSION

Based on the foregoing arguments, the HOA respectfully requests reconsideration of the Order entered on May 23, 2019.

DATED: June 3, 2019

LYNCH & ASSOCIATES LAW GROUP

By: /s/ Francis I. Lynch
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Certificate of Service

I hereby certify that on the 3rd day of June, 2019, the foregoing **DEFENDANT'S MOTION FOR RECONSIDERATION OF THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) OR, IN THE ALTERNATIVE, MOTION TO STAY THE COURT'S ORDER** was served on the following by Electronic Service to all parties on the Court's service list.

/s/ Colin Hughes
An employee of Lynch & Associates Law Group

EXHIBIT A

EXHIBIT A

Assembly Bill No. 421–Committee on Judiciary

CHAPTER.....

AN ACT relating to construction; revising provisions relating to the information required to be included in a notice of a constructional defect; removing provisions requiring the presence of an expert during an inspection of an alleged constructional defect; establishing provisions relating to a claimant pursuing a claim under a builder's warranty; removing certain provisions governing the tolling of statutes of limitation and repose regarding actions for constructional defects; revising provisions relating to the recovery of damages proximately caused by a constructional defect; increasing the period during which an action for the recovery of certain damages may be commenced; revising the prohibition against a unit-owners' association pursuing an action for a constructional defect unless the action pertains exclusively to the common elements of the association; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant: (1) is required to give written notice to the contractor; and (2) if the contractor is no longer licensed or acting as a contractor in this State, is authorized to give notice to any subcontractor, supplier or design professional known to the claimant who may be responsible for the constructional defect. Existing law also requires that such a notice identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim. (NRS 40.645) **Section 2** of this bill instead requires that such a notice specify in reasonable detail the defects or any damages or injuries to each residence or appurtenance that is the subject of the claim.

Existing law requires that after notice of a constructional defect is given by a claimant to a contractor, subcontractor, supplier or design professional, the claimant and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert or his or her representative with knowledge of the alleged defect must: (1) be present when a contractor, subcontractor, supplier or design professional conducts an inspection of the alleged constructional defect; and (2) identify the exact location of each alleged constructional defect. (NRS 40.647) **Section 3** of this bill removes the requirement that an expert who provided an opinion concerning the alleged constructional defect or his or her representative be present at an inspection and revises certain other requirements.

Existing law provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant: (1) the claimant is prohibited from sending notice of a constructional defect or pursuing a claim for a constructional defect unless the claimant has submitted a claim under the homeowner's warranty and the insurer has denied the claim; and (2) notice of a constructional defect may only include claims that were denied by the insurer. (NRS 40.650) **Section 4** of this bill removes such provisions, and **section 1.5** of this bill replaces the term "homeowner's warranty" with

"builder's warranty" and clarifies that such a warranty is not a type of insurance. **Section 4** provides that if a residence or appurtenance that is the subject of a claim is covered by a builder's warranty, the claimant is required to diligently pursue a claim under the builder's warranty. **Section 5.5** of this bill makes conforming changes.

Existing law also provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant, statutes of limitation or repose are tolled from the time the claimant submits a claim under the homeowner's warranty until 30 days after the insurer rejects the claim, in whole or in part. (NRS 40.650) **Section 4** removes this provision.

Existing law establishes the damages proximately caused by a constructional defect that a claimant is authorized to recover, including additional costs reasonably incurred by the claimant for constructional defects proven by the claimant. (NRS 40.655) **Section 5** of this bill removes the requirement that such costs be limited to constructional defects proven by the claimant.

Existing law prohibits an action for the recovery of certain damages 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, from being commenced more than 6 years after the substantial completion of such an improvement. (NRS 11.202) **Section 7** of this bill increases such a period to 10 years after the substantial completion of such an improvement. **Section 7** also: (1) authorizes such an action to be commenced at any time after the substantial completion of such an improvement if any act of fraud caused a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; and (2) exempts lower-tiered subcontractors from such an action in certain circumstances.

Existing law prohibits a unit-owners' association from instituting, defending or intervening in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners relating to an action for a constructional defect unless the action pertains exclusively to common elements. (NRS 116.3102) **Section 8** of this bill requires that such an action for a constructional defect pertain to: (1) common elements; (2) any portion of the common-interest community that the association owns; or (3) any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association.

Existing law authorizes a unit-owners' association to enter the grounds of a unit to conduct certain maintenance or remove or abate a public nuisance, or to enter the grounds or interior of a unit to abate a water or sewage leak or take certain other actions in certain circumstances. (NRS 116.310312) **Section 8.5** of this bill provides that such provisions do not give rise to any rights or standing for a claim for a constructional defect.

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

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

Section 1. (Deleted by amendment.)

Sec. 1.5. NRS 40.625 is hereby amended to read as follows:

40.625 ~~[~~"Homeowner's~~]~~ ***"Builder's*** warranty" means a warranty ~~[~~or policy of insurance:

~~1. Issued]~~ ***issued*** or purchased by or on behalf of a contractor for the protection of a claimant ***.*** ~~[~~; or

~~2. Purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive.~~

~~➥]~~ The term ~~[~~includes~~]~~ ***:***

1. Includes a warranty contract issued by ***or on behalf of a contractor whose liability pursuant to the warranty contract is subsequently insured by*** a risk retention group that operates in compliance with chapter 695E of NRS and insures all or any part of the liability of a contractor for the cost to repair a constructional defect in a residence.

2. Does not include a policy of insurance for home protection as defined in NRS 690B.100 or a service contract as defined in NRS 690C.080.

Sec. 2. NRS 40.645 is hereby amended to read as follows:

40.645 1. Except as otherwise provided in this section and NRS 40.670, before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant:

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

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

2. The notice given pursuant to subsection 1 must:

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

(b) ~~[~~Identify~~]~~ ***Specify*** in ~~[~~specific~~]~~ ***reasonable*** detail ~~[~~each defect, damage and injury~~]~~ ***the defects or any damages or injuries*** to each residence or appurtenance that is the subject of the claim ***;*** ~~[~~, including, without limitation, the exact location of each such defect, damage and injury;~~]~~

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

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

3. A representative of a homeowners' association may send notice pursuant to this section on behalf of an association if the representative is acting within the scope of the representative's duties pursuant to chapter 116 or 117 of NRS.

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

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

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

Sec. 3. NRS 40.647 is hereby amended to read as follows:

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

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

(b) Be present ***or have a representative of the claimant present*** at an inspection conducted pursuant to NRS 40.6462 and ***, to the extent possible, reasonably*** identify the ~~[exact location of each alleged constructional defect]~~ ***proximate locations of the defects, damages or injuries*** specified in the notice ***;*** ~~[and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert, or a representative of the expert who has knowledge of the alleged constructional defect, must also be present at the inspection and identify the exact location of each alleged constructional defect for which the expert provided an opinion;]~~ and

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

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

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

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

Sec. 4. NRS 40.650 is hereby amended to read as follows:

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

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

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

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

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

(a) Comply with the provisions of NRS 40.6472;

(b) Make an offer of settlement;

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

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

(e) Participate in mediation,

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

3. If a residence or appurtenance that is the subject of the claim is covered by a ~~[homeowner's]~~ ***builder's*** warranty ~~[that is purchased~~

~~by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive:~~

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

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

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

~~(d) Statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, are tolled from the time notice of the claim under the homeowner's warranty is submitted to the insurer until 30 days after the insurer rejects the claim, in whole or in part, in writing.~~**]** ***, a claimant shall diligently pursue a claim under the builder's warranty.***

4. Nothing in this section prohibits an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure or NRS 40.652.

Sec. 5. NRS 40.655 is hereby amended to read as follows:

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

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

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

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

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

(e) Any additional costs reasonably incurred by the claimant **,** ~~[for constructional defects proven by the claimant,]~~ including, but

not limited to, any costs and fees incurred for the retention of experts to:

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

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

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

(f) Any interest provided by statute.

2. If a contractor complies with the provisions of NRS 40.600 to 40.695, inclusive, the claimant may not recover from the contractor, as a result of the constructional defect, any damages other than damages authorized pursuant to NRS 40.600 to 40.695, inclusive.

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

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

Sec. 5.5. NRS 40.687 is hereby amended to read as follows:

40.687 Notwithstanding any other provision of law:

1. A ~~[claimant shall, within 10 days after commencing an action against a contractor, disclose to the contractor all information about any homeowner's warranty that is applicable to the claim.~~

~~2. The]~~ contractor shall, no later than 10 days after a response is made pursuant to this chapter, disclose to the claimant any information about insurance agreements that may be obtained by discovery pursuant to rule 26(b)(2) of the Nevada Rules of Civil Procedure. Such disclosure does not affect the admissibility at trial of the information disclosed.

~~[3.]~~ ***2.*** Except as otherwise provided in subsection ~~[4,]~~ ***3,*** if ~~[either party]~~ ***the contractor*** fails to provide the information required pursuant to subsection 1 ~~[or 2]~~ within the time allowed, the ~~[other party]~~ ***claimant*** may petition the court to compel production of the information. Upon receiving such a petition, the court may order the ~~[party]~~ ***contractor*** to produce the required information and may award the ~~[petitioning party]~~ ***claimant*** reasonable attorney's fees and costs incurred in petitioning the court pursuant to this subsection.

~~[4.]~~ ***3.*** The parties may agree to an extension of time ***for the contractor*** to produce the information required pursuant to this section.

~~[5.]~~ ***4.*** For the purposes of this section, "information about insurance agreements" is limited to any declaration sheets, endorsements and contracts of insurance issued to the contractor from the commencement of construction of the residence of the claimant to the date on which the request for the information is made and does not include information concerning any disputes between the contractor and an insurer or information concerning any reservation of rights by an insurer.

Sec. 6. (Deleted by amendment.)

Sec. 7. NRS 11.202 is hereby amended to read as follows:

11.202 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]~~ ***10*** years after the substantial completion of such an improvement, for the recovery of damages for:

(a) ~~[Any]~~ ***Except as otherwise provided in subsection 2, 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.

2. ***Except as otherwise provided in this subsection, an action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for any act of fraud in causing a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement. The provisions of this subsection do not apply to any lower-tiered subcontractor who performs work that covers up a defect or deficiency in another contractor's trade if the lower-tiered subcontractor does not know, and should not reasonably know, of the existence of the alleged defect or deficiency at the time of performing such work. As used in this subsection, "lower-tiered subcontractor" has the meaning ascribed to it in NRS 624.608.***

3. The provisions of this section do not apply:

(a) To a claim for indemnity or contribution.

(b) In an action brought against:

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

(2) Any person on account of a defect in a product.

Sec. 8. NRS 116.3102 is hereby amended to read as follows:

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

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

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

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

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

(1) Common elements ~~[.]~~ ***;***

(2) Any portion of the common-interest community that the association owns; or

(3) Any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association.

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

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

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

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

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

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

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

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

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

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

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

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

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

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

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

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

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or

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

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

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

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

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

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

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

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

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

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

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

5. Notwithstanding any provision of this chapter or the governing documents to the contrary, an association may not impose any assessment pursuant to this chapter or the governing documents on the owner of any property in the common-interest community

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

Sec. 8.5. NRS 116.310312 is hereby amended to read as follows:

116.310312 1. A person who holds a security interest in a unit must provide the association with the person's contact information as soon as reasonably practicable, but not later than 30 days after the person:

(a) Files an action for recovery of a debt or enforcement of any right secured by the unit pursuant to NRS 40.430; or

(b) Records or has recorded on his or her behalf a notice of a breach of obligation secured by the unit and the election to sell or have the unit sold pursuant to NRS 107.080.

2. If an action or notice described in subsection 1 has been filed or recorded regarding a unit and the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association, including its employees, agents and community manager, may, but is not required to, enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions if the unit's owner refuses or fails to take any action or comply with any requirement imposed on the unit's owner within the time specified by the association as a result of the hearing:

(a) Maintain the exterior of the unit in accordance with the standards set forth in the governing documents, including, without limitation, any provisions governing maintenance, standing water or snow removal.

(b) Remove or abate a public nuisance on the exterior of the unit which:

(1) Is visible from any common area of the community or public streets;

(2) Threatens the health or safety of the residents of the common-interest community;

(3) Results in blighting or deterioration of the unit or surrounding area; and

(4) Adversely affects the use and enjoyment of nearby units.

3. If:

(a) A unit is vacant;

(b) The association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031; and

(c) The association or its employee, agent or community manager mails a notice of the intent of the association, including its employees, agents and community manager, to maintain the exterior of the unit or abate a public nuisance, as described in subsection 2, by certified mail to each holder of a recorded security interest encumbering the interest of the unit's owner, at the address of the holder that is provided pursuant to NRS 657.110 on the Internet website maintained by the Division of Financial Institutions of the Department of Business and Industry,

➥ the association, including its employees, agents and community manager, may enter the grounds of the unit to maintain the exterior of the unit or abate a public nuisance, as described in subsection 2, if the unit's owner refuses or fails to do so.

4. If a unit is in a building that contains units divided by horizontal boundaries described in the declaration, or vertical boundaries that comprise common walls between units, and the unit is vacant, the association, including its employees, agents and community manager, may enter the grounds and interior of the unit to:

(a) Abate a water or sewage leak in the unit and remove any water or sewage from the unit that is causing damage or, if not immediately abated, may cause damage to the common elements or another unit if the unit's owner refuses or fails to abate the water or sewage leak.

(b) After providing the unit's owner with notice but before a hearing in accordance with the provisions of NRS 116.31031:

(1) Remove any furniture, fixtures, appliances and components of the unit, including, without limitation, flooring, baseboards and drywall, that were damaged as a result of water or mold damage resulting from a water or sewage leak to the extent such removal is reasonably necessary because water or mold damage threatens the health or safety of the residents of the common-interest community, results in blighting or deterioration of the unit or the surrounding area and adversely affects the use and enjoyment of nearby units, if the unit's owner refuses or fails to remediate or remove the water or mold damage.

(2) Remediate or remove any water or mold damage in the unit resulting from the water or sewage leak to the extent such remediation or removal is reasonably necessary because the water or

mold damage threatens the health or safety of the residents of the common-interest community, results in blighting or deterioration of the unit or the surrounding area and adversely affects the use and enjoyment of nearby units, if the unit's owner refuses or fails to remediate or remove the water or mold damage.

5. After the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association may order that the costs of any maintenance or abatement or the reasonable costs of remediation or removal conducted pursuant to subsection 2, 3 or 4, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

6. A lien described in subsection 5 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.

7. Except as otherwise provided in this subsection, a lien described in subsection 5 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.

8. A person who purchases or acquires a unit at a foreclosure sale pursuant to NRS 40.430 or a trustee's sale pursuant to NRS 107.080 is bound by the governing documents of the association and shall maintain the exterior of the unit in accordance with the governing documents of the association. Such a unit may only be removed from a common-interest community in accordance with the governing documents pursuant to this chapter.

9. Notwithstanding any other provision of law, an association, its directors or members of the executive board, employees, agents or community manager who enter the grounds or interior of a unit pursuant to this section are not liable for trespass.

10. ***Nothing in this section gives rise to any rights or standing for a claim for a constructional defect made pursuant to NRS 40.600 to 40.695, inclusive.***

11. As used in this section:

(a) "Exterior of the unit" includes, without limitation, all landscaping outside of a unit, the exterior of all property exclusively owned by the unit owner and the exterior of all property that the unit owner is obligated to maintain pursuant to the declaration.

(b) "Remediation" does not include restoration.

(c) "Vacant" means a unit:

(1) Which reasonably appears to be unoccupied;

(2) On which the owner has failed to maintain the exterior to the standards set forth in the governing documents of the association; and

(3) On which the owner has failed to pay assessments for more than 60 days.

Secs. 9 and 10. (Deleted by amendment.)

Sec. 11. 1. The provisions of NRS 40.645 and 40.650, as amended by sections 2 and 4 of this act, respectively, apply to a notice of constructional defect given on or after October 1, 2019.

2. The provisions of NRS 40.647, as amended by section 3 of this act, apply to an inspection conducted pursuant to NRS 40.6462 on or after October 1, 2019.

3. The provisions of NRS 40.655, as amended by section 5 of this act, apply to any claim for which a notice of constructional defect is given on or after October 1, 2019.

4. The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019.

EXHIBIT B

EXHIBIT B

AB421

Final Passage

Assembly

Passed:
Yes (Constitutional Majority)
Date:
Tuesday, April 23, 2019
Votes:

All: 42

Yea: 27

Nay: 13

Excused: 2

Not Voting: 0

Absent: 0

Senate

Passed:
Yes (Constitutional Majority)
Date:
Friday, May 24, 2019
Votes:

All: 21

Yea: 20

Nay: 0

; ;

Excused: 1

Not Voting: 0

Absent: 0

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Steven D. Grierson
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Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

HEARING REQUESTED

DEFENDANT'S MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)

Case Number: A-16-744146-D

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

Counterclaimants,

vs.

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

Counterdefendants.

Defendant Panorama Towers Condominium Unit Owners' Association ("Association"), by and through its counsel of record, hereby respectfully submits this Motion for Reconsideration of and/or to Alter or Amend the Court's Findings of Fact, Conclusions of Law, and Order (the "Order") Granting Plaintiffs Laurent Hallier, Panorama Towers I LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc.'s (collectively, the "Builders") Motion for Summary Judgment Pursuant to NRS 11.202(1).

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This Motion is made and based upon the following Points and Authorities, any exhibits attached thereto, the pleadings and papers on file herein, the oral argument of counsel, and such other or further information as this Honorable Court may request.

DATED this 13th day of June, 2019.

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Less than two weeks after this Court entered its Order time-barring the Association's construction defect claims, the applicable, controlling Nevada law retroactively changed. On June 3, 2019, Governor Sisolak signed into law Assembly Bill 421, which immediately extended the applicable statute of repose to 10 years. Based on the Court's findings of fact related to the dates of substantial completion for both Panorama Towers (January and March 2008), the Association filed its counterclaims well within the new 10-year repose period.

Due to the interlocutory nature of the Order, this Court possesses the authority—both under its inherent powers and those granted by NRCP 54(b)—to revisit and revise the Order at any time before entry of a final judgment. Even if the Order constitutes a final judgment, which it does not, NRCP 59(e) allows the Court to alter or amend the Order due to a subsequent change in the controlling law.

Therefore, the Association respectfully requests reconsideration of the Builders' Motion for Summary Judgment filed on February 11, 2019, and the Order entered on May 23, 2019.

II.

STATEMENT OF FACTS

On February 24, 2015, AB125 became the law. AB125 established, among other things, a shorter, six-year statute of repose period. *See* NEV. REV. STAT. § 11.202(1). The shortened repose period applied retroactively. *See* AB125 § 21(5); Order at ¶10. In conjunction with the shortened repose period, AB125 created a constitutionally required one-year grace period in which claimants were allowed to file claims without being time-barred.

On February 24, 2016, the Association served a Chapter 40 Notice on the Builders for various constructional defects in both of the Panorama Towers. On September 26, 2016, the parties engaged in a pre-litigation mediation pursuant to NRS 40.680. On September 28, 2016, the Builders filed the Complaint against the Association. On March 1, 2017, after briefing and hearing related to the Association's motion to dismiss, the Association timely filed its Answer and

Counterclaim against the Builders.

On March 20, 2017, the Builders filed their first motion for summary judgment to challenge the Association's Chapter 40 Notice under NRS 40.645. On June 20, 2017, the Court heard that motion. On September 23, 2017, the Court granted the Builders' motion and stayed the case to allow the Association to amend its Chapter 40 Notice.

On April 5, 2018, the Association served the Builders with its Amended Chapter 40 Notice.

On June 3, 2018, the Builders filed their second motion for summary judgment, this time challenging the Association's Amended Chapter 40 Notice under NRS 40.645. On October 2, 2018, the Court heard that motion. On November 30, 2018, the Court partially granted the Builders' second motion and allowed the Association's window-based claims to proceed.

On October 22, 2018, the Builders filed their third motion for summary judgment challenging the Association's standing to prosecute the claims. On December 17, 2018, the Builders filed a motion for reconsideration of the Court's order determining the Association's Amended Chapter 40 Notice to be sufficient for the window-based claims. On February 12, 2019, the Court heard and denied the Builders' third motion for summary judgment and motion for reconsideration. *See* Orders entered on March 11, 2019.

On February 11, 2019, the Builders filed their fourth motion for summary judgment, this time challenging the timeliness of the Association's construction defect counterclaims under NRS 11.202(1). On March 1, 2019, the Association filed its opposition to the motion and a countermotion. On April 23, 2019, the Court heard the Builders' motion and the Association's countermotion. On May 23, 2019, the Court entered its Order granting the Builders' motion and denying the Association's countermotion ("Order"). In its Order, the Court determined the dates of substantial completion are "January 16, 2018 (Tower I) and March 16, 2018 (Tower II) . . . ." On May 28, 2019, the Builders filed a Notice of Entry for the Order.

On May 28, 2019, the Builders filed a Verified Memorandum of Costs. On May 29, 2019, the Builders filed an Errata to their Verified Memorandum of Costs. On May 31, 2019, the Association filed a Motion to Re-Tax and Settle Costs, which is presently set for hearing on July

2, 2019.

On June 1, 2019, the Nevada Legislature passed Assembly Bill 421 and delivered it to Governor Sisolak for consideration. *See* **Exhibit 1**, AB421, Nevada Electronic Legislative Information System, https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6799/Overview (viewed on June 13, 2019).

On June 3, 2019, the Association filed a motion for reconsideration of the Order, which is presently set for hearing on July 9, 2019. In that motion, the Association noted the status of AB421 and the possibility of filing another motion for reconsideration should the bill become Nevada law. The Builders' time to respond to that motion has not yet expired.

Later in the day on June 3, 2019, Governor Sisolak signed AB421 into law. *See* Ex. 1 (AB421 NELIS). AB421 provides, among other things, for an extension of the statute of repose period from six years to 10 years. *See* **Exhibit 2**, AB421 at § 7 (as enrolled). Of importance, the new 10-year statute of repose "***appl[ies] retroactively to actions*** in which the substantial completion of the improvement to the real property occurred before October 1, 2019." *Id.* at § 11 (emphasis added).

III.

ARGUMENT

A. This Court Has the Power to Reconsider its Orders at Any Time Before Entry of a Final Judgment Resolving All Claims Asserted by or Against All Parties.

Prior to entry of a final judgment, the district courts possess the inherent authority to reconsider or modify any interlocutory order previously entered in an action. *See Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 733 (1994); *see also City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 885 (9th Cir. 2001) (holding "[a]s long as a district court has jurisdiction over the case, then it possesses the inherent procedural power to reconsider, *rescind,* or modify an interlocutory order for cause seen by it to be sufficient.").

In addition to this inherent power, Rule 54(b) expressly provides that "any order or other decision, however designated, . . . ***may be revised at any time*** before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." NEV. R. CIV. P. 54(b)

(emphasis added). The Nevada Supreme Court has expressly held that Rule 54(b)'s reach includes reconsideration of a motion for summary judgment. *See In re Manhattan W. Mechanic's Lien Litig.*, 131 Nev. Adv. Op. 70, 359 P.3d 125, 129 n.3 (2015) (citing *Bower v. Harrah's Laughlin*, 125 Nev. 470, 479, 215 P.3d 709, 716 (2009)). In *Bower*, litigation spawning from a brawl between the Hell's Angels and the Mongols, one district court initially denied a motion for summary judgment. After consolidation of the *Bower* matter with other related matters, the district court presiding over the consolidated matters reheard and granted the *Bower*-based motion for summary judgment. *See Bower*, 125 Nev. at 476, 215 P.3d at 714. The Nevada Supreme Court held, *sua sponte*, that Rule 54(b) authorized the second district court to rehear the prior summary judgment determination before entering a final judgment as to all of the claims and parties. *Id.* at 479.

1. This Court's Order Granting Plaintiffs' Motion for Summary Judgment is Not a Final Judgment.

Under Nevada law, "the finality of an order or judgment" is determined by "what the order or judgment actually *does*, not what it is called." *Ginsburg*, 110 Nev. at 445, 874 P.2d at 733 (1994) (citing *Taylor v. Barringer*, 75 Nev. 409, 344 P.2d 676 (1959)) (emphasis in original). "More precisely, a final, appealable judgment is 'one that disposes of the issues presented in the case . . . and leaves nothing for the future consideration of the court.'" *Id.* (quoting *Alper v. Posin*, 77 Nev. 328, 330, 363 P.2d 502, 503 (1961)).

This Court's Order entered on May 23, 2019, is an interlocutory order and a non-final judgment because it resolves only one of Plaintiffs' claims rather than all of the claims, rights, and liabilities of all parties. While the Order grants summary judgment, it does not resolve Plaintiffs' Second, Third, Fourth, Fifth, Sixth, or Seventh claims for relief. *See* Compl. at ¶¶ 71–114. That being the case, the Order does not dispose of all issues in the case or leave "nothing for the future consideration of the court." *Ginsburg*, 110 Nev. at 445, 874 P.2d at 733. Further illustrating the non-finality of the Order, Plaintiffs filed a Memorandum of Costs that is subject to Defendant's

Motion to Re-Tax and Settle Costs.[1]

2. The Recent Passage of AB421 Merits Reconsideration of the Order.

Based on the very recent change in the applicable statute of repose period, this Court should exercise its inherent discretion and the power granted to it under Rule 54(b) to reconsider the Order entered just weeks ago. The Court based its Order on the six-year statute of repose in force at the time. *See* Order at ¶¶ 13, 20. However, on June 3, 2019, the statute of repose applicable to the Association's claims immediately and retroactively changed to 10 years. *See* Ex. 2 at §§ 7, 11. Due to the Court's findings regarding the dates of substantial completion for the two towers (*i.e.*, January 16, 2008 (Tower I) and March 16, 2018 (Tower II)), *see* Order at 12:4-6, the Association brought its construction defect claims against Plaintiffs well within the 10-year repose period by filing the Counterclaims on March 1, 2017. Therefore, Nevada law no longer time-bars the Association's claims. For that reason, the Association respectfully requests reconsideration of the Order and the ability to proceed with prosecuting its construction defect claims against Plaintiffs.

B. Even if the Order Constitutes a Final Judgment, the Court Should Alter or Amend its Judgment Based on a Subsequent Change in the Controlling Law.

Should the Court consider its Order to be a final judgment, Rule 59(e) authorizes the Association to seek an order altering or amending the Order within 28 days of the notice of entry of the judgment. *See* NEV. R. CIV. P. 59(e). "Among the "basic grounds" for a Rule 59(e) motion are 'correct[ing] manifest errors of law or fact,' 'newly discovered or previously unavailable evidence,' the need 'to prevent manifest injustice,' or ***a 'change in controlling law.'***" *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010) (quoting *Coury v. Robison*, 115 Nev. 84, 91 n.4, 976 P.2d 518, 522 n.4 (1999)) (emphasis added).

As already discussed, AB421's immediate and retroactive lengthening of the applicable statute of repose period merits altering the Order. Under the new 10-year repose period, the Association timely filed its construction defect counterclaims against Plaintiffs. *See supra*, Section

[1] Defendant disputes the propriety of Plaintiffs filing the Memorandum of Costs due to the non-final nature of the Order.

III(A)(2). Therefore, the Order's effect of procedurally barring the Association's claims is no longer supported by the controlling law and must be reversed.

IV.

CONCLUSION

For the foregoing reasons, the Association respectfully requests an order reconsidering or altering/amending the Order entered on May 23, 2019, to permit the Association to proceed with prosecuting its construction defect claims against the Builders.

DATED this 13th day of June, 2019.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 13 day of June, 2019, the foregoing **DEFENDANT'S MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)** 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 1

AB421

Summary:
Revises provisions relating to construction. (BDR 3-841)

Title:
AN ACT relating to construction; revising provisions relating to the information required to be included in a notice of a constructional defect; removing provisions requiring the presence of an expert during an inspection of an alleged constructional defect; establishing provisions relating to a claimant pursuing a claim under a builder's warranty; removing certain provisions governing the tolling of statutes of limitation and repose regarding actions for constructional defects; revising provisions relating to the recovery of damages proximately caused by a constructional defect; increasing the period during which an action for the recovery of certain damages may be commenced; revising the prohibition against a unit-owners' association pursuing an action for a constructional defect unless the action pertains exclusively to the common elements of the association; and providing other matters properly relating thereto.

Introduction Date:
Monday, March 25, 2019

Fiscal Notes:
Effect on Local Government: No.
Effect on the State: No.

Digest:
Existing law provides that before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant: (1) is required to give written notice to the contractor; and (2) if the contractor is no longer licensed or acting as a contractor in this State, is authorized to give notice to any subcontractor, supplier or design professional known to the claimant who may be responsible for the constructional defect. Existing law also requires that such a notice identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim. (NRS 40.645) Section 2 of this bill instead requires that such a notice specify in reasonable detail the defects or any damages or injuries to each residence or appurtenance that is the subject of the claim. Existing law requires that after notice of a constructional defect is given by a claimant to a contractor, subcontractor, supplier or design professional, the claimant and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert or his or her representative with knowledge of the alleged defect must: (1) be present when a contractor, subcontractor, supplier or design professional conducts an inspection of the alleged constructional defect; and (2) identify the exact location of each alleged constructional defect. (NRS 40.647) Section 3 of this bill removes the requirement that an expert who provided an opinion concerning the alleged constructional defect or his or her representative be present at an inspection and revises certain other requirements. Existing law provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant: (1) the claimant is prohibited from sending notice of a constructional defect or pursuing a claim for a constructional defect unless the claimant has submitted a claim under the homeowner's warranty and the insurer has denied the claim; and (2) notice of a constructional defect may only include claims that were denied by the insurer. (NRS 40.650) Section 4 of this bill removes such provisions, and section 1.5 of this bill replaces the term "homeowner's warranty" with "builder's warranty" and clarifies that such a warranty is not a type of insurance. Section 4 provides that if a residence or appurtenance that is the subject of a

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claim is covered by a builder's warranty, the claimant is required to diligently pursue a claim under the builder's warranty. Section 5.5 of this bill makes conforming changes. Existing law also provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant, statutes of limitation or repose are tolled from the time the claimant submits a claim under the homeowner's warranty until 30 days after the insurer rejects the claim, in whole or in part. (NRS 40.650) Section 4 removes this provision. Existing law establishes the damages proximately caused by a constructional defect that a claimant is authorized to recover, including additional costs reasonably incurred by the claimant for constructional defects proven by the claimant. (NRS 40.655) Section 5 of this bill removes the requirement that such costs be limited to constructional defects proven by the claimant. Existing law prohibits an action for the recovery of certain damages 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, from being commenced more than 6 years after the substantial completion of such an improvement. (NRS 11.202) Section 7 of this bill increases such a period to 10 years after the substantial completion of such an improvement. Section 7 also: (1) authorizes such an action to be commenced at any time after the substantial completion of such an improvement if any act of fraud caused a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; and (2) exempts lower-tiered subcontractors from such an action in certain circumstances. Existing law prohibits a unit-owners' association from instituting, defending or intervening in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners relating to an action for a constructional defect unless the action pertains exclusively to common elements. (NRS 116.3102) Section 8 of this bill requires that such an action for a constructional defect pertain to: (1) common elements; (2) any portion of the common-interest community that the association owns; or (3) any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association. Existing law authorizes a unit-owners' association to enter the grounds of a unit to conduct certain maintenance or remove or abate a public nuisance, or to enter the grounds or interior of a unit to abate a water or sewage leak or take certain other actions in certain circumstances. (NRS 116.310312) Section 8.5 of this bill provides that such provisions do not give rise to any rights or standing for a claim for a constructional defect.

Primary Sponsor Assembly Committee on Judiciary

Most Recent History Action

Chapter 361.
(See full list below)

Upcoming Hearings

None scheduled

Past Hearings

Assembly Judiciary	Mar 25, 2019	8:30 AM	Agenda	Minutes not yet available	Discussed as BDR
Assembly Judiciary	Apr 09, 2019	8:00 AM	Agenda	Minutes not yet available	Heard
Assembly Judiciary **(Work Session)**	Apr 12, 2019	8:00 AM	Agenda	Minutes not yet available	Amend, and do pass as amended

Senate Judiciary	May 15, 2019	8:00 AM	Agenda	Minutes	Heard, No Action
Senate Judiciary **(Work Session)**	May 17, 2019	8:00 AM	Agenda	Minutes	Amend, and do pass as amended

Final Passage Votes

Assembly Final Passage
(1st Reprint)
Apr 23, 2019
Yeas: 27, Nays: 13, Excused: 2
Senate Final Passage
(3rd Reprint)
May 24, 2019
Yeas: 20, Nays: 0, Excused: 1

Conference Committees

None scheduled

Bill Text

As Introduced Reprint 1 Reprint 2 Reprint 3 As Enrolled

Adopted Amendments

Amendment 640 Amendment 808 Amendment 963

Bill History

Date	Action	Journal
Jun 05, 2019	Chapter 361.	
Jun 03, 2019	Approved by the Governor.	Assembly: Not discussed Senate: Not discussed
Jun 01, 2019	Enrolled and delivered to Governor.	Assembly: Not discussed Senate: Not discussed
May 28, 2019	Senate Amendment Nos. 808 and 963 concurred in. To enrollment.	Assembly: Journal

Senate: Not discussed

; ;

EXHIBIT 2

Assembly Bill No. 421–Committee on Judiciary

CHAPTER.....

AN ACT relating to construction; revising provisions relating to the information required to be included in a notice of a constructional defect; removing provisions requiring the presence of an expert during an inspection of an alleged constructional defect; establishing provisions relating to a claimant pursuing a claim under a builder's warranty; removing certain provisions governing the tolling of statutes of limitation and repose regarding actions for constructional defects; revising provisions relating to the recovery of damages proximately caused by a constructional defect; increasing the period during which an action for the recovery of certain damages may be commenced; revising the prohibition against a unit-owners' association pursuing an action for a constructional defect unless the action pertains exclusively to the common elements of the association; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law provides that before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant: (1) is required to give written notice to the contractor; and (2) if the contractor is no longer licensed or acting as a contractor in this State, is authorized to give notice to any subcontractor, supplier or design professional known to the claimant who may be responsible for the constructional defect. Existing law also requires that such a notice identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim. (NRS 40.645) **Section 2** of this bill instead requires that such a notice specify in reasonable detail the defects or any damages or injuries to each residence or appurtenance that is the subject of the claim.

Existing law requires that after notice of a constructional defect is given by a claimant to a contractor, subcontractor, supplier or design professional, the claimant and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert or his or her representative with knowledge of the alleged defect must: (1) be present when a contractor, subcontractor, supplier or design professional conducts an inspection of the alleged constructional defect; and (2) identify the exact location of each alleged constructional defect. (NRS 40.647) **Section 3** of this bill removes the requirement that an expert who provided an opinion concerning the alleged constructional defect or his or her representative be present at an inspection and revises certain other requirements.

Existing law provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant: (1) the claimant is prohibited from sending notice of a constructional defect or pursuing a claim for a constructional defect unless the claimant has submitted a claim under the homeowner's warranty and the insurer has denied the claim; and (2) notice of a constructional defect may only include claims that were denied by the insurer. (NRS 40.650) **Section 4** of this bill removes such provisions, and **section 1.5** of this bill replaces the term "homeowner's warranty" with

"builder's warranty" and clarifies that such a warranty is not a type of insurance. **Section 4** provides that if a residence or appurtenance that is the subject of a claim is covered by a builder's warranty, the claimant is required to diligently pursue a claim under the builder's warranty. **Section 5.5** of this bill makes conforming changes.

Existing law also provides that if a residence or appurtenance that is the subject of a claim is covered by a homeowner's warranty purchased by or on behalf of the claimant, statutes of limitation or repose are tolled from the time the claimant submits a claim under the homeowner's warranty until 30 days after the insurer rejects the claim, in whole or in part. (NRS 40.650) **Section 4** removes this provision.

Existing law establishes the damages proximately caused by a constructional defect that a claimant is authorized to recover, including additional costs reasonably incurred by the claimant for constructional defects proven by the claimant. (NRS 40.655) **Section 5** of this bill removes the requirement that such costs be limited to constructional defects proven by the claimant.

Existing law prohibits an action for the recovery of certain damages 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, from being commenced more than 6 years after the substantial completion of such an improvement. (NRS 11.202) **Section 7** of this bill increases such a period to 10 years after the substantial completion of such an improvement. **Section 7** also: (1) authorizes such an action to be commenced at any time after the substantial completion of such an improvement if any act of fraud caused a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement; and (2) exempts lower-tiered subcontractors from such an action in certain circumstances.

Existing law prohibits a unit-owners' association from instituting, defending or intervening in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners relating to an action for a constructional defect unless the action pertains exclusively to common elements. (NRS 116.3102) **Section 8** of this bill requires that such an action for a constructional defect pertain to: (1) common elements; (2) any portion of the common-interest community that the association owns; or (3) any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association.

Existing law authorizes a unit-owners' association to enter the grounds of a unit to conduct certain maintenance or remove or abate a public nuisance, or to enter the grounds or interior of a unit to abate a water or sewage leak or take certain other actions in certain circumstances. (NRS 116.310312) **Section 8.5** of this bill provides that such provisions do not give rise to any rights or standing for a claim for a constructional defect.

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

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

Section 1. (Deleted by amendment.)

Sec. 1.5. NRS 40.625 is hereby amended to read as follows:

40.625 ~~[~~"Homeowner's~~]~~ ***"Builder's*** warranty" means a warranty ~~[~~or policy of insurance:

~~1. Issued]~~ ***issued*** or purchased by or on behalf of a contractor for the protection of a claimant ***.*** ~~[~~; or

~~2. Purchased by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive.~~

~~➥]~~ The term ~~[~~includes~~]~~ ***:***

1. Includes a warranty contract issued by ***or on behalf of a contractor whose liability pursuant to the warranty contract is subsequently insured by*** a risk retention group that operates in compliance with chapter 695E of NRS and insures all or any part of the liability of a contractor for the cost to repair a constructional defect in a residence.

2. Does not include a policy of insurance for home protection as defined in NRS 690B.100 or a service contract as defined in NRS 690C.080.

Sec. 2. NRS 40.645 is hereby amended to read as follows:

40.645 1. Except as otherwise provided in this section and NRS 40.670, before a claimant commences an action or amends a complaint to add a cause of action for a constructional defect against a contractor, subcontractor, supplier or design professional, the claimant:

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

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

2. The notice given pursuant to subsection 1 must:

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

(b) ~~[~~Identify~~]~~ ***Specify*** in ~~[~~specific~~]~~ ***reasonable*** detail ~~[~~each defect, damage and injury~~]~~ ***the defects or any damages or injuries*** to each residence or appurtenance that is the subject of the claim ***;*** ~~[~~, including, without limitation, the exact location of each such defect, damage and injury;~~]~~

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

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

3. A representative of a homeowners' association may send notice pursuant to this section on behalf of an association if the representative is acting within the scope of the representative's duties pursuant to chapter 116 or 117 of NRS.

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

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

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

Sec. 3. NRS 40.647 is hereby amended to read as follows:

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

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

(b) Be present ***or have a representative of the claimant present*** at an inspection conducted pursuant to NRS 40.6462 and ***, to the extent possible, reasonably*** identify the ~~[exact location of each alleged constructional defect]~~ ***proximate locations of the defects, damages or injuries*** specified in the notice ***;*** ~~[and, if the notice includes an expert opinion concerning the alleged constructional defect, the expert, or a representative of the expert who has knowledge of the alleged constructional defect, must also be present at the inspection and identify the exact location of each alleged constructional defect for which the expert provided an opinion;]~~ and

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

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

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

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

Sec. 4. NRS 40.650 is hereby amended to read as follows:

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

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

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

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

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

(a) Comply with the provisions of NRS 40.6472;

(b) Make an offer of settlement;

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

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

(e) Participate in mediation,

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

3. If a residence or appurtenance that is the subject of the claim is covered by a ~~[homeowner's]~~ ***builder's*** warranty ~~[that is purchased~~

~~by or on behalf of a claimant pursuant to NRS 690B.100 to 690B.180, inclusive:~~

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

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

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

~~(d) Statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, are tolled from the time notice of the claim under the homeowner's warranty is submitted to the insurer until 30 days after the insurer rejects the claim, in whole or in part, in writing.~~**]** ***, a claimant shall diligently pursue a claim under the builder's warranty.***

4. Nothing in this section prohibits an offer of judgment pursuant to Rule 68 of the Nevada Rules of Civil Procedure or NRS 40.652.

Sec. 5. NRS 40.655 is hereby amended to read as follows:

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

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

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

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

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

(e) Any additional costs reasonably incurred by the claimant **,** ~~[for constructional defects proven by the claimant,]~~ including, but

not limited to, any costs and fees incurred for the retention of experts to:

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

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

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

(f) Any interest provided by statute.

2. If a contractor complies with the provisions of NRS 40.600 to 40.695, inclusive, the claimant may not recover from the contractor, as a result of the constructional defect, any damages other than damages authorized pursuant to NRS 40.600 to 40.695, inclusive.

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

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

Sec. 5.5. NRS 40.687 is hereby amended to read as follows:

40.687 Notwithstanding any other provision of law:

1. A ~~[claimant shall, within 10 days after commencing an action against a contractor, disclose to the contractor all information about any homeowner's warranty that is applicable to the claim.~~

~~2. The]~~ contractor shall, no later than 10 days after a response is made pursuant to this chapter, disclose to the claimant any information about insurance agreements that may be obtained by discovery pursuant to rule 26(b)(2) of the Nevada Rules of Civil Procedure. Such disclosure does not affect the admissibility at trial of the information disclosed.

~~[3.]~~ ***2.*** Except as otherwise provided in subsection ~~[4,]~~ ***3,*** if ~~[either party]~~ ***the contractor*** fails to provide the information required pursuant to subsection 1 ~~[or 2]~~ within the time allowed, the ~~[other party]~~ ***claimant*** may petition the court to compel production of the information. Upon receiving such a petition, the court may order the ~~[party]~~ ***contractor*** to produce the required information and may award the ~~[petitioning party]~~ ***claimant*** reasonable attorney's fees and costs incurred in petitioning the court pursuant to this subsection.

~~[4.]~~ ***3.*** The parties may agree to an extension of time ***for the contractor*** to produce the information required pursuant to this section.

~~[5.]~~ ***4.*** For the purposes of this section, "information about insurance agreements" is limited to any declaration sheets, endorsements and contracts of insurance issued to the contractor from the commencement of construction of the residence of the claimant to the date on which the request for the information is made and does not include information concerning any disputes between the contractor and an insurer or information concerning any reservation of rights by an insurer.

Sec. 6. (Deleted by amendment.)

Sec. 7. NRS 11.202 is hereby amended to read as follows:

11.202 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]~~ ***10*** years after the substantial completion of such an improvement, for the recovery of damages for:

(a) ~~[Any]~~ ***Except as otherwise provided in subsection 2, 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.

2. ***Except as otherwise provided in this subsection, an action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property at any time after the substantial completion of such an improvement, for the recovery of damages for any act of fraud in causing a deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement. The provisions of this subsection do not apply to any lower-tiered subcontractor who performs work that covers up a defect or deficiency in another contractor's trade if the lower-tiered subcontractor does not know, and should not reasonably know, of the existence of the alleged defect or deficiency at the time of performing such work. As used in this subsection, "lower-tiered subcontractor" has the meaning ascribed to it in NRS 624.608.***

3. The provisions of this section do not apply:

(a) To a claim for indemnity or contribution.

(b) In an action brought against:

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

(2) Any person on account of a defect in a product.

Sec. 8. NRS 116.3102 is hereby amended to read as follows:

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

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

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

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

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

(1) Common elements ~~[.]~~ ***;***

(2) Any portion of the common-interest community that the association owns; or

(3) Any portion of the common-interest community that the association does not own but has an obligation to maintain, repair, insure or replace because the governing documents of the association expressly make such an obligation the responsibility of the association.

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

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

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

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

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

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

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

(j) May impose and receive any payments, fees or charges for the use, rental or operation of the common elements, other than limited common elements described in subsections 2 and 4 of NRS 116.2102, and for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312.

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

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

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

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

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

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

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

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

(s) May direct the removal of vehicles improperly parked on property owned or leased by the association, as authorized pursuant to NRS 487.038, or improperly parked on any road, street, alley or

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

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

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

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

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

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

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

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

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

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

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

5. Notwithstanding any provision of this chapter or the governing documents to the contrary, an association may not impose any assessment pursuant to this chapter or the governing documents on the owner of any property in the common-interest community

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

Sec. 8.5. NRS 116.310312 is hereby amended to read as follows:

116.310312 1. A person who holds a security interest in a unit must provide the association with the person's contact information as soon as reasonably practicable, but not later than 30 days after the person:

(a) Files an action for recovery of a debt or enforcement of any right secured by the unit pursuant to NRS 40.430; or

(b) Records or has recorded on his or her behalf a notice of a breach of obligation secured by the unit and the election to sell or have the unit sold pursuant to NRS 107.080.

2. If an action or notice described in subsection 1 has been filed or recorded regarding a unit and the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association, including its employees, agents and community manager, may, but is not required to, enter the grounds of the unit, whether or not the unit is vacant, to take any of the following actions if the unit's owner refuses or fails to take any action or comply with any requirement imposed on the unit's owner within the time specified by the association as a result of the hearing:

(a) Maintain the exterior of the unit in accordance with the standards set forth in the governing documents, including, without limitation, any provisions governing maintenance, standing water or snow removal.

(b) Remove or abate a public nuisance on the exterior of the unit which:

(1) Is visible from any common area of the community or public streets;

(2) Threatens the health or safety of the residents of the common-interest community;

(3) Results in blighting or deterioration of the unit or surrounding area; and

(4) Adversely affects the use and enjoyment of nearby units.

3. If:

(a) A unit is vacant;

(b) The association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031; and

(c) The association or its employee, agent or community manager mails a notice of the intent of the association, including its employees, agents and community manager, to maintain the exterior of the unit or abate a public nuisance, as described in subsection 2, by certified mail to each holder of a recorded security interest encumbering the interest of the unit's owner, at the address of the holder that is provided pursuant to NRS 657.110 on the Internet website maintained by the Division of Financial Institutions of the Department of Business and Industry,

➥ the association, including its employees, agents and community manager, may enter the grounds of the unit to maintain the exterior of the unit or abate a public nuisance, as described in subsection 2, if the unit's owner refuses or fails to do so.

4. If a unit is in a building that contains units divided by horizontal boundaries described in the declaration, or vertical boundaries that comprise common walls between units, and the unit is vacant, the association, including its employees, agents and community manager, may enter the grounds and interior of the unit to:

(a) Abate a water or sewage leak in the unit and remove any water or sewage from the unit that is causing damage or, if not immediately abated, may cause damage to the common elements or another unit if the unit's owner refuses or fails to abate the water or sewage leak.

(b) After providing the unit's owner with notice but before a hearing in accordance with the provisions of NRS 116.31031:

(1) Remove any furniture, fixtures, appliances and components of the unit, including, without limitation, flooring, baseboards and drywall, that were damaged as a result of water or mold damage resulting from a water or sewage leak to the extent such removal is reasonably necessary because water or mold damage threatens the health or safety of the residents of the common-interest community, results in blighting or deterioration of the unit or the surrounding area and adversely affects the use and enjoyment of nearby units, if the unit's owner refuses or fails to remediate or remove the water or mold damage.

(2) Remediate or remove any water or mold damage in the unit resulting from the water or sewage leak to the extent such remediation or removal is reasonably necessary because the water or

mold damage threatens the health or safety of the residents of the common-interest community, results in blighting or deterioration of the unit or the surrounding area and adversely affects the use and enjoyment of nearby units, if the unit's owner refuses or fails to remediate or remove the water or mold damage.

5. After the association has provided the unit's owner with notice and an opportunity for a hearing in the manner provided in NRS 116.31031, the association may order that the costs of any maintenance or abatement or the reasonable costs of remediation or removal conducted pursuant to subsection 2, 3 or 4, including, without limitation, reasonable inspection fees, notification and collection costs and interest, be charged against the unit. The association shall keep a record of such costs and interest charged against the unit and has a lien on the unit for any unpaid amount of the charges. The lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive.

6. A lien described in subsection 5 bears interest from the date that the charges become due at a rate determined pursuant to NRS 17.130 until the charges, including all interest due, are paid.

7. Except as otherwise provided in this subsection, a lien described in subsection 5 is prior and superior to all liens, claims, encumbrances and titles other than the liens described in paragraphs (a) and (c) of subsection 2 of NRS 116.3116. If the federal regulations of the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien, the period during which the lien is prior and superior to other security interests shall be determined in accordance with those federal regulations. Notwithstanding the federal regulations, the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien.

8. A person who purchases or acquires a unit at a foreclosure sale pursuant to NRS 40.430 or a trustee's sale pursuant to NRS 107.080 is bound by the governing documents of the association and shall maintain the exterior of the unit in accordance with the governing documents of the association. Such a unit may only be removed from a common-interest community in accordance with the governing documents pursuant to this chapter.

9. Notwithstanding any other provision of law, an association, its directors or members of the executive board, employees, agents or community manager who enter the grounds or interior of a unit pursuant to this section are not liable for trespass.

10. ***Nothing in this section gives rise to any rights or standing for a claim for a constructional defect made pursuant to NRS 40.600 to 40.695, inclusive.***

11. As used in this section:

(a) "Exterior of the unit" includes, without limitation, all landscaping outside of a unit, the exterior of all property exclusively owned by the unit owner and the exterior of all property that the unit owner is obligated to maintain pursuant to the declaration.

(b) "Remediation" does not include restoration.

(c) "Vacant" means a unit:

(1) Which reasonably appears to be unoccupied;

(2) On which the owner has failed to maintain the exterior to the standards set forth in the governing documents of the association; and

(3) On which the owner has failed to pay assessments for more than 60 days.

Secs. 9 and 10. (Deleted by amendment.)

Sec. 11. 1. The provisions of NRS 40.645 and 40.650, as amended by sections 2 and 4 of this act, respectively, apply to a notice of constructional defect given on or after October 1, 2019.

2. The provisions of NRS 40.647, as amended by section 3 of this act, apply to an inspection conducted pursuant to NRS 40.6462 on or after October 1, 2019.

3. The provisions of NRS 40.655, as amended by section 5 of this act, apply to any claim for which a notice of constructional defect is given on or after October 1, 2019.

4. The period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019.

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CLERK OF THE COURT

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

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Plaintiffs, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant, vs.	Case No. A-16-744146-D Dept. XXII **PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S, MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B)**

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/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S, MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B)

COMES NOW, Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, and M.J. DEAN CONSTRUCTION, INC. (herein after collectively referred to as "the Builders"), by and through their counsel of record, Peter C. Brown, Esq., Jeffrey W. Saab, Esq., Devin R. Gifford, Esq. and Cyrus S. Whittaker, Esq. of the law firm of Bremer Whyte Brown & O'Meara, LLP, and hereby file their **MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B).**

This Motion is supported by the attached memorandum of points and authorities, Declaration, Appendix of Exhibits, the pleadings and papers on file herein, and any oral argument as the Court may allow at the time of the hearing.

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE COUNSEL:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S MOTION FOR MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B) will come on for hearing before the above-entitled Court on the _____day of _____, 2019 at _____ a.m., or as soon thereafter as counsel may be heard.

Dated: June 16, 2019

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Jeffrey W. Saab, Esq.
Nevada State Bar No. 11261
Devin R. Gifford, Esq.
Nevada State Bar No. 14055
Cyrus S. Whittaker, Esq.
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Attorneys for Plaintiffs/Counter-Defendants
LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, and M.J. DEAN CONSTRUCTION, INC.

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DECLARATION OF PETER C. BROWN, ESQ.

IN SUPPORT OF MOTION FOR ATTORNEYS' FEES

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, PETER C. BROWN, Esq., declare under penalty of perjury:

1. I am a partner at the law firm of Bremer, Whyte, Brown & O'Meara, LLP, and I am in good standing and licensed to practice law in the State of Nevada.
2. Bremer, Whyte, Brown & O'Meara, LLP, is counsel for Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. (hereafter collectively referred to as the "Builders" in the above-captioned matter).
3. I have personal knowledge of the facts set forth herein, and if called to testify I could competently do so.
4. The Bremer, Whyte, Brown & O'Meara, LLP attorneys' fees invoices are true and correct copies of the same. (*See,* Exhibits **"A-M"** to the Appendix).
5. The attorneys' fees presented herein are true and correct to the best of my knowledge and belief.
6. The attorneys' fees have been reasonably and necessarily incurred in litigation this action.
7. The said disbursements have been actually, necessarily, and reasonably incurred and paid in this action.
8. Attached as **"Exhibit A"** is a true and correct copy of the Chapter 40 Notice to Builders dated February 24, 2016.
9. Attached as **"Exhibit B"** is a true and correct copy of the Findings of Fact, Conclusions of Law and Order dated May 23, 2019.
10. Attached as **"Exhibit C"** is a true and correct copy of the Findings of Fact, Conclusions of Law, and Order dated September 15, 2017.

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11. Attached as **"Exhibit D"** is a true and correct copy of the Chapter 40 Response dated May 24, 2016.

12. Attached as **"Exhibit E"** is a true and correct copy of the Complaint filed September 28, 2016.

13. Attached as **"Exhibit F"** is a true and correct copy of the Invoices dated May 2016 through December 2017.

14. Attached as **"Exhibit G"** is a true and correct copy of the Findings of Fact, Conclusions of Law, and Order filed November 30, 2018.

15. Attached as **"Exhibit H"** is a true and correct copy of the Amended Chapter 40 Notice dated April 5, 2018.

16. Attached as **"Exhibit I"** is a true and correct copy of the March 29, 2016 Correspondence to Association.

17. Attached as **"Exhibit J"** is a true and correct copy of the April 29, 2016 Correspondence to Association.

18. Attached as **"Exhibit K"** is a true and correct copy of the Response to Amended Chapter 40 Notice dated December 28, 2018.

19. Attached as **"Exhibit L"** is a true and correct copy of the Invoices dated 2018 through January 2019.

20. Attached as **"Exhibit M"** is a true and correct copy of the Invoices dated March through May 2019.

21. That this motion is made in good faith and not for undue advantage.

Peter C. Brown, Esq.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case arose as a result of alleged, and ultimately proven to be unwarranted, unjustified and untimely noticed, construction defects at Panorama Towers ("the Towers"), located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada. On February 24, 2016, the very last day of AB125's "safe harbor," Defendant/Counter-Claimant Panorama Towers Condominium Unit Owners' Association ("the Association") served its original NRS 40.645 Notice of Constructional Defects ("February 2016 Chapter 40 Notice") upon Plaintiffs/Counter-Defendants ("the Builders") identifying the following four alleged deficiencies: (1) Residential Tower Windows, (2) Residential Tower Fire Blocking, (3) Mechanical Room Piping, and (4) Sewer Problems. (*See*, Exhibit **"A"**). Immediately after the Association served its Chapter 40 Notice, the Builders advised the Association, in correspondence, their response to the Chapter 40 Notice as well as via a lengthy power-point presentation at the pre-litigation Chapter 40 mediation, that the Association's claims were time-barred and/or the Association's Chapter 40 Notice was procedurally invalid—the two principal grounds that this Court ultimately found in granting summary disposition of the Association's claims.

Because the Association insisted on pursuing its procedurally invalid claims, years of costly litigation ensued. The Builders filed their Complaint on September 28, 2016 against the Association, which again specifically set out each and every procedural deficiency in the Association's Chapter 40 Notice and alleged defect claims within. Nonetheless, the Association chose to still pursue its claims, through the filing of its March 1, 2017 Counter-claim. Due to the Association's failure to comply with basic procedural requirements in asserting its claims for construction defects, the Builders were able to successfully convince this Court that the Association's claims should be summarily dismissed. Over three years from the filing of the Association's Chapter 40 Notice, the Builders are the prevailing parties as to the Associations' Counter-Claim, following this Court's most recent Findings of Fact, Conclusions of Law, and Order. (*See*, Exhibit **"B"**)

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Succeeding against the Association, however, did not come without tremendous monetary cost to the Builders. Indeed, despite unequivocally clear procedural deficiencies, the Association insisted on pursuing its constructional defect claims. The Association's unreasonable behavior caused the Builders to incur substantial, unnecessary attorneys' fees. Essentially, the Builders were unreasonably forced to defend against defect allegations by the Association for which recovery, by the Association, was legally untenable.

Thus, as the prevailing parties against the Association, the Builders are entitled to reasonable attorney fees to compensate them for the onerous expense of engaging in over three years of litigation that never should have been instituted by the Association.

II. ARGUMENT

Since the Association's service of its February 24, 2016 Chapter 40 Notice, this Court has consistently and summarily dismissed the claims in the Association's Counter-Claim. The Court, in ruling for the Builders on each of these alleged defects, has correctly barred the Association from pursuing any such relief through its Counter-Claim. Not only are the Builders the prevailing parties against the Association, but the Association unreasonably brought and maintained its action when it was apparent from the very onset that any recovery was untenable.

Due to the Association's unreasonable pursuit of its alleged defect claims, the Builders are entitled to recover these fees pursuant to NRS 18.020(2)(B). The Builders began incurring fees when its defense counsel was initially retained in response to the Association's February 24, 2016 Chapter 40 Notice, as the four alleged defects, first identified in the Notice, served as the substantive bases for which the Association sought relief in its late-filed Counter-Claim. These fees have continued the entire duration of the litigation, including up to and beyond his Court's May 2019 Findings of Fact, Conclusions of Law, and Order ("May 2019 Order").

Altogether, the Builders incurred attorneys' fees in the total amount of **$240,098.11**. The Builders' attorneys' fees are reflected in the following invoices:

Invoice Date	Invoice Number	Fees
May 2016	1-1287.5511	$12,517.83
August 2016	2-1287.5511	$6,158.04
November 2016	3-1287.5511	$11,548.60

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February 2017	4-1287.5511	$7,856.77
March 2017	7, 8, 9-1287.5511	$25,791.96
May 2017	8-1287.5581	$5,267.57
August 2017	10-1287.5511	$10,593.25
December 2017	10-1287.5581	$3,141.25
February 2018	11-1287.5511	$3,490.33
March 2018	11-1287.5581	$349.03
May 2018	12-1287.5511	$4,028.40
August 2018	13-1287.5511	$10,757.65
November 2018	14-1287.5511	$13,670.77
December 2018	15-1287.5511	$29,287.09
January 2019	16-1287.5511	$33,858.75
March 2019	17-1287.5511	$21,103.26
April 2019	15-1287.5581	$21,132.92
May 2019 - Forward	(Not yet reduced to specific invoices for BWB&O file #1287.551 & #1287.558)	$19,544.64
TOTAL		**$240,098.11**

Because this Court has disposed of the Association's four alleged defects through the course of several dispositive findings, the Builders address each ruling period separately, below.

A. LEGAL STANDARD PURSUANT TO NRS 18.020(2)(B).

Pursuant to NRS 18.010(2)(b):

> 2. In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees to a **prevailing party**:
> ...
> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained **without reasonable ground** or to harass the prevailing party. **The court shall liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations..."**
>
> *Id.* at NRS 18.010(2)(b). (Emphasis Added).

Thus, in order for a party to be awarded attorney fees under NRS 18.010(2)(b), two conditions must be met: (1) the party seeking fees must be a "prevailing party," and (2) the court must find that the opposing party's claim was brought or maintained without reasonable ground or to harass the prevailing party. The clear intent of NRS 18.010(2)(b) is "to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited

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judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." *Id*.

The Nevada Supreme Court has defined "prevailing party," as any party "who succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing the suit." *See*, *Hornwood v. Smith's Food King*, 105 Nev. 188, 192; 772 P.2d 1284, 1287 (1989). The Court later expanded its definition to include defendants, stating, "[T]he term 'prevailing party' is broadly construed as to encompass plaintiffs, counterclaimants, and defendants." *See*, *Valley Electric Association v. Overfield*, 121 Nev. 7, 10; 106 P.3d 1198, 1200 (2005).

An award of attorney's fees under NRS 18.010(2)(b) is discretionary with the district court. *Foley v. Morse & Mowbray*, 109 Nev. 116, 124, 848 P.2d 519, 524 (1993). To support such an award, "there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds…" *Chowdhry v. NLVH, Inc*., 109 Nev. 478, 486, 851 P.2d 459, 464 (1993). There is more than sufficient evidence in the record before this Court to support the proposition that the Association's Counter-Claim against the Builders was brought without reasonable grounds.

Furthermore, "[a] claim is groundless if 'the allegations in the complaint. . . are not supported by any credible evidence at trial.'" *See*, *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 996, 860 P.2d 720, 724 (1993), quoting *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984)). The Nevada Supreme Court has found that where a plaintiff's allegations survive a motion for summary judgment, no basis for an award of attorneys' fees pursuant to NRS 18.010(2)(b) exists. *See*, *Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998); *See also*, *Fire Insurance Exchange v. Efficient Enterprises, Inc. D/B/A Efficient Electric*, 2017 WL 2820000 (June 27, 2017). Thus, it stands to reason that where summary judgment is granted (as was the case here numerous times), there is a basis for awarding attorneys' fees pursuant to NRS 18.010(2)(b).

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B. THE BUILDERS ARE ENTITLED TO RECOVER THEIR ATTORNEYS' FEES BECAUSE THE ASSOCIATION HAD NO REASONABLE GROUNDS IN BRINGING AND MAINTAINING ITS CLAIMS.

The Builders have unquestionably prevailed in this litigation, inasmuch as this Court granted the Builders' three separate Motions for Summary Judgment barring the Association from asserting any aspect of its Counter-Claim against the Builders. With this Court's most recent May 2019 Order, all of the Association's four underlying construction defect claims have been summarily disposed. Because these four claims were the predicate for the Association's Counter-Claim, the Builders are the prevailing parties as to the Association's Counter-Claim.

Furthermore, the Association unreasonably brought and unreasonably maintained its Counter-Claim against the Builders as it was clear from the onset that there were no grounds to continue pursuit of any of the four alleged construction defects. All of the defects suffered from unequivocal procedural deficiencies, of which the Association had reason to know prior to filing its Counter-Claim.

Thus, the Builders respectfully request this Court award all attorneys' fees to the Builders pursuant to NRS 18.010(2)(b), which should be liberally construed in favor of awarding fees. *Id.* The attorneys' fees incurred from February 24, 2016 to the present total **$240,098.11**.

i. Mechanical Room Piping

Of the four alleged defects in the Association's Chapter 40 Notice, the mechanical room piping defect, described as the third deficiency in its Chapter 40 Notice (See, Exhibit **"A"**), was the first to be summarily disposed of by this Court.

In this Court's September 15, 2017 Findings of Fact, Conclusions of Law, and Order ("September 2017 Order"), this Court stated the following:

> There remains no genuine issue of material fact concerning the time-barring effect of the four-year statute of limitations, and thus, Defendant's/Counter-Claimant's claims for constructional defects located in the mechanical rooms are dismissed pursuant to NRS 11.202. (*See*, Exhibit **"C"**, Pgs. 19 (Lines 23-24), 20 (1-2))

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The Court's basis for this ruling was that the Association learned of the constructional defects existing in the towers' mechanical rooms, at the latest, on or about November 17, 2011. The Association failed to bring its claims within the four-year limitations period identified in NRS 11.220, leading this Court to conclude that the Association's claims regarding the mechanical rooms were time-barred pursuant to NRS 11.202.

Prior to any dispositive motions being filed, the Builders advised the Association that its claims—including the mechanical rooms claim—were barred by NRS 11.202 as falling outside of the six-year statute of repose period. (*See*, Chapter 40 Response, Exhibit **"D"**). A pre-litigation mediation occurred on September 26, 2016; at that time the Builders again advised the Association that all construction defect allegations were barred by the six-year statute of repose. In addition, the Builders stated in their Complaint that the Association "had knowledge of the alleged mechanical room piping defects more than 3½ years prior to the date it served Plaintiffs with Defendant's Chapter 40 Notice," a fact that ultimately led to the Court's decision to dismiss this defect claim as being time-barred (*See*, Exhibit **"E"**, Pg. 3, Lines 10-12). Thus, despite the Builders unequivocally demonstrating that the Association's claims were barred by the application of NRS 11.202, the Association unreasonably brought and maintained the mechanical rooms construction defect claim without reasonable grounds.

The Builders' attorneys' fees for the relevant period of work completed through the Court's final disposition on its September 2017 Order (March 2016 through the December 2017 invoice for BWB&O File #1287.588) is reflected in the following invoices:

Invoice Date	**Invoice Number**	**Fees**
May 2016	1-1287.5511	$12,517.83
August 2016	2-1287.5511	$6,158.04
November 2016	3-1287.5511	$11,548.60
February 2017	4-1287.5511	$7,856.77
March 2017	7, 8, 9-1287.5511	$25,791.96
May 2017	8-1287.5581	$5,267.57
August 2017	10-1287.5511	$10,593.25
December 2017	10-1287.5581	$3,141.25
		Total $82,875.27

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Bremer, Whyte, Brown, O'Meara LLP ("BWBO") invoices for this time period are attached for the Court's review. (*See*, BWBO invoices attached to the Appendix as Exhibit **"F"**). While it is expected that the Association will argue that not all of the fees included in these invoices were incurred with regard to the mechanical rooms claim, and the Builders would not dispute that assertion, any fees not directly related to the mechanical rooms claim were directly related to the other claims which were summarily dismissed by this Court via subsequent rulings.

ii. Residential Tower Fire Blocking and Sewer Problems

In addition to summarily dismissing the Association's claim for alleged construction defects located in the mechanical rooms, this Court also ordered, in its September 2017 Order (*See*, Exhibit **"C"**), that the Association's February 2016 Chapter 40 Notice was itself deficient, and that the Builders met their burden of overcoming the presumption of the Notice's validity. Nonetheless, this Court declined to dismiss the Association's Counter-Claim pursuant to NRS 40.647(2)(a). Specifically, this Court stated the following in its September 2017 Order:

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

Subsequently, this Court ordered, in its November 30, 2018 Findings of Fact, Conclusions of Law, and Order (*See*, Ex. **"G"**) ("November 2018 Order"), that the Association's Amended NRS 40.645 Notice (*See*, Ex. **"H"**) was still procedurally insufficient as to both the residential tower fire blocking allegation and the sewer problem allegation.

Regarding the alleged residential tower defect, this Court stated the following:

> Within the amended notice, the Association admitted it inspected 15 of the 616 units and determined the defect exists in only 76 percent of

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> the small sample. Notwithstanding the deficiency cannot be shown to exist in every unit, the damage and injury to each residence and common areas are not detected. It follows the exact location of each defect, damage and injury is not identified. For these reasons, this Court concludes the portion of the amended NRS 40.645 notice, which addresses the lack of fire blocking insulation, is not sufficient.
>
> (*See*, Exhibit **"G"**, Pg. 15, Lines 11 - 17)

Regarding the alleged sewer problem, this Court stated the following:

> As set forth in the original notice, "[t]he main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to the adjacent areas. This deficiency has been repaired. In addition to causing damage, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter." Neither notice specified the "installation error made" or although the amended does note raw sewage seeped into the common areas and there was damage in the vicinity of the rupture. This Court concludes this portion of the NRS 40.645 notice, addressing the sewer problem, is not sufficient.
>
> (*See*, Exhibit **"G"**, Pg. 15, Lines 11 - 17)

In addition, the Court also found that in regard to the sewer problem, "...the Contractors never notified of the sewer issue prior to renovation, and thus, were not accorded the right to inspect and repair." (*See*, Exhibit **"G"**, Pg. 16, Lines 1-2)

As it relates to the Builders' request for attorneys' fees, this Court's prior Orders are helpful in emphasizing the following points showing the Association's unreasonable pursuit of its defect allegations. First, the September 2017 Order demonstrates that the Association failed to even comply with the most basic of NRS 40.645 requirements as to these two alleged defects, which is, in and of itself, a ground to question the reasonableness of the alleged claims. Second, the Association still failed to comply with basic NRS 40.6545 requirements, even after this Court provided the Association a detailed description of the procedural deficiencies and gave the Association an opportunity to correct such deficiencies. Third, as relating to the alleged sewer problem claims, the Association not only brought this claim in violation of basic NRS 40.645

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requirements, but also failed to even notify the Builders of such problem, thus precluding the Builders from their statutory right to inspect and repair the issue.

Furthermore, as with the other two alleged defect claims, the Builders expressly advised the Association on multiple occasions that its claims were procedurally invalid. First, on March 29, 2016, the Builders sent a letter to the attorneys for the Association, requesting "information regarding the alleged sewer line, including the date of occurrence and the date of repair...In addition, please confirm the current location of any sewer line materials that were removed and replaced as part of the repair. (*See*, Exhibit **"I"**) The Builders also requested "the date(s) when that work was done and the identify of the contractor(s). Please also confirm whether and where the removed pipes have been stored for safekeeping." (*See*, Exhibit **"I"**). After there was no response from the Association to this letter, the Builders followed up with another letter sent April 29, 2016, again with no response. Second, the Builders sent a response to the Association's February 2016 Chapter 40 Notice, in which they specifically stated to the Association that its Chapter 40 Notice failed to comply with NRS 40.645(3),(b), and (c). (*See*, Exhibit **"J"**). Third, during the September 26, 2016 pre-litigation mediation, the Builders advised the Association that its February 2016 Chapter 40 Notice was procedurally deficient.

Fourth, in their Complaint, the Builders put the Association on notice of these deficiencies, alleging: (1) the Association failed to comply with NRS 40.645(3)(b) and (c) (*See*, Exhibit "**E**", Pg. 3, Lines 2-5); (2) the Association failed to provide timely Chapter 40 Notice to the Builders of the alleged sewer piping defect (*See*, Exhibit "**E**", Pg. 3, Lines 13-19); (3) the Association did not provide notice to the Builders of the alleged sewer piping defect prior to the Association performing its repair work (*See*, Exhibit "**E**", Pg. 4, Lines 4-7); and (4) that the Builders had previously already indicated said deficiencies in the Builders' March 29, 2016 correspondence to the Association's counsel, of which there was never a response (*See*, Exhibit "**E**", Pg. 4, Lines 8-17). Put simply, the Builders' Complaint reiterated and placed the Association on express notice of the myriad of procedural deficiencies in its Chapter 40 Notice and the defect claims within.

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Fifth, in the Builders' response to the Association's Amended Chapter 40 Notice, the Builders again notified the Association that its Notice was deficient, in that it failed to comply with NRS 40.645(2)(b) and (c) as to the fire blocking and sewer issues. (*See*, Exhibit **"K"**).

Despite the Builders unequivocally warning and remonstrating that the Association' claims were barred by the application of basic NRS 40.645 requirements, the Association unreasonably insisted on bringing and maintaining its Counter-Claim. Consequently, the Builders' are entitled to recover their attorneys' fees when the Association's futile pursuit is ultimately summarily disposed of by this Court's Orders.

The Builders' attorneys' fees for the relevant period of work completed following the Court's final disposition on its September 2017 Order through the Court's final disposition on its November 2018 Order (February 2018 through January 2019) is reflected in the following invoices:

Invoice Date	Invoice Number	Fees
February 2018	11-1287.5511	$3,490.33
March 2018	11-1287.5581	$349.03
May 2018	12-1287.5511	$4,028.40
August 2018	13-1287.5511	$10,757.65
November 2018	14-1287.5511	$13,670.77
December 2018	15-1287.5511	$29,287.09
January 2019	16-1287.5511	$33,858.75
		Total $95,442.02

Bremer, Whyte, Brown, O'Meara LLP ("BWBO") invoices for this time period are attached for the Court's review. (*See*, BWBO invoices attached to the Appendix as Exhibit **"L"**). While it is again expected that the Association will argue that not all of the fees included in these invoices were incurred with regard to the fire blocking and sewer claim, and the Builders would not dispute that assertion, any fees not directly related to those claims were directly related to the remain window claim which was summarily dismissed by this Court via a subsequent ruling.

iii. Window Defects

The last aspect of the Association's Counter-Claim to be summarily disposed of was the windows defect claim. In its May 28, 2019 Findings of Fact, Conclusions of Law, and Order ("May 2019 Order"), this Court ruled that the Association's claim for this alleged defect was barred as a

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result of the Association untimely bringing this claim outside of the six-year statute of repose period pursuant to NRS 40.695. (*See*, Ex. **"B"**)

As with the other three alleged defect claims, the Association unreasonably pursued litigation on the alleged window defect claim despite unequivocal notice that such a claim was procedurally invalid. The Builders provided notice of this procedural defect in its response to the Association's February 2016 Chapter 40 Notice. (See, Ex. **"A"**) and, again, during the September 26, 2016 pre-litigation mediation. Furthermore, the Builder's Complaint laid out, in in detail, the reasons for why the Association's alleged defect claims were barred by NRS 11.202(1). (*See*, Exhibit **"E"**, Pg. 5, Lines 7-23). Thus, it was clear from the onset that the Association was barred for continuing pursuit of this claim. The Association knew about the statute of repose and yet unreasonably maintained this lawsuit in light of that knowledge. The Association exacerbated its untenable position by failing to file is Counter-Claim until over one year after the expiration of any possible tolling that would have been in effect until 30 days after the pre-litigation mediation. As with the summary disposition of the other claims, as the prevailing parties on the window claim, the Builders are entitled to attorneys' fees incurred through such unreasonable pursuit.

The Builders' attorneys' fees for the relevant period of work completed day following the Court's final disposition on its November 2018 Order through the present (March 12, 2019 forward) is reflected in the following invoices:

Invoice Date	**Invoice Number**	**Fees**
March 2019	17-1287.5511	$21,103.26
April 2019	15-1287.5581	$21,132.92
May 2019 - Forward		$19,544.64
		Total $42,236.18

Bremer, Whyte, Brown, O'Meara LLP ("BWBO") invoices for this time period are attached for the Court's review. (*See*, BWBO invoices attached to the Appendix as Exhibit **"M"**).

///

///

///

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III. CONCLUSION

Based on all of the above, the Builders are the prevailing parties and are entitled to the fees they were unreasonably forced to incur in their efforts to defend against the Association's unreasonable and groundless claims. Accordingly, the Builders are entitled to recover fees in the amount of $240,098.11.

Dated: June 16, 2019

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Jeffrey W. Saab, Esq.
Nevada State Bar No. 11261
Devin R. Gifford, Esq.
Nevada State Bar No. 14055
Cyrus S. Whittaker, Esq.
Nevada State Bar. No. 14965
Attorneys for Plaintiffs/Counter-Defendants
LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, and M.J. DEAN CONSTRUCTION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2019 a true and correct copy of the foregoing document was electronically delivered to Odyssey for service upon all electronic service list recipients.

Jennifer Vela, an employee of
Bremer, Whyte, Brown & O'Meara LLP

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

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Plaintiffs, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant, vs.	Case No. A-16-744146-D Dept. XXII **APPENDIX TO PLAINTIFFS/ COUNTER-DEFENDANTS LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; AND M.J. DEAN CONSTRUCTION, INC.'S, MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B) – Volume I of II**

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.

APPENDIX TO PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; AND M.J. DEAN CONSTRUCTION, INC.'S, MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B) – Volume I of II

COMES NOW, Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, and M.J. DEAN CONSTRUCTION, INC. (herein after collectively referred to as "the Builders"), by and through their counsel of record, Peter C. Brown, Esq., Jeffrey W. Saab, Esq., Devin R. Gifford, Esq. and Cyrus S. Whittaker, Esq. of the law firm of Bremer Whyte Brown & O'Meara, LLP and hereby submits their Appendix to Motion for Attorney's Fees Pursuant to NRS 18.010(2)(B).

Exhibit No.	Brief Description	# of Pages (including exhibit page)	Location of exhibit within Motion
A	Chapter 40 Notice to Builders dated 02/24/2016	103	Pages 4, 6, 10, 16
B	Findings of Fact, Conclusions of Law and Order dated May 23, 2019	20	Pages 4, 6, 16
C	Findings of Fact, Conclusions of Law and Order filed September 15, 2017	21	Pages 4, 10, 12
D	Chapter 40 Response dated May 24, 2016	10	Pages 5, 11
E	Complaint dated September 28, 2016	23	Pages 5, 11, 14, 16

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Date: June 16, 2019

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Jeffrey W. Saab, Esq.
Nevada State Bar No. 11261
Devin R. Gifford, Esq.
Nevada State Bar No. 14055
Cyrus S. Whittaker, Esq.
Nevada State Bar. No. 14965
Attorneys for Plaintiffs/Counter-Defendants
LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, and M.J. DEAN CONSTRUCTION, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June 2019 a true and correct copy of the foregoing document was electronically delivered to Odyssey for service upon all electronic service list recipients.

Jennifer Vela, an employee of
Bremer, Whyte, Brown & O'Meara LLP

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(702) 258-6665

EXHIBIT "A"

Certified Article Number
9314 8699 0430 0020 7987 21
SENDERS RECORD

LJSG LEACH JOHNSON SONG & GRUCHOW

Edward J. Song, Esq. esong@leachjohnson.com

February 24, 2016

Mr. Laurent Hallier,
aka Laurence Hallier
2510 E. Sunset Road, #5-400
Las Vegas, NV 89120

NOTICE TO CONTRACTOR PURSUANT TO NEVADA REVISED STATUTES, SECTION 40.645

Please take notice that Panorama Towers Condominium Unit Owners' Association, Inc., a Nevada non-profit corporation (Claimant), intends to pursue claims against you pursuant to Nevada Revised Statutes (NRS) 40.600 *et seq.*, arising from defects in the design and/or construction of the Panorama Towers condominium development located at 4525 Dean Martin Drive, Las Vegas, Nevada (the Development). Your legal rights are affected by this notice which is being given to satisfy the requirements of NRS 40.645.

Notice to others responsible. Pursuant to NRS 40.646, you must forward a copy of this Notice within 30 days, by certified mail, return receipt requested, to the last known address of each subcontractor, supplier or design professional whom you reasonably believe is responsible for the constructional defects identified below. Failure to send this Notice may restrict your ability to commence an action against such a subcontractor, supplier or design professional.

Response to notice. Pursuant to NRS 40.6472, you must provide a written response to each of the defects identified below within 90 days from your receipt of this Notice. Your response must state, as to each constructional defect identified below, whether you elect to repair the defect, propose to pay monetary compensation for the defect, or disclaim liability for the defect and the reasons therefore.

Your response to this Notice, and all communications pertaining to this Notice, should be directed to Edward J. Song, Esq., Leach Johnson Song & Gruchow, 8945 West Russell Road, Ste. 330, Las Vegas, Nevada 89148 (702/538-9074).

Preliminary list of constructional defects. This claim pertains to the following defects and resulting damages:

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

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

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

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

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

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

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

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

Additional constructional defects. Claimant is still in the process of investigating the existing conditions at the Development, and accordingly, this preliminary list of defects is not intended as a complete statement of all of the defects in or at the Development. Claimant reserves the right to amend or update this list in the event that new defects and/or resulting damages are discovered during the course of investigation.

Requested documents. Pursuant to NRS 40.681, this will serve as Claimant's demand that you provide copies of all relevant documents pertaining to the construction of the Development, including plans, specifications, shop drawings, warranties, contracts, subcontracts, change orders, requests for information, inspection or other reports, soil and other engineering reports, photos, correspondence, memoranda, work orders for repair, videotapes,

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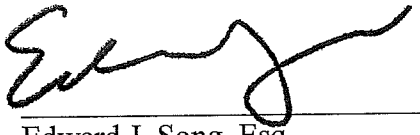
10775 Double R Boulevard • Reno, Nevada 89521 • Phone 775-682-4321 • Fax 775-682-4301

audiotapes, and any and all policies of insurance that provided liability insurance coverage for your services or work in connection with the Development.

Mediation demand. Pursuant to NRS 40.680, this well serve as Claimant's demand for pre-litigation mediation with a mediator to be agreed to by the parties.

LEACH JOHNSON SONG & GRUCHOW



Edward J. Song, Esq.

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EDWARD SONG, ESQ., NVB: 007922
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Facsimile: (702) 538-9113

Attorneys for Claimant

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Claimant,

v.

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; PANORAMA TOWERS II, LLC, a Nevada limited liability company; PANORAMA TOWERS II MEZZ, LLC, a Nevada limited liability company; M.J. DEAN CONSTRUCTION, INC., a Nevada corporation; SIERRA GLASS & MIRROR, INC., a Nevada corporation; F. RODGERS CORPORATION, a Nevada corporation; DEAN ROOFING COMPANY, a Nevada corporation; FORD CONTRACTING, INC., a Nevada corporation; INSULPRO PROJECTS, INC., a Nevada corporation; FLIPPIN'S TRENCHING, INC., a Nevada corporation; X-TREME X-CAVATION, INC., a Nevada corporation; SOUTHERN NEVADA PAVING, INC., a Nevada corporation; BOMBARD MECHANNICAL, LLC, a Nevada limited liability company; SILVER STAR PLUMBING, INC., a close corporation; FIVE STAR PLUMBING & HEATING, LLC, a Nevada limited liability company,

Respondents.

VERIFICATION OF EXPERT REPORTS PURSUANT TO 40.645

VERIFICATION

State of Nevada)
)ss:
County of Clark)

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

Dennis Kariger, being duly sworn according to law, deposes and says:

The undersigned on behalf of Claimant the Panorama Towers Condominium Unit Owners' Association verifies that they have reviewed the expert reports included and referenced to said notice as enumerated in Exhibit 1 and that the defects, damages, and injuries set forth in those reports exist at the locations depicted therein within the Panorama Towers Condominium community.

I declare under penalty of perjury that the foregoing is true and correct and that this Verification was executed on this 24th day of February, 2016.

Dennis B Kariger
[Signature]

Subscribed and sworn on before me
this 24th day of February, 2016.

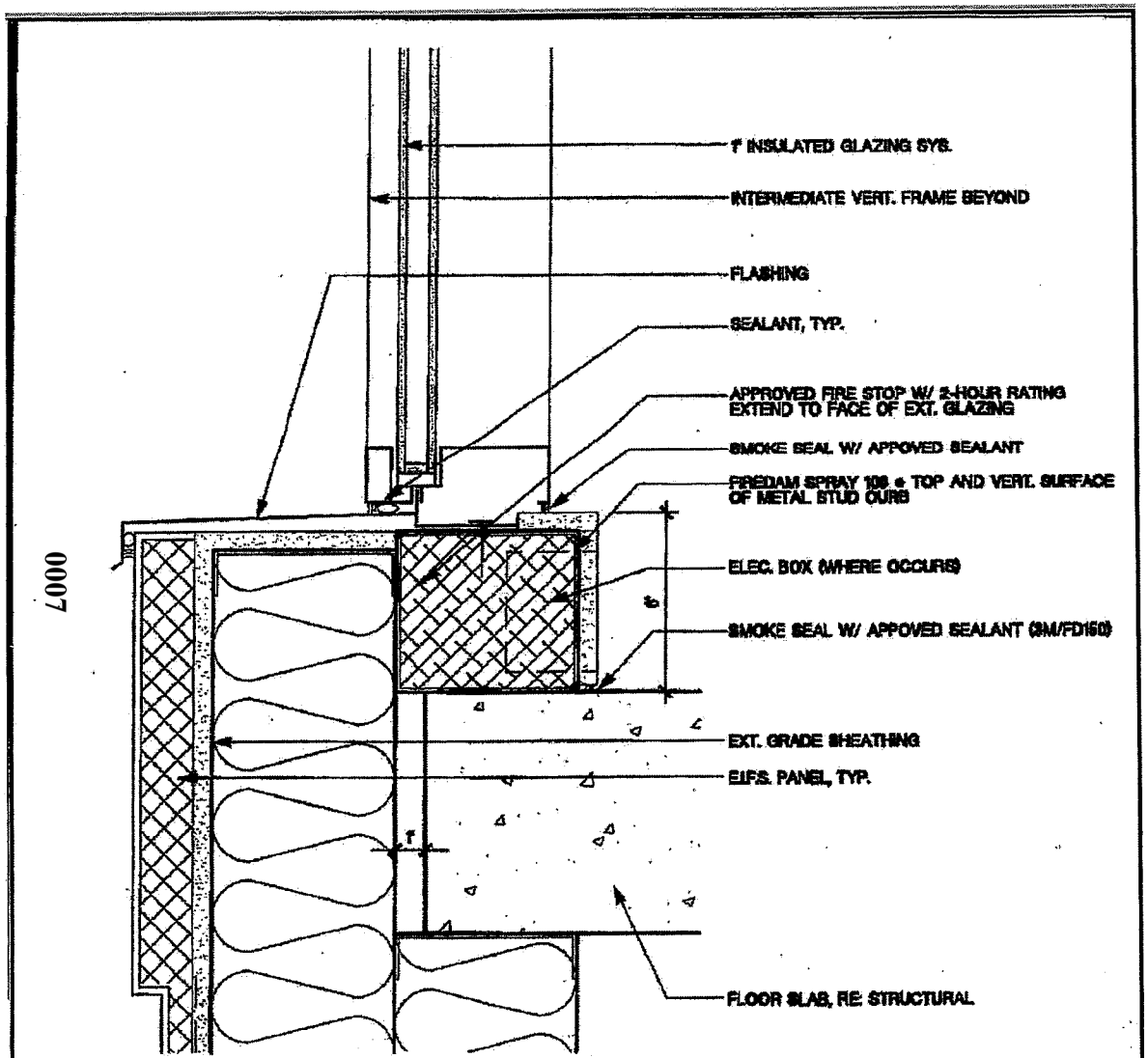
MERLIN ANN CALIMPONG
Notary Public State of Nevada
No. 98-0827-1
My Appt. Exp. Jan. 10, 2018

Merlin Ann Calimpong
NOTARY PUBLIC In and For Said
County and State

LEACH JOHNSON SONG & GRUCHOW
8945 West Russell Road, Suite 330, Las Vegas, Nevada 89148
Telephone: (702) 538-9074 – Facsimile (702) 538-9113

Exhibit "A"

Exhibit "A"



4 TYPICAL CURB DETAIL

SCALE: 3" = 1'-0"

0007

AA2535

KLAI JUBA

PANORAMA

KJA Job Number: 03031

REVISION 6: 11-01-05

"REVISION"

DETAILS

A9.00.0

Exhibit "B"

Exhibit "B"

UNIT / AREA	PART	DISPOSITION Replace with Stainless Steel, Brass*, Bronze, Copper as applicable			Photo Reference
		Now	1 - 5 years	Long Term	
Media Tanks	4 ferrous check valves		X		6
	Culligan ferrous parts		X		7
	tank steel flanges			X	
City Water Inlet	2 ferrous butterfly valves	X			4
	3 overhead butterfly valves	X			5
Zone 4 Hot Water Tank	ferrous check valve		X		2
	inlet carbon steel nipple		X		
	carbon steel drains		X		
Zone 3 Hot Water Tank	2 ferrous check valves		X		3
	inlet carbon steel nipple		X		
	carbon steel drains		X		
Hot Water Recirculation Pump	ferrous pump bowl assembly	X			1
	steel nipple		X		
Unidentified pipe run	carbon steel pipes, fittings, nipples		X		8

*Note: ferrous refers to carbon steel, ductile iron, or cast iron; if brass is used as a replacement, use red brass or 15% zinc maximum brass alloy

PANORAMA TOWER 1
UPPER MECHANICAL ROOM
Replacement Recommendation

UNIT / AREA	PART	DISPOSITION Replace with Stainless Steel, Brass*, Bronze, Copper as applicable			Photo Reference
		Now	1 - 5 years	Long Term	
Media Tanks	4 ferrous check valves		X		6
	Culligan ferrous parts		X		7
	tank steel flanges			X	
City Water Inlet	2 ferrous butterfly valves	X			4
	3 overhead butterfly valves	X			5
Zone 4 Hot Water Tank	ferrous check valve		X		2
	inlet carbon steel nipple		X		
	carbon steel drains		X		
Zone 3 Hot Water Tank	2 ferrous check valves		X		3
	inlet carbon steel nipple		X		
	carbon steel drains		X		
Hot Water Recirculation Pump	ferrous pump bowl assembly	X			1
	steel nipple		X		
Unidentified pipe run	carbon steel pipes, fittings, nipples		X		8

*Note: ferrous refers to carbon steel, ductile iron, or cast iron; if brass is used as a replacement, use red brass or 15% zinc maximum brass alloy

UNIT / AREA	PART	DISPOSITION Replace with Stainless Steel, Brass*, Bronze, Copper as applicable			Photo Reference
		Now	1 - 5 years	Long Term	
BP-1 Pump Unit	ferrous* pump bowls			X	2
	angle valves		X		1
	bypass butterfly valve	X			4
	inlet butterfly valve	X			4
	outlet butterfly valve	X			4
	flex connections with steel flanges			X	3
	pump butterfly valves	X			2
BP-2 Pump Unit	ferrous pump bowls			X	5
	angle valves		X		5
	bypass butterfly valve	X			9
	inlet butterfly valve	X			9
	outlet butterfly valve	X			9
	flex connections with steel flanges			X	9
	pressure gage nipple	X			5
	pump butterfly valves	X			6
	west pump butterfly valve fasteners	X			7
Media Tanks	4 ferrous check valves		X		12
	Culligan ferrous parts	X			27
	tank steel flanges			X	12
Pressure Regulator Manifold	ferrous butterfly valves	X			13
	3 ferrous strainers	X			13
	4 ductile iron pressure regulator bodies		X		13, 19
	3 ductile iron regulator bonnets (tops)		X		13, 18, 19
	leaking plastic lined steel nipples	X			14, 15
	non-leaking plastic lined steel nipples		X		16
	steel drain nipples	X			17

UNIT / AREA	PART	DISPOSITION Replace with Stainless Steel, Brass*, Bronze, Copper as applicable			Photo Reference
		Now	1 - 5 years	Long Term	
City Water Inlet Manifold	6 ferrous butterfly valves	X			20
	2 ferrous strainers	X			20
	2 pressure regulator ductile iron bodies		X		20
Zone 1 Hot Water Tank	ferrous butterfly valve	X			23, 24
	ferrous check valve		X		23, 24
Zone 2 Hot Water Tank	ferrous butterfly valve	X			21, 22
	ferrous check valve		X		21, 22
Hot Water Recirculation Pumps	ferrous pump bowl assemblies	X			25, 26
Outlet Piping Sample Connections; Connections to Sink in Maintenance room	carbon steel nipples	X			28
Filter Bank	replace all carbon steel nipples, fittings	X			na

*Note: ferrous refers to carbon steel, ductile iron, or cast iron; if brass is used as a replacement, use red brass or 15% zinc maximum brass alloy

UNIT / AREA	PART	DISPOSITION Replace with Stainless Steel, Brass*, Bronze, Copper as applicable			Photo Reference
		Now	1 - 5 years	Long Term	
Media Tanks	4 ferrous check valves		X		
	Culligan ferrous parts	X			
	tank steel flanges			X	
Overhead piping	cold to zone 3 and 4 - 2 carbon steel nipples		X		2
	carbon steel nipple to main cold line	X			1
Zone 4 Hot Water Tank	ferrous butterfly valve	X			
	ferrous check valve		X		
Zone 3 Hot Water Tank	ferrous butterfly valve	X			
	ferrous check valve		X		
Hot Water Recirculation Pumps	ferrous pump bowl assemblies	X			
	ferrous check valve		X		

*Note: ferrous refers to carbon steel, ductile iron, or cast iron; if brass is used as a replacement, use red brass or 15% zinc maximum brass alloy

PANORAMA 1 Lower Mechanical Room

1. View of lower mechanical room (jpg100).

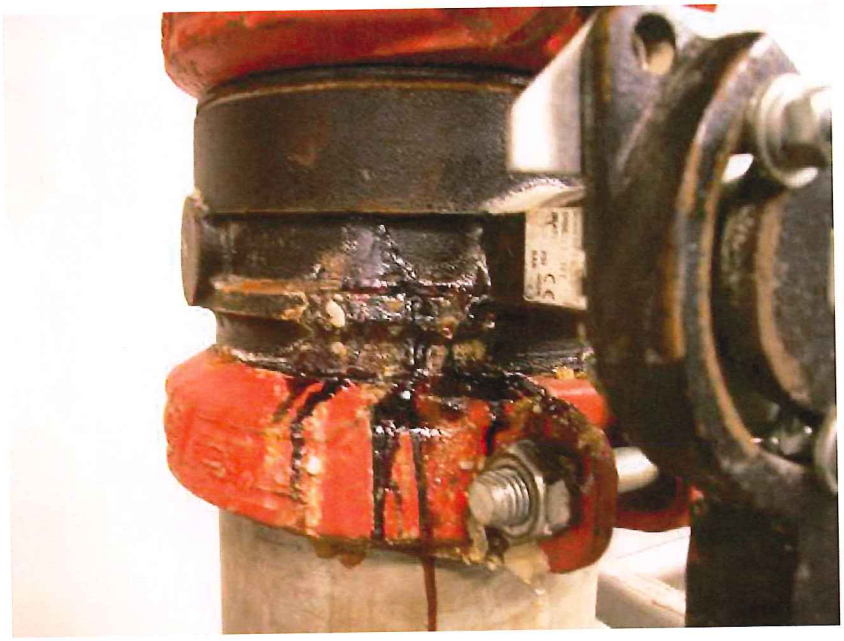
2. BP-1, (jpg66)

PANORAMA 1 Lower Mechanical Room

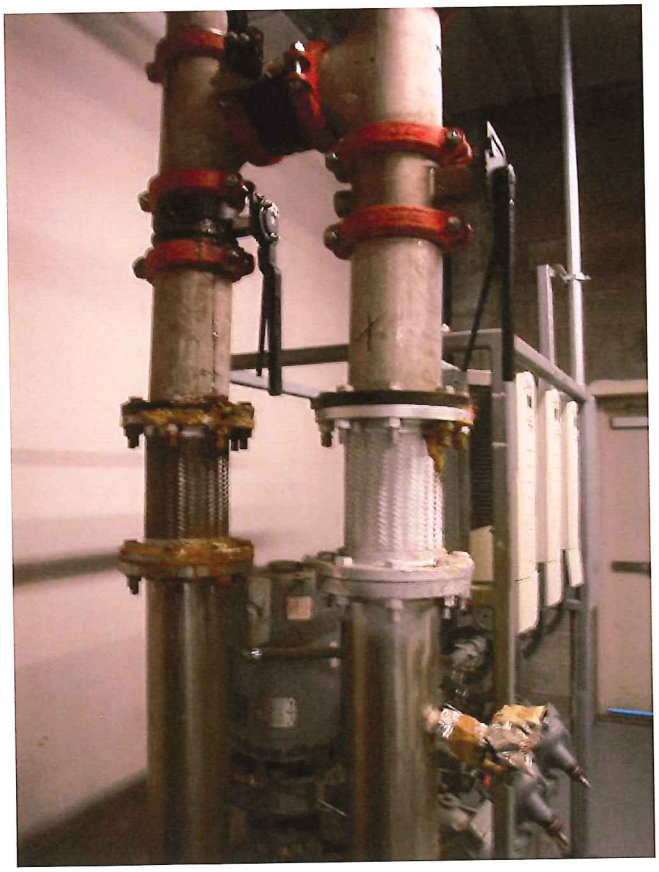
3. BP-1, flex connection (jpg68)

4. BP-1, close up of leaking flex flange connection (jpg72)

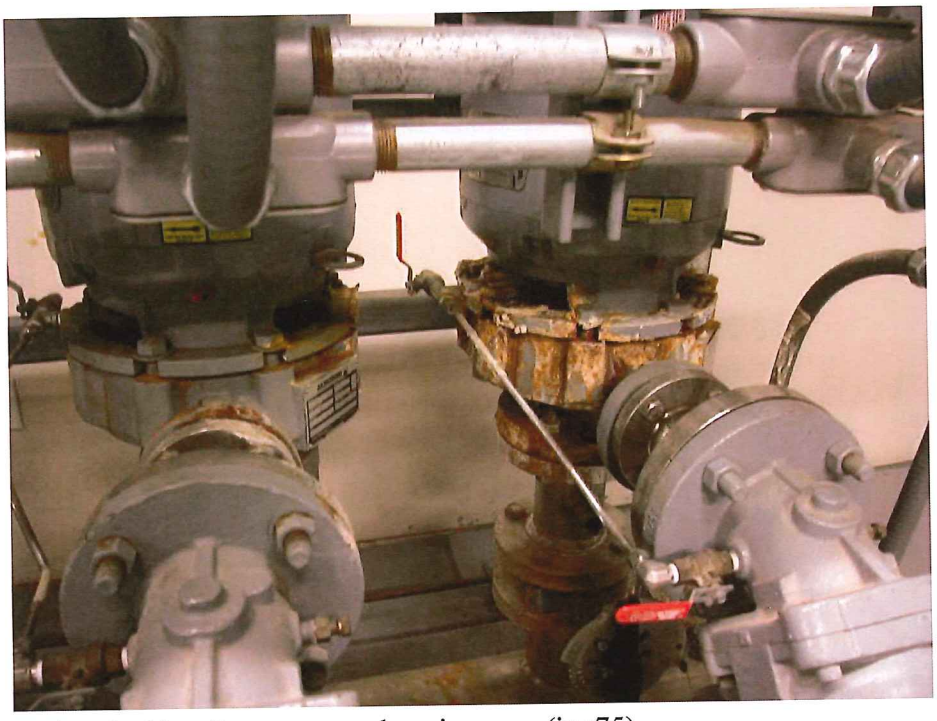
PANORAMA 1 Lower Mechanical Room



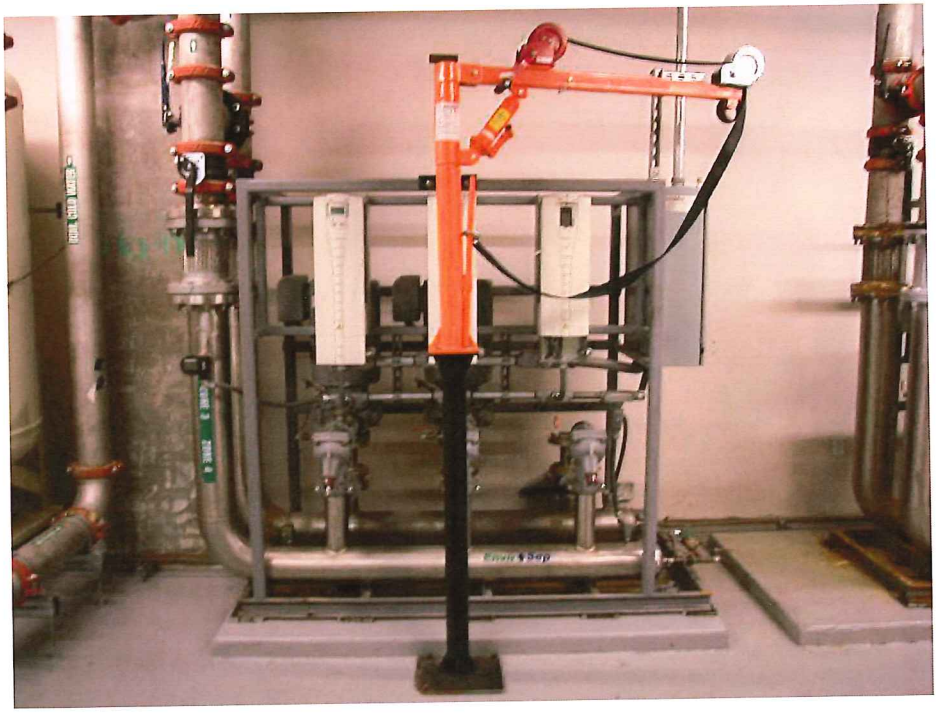
5. BP-1 (jpg 73)



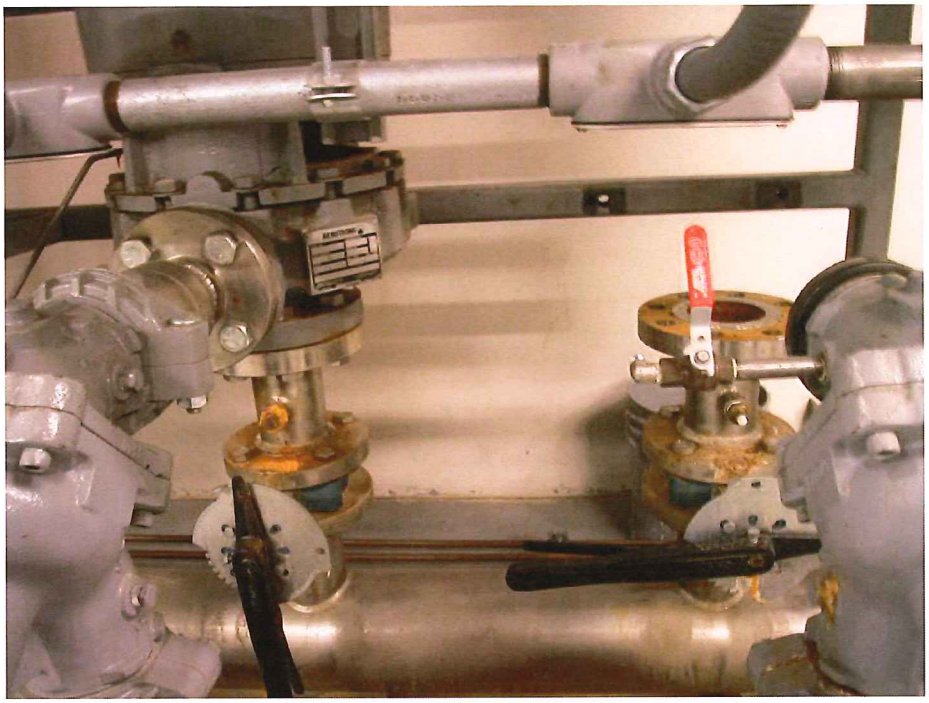
6. BP-1 (jpg(74)



7. BP-1, replace leaking ferrous pump housing now (jpg75).



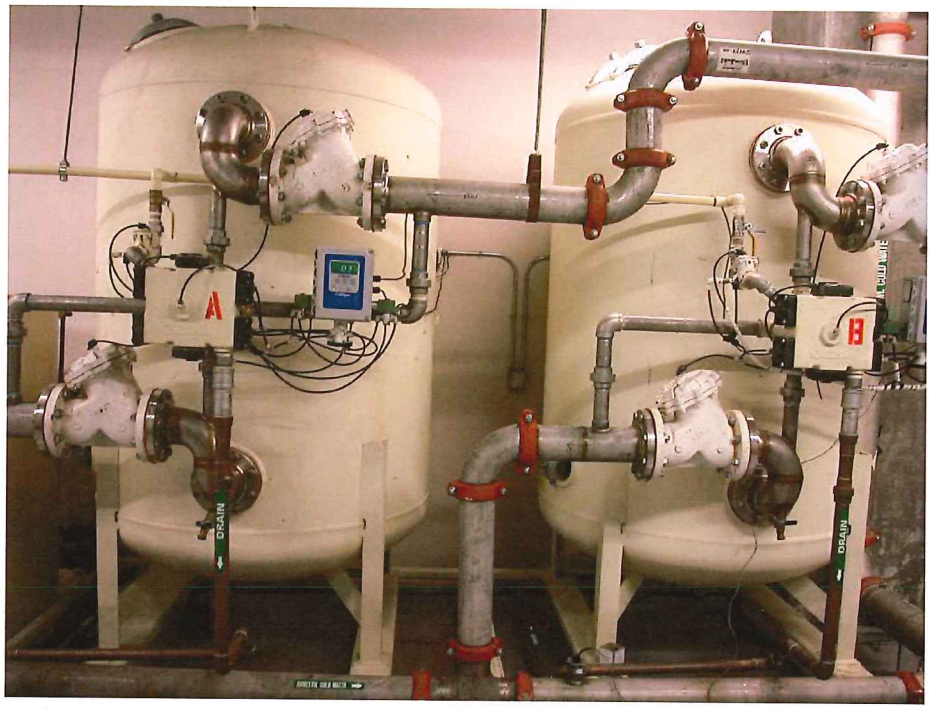
8. BP-2, (jpg 77)



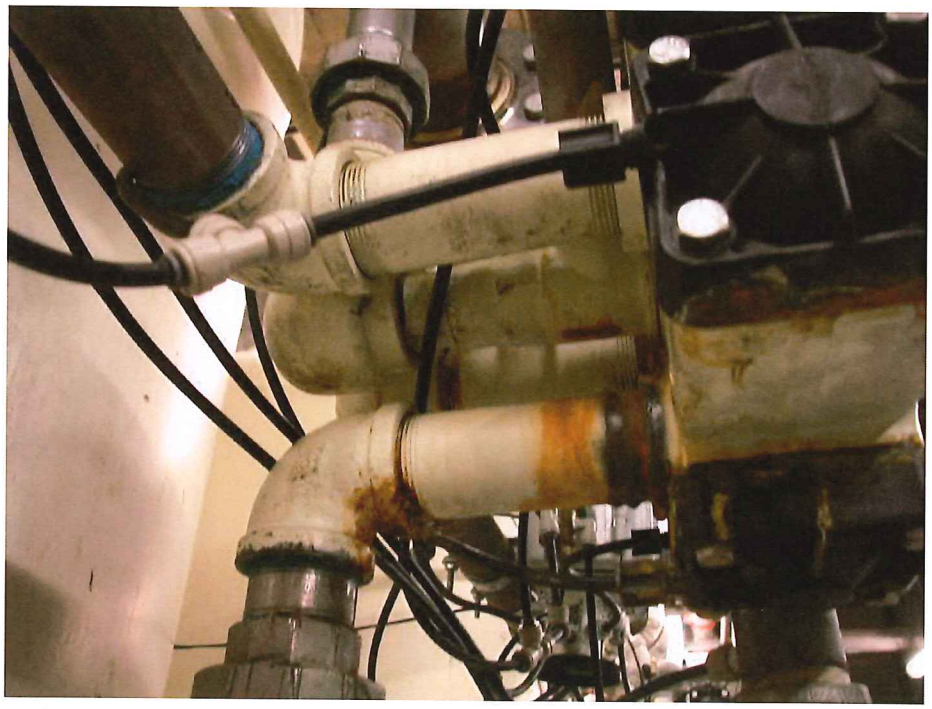
9. BP-2, (jpg78)

10. BP-2, (jpg79)

PANORAMA 1 Lower Mechanical Room



11. Media tanks (jpg80)



12. Culligan carbon steel parts (jpg81).

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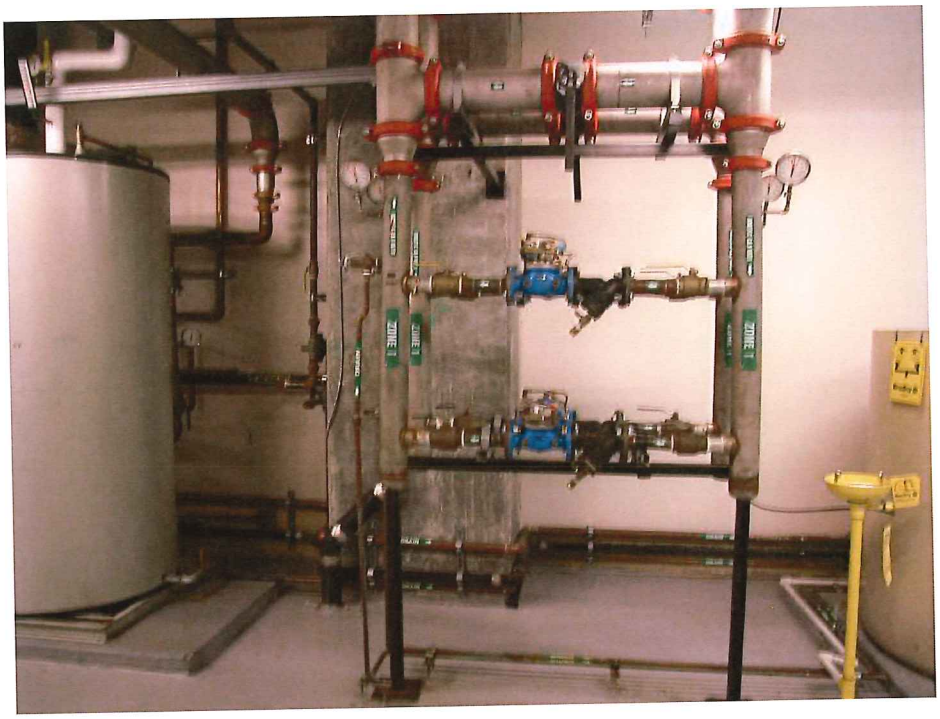
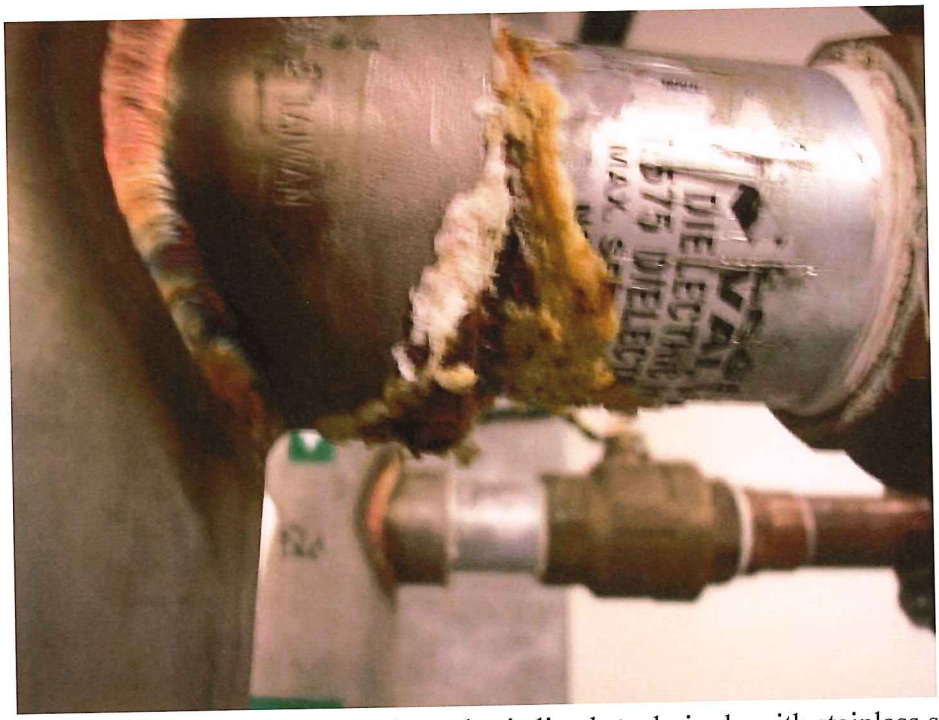
PANORAMA 1 Lower Mechanical Room



13. Pressure regulator manifold (jpg82).

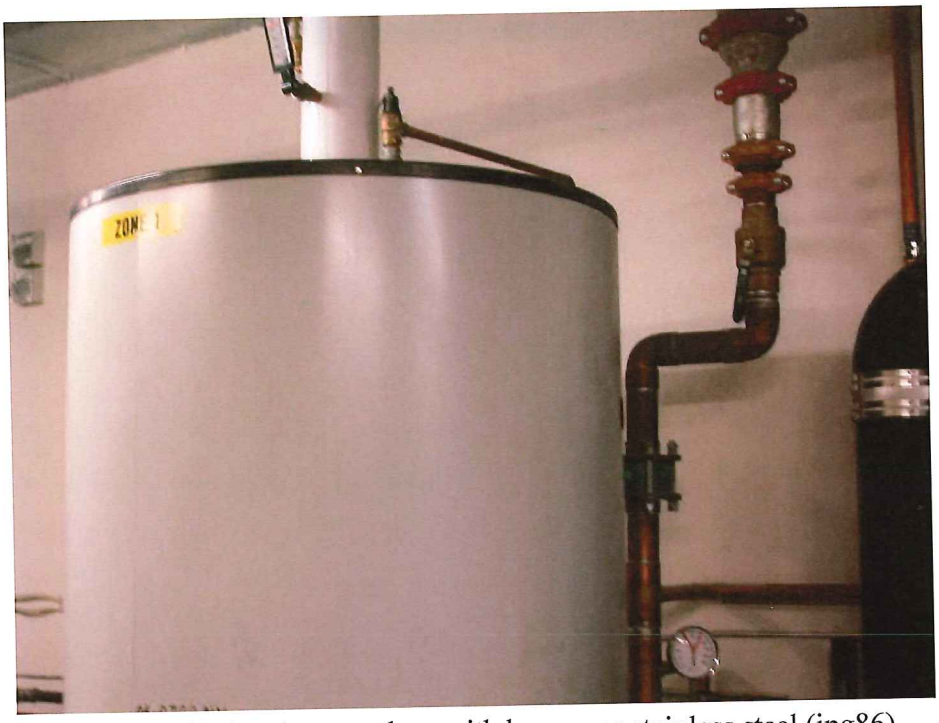


14. Pressure regulator manifold (jpg83) replace plastic lined steel nipple with stainless steel.

15. Another view of previous photo (jpg84).

16. Pressure regulating manifold, leaking plastic lined nipple – replace with stainless steel now(jpg85).

PANORAMA 1 Lower Mechanical Room



17. Hot water tank ferrous check valve – replace with bronze or stainless steel (jpg86).

18. (jpg87)

PANORAMA 1 Lower Mechanical Room

19. Filter bank (jpg88).

20. (jpg89)

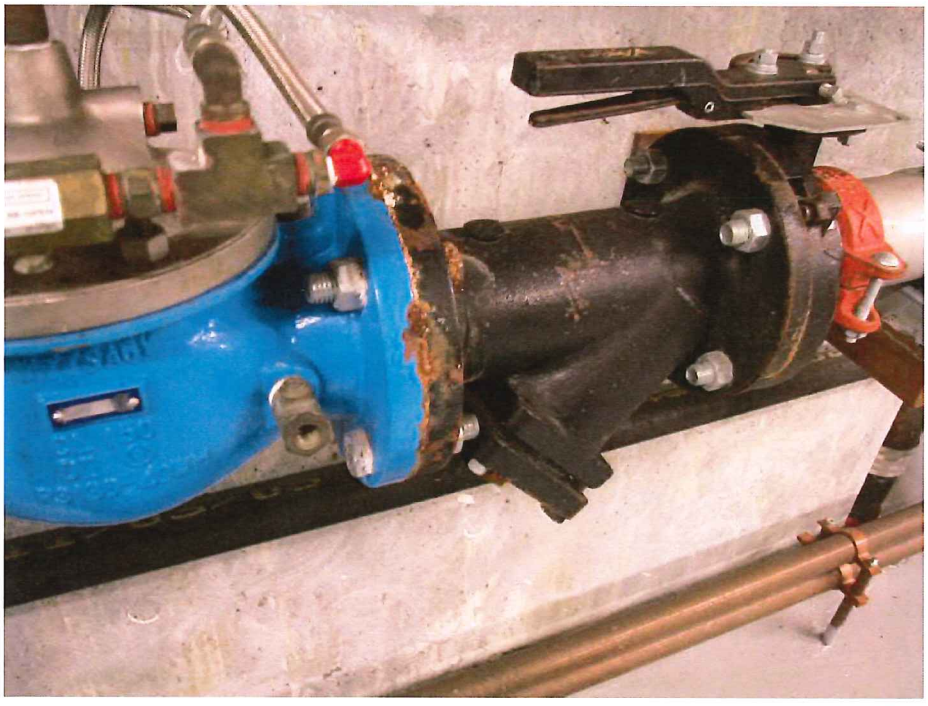
PANORAMA 1 Lower Mechanical Room

21. (jpg91)

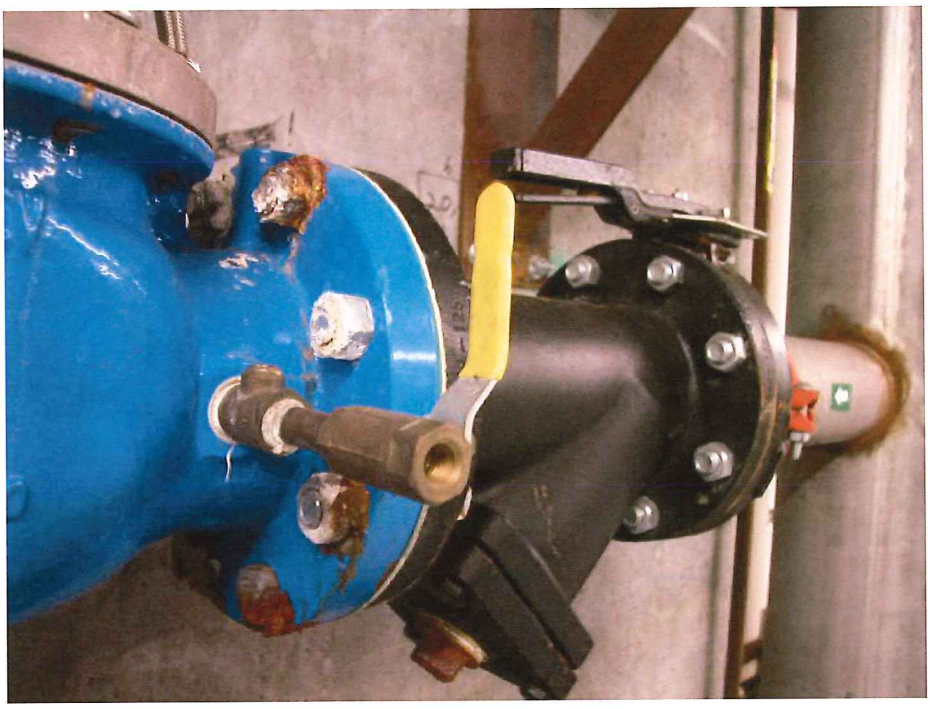
22. (jpg93)

PANORAMA 1 Lower Mechanical Room

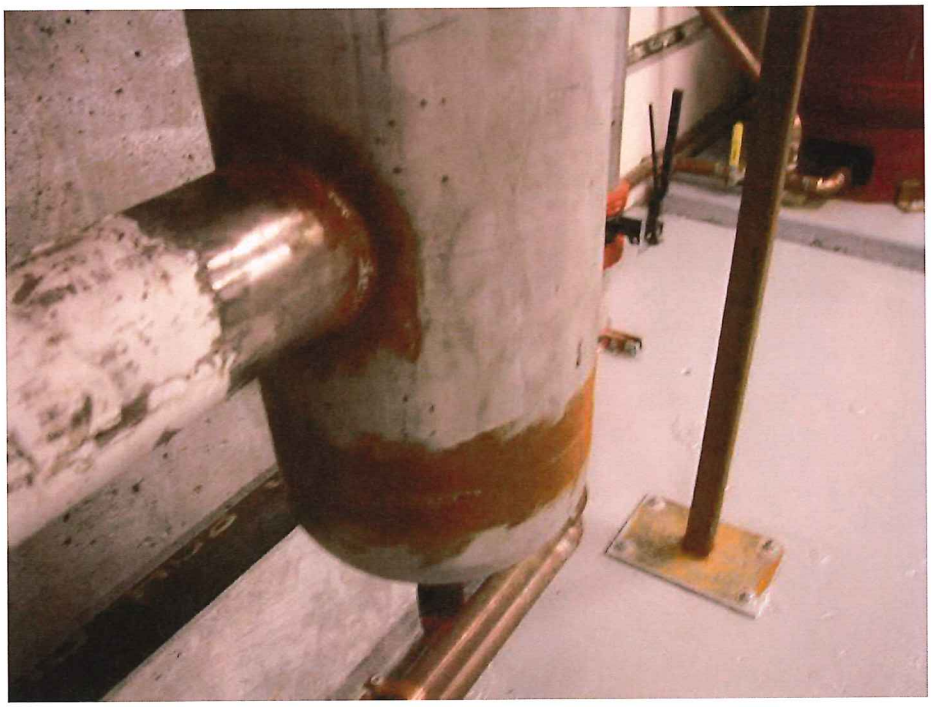
23. (jpg94)



24. (jpg95)



25. (jpg96)

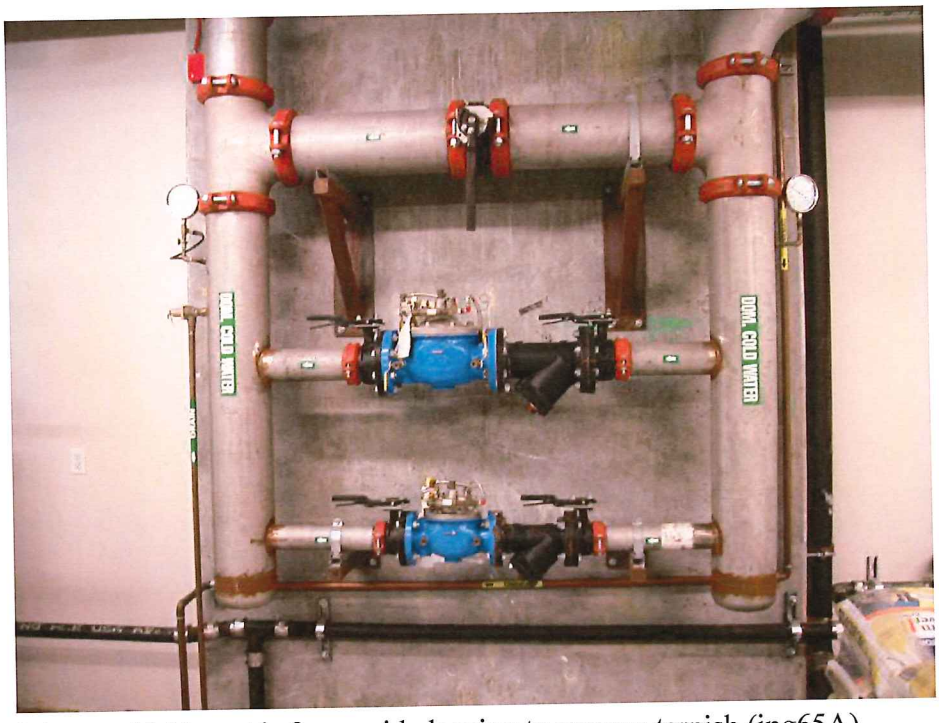


26. Evidence of removing welding tarnish with an acid e.g. hydrochloric; recommend cleaning with a stainless steel cleaner containing nitric acid.

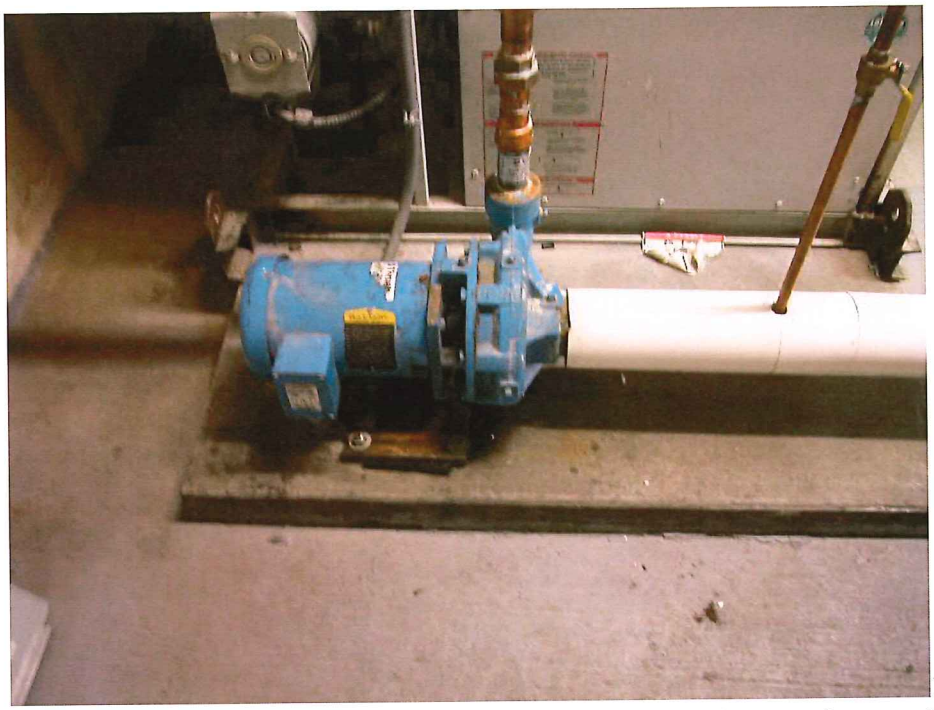
27. City water inlet; replace ferrous butterfly valve with stainless steel (jpg98).

28. Hot water recirculation pumps – replace with nonferrous alloy (jpg99).

PANORAMA 1 Lower Mechanical Room



29 City water inlet manifold; rust is from acid cleaning to remove tarnish (jpg65A).

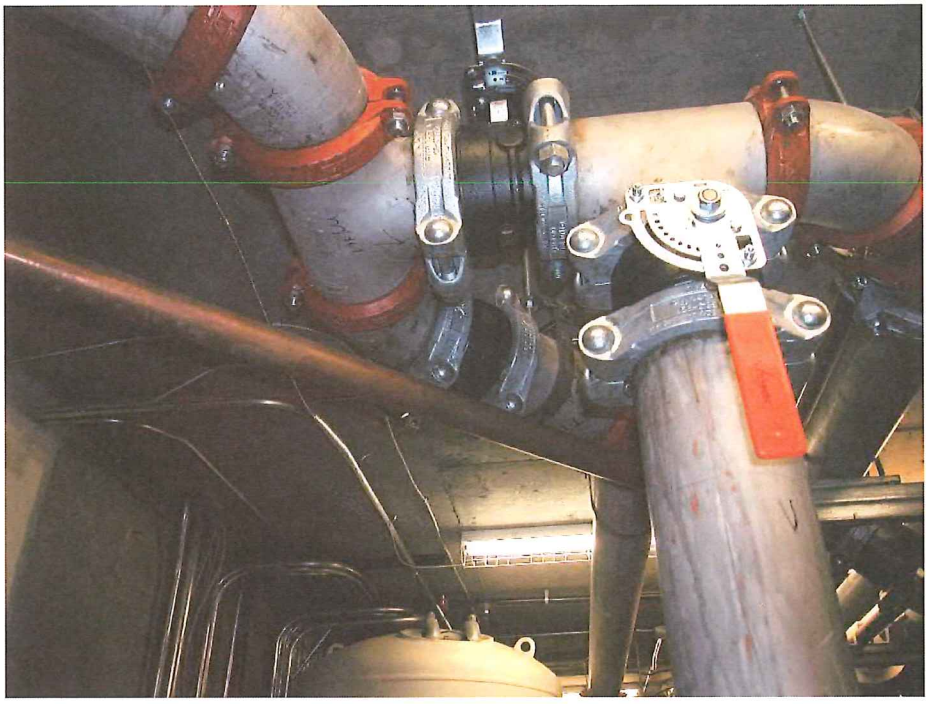


1. Hot water ferrous recirculation pump body requires replacement with a non-ferrous alloy now; replace carbon steel nipples now (jpg103).

2. Zone 4 hot water system with ferrous check valve – replace within 5 years (jpg104).

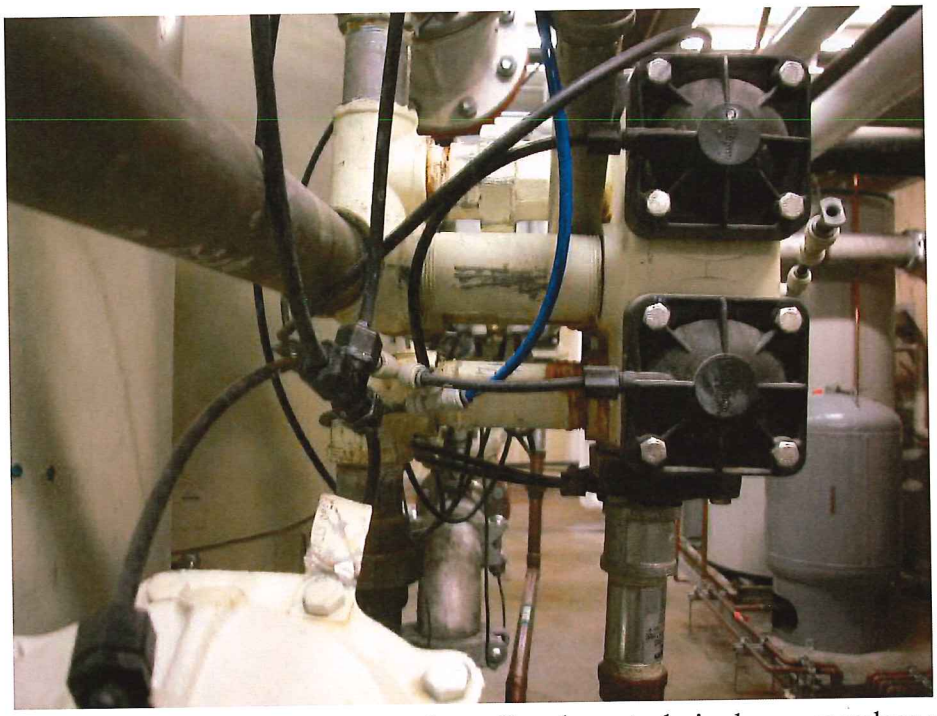
3. Zone 3 hot water system with 2 ferrous check valves that need to be replaced within 5 years.

4. City water inlet, Zone 3 and 4 ferrous butterfly valves – replace with stainless or bronze valves (jpg106).

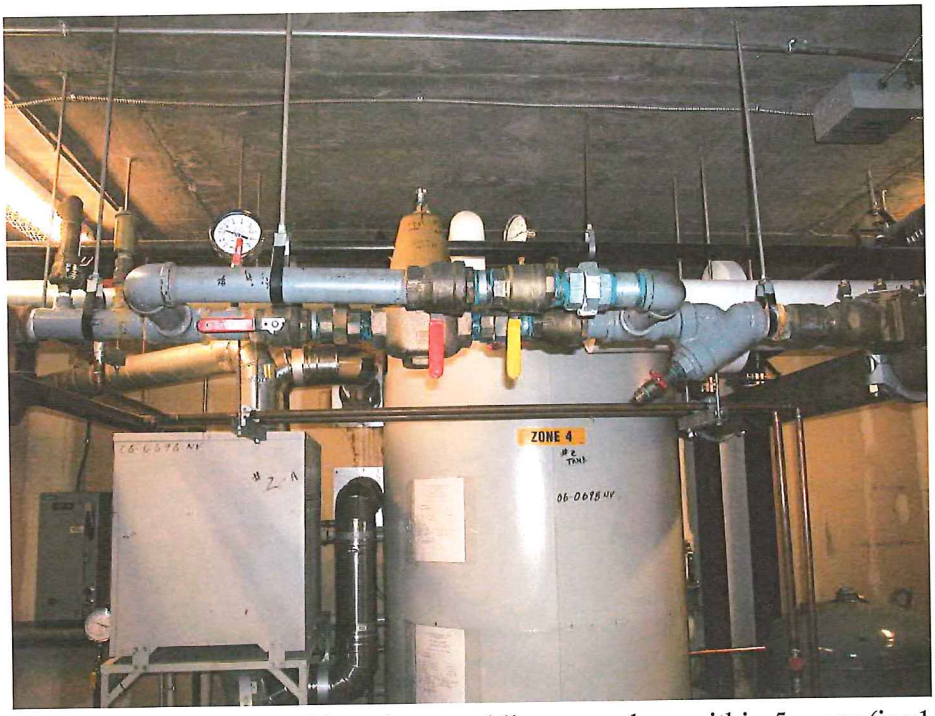


5. Feed water to water conditioners and bypass ferrous butterfly valves – replace now (jpg107).

6. Media tanks with 4 ferrous check valves – replace valves within 5 years (jpg109).



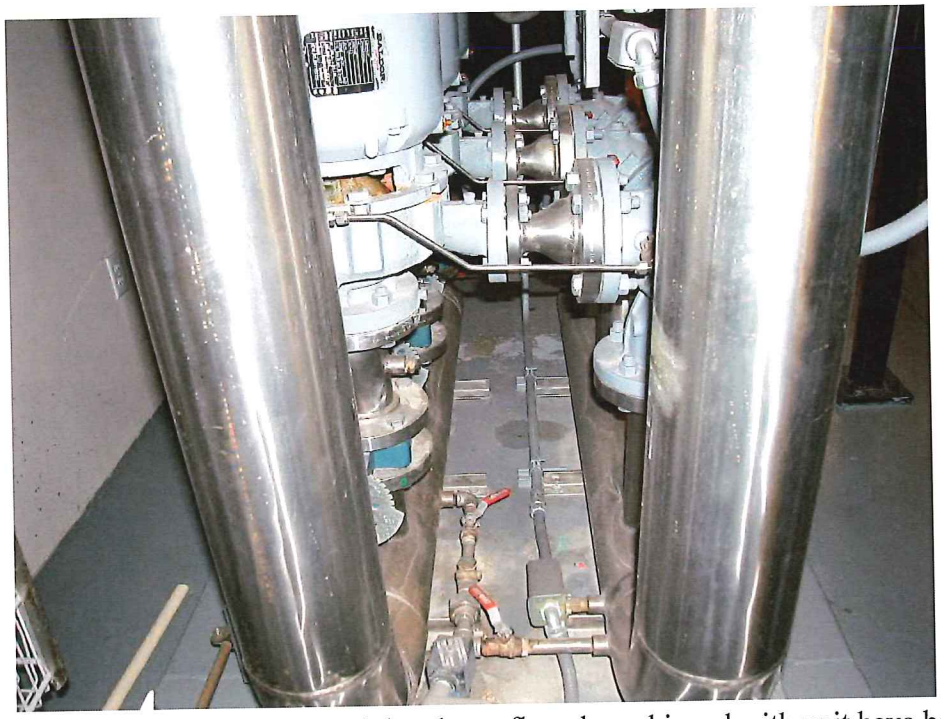
7. Media tanks with Culligan systems – replace all carbon steel nipples now; valves within 5 years (jpg108).



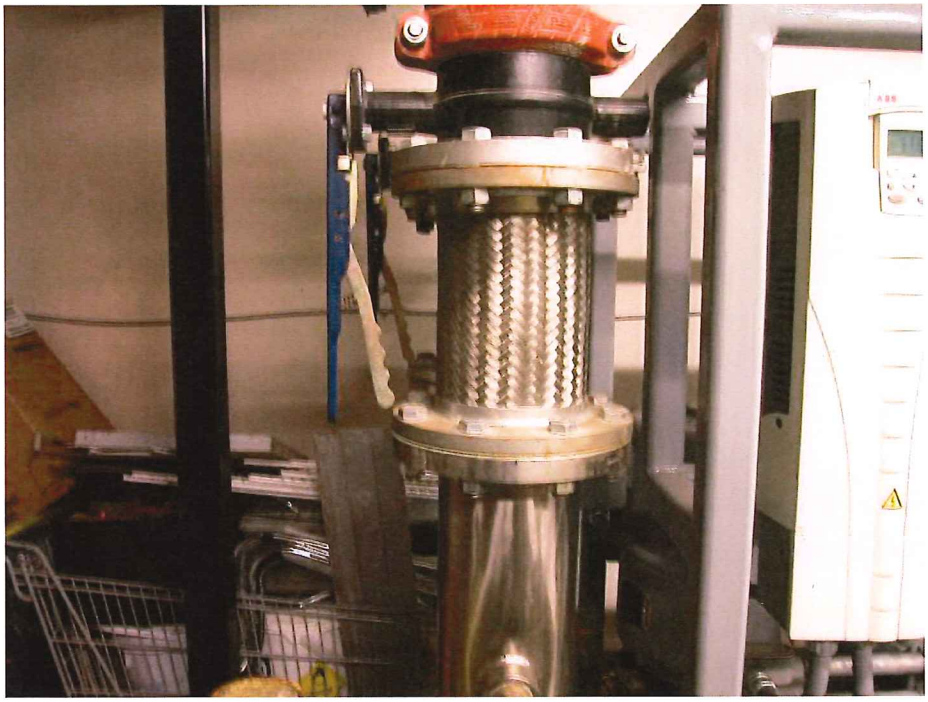
8. Unidentified pipe run with carbon steel lines – replace within 5 years (jpg110).

PANORAMA 2 Lower Mechanical Room

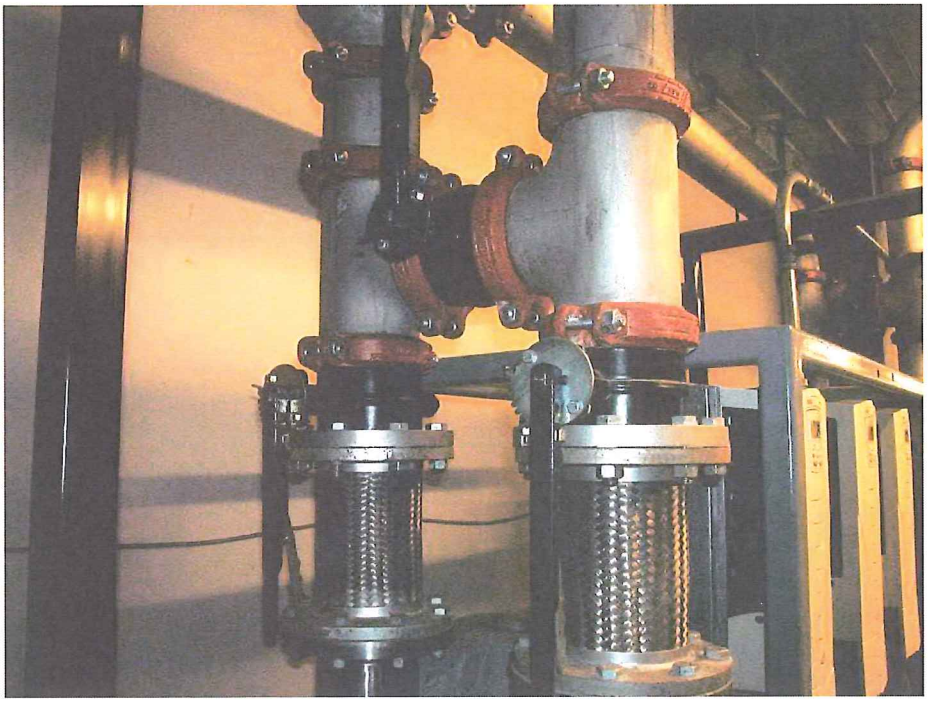
1. BP-1 skid mounted unit (jpg39).



2. End view BP-1 skid mounted unit; stainless butterfly valves shipped with unit have been replaced with carbon steel valves that should be replaced now with stainless (jpg25).

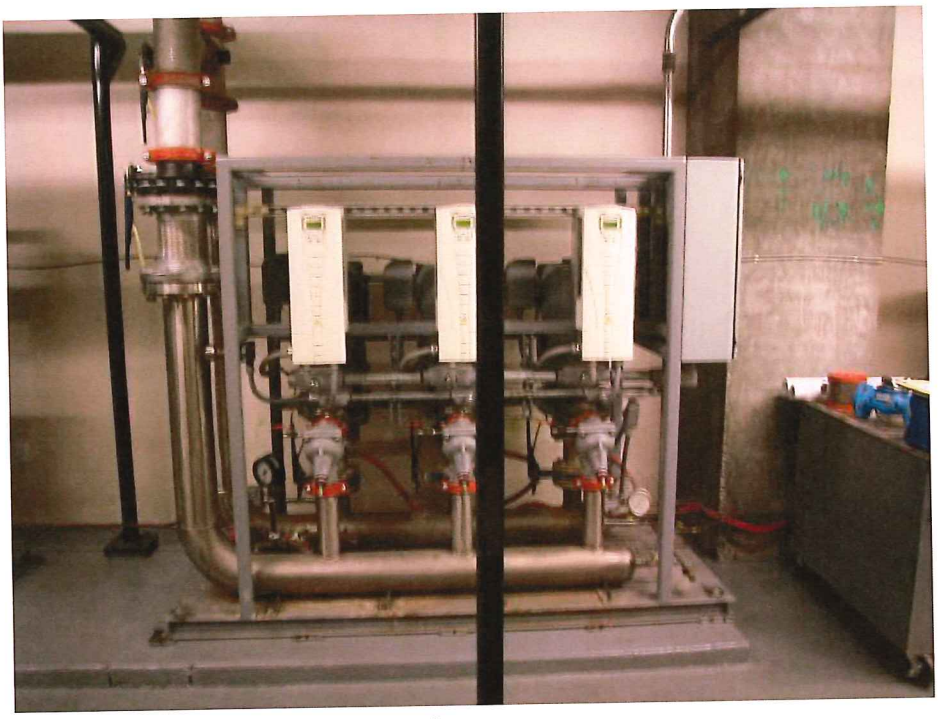


3. BP-1 Flex joint below carbon steel butterfly valve – replace valve now – see below (jpg28).

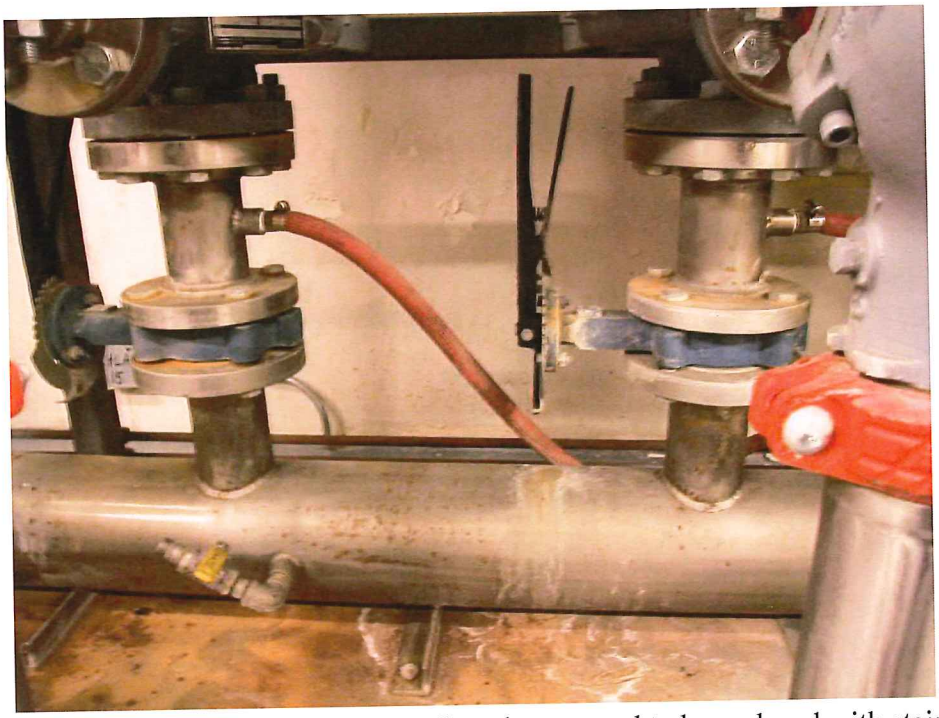


4. BP-1 showing inline and bypass carbon steel butterfly vales – all need to be replaced now (jpg29).

PANORAMA 2 Lower Mechanical Room

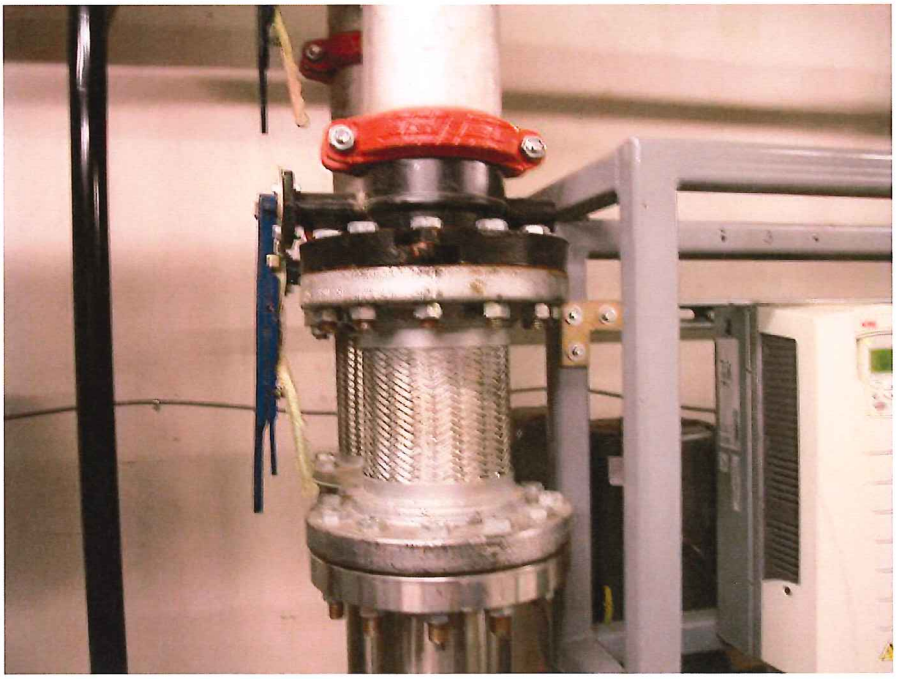


5. BP-2 high pressure skid mounted unit (jpg40).



6. BP-2 center and east carbon steel butterfly valves – need to be replaced with stainless now (jpg27).

7. BP-2 west carbon steel butterfly valve; valve and corroded fasteners need to be replaced now (jpg26).



8. BP-2 high pressure flex connection with carbon steel flanges (jpg30).

9. BP-2 inlet, outlet, and bypass butterfly valves need to be replaced with stainless steel valves now (jpg31).

10. Typical inside of carbon steel butterfly valve after several months service; this is the reason they must be replaced as soon as practical with stainless steel valves (jpg33).