Case No. 80615

IN THE SUPREME COURT OF NEVADA

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Sep 21 2020 06:34 p.m.
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 23 OF 27

FRANCIS I. LYNCH (#4145)
LYNCH & ASSOCIATES LAW GROUP
1445 AMERICAN PACIFIC DRIVE
STE 110 #293
HENDERSON, NV 89074

MICHAEL J. GAYAN (#11135)
JOSHUA D. CARLSON (#11781)
KEMP JONES, LLP
3800 HOWARD HUGHES PKWY, 17TH FL.
LAS VEGAS, NV 89169

SCOTT WILLIAMS (*pro hac vice)*
WILLIAMS & GUMBINER, LLP
1010 B STREET, STE 200
SAN RAFAEL, CA 94901

Attorneys for Appellant

Docket 80615 Document 2020-34747

CHRONOLOGICAL TABLE OF CONTENTS TO APPENDIX

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

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

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

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

ALPHABETICAL TABLE OF CONTENTS TO APPENDIX

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

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

. . .

. . .

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:

PETER C. BROWN, ESQ.
BREMER WHYTE BROWN & O'MEARA, LLP
1160 North Town Center Drive, Suite 250
Las Vegas, Nevada 89144
pbrown@bremerwhyte.com

FRANCIS I. LYNCH, ESQ.
CHARLES "DEE" HOPPER, ESQ.
SERGIO SALZANO, ESQ.
LYNTH HOPPER, LLP
1210 South Valley View Boulevard, Suite 208
Las Vegas, Nevada 89102

SCOTT WILLIAMS
WILLIAMS & GUMBINER, LLP
100 Drakes Landing Road, Suite 260
Greenbrae, California 94904

MICHAEL J. GAYAN, ESQ.
WILLIAM L. COULTHARD, ESQ.
KEMP JONES & COULTHARD
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
m.gayan@kempjones.com

Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

File Into Existing Case

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

1 20 items per page 1 - 1 of 1 items

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Service Contacts: A-16-744146-D

Name	Email
▸ **Party:** Laurent Hallier - Plaintiff	
▾ **Party:** Panorama Towers Condominium Unit Owners Association - Defendant	
Angela Embrey	a.embrey@kempjones.com
Michael J. Gayan	m.gayan@kempjones.com
Nicole McLeod	n.mcleod@kempjones.com
Patricia Ann Pierson	p.pierson@kempjones.com
▸ **Party:** Laurent Hallier - Counter Defendant	
▸ **Party:** Panorama Towers I LLC - Plaintiff	
▸ **Party:** Panorama Towers I LLC - Counter Defendant	
▸ **Party:** Panorama Towers I Mezz LLC - Plaintiff	
▸ **Party:** Panorama Towers I Mezz LLC - Counter Defendant	
▸ **Party:** MJ Dean Construction Inc - Plaintiff	
▸ **Party:** MJ Dean Construction Inc - Counter Defendant	
▸ **Party:** Panorama Towers Condominium Unit Owners Association - Counter Claimant	

1 2 3 10 items per page

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1 20 items per page 1 - 1 of 1 items

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Service Contacts: A-16-744146-D

Party: Southern Nevada Paving Inc - Counter Defendant

Party: Insulpro Inc - Counter Defendant

Other Service Contacts

Name	Email
"Charles ""Dee"" Hopper, Esq. " .	CDHopper@lynchhopper.com
"Francis I. Lynch, Esq. " .	FLynch@lynchhopper.com
Ben Ross .	Ben@litigationservices.com
Calendar .	calendar@litigationservices.com
Colin Hughes .	colin@lynchhopper.com
Crystal Williams .	cwilliams@bremerwhyte.com
Darlene Cartier .	dcartier@bremerwhyte.com
Debbie Holloman .	dholloman@jamsadr.com
Depository .	Depository@litigationservices.com
Floyd Hale .	fhale@floydhale.com
Jennifer Juarez .	jjuarez@lynchhopper.com
Peter C. Brown .	pbrown@bremerwhyte.com
Rachel Bounds .	rbounds@bremerwhyte.com
Scott Williams .	swilliams@williamsgumbiner.com
Shauna Hughes .	shughes@lynchhopper.com
Terri Scott .	tscott@fmglegal.com
Vicki Federoff .	vicki@williamsgumbiner.com
Wendy Jensen .	wjensen@williamsgumbiner.com
Kimberley Chapman	kchapman@bremerwhyte.com
Christie Cyr	ccyr@leachjohnson.com
Devin R. Gifford	dgifford@bremerwhyte.com
Terry Kelly-Lamb	tkelly-lamb@kringandchung.com
Nancy Ray	nray@kringandchung.com
Alondra A Reynolds	areynolds@bremerwhyte.com
Jeff W. Saab	jsaab@bremerwhyte.com
Robert L. Thompson	rthompson@kringandchung.com
Jennifer Vela	Jvela@bremerwhyte.com

1 2 3 10 items per page

EXHIBIT "B"

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Steven D. Grierson
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NEO

PETER C. BROWN, ESQ.
Nevada State Bar No. 5887
JEFFREY W. SAAB, ESQ.
Nevada State Bar No. 11261
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pbrown@bremerwhyte.com
jsaab@bremerwhyte.com

Attorneys for Plaintiffs,
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.	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:_____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Jeffrey W. Sab, Esq.
Nevada State Bar No. 11261
Attorneys for Plaintiffs,
LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA
TOWERS I MEZZ, LLC; and M.J.
DEAN CONSTRUCTION, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 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
BREMER, WHYTE, BROWN & O'MEARA, LLP

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

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CLERK OF THE COURT

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

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

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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]

. . .

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

. . .

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

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

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

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

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

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

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

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

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

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

> 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property *more than 6 years* after the substantial completion of such an improvement for the recovery of damages for:
>
> (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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SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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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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:

PETER C. BROWN, ESQ.
BREMER WHYTE BROWN & O'MEARA, LLP
1160 North Town Center Drive, Suite 250
Las Vegas, Nevada 89144
pbrown@bremerwhyte.com

FRANCIS I. LYNCH, ESQ.
CHARLES "DEE" HOPPER, ESQ.
SERGIO SALZANO, ESQ.
LYNTH HOPPER, LLP
1210 South Valley View Boulevard, Suite 208
Las Vegas, Nevada 89102

SCOTT WILLIAMS
WILLIAMS & GUMBINER, LLP
100 Drakes Landing Road, Suite 260
Greenbrae, California 94904

MICHAEL J. GAYAN, ESQ.
WILLIAM L. COULTHARD, ESQ.
KEMP JONES & COULTHARD
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
m.gayan@kempjones.com

Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

File Into Existing Case

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

1 20 items per page 1 - 1 of 1 items

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Service Contacts: A-16-744146-D

Name	Email
▸ **Party:** Laurent Hallier - Plaintiff	
▾ **Party:** Panorama Towers Condominium Unit Owners Association - Defendant	
Angela Embrey	a.embrey@kempjones.com
Michael J. Gayan	m.gayan@kempjones.com
Nicole McLeod	n.mcleod@kempjones.com
Patricia Ann Pierson	p.pierson@kempjones.com
▸ **Party:** Laurent Hallier - Counter Defendant	
▸ **Party:** Panorama Towers I LLC - Plaintiff	
▸ **Party:** Panorama Towers I LLC - Counter Defendant	
▸ **Party:** Panorama Towers I Mezz LLC - Plaintiff	
▸ **Party:** Panorama Towers I Mezz LLC - Counter Defendant	
▸ **Party:** MJ Dean Construction Inc - Plaintiff	
▸ **Party:** MJ Dean Construction Inc - Counter Defendant	
▸ **Party:** Panorama Towers Condominium Unit Owners Association - Counter Claimant	

1 2 3 10 items per page

File Into Existing Case

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A-16-744146-D	Department 22	Laurent Hallier, Plaintiff(s...	Chapter 40

1 20 items per page 1 - 1 of 1 items

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Version: 2017.2.5.7059

Service Contacts: A-16-744146-D

Party: Southern Nevada Paving Inc - Counter Defendant

Party: Insulpro Inc - Counter Defendant

Other Service Contacts

Name	Email
"Charles ""Dee"" Hopper, Esq. " .	CDHopper@lynchhopper.com
"Francis I. Lynch, Esq. " .	FLynch@lynchhopper.com
Ben Ross .	Ben@litigationservices.com
Calendar .	calendar@litigationservices.com
Colin Hughes .	colin@lynchhopper.com
Crystal Williams .	cwilliams@bremerwhyte.com
Darlene Cartier .	dcartier@bremerwhyte.com
Debbie Holloman .	dholloman@jamsadr.com
Depository .	Depository@litigationservices.com
Floyd Hale .	fhale@floydhale.com
Jennifer Juarez .	jjuarez@lynchhopper.com
Peter C. Brown .	pbrown@bremerwhyte.com
Rachel Bounds .	rbounds@bremerwhyte.com
Scott Williams .	swilliams@williamsgumbiner.com
Shauna Hughes .	shughes@lynchhopper.com
Terri Scott .	tscott@fmglegal.com
Vicki Federoff .	vicki@williamsgumbiner.com
Wendy Jensen .	wjensen@williamsgumbiner.com
Kimberley Chapman	kchapman@bremerwhyte.com
Christie Cyr	ccyr@leachjohnson.com
Devin R. Gifford	dgifford@bremerwhyte.com
Terry Kelly-Lamb	tkelly-lamb@kringandchung.com
Nancy Ray	nray@kringandchung.com
Alondra A Reynolds	areynolds@bremerwhyte.com
Jeff W. Saab	jsaab@bremerwhyte.com
Robert L. Thompson	rthompson@kringandchung.com
Jennifer Vela	Jvela@bremerwhyte.com

1 2 3 10 items per page

EXHIBIT "C"

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Steven D. Grierson
CLERK OF THE COURT

FRANCIS I. LYNCH, ESQ. (#4145)
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive, Suite 110 #293
Henderson, Nevada 89074
T: (702) 868-1115
F: (702) 868-1114

SCOTT WILLIAMS (California Bar #78588)
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901
T: (415) 755-1880
F: (415) 419-5469
Admitted Pro Hac Vice

WILLIAM L. COULTHARD, ESQ. (#3927)
MICHAEL J. GAYAN, ESQ. (#11125)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
T: (702) 385-6000
F: (702) 385-6001

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 **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
Francis I. Lynch, Esq.
Nevada Bar No. 4145
1445 American Pacific Drive
Suite 110 #293
Henderson, Nevada 89074

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
Francis I. Lynch, Esq.
Nevada Bar No. 4145
1445 American Pacific Drive
Suite 110 #293
Henderson, Nevada 89074

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

AA3822

"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.)

AA3823

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;~~]~~

AA3824

(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

AA3827

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.

AA3828

~~[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

EXHIBIT "D"

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6/13/2019 2:07 PM
Steven D. Grierson
CLERK OF THE COURT

FRANCIS I. LYNCH, ESQ. (#4145)
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive, Suite 110 #293
Henderson, Nevada 89074
T: (702) 868-1115
F: (702) 868-1114

SCOTT WILLIAMS (California Bar #78588)
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901
T: (415) 755-1880
F: (415) 419-5469
Admitted Pro Hac Vice

WILLIAM L. COULTHARD, ESQ. (#3927)
MICHAEL J. GAYAN, ESQ. (#11125)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
T: (702) 385-6000
F: (702) 385-6001

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,

KEMP, JONES & COULTHARD, LLP

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

FRANCIS I. LYNCH, ESQ. (#4145)
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive, Suite 110 #293
Henderson, Nevada 89074
T: (702) 868-1115
F: (702) 868-1114

SCOTT WILLIAMS (*admitted pro hac vice*)
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901
T: (415) 755-1880
F: (415) 419-5469

Counsel for Defendant/Counter-claimant Panorama Towers Condominium Unit Owners' Association

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,

KEMP, JONES & COULTHARD, LLP

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

FRANCIS I. LYNCH, ESQ. (#4145)
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive, Suite 110 #293
Henderson, Nevada 89074
T: (702) 868-1115
F: (702) 868-1114

SCOTT WILLIAMS (*admitted pro hac vice*)
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901
T: (415) 755-1880
F: (415) 419-5469

Counsel for Defendant/Counter-claimant Panorama Towers Condominium Unit Owners' Association

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.

0012

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

AA3851

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

0014

AA3853

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

AA3856

"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.)

AA3857

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;~~]~~

AA3858

(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.

AA3862

~~[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 "E"

DISTRICT COURT CIVIL COVER SHEET

A-16-744146-D

XXII

_____ County, Nevada

Case No. _____

(Assigned by Clerk's Office)

I. Party Information *(provide both home and mailing addresses if different)*

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
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	Panorama Towers Condominium Unit Owners' Association, a Nevada non-profit corporation
Attorney (name/address/phone): Peter C. Brown, Esq. and Darlene M. Cartier, Esq. Bremer, Whyte, Brown & O'Meara, LLP 1160 N. Town Center Drive, Suite 250 Las Vegas, Nevada 89144; 702-258-6665	Attorney (name/address/phone):

II. Nature of Controversy *(please select the one most applicable filing type below)*

Civil Case Filing Types

Real Property	Torts	
Landlord/Tenant	**Negligence**	**Other Torts**
☐ Unlawful Detainer	☐ Auto	☐ Product Liability
☐ Other Landlord/Tenant	☐ Premises Liability	☐ Intentional Misconduct
Title to Property	☐ Other Negligence	☐ Employment Tort
☐ Judicial Foreclosure	**Malpractice**	☐ Insurance Tort
☐ Other Title to Property	☐ Medical/Dental	☐ Other Tort
Other Real Property	☐ Legal	
☐ Condemnation/Eminent Domain	☐ Accounting	
☐ Other Real Property	☐ Other Malpractice	

Probate	Construction Defect & Contract	Judicial Review/Appeal
Probate *(select case type and estate value)*	**Construction Defect**	**Judicial Review**
☐ Summary Administration	■ Chapter 40	☐ Foreclosure Mediation Case
☐ General Administration	☐ Other Construction Defect	☐ Petition to Seal Records
☐ Special Administration	**Contract Case**	☐ Mental Competency
☐ Set Aside	☐ Uniform Commercial Code	**Nevada State Agency Appeal**
☐ Trust/Conservatorship	☐ Building and Construction	☐ Department of Motor Vehicle
☐ Other Probate	☐ Insurance Carrier	☐ Worker's Compensation
Estate Value	☐ Commercial Instrument	☐ Other Nevada State Agency
☐ Over $200,000	☐ Collection of Accounts	**Appeal Other**
☐ Between $100,000 and $200,000	☐ Employment Contract	☐ Appeal from Lower Court
☐ Under $100,000 or Unknown	☐ Other Contract	☐ Other Judicial Review/Appeal
☐ Under $2,500		

Civil Writ		Other Civil Filing
Civil Writ		**Other Civil Filing**
☐ Writ of Habeas Corpus	☐ Writ of Prohibition	☐ Compromise of Minor's Claim
☐ Writ of Mandamus	☐ Other Civil Writ	☐ Foreign Judgment
☐ Writ of Quo Warrant		☐ Other Civil Matters

Business Court filings should be filed using the Business Court civil coversheet.

9/28/2016

Date

Signature of initiating party or representative

See other side for family-related case filings.

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CLERK OF THE COURT

PETER C. BROWN, ESQ.
Nevada Bar No. 5887
DARLENE M. CARTIER, ESQ.
Nevada Bar No. 8775
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pbrown@bremerwhyte.com
dcartier@bremerwhyte.com

Attorneys for Plaintiffs,
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.	Case No. A-16-744146-D Dept. No. XXII **COMPLAINT**

COMES NOW Plaintiffs LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ LLC; and M.J. DEAN CONSTRUCTION, INC. (hereinafter collectively referred to as "Plaintiffs"), by and through their attorneys of record, the law firm of Bremer, Whyte, Brown & O'Meara LLP, and hereby bring their Complaint against Defendant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION (hereinafter referred to as "Defendant"), and complain and allege as follows:

///

PARTIES

1. At all times relevant herein, Plaintiff LAURENT HALLIER, was an individual domiciled in Clark County, Nevada.

2. At all times relevant herein, Plaintiff PANORAMA TOWERS I, LLC, was a Nevada corporation duly licensed and authorized to conduct business in Clark County, Nevada.

3. At all times relevant herein, Plaintiff PANORAMA TOWERS I MEZZ, LLC, was a Nevada corporation duly licensed and authorized to conduct business in Clark County, Nevada.

4. At all times relevant herein, Plaintiff M.J. DEAN CONSTRUCTION, INC. was a Nevada corporation duly licensed and authorized to conduct business in Clark County, Nevada.

5. Upon information and belief, Plaintiffs allege that at all times relevant herein, Defendant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, was incorporated as a Nevada non-profit Nevada corporation with its principal place of business in Clark County, Nevada.

JURISDICTION AND VENUE

6. This Court has jurisdiction in this matter, and venue is proper in that this Complaint involves claims for alleged construction defects and/or deficiencies at the Panorama Towers Condominiums, located at 4525 Dean Martin Drive (Tower I) and 4575 Dean Martin Drive, Las Vegas, Nevada, Clark County, Nevada (hereinafter "Subject Property").

GENERAL ALLEGATIONS

7. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 6, inclusive, as though fully set forth herein.

8. Defendant is an "Association" or "Unit-Owners' Association" as defined in NRS 116.011.

9. On or about February 24, 2016, Defendant, through its counsel, served Plaintiffs with a "Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645" (hereinafter "Chapter 40 Notice").

10. Defendant's Chapter 40 Notice alleges defects and resulting damages involving: (1) residential tower windows, (2) residential tower fire blocking; (3) mechanical room piping; and (4)

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(702) 258-6665

sewer piping.

11. Defendant's Chapter 40 Notice fails to comply with NRS 40.645(3)(b) and (c) in that it does not identify in specific detail, the alleged damages and the exact location of the damage(s) relating to the alleged residential tower windows, residential tower fire blocking defects or the alleged sewer piping defects.

12. Defendant's Chapter 40 Notice includes as an Exhibit, a report by Gregory Fehr, P.E. of Advanced Technology & Marketing Group ("ATMG"), dated November 17, 2011, in support of Defendant's mechanical room piping claims. The ATMG report states that ATMG observed alleged corrosion damage and alleged leaking connections in the mechanical rooms at the Subject Property on or about September 20, 2011. Thus, Defendant 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.

13. With respect to the alleged sewer piping defect allegation, Defendant's Chapter 40 Notice states "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." Such alleged risk of injury does not and did not alleviate Defendant from its obligation to provide timely Chapter 40 Notice to Plaintiffs of the alleged defect, and to provide a Chapter 40 Notice prior to Defendant performing repairs of the alleged defect.

14. Defendant's Chapter 40 Notice also alleges Defendant (i.e. Claimant) is "still in the process of investigating the alleged conditions at the Development, and accordingly, this preliminary list of defects is not intended as a complete statement of all 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."

15. On March 24, 2016, pursuant to NRS 40.646, Plaintiffs inspected the defects alleged in Defendant's Chapter 40 Notice.

16. During Plaintiffs' March 24, 2016, inspection, Plaintiffs observed that the majority of the allegedly defective (i.e. corroded) mechanical room piping had been removed and replaced

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prior to Plaintiffs' inspection. Defendant did not provide notice to Plaintiffs of the allegedly defective mechanical room piping prior to performing said repair work, including, but not limited to, a Chapter 40 Notice.

17. During Plaintiffs' March 24, 2016, inspection, Plaintiffs also became aware that the allegedly defective sewer piping had also been repaired prior to Plaintiffs' inspection. Defendant did not provide notice to Plaintiffs of the allegedly defective sewer piping prior to performing this repair work, including, but not limited to, a Chapter 40 Notice.

18. On March 29, 2016, Plaintiffs sent correspondence to Defendant's counsel requesting information and documents relating to (1) the sewer line defect allegations identified in Defendant's Chapter 40 Notice, including the date of occurrence and date of repair of the alleged defects, and requesting the current location of any sewer line materials that were removed and replaced as part of Defendant's repair; and (2) the mechanical room piping defect allegations identified in Defendant's Chapter 40 Notice, including the date when the allegedly corroded pipes were replaced, the date the repair work was performed, the identity of the contractor(s) who performed the repair work, and also requesting Defendant confirm whether and where the removed mechanical room pipe materials have been stored for safekeeping. Defendant did not respond to Plaintiffs' March 29, 2016 correspondence.

19. On April 29, 2016, Plaintiffs sent follow up correspondence to Defendant's counsel requesting Defendant promptly provide information and documents relating to (1) the alleged sewer line defect allegations identified in Defendant's Chapter 40 Notice, including the date of occurrence and date of repair of the alleged defects, and requesting the current location of any sewer line materials that were removed and replaced as part of Defendant's repair; and (2) the alleged mechanical room piping defects identified in Defendant's Chapter 40 Notice, including the date when the allegedly corroded pipes were replaced, the date the repair work was performed, the identity of the contractor(s) who performed the repair work, and also requesting Defendant confirm whether and where the removed mechanical room pipe materials have been stored for safekeeping. Plaintiff requested a response from Defendant no later than May 3, 2016. Defendant did not respond to Plaintiffs' April 29, 2016 correspondence.

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20. On May 24, 2016, Plaintiffs served Defendant with Plaintiffs' Response to Defendant's Chapter 40 Notice.

21. On September 26, 2016, Plaintiffs and Defendant participated in a pre-litigation mediation regarding the claims and defects included in Defendant's Chapter 40 Notice, as required by NRS 40.680, but were unable to reach a resolution. As a result, the mandatory pre-litigation process has concluded.

22. On February 24, 2015, the Nevada Legislature enacted the Homeowner Protection Act of 2015 (aka Assembly Bill 125) (hereinafter referred to as "AB 125"). AB 125, Section 17, amended NRS 11.202(1), abolishing the previously applicable statutes of limitation and shortening the statute of repose for all claims to six (6) years from the date of substantial completion of an improvement.

23. Pursuant to AB 125, Section 21(5) and Section 22, the six-year statute of repose applies retroactively to actions in which substantial completion of the improvement to real property occurred before February 6, 2015.

24. Upon information and belief, the Clark County Building Department issued a Certificate of Occupancy for Tower I (4525 Dean Martin Drive) on January 16, 2008.

25. Upon information and belief, the Clark County Building Department issued a Certificate of Occupancy for Tower II (4572 Dean Martin Drive) on March 31, 2008.

26. Plaintiffs contend the date of substantial completion of Tower I (4525 Dean Martin Drive) (as provided in NRS 11.2055(1)) is on or about January 16, 2008.

27. Plaintiffs contend the date of substantial completion of Tower II (4572 Dean Martin Drive) (as provided in NRS 11.2055(1)) is on or about March 31, 2008.

28. Plaintiffs are informed and believe, and thereon allege, that the six-year statute of repose applies retroactively to Defendant's Chapter 40 Notice and the defects alleged therein, because substantial completion of the Subject Property occurred prior to enactment of AB 125. Therefore, Plaintiffs are informed and believe, and thereon allege, that Defendant's claims in its Chapter 40 Notice are all time barred by AB 125/NRS 11.202(1).

29. The one-year "grace period" contained in AB 125, Section 21(6)(a) allows a

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Suite 250
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(702) 258-6665

construction defect claim to proceed under the pre-AB 125 statutes of repose (i.e. eight-year, ten-year, or unlimited statutes of repose) only if the claim "accrued before the effective date of [the] act [February 24, 2015] and was commenced within 1 year of the effective date of [the] act [February 24, 2016]".

30. Plaintiffs are informed and believe, and thereon allege, that in order to be able to rely on AB 125, Section 21(6)(a)'s one-year "grace period," Defendant was required to provide Chapter 40 Notice to Plaintiffs prior to the effective date of the act [February 24, 2015] and to commence any lawsuit with regard to any unresolved claims prior to the expiration of AB 125, Section 21(6)(a)'s one-year "grace period" [February 24, 2016].

31. Defendant did not mail its Chapter 40 Notice to Plaintiffs until February 24, 2016, almost one year after the effective date of AB 125 (i.e. February 24, 2015).

32. Defendant did not contend in its Chapter 40 Notice that the claims alleged in its Chapter 40 Notice "accrued before the effective date" of AB 125.

33. Defendant did not commence a lawsuit within AB 125, Section 21(6)(a)'s one-year "grace period" (i.e. by February 24, 2016).

34. Plaintiffs are informed and believe, and thereon allege, that Defendant's claims in its Chapter 40 Notice are all time barred by AB 125/NRS 11.202(1).

35. Pursuant to NRS 40.615, as amended by AB 125, Section 6, a "Constructional Defect" must present an "unreasonable risk of injury to a person or property" or "proximately cause physical damage to the residence, an appurtenance or the real property to which the residents or appurtenance is affixed."

36. Plaintiffs contend that Defendant's Chapter 40 Notice failed to provide any evidence that any of the alleged defects involved an unreasonable risk of injury to a person or property or proximately cause physical damage to the Subject Property.

37. Pursuant to NRS 40.615, as amended by AB 125, Section 8, a claimant's Chapter 40 Notice must "identify in specific detail each defect, damage and injury to each residence or appurtenance that is the subject of the claim, including, without limitation, the exact location of each such defect, damage and injury…"

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38. Plaintiffs contend that Defendant's Chapter 40 Notice failed to identify in specific detail, each defect, damage and injury to the Subject Property, including, without limitation, the exact location of each such alleged defect, damage and injury.

39. Pursuant to NRS 116.3102 (1)(d), as amended by AB 125, Section 20, "…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 of units' owners with respect to an action for constructional defect pursuant to NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of the act unless the action pertains exclusively to common elements."

40. Plaintiffs are informed and believe, and thereon allege, that the Declaration of Covenants, Conditions and Restrictions and Grant and Reservation of Easements for Panorama Towers ("CC&Rs") for the Subject Property, were recorded by the Clark County Recorder on or about November 7, 2006.

41. Article 1 of the Subject Property's CC&Rs relates to Definitions. Section 1.39 provides that "Common Elements shall mean all portions of the [Subject] Property other than the Units..."

42. Article 4 of the Subject Property's CC&Rs relates to the Unit and Boundary Descriptions. Section 4.2 (e) governs "apertures" and provides "Where there are apertures in any boundary, including, but not limited to, windows, doors, bay windows and skylights, such boundaries shall be extended to include the windows, doors and other fixtures located in such apertures, including all frameworks window casings and weather stripping thereof, except that the exterior surfaces made of glass and other transparent materials …shall not be included in the boundaries of the Unit and shall therefore be Common Elements."

43. Article 6 of the Subject Property's CC&Rs relates to Maintenance. Section 6.4 governs maintenance of "units and limited common elements" and provides "Each Owner shall maintain, repair, replace, finish and restore or cause to be so maintained, repaired, replaced and restored, at such Owner's sole expense all portions of such Owner's Unit…"

44. Plaintiffs are informed and believe, and thereon allege, that Defendant's claims relating to the residential tower windows as alleged in the Chapter 40 Notice, fall within Article 4,

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Section 4 (e) and Article 6, Section 6.4, of the Property's CC&Rs and are not within the "Common Elements" as defined in the CC&Rs. Therefore, Plaintiffs contend that Defendant lacks standing under AB 125 to bring claims relating to the residential tower windows.

45. On September 9, 2009, Defendant filed a Complaint for construction defects against Plaintiffs PANORAMA TOWERS I, LLC and PANORAMA TOWERS II, LLC, entitled Panorama Towers Condominium Unit Owners' Association v. Panorama Towers I, LLC, et al. (Eighth Judicial District Court, Department XXII, Case No. A-09-598902) (hereinafter referred to as "the Prior Litigation").

46. On January 17, 2011, Defendant filed an Amended Complaint in the Prior Litigation, naming Plaintiff M.J. DEAN CONSTRUCTION, INC. and others as additional defendants.

47. The parties in the Prior Litigation reached a settlement, and the terms of the settlement were set forth in writing in a Settlement Agreement and Release (hereinafter "Settlement Agreement").

48. The Settlement Agreement provides that "…the Agreement may be disclosed and shall be deemed admissible as may be necessary to enforce the terms hereof…"

49. Parties to the Settlement Agreement in the Prior Litigation include Plaintiffs PANORAMA TOWERS I, LLC, PANORAMA TOWERS II, LLC, and "all of their past, present and future managers, members, officers, directors, predecessors, successors-in-interest, and assigns and all other persons, firms or entities with whom any of the former have been, are now, or may hereinafter be affiliated," Plaintiff M.J. DEAN CONSTRUCTION, INC., and others.

50. Upon information and belief, the Settlement Agreement in the Prior Litigation was executed by Defendant on June 1, 2011, and approved as to form and content by Defendant's counsel on June 3, 2011.

51. The Settlement Agreement in the Prior Litigation provides an irrevocable and unconditional release by Defendant of Plaintiffs PANORAMA TOWERS I, LLC, PANORAMA TOWERS II, LLC, and M.J. DEAN CONSTRUCTION, INC., and "all of their respective heirs, executors, administrators, third party administrators, insurers, trustors, trustees, beneficiaries,

predecessors, successors, assigns, members, partners, partnerships, parents, subsidiaries, affiliates, and related entities and each of the foregoing respective officers, directors, stockholders, controlling persons, principals, agents, servants, employees, representatives, and all persons, firms and entities connective with them, including, without limitation, their insurers and sureties, who are or who may ever become liable to them as to any and all demands, liens, claims, defects, assignments, contracts, covenants, actions, suits, causes of action, costs, expenses, attorneys [sic] fees, damages, losses, controversies, judgments, orders and liabilities of whatsoever kind and nature, at equity or otherwise, either now known with respect to the construction defect claims ever asserted in the SUBJECT ACTION or related to the alleged defect claims ever asserted in the SUBJECT ACTION…This release specifically does not extend to claims arising out of defects not presently known to the HOA."

52. Plaintiffs PANORAMA TOWERS I, LLC, M.J. DEAN CONSTRUCTION, INC. and/or their privies, Plaintiffs LAURENT HALLIER, PANORAMA TOWERS I MEZZ LLC, and Defendant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION are the same in the instant matter as in the Prior Litigation. Therefore, Plaintiffs are informed and believe, and thereon allege, that claim preclusion applies to the defects alleged in Defendant's Chapter 40 Notice and prevents Defendants from bringing said claims against Plaintiffs in a subsequent action.

53. The Settlement Agreement in the Prior Litigation provides that Plaintiffs (and others) "shall bear no responsibility whatsoever as to the re-design, repairs, remediation, corrective work, maintenance, and/or damage arising therefrom, or how the settlement funds shall be divided, distributed, or spent, or to remedy any of the claims released herein."

54. The Settlement Agreement in the Prior Litigation also provides that Defendant "covenants and agrees that it shall not bring any other claim, action, suit or proceeding" against Plaintiffs (and others) "regarding the matters settled, released and dismissed hereby."

55. Furthermore, the Settlement Agreement in the Prior Litigation also provides that if Defendant, "or any person or organization on its behalf, including an insurer, ever pursues litigation related to the PROJECT which seeks to impose liability for defects that were known to [Defendant]" at the time the Settlement Agreement was executed by Defendant, than "[Defendant]

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will defend, indemnify, and hold harmless" Plaintiffs (and others) "and their insurers with respect to such litigation."

56. On September 26, 2016, Plaintiffs' counsel personally tendered Plaintiffs' defense and indemnity pursuant to the express terms of the Settlement Agreement in the Prior Litigation, to Defendant's counsel.

57. On January 19, 2012, the Court entered an Order based upon the stipulation of counsel and the parties, ordering all claims against Plaintiffs PANORAMA TOWERS I, LLC, M.J. DEAN CONSTRUCTION, INC. and others in the Prior Litigation, be dismissed with prejudice.

58. Notice of Entry of the Order dismissing the Prior Litigation against PANORAMA TOWERS I, LLC, M.J. DEAN CONSTRUCTION, INC. and others, with prejudice, was entered on January 23, 2012.

59. The dismissal with prejudice of Plaintiffs' asserted claims and/or related to the asserted claims in the Prior Litigation operates as a final judgment (i.e. an adjudication on the merits) in the Prior Litigation, pursuant to NRCP 41(b). Thus, the final judgment in the Prior Litigation is valid. Therefore, Plaintiffs are informed and believe, and thereon allege, that claim preclusion applies to the defects alleged in Defendant's Chapter 40 Notice and all grounds of recovery by Defendant against Plaintiffs related thereto.

60. Plaintiffs are informed and believe, and thereon allege, that the defects alleged by Defendant in Defendant's Chapter 40 Notice were asserted in the Prior Litigation and/or are related to alleged defect claims asserted in the Prior Litigation, and were irrevocably released in the Settlement Agreement. Thus, the defects alleged in Defendant's Chapter 40 Notice are based on the same claims or are part of the same claims brought against Plaintiffs in the Prior Litigation. Therefore, Plaintiffs are informed and believe, and thereon allege, that claim preclusion applies to the defects alleged in Defendant's Chapter 40 Notice and prevents Defendants from bringing said claims against Plaintiffs in a subsequent action.

FIRST CLAIM FOR RELIEF

(Declaratory Relief – Application of AB 125)

61. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 60

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Suite 250
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(702) 258-6665

inclusive, as though fully set forth herein.

62. Upon information and belief, Defendant intends to file a Complaint against Plaintiffs for the alleged construction defects identified in Defendant's Chapter 40 Notice.

63. Upon information and belief, Defendant will seek damages against Plaintiffs for Defendant's prior repair costs, the costs of future repairs, its expert fees and costs, attorney's fees and interest, as well as other damages, relating to the alleged construction defects identified in Defendant's Chapter 40 Notice.

64. A justiciable controversy now exists between Plaintiffs and Defendant as to their respective rights and liabilities relating to Defendant's Chapter 40 Notice and the defects alleged therein, including whether any or all of Defendant's claims are all time barred by AB 125/NRS 11.202(1), and/or whether Defendant has standing to bring claims relating to the residential tower windows.

65. Plaintiffs' and Defendant's interests in the controversy are adverse. Plaintiffs contend Defendant may not recover damages against Plaintiffs relating to the claims in Defendant's Chapter 40 Notice. Upon information and belief, Defendant contends otherwise. Thus, Plaintiffs' and Defendant's interests are adverse to each other.

66. Plaintiffs assert a claim of a legally protectible right with respect to Defendant's Chapter 40 Notice and the construction defects alleged therein. Plaintiffs have a legally protectible interest with respect to whether a jury awards damages against them in favor or Defendant.

67. Plaintiffs and Defendant have completed the mandatory pre-litigation process for the construction defect claims alleged in Defendant's Chapter 40 Notice. As a result, the controversy is ripe for judicial determination.

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.

69. Plaintiffs allege that an actual controversy exists between Plaintiffs and Defendant under the circumstances alleged, which Plaintiffs request the Court resolve. A declaration of rights, responsibilities and obligations of Plaintiffs and Defendant, and each of them, is essential to

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

determine their respective obligations in connection with Defendant's Chapter 40 Notice and the claims alleged therein, and Plaintiffs have no true and speedy remedy at law of any kind.

70. It has been necessary for Plaintiffs to retain the services of Bremer, Whyte, Brown & O'Meara LLP to bring this action. Accordingly, Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred therein.

SECOND CLAIM FOR RELIEF

(Declaratory Relief – Claim Preclusion)

71. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 70, inclusive, as though fully set forth herein.

72. Upon information and belief, Defendant intends to file a Complaint against Plaintiffs for the alleged construction defects identified in Defendant's Chapter 40 Notice.

73. Upon information and belief, Defendant will seek damages against Plaintiffs for Defendant's prior repair costs, the costs of future repairs, its expert fees and costs, attorney's fees and interest, as well as other damages, relating to the alleged construction defects identified in Defendant's Chapter 40 Notice.

74. A justiciable controversy now exists between Plaintiffs and Defendant as to their respective rights and liabilities relating to the Settlement Agreement in the Prior Litigation and the defects alleged and released therein.

75. Plaintiffs' and Defendant's interests in the controversy are adverse. Plaintiffs contend Defendant may not recover damages against Plaintiffs relating to the alleged defects/claims released in the Settlement Agreement in the Prior Litigation. Upon information and belief, Defendant contends otherwise. Thus, Plaintiffs' and Defendant's interests are adverse to each other.

76. Plaintiffs assert a claim of a legally protectible right with respect to the Settlement Agreement in the Prior Litigation and the defects alleged and released therein. Plaintiffs have a legally protectible interest with respect to whether a jury awards damages against them in favor or Defendant.

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

77. Plaintiffs and Defendant have completed the mandatory pre-litigation process for the construction defect claims alleged in Defendant's Chapter 40 Notice. As a result, the controversy is ripe for judicial determination.

78. 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.

79. Plaintiffs allege that an actual controversy exists between Plaintiffs and Defendant under the circumstances alleged, which Plaintiffs request the Court resolve. A declaration of rights, responsibilities and obligations of Plaintiffs and Defendant, and each of them, is essential to determine their respective obligations in connection with the Settlement Agreement in the Prior Litigation, and Plaintiffs have no true and speedy remedy at law of any kind.

80. It has been necessary for Plaintiffs to retain the services of Bremer, Whyte, Brown & O'Meara LLP to bring this action. Accordingly, Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred therein.

THIRD CLAIM FOR RELIEF

(Failure to Comply With NRS 40.600 et seq.)

81. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 80, inclusive, as though fully set forth herein.

82. Defendant failed to comply with NRS 40.645(2)(b) and (c) in that Defendant's Chapter 40 Notice does not identify in specific detail the alleged defect, damage and injury, including without limitation, the exact location of the alleged defect, damage and injury, relating to the alleged residential tower windows defects.

83. Defendant failed to comply with NRS 40.645(2)(b) and (c) in that Defendant's Chapter 40 Notice does not identify in specific detail the alleged defect, damage and injury, including without limitation, the exact location of the alleged defect, damage and injury, relating to the alleged residential tower fire blocking defects.

84. Defendant failed to comply with NRS 40.645(2)(b) and (c) in that Defendant's Chapter 40 Notice does not identify in specific detail the alleged defect, damage and injury, including

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Suite 250
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(702) 258-6665

without limitation, the exact location of the alleged defect, damage and injury, relating to the alleged mechanical room piping defects.

85. Defendant failed to comply with NRS 40.645(2)(b) and (c) in that Defendant's Chapter 40 Notice does not identify in specific detail the alleged defect, damage and injury, including without limitation, the exact location of the alleged defect, damage in injury, relating to the alleged sewer line defects.

86. Defendant failed to comply with NRS 40.645(1)(a) in that Defendant failed to provide a Chapter 40 Notice to Plaintiffs regarding the alleged residential tower windows defects prior to performing repairs, thereby denying Plaintiffs' statutory rights under NRS 40.6472.

87. Defendant failed to comply with NRS 40.645(1)(a) in that Defendant failed to provide a Chapter 40 Notice to Plaintiffs regarding the alleged mechanical room piping defects prior to performing repairs, thereby denying Plaintiffs' statutory rights under NRS 40.6472.

88. Defendant failed to comply with NRS 40.645(1)(a) in that Defendant failed to provide a Chapter 40 Notice to Plaintiffs regarding the alleged sewer piping defects prior to performing repairs, thereby denying Plaintiffs' statutory rights under NRS 40.6472.

89. As a result of Defendant's failure to comply with NRS 40.600 et seq., Plaintiffs have been denied their statutory rights under NRS 40.600 et seq.

90. It has been necessary for Plaintiffs to retain the services of Bremer, Whyte, Brown & O'Meara LLP to bring this action. Accordingly, Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred therein.

FOURTH CLAIM FOR RELIEF

(Suppression of Evidence/Spoliation)

91. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 90, inclusive, as though fully set forth herein.

92. Plaintiffs are informed and believe, and thereon allege that Defendant and/or its agents have intentionally suppressed and/or destroyed evidence relating to Defendant's claims against Plaintiffs and/or Plaintiffs' defenses to such claims with the intent to harm Plaintiffs, or Defendants negligently lost or destroyed such evidence.

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93. It has been necessary for Plaintiffs to retain the services of Bremer, Whyte, Brown & O'Meara LLP to bring this action. Accordingly, Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred therein.

FIFTH CLAIM FOR RELIEF

(Breach of Contract)

94. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 93, inclusive, as though fully set forth herein.

95. Plaintiffs and Defendant entered into a Settlement Agreement in the Prior Litigation; whereby: (1) in full and complete settlement of the claims asserted in the Prior Litigation, Plaintiffs paid a monetary settlement to Defendant, the amount of which is confidential; (2) Defendant expressly agreed it would not bring any other claim, action, suit or proceeding against Plaintiffs (and others) regarding the matters settled, released and dismissed in the Prior Litigation; and (3) Defendant agreed to defend and indemnify Plaintiffs (and others) and to hold Plaintiffs (and others) harmless with respect to any litigation relating to defects that were known to Defendant at the time Defendant executed the Settlement Agreement.

96. Plaintiffs have performed all the terms, conditions, covenants and promises required of Plaintiffs in the Settlement Agreement. Defendant failed and refused to perform the terms, conditions, covenants and promises required of Defendant in the Settlement Agreement, despite Plaintiffs' demand to do so, thereby materially breaching the terms of the settlement and the Settlement Agreement.

97. As a proximate cause of Defendant's breaches of the Settlement Agreement, Plaintiffs have and continue to suffer damages, which include, without limitation, attorney's fees, costs, statutory interest and costs, expended in pursuant of this Complaint.

98. It has been necessary for Plaintiffs to retain the services of Bremer, Whyte, Brown & O'Meara LLP to bring this action. Accordingly, Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred therein.

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BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

SIXTH CLAIM FOR RELIEF

(Declaratory Relief - Duty to Defend)

99. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 98, inclusive, as though fully set forth herein.

100. Pursuant to the Settlement Agreement in the Prior Litigation, Plaintiffs contend Defendant has a duty to defend Plaintiffs (and others) with respect to any subsequent litigation relating to defects that were known to Defendant at the time Defendant executed the Settlement Agreement, and upon information and belief, Defendant contends otherwise.

101. A justiciable controversy now exists between Plaintiffs and Defendant as to their respective rights and obligations in the Settlement Agreement in the Prior Litigation in that Plaintiffs contend that Defendant has a duty to defend Plaintiffs (and others) involving the alleged defects/claims released in the Settlement Agreement in the Prior Litigation, including, but not limited to, Defendant's alleged residential tower windows, and residential tower fire blocking defects, which Plaintiffs assert were known to Defendant at the time Defendant executed the Settlement Agreement or are reasonably related to claims that were known to Defendant at the time Defendant executed the Settlement Agreement. Upon information and belief, Defendant contends otherwise. Thus, Plaintiffs' and Defendant's interests in the controversy are adverse.

102. Plaintiffs assert a claim of a legally protectible right with respect to the Settlement Agreement in the Prior Litigation and the defects alleged and settled therein. Plaintiffs have a legally protectible interest with respect to whether a jury awards damages against them in favor or Defendant.

103. Plaintiffs and Defendant have completed the mandatory pre-litigation process for the construction defect claims alleged in Defendant's Chapter 40 Notice. As a result, the controversy is ripe for judicial determination.

104. 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.

105. Plaintiffs allege that an actual controversy exists between Plaintiffs and Defendant

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

under the circumstances alleged, which Plaintiffs request the Court resolve. A declaration of rights, responsibilities and obligations of Plaintiffs and Defendant, and each of them, is essential to determine their respective obligations in connection with the Settlement Agreement in the Prior Litigation, and Plaintiffs have no true and speedy remedy at law of any kind.

106. It has been necessary for Plaintiffs to retain the services of Bremer, Whyte, Brown & O'Meara LLP to bring this action. Accordingly, Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred therein.

SEVENTH CLAIM FOR RELIEF

(Declaratory Relief - Duty to Indemnify)

107. Plaintiffs refer to, reallege and incorporate by reference Paragraphs 1 through 106, inclusive, as though fully set forth herein.

108. Pursuant to the Settlement Agreement in the Prior Litigation, Plaintiffs contend Defendant has a duty indemnify Plaintiffs and to hold Plaintiffs (and others) harmless with respect to any subsequent litigation relating to defects that were known to Defendant at the time Defendant executed the Settlement Agreement, and upon information and belief, Defendant contends otherwise.

109. A justiciable controversy now exists between Plaintiffs and Defendant as to their respective rights and obligations in the Settlement Agreement in the Prior Litigation in that Plaintiffs contend that Defendant has a duty to defend Plaintiffs (and others) involving the alleged defects/claims released in the Settlement Agreement in the Prior Litigation, including, but not limited to, Defendant's alleged residential tower windows, and residential tower fire blocking defects, which Plaintiffs assert were known to Defendant at the time Defendant executed the Settlement Agreement or are reasonably related to claims that were known to Defendant at the time Defendant executed the Settlement Agreement. Upon information and belief, Defendant contends otherwise. Thus, Plaintiffs' and Defendant's interests in the controversy are adverse.

110. Plaintiffs assert a claim of a legally protectible right with respect to the Settlement Agreement in the Prior Litigation and the defects alleged and settled therein. Plaintiffs have a

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(702) 258-6665

legally protectible interest with respect to whether a jury awards damages against them in favor or Defendant.

111. Plaintiffs and Defendant have completed the mandatory pre-litigation process for the construction defect claims alleged in Defendant's Chapter 40 Notice. As a result, the controversy is ripe for judicial determination.

112. 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.

113. Plaintiffs allege that an actual controversy exists between Plaintiffs and Defendant under the circumstances alleged, which Plaintiffs request the Court resolve. A declaration of rights, responsibilities and obligations of Plaintiffs and Defendant, and each of them, is essential to determine their respective obligations in connection with the Settlement Agreement in the Prior Litigation, and Plaintiffs have no true and speedy remedy at law of any kind.

114. It has been necessary for Plaintiffs to retain the services of Bremer, Whyte, Brown & O'Meara LLP to bring this action. Accordingly, Plaintiffs are entitled to recover their reasonable attorneys' fees and costs incurred therein.

WHEREFORE, Plaintiffs pray for judgment against Defendant, as follows:

1. For a declaration of rights and obligations as between Plaintiffs and Defendant pursuant to NRS 30.010;

2. For general and special damages in excess of $10,000.00;

3. For reasonable attorney's fees, costs, expert costs and expenses, pursuant to statutory law, common law, and contract law;

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Suite 250
Las Vegas, NV 89144
(702) 258-6665

4. For prejudgment interest; and

5. For such other and further relief as this Court may deem just, equitable and proper.

Dated: September 28, 2016

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Darlene M. Cartier, Esq.
Nevada State Bar No. 8775
Attorneys for Plaintiffs,
LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN CONSTRUCTION, INC.

PETER C. BROWN, ESQ.
Nevada Bar No. 5887
DARLENE M. CARTIER, ESQ.
Nevada Bar No. 8775
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pbrown@bremerwhyte.com
dcartier@bremerwhyte.com

Attorneys for Plaintiffs,
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.	Case No. Dept. No. **INITIAL APPEARANCE FEE DISCLOSURE**

Pursuant to N.R.S. Chapter 19, as amended by Senate Bill 106, filing fees are submitted for the party appearing in the above-entitled action as indicated below:

CONSTRUCTION DEFECT FILING FEE:	$520.00
LAURENT HALLIER:	$30.00
PANORAMA TOWERS I, LLC:	$30.00
PANORAMA TOWERS I MEZZ, LLC:	$30.00

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M.J. DEAN CONSTRUCTION, INC.:		$30.00
TOTAL REMITTED:		**$640.00**

Dated: September 28, 2016

BREMER WHYTE BROWN & O'MEARA LLP

By: _____

Peter C. Brown, Esq.
Nevada State Bar No. 5887
Darlene M. Cartier, Esq.
Nevada State Bar No. 8775
Attorneys for Plaintiffs,
LAURENT HALLIER; PANORAMA TOWERS I, LLC; PANORAMA TOWERS I MEZZ, LLC; and M.J. DEAN CONSTRUCTION, INC.

BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

EXHIBIT "F"

CHAPTER III

LEGISLATIVE PROCEDURE AND ACTION

CHAPTER III

LEGISLATIVE PROCEDURE AND ACTION

LEGISLATIVE PROCEDURE

Sessions

Regular sessions of the Nevada Legislature are held biennially in odd-numbered years. They convene on the Monday in February after the election of members of the Senate and Assembly. At other times, the Governor may, for a purpose, call the Legislature into special session,[1] or the Legislature may, upon a petition signed by two-thirds of the members elected to each house of the Legislature, convene a special .[2]

Sessions are limited to 120 calendar days following the approval by voters of a constitutional amendment in 1998.[3] Previous sessions were unlimited in length following the repeal in 1958 of a constitutional provision setting a 60-day maximum limit on the duration of a session. Since 1958, there has been only one regular session of less than 60 days, that being the single annual session of 1960, which lasted 55 days. Between 1975 and 1997, regular sessions in Nevada ran between 113 and 169 days. Conversely, the 1989 Special Session was the shortest in history, lasting just over two hours in the Senate.

The *Nevada Constitution* also limits the number of days for which legislators may receive compensation. Since 2005, the salary of members has been set by NRS 218A.630 at a minimum of $130 per day, adjusted by an amount equal to the cumulative increase in the salaries of state employees. However, the *Constitution* forbids compensation for services to be paid to legislators for more than 60 calendar days for any regular session and 20 days for any special session.[4] Reimbursement for certain expenses of members, however, may continue for the entire length of a session.

Special sessions of the Legislature may be convened on the call of the Governor or by petition of the Legislature.[5] After both houses have organized in special session, the Governor is required by the *Nevada Constitution* to state the purpose for which they have been convened. If the Legislature were to convene itself in special session, the purpose of the session would be included in the petition. The Legislature may not enact any bills pertaining to subjects other than those for which it was convened. The Legislature, at times, has adopted simple or concurrent resolutions to express its sentiments on matters not contained in the Governor's call. The last special session, which was the thirtieth in state history, was conducted in October 2016. The Legislature was granted the authority to call itself into a special session by the voters at the 2012 General Election. It has not yet exercised this ability.

Legislative activities, including committee hearings, are open to the public. The *Constitution* also stipulates that neither house may, without the consent of the other, adjourn for more than three days nor move to any place other than where it is holding its session.[6] The Joint Rules of the Senate and Assembly specify that one or more adjournments, for a duration of more than three days, may be taken to permit standing committees, select committees, or the Legislative Counsel Bureau (LCB) to prepare the matters respectively entrusted to them for the consideration of the Legislature as a whole. The total time taken for all such adjournments is not to exceed 20 days during any regular session.[7] The 1991, 1993, and 1995 Legislatures adjourned for two weeks early in the session to allow the Senate Committee on Finance and Assembly Committee on Ways and Means to work full-time on the review of proposed state agency budgets. During this same period, the remaining "morning" committees of the Legislature held hearings on bills and other legislative matters in the Las Vegas area. Beginning in 1999, the two money committees have conducted informational hearings in Carson City as a subcommittee acting under the auspices of the Legislative Commission during the two weeks immediately preceding the start of session.

In the case of a disagreement between the two houses with respect to the time of the Legislature's adjournment, the Governor is constitutionally empowered to adjourn the Legislature to such a time as deemed proper, but not, however, beyond the
[8]

Legislative Leadership

LEGISLATIVE OFFICERS: SENATE

To perform their proper roles , the two houses of the Nevada Legislature are authorized by the *Nevada Constitution* to choose their own (except for the President of the Senate). They also may determine the rules of their proceedings, punish their members for disorderly conduct, and, with the concurrence of two-thirds of all the members elected, expel a member.[9] From tradition and experience, both houses have created internal administrative structures that closely parallel one another. There are, however, certain differences in terminology and the assignment of responsibility that distinguish the two houses.

The Lieutenant Governor is the Senate's presiding , sitting as the President of the Senate. The Lieutenant Governor is elected by the public for a four-year term in November of even-numbered years between presidential elections and is the in line of succession to the governorship. The Lieutenant Governor presides over the Senate but is not a member of it and cannot vote on any question, except to break a tie vote.[10]

The President calls the Senate to order, chairs the conduct of business before the body, is responsible for the maintenance of decorum in the chamber, and has the

general direction of the Senate chamber. In addition, the President recognizes senators during debate; decides questions of parliamentary procedure, subject to appeal to the whole Senate; and signs all acts, addresses, joint resolutions, writs, warrants, and subpoenas.[11]

The President Pro Tempore presides over the Senate in the absence of the President. Unlike the President, the President Pro Tempore is a member of the Senate and elected by it. As a senator, the President Pro Tempore may vote on all issues, may enter into debate by relinquishing the chair, and exercises all of the powers and responsibilities of the President.[12] Under the *Nevada Constitution*, the President Pro Tempore is the second in line of succession to the governorship, immediately after the Lieutenant Governor.[13]

If both the President of the Senate and the President Pro Tempore are absent or unable to discharge their duties, the *Standing Rules of the Senate* stipulate that the chair of the Standing Committee on Legislative Operations and Elections or, if this is absent, the committee's vice chair should preside. In the event that none of the designated is able to preside, the rules provide for the Senate to elect one [14]

The Secretary of the Senate is elected by the members of the Senate to serve as administrative and parliamentarian. Responsible to the Majority Leader, the Secretary coordinates the daily activities of sessions, reads communications to the body, calls roll, tabulates votes, edits the Journals and Histories of the Senate, records all action, oversees the processing of bills and resolutions, and signs all acts passed by the Legislature. The Secretary also interviews and hires Senate employees and supervises a cadre of administrative professionals. At the end of each working day, unless otherwise ordered by the Senate, the Secretary transmits to the Assembly those bills and resolutions upon which the next action is to be taken by that body.[15]

The Sergeant at Arms of the Senate is responsible for keeping order in and around the chamber, ensuring that only authorized persons are permitted on the , and handling other duties as directed by the Majority Leader. The Sergeant at Arms also is responsible for maintaining the Senate's chamber, private caucus room, kitchen, and meeting rooms for committees.[16] The Deputy Sergeant at Arms and the Assistant Sergeants at Arms act as the Senate doorkeepers, preserve order in the Senate chamber, and provide other assistance to the Sergeant at Arms.[17]

In addition to these major Senate there are a number of employees hired to perform miscellaneous functions. Legislative assistants, clerks, and other staff are appointed to their positions via a one-house resolution. In the Assembly, these are referred to as attachés; in the Senate, session staff. The number of and employees of the Senate and the Assembly is determined each session by each respective house.[18]

LEGISLATIVE OFFICERS: ASSEMBLY

The presiding of the Nevada Assembly is the Speaker. Unlike the President of the Senate, the Speaker of the Assembly is elected from among the membership of the Assembly. The 2017 Assembly Standing Rules provide that the Speaker shall, among other things: (1) preserve order and decorum and have general direction of the chamber; (2) decide all questions of order, subject to each member's right to appeal; (3) have the right to assign the duties of the chair to any member for up to one legislative day; (4) have the power to accredit the persons who act as representatives of the news media and assign their seats; (5) sign all bills and resolutions passed or adopted by the Legislature and all subpoenas issued by the Assembly or any committee thereof; and (6) vote on passage of a bill or resolution. The Speaker is not required to vote in ordinary legislative proceedings except when such a vote would be decisive. In all yea and nay votes, the Speaker's name is required to be called last.[19] The Speaker is third in the line of succession to the governorship, behind the Lieutenant Governor and President Pro Tempore of the Senate.[20] The tenures of the President Pro Tempore and the Speaker continue beyond the end of the session and until their successors are designated after the general election.[21]

It has been customary for the Assembly to elect a Speaker Pro Tempore to preside in the temporary absence of the Speaker. This 's duties are comparable to those of the President Pro Tempore of the Senate, exclusive of the right of succession to the governorship. Assembly Standing Rule 1 requires that if a permanent vacancy occurs , the Assembly shall select a new Speaker.[22]

The Chief Clerk is elected by the members of the Assembly to serve as administrative and parliamentarian. The Clerk also serves as an ex member of the Committee on Legislative Operations and Elections. Responsible to the Speaker, the Chief Clerk coordinates the daily activities of sessions, reads communications to the body, calls roll, tabulates votes, edits the Journals and Histories of the Assembly, records all actions, oversees the processing of bills and resolutions, and signs all acts passed by the Legislature. The Chief Clerk recruits, selects, trains, and supervises all attachés employed to assist with the work of the Assembly. The Chief Clerk also transmits to the Senate measures passed or adopted by the Assembly that next require Senate action.[23]

The Sergeant at Arms of the Assembly is responsible for keeping order in and around the chamber, ensuring that only authorized persons are permitted on the , taking into custody any person who interferes with the legislative process, and handling other duties as directed by the Speaker and Chief Clerk. The Sergeant at Arms is also responsible for maintaining the Assembly chamber, private caucus rooms, and kitchen.[24] The Assistant Sergeants at Arms act as the Assembly doorkeepers, preserve order in and around the Assembly chamber, and provide other assistance to the Sergeant at Arms.[25]

The law permits the Senate and Assembly to invite ministers of the different religious denominations to alternately as chaplains of the respective houses.[26] By custom, the chaplains are usually selected from the local clergy association. Occasionally, however, ministers from other locations, legislative staff, or legislators themselves serve as chaplains.

FLOOR LEADERS

In addition to the formal leadership in the two houses of the Legislature, the partisan nature of the chambers makes it necessary to use majority membership leadership positions to manage the legislative workload. In the Senate, the Majority and Minority Leaders of their respective parties are selected during party caucus. In the Assembly, the Minority Floor Leader is selected during that party's caucus. The Senate and Assembly also have, by custom, established the positions of Assistant Majority Floor Leader, Assistant Minority Floor Leader, Majority Whip, Minority Whip, Assistant Majority Whip, and Assistant Minority Whip. House leaders are not legal of the houses, since their do not exist under provisions of law.[27] In Nevada, the Senate Majority Leader is the actual leader of the Senate, with powers similar to those of the Speaker of the Assembly.

Generally, the Majority Floor Leader or the Assistant Majority Floor Leader manages the referral to committee of bills that are received from the other house and works closely with the presiding and chief legislative on parliamentary operations involving legislation being considered on the . Thus, a thorough knowledge of parliamentary procedure is an important attribute of a competent Majority Floor Leader or Assistant Majority Floor Leader.

Floor leaders are party in the Legislature and are responsible for maintaining party discipline in their respective houses. Straight party voting is relatively uncommon in the Nevada Legislature, as members customarily exercise wide latitude in voting. But in certain critical areas, the Majority and Minority Floor Leaders are expected to call a caucus to determine their party's stance on an issue. Once a position is agreed upon, the leaders work with the party "whips" to solidify partisan support for the caucus decision. The tenure of the leaders extends during the interim between regular sessions of the Legislature and until the organization of the next succeeding regular session.[28]

Procedure and Order of Business in the Senate and Assembly

The Senate and the Assembly function in accordance with constitutional provisions and judicial decisions thereon; adopted joint rules of the two houses and house standing rules; custom, usage, and precedents; *Nevada Revised Statutes*; *Mason's Manual of Legislative Procedure*; and parliamentary law.

The Senate rules stipulate that *Mason's Manual of Legislative Procedure* shall govern in all cases in which it is not inconsistent with the Standing Rules and orders and the Joint Rules of the two houses.[29]

Under the Standing Rules of the Senate, precedence of authority is outlined within *Mason's Manual of Legislative Procedure*, Sec. 4.2. The precedence of parliamentary authority for the Assembly is outlined in its Standing Rules.

The Secretary of the Senate and the Chief Clerk of the Assembly serve as parliamentarians for their respective houses.

Under the rules of the Senate, the President calls the chamber to order at 11 a.m. each day of sitting unless the Senate has adjourned to some other day and hour.[30] The Assembly meets daily at 11:30 a.m., unless it has previously adjourned to some other hour.[31]

Quorum

The *Nevada Constitution* states that a majority of all members elected to each house constitutes a quorum to transact business. However, a number smaller than this quorum may adjourn from day to day and may compel the attendance of absent members.[32]

Order of Business

Each house has an order of business incorporated into its Standing Rules. In the Senate, the order of business for the 2017 Session was as follows:

1. Roll Call.
2. Prayer and Pledge of Allegiance to the Flag.
3. Reading and Approval of the Journal.
4. Reports of Committees.
5. Messages from the Governor.
6. Messages from the Assembly.
7. Communications.
8. Waivers and Exemptions.
9. Motions, Resolutions and Notices.
10. Introduction, First Reading and Reference.
11. Consent Calendar.
12. Second Reading and Amendment.
13. General File and Third Reading.
14.
15. Special Orders of the Day.
16. Remarks from the Floor; Introduction of Guests. A senator may speak under this order of business for a period of not more than 10 minutes.[33]

On the Assembly side, the 2017 order of business varied slightly:

1. Call to Order.
2. Reading and Approval of Journal.
3. Presentation of Petitions.
4. Reports of Standing Committees.
5. Reports of Select Committees.
6. Communications.
7. Messages from the Senate.
8. Motions, Resolutions and Notices.
9. Introduction, First Reading and Reference.
10. Consent Calendar.
11. Second Reading and Amendment.
12. General File and Third Reading.
13. .
14. Vetoed Bills and Special Orders of the Day.
15. Remarks from the Floor, limited to 10 minutes.[34]

Each item in an order of business is considered as the house progresses through the day's program of business. From time to time, however, members may request that the presiding turn to items of business that are out of the usual order.

THE LEGISLATURE IN ACTION: A BILL BECOMES A LAW

The steps through which a bill progresses toward enactment are outlined in a chart entitled "Nevada's Legislative Process," which is located in Appendix C at the end of this manual. The following discussion provides a brief overview of the process. The 2017 Regular Session of the Nevada Legislature considered 1,077 bills—522 bills from the Assembly and 555 bills from the Senate. Additionally, one initiative petition was considered. The Senate and Assembly combined also considered over 60 resolutions. Of the bills and initiative petition that were considered during the 2017 Session, 649 bills were approved. The Governor vetoed 26 bills during session, none of which were overridden. He vetoed another 15 bills after the 2017 Session ended; these bills will be returned to the houses in which they originated for possible reconsideration when the 2019 Legislature convenes. The Governor signed all remaining bills; therefore, 608 bills became law.[35]

Organizing the Legislature

When the Legislature convenes in February of odd-numbered years, there are no operative rules and, in the Assembly, no presiding . The Secretary of State calls the Assembly to order at the beginning of a session and appoints a Temporary Chief Clerk. After call to order, the Secretary of State appoints a temporary Committee on Legislative Operations and Elections, which examines a copy of the *Abstract of Votes* along with any of appointment issued by a county commission to a vacant seat and recommends the seating of legislators. Once the

members of the Assembly have been sworn in by a Justice of the Supreme Court, the Secretary of State customarily asks for nominations for Speaker. Once the entire membership of the body elects a Speaker, the Secretary of State turns the chair over to the new Speaker, who proceeds to conduct elections for Speaker Pro Tempore and Chief Clerk of the Assembly.[36] After the Assembly is organized, committees are appointed to inform the Senate and Governor that the Assembly is ready for business. However, these procedures may not be necessary if a special session of the Legislature has recently been held.

On the Senate side, the Lieutenant Governor presides over the chamber as President, in accordance with the provisions of the *Nevada Constitution*. With the exception of the election of a presiding (which is unnecessary in the Senate), the procedures parallel those of the Assembly. The major difference is that the Senate is not an entirely new body. Approximately one-half of the Senators are elected at each general election, the remainder serving in a holdover capacity.

In recent years, the *State of the State Address* by the Governor has been given to a joint gathering of the members of the Senate and Assembly prior to the start of the session. The text of the message is then accepted on the day of the session. In this message to the Legislature, the Governor outlines the major problems confronting the state and proposes legislative solutions for the consideration of the houses. Under usual circumstances, the speech highlights the most important elements of the Governor's party's legislative program. It constitutes the "action" agenda of the session, for even if the legislative majority party is not of the same political persuasion, the Governor'

Long before the Legislature convenes in February, the legislative process is set in motion in subtle and frequently intangible ways. Social problems enter the forum of public debate, and through the exchange of ideas among the citizenry, certain opinions and issues are given the impetus needed to expression in the legislative arena. Contending positions on public questions are and proposed solutions to problems and are advocated in the press, among the people, in the academic community, within various interest groups, and among concerned governmental agencies and But whatever the source of an idea for resolving a civic issue, that idea must be translated into a concrete legislative proposal for action—a bill or resolution—before it can formally enter the legislative forum for consideration.

In Nevada, only members of the Legislature or standing committees from either house can introduce legislation. Advocates of proposed legislation must secure a legislative sponsor in order to see their ideas enacted into law. Once a sponsor is obtained, a proposal may then be drafted in the form of a bill or a resolution, whichever is appropriate to the matter under consideration. Much of the proposed legislation is initiated by the legislators themselves.

Catastrophic Emergencies

The Legislature has established a plan for the continuation of state and local governmental operations in the event of a catastrophic emergency. The Governor must determine that the provisions in the *Nevada Constitution* and the *Nevada Revised Statutes* are not able to provide for a expedient continuity of government and temporary succession of power as a result of vacancies in created by the catastrophic emergency.[37] Under the plan, if vacancies occur in more than 15 percent of the seats in either house of the Legislature (three in the Senate or six in the Assembly) as a result of a catastrophic emergency, the remaining legislators available for duty constitute the Legislature and have full power to act in separate or joint assembly by majority vote of those present. Legislative measures may be approved in the same proportion necessary as if the entire Legislature were present. Any requirement for a quorum must initially be suspended and adjusted as vacant are The Legislature may meet at a location other than the location the legislative body ordinarily meets (Carson City), if the legislative body determines that such a change is needed due to safety and related concerns.

Bill Drafting

Before starting its journey through the Legislature, each proposed legislative measure must be drafted in suitable form and terminology. Under law, this function for the Nevada Legislature is performed by bill drafters employed by the Legislative Counsel.[38] The Legislative Counsel and bill drafting staff provide legal services at no charge for all legislators, regardless of political party. The service is and the contents of a proposed legislative measure will not be divulged to anyone without the express consent of the sponsor or sponsors.

After obtaining the facts and objectives from a sponsor, the bill drafter must translate the information into proper legal terminology, form, and style. The bill must be coherent, concise, understandable, and free of ambiguity; it must be checked for conformance with the *U.S. Constitution* and the *Nevada Constitution*; court decisions relevant to the legislative measure must be checked; and *Nevada Revised Statutes* must be studied to ascertain whether there are To the extent practicable, the Legislative Counsel shall cause each bill or joint resolution introduced in the Legislature to include a digest. The digest must be printed on the bill immediately following the title of the bill.[39]

In addition, the bill drafter must check the legislative measure for compliance with the provision in the *Nevada Constitution* that requires that each law enacted by the Legislature must be limited to one subject area.[40]

The Legislative Counsel, insofar as it is possible, processes legislators' bill draft requests (BDRs) in the order in which they are received. However, legislators may designate different drafting priorities for their own bills and resolutions.

In addition to drafting legislative measures for legislators, the Legislative Counsel prepares legislative measures for the Executive Branch when authorized by the Governor or a designated representative.[41] The Legislative Counsel also prepares legislative measures requested by the Supreme Court.[42] Authorization for the drafting of legislative measures on behalf of state constitutional local governments, school districts, and other groups are also in statute.[43] Appendices A and B provide a general overview of the statutory limitations and deadlines for BDRs.

After November 1 of the year preceding a regular session, full priority is given to legislators' requests for bill drafting, and the Legislative Counsel is not permitted to prepare any proposed legislation during any regular session of the Legislature except as authorized by statute or joint rule of the Legislature.[44] On July 1 of the year preceding the next regular session (and each week thereafter until adjournment of the Legislature), the Legislative Counsel prepares a list of requests received for the preparation of legislative measures to be submitted to the Legislature.[45] The BDR list is available to the public in booklet form and on the Nevada Legislature's website at: https://www.leg.state.nv.us/.

Pr

A majority of states, including Nevada, authorize the of bills. allows drafted bills and joint resolutions, upon the approval of the primary sponsor, to be numbered, printed and made available for public review, and scheduled for hearing before the start of session. On the day of session, these measures are formally introduced and referred to committee. bills and resolutions could be heard in committee as early as the second or third day of session. The process of is designed to help expedite the review of a number of bills early in the session.

The statutory provisions regarding are generally found in NRS 218D.575, 218D.580, and 218D.585. Current law provides that all requests for measures submitted by certain nonlegislative entities (including local governments, the Executive Branch, and the Supreme Court) must be by the third Wednesday of November preceding a legislative session or they will be deemed withdrawn.[46]

Fiscal Notes

A note is a document that details the effect of certain bills and resolutions and is attached to or becomes a part of the bill or resolution. An example of a note may be found in Appendix D. The statutory provisions regarding notes for bills and joint resolutions are found in NRS 218D.400 through NRS 218D.495, inclusive. A bill or joint resolution is required to have a note if it meets any of the following criteria:

- It creates or increases a liability or decreases revenue for the state government by more than $2,000;

- It increases or provides for a new term of imprisonment in the state prison or makes release on parole or probation from the state prison less likely; or

- It creates or increases a liability or decreases revenue for any local government or school district. (A note is not required if the only impact on a local government is that a bill or joint resolution increases or newly provides for a term of imprisonment in a county or city jail or detention facility, or makes release on probation therefrom less likely.)[47]

Information regarding the necessity of a note can be found in the summary of the bill or joint resolution.[48] All bills or joint resolutions which propose ballot

When a bill or resolution is drafted, the Legislative Counsel consults with the Fiscal Analysis Division to determine if a note is required. If the requester is a legislator, the Fiscal Analysis Division then informs the legislator requesting the bill draft that a note is required and requests permission to obtain notes from the affected state or local government entities. If the legislator does not give permission, requests for notes are made automatically upon introduction of the bill. Although a bill or joint resolution can be introduced without a note, the note shall be obtained by the Fiscal Analysis Division before a vote is taken on such a bill or joint resolution by a committee of the Senate or the Assembly.[49]

A note is required only on the original bill or joint resolution, but is not required on amendments. If an amendment by either house invalidates the original note, the presiding (the Senate Majority Leader or the Speaker of the Assembly) may direct the Fiscal Analysis Division to obtain a new note showing the effect of the amended bill or joint resolution.[50] Any legislator may request that a note be done on any bill while it is before the house of the Legislature to which the legislator belongs. Upon receiving the request, the presiding shall request the Fiscal Analysis Division to obtain a note if the presiding determines

[51]

A bill or joint resolution that is sent to a state or local government entity for a note may be used by that entity for purposes only, and may not be copied or otherwise disseminated by that entity until the bill or joint resolution has been made public, or with permission of the party who has requested the bill or joint resolution.[52] The Fiscal Analysis Division does not release the name of the party requesting the bill to the entity requested to complete the note. State agencies have working days from the date of request to provide a response of the impact, send it to the Governor's of Finance for review and comments, and

return it to the Fiscal Analysis Division. The Fiscal Analysis Division may grant up to a ten-day extension if the subject requires extensive research.[53] Fiscal notes completed by the Judicial Branch, the Legislature, or other non-Executive Branch agencies are returned directly to the Fiscal Analysis Division and are not subject to review by the Governor'

Local governments are allowed eight working days to provide a response to a request for a note, and may not be given an extension beyond that period. Completed notes from local governments are compiled by the Fiscal Analysis Division from the information provided by the appropriate local government agencies.[54]

A bill designated as "Effect on Local Government: May have Fiscal Impact" or "Effect on the State: Yes" by the Legal Division should not be used as the statement on whether the bill actually has a impact upon state or local government. These designations require the Fiscal Analysis Division to obtain a note from the potentially affected state and local government entities. The actual notes submitted by the requested state and local government entities will indicate .

The Fiscal Analysis Division is not required to request a note on a bill designated as "Effect on Local Government: No" or "Effect on the State: No" by the Legal Division. However, state and local government entities may submit unsolicited notes indicating a potential impact. Although unsolicited notes are not printed in paper form, they are posted in NELIS (Nevada Electronic Legislative Information System) and on the bill's information page on the LCB's website.

It is important to review the notes to determine whether there is a negative impact on state and local government. If there are any questions regarding a note for a bill, you can contact the Senate Fiscal Analyst or the Assembly Fiscal Analyst, in the Fiscal Analysis Division.

Introduction and First Reading

After a bill has been drafted, it is ready for introduction in the Legislature. Only legislators and standing committees are authorized to introduce a bill. Under the *Nevada Constitution*, any bill may originate in either house, and all bills passed by one house may be amended in the other.[55] This is a departure from the practice in the United States Congress, where bills raising revenue must originate in the House of Representatives. But in Nevada, as in Congress, bills originating in one house must be sponsored by a member or a committee of that house. Joint sponsorship of legislation by standing committees and by one or more legislators from one or both houses (Senate and Assembly) is authorized.[56]

Legislators have time and number limits on requests for the drafting of bills and resolutions. After a regular legislative session has convened, each senator is entitled to two requests, and each member of the Assembly is entitled to one request, for the drafting of a bill that must be submitted by the eighth calendar day of session.[57] The number of requests for bills by standing committees is also limited, and these requests must be submitted by the calendar day of session.[58] Emergency bills may be authorized by the Majority Leader of the Senate, the Speaker of the Assembly, the Minority Leader of the Senate, and the Minority Floor Leader of the Assembly.[59] All bill draft requests must be introduced no later than ten calendar days after initial delivery.[60] Appendix A provides an overview of the deadlines for introduction and passage of legislation.

All bills in Nevada, except for those placed on a consent calendar, are required by the *Constitution* to be read by sections in each house on three separate days. In an emergency, two-thirds of the house where a bill is pending may order this rule dispensed with on the and second readings, but a bill must be read by sections on its passage.[61] To comply with the constitutional requirements, the houses have second, and third readings on every bill and joint resolution. However, because of the volume of bills processed through the chambers, time considerations have necessitated a liberal interpretation of the meaning of the phrase to "read by sections." At the time the *Constitution* was framed, printed bills were not available to each legislator for analysis, so three full readings permitted a greater study and understanding of a bill's contents and any amendments added to it prior to the vote on passage. Today, of course, bills are readily available in print form and electronically, with the latest amendments incorporated into their texts.

The reading in both houses is for information only.[62] When the bills are introduced and read, they are delivered by a legislator or legislative staff member to the desk of the Secretary or Chief Clerk, as the case may be, who assigns numbers to the bills and reads them. In the Senate, bills and resolutions are usually referred to committees with jurisdiction over measures affecting titles and chapters of NRS as prescribed in Senate Standing Rule 40. Although a bill may initially be referred to a particular committee, on occasion, different committees may be proposed from the . In the Assembly, a motion is usually made for referral to committees by the introducer. As with all bill referrals, the whole house votes on the question. A duplicate copy is transmitted to the Legislative Counsel for photocomposition and [63] By the following day, the printed copies of the bills and resolutions are delivered to the Secretary or Chief Clerk. Immediately thereafter, the printed copies are delivered by receipt to the chairs of the committees to which the bills or resolutions were referred. (When a bill introduced and passed in the house is presented to the other house, it is typically the Assistant Majority Leader in the Senate and the Majority Floor Leader in the Assembly who make a motion to refer it to committee.)

Committees

STANDING COMMITTEES

Each house of the Nevada Legislature has its own standing committees, the members of which are announced (Senate) or appointed (Assembly) by the presiding in accordance with current standing rules.[64] The number of members is determined by these rules, and there are often changes made at the beginning of each session. In the Senate, the composition of the committees, including selection of chairs and vice chairs, is determined by the Majority Leader. Minority party assignments to the Senate committees are determined by the Minority Leader. In the Assembly, the Speaker designates the chair, vice chair, and members of each committee.[65] The Speaker usually consults with the Minority Floor Leader on the committee appointments of minority party members. With some exceptions, the general practice is for the party membership on committees to the composition of the entire Assembly. The Assembly Standing Rules include detailed uniform committee rules, and committees may adopt policies. In the Senate, basic rules for the functioning of committees are contained in the standing rules, the adopted rules of the committees, and *Mason's Manual of Legislative Procedure*, which has been adopted by both houses as the basis of parliamentary practice in cases in which it is applicable and in which it is not inconsistent with the *Constitution*, the standing rules, and the customs, usage, and precedence of the respective houses.[66]

The names and memberships of Senate and Assembly standing committees for the 2019 Session are listed in Chapter I of this manual.

Committees are the workshops of the Legislature. Visitors to the two chambers are often amazed at the rapidity with which business is dispatched, few realizing that long hours in committee sessions have transpired prior to any action on a bill. It is in committee that hearings are held, testimony from interested parties is taken, and bills are analyzed line by line for their legal and social merits.

Committees make several types of recommendations on legislative measures that come before them for consideration. A committee of either house may report a bill back to the whole house with a recommendation of "Do pass"; "Amend, and do pass, as amended"; or "Do pass, as amended" (from re-referral committee only on a bill previously amended in the same house). Such recommendations mean that a committee considers a bill to have merit to justify its enactment, either as introduced or with appropriate amendments. Other recommendations concerning a bill include: (1) a report that the bill be passed and re-referred or amended and re-referred to a committee; (2) Postpone"; and (3) "Do pass, and place on consent calendar." This last procedure is discussed later under the heading "Consent Calendar."

A standing committee of either house may report a one-house or concurrent resolution back to the with a "Be adopted" recommendation. Resolutions may be amended and/or re-referred by recommendation as well.

A committee may also report a bill or resolution "Without recommendation," or "Amend, but without recommendation," which means that the committee was unable to reach a conclusion on what it believes should be the action taken by the whole house.

Senate Standing Rule 53 requires that minutes and complete records of all bills be maintained. Assembly Standing Rules 46, 47, and 48 require that records be kept of committee votes on bills or resolutions and of committee proceedings. Furthermore, these records, minutes, and documents are required to be in the of the LCB upon completion.

Standing committees may perform other functions besides considering legislation. For example, Senate Standing Rule 54 encourages each standing committee of the Senate to plan and conduct a general review of selected programs of state agencies or other areas of public interest within the committee's jurisdiction.

COMMITTEE OF THE WHOLE

In addition to standing committees, which continue in existence throughout a session, there are three other types of committees used by the Legislature in Nevada—committees of the whole, conference committees, and select committees. A committee of the whole is a committee composed of the entire membership of one of the houses. It is usually convened so that the entire house can consider, analyze, and hear testimony on proposed legislation. When the Senate forms itself into a committee of the whole, the Senator who has moved to form a committee of the whole or the Majority Leader names a chair to preside over the committee. In the Assembly, the Speaker or his or her designee presides over the committee. A committee of the whole is a temporary, or "ad hoc," committee. At the conclusion of its deliberations, the committee of the whole (through its Chair) normally reports its recommendations back to the house for formal action, in the same manner as standing or select committees.[67]

SELECT COMMITTEES AND CONFERENCE COMMITTEES

Select committees are also temporary committees appointed for a special purpose, which may be the consideration of a particular bill or the performance of a ceremonial function (e.g., a committee on escort for a visiting dignitary). In Nevada, bills of application or primary concern to particular localities are sometimes referred to select committees composed of the legislative delegation from the area affected.

Another particularly important type of committee is the conference committee. Oftentimes when a bill is passed by both houses in differing forms because of amendments added by one of the houses, and the two houses cannot agree on identical language for the bill in question, each house appoints a number of conferees to meet with conferees of the other house to seek a resolution of the differences existing in the two versions of the bill. In a conference committee, the conferees of one house may agree to amendments adopted in the other house or recede from the amendments adopted by their chamber. Conferees may also decide that new amendments or even new bills are necessary to reach accord. A conference committee may consider the whole subject matter of a bill without restriction to the points in dispute and may make any changes it deems appropriate. Once the conferees reach an agreement, they report back to their respective houses with their recommendations. The report of a conference committee may be adopted by acclamation, and such action is considered equivalent to the passage voting requirement of the bill as recommended in the report. Conference reports themselves are not subject to amendment.

The 2017 Joint Rules of the Senate and Assembly require that there be no more than one conference committee on any bill or resolution. The rules also require that a majority of the members from each house on a committee be members who voted for passage of the measure.[68] If agreement cannot be reached by the conference committee, the bill or resolution dies.

Committee Hearing

The rules of the Senate require committees to acquaint themselves with the interests of the state represented by the committee.[69] Committees may also initiate legislation within their jurisdiction. In the Senate, any bill or other matter referred to a committee may be withdrawn from it by a majority vote of the Senate. The Senate rules require that at least one day's notice of a withdrawal motion be given to the body.[70]

At a committee hearing, the proponents and opponents of a measure are given an opportunity to present their cases. Testimony may be taken from lobbyists, academicians, public special interest groups, and private citizens. To avoid additional expense and duplication of effort for both witnesses and committee members, joint hearings by committees in both houses may be held.

In the Assembly, when a measure is referred concurrently to two committees, the rules specify that it is transmitted to the committee named. If the committee votes to amend the bill or resolution, the measure is sent to the for a vote on the amendment, reprinted with amendments if the amendment is adopted, and then sent to the second committee. If no amendment is proposed by the committee, the measure must be sent to the with a committee recommendation and is then transmitted to the second committee.[71]

Witnesses summoned to appear before the Senate or Assembly or any of their committees are compensated at the same rate as witnesses required to attend a court of law in Nevada.[72] However, witnesses appearing of their own volition do so at their own expense.

As discussed under the heading "Standing Committees," committees may or may not report bills out to the of the houses for further action, and they may report them out with a variety of recommendations. When a referral committee reports a bill and recommends a certain disposition of it, the bill is then placed on the appropriate

.

Notice of Bills, Topics, and Public Hearings

Both Senate and Assembly rules require that adequate notice be provided on bills, resolutions, and public hearings.[73] Notices, or agendas, must include the date, time, place, and topics or legislation to be covered and must be: (1) posted conspicuously in the Legislative Building; and (2) made available to the news media. Both houses permit suspension of this requirement for an emergency.

Consent Calendar

To process bills of a noncontroversial nature in a more and less time-consuming manner, the rules of the Senate and Assembly, as well as the *Nevada Constitution*, provide for the use of consent calendars by both houses of the Nevada Legislature. Bills on a consent calendar are considered for passage and do not require second or third readings.

Standing committees may report a bill out with the recommendation that it be placed on a consent calendar. In the Senate, a measure that is recommended both for passage with no amendments and for placement on the consent calendar must be included in the daily for at least one calendar day before it may be considered. Measures that contain an appropriation, require a two-thirds vote, or are controversial in nature are not eligible for the Senate's consent calendar. In the Assembly, a bill may be placed on the consent calendar if it has: (1) been recommended for passage; (2) no amendments recommended for it; and (3) received a unanimous vote by the standing committee to be placed on the consent calendar. The Chief Clerk of the Assembly is required to maintain a list of bills recommended for the consent calendar that must be

The standing rules of both the Senate and the Assembly require that a bill on a consent calendar must be transferred to the second reading if any member objects to the bill's inclusion on the consent calendar or requests such bill's removal from the consent calendar.[74]

Second Reading

Committees cannot amend bills; they can only suggest amendments for adoption by their respective houses. In fact, the rules of both chambers specify that a bill cannot be amended until read twice. Assembly rules require that bills be read the second time on the legislative day after reported from committee unless a different day is designated by motion.[75] If the committee recommends amendment or individual legislators propose amendments, the amendments must be made available electronically to all members prior to actual adoption or rejection of the amendments proposed.[76] Although the Senate rules are silent on this point, the practice has generally been the same.

On second reading, the Secretary or Chief Clerk reads the bill, the enacting clause, the various sections by number only, and the amendments by number and proposer only. In the Senate, a senator moves to dispense with reading of the amendment. Committee amendments or amendments from individual legislators are then adopted or rejected by simple majority vote of the members present and voting. Voting on amendments is normally by voice vote, although other methods, including roll calls, may be employed on demand of three members present or in order to determine the prevailing side.[77] If a bill is amended on second reading, the presiding orders the bill reprinted, action.

General File and Third Reading

At the end of each day's session, the bills or joint resolutions placed on the general for third reading and passage are posted on the Nevada Legislature's website (https://www.leg.state.nv.us/). When the order of business "general and third reading" is reached on the following day, the bills are considered in their proper order, unless a motion is made and approved to move certain bills to a different position on the general The Secretary or Chief Clerk reads the bill, the enacting clause, and the and last sections.[78] If new amendments are proposed and adopted, the bill is sent back for reprinting and goes through the reprinting and engrossment process once more. To expedite bill processing, the Senate and Assembly may, upon motion, dispense with the reprinting and engrossment of amended bills and resolutions. If there are no amendments, the merits of the bill are discussed and then the roll is opened.[79]

In debate, after a legislator has requested to speak and has been recognized by the presiding , the legislator rises and addresses the chair ("Mr. or Madam President," "Mr. or Madam Speaker"). The legislator is expected to observe decorum at all times, speak only on the subject under consideration, and avoid all references to personalities.[80] To be entitled to the , a speaker must be recognized by the presiding , and when two or more legislators rise at the same time, it is the prerogative of the presiding to name the one to speak In doing so, preference is given to the mover or introducer of the subject under consideration.[81]

A legislator may not speak more than twice during the consideration of any one question on the same day, except for explanation, nor a second time without leave of the body when others who have not spoken desire the . Incidental or subsidiary questions are not considered the same question.[82] In closing debate, the author of the bill, resolution, or main motion customarily has the privilege of speaking last, unless the previous question has been sustained.[83]

In order for a bill or joint resolution to pass, the *Nevada Constitution* requires that a majority of the members elected to the body vote for the measure. Bills or joint resolutions which create, generate, or increase public revenue through taxes, fees, or similar mechanisms require approval by a two-thirds majority of the members elected in each house unless the measure is referred to the voters by a majority vote.[84] All votes on passage are by roll call and are recorded in the journal of the chamber taking the action. If the bill passes, it is transmitted to the other house.

After a bill has passed on third reading and been transmitted to the other house, the house of origin has relinquished control over the measure. To take further action on it, the house of origin must either petition the other chamber, through a concurrent resolution, to return the bill or wait until it has passed in the other house and is
[85]

In the Other House and Conference Committees

Each bill must go through the entire process all over again when it is transmitted to the other house. If a bill is passed by the other house without amendment, it is sent back to the originating house for enrollment (preparation for printing by the Legislative Counsel) and delivery to the Governor. If the other house amends the bill, then it is necessary for the originating house to concur or not to concur with the amendments. If the originating house concurs in the amendments, the bill is ready for enrollment. If it does not concur and the other house does not recede from its amendments, a conference committee, composed of an equal number of members from the Senate and the Assembly, may be appointed for settlement of the bill' form.

Deadlines for Legislation

Prior to each session, the Legislative Commission's Committee to Consult with the Director considers methods for improving the operation of the session.[86] The recommendations of the Committee to the next Legislature may affect many procedural rules, including limitations on the number of bills that may be requested; deadlines for the submission, introduction, and passage of legislation; and the procedure for obtaining waivers. These procedures are generally contained in the Joint Rules of the Senate and Assembly, which are adopted at the beginning of each session.[87] Appendix A provides an overview of the deadlines for introduction and passage of legislation.

Measures within the jurisdiction of the Senate Committee on Finance or the Assembly Committee on Ways and Means; bills required to carry out the business of the Legislature; and concurrent or simple resolutions are generally exempted from these limitations.[88] Also exempt are emergency requests submitted by the Majority Leader of the Senate, the Speaker of the Assembly, and the Minority Leaders in the Senate and the Assembly.[89]

Enrollment

After a bill has passed both houses in identical form, it is transmitted by the Secretary of the Senate or the Chief Clerk of the Assembly (depending upon the house in which the bill originated) to the Legislative Counsel to be enrolled.[90] The Legislative Counsel then prepares the passed bill for the printing.[91] It is inserted in a white cover, which contains blanks for the signatures of the President and Secretary of the Senate, the Speaker and Chief Clerk of the Assembly, the Governor, and the Secretary of State. After printing, the bill is returned to the Legislative Counsel, who compares the enrolled copy with the engrossed copy. If the enrolled bill is found to be correct, the Legislative Counsel presents the measure to the proper legislative for their signatures.[92] The bill is then delivered by the Legislative Counsel, or that person's designee, to the Governor for consideration.[93] Once the Governor signs the bill, it is [94]

Gubernatorial Action

The Governor has the choice of signing bills, vetoing bills, or allowing them to become law without a signature. If the bill is delivered to the Governor with more than days remaining in the session, the Governor has days to make a decision. If it is delivered to the Governor with less than days remaining in the session or after the Legislature has adjourned *sine die*, the Governor has ten days after *sine die* to make this decision. The day of delivery and Sundays are not counted for purposes of calculating these and ten-day periods. If the Governor vetoes a bill during the session, the measure is returned to the house of origin for further action, and the veto may be either sustained or overridden by a two-thirds vote of the elected members of each house. If the Governor vetoes a bill within ten days after adjournment (day of receipt and Sundays excepted), the bill must be together with the objections to it, in the of the Secretary of State. When the next regular session of the Legislature convenes, the Secretary of State must present the vetoed bill to the house of origin for disposition. If a two-thirds majority of the elected members of each house of the Legislature vote to override any gubernatorial veto on a recorded roll call vote, the measure becomes law despite the veto. If the Governor does not sign 's signature.[95]

Effective Date of the Bill

If no date is included in a bill to indicate when it will become effective (e.g., "This act shall become effective upon passage and approval" or "This act shall become effective May 1, 2019"), it automatically becomes effective on October 1 of the year in which the bill is passed (October 1, 2019, for this session of the Legislature).[96]

Adoption or Passage of Resolutions

The *Nevada Constitution* requires that bills and joint resolutions be processed and passed in an identical manner,[97] except that joint resolutions are delivered directly to the Secretary of State (not the Governor). Joint resolutions amending the *Constitution* are held by the Secretary of State and returned to the next chosen Legislature for reconsideration.[98] If the next Legislature approves the proposed constitutional amendment, it then must be submitted to the people "in such manner and at such time as the Legislature shall prescribe" for a vote.[99] The law currently requires that this opportunity to vote be at the next general election.[100]

Concurrent resolutions must be adopted by both houses; they may be adopted by a voice vote, and only a majority of the members present are necessary for the adoption. Concurrent resolutions are not signed by the Governor and are delivered to

Senate or Assembly one-house resolutions are adopted by a voice vote by a simple majority of the members present and are enrolled and delivered to the Secretary of State. A recorded vote is required to be taken for both concurrent and one-house resolutions if such is requested by three members present.[101]

Petitions and Memorials

From time to time, the Legislature is presented with petitions from various groups and individuals, as well as memorials from other legislatures. Although the essence of these documents may vary from requests to take certain action to expressions of gratitude for courtesies extended, their contents are always made known to the chamber through a statement by the presiding or the legislator presenting the material. These nonlegislative petitions or memorials then lie on the table or are referred to committee as deemed appropriate by the chair or the chamber.[102]

The right to petition for redress of grievances is a time-honored tradition of our system of government. It is one means by which citizens can voice their opinions on the course of public affairs and, on occasion, have a direct impact on the legislative process.

Nonlegislative Initiatives to Change Statutes or the *Nevada Constitution*

Initiative petitions may be used to amend the *Nevada Constitution* and to enact a new statute or amend an existing law. An initiative petition to amend the *Nevada Constitution*, after the required number of signatures are gathered, is submitted directly to the voters at the next general election. If approved, it must be returned to the next general election for a second approval of the voters before the *Constitution* is [103]

An initiative petition to enact a new statute or amend an existing law that receives the required number of signatures is transmitted by the Secretary of State to the Legislature as soon as it convenes in regular session. Such petitions are traditionally introduced in the Assembly. The petition must be enacted without change or rejected by the Legislature within 40 days. If the proposed statute or amendment to a statute is enacted by the Legislature and approved by the Governor, it becomes law. If it is rejected or is not acted upon by the Legislature within 40 days, the Secretary of State must submit the initiative question to the voters for approval or disapproval at the next general election.

After rejecting the proposed statute or amendment to a statute, the Legislature is authorized to propose an alternative measure on the same subject, which (if approved by the Governor) must also be submitted to the voters. If both provisions (the original initiative question and the alternative measure) are approved, the question receiving the largest number of votes becomes law. An initiative petition approved by the voters cannot be amended, annulled, repealed, set aside, or suspended by the Legislature within three years from the date it takes effect.[104]

DISTINCTION AMONG TYPES OF LEGISLATION

Several types of bills and resolutions may be acted upon by the Nevada Legislature. Examples of these types of measures are presented in Appendix D of this manual.

Bill

A bill is a draft of a proposed statute, which, to become law, must be passed by both houses of the Legislature on roll call vote and be approved by the Governor.

Skeleton Bill

Skeleton bills may be introduced when, in the opinion of the sponsor and the Legislative Counsel, the full drafting of the bill would entail extensive research or be of considerable length. Such a bill is a presentation of ideas or statements of purpose in style and expression to enable the Legislature and the committee to which the bill may be referred to consider the substantive merits of the legislation proposed.

The committee, if it treats the skeleton bill favorably, must then request the drafting of a completed bill in such detail as would afford the committee the opportunity of [105]

Joint Resolution

A joint resolution is passed by both houses in the same manner as a bill. Joint resolutions are used for the purpose of requesting the President, Congress, a federal agency, or members of Nevada's Congressional Delegation to perform some act believed to be in the best interests of the state or nation. The joint resolution is also employed to amend the *Nevada Constitution* and to ratify an amendment to the *U.S. Constitution*.[106]

Concurrent Resolution

A concurrent resolution must be adopted by both houses to amend the Joint Rules; express facts, principles, opinions, and purposes of the Senate and Assembly; establish joint committees of the two houses; direct the Legislative Commission to conduct interim studies; resolve that the return of a bill from the other house is necessary and appropriate; and request the return from the Governor of an enrolled bill. Other uses include memorializing a former member of the Legislature or other distinguished person upon death.[107] A concurrent resolution is acted upon by voice vote unless three members request a roll call vote.

One-House Resolution

A one-house resolution may be adopted by either house to establish its rules, appoint attachés or session staff, provide postage and stationery money for the members, express an opinion, express regret on the death of a former member of the Legislature or other person, request the return of an enrolled resolution from the Secretary of State, and for additional purposes determined to be appropriate by the Majority Leader of the Senate or the Speaker of the Assembly for their respective houses. Except when three members request a roll call vote, a one-house resolution is acted upon by voice vote.

ENDNOTES FOR CHAPTER III

[1] *Nevada Constitution*, Art. 5, Sec. 9.

[2] *Nevada Constitution*, Art. 4, Sec. 2A.

[3] *Nevada Constitution*, Art. 4, Sec. 2

[4] *Nevada Constitution*, Art. 4, Sec. 33.

[5] *Nevada Constitution*, Art. 4, Sec. 2A and Art. 5, Sec. 9.

[6] *Nevada Constitution*, Art. 4, Sec. 15.

[7] Joint Rule 9, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[8] *Nevada Constitution*, Art. 5, Sec. 11.

[9] *Nevada Constitution*, Art. 4, Sec. 6.

[10] *Nevada Constitution*, Art. 5, Sec. 17; Senate Standing Rule 31, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[11] Senate Standing Rule 1, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[12] NRS 218A.500; and Senate Standing Rule 2, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[13] *Nevada Constitution*, Art. 5, Sec. 17.

[14] Senate Standing Rule 2, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[15] NRS 218A.520; and Senate Standing Rule 3, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[16] Senate Standing Rule 4, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[17] Senate Standing Rule 5, ibid.

[18] NRS 218A.510 and 218A.540.

[19] Assembly Standing Rule 1, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[20] NRS 223.080.

[21] Senate Standing Rule 6, Assembly Standing Rule 2, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[22] Assembly Standing Rule 1, ibid.

[23] NRS 218A.550; Assembly Standing Rule 3, *Standing Rules of the Senate and Assembly*, Nevada Legislature 79th Session, 2017.

[24] NRS 218A.910 and 218F.520.

[25] Id.

[26] NRS 218A.410.

[27] The Majority Floor Leader and Minority Floor Leader of each house are, however, cited in NRS 218A.665

[28] Senate Standing Rule 6, Assembly Standing Rule 2, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[29] Senate Standing Rule 90, Assembly Standing Rule 100, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

[30] Senate Standing Rule 10, ibid.

[31] Assembly Standing Rule 10, ibid.
[32] *Nevada Constitution*, Art. 4, Sec. 13.
[33] Senate Standing Rule 120, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[34] Assembly Standing Rule 120, ibid.
[35] "Legislative Box Score, 2017 Session of the Nevada Legislature," *Senate History, Final Volume*, Nevada Legislature at Carson City, 79th Session, 2017.
[36] NRS 218A.400.
[37] NRS 239C.260.
[38] NRS 218D.050.
[39] NRS 218D.290.
[40] *Nevada Constitution*, Art. 4, Sec. 17.
[41] NRS 218D.115 and 218D.175.
[42] NRS 218D.190.
[43] NRS 218D.105, 218D.115, 218D.175, 218D.205, 218D.210, 218D.212, 218D.214, 218D.216, 218D.220, and 219A.220.
[44] NRS 218D.050 and 218D.110.
[45] NRS 218D.130.
[46] NRS 218D.175, 218D.190, 218D.205, 218D.210, 218D.212, 218D.214, 218D.216, and 218D.220.
[47] NRS 218D.430 and 218D.435.
[48] NRS 218D.415.
[49] NRS 218D.430, 218D.435, and 218D.460.
[50] NRS 218D.440.
[51] NRS 218D.445.
[52] NRS 218D.495.
[53] NRS 218D.475.
[54] NRS 218D.475 and 218D.480.
[55] *Nevada Constitution*, Art. 4, Sec. 16.
[56] Joint Rule 5, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[57] NRS 218D.150.
[58] Joint Rule 14, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[59] Joint Rule 14.4, ibid.
[60] Joint Rule 14.2, ibid.
[61] *Nevada Constitution*, Art. 4, Sec. 18.
[62] Senate Standing Rule 109, Assembly Standing Rule 109, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[63] NRS 218D.600.
[64] Senate Standing Rule 40, Assembly Standing Rules 40 and 41, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[65] Assembly Standing Rule 41, ibid.
[66] Senate Standing Rule 90, Assembly Standing Rule 100, ibid.
[67] Senate Standing Rules 46, 47, and 48, Assembly Standing Rule 45, ibid.
[68] Joint Rule 1, ibid.
[69] Senate Standing Rule 43, ibid.
[70] Senate Standing Rule 50, ibid.
[71] Assembly Standing Rule 43, ibid.

[72] Senate Standing Rule 140, Assembly Standing Rule 140, ibid.
[73] Senate Standing Rule 92, Assembly Standing Rule 52.5, ibid.
[74] *Nevada Constitution*, Art. 4, Sec. 18; Senate Standing Rule 110, Assembly Standing Rule 111, ibid.
[75] Assembly Standing Rule 110, ibid.
[76] Senate Standing Rule 113, Assembly Standing Rule 110, ibid.
[77] Senate Standing Rules 30 and 32, Assembly Standing Rule 30, ibid.
[78] *Nevada Constitution*, Art. 4, Sec. 18.
[79] Senate Standing Rule 113, Assembly Standing Rule 113, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[80] Senate Standing Rule 80, ibid; *Mason's Manual of Legislative Procedure*, Secs. 120 through 126.
[81] Senate Standing Rule 124, ibid; *Mason's Manual of Legislative Procedure*, Sec. 91.
[82] Senate Standing Rule 80, Assembly Standing Rule 80, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[83] Senate Standing Rule 81, Assembly Standing Rules 81 and 82, ibid.
[84] *Nevada Constitution*, Art. 4, Sec. 18.
[85] Joint Rule 7, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[86] NRS 218E.225.
[87] Joint Rules of the Senate and Assembly, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[88] Joint Rule 14.6, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[89] Joint Rule 14.4, ibid.
[90] NRS 218D.630.
[91] NRS 218D.605
[92] NRS 218D.635; Joint Rule 4, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[93] NRS 218D.660.
[94] NRS 218D.675.
[95] *Nevada Constitution*, Art. 4, Sec. 35; and NRS 218D.680.
[96] NRS 218D.330.
[97] *Nevada Constitution*, Art. 4, Sec. 18.
[98] NRS 218D.800.
[99] *Nevada Constitution*, Art. 16, Sec. 1.
[100] NRS 218D.800.
[101] Senate Standing Rule 30, Assembly Standing Rule 30, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[102] Senate Standing Rule 97, Assembly Standing Rule 97, ibid.
[103] *Nevada Constitution*, Art. 19, Sec. 2.
[104] *Nevada Constitution*, Art. 19, Secs. 2 and 3.
[105] Senate Standing Rule 106, Assembly Standing Rule 106, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[106] *Nevada Constitution*, Art. 4, Sec. 18; NRS 218D.805; and Joint Rule 7, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.
[107] Joint Rule 7, *Standing Rules of the Senate and Assembly*, Nevada Legislature, 79th Session, 2017.

EXHIBIT "G"

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.)

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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

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(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 "H"

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, Plaintiff, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS ASSOCIATION, Defendant.	CASE#: A-16-744146-D DEPT. XXII

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE
TUESDAY, APRIL 23, 2019

RECORDER'S TRANSCRIPT OF PENDING MOTIONS

APPEARANCES

For the Plaintiff/Counter Defendant:	DEVIN R. GIFFORD, ESQ. JEFFREY W. SAAB, ESQ.
For the Defendant/Counter Claimant:	MICHAEL J. GAYAN, ESQ. FRANCIS I. LYNCH, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

Las Vegas, Nevada, Tuesday, April 23, 2019

[Case called at 9:38 a.m.]

THE COURT: -- Owners Association. Case Number A-16-744146-D.

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

MR. GIFFORD: Devin Gifford, Bar Number 14055 on behalf of the Defendants.

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

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

THE CLERK: And I need to get Mr. Williams on the phone.

THE COURT: Okay.

THE CLERK: Sorry.

THE COURT: We got to get Mr. Williams on the phone.

MR. GIFFORD: Right. Thank you for remembering. I have to say; I'm impressed with Your Honor's math on the fly.

THE COURT: I should have done that before, but default judgments, I usually don't take those home.

MR. WILLIAMS: Hello.

THE CLERK: Mr. Williams is on the phone.

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

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

THE COURT: I just called the Hallier vs. Panorama Towns Condominium Unit Owners Association, case number A-16-744146-D. Counsel here has identified -- have identified themselves, but I'd like to have them do it again, and everyone identify who you represent.

MR. GIFFORD: Devin Gifford on behalf of Plaintiffs/Counter-Defendants.

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

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

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

THE COURT: Okay, Mr. Williams?

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

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

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

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

Okay. This is the Plaintiff's and Counter-Defendant's Motion for Summary Judgment Pursuant to NRS11.200 -- wait 202, subsection 1, and then we've got Defendant's conditional countermotion for relief

pursuant to NRS40.695, subsection 2. I don't think I've ever had a conditional countermotion. Anyway, it's the Plaintiff's show.

MR. GIFFORD: Thank you, Your Honor. Your Honor, we filed this motion for summary judgment under NRS, as you said 11.202, as amended by AB 125. It states that, "No action may be commenced more than six years after substantial completion of the project. There is three pertinent dates that's part of our motion. There's one, the substantial completion dates of the two towers, which are January 16 and March 26 of 2008.

THE COURT: Well, now, I will tell you there was a rub by the Plaintiff -- the Homeowners Association --

MR. GIFFORD: Sure.

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

MR. GIFFORD: Sure. So I'll just address that now, Your Honor. So, in our motion, under Exhibit C and D, we included certificates of occupancy. And certificates of occupancy for the two towers themselves, they actually have the issuance dates for the certificates of occupancy, in addition to the building file completion dates.

Now with regard to the notice of completion, you know, I know that they -- I know that counsel, they had an issue with us, you know, showing -- you know, we don't have enough information, we haven't provided that, but the problem is, Your Honor, there are no notices of completion that were recorded for these buildings themselves.

If they were recorded, they would have been recorded in the Recorder's Office, as per NRS108.228.

And we looked -- we've scoured those records, Your Honor. They do not exist. Those are optional -- those are optional documents that don't even have to necessarily exist in every case. They're used by owners to put parties on notice that the time to file a lien has begun.

For the towers themselves, they don't exist. And the fact that the Association's counsel hasn't provided any documents or any other arguments, other than saying we haven't provided enough, isn't enough under the *Wood v. Safeway* case. They have to actually show some material dispute and show some facts or some -- more than a scintilla of facts that that could exist.

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

MR. GIFFORD: Correct.

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

MR. GIFFORD: Correct. And then Exhibit D would be for the tower 2, and it's the same situation.

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

MR. GIFFORD: Sure.

THE COURT: Okay. Actually, we have to go to 2055. Okay. All right. So the date of -- date of substantial completion of the

improvement -- by the way I didn't have my book at home when I was reading through this last night.

MR. GIFFORD: No problem.

THE COURT: Okay. It shall be deemed to be -- the date of the substantial completion of the improvement to the property shall be deemed to be the date on which (a) the final building inspection of the improvement is conducted, a notice of completion is issued for the improvement, or a certificate of occupancy is issued for the improvement, whichever occurs later.

Now enlighten me. Isn't a notice of completion usually issued prior to the certificate of occupancy?

MR. GIFFORD: Yes. So it's a later three days.

THE COURT: Right.

MR. GIFFORD: And so we were trying to exercise all caution. We looked up the Recorder's Office, we called the Recorder's Office, they don't exist. And, Your Honor, even if they did, in order to affect our analysis under the motion, they would have to be issued after February 24, 2010, because that's -- in that period, that wouldn't impact them. Even if they were issued after, which they weren't, and they don't exist, they would have to be issued at that point.

Even then, even if they were issued, the Association would still have to have filed their claims before the tolling period ended that they were granted. So it's not a material dispute with respect to the substantial completion date. There's no dispute that those are the actual dates.

THE COURT: Okay. If we were to use the C of O issue date -- by the way, when I say certificate -- C of O, I mean certificate of occupancy, which you've got attached as Exhibit C and D to your motion.

MR. GIFFORD: Right.

THE COURT: If we were to use those dates, which are -- one is January 16 of 2008, and March 26 of 2008, now one thing you had indicated in your motion is that you pointed out, well, the six years would have run anyway. But the problem I'm having with that analysis, is that we have to go with what the statute of repose was before 2015, which would be six for latent defects -- or patent defects, eight for latent defects, and then ten for those defects that the contractor knew or should have known. Of course, then it changes to the six.

So I don't consider them dead, or that the statute of repose ran before AB 125 came into existence.

MR. GIFFORD: Right.

THE COURT: Okay.

MR. GIFFORD: Right.

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

MR. GIFFORD: Right.

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

MR. GIFFORD: Right.

THE COURT: Okay.

MR. GIFFORD: Right. So, no, I understand the argument, and I understand your position, Your Honor. It's just that there aren't any notices of completion. And without -- without those in existence, we can't -- we can't assume that they exist. You know what I mean?

THE COURT: Okay.

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

THE COURT: Okay.

MR. GIFFORD: Okay. So moving on, Your Honor, we've kind of passed that issue. The other issue that the Association had with our motion is that we didn't argue the accrual date as a material issue of fact, so we can't -- you can't analyze that. But again, the accrual date, and if you remember in Section AB 125, subsection -- Section 21, subsection 6, says that the accrual date -- if there's an accrual date, if the accrual of a party's claims occur before the enactment of AB 125, then -- and that party would otherwise lose their rights for their claims because of the retroactive ability of the statute of repose, then they actually get a grace period.

THE COURT: Right.

MR. GIFFORD: Well, we're not necessarily disputing that their claims accrued back in 2013. And actually the fact that we're not disputing it helps them out. Because the alternative is, there's one or two options, right? So there's one, the accrual date occurred before, and

after April 1, 2015; or, two, it occurred on or after that date. If it occurred on or after that date, the law says that they lose their claims. There is no grace period. If they accrued before -- and then we're guaranteed to win, right. So if they accrued before, which is what they're asserting in this case, then, yeah, they get the grace period, and we're not disputing that there's a grace period that's applicable.

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

THE COURT: Okay.

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

THE COURT: You know, it's not commencing the lawsuit, but it does toll any limiting provisions.

MR. GIFFORD: Right. And I just wanted to clarify, because their motion, although they kind of backtrack and say something else, but they kind of mention, well, Chapter 40 notice itself commences the lawsuit. And I wanted to make sure that was clear, because there really is no dispute about that with your prior orders, with other cases, and even they've made some judicial admissions in there, in their oppositions. For instance, one they say -- and this was their opposition to the MSJ regarding the amended Chapter 40 notice. They said, no notice or opportunity to repair was required before commencing their own action to recover for construction defects. By way of their answer and counterclaim, the Association filed such an action.

So they have these admissions in their pleadings. I don't really think there's really any dispute that commencing a lawsuit is different than serving a notice, under the rule.

THE COURT: Well, I don't know that I -- we -- I know we're talking form over substance.

MR. GIFFORD: Uh-huh.

THE COURT: But I view the service of the notice on February 24th of 2016 as, at that point tolling, because they did it on the last day.

MR. GIFFORD: Right.

THE COURT: It tolls until the completion of the Chapter 40 process. Now, of course, that puts the Homeowners Association basically on notice that, you know, they've got to pull the trigger on filing a -- instituting litigation on the last day, or that the tolling -- by the last day of the tolling provisions, you know, ceasing.

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

THE COURT: Okay.

MR. GIFFORD: Okay. Now, with regard to the tolling, Your Honor, and you've mentioned it, the Association claims that by virtue of their serving the Chapter 40 notice within the grace period, they get the

benefit of tolling to save their late filing of the lawsuit. This is problematic, Your Honor, because number one, NRS40.695 provides that statutes of limitations of repose are tolled from the time notice of claim is given.

Now, the grace period that's found in AB 125, that is not codified in any statute. That is only found in AB 125, which is part of the bill. And an Assembly Bill is not a statute. So you can't -- the tolling provision of NRS40.695, it can't apply to toll the grace period. It's a completely separate distinct element, right? And you've agreed with that in your *Skye* (phonetic) order, in the prior case. You said, I quote, "The grace period does not toll the statute of repose. Nothing in Section 21, subsection 6 of AB 125 indicates that the grace period is subject to tolling."

Your Honor, there's -- there was no tolling in this case, and that's one of the primary arguments we try to convey in our motion is that when the Association served their Chapter 40 notice during the grace period, that did not seek to toll the statute of limitations, because by that time, the statute of repose --

THE COURT: Now we're talking about --

MR. GIFFORD: -- had already expired.

THE COURT: -- okay, now we're talking about statute of repose or state of limitations?

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

THE COURT: Right. Okay.

MR. GIFFORD: What I'm -- what I'm referring to today is the

statute of repose.

THE COURT: Okay.

MR. GIFFORD: Right. So the minute that April 25 became effective, the ten-year -- potential ten-year statute of repose period went down to six years immediately. Now, there was no action by the -- by the Association before the enactment of AB 125.

So when they served their Chapter 40 notice, during the 8 -- during the grace period, that did not toll the statute or repose. It couldn't have, because the statute of repose had already expired. That period was already way before that. So by serving that notice, they can't toll a statute that doesn't exist. And that was really the point we were trying to convey.

So you have -- you have a statute of repose that because of the -- because of the shortened statute of repose, it would have expired in 2014, as of February 23, 2015 when AB 125 is enacted.

THE COURT: Well, that's if the six-year statute of repose -- well, I don't know that I agree with that part on it, but I think the fact of the matter is -- see if there was a statute -- if the statute of repose that was six years only before -- like, now I'm talking about, for example, if they had a patent defect, and they didn't act on it within the six years, well, then it would have expired two years before AB 125 came into existence, but we're not getting -- I'm getting the sense that you're not contesting that at all. You're just assuming, hey, it is this ten-year for purposes of this motion.

MR. GIFFORD: Correct. Yeah, no, we're not -- we're not

arguing it's 6, 10, 8 years. What I'm saying is that it doesn't really matter. Because the minute that AB 125 became effective, and no action was taken by the Association, it all of a sudden became six years.

THE COURT: And then they have a safe harbor to file their lawsuit, or to --

MR. GIFFORD: To file a lawsuit.

THE COURT: -- institute --

MR. GIFFORD: Right. To commence their action. Right. And that's the point that we're trying to convey. They did not commence their action in that period of time. They should have. And they're arguing that they get tolling in this case because they served their Chapter 40 notice within the safe harbor. And the point is, Your Honor, that serving it in that period alone, by itself, does not toll the statute of repose.

If you serve it during the statute of repose, yeah, you get that. In all the cases before us, we have the *Foster* Ruling, your analysis was consistent with that. In *Burn* (phonetic) Judge Scotti -- I know this is not, you know, binding, but Judge Scotti said the same thing. In *Lopez*, it's consistent with the *Lopez* ruling. It's consistent with *Dykema* (phonetic). As long as you serve your Chapter 40 notice during the repose period, you get the tolling.

And I'm not arguing they couldn't. If they had served their Chapter 40 notice, the day before AB 125 was enacted, assuming there was a ten year statute of repose period, then, yeah, they would have gotten the tolling. They would have gotten it, but they didn't. They

missed it, And they had to file their lawsuit within that one year.

THE COURT: Okay. I understand your position.

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

THE COURT: So I'm going to have to go back and read what I did before.

MR. GIFFORD: Right.

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

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

Now, even if they get the tolling, even if you give them the benefit of the doubt, the fact is, they still missed their deadline for the tolling period. So the first thing is important, we have to realize, okay, well, let's assume they get the tolling. Let's assume they got it. What would be the applicable tolling period? Well, under 40.695, the new statute, it says that it's the earlier of 30 days after mediation, or one year. So it's a maximum of one year.

Well, February 24, 2016 is when they served their Chapter 40 notice. One year would be a year from that. But the -- the mediation in

this case was actually September 28, 2016. So 30 days after that, October 28, 2016. That was the earlier of the two days. So that would be the applicable statute of repose -- excuse me, that would be the applicable tolling period, if they had gotten it.

Now, during that time, September 28th to October 28th, they didn't bring their lawsuit. They missed it not, only by -- and they say in their briefs, oh, we've only missed it by five days, no, they missed the one year rule. The one year mark by five days. They missed what would have been the tolling provision by four months.

And in *Skye,* you used the same set of facts. You said, look even if I get them the benefit of the tolling, you missed it by two weeks, sorry, you're out of luck. Well, that's exactly the situation here, except in this case, their conduct is more egregious. They missed it by four months. So all we're asking you to do is look at your *Skye* ruling and -- and agree with that ruling. It's exactly on point with what we're here to say today.

And I want to address a couple of the arguments on response that the Association has made. They made -- I'll give them credit, it's creative, I think, but I think it's as little bit far-fetched. It's this relation back doctrine, as applied to compulsory counterclaims. I mean first, if you were to agree with that premise, agree with that argument as a whole, you would have to agree with two premises. You'd have to agree with two arguments.

One that their affirmative claims for construction defect were one, compulsory -- compulsory against our dec relief action; and, two,

that because they are compulsory, they relate back to the date of our, filing of our complaint. Well, first of all, the Association's affirmative construction defect claims are not compulsory against our claims. There is a Nevada case specifically on point that says that -- it was the *Boca Park* case, and it says that look, counterclaims to declaratory relief actions, by nature they're not compulsory. It's by the nature of dec relief actions. It doesn't preclude you from bringing later actions. It's not -- counterclaims are not claim precluded from that point. So there's -- not only that, there's a direct Nevada Supreme Court case on the issue.

And, number two, it doesn't -- the factual bases behind both, our complaint -- the builder's complaint and the Association's affirmative complaints, it doesn't meet the logical relationship test that was established by the Ninth Circuit. In that test, it says, it's -- that test is satisfied where the substantial overlap between the facts to the claim -- when there is substantial overlap between the facts to the claim and counterclaim.

Now in the Association's brief, all they say is that our claims are compulsory because they arise at the same transaction or occurrence as the builder's motion -- as the builder's complaint. That's all they say. They don't provide any analysis whatsoever.

Well, if we think about this from a temporal standpoint, if you look at the facts of our motion -- of our complaint, which was a dec relief action, it sought the -- it sought the -- it attacks one, sufficiency of the notice, the February 23, 2016 notice. And it also -- it attacked -- it sought the determination of the current rights and obligations of the parties,

based on the fact there was a prior settlement agreement. So we have these factual elements that would be proved at trial, that exists in this -- time period. And then you have their -- the Association's counterclaim for constructive defect action, those facts, in order to prove those facts, they're going to have to rely on facts that occurred more than 12 years ago. Those facts were whether the building was designed as intended; whether the building was constructed as designed. Those questions are all completely isolated from what is happening in the factual focus of our motion.

So just by virtue of that, they don't meet the logical relationship test at all. Now, even if you would agree that the -- for some reason, if the counterclaims were deemed compulsory, in order to buy that argument, you'd still have to agree that those claims relate back.

Now Nevada does have relation back. They have a relation back doctrine, but it applies to one's one pleadings. If I were to file a complaint, and I filed an amended complaint, that amended complaint's date of filing would be deemed related back to the original complaint. It doesn't cross party lines. It doesn't --

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

MR. GIFFORD: Right. So it doesn't. And not only that, like just from a logistical standpoint, it doesn't really make sense, and there's no law that really supports it, but at the same time, there's a law that specifically does not support it, and it's the -- sorry, the *Nevada State Bank v. Jamison* case. That case is directly on point. It actually

couldn't even be clearer.

So it says, instituting an action before the expiration of a statute of limitations, which would be the builder's complaint, does not toll the running of that statute against compulsory counterclaims filed by the Defendant after the statute has expired. So right there you have a very clear holding from the Nevada Supreme Court. That case has not been overturned. There is nothing in that case that limits the applicability of that law to the facts of that case, at all. It's good law. And it's directly on point.

So, again, even if you agree that the claims are compulsory, you still have to agree that they relate back, but that would be contradictory to what the Nevada Supreme Court clearly stated in a very clear case. And again, just to go back to *Skye* for a moment, Your Honor didn't rule that those claims -- it was the same set of facts, whereas the builders in that case, they filed a complaint a couple of days after the mediation. There was an answer and counterclaim for construction defects by the HOA, they filed that claim two weeks after that deadline. There was no ruling that those are compulsory counterclaims, and they relate back to the filing. They were out luck. So it's -- you know, ruling in that way would be consistent with what you ruled in *Skye.*

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

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

THE COURT: Okay.

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

THE COURT: Right.

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

In addition to that, the law clearly states that construction defect claims are not compulsory, and they do not relate back to builder's complaint. The only other way Association can succeed today, is by successfully arguing with a good cause argument, under NRS40.6952. That's the only way they can succeed. And the problem with that is three-fold. Number one, they haven't -- the Association hasn't provided any relevant caselaw or analysis in support.

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

MR. GIFFORD: You know what, I apologize.

MR. GAYAN: Okay.

MR. GIFFORD: I apologize. I'm actually going to -- I had two more lines, and I'm going to let them argue their countermotion.

MR. GAYAN: That's fine.

MR. GIFFORD: And then I'll respond to that.

THE COURT: Okay.

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

THE COURT: Go ahead.

MR. GIFFORD: Number two, the good cause factors addressed in the Association's reply brief deal with a completely separate issue of whether it is appropriate to serve someone with a complaint that's already been filed. That's under NRCP4I. Completely inapplicable; and, three, the Association has not shown good cause, as they say by diligently prosecuting this case. And with that, Your Honor, I'll let that rest for now. Thank you.

THE COURT: Okay.

MR. GAYAN: Good morning, Your Honor.

THE COURT: Good morning.

MR. GAYAN: So I want to take a step back. This is a 2016 case -- September of 2016. We are approaching three years into the case. This is the builder's fifth dispositive motion filed against our client over the course of the three years. The first one, they asked Your Honor to compel us to amend our notice. We spent six months doing that. Amended the notice. Your Honor has authored two extensive, written decisions in this case on builder's prior dispositive motions. And now we're standing here today, and they're saying we were time barred from the outset.

If that truly was the case, and they believed that to be the

case, why was this not the very first motion filed? Why make us -- why make the Association jump through hoops? Why make the Court waste its time? I don't know. We've probably been over here -- and these hearings are always quite long, and I appreciate the Court's patience, but probably 15 to 20 hours between all of the hearings we've had over the years of this case, and that doesn't even count the Court's preparation time.

Then my client, having to go amend the Chapter 40 notice, come back, litigate all of these other issues, when the builders now say we were time barred from the day this case started. I think that's pretty telling about what the builders actually believe about this motion. I don't know why they would've wasted all the time, their time. They don't work for free. This isn't a pro bono case.

Everybody is putting a lot of time and effort into the case, and so to bring a motion like this three years into the case, practically, we have a special master appointed, a CMO entered, parties that are -- we have a depository open, the builders have been demanding documents and recent special master hearings, Mr. Lynch has been chasing down documents with the HOA's prior counsel, we've been producing documents, we've been doing inspections.

It's pretty ridiculous to come in -- frankly, in my opinion, to come in here merely three years into the case after all of this work has been done by the parties and by the Court, and to say we were time barred at the very beginning, and we shouldn't even be here, and it's all been a big waste of time. So I think that's pretty ridiculous and a

window into what the builders actually believe about this motion.

As far as the procedural problems that they have, it's in our papers, and I think it's pretty clear, the builders did not meet the Rule 56(c) requirements when we filed this motion, and those are important requirements, and it's straight from the rule, and I'm looking at the old rule. I know it's changed, but this motion was filed with the old rule, and I don't know that it's changed substantively a whole lot, but, you know, they moved all the subparts around. So I don't know if it's still 56(c). I didn't check that.

But in any event, 56(c), they actually have to present with admissible evidence -- admissible evidence -- and that's important, and I'll get to that in a minute -- and demonstrate to the Court that there are no genuine issues of material fact related to a particular issue. And so they're coming in here on a statute of repose. Well, let's go look at what that motion -- or what that relief requires. And we're looking at AB 125, so section 6(a), whatever. I can't remember, 21(a)(6), or something, I think it is. And we have to look at substantial completion, and we have to make an accrual.

So that's what we put in our opposition. And the builder's response to their shortfalls on their own burden are way off base. My client has no obligation to come in and supply facts to refute something that they never even proved in the first place, that the rule itself and all of the cases interpreting it say the moving party's initial burden is to supply all of the necessary undisputed facts, and only when that happens does the burden shift to my client, the non-moving party, to

respond with admissible evidence to show that there is a genuine issue of material fact.

So for the builders to argue here today and in their papers and say that we had some obligation to put forth the evidence of when notice of completion was done or the accrual date and all of those things, that just completely misses the mark.

THE COURT: I do have one thing I did think about, Mr. Gayan, on this one, though, is they've got two of the dates for these buildings. They've got the first one and the last one. The final building inspection date and the certificate of occupancy. The one that they're lacking is notice of completion, and they're just -- they're telling me they can't find it, but one thing that strikes me is that, you know, the instructors, whenever they are in the jury box, you don't leave the high juror every day common sense, and it doesn't make sense to me that a notice of completion would be years after -- would come later, you know, years later possibly, after the C of O. It seems to me that it would've come down about the same time, and typically in my experience, it is even a few days before the C of O is issued.

So I mean, can't I just look at it, say, you know, isn't this getting into the -- oh gosh, I'm losing what they -- in fact, I'm going to go back to my motion on that, the standard of review, where --

MR. GAYAN: I understand what the Court is saying.

THE COURT: That it's -- yeah, it's, basically -- are we into the gossamer threads of whimsy, speculation and conjecture now as to where the notice of completion would be. I mean, I can't speculate that it

would've been years later when people are in the building.

MR. GAYAN: Well, I'm happy to address it.

THE COURT: Sure.

MR. GAYAN: The gossamer threads of whimsy and conjecture, those are the ones the burden has shifted. The burden has not shifted -- there's three dates that must be provided, and it's the --

THE COURT: Yeah.

MR. GAYAN: -- latest of those three. I'm not asking the Court to speculate about anything. And I understand the Court's urge and what we tell the jury to bring their common sense, but frankly, we're here at a Rule 56 hearing. The jury is a fact finder, so two completely separate roles --

THE COURT: Okay.

MR. GAYAN: -- I think.

THE COURT: I understand.

MR. GAYAN: And once we get to a jury, everybody has had a full opportunity to do discovery, and if the evidence isn't there, they can infer whatever they want to infer. The Court should not be inferring things, and actually, everything is supposed to be taken in the light most favorable to my client, and I'm not saying -- I'm not asking the Court to assume it was two, three, five years later. I'm not sure, you know -- that's not the Court's role here today, but at the same time, the Court shouldn't be speculating that it was around the same time as the certificate of occupancy, even though that's what normally done.

And on the term to what builders have said -- so they're not

on the notice of completion date. In their reply, which is too late -- too late to bring up new evidence on a motion for summary judgment. Rob, my client, are going to have an opportunity to respond to the new evidence. And I just want to point out really quick, Your Honor, it was a 17 page motion with like 50 or 60 pages of exhibits. The reply was 30 pages with 110 pages of exhibits. On a motion for summary judgment, think about that for a minute. All of the new argument and evidence that they're trying to put in.

Now, on this notice of completion issue, all sorts of new documents, and a builder's affidavit from counsel. That is not admissible evidence. Further, Rule 56 requires any affidavits submitted in support of this motion for summary judgment to be based on personal knowledge. Take a look at the builder's affidavit. It says, someone in my office did this. Well, that's not personal knowledge. That's, okay, I told someone else to do something and they looked online, and they searched records, and they made some phone calls. That's not personal knowledge. That wouldn't come in at trial. It's not admissible.

So we've got major objection to the builder's affidavit, and the new information and evidence being supplied on reply, when it should have been, and was required to be by rule in the motion, to even shift the burden to my client in the first place. So that's a major procedural error that I think it precludes summary judgment outright.

Now I understand they could fix it, and we could come back here. I get that. So at least my client has an opportunity to respond, maybe leave for a sur-reply and continue the hearing, if the Court is

open to that rather than making them refile the whole motion. We would be open to something like that because we don't want to waste everybody's time, of course, but I think it is a pretty significant issue from a procedural standpoint, and them asking to throw our whole case out when the burden was never actually shifted due to the lack of sufficient evidence.

As far as the accrual goes, I understand his position that it's better for us to assume that -- better for the Association and for the Court to assume that accrual happened before AB 125's enactment. I get that. That was more of a ticky-tack pointed out thing that it just wasn't in their motion either. Both of the things that were required to determine what the statute proposes and whether the HOA timely brought its claims, they didn't have sufficient evidence for either, so it was just a deficient motion from the outset, and that was really the point being made there.

We obviously believe and acknowledge that the claim accrued for statute of limitations purposes, which is what is the accrued in the grace period, part of AB 125. That's what it's referring to, and that's in the *Alsenz* decision where they're talking about the constitutionality of retroactive statutes and repose and limitation. Specifically, repose and that you need a grace period, and *Alsenz* followed that older *G&H* [phonetic] case where they struck down the retroactive statute repose because there wasn't a grace period. Fast forward a few sessions and the Legislature learned its lesson and put the grace period in, and then in *Alsenz*, the grace period was enforced.

So in any event, just procedurally, the evidence they needed

to supply to support this motion was not in the motion. My client had no opportunity to respond to a properly, brought Rule 56 motion. The burden never shifted to my client, and we had no obligation to help out the builders in supply of information when that burden was not met.

I just want to state it for the record since it was also in the reply. It's on page 4 of the reply, their purported table of undisputed facts. There's all sorts of legal conclusions baked into those. We just object to anything, well, saying that a certain date was the date of substantial completion. That's for the Court to decide based on the evidence, and the evidence wasn't actually provided until the reply. And then also, when the HOA commenced the action, so we just want to lodge some objections there for the record since this is in response to their motion.

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

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

MR. GAYAN: No.

THE COURT: Oh.

MR. GAYAN: I'm just taking a pause.

THE COURT: Oh, okay.

MR. GAYAN: In case you have any questions.

THE COURT: Nope.

MR. GAYAN: I do want to address your conditional counter motion comment. You've never had one. It only matters if the Court buys into their motion in the first place, so that's why it's conditional.

We don't need relief under subpart two of the towing statute unless you think we're already time barred. So anyways, that's why it's conditional.

As far as the substance of the builder's motion, if we could get to that, they're essentially -- what I understand from the papers and what I think I heard here today is that AB 125 immediately -- upon its enactment, immediately shortened all statutes of repose to six years, and the HOA does not give a benefit of the grace period. That's just not what -- not -- we don't get the full benefit of the grace period. AB 125 definitely does not stand for that proposition, and I think it's in the papers, but I just printed a copy as it's easier. You know, this is section 21(6)(a).

Now, sub 5 of Section 21 here, in 8125 is the section that applies the new six year statute of repose, retroactively. Okay? So sub 5 is the retroactive part of the law. Sub 6 says the provisions of subsection 5, which are the retroactive portions, do not limit an action; A, that accrued before the effective date of this act, and was commenced within one year after the effective date of this ad. And then the other subsection relates to contracts. So I'm not sure that one applies, but we're talking about accrual and commencement within a year.

So the way the grace period actually reads, the retro activity, and the new statute of repose six years, does not apply if the action is commenced within one year, so the builder's argument that it immediately applied, no. AB 125 specifically says it does not apply if the association complied with the requirements for the grace period, which was to commence the action within a year, and we did, and I'll get to that

in more detail here in a minute, but what the builders are trying to do is completely unconstitutional under All Sense, it's cited on page 9 of our opposition.

We didn't discuss the constitutionality argument fully, but we did say it is a constitutional problem what they are asking the Court to do, and I'm just going to read a short blurb from *Alsenz*. This is page 1123 of the decision. This is the conclusion. Therefore, the legislature must allow a grace period for a claimant to file an existing cause of action. Without such a grace period, SP105 is unconstitutional."

So that's essentially what the builders are asking this Court to do, to ignore the full one year grace period, and they're arguing that there was no grace period left to toll at the time we served our Chapter 40 note. That is just wrong. As a matter of law, *Alsenz*, very clear and binding. We get the full opportunity of a grace period whenever a statute to repose is retroactively replied and shortened, which is what happened here.

I think I heard the Court say the Chapter 40 notice tolls, so I think -- and if I'm wrong, I'm happy to address that in more detail. I was hoping to skip over that.

THE COURT: Well, in fact, I'll just kind of read from my Skyview, paragraph 11. "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 acclaim based upon a constructional defect governed by Chapter 40 still toll deficiency causes of action from the time NRS 40.645 notice is

given until 30 days after mediation is concluded or waived in writing."

MR. GAYAN: I have nothing else to say.

THE COURT: Okay.

MR. GAYAN: That is what the law is. I think that's an accurate statement of the law. So now, the builders little trick around the tolling provision is, well, the grace period wasn't codified. It's not actually in the NRS, and so it wasn't told because 46951 only says it tolls statutes of limitations or repose. Well, that's just nonsense.

I looked up the definition of statute to repose. It's any law that limits the time in which a party can bring an action against a Defendant from the time the Defendant acted. Any law. It doesn't matter if it was codified. And let's think about it practically. Why would the legislature codify the one year grace period? Why would it go on the books forever when it only applies for one year?

If you go back and you look at SB105 and *Alsenz*, they didn't codify if there either, but -- so that's kind of a ridiculous form over substance argument getting way into the weeds saying that the grace period isn't technically a statute, and so it can't be tolled. That's just wrong. Then practically, those grace periods are not codified because they're -- they've got a one year fuse on them. Why put them in the books forever?

Then from a legal standpoint -- not a practical, but legal -- the grace period is an extension of the statute of repose. It specifically relates to the statute of repose. It's required for a retroactively shortened statute of repose.

It is essentially its own mini statute of repose for one year because it's required under the due process clause of the Nevada Constitution. So it is its own little statute of repose. So to say it's incapable of being tolled at all because it's not a statute, is just long and incorrect on a number of levels, and frankly, unconstitutional and in violation of *Alsenz* and Nevada law.

And Your Honor, I'm going to point out -- I don't know if you have the papers in front of you, but the builder's reply, Exhibit K, and this is interesting. This is a copy of their complaint. I don't know if Your Honor has that, but --

THE COURT: I do. Right here.

MR. GAYAN: Okay. So I'm looking at paragraph 30 on page six, and this is the section where the builders are talking about the grace period. Paragraph 29 is talking about the grace period and what it does, and basically quotes it right there, but paragraph 30 is the interesting part and it's really near the end of the second line, but I'll read the whole allegation. This is the builder's allegation. Plaintiffs are informed and believe in thereon allege that in order to be able to rely on AB 125, § 216(a)'s one year's grace period."

And then this is the interesting part. The Defendant was required -- the HOA was required to provide Chapter 40 notice to Plaintiffs prior to the effective date of the act, February 24th, 2015, and to commence any lawsuit with regard to any unresolved claims prior to the expiration of AB 125's one year grace period."

So it's the first part of that. The allegation is that to take

advantage of the grace period, the HOA had to serve its Chapter 40 notice before AB 125 became effective. I don't see that in any of their papers here today. So I don't know how you mov for summary judgment for dec relief on a completely different theory than what you've alleged in your complaint. They have gone away from this for some reason.

I think it's an incorrect statement of the law. I don't think there's anything that would require -- in AB 125 that required the HOA to -- in order to take advantage of the grace period, we have to have served the notice before AB 125 was even inactive. I mean, now you're going back to *Alsenz*. The parties have to have notice of a change in the law before they can act. So to say we have to act and predict what the legislature is going to do, that they might pass AB 125, so we better hurry up and get a notice out, that's just absurd. So I think that's why they've completely gone away from what they're alleging in their complaint in paragraph 30. Now they're arguing something completely different. So from a -- also from a procedural standpoint, I'm not sure they can actually do that, allege one thing and move for summary judgment on another.

So Your Honor -- and I apologize, this is -- you know, this is a fairly important issue for my client, this case is dispositive, so I do want to make a bit of a record, but I think the statutory analysis and issues, even though it looks complicated with all the paper, it's relatively simple. I mean, the first question -- I think it's really three questions, and the answers to those three questions are all yes, but does the grace period

apply from AB 125. I think the answer based on the evidence is yes.

Did NRS 469571, sub 1, did it toll when the HOA served its Chapter 40 notice? Based on what Your Honor read before and we've already talked about, that's a yes. And the last thing is did the HOA bring its claims -- its defect claims, before the tolling period expired, and the answer to that is yes, as well. And I'll get to that one in more detail. I think we've already covered the first two, but really, we're down to the third question, which is also a yes, but it's maybe the most complicated or the most factually intensive one of the questions of the bunch.

So Your Honor, it kind of comes down to we've got the notice filed, the pre-mediation process is going on, inspection is happening, correspondence being sent back and forth. That timeline is in our papers. The parties were working together, as they're supposed to, behaving, and cooperating during the prelitigation process. That was all happening, then the mediation happened.

I think that occurred on September 26th, 2016, if I recall correctly, and that mediation did not result in the HOA's claim, and it was two days later, on September 28th, is when the builders sued the HOA. And in doing this, and Mr. Gifford here today, and he put it in their papers, and he told you repeatedly, because they really need you to believe this, that their complaint is only for dec relief. Well, I don't know if Your Honor still has Exhibit K open --

THE COURT: I do.

MR. GAYAN: -- or handy, but I'd just like to point out how wrong that is. There are some claims for dec relief here. The first claim

is dec relief, the second claim is sec relief. The third claim, failure to comply with Chapter 40. Also, dec relief, seemingly, and that was their first motion they tried here, and second. The fourth claim, suppression of evidence spoliation, and that is -- and the Association actually brought a motion to dismiss and said that's not an independent claim, and the Court denied the motion because there's some Nevada law out there that says this could be construed as a poorly pled negligence claim.

So this isn't for dec relief. This is for substantive relief or spoliation. And then even worse, fifth claim, breach of contract. And then there's dec relief, duty to defend, and duty to identify, but if you flip it over, page 18, in their prayer for relief, second prayer for relief, for general and special damages, in excess of $10,000. They're filing claims for damages against our client, so this is not a dec relief complaint that was filed by the builders. This was dec relief and damages.

And so that's pretty important, especially to knock the argument out of the water that they're entitled to some kind of an exception under *Boca Park* [phonetic], and they cite *Boca Park* -- that *Boca Park* case. It has nothing to do with the HOA's counterclaims. It has everything to do with the builder's claim. *Boca Park* just says you can file a complaint for dec relief, get some certainty on the issues that you're seeking in your dec relief complaint, and bring your complaint for damages later. You can split the two because *Boca Park* was where a party did that.

I think it was a tenant or a landlord. I think it was a tenant, sought dec relief first, one, then went and filed the complaint for

damages, jury trial in front of Judge Gonzales, won at the jury trial, then appealed, and the Supreme Court said, that's fine. That's what dec relief complaints are for, so you can get some certainty before you go into some big blown up, you know, litigation that lasts three to five years or whatever and spend a lot of money. Parties can get certainty.

So you can split those up, but -- let me find *Boca Park*. I apologize. I don't remember where I put it. There's a good quote from *Boca Park*, and I hope Mr. Williams can hear me. I'm trying to speak up into the microphone.

Okay. So *Boca Park* -- this is right in the introduction --

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

MR. GAYAN: Yeah.

THE COURT: In the fifth claim for relief, they -- I mean, they've got a dec action on just about everything else, but they've got a breach of contract action on the settlement agreement. So I haven't asked the Plaintiff yet, but I just assumed that these general and special damages in excess of 10,000, dealt with that. I mean, I haven't seen --

MR. GAYAN: If --

THE COURT: -- a settlement agreement, if there's a liquidated damage clause. I mean, I don't know what's there, so --

MR. GAYAN: The whole -- those claims, breach of contract and spoliation, it all relates to our Chapter 40 notice and the construction defect allegations. They're claiming that the association breached the prior settlement agreement by asserting claims in a Chapter 40 notice, and they're claiming they were damaged by it and that there was some

duty to indemnify and defend in that settlement agreement, and so the HOA owes them all of their Defense costs and has to indemnify them for any of the HOA's damages.

That's what they're arguing, so in their mind, under their -- the way they've alleged it here, they're not just seeking dec relief on the duty to defend and duty to indemnify that they say exists for these claims, they're actually seeking those damages in this case. They're not just asking the Court to rule on a settlement agreement and what it means. They want their money. So as far as they're concerned, the bill for my client is running as we speak right now, and their damages are just going higher and higher. Every day -- every time they file a new motion.

And now, you know, they're going to ask my client to pay their Defense costs, even though they could've brought this motion the very first, right? So now we've wasted two and a half years of time on a simple statute of repose motion that could've been brought at the outset. So I don't think their settlement agreement claims will prevail in the end.

I'm not asking the Court to decide that today. You haven't even seen it, but in their mind, they're asking my client to pay for all of their defense costs for our own claims, under this prior settlement agreement, and then they choose to litigate in this manner and waste everybody's time and bring this simple motion fifth, when it could've been brought first. So it's certainly a claim. They've got at least two claims for damages. Their prayer for relief seeks damages. This is not simply a dec relief complaint.

So just to close the loop on the *Boca Park* issue, the holding right up front from Justice Pickering, "So long as the first suit only sought declaratory relief a second suit for contract damages may follow."

So the builders have combined their dec relief and damages claims into one. They're stuck. This is their one shot at dec relief and damages. They cannot bring a damages suit second.

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

Now that that issue is resolved, hopefully, Rule 13A -- and this is in our papers -- requires, a part of Defendant, to file counter-claims, as long as they are -- it rises out of the transaction or occurrence that is a subject of the opposing party's claim. Their entire complaint relates to our Chapter 40 notice, and whether they've been damaged by us even bringing those claims. Their entire complaint relates to the Chapter 40 notice, and they have substantive claims for damages related to our Chapter 40 notice. How in the world can they argue that our actual Chapter 40 claims, which are the entire subject of their complaint, are not related to or of the same transaction or occurrence as what's going on in their complaint?

Our substantive claims are spot on. I don't know how the Court -- how would the Court -- the Court's going to have to do the same thing, right? At some point, you or a jury or somebody is going to have to look at the prior settlement agreement and determine if our current window claims were settled and released in the prior case. Why would we go through this exercise twice?

So to say that our claims are not compulsory counterclaims, I think is -- or to say that they're not arising from the same transaction or occurrence is a pretty tortured reading of that language. I think there's certainly compulsory counterclaims, and that's why they were brought. Certainly, for efficiency sake, but also because I think they have to be as a counterclaim in this case. Ultimately, that's for the Court to decide, but I think there is really no other way to interpret the rule and the law on that issue.

As far as relation back, it doesn't cross party lines. That's not in the law. It's not in the rule. It's a good little catchphrase, but it's just not true. Sure, Rule 15 says under certain conditions amended claims can relate back. I'm sure Your Honor has heard a few of those motions over the years about whether claims and amended complaint do relate back or not, and that's a big deal sometimes in those cases, but there's nothing that says it only applies in those scenarios. And, actually, we cited to Nevada, District in Nevada, Federal Court decisions on Federal Rule 13, which is, you know, Nevada just overhauled all of their Rules of Procedure. They pretty much mirror a lot of the Federal rules, and those changes that have happened over the years, and those Federal rules

decisions said counterclaims do relate back.

There's no case on point in Nevada. The builders point to this *Jamison* case, that is very factually different from what we're talking about here. I would urge the Court to look at that more closely before deciding the relation of back issue or least before accepting the builder's position on what *Jamison* says.

This was a deficiency judgment case. I think maybe you even had one of those on the calendar today. But, in any event, this was dealing with a 90-day statute of limitations, specifically for that type of claim. And the Supreme Court, they looked at this one, and they were deciding whether the filing of the complaint tolled statutes -- or statute of limitations for counterclaims that had expired before the counterclaims were filed.

And this is 106 Nev -- let's see if I can get the whole cite for the Court -- 792, and then at page 798 is where the Court really discusses it, and there's a couple paragraph discussions here that near the end of its analysis, the Court says, in this case, deficiency judgment with a 90-day statute of limitations, it is questionable whether stable claims and lost evidence represent the paramount concern addressed by a three month statute of limitations. Since the statute also addresses viable concerns other than stale evidence, it should be enforced.

So I think *Jamison* -- Mr. Gifford said it isn't limited to its facts. I think every appellate decision is limited to its facts for the most part. The district courts are always looking at those to try to see what the holdings are and what it really meant, what was really decided,

what's dicta, what's not. *Jamison* is specifically dealing with whether tolling applied where there's a 90-day statute of limitations, where it's clear that there are significant other considerations baked into that 90-day deadline besides stale evidence.

Here, we're talking about a six year statute to repose that just came down from eight or ten years. That's clearly a stale evidence situation where you're talking about many, many years, instead of the outer -- furthest outer limit to bring a claim many years in the future. Very different from the 90-day statute of limitations that *Jamison* was dealing with.

So I don't think there is any law on point on this issue. In the State of Nevada, I think the Federal law, which is very persuasive here and how that's going to interpret it, is clear, that counterclaims do relate back -- compulsory counterclaims relate back, and that's what we have here with the Association's defect claims.

And I don't think there's any dispute that if the Association's claims, the window claims that are left, based on the Court's prior rulings -- I don't think there's any dispute that if they do relate back, then it's within the 4695, sub 1 tolling period. It was just two days after the mediation concluded and failed.

So does the Court have any questions --

THE COURT: Not yet.

MR. GAYAN: -- on the counter -- okay. So now I'm on the conditional counter motion. I'm happy to be the Court's first conditional counter motion. I'll make note of this.

So if the Court, after all of that, decides the HOA did not timely bring its construction defect claims, we are counter-moving for relief under NRS 4695, sub 2, which gives the Court discretion to extend the tolling period for good cause. And as stated in our papers, there's no case right on point that interprets good cause under 4695.

And so the closest thing we found was this *Scrimer* case. I don't know how to pronounce it. *Scrimer*, it's in our papers. I'll call it *Scrimer*. And that was interpreting the good cause requirement in Rule 4, which is when a Court should extend the time for service beyond the 120 days.

Well, from a practical consideration as far as stale dating claims and those types of considerations, when you're talking about statute of limitations or repose, deadline to serve is pretty similar, because now you're just delaying notice to the plaintiff or to the defendants, potentially a lot longer than the four months than the rule gives.

So those *Scrimer* factors, I think, apply here, and I think the Supreme Court would apply them, and I think it makes a lot of sense. And this is on page five of our reply on the counter-motion. We list those factors. And all of those factors favor extending, if the Court believes that's even necessary.

THE COURT: Mr. Gayan, in looking at subsection 2 of 40.695 --

MR. GAYAN: Uh-huh.

THE COURT: -- when this first came down, it seemed to me

that subsection 2 was taking into consideration those cases such as *Kitech* [phonetic], for example. And I know you're intimately familiar with that because that involved, what, 36,000 homes over the course of three or four cases, right?

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

THE COURT: Yes, I know -- and you would have engaged in a lot of destructive testing, or I should say the folks you hired for that. So, anyway, I took subsection 2 as really applying to the one year because under subsection one where it says that you've got a tolling from time of notice of the claim to be given until the earlier of one year after the notice is given, meaning they really want you to get this thing done, or 30 days after mediation is concluded or waived the right pursuant to enter NRS40.680, and it's the earlier of.

So I think they were envisioning 30 days after the mediation or, you know, one year. And then that would give the Court -- if you're still doing the Chapter 40 step because you've got these 36,000 homes, for example, then you're going to need more time than a year.

In fact, how long did it take you guys to do all the destructive testing that you needed to do in the *Kitech* case?

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

THE COURT: Judge Williams.

MR. GAYAN: Okay, Judge Williams. Because it was both, really.

THE COURT: Okay.

MR. GAYAN: I mean, we were doing both. Your Honor

stayed us in that *Quintero* [phonetic] tag along case --

THE COURT: U-huh..

MR. GAYAN: -- against KB and Woodside [phonetic], so we were stayed. It took a long time. That might be what the legislature intended. I haven't researched that issue. I'm looking at the plain language of what it says. The good cause requirement for extending the tolling, but I'm glad Your Honor brought up the *Kitech* and wove in the stay argument because --

THE COURT: Because there would've been no way you guys could have done the prelitigation process and resolved in the prelitigation process with respect to *Kitech* if we followed the strict timeframes that are set in Chapter 40. And so when this came out, I was saying, oh, they're giving us a, you know -- a little bit more leeway than 40.647 to give you a little bit more time, you know, to extend the time where we have an anomaly like *Kitech*.

MR. GAYAN: That's certainly one of the scenarios that the statute, probably contemplated. It certainly applies to, but I think the distinction is -- and I looked at the *D.R. Horton* case. I think it was in this department, *Arlington Ranch*. And there was a decision on the stay, and Your Honor brought up 4647. This was interpreting 2B, the State provision. And Supreme Court said this is on page 929 of the *D.R. Horton Arlington Ranch* decision. Just as it would for a statutory limitation period -- sorry, let me start at the beginning of the sentence. Let me find a good spot. This was an issue -- Your Honor probably knows this issue better than I do. This was -- we had our contract that's

shortened the statute of limitations to two years, and so there was litigation over, well, you know, what does that mean and what do we do with the stay, the Chapter 40 stay provision.

And so they're interpreted 46472B, and I'll just pick it up here. "Just as it would for a statutory limitation period so that High Noon could undertake the prelitigation process without jeopardizing its claims."

So I think the Supreme Court there is saying, the whole point of the stay provision is kind of what Your Honor was just saying. We want the parties to participate in the prelitigation process and not be rushed through it, and not worry about risking their claims by not filing quickly enough, and I think the distinction here, it's similar.

So 4647 allows the Court to stay, I think, maybe technically requires the Court to stay, if a case has been filed and Chapter 40 hasn't been complied with fully before the Plaintiffs move forward, and 4695 just tolls claims where notices have been provided, but the complaint hasn't been filed. I think they're kind of bookends to the same issue and protect the claimant at all costs, I think, is what the scheme is setup to do. Either way a claimant goes, they're protected. They either get a stay, so they don't get tossed on a statute of repose or limitations issue, or they're tolled so they don't get thrown out for the same reason.

And I think, you know, the way the Supreme Court has interpreted that over the years, and I come back to *Scrimer*, is the whole good cause analysis. The Court has why discretion to determine good cause. That's clear at least under *Scrimer*, and I think it would apply to

4695, sub 2, but the discretion is not unlimited, and *Scrimer* Court actually reversed and remanded because there was no prejudice to the defendant from the slight delay in bringing the claim.

And we went through all the factors from *Scrimer*. It's essentially the same thing, and Nevada public policy is called out, again, there by the Supreme Court. We have a strong, very clear public policy that claims are to be decided on their merits. So that's kind of the foundation that all the other factors build on, and the Supreme Court adopted a more flexible approach to the good cause. They specifically and expressly disavowed any of their prior opinions that suggested it was a very rigid good cause analysis. They said it's very flexible and remember, strong public policy on deciding claims under merits.

In going through the factors, the first three don't really apply, and I'm looking at page 5 of our reply in the counter motion, but four doesn't really apply either. Five, the running of the applicable statute of limitations, here it's reposed. Six, the parties good faith attempts to settle during the 120 day period. I think they threw that in the mix because some of the cases that I cited here, prior decisions on this good cause issue, said look, they didn't serve because the Defendant knew about the case, and they were trying to work it out, so it's pretty ridiculous to say that there's not good cause to extend the service under that scenario. And that's what we have here.

They got our Chapter 40 notice. We were going through the prelitigation process. We had the prelitigation mediation. They were fully aware of our claims long before they got the actual counterclaim.

Then factor seven, the lapse of time. Here, there was a lapse of time before the counter-claims were filed, after the 30-day portion of 4695, somewhat, but the outer limit is one year. We're a few days after that, and you know, I can't really speak to -- that was before my time. I can't really speak to what happened or why, but you know, obviously I think they're compulsory counterclaim that don't to need to get here, but the timing, it's not like it was some egregious timing.

The HOA filed their counterclaims timely, in the ordinary course after filing a Rule 12 motion, getting the Court's decision, and then answering and filing a counterclaim was all done on time, the way it should. The HOA has been diligently prosecuting the case, both prelitigation and once the case was filed by the builders, preemptively getting it started. HOA has been participating fully in the entire process.

Factor eight, the prejudice to the Defendant caused by the Plaintiff's delay. There's none. If you look at the builder's opposition to the counter motion, they can't identify any prejudice from the slight delay in the counterclaims actually being filed if they don't relate back, because there is none. They hold off and filed. They knew about our claims. We tried to settle our claims before they even filed. And factor nine, Defendant's knowledge of the existence civil lawsuit. They knew it was coming. That's why they filed their complaint preemptively.

So I think prejudice, you heard it in a hearing previously, similar to Rule 15 analysis. There's just simply no prejudice whatsoever to the builders from moving forward with this case on the merits, especially after all of the work everybody has been through and the

Court has decided HOA has viable window claims. Here we are today, and then to say that there's somehow prejudice, I think it's pretty clear that they're fully capable of defending this case or prosecuting this case, however you want to look at it, based on what's happened so far.

So the lack of any prejudice whatsoever, that, and some of the other factors, that's what caused the Nevada Supreme Court to reverse the district court in the *Scrimer* case, and that was a similar good cause analysis under Rule 4.

We reviewed all those factors and so to the extent it's even necessary, I think although this Court has wide discussion to determine good cause based on the circumstances of each case, I think the circumstances here it would not base the discretion to not find good cause due to the complete lack of any prejudice, first and foremost, and we had a strong policy [indiscernible] the case on the merits. Thank you.

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

MR. SAAB: Sure.

THE COURT: Okay. Let's do, what, 10 minutes?

[Recess at 10:56 a.m., recommencing at 11:04 a.m.]

THE MARSHAL: Come to order. Court is back in session.

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

[Pause]

MR. GIFFORD: Thank you, Your Honor.

I'm just gonna' go over and address some of the points that counsel made in its opposition.

THE COURT: Okay.

MR. GIFFORD: Then, we'll move into our opposition to their counter -- their conditional counter.

THE COURT: Okay.

MR. GIFFORD: Sure. So, you know, one of the -- one of the complaints that the association has is that this motion, today, should have been filed three years ago. Maybe that -- maybe that should be the case or not, but, the focus here today should not be on, you know, our litigation strategy, you know, and it should be on what good cause, and what good reason they had to file their action, after the statute of repose period expired. That should be the focus.

And, yes, regrettably, the association has incurred costs; so have we. We've been here for -- yeah, three and a half years, and we've incurred a lot of costs, too; I get it. But, that -- that alone, isn't really -- isn't really go to any sort of argument that, you know, that we were not being diligent, or that we were acting in bad faith. I think they used the word dilatory. Your Honor, no, I mean, that's just not -- that's just not true.

The next argument that counsel was arguing, was that under Rule 56, that we hadn't met our burden. Well, Your Honor, like I said earlier, we provided the Court everything that was available. And, we've explained that, once it was challenged -- in our reply brief, we explained what we did. And, counsel had an issue with the fact that it was somebody from my office. Well, that person is under my supervision. I even looked personally. I looked at all the records, myself, as well. And,

just because our affidavit said our office, it was, yes, I did it as well. I just doubled down, just to be safe. There are none of those records available.

Counsel said that they have no obligation to do anything with regard to showing any sort of facts in response to NRCP56. But, the *Wood v. Safeway* case, Nevada Supreme Court case. It says, the non-moving party -- this is on page 732 -- citation 732 -- the non-moving party also must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial, or have summary judgment entered against him. All they've done, they, being the association, all they've done is just complain that we haven't told -- provided all of the available dates. But, Your Honor, their obligation is to try to pull something out and show that there's some factual dispute; they haven't done that.

One complaint that the association had was that our reply brief was much longer than our-- than our motion. I think if you look at the conditional countermotion as well -- that was one page -- there was no -- there were no exhibits to that. Their reply in support of their conditional countermotion was seven page, and it had over 50 pages of new -- new documents that they've brought forth. So I don't really think that argument pulls much weight.

Counsel brought up the fact that he believes that the stat -- that the proposed -- the grace period itself, is sort of a mini statute of limitation or repose. That is so far from the truth, it is contrary to the whole point of the grace period to begin with. The whole point of the

grace period is -- when AB125 -- and I know you know this -- when AB125 was enacted, it was meant to -- it was a very harsh ruling, because it would apply retroactively to claimant's claims. And, it would cut those off. So the legislature decided, look, we're gonna' provide -- if your claims accrued before that date, you would otherwise have lost those claims? By virtue of the statutory oppose being shortened, we're gonna' provide a grace period for you to bring your claims, file those causes of action, and -- and that was what the legislature intended. It was a harsh result. The fact that they have a grace period to counteract the bad -- the harshness of the new limited statute of repose, they're not the same thing. They're completely different. One is meant to counteract that statute.

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

MR. GIFFORD: Understood, Your Honor.

THE COURT: But, you're being very nice to the legislatures, I just want to let you know that.

MR. GIFFORD: Yeah. I'm trying to be respectful; you know.

Your Honor, the counsel brought up Paragraph 30 in our complaint. As you know, facts and arguments, they develop over time in a case; but, the one thing I will -- I would like to say is that we're

objecting to the fact that they're bringing that up in this -- in today's hearing. There was no mention of that argument anywhere in any of their moving papers. And besides, under prong -- you know, under that, yeah, we're still arguing that, yeah, they had to commence a lawsuit, with regard to any unresolved claims, prior to the expiration of AB 125's grace period. There's nothing inconsistent about that, with what we're saying today.

Counsel had some complaints about the fact that our complaint is not solely limited to debt relief actions. Yes, there's a breach of contract claim in there. There's a suppression of evidence claim in there. But, the -- the claims themselves revolve around the occurrences that happened in -- recently, with respect to the notice that they served, we argue that there was deficient, we argued that there was a prior settlement agreement, and by virtue of their acts today, and by serving their Chapter 40 notice, they would have a duty to identify and defend us, under -- under that prior agreement. It had nothing to do with the workmanship and the decisions that were made 12 years ago. It's a completely separate element. But, even if, like I said before, even if the Court is inclined to agree with that argument, they still have to prove the relation back doctrine.

But, the problem is -- and they -- and counsel strips away the *Jamison* case as not being applicable. Well, first the -- the cases that they side to are, yeah, they're U.S. District Court cases. Some -- one of them, the *Yates* case, the one they rely on the most heavily, that's -- or the *Suborne* case, that one is being appealed right now. It's on appeal

right now as of February 12th, 2019. And, some of the cases that they cite to, are unpublished opinions, as well.

So, I mean, we look at these U.S. District Court cases, which are also very factually different than our case now. They don't have the same facts at all. Or, you look at the *Jamison* case, yeah, it has a little bit different facts. But, the *Jamison* case is -- at least it's -- it's a strong holding, it's a Nevada Supreme Court holding, and it specifically provided -- and, let me pull up my notes here -- and I believe counsel said that the *Jamison* case had nothing to do with counterclaims. Those are -- I don't know where he's understanding that, because this is a direct quote from that case. Instituting an action before the expiration of the statute of limitations, does not toll the running of that statute against compulsory counterclaims filed by the defendant, after the statute is expired.

[Pause]

And, counsel made one -- one more point about *Jamison*, Your Honor, he said that -- that in his -- he says here today that -- that he believes that the *Jamison* court, and other decisions like it, are limited to the facts of those case. Well, in his moving papers, specifically, he says, the Supreme Court specifically confined their ruling to those facts. That that's not found anywhere in that ruling. That's counsel's interpretation of that -- of that, and that's fine, if that's how he's interpreting it. But, I want to object to the fact that that's not what was in his moving papers. He made it more of an objective stance where that's concerned.

Your Honor, I want to talk a little about the counterclaim.

The association wants you to agree that by virtue of NRS 40.6952, that they get additional time to file their lawsuit, after the statute of repose period has expired. What they're trying to get you to do, is to agree that they should have extra time to file their lawsuit, after the statute of repose is gone. That's not what that provision says.

I'm gonna' first talk about -- a little bit about the good-cause arguments, and then I'll come back -- kind of circle back to that argument. But, the association -- or, the association council, they brought up -- well, first of all, NRS 40.6952(2), provides that if good cause exists, the Court can provide an extension to the tolling period. Now, the standards that the association council brought forth, they bring up NRCP 4(i) in the *Scrimer* case. Well, first of all, it's very clear that the *Scrimer* case, and NRCP 4(i), those deal with service of process on a defendant, when a complaint has already been filed.

The *Scrimer* court -- it wasn't this soft, flexible approach, hey, you know, we'll give you -- we'll give you all these factors, and if you -- if you just, you know, you kind of tell us, you know, that you want some more time to serve 'em, go ahead. No, they -- they say, if you don't want your complaint thrown out, file a motion, get the extension of time to serve your complaint, and, yeah, maybe we'll grant it. We'll analyze these factors. But, that is not at all what the situation that we're dealing with. Their statute of limitations in repose are much stricter than that. Counsel is trying to cannibalize the statues of repose and limitations, by extracting portions of NRCP 4(i) factors, Scrimer case factors that have nothing to do with the statute of repose, or limitation at all.

Even counsel admitted. First he said that all the factors sway in the favor of agreeing that good cause exists. Well, then he went through a list of factors and said, oh, well, that one doesn't apply; that one doesn't apply. Yeah, they don't apply. All of them don't apply, because it's not the right test. There isn't a test, and counsel hasn't provided that test. The Court -- it's gonna' be your determination, Your Honor, your decision today, to determine whether there's good cause to, under this rule, to extend the tolling time, beyond all those times. But, keep in mind, the rule says good cause, the tolling -- excuse me -- the tolling can be extended beyond the one year, if more time is needed.

Now, I'm glad you brought up the *Kitech* case. We're not dealing with a situation with 36,000 homeowners. We had four defects in this case. Four. There's not -- we have one HOA. It's not the same situation. We don't have the same policy considerations where that's concerned, and -- and moreover, NRCP 46.952(2), it extends the tolling time that was already granted. It extends -- it assumes; it implies that there is already a tolling provision that wasn't in existence. But, the problem is, the association has not ever got the tolling. You can't -- you can't extend something that doesn't exist. You just can't.

So my argument is that, I mean, and it's -- I think it's pretty clear, is that that statute can't apply to extending statutes of repose, when it's only meant to extend tolling provisions. And, those tolling provisions can't be extended because there weren't any in the first place. They had to serve their Chapter 40 notice before the expiration of the statute of repose.

THE COURT: Okay.

Counsel, I'm kind of going through a little bit of the *Sky*e -- *Skye* case that I dealt with. And -- 'cause I was thinking, wait a minute, I did extend -- in fact, let me get right down to that one paragraph -- okay, I indicated in the *Skye* case, that, you know, they served the notice on the last day --

MR. GIFFORD: Right.

THE COURT: -- of the -- of the safe harbor.

MR. GIFFORD: Right.

THE COURT: Okay. So -- or, the second to the last day, whatever it was, it was February 23rd. And I said, well, it does toll the statute of a vote. Which was basically, it tolls in a way, the grace period. Then later -- and then I went through how long it got tolled, and I figured it was 30 days after the mediation took place. And they had filed their counterclaim, what, two weeks later.

Now, what I did say, *Sky* can't -- *Sky* law stated its condominium owners -- I'm looking at Paragraph 14 of the conclusions of law -- argues a one-year grace period, operates to toll the new statute of repose period of six years. I said, no, the grace period doesn't do it, but obviously, NRS 40.695 does. So, I just want to make sure that I -- 'cause I was getting a little confused there. I said there's nothing stated in Section 216, to suggest it tolls the new statute of repose period.

MR. GIFFORD: Right.

THE COURT: To the contrary, Section 21(6) states the retroactive application as of the amended NRS 11.202, will not limit

actions that occur prior to the effective date of the act, as if it was commenced within one year thereafter. So that was -- and then in this case, the homeowners association was given the benefit of not only the one-year safe harbor, but also the time tolled to allow the NRS Chapter 40, pre-litigation process to proceed.

MR. GIFFORD: Right.

THE COURT: So that was basically what I ruled.

MR. GIFFORD: Right. Right. No, and I -- and I understand that ruling, Your Honor, it's just that when we look at NRS 40.695, it's -- you -- it's a tolling provision that tolls the statute. It's not a provision that tolls the grace period itself.

But, your ultimate ruling in *Sky*, what it was, it wasn't that you just get to toll the repose period. That wasn't the ultimate ruling. You said in your order that given the benefit -- giving them the benefit of the doubt, giving them that I give them the tolling, giving them I give them the grace period, even then, they still failed to meet the deadline of the tolling period, of the 30 days after the mediation. That was the ultimate holding. The fact that the -- that the -- that the Chapter 40 notice was not served during -- during the repose period, was not actually raised in any of the moving papers. But, Your Honor, you still agree that, irrespective of that -- of that fact, you still ruled that, given the benefit of the doubt, they still missed the mark. So, that ruling would be consistent with anything today, because the moving papers in our arguments today, our only different -- the only difference in the arguments is that, one, we're making that argument, and it's in front of you today, but it's

ultimately gonna' be the same ruling, because they still missed the mark.

THE COURT: Okay.

MR. GIFFORD: Okay?

And, counsel would like the Court to think that by -- by the Court giving them an extension of toll time, only another five days. It's not five days, it's four months. Because, as you read in *Sky*, there was a 30-day window. They didn't -- they didn't file their complaint until March 1, 2017. Way later.

So giving them an extension, it wouldn't be just a simple one extension. It would actually be more like two extensions. One, you're giving an extension from the period of a 30-day window, up until the one year. Because the rule says, you get an extension beyond the one year. Well, they'd have to get an extension from 30 days to the year. And then you get another extension from the year to another five days. So that would be two extensions that they're asking you to do, under a provision that only pertains to extending the tolling period; that doesn't pertain directly to statute of repose itself, all so that they can file their claims late.

Counsel brought up some arguments in some of their moving papers about good cause, and how they've -- how they've -- how they can establish that, and why it's a good reason why they can file their claim after the statute to repose. Well, one of the arguments was that the HOA has diligently pursued their CD claims against the builders by a) serving its Chapter 40 notice during the safe harbor. Well, Your Honor, serving it the day before the safe harbor provision expired, that's

not diligent. These -- HOA have already admitted, they knew about these claims in 2013. They knew about these window claims in 2013. They could have served their Chapter 40 notice, before AB125 came around -- you know, by the time AB125 was enacted, people around town, plaintiffs' attorneys, they knew what was going to happen. Well, they didn't know how it would affect 'em. But, they knew something was going on. A lot of plaintiffs' attorneys, they would -- they would -- just to be safe, they would serve their Chapter 40 notices. They would file their complaints right before that cut off. The association didn't do any of that, even though they knew about these claims. They sat on their rights. So they sat on them, not only until -- until, you know, the first day after the AB125 came around and looked at the statute and said, well, you know, hey that -- that's -- that could be bad for us; maybe we should get this done. There was no reason they couldn't have -- couldn't have served their Chapter 40 notice, either before -- maybe they would have had the benefit at that point if the statute to repose was 10 years, of tolling. If they started after they still could have filed their complaint within the year. There's only for defects in this case that were alleged. There's nothing stopping them from doing that, but they just sat on it until the last day before -- the last day before the grace period expired.

Now, they say they've been diligent in participating in the litigation, well, Your Honor, it's their litigation. They're the ones who served the Chapter 40 notice on us. It's their obligation. You don't get kudos for showing up to your own party. You have to -- you have to participate. Otherwise, their claims would have been thrown out a long

time ago.

Counsel says that they -- they were diligent in prosecuting the claims, well, four months after what would have been the tolling period of filing your lawsuit, is not diligent. They said that they've been diligent with respect to inspections and participating in those, well, if, Your Honor -- and I don't want to get too much into the weeds with old defects that are no longer the case but there were sewer complaints, there were mechanical complaints. Those issues were resolved, they were inspected; they were repaired, before the builders knew about it. We didn't even know about what was going on until way later. That's not diligent to not notify the contractors who you believe is responsible, and who you're gonna' sue later, of what's going on.

Number three. There was Unit 300 repairs. Those Unit 300 repairs had already begun by the time our experts got out there to look at it. Those were already going on. There was water testing on Unit 300. Yeah, counsel informed our office that there was going to be testing coming up. Our office, my boss, he reached out to opposing counsel and said, hey, when is this -- I think it was a Monday -- he reached out to opposing counsel and asked, well, when's the water testing gonna' occur? And this was all in their moving papers. They actually provided these emails. And our -- my boss said, well, when's the water testing on the units gonna' come? They said, oh, well, sorry, actually it just started, you know, it started earlier this morning; you better get out there. But, by that time it was too late for us to grab our expert -- our fenestration guy and get out there.

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

And again, about the timeline that they provide. They provide all these dates of things that happen. Again, they have to -- they had to do that. It's part of their obligation. They have to be vigilant for their client; they have to show up. But all of the other dates, they really are -- they're red herrings. The only dates that really matter, 'cause here's what they're contending that they get tolling -- the only dates that really matter is the 30-day window after the mediation. Let's look and see what happened during that time. We don't have any specific dates.

We don't have any written record of anything that really occurred during that 30-day window. It wasn't, like, oh, NRCP 4(i), like they said. They didn't file a motion with the Court, seeking an extension of time to file their complaint. Nothing happened. It wasn't -- like they said a minute ago, it wasn't their obligation to give this information for our motion for summary judgment on the substantial completion dates. Well, it wasn't our obligation to tell them about their affirmative claims that they had to file. There was nothing done in that 30-day period. Nothing. And, nothing written of record of that. That's when they had to be vigilant; the most vigilant. Everything else are things that, yeah, special master has a hearing; you gotta' show up. If the Court has a hearing, you gotta' show up. If there's inspections that you are undergoing yourself, yeah, you gotta' show up, it's your inspections. So, the argument that they've been diligent, and vigilant, and they've done everything they could, is frankly, Your Honor, just not true.

Sorry, I have a lot of notes, Your Honor.

THE COURT: That's okay.

MR. GIFFORD: Making sure I covered all my bases.

THE COURT: That's okay.

MR. GIFFORD: Thank you.

[Pause]

MR. GIFFORD: And, just again, Your Honor, to reiterate, NRCP -- or excuse me -- NRS 40.695(2), it is again, it's an extension of what would already have been a tolling process so that parties could complete that process if they needed it. It wasn't meant for people to

just skirt the statute of repose, and then ask the Court for an extension of time to file that lawsuit beyond that statute of repose. What they're asking you to do, is to make statute of repose longer. That is not what NRS 40.695(2) says. Counsel even admitted that he didn't really research the issue of what the purpose of that statute was. But, he's relying on it heavily in his reply. And, it is a conditional countermotion.

[Pause]

MR. GIFFORD: I want to mention a couple more arguments, Your Honor, about some of the other good-faith arguments, or, excuse me, the good-cause arguments that counsel raised.

They say that the builders can't claim prejudice. Your Honor, any party that files their claims timely, are absolutely prejudice by claims getting filed back against them, that were late. The whole purpose of the statute of limitations of repose, the reason they are so rigid is because prejudice is implied in those -- in that reasoning. It's -- there's no good-cause test, so when it's okay to move beyond those issues.

So we are faced with liability if the Court agrees with the association, that they can file their claims late. And, that is absolutely prejudicial, there's no doubt about that at all.

One argument that counsel made in their conditional countermotion was that the HOA brought their claims five days after the one-year anniversary of the Chapter 40 notice. Well, Your Honor, I've already said this before; that argument is irrelevant because that wasn't the applicable tolling period, even if a tolling period had applied. It was the 30 days after. So when they filed their claims, they're just four

months late.

Now, even if you agree, Your Honor, that somehow good cause exists, it doesn't matter because tolling never occurred, and there was nothing to extend.

Thank you.

THE COURT: Thank you.

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

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

THE COURT: Well, *Sky* was mine.

MR. GAYAN: *Sky* was yours. But, I will point out, and I'm so glad that the builders attached the summary judgment briefing about *Sky*, because I looked at it over the past few minutes here, and the association in that case, didn't argue compulsory counterclaims, and did not request any relief under 40.695(2). Those are issues the Court never considered, and that is a prime example of why comparing between District Court cases is often apples to oranges.

I think, you know, courts do the beset with what they're given, a lot of the time, and if a party doesn't ask for something, I don't know that courts always have to, or do sua sponte, help somebody out with some -- an argument that they should have made, or could have

made. I don't think that's the Court's obligation. I know judges like to do that for pro se litigants but when there's counsel, Your Honor, doesn't need to go out on a limb and help people out.

So just looking at those, those are arguments that were never made. Those are important arguments that we have here. And so, while I think a lot of the analysis and conclusions of law that the court did in *Sky* is similar, from the AB125 grace period, and tolling-type arguments in general, it seems to apply to what we're talking about here today. We've got issues and arguments being made that go well beyond what the Sky Association argued, and so, I don't know that the Court -- I'll say the Court is definitely not limited by what it did in the *Skye* case.

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

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

THE COURT: Well, I -- can I ask you, though, I -- and I brought *Kitech* up --

MR. GAYAN: Uh-huh.

THE COURT: -- because, there is no way you could have

been working 48 hours a day, which we don't have, obviously, to get --

MR. GAYAN: They try to make me to do that.

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

So, bottom line, we have to give you an extension of time. And, thankfully, the legislature has given us that discretion to do that. But where I'm having a little bit of a rub, Mr. Gayan, is after -- obviously you guys have got your discovery done, you've got enough to get to the mediation, why wasn't your claims brought within that 30-day period? I mean, now let's get outside of the compulsory counterclaim. And you may even say, well, good cause exists because we thought that we already had everything taken care of. I get that. But, why wasn't it brought after the mediation?

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

THE COURT: Yeah, please.

MR. GAYAN: So, I think that *Kitech* and Chapter 40 -- long Chapter 40 process scenario is certainly the most common use of extending the tolling provision under sub 2, but it's certainly not limited to that. There's nothing in the statute that would say, it's limited to that; so, it's any -- any good cause.

And so, the good cause here is, the association was sued by the parties that they gave the Chapter 40 notice to. They were sued two days after the mediation. So, the association was actually defending the claims, and those are affirmative claims for relief; not just debt relief, they were defending the action right after the case -- right after the mediation; within two days, there it is. And, our reply on the countermotion shows, we got a brief extension to respond to the builder's complaint, and so, counsel said he didn't know what we were doing. Well, that was before my time but pretty normal to get a little extension when you have a complaint served against you. I just asked for two weeks, yesterday, on another one. So it happens all the time 'cause you're, you know, whoa, I didn't know that was coming, I gotta' find counsel, local, whatever --

THE COURT: You could just be busy.

MR. GAYAN: You're usually not sitting around twiddling your thumbs; waiting to be sued, I'll tell you that. And, I know Your Honor practiced as well, and so, it's pretty unusual to just sit around and wait for it. Especially two days after the mediation. There was no reason the builders had to sue the HOA, but they did. And so, there it is. The association got a brief extension and started brief -- filed a motion to

dismiss, on time, based on the extension that they got.

And so, my understanding, because it -- like I said, before my time, the HOA filed -- they were doing it right. They were getting an extension, responding to the complaint, briefing the motion to dismiss, coming in here, arguing it, getting the Court's ruling, and then filing their answer and counterclaim, which is the normal process for responding to a complaint. It's possible -- sure, is it theoretically possible that the HOA could have separately filed a new action somewhere else and had it consolidated? Sure. They could have done that. But, we already had this case here. And so, answering and filing a counterclaim within the 30 days, would have been out of the normal course of responding to a complaint.

So I think that's why it was done. I believe that's another basis for good cause. And when I say the HOA was diligently litigating this case, it's not just the pre-litigation. They got the complaint, they responded to it timely, they were doing everything they were supposed to be doing in the normal course of defending a case filed against them. And I thought, I believe, I think they were doing what they were supposed to be doing.

And, I know, you know, that's separate and apart from whether it's compulsory counterclaims and it relates back and all those things. But, the HOA thought it was doing everything right. And, one thing, Your Honor, did not hear, you've heard from the builders council twice today, pretty lengthy presentations. Not one mention of how they are prejudiced, whatsoever.

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

MR. GAYAN: Well, if that was the case, then no court could ever grant an extension to serve a complaint, right? You get 120 days. Well, you know, if I let you sue this party, they're gonna' be prejudiced. That's not the prejudice we're talking about, the fact that claims exist. The Supreme Court wants claims to be heard on the merits; not tossed on procedural technicalities; particularly where there is zero prejudice. He had a 30-page reply, two opportunities today to tell Your Honor how they were prejudiced or surprised by any of this. The fact is they weren't. That's why he can't come up with anything, they have nothing. There is no harm, there's no prejudice. They're fully aware of our claims, the HOA's claims, that's why they preemptively sued us, two days after the mediation. Because they wanted to tackle it head on. That's their strategy, that's why we're here, and that's what we're doing. But, there's no possible way for them to claim surprise, prejudice, anything. And, that is the key analysis, I think, for deciding this issue, is whether there's actually any harm, and there is none.

We're going forward on the builder's claims, regardless, and so, we're gonna' be here. So why not litigate all the claims on their merits, Your Honor.

And, let me just check my notes and make sure I have --

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

MR. GAYAN: I'm happy to answer.

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

MR. GAYAN: Yep. Nope, go ahead right now, please.

THE COURT: Well, I've been thinking about this while I've been listening to you, and that gets into the start of the substantial completion. And I know I'm kind of going back; outside of the conditional counterclaim arguments. But -- and I've gotten to thinking about this. Okay. If -- and this is not the first case where the parties have found for me, two of those three elements, or what you can find. This is not the first time. And what Defense counsel is telling me is that we just could not find that second factor.

And I -- maybe I'm thinking about this for future cases. If you always -- if you've got a situation in future cases, and in this one, where you can't find one, or maybe you can't find two, and you've exercised good diligence, just you can't find it. Doesn't that, in fact, extend the statute of repose because you can't have a start date?

MR. GAYAN: Your Honor, it's a -- that's a good point. I think it's a good, logical way to go with the issue. I'll tackle it procedurally, maybe, first.

THE COURT: Sure.

MR. GAYAN: And, I don't know what's happened in other cases. Your Honor years a lot of cases and motions and these issues not probably unique to the Court. But, I mentioned we've started discovery. We haven't actually gotten there. So when -- when the builders say they've looked, they mean their lawyers have looked. And we heard Mr. Gifford, you know, basically testify here today, amending his affidavit;

saying, that oh, I did personally search, oh, you know, don't mind what the affidavit says, I looked, too. But, that's not admissible either, are we gonna' put Mr. Gifford on the stand at trial, that's not what's gonna' happen.

So, what would normally happen is, we would do discovery, parties would find things, the builders would depose my client and other people, and find out if a notice of completion exists, and where is it, and do you know if one was ever done? And then we'd actually have admissible evidence, for the Court to consider, on a Rule 56 motion. Not this thing at the beginning of the case before any discovery on this topic has been done, they pulled, you know, oh, we looked and we found two of the three, but we couldn't find a third, well, so, Rule 56 precludes summary judgment.

And, yeah, if we don't' have a third one. If we get to that point in time where everybody who knows anything about this, and they say definitively, nope, one was never done. Okay, well, that's a different scenario, right? Right now, the Court has two of the three, one doesn't exist, and so you take the later of the two that exist. But, we're not even there yet. We don't even know.

And, you know, we haven't had a chance to respond on that issue. I haven't had a chance to look at it, brief it, whatever; that was stuck into the reply. I think that's also a bit unfair, and, you know, not permitted.

I hope that answered the Court's question.

THE COURT: Sure.

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

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

MR. GAYAN: When did it -- when did it start.

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

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

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

Thank you, Your Honor.

THE COURT: Okay, thank you.

Okay, I want to -- I got a chance to review your briefs but I did not get a chance to review all the cases.

MR. GIFFORD: Okay.

THE COURT: And, I would like to take this one under advisement. These case -- and you brought up some new issues, and on big cases like this, I assume these kinds of issues go up to the Supreme Court eventually. So I would like to write a decision on it. So I'm gonna' take it under advisement.

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

MR. GIFFORD: Thank you, Your Honor.

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

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

Jessica B. Cahill

Maukele Transcribers, LLC
Jessica B. Cahill, Transcriber, CER/CET-708

EXHIBIT "I"

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Steven D. Grierson
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FRANCIS I. LYNCH, ESQ. (#4145)
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive, Suite 110 #293
Henderson, Nevada 89074
T: (702) 868-1115
F: (702) 868-1114

SCOTT WILLIAMS (California Bar #78588)
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901
T: (415) 755-1880
F: (415) 419-5469
Admitted Pro Hac Vice

WILLIAM L. COULTHARD, ESQ. (#3927)
MICHAEL J. GAYAN, ESQ. (#11125)
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
T: (702) 385-6000
F: (702) 385-6001
m.gayan@kempjones.com

Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

Defendant's (1) Opposition to Plaintiffs/ Counter-Defendants' Motion for Summary Judgment Pursuant to NRS 11.202(1) and (2) Conditional Countermotion for Relief Pursuant to NRS 40.695(2)

Hearing Date: March 19, 2019
Hearing Time: 8:30 a.m.

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

Counterclaimants,

vs.

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

Counterdefendants.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

I.

INTRODUCTION

The Builders' latest Motion is nothing more than one final Hail Mary attempt to avoid engaging in discovery and defend the HOA's claims on the merits. The Builders' election to file this simple, potentially case-dispositive Motion more than 28 months after commencing this action—and only after asking the Court to consider four other motions seeking to summarily dispose of the HOA's claims on other grounds—speaks volumes about how the Builders view its likelihood of success. Had the Builders truly believed in the merits of this Motion, they would and should have filed it long before now.

Despite the Builders' dilatory conduct, the Motion fails for three reasons. First, the Motion lacks all the facts necessary under Rule 56(c) for the Court to grant summary judgment. Specifically,

the Builders do not provide enough information to determine each tower's date of substantial completion. Second, the HOA issued its Chapter 40 Notice within AB 125's one-year grace period for claims that accrued before its effective date—which include the HOA's claims. Third, under NRS 40.695, the HOA's Chapter 40 Notice tolled the time to commence an action, and the HOA filed its compulsory counterclaims before the tolling period expired.

Should the Court find the HOA did not bring its defect claims prior to the expiration of the tolling period, good cause exists to extend the tolling period to March 1, 2017. For that reason, the HOA hereby conditionally countermoves, pursuant to NRS 40.695(2), for such an extension.

II.

STATEMENT OF RELEVANT FACTS

A. The Relevant Procedural History.

This case has its beginnings in February 2016 when the Panorama Towers Condominium Unit Owner's Association (the "HOA") served the Builders with a Chapter 40 Notice alleging construction defects in the HOA's two towers. After the Builders conducted perfunctory pre-litigation inspections, the parties participated in the mandatory pre-litigation mediation.

On September 28, 2016, just two days after that mediation ended without any resolution of the HOA's claims, the Builders filed this action against the HOA seeking to enforce a prior contractual agreement and obtain declaratory relief. On March 1, 2017, after the Court denied the HOA's motion to dismiss, the HOA filed its Answer and Counterclaims against the Builders and others.

By March 20, 2017, the Builders filed the first in their carefully planned series of motions for summary judgment. The Builders first chose to challenge the contents of the HOA's Chapter 40 Notice. On June 20, 2017, after substantial briefing by the parties, the Court heard and granted in part the Builders' motion. By its Order entered on September 15, 2017, the Court gave the HOA leave to amend its Chapter 40 Notice and stayed the action for six (6) months.

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

On April 5, 2018, the HOA timely served its Amended Chapter 40 Notice on the Builders. On August 3, 2018, after the HOA stipulated to extend the stay at the Builders' request, the Builders filed their next motion for summary judgment. This time, the Builders challenged the contents of the HOA's Amended Chapter 40 Notice. On October 2, 2018, the Court heard arguments of counsel on the Builders' motion. By its Order entered on November 30, 2018, the Court granted in part the Builders' motion and determined the HOA's Amended Notice sufficiently identified the window-related defects.

On October 22, 2018, just weeks after the last hearing and more than a month before the Court entered its Order, the Builders filed their next motion for summary judgment—this time challenging the HOA's standing to assert the window-related claims. On December 17, 2018, the Builders filed a motion seeking reconsideration of the Court's Order addressing the HOA's Amended Notice. The HOA agreed to consolidate and continue the hearings on both of the Builders' motions to accommodate counsel's schedule. On February 12, 2019, after more substantial briefing by the parties, the Court heard and denied both of the Builders' motions.

On February 11, 2019, the eve of the most recent hearing, the Builders filed the instant Motion—**their fifth pre-discovery motion for summary judgment**—claiming all of the HOA's claims were time-barred from the beginning.

B. A Timeline of All Relevant Events.

For the Court's convenience, the following timeline details the events relevant to the Builders' Motion:

When	What
Jan. 16, 2008	Certificate of Occupancy issued for Tower I
Mar. 26, 2008	Certificate of Occupancy issued for Tower II
August 2013	HOA learned of potential window-related claims against the Builders, *see* **Exhibit 1** (Hindiyeh Dec.) at ¶ 3
Feb. 24, 2015	Nevada Legislature enacted AB 125, including six-year statute of repose and one-year grace period for filing actions that accrued before AB 125's enactment

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

When	What
Feb. 24, 2016	HOA served the Builders with its Chapter 40 Notice Towers I and II
Mar. 24, 2016	Builders performed inspections of Towers I and II
Sept. 26, 2016	Mandatory pre-litigation mediation held, ending without resolving the HOA's construction defect claims
Sept. 28, 2016	Builders filed this action against the HOA
Mar. 1, 2017	HOA timely files Answer to Builders' Complaint and Counterclaim
Mar. 20, 2017	Builders filed their first motion for summary judgment to challenge the HOA's Chapter 40 Notice ("First Motion")
March 23, 2017	Court entered its Case Management Order
June 20, 2017	Court heard the Builders' First Motion
Sept. 15, 2017	Court entered Order granting the Builders' First Motion and staying case for six (6) months (through March 15, 2018) to allow the HOA to serve an Amended Chapter 40 Notice
Mar. 15, 2018	Court ordered stay continued another 30 days
April 5, 2018	HOA served the Builders with its Amended Chapter 40 Notice
June 3, 2018	Builders filed their second motion for summary judgment to challenge the HOA's Amended Notice of Claims ("Second Motion")
Oct. 2, 2018	Court heard the Builders' Second Motion
Oct. 22, 2018	Builders filed their third motion for summary judgment to challenge the HOA's standing ("Third Motion")
Nov. 30, 2018	Court entered Order partially granting the Builders' Second Motion
Dec. 17, 2018	Builders filed their motion for reconsideration of the Order resolving their Second Motion ("Fourth Motion")
Feb. 11, 2019	Builders filed their motion for summary judgment to challenge the timeliness of the HOA's claims ("Fifth Motion")
Feb. 12, 2019	Court heard and denied the Builders' Third Motion and Fourth Motion

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KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

III.

ARGUMENT

A. The Summary Judgment Standard of Review.

Nevada no longer applies the "slightest doubt" standard for summary judgment under Rule 56 and now uses the standard and case law of the federal courts. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029–31 (Nev. 2005). To prevent summary judgment, the nonmoving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial . . . ." *Id.* at 1031 (quoting *Bulbman, Inc. v. Nevada Bell*, 825 P.2d 588, 591 (Nev. 1992)). "Summary judgment, however, may not be used as a shortcut to the resolving of disputes upon facts material to the determination of the legal rights of the parties." *Collins v. Union Federal Sav. & Loan Ass'n*, 662 P.2d 610, 619 (Nev. 1983) (quoting *Parman v. Petricciani*, 272 P.2d 492, 496 (Nev. 1954)). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.*; *Posadas v. City of Reno*, 851 P.2d 438, 441–42 (Nev. 1993). The "substantive law controls which factual disputes are material" so as to preclude summary judgment. *Collins*, 662 P.2d at 619.

Nevada law places additional limitations on a trial court's use of summary judgment, and the Nevada Supreme Court has instructed trial judges to exercise "great caution" in granting summary judgment. *Posadas*, 851 P.2d at 442. When considering a motion for summary judgment, the district court must view "the evidence, and any reasonable inferences drawn from it, . . . in a light most favorable to the nonmoving party." *Winn v. Sunrise Hosp. & Medical Center*, 277 P.3d 458, 462 (Nev. 2012). Furthermore, "'the trial court should not pass upon the credibility of opposing affidavits, unless the evidence tendered by them is too incredible to be accepted by reasonable minds.'" *Short v. Hotel Riviera, Inc.*, 378 P.2d 979, 984 (Nev. 1963) (quoting 6 Moore's Federal Practice 2070); *see also Sawyer v. Sugarless Shops, Inc.*, 792 P.2d 14, 15–16 (Nev. 1990). Finally, the summary judgment tool

is not meant "to cut litigants off from their right to trial by jury if they really have issues to try." *Short*, 378 P.2d at 984 (*citing Sartor v. Arkansas Gas Corp.*, 321 U.S. 620 (1944)).

B. The Builders Fail to Shift the Burden to the HOA to Show a Genuine Issue of Fact.

A motion for summary judgment must "include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the . . . evidence upon which the party relies." NEV. R. CIV. P. 56(c). Only "[w]hen a motion for summary judgment is made and supported as provided in this rule" does it shift to the nonmoving party the burden to "set forth specific facts showing that there is a genuine issue for trial." NEV. R. CIV. P. 56(e).

The Builders do not provide the Court with all the facts necessary to decide their Motion, which requires the Motion's denial. Specifically, the Motion quotes Nevada's statutory definition for substantial completion—the event that starts the running of the statute of repose. *See* Mot. at 12:7–10 (quoting NEV. REV. STAT. § 11.2055). That statute defines substantial completion as the latest of three events: (1) the date the final building inspection of the improvement is conducted; (2) the date the notice of completion is issued for the improvement; or (3) the date the certificate of occupancy is issued for the improvement. NEV. REV. STAT. § 11.2055. However, the Builders provide only one of the three dates in their Motion—the date of the certificate of occupancy for each tower. *See* Mot. at 12:23–24. Without the other dates for each tower, the Court cannot determine when the statutory repose period commenced, and therefore, whether the HOA's claims are time-barred by NRS 11.202(1).

The Builders also fail to provide the Court with any information on whether the HOA's claim accrued before AB 125's enactment, information necessary to determine the applicability of the one-year grace period. *See* AB 125, Section 21, Subsection 6. Under Nevada law, accrual of the HOA's action for purposes of AB 125's grace period has nothing to do with the dates of substantial

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

completion. *See G and H Associates v. Ernest W. Hahn, Inc.*, 113 Nev. 265, 934 P.2d 229 (1997). Instead, the Nevada Supreme Court has held the use of "accrued" in a statute's repose-related grace period "can only reasonably be interpreted to mean for purposes of the statute of limitations." *Id.* at 273. Under Nevada law, any applicable statutes of limitation "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." *Id.* at 272 (citing *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990)). The Builders' failure to provide any information about when the HOA's claims accrued for purposes of the statutes of limitation precludes the Court from granting the Motion because the Builders cannot provide this information for the first time on reply.

C. The HOA Timely Asserted its Construction Defect Claims Against the Builders.

On a substantive level, the HOA timely filed its construction defect claims against the Builders, both in terms of its Chapter 40 Notice and the filing of its Counterclaim. First, the HOA timely "commenced the action" when it served its Chapter 40 notice within AB 125's one-year grace period. As acknowledged by the Builders, the grace period exempts an action from the new six-year statue of repose if it "accrued before the effective date of the act, and was commenced within 1 year after the effective date of this act." Mot. at 11:21–23 (quoting AB 125, Section 21, Subsection 6). This exemption applies to all actions that "accrued before the effective date of this act," not just actions that accrued less than six (6) years before the effective date of AB 125. *Id.* Because the HOA's window claims accrued in 2013 for purposes of AB 125's grace period, and the HOA timely served its initial Chapter 40 Notice within the one-year grace period, NRS 40.695 tolled the statute of repose during the pre-litigation proceedings.

Second, the HOA timely filed its Counterclaim within the tolling period resulting from is timely served Chapter 40 Notice. The mandatory pre-litigation mediation concluded on September 26, 2016, and the Builders filed their complaint two days later, well within the tolling period provided by

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

NRS 40.695. Although the HOA's Counterclaim was filed on March 1, 2017, after the tolling period expired, its compulsory counterclaim relates back to the date of the Builders' Complaint by operation of law, meaning the HOA timely filed its defect claims within the statutory tolling period.

1. The HOA timely commenced the action within AB 125's one-year grace period.

To comply with constitutional due process requirements, *see Alsenz v. Twin Lakes Village, Inc.*, 108 Nev. 117, 843. P.2d 834 (1992), AB 125 expressly provides that its new, shorter statute of repose for construction defect claims "**do[es] not limit an action**: (a) **[t]hat accrued before the effective date** of this act, and was **commenced within 1 year** after the effective date of this act." AB 125, Section 21, Subsection 6(a) (emphasis added). AB 125's effective date was February 24, 2015. Therefore, AB 125's grace period applies if an action (a) accrued before February 24, 2015,[1] and (b) was commenced within one (1) year of February 24, 2015. *See* AB 125, Section 21, Subsection 6. The HOA's action for window deficiencies meets both of these requirements.

a. <u>The HOA's window claims accrued before the enactment of AB 125.</u>

Under Nevada law, the term "accrued" as used in AB 125's grace period pertains to accrual of an action for purposes of the statutes of limitation. *See G and H Associates*, 113 at 273, 934 P.2d at 234. An action does not accrue for purposes of the statutes of limitation until a party knew, or reasonably should have known, of facts giving rise to the claims. *See id.* at 272. Here, the HOA's action against the Builders accrued prior to February 24, 2015. The evidence shows the HOA first learned of the window-related damages and/or defects in 2013, well before AB 125's enactment. *See*

[1] "It is well established that when 'the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007) (quoting *State, Div. of Ins. v. State Farm Mutual Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)).

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

Ex. 1 (Hindeyah Dec.) at ¶ 3. Therefore, AB 125's one-year grace period applies and extends the HOA's time to bring an action.

b. The HOA commenced the action before expiration of AB 125's grace period.

NRS 40.645(1)(a) mandates that claimants "must give written notice" before commencing an action against a contractor for claims related to construction defects. The enactment of AB 125 did not alter the pre-litigation notice requirement. NRS 40.695, as amended by AB 125, provides as follows:

> 1. Except as otherwise provided in subsections 2 and 3, **statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive, are tolled from the time notice of the claim is given, until** the earlier of:
>
> (a) One year after notice of the claim is given; or
>
> **(b) Thirty days after mediation is concluded** or waived in writing pursuant to NRS 40.680.
>
> 2. Statutes of limitation and repose may be tolled under this section for a period longer than 1 year after notice of the claim is given only if, in an action for a constructional defect brought by a claimant after the applicable statute of limitation or repose has expired, the claimant demonstrates to the satisfaction of the court that good cause exists to toll the statutes of limitation and repose under this section for a longer period.
>
> 3. Tolling under this section applies to a third party regardless of whether the party is required to appear in the proceeding.

NEV. REV. STAT. § 40.695 (emphasis added). The Nevada Supreme Court has clarified this tolling provision prevails over any other statutory limitations period for bringing an action. *See Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 632, 635 (2004).

The Honorable Gloria Navarro of the United States District Court for the District of Nevada applied NRS 40.695 to toll the applicable statute of repose in a defect action brought during AB 125's one-year grace period. *See Lopez v. U.S. Home Corp.*, 2016 WL 6988486 (D. Nev. Nov. 27, 2016). Judge Navarro held as follows:

> The Nevada legislature provided that this version of NRS § 11.202 "applies retroactively to actions in which the substantial completion of the improvement to the real property occurred before the effective date [February 24, 2015] of this act" and incorporated a one-year grace period to commence an action. 2015 Nev. Stat. Ch. 2 § 21(5), (6) ("AB 125"). Based on AB 125, Defendants assert that these Plaintiffs' claims

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

expired when Plaintiffs failed to "commence an action" before expiration of the grace period on February 24, 2016.

Defendants' argument, however, fails to account for the tolling provision articulated in NRS § 40.695. The operative version of NRS § 40.695 states that "statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695 . . . are tolled from the time notice of the claim is given, until 30 days after mediation is concluded or waived in writing."[5] NRS § 40.695 (2003). This tolling provision "[p]revail[s] over any conflicting law otherwise applicable to the claim or cause of action." NRS § 40.635. Accordingly, **the tolling provision in NRS § 40.695 takes precedence over the statute of limitations articulated in NRS § 11.202.** Indeed, NRS Chapter 11 reinforces this conclusion: "Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, *except where a different limitation is prescribed by statute*." NRS § 11.010 (emphasis added).

Plaintiffs' construction defect claims were therefore tolled from July 30, 2014, the date of the first NRS Chapter 40 Notice, to July 9, 2016, thirty days after Defendants waived mediation. *See* NRS § 40.695 (tolling "statutes of limitation ... applicable to a claim based on a constructional defect ... from the time notice of the claim is given, until 30 days after mediation is concluded or waived in writing"). Plaintiffs filed the instant Complaint in state court within the tolling period on June 22, 2016. Consequently, Plaintiffs timely filed their construction defect claims, and Defendants' Motion to Dismiss is DENIED as to these claims.

Id. at *3–4 (emphasis added in bold).

This Court, in ruling on a similar motion for summary judgment in a prior matter, issued a detailed order resolving this precise issue and held as follows:

To determine whether the pre- or post-AB 125 version of the statute of repose applies, this Court notes Section 21(5) of AB 125 provides the period of limitations set forth in NRS 11.202 as amended by Section 17 applies retroactively to actions in which the substantial completion of the improvement to real property occurred before AB 125's effective date, *except* as otherwise provided in Section 21(c). Section 21(c) states the provisions of Section 21(5) do not limit an action that accrued before the effective date of AB 125, and was commenced within one (1) year after the effective date of the act. Applying the aforementioned analysis to the facts here, this Court concludes the statute of repose applicable to Defendant's claim for constructional defects is six (6) years, but **as it accrued prior to the effective date of AB 125, or February 24, 2015, the action would not be limited if it was commenced within one (1) year after, or by February 24, 2016.**

In this case, [the Association] served its NRS 40.645 constructional defect notice on February 23, 2016, or one day before the one-year "safe harbor" expired. **The service of the NRS Chapter 40 notice operated to toll the applicable statute of repose** until

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169
Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com

> thirty (30) days after the NRS 40.680 mediation took place on June 16, 2016, and unfortunately, the matter was not resolved. The statute of repose was tolled another thirty (30) days or until July 16, 2016. In this Court's view, [the Association] had up to and including July 16, 2016 in which to file its lawsuit.

See **Exhibit 2** (Order) at 10–11 (¶ 13) (emphasis added).

While not binding, the *Lopez* and *Sky Las Vegas* courts' analyses persuasively resolve the same factual and legal scenario that exists in this action. Here, the HOA issued its mandatory Chapter 40 Notice to the Builders on February 24, 2016—within AB 125's grace period—which automatically tolled the statue of repose pursuant to NRS 40.695(1). On September 26, 2016, the parties participated in the mandatory pre-litigation mediation without resolving any of the claims. Therefore, NRS 40.695(2)(b) tolled the statute of repose for at least 30 days after the mediation—until at least October 26, 2016.

2. The HOA filed its compulsory counterclaim, which relates back to the Builders' Complaint, within the statutory tolling period.

Under Rule 13(a), a party must assert any counterclaim "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." NEV. R. CIV. P. 13(a). Both the Honorable James C. Mahan and Larry R. Hicks of the United States District Court for the District of Nevada have held that compulsory counterclaims relate back to the filing of the original complaint, and that the plaintiff's institution of a suit tolls or suspends the running of the statute of limitations governing compulsory counterclaims. *See Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 2019 WL 177467, at *3 (D. Nev. Jan. 10, 2019) (citing *Religious Technology Center v. Scott*, 82 F.3d 423 (9th Cir. 1996)) ("***Because a compulsory counterclaim relates back to the filing of the original complaint***, Wells Fargo asserted its claim for quiet title . . . within the five-year limitations period.") (internal citations omitted) (emphasis added); *see also Yates v. Washoe County School Dist.*, 2007 WL 3256576, at *2 (D. Nev. Oct. 13, 2007) (citing *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d

KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
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Tel. (702) 385-6000 • Fax: (702) 385-6001
kjc@kempjones.com