Case No. 80615

IN THE SUPREME COURT OF NEVADA

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

Appellant,

vs.

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

Respondents.

APPEAL

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

APPELLANT'S APPENDIX VOL 24 OF 27

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380 (4th Cir. 2000)) ("***Because this court has already determined that the filing of an action tolls the limitations period for a compulsory counterclaim***, WCSD's cross-appeal and counterclaim was timely filed.") (emphasis added).

Here, the HOA's counterclaims are compulsory because they arise out of the same transaction and occurrence that is the subject matter of the Builders' Complaint—the defect allegations contained in the HOA's Chapter 40 Notice. *See* NEV. R. CIV. P. 13(a); *compare* the Builders' Complaint *with* the HOA's Answer and Counter-Claim filed March 1, 2017.[2] On September 28, 2016, just two (2) days after the mediation, the Builders filed a Complaint seeking declaratory relief directly related to the construction defect claims raised in the HOA's Chapter 40 Notice. On March 1, 2017, the HOA timely filed its Answer and Counterclaim. The HOA's counterclaims are compulsory because they arise out of the same transaction and occurrence that is the subject matter of the Builders' Complaint. *See* NEV. R. CIV. P. 13(a). Because the HOA's counterclaims are compulsory, they relate back to the date of the filing of the Builders' Complaint filed just two (2) days after the mediation. Fairness dictates that the HOA's Counterclaims relate back to the Builders' Complaint because the Builders' cannot complain of surprise by or prejudice from the HOA's assertion of its compulsory counterclaims.

Moreover, this case does not present the same concerns raised in *Jamison* because the lengthy statute of repose for construction defect claims cannot be compared to the 90-day statute of limitation on a claim for a deficiency judgment. These vastly differing substantive claims involve unrelated public policy concerns leading to the disparity in their statutory limitations, and the Nevada Supreme Court made it clear that its ruling in *Jamison* was specific to the facts of that case and not setting forth the general rule of law in Nevada.

[2] Both the Complaint (at 2:27–3:19) and the Counterclaim identify the same deficiencies asserted in the HOA's Chapter 40 notice; *i.e.*, tower windows, tower window fire-blocking, mechanical room piping, and sewer deficiencies.

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IV.

Conditional Countermotion

A. Even if the HOA's Compulsory Counterclaims Do Not Relate Back, Good Cause Exists to Extend the Tolling Period to March 1, 2017, When the HOA Filed its Counterclaims.

Should the Court determine the HOA's compulsory counterclaims do not relate back to the date of the Builders' Complaint, NRS 40.695 empowers this Court to extend the tolling period upon a showing of good cause. NRS 40.695, as amended by AB 125, provides, in pertinent part as follows:

> 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.***

NEV. REV. STAT. § 40.695(2) (emphasis added).

Here, good cause exists for the Court to extend the NRS 40.695 tolling period to avoid time-barring the HOA's valid construction defect claims. First, the HOA has diligently prosecuted its construction defect claims against the Builders. The HOA served its Chapter 40 Notice within AB 125's one-year grace period. The parties participated in all pre-litigation proceedings, including inspections and mediation, as required by Nevada law. And the HOA timely brought its compulsory counterclaims against the Builders. Second, the Builders cannot claim surprise or prejudice from the HOA's compulsory counterclaims because they have been on notice of these construction defect claims since February 24, 2016, and filed a complaint challenging the HOA's claims. Third, the HOA brought its compulsory counterclaims on March 1, 2017—just five (5) days after the one-year anniversary of the initial Chapter 40 Notice. The Builders have not and cannot argue that the passage of another five (5) days has adversely impacted their ability to defend the defect claims. Fourth, the Builders elected to raise this statute-of-repose issue nearly two-and-a-half years after filing suit. Since that time, the Builders have forced the HOA and this Court to engage in significant work related to their four (4)

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prior dispositive motions, including asking the Court to require the HOA to amend its Chapter 40 Notice to provide additional details. To the extent necessary, fairness requires a brief extension of the tolling period to avoid the inequitable and wasteful result requested by the Builders.

V.

CONCLUSION

For the foregoing reasons, the HOA respectfully requests an order denying the Builders' Motion and, to the extent necessary, briefly extending the tolled period under NRS 40.695(2).

DATED this 1st day of March 2019.

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 1st day of March, 2019, the foregoing **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)** 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

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Counsel for Defendant

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Plaintiffs, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant.	CASE NO.: A-16-744146-D DEPT. NO.: XXII
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, and Does 1 through 1000, Counterclaimants, vs. LAURENT HALLIER, an individual;	

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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.

AFFIDAVIT OF OMAR HINDIYEH IN SUPPORT OF PANORAMA'S OPPOSITION TO HALLIER'S MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, Omar Hindiyeh, being first duly sworn, state as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Omar Hindiyeh

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

NOTARY PUBLIC

AVTAR SINGH NAT
NOTARY PUBLIC - CALIFORNIA
COMMISSION # 2094185
SANTA CLARA COUNTY
My Comm. Exp. January 16, 2019

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Exhibit 2

2017 WL 3204958 (Nev.Dist.Ct.) (Trial Order)
District Court of Nevada.
Clark County

SKY LAS VEGAS CONDOMINIUMS, INC., a Nevada Corporation; M.J. Dean Construction, Inc., a Nevada corporation, Plaintiffs,
v.
SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant.
SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant,
v.
SKY LAS VEGAS CONDOMINIUMS, INC., a Nevada Corporation; M.J. Dean Construction, Inc., a Nevada corporation, Counter-Defendants.

No. 16A738730.
June 9, 2017.

Order Re: Sky Las Vegas Condominiums, Inc.'s and M.J. Dean Construction, Inc.'s Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose

Susan H. Johnson, Judge.

***1** This matter concerning SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose filed November 21, 2016 came on for hearing on the 7th day of February 2017 at the hour of 10:30 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 SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. appeared by and through their attorneys, MEGAN K. DORSEY, ESQ. of the law firm, KOELLER NEBEKER CARLSON & HALUCK, and PETER C. BROWN, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and through its attorney, MICHAEL C. RUBINO, ESQ. of the law firm, FENTON GRANT MAYFIELD KANEDA & LITT. 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 eight (8) constructional defects allegedly located at the SKY LAS VEGAS mixed-use 45-story tower located at 2700 Las Vegas Boulevard South, Las Vegas, Nevada. The property in question comprises retail and commercial development as well as 409 condominium units within the high-rise as well as four (4) levels of parking below the plaza level pool deck.

2. Plaintiff/Counter-Defendant SKY LAS VEGAS CONDOMINIUMS, INC. was the project's developer and Plaintiff/Counter-Defendant M.J. DEAN CONSTRUCTION, INC. was the general contractor. Defendant/Counter-Claimant SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION is the homeowners' association responsible for maintaining the condominium component of the aforementioned project.

3. Certificates of Completion and Occupancy for the project were issued by the county on April 26, 2007 and November 26,

2007, respectively.[1] The final building inspection of the project occurred May 24, 2007. All parties agree the latest date of the three, i.e. November 26, 2007, when the Certificate of Occupancy was issued, is when the project was substantially completed.[2] *See* NRS 11.2055.

4. Notably, the eight (8) constructional defects for which SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION seeks damages[3] were discovered in about January and February 2015[4] when extrapolation testing took place by order of the Court in another related case, *Sky Las Vegas Condominium Unit Owners' Association v. Sky Las Vegas Condominiums, Inc., et al.*, Case No. A-13-680709-D filed in Department XVI of the Eighth Judicial District Court, in and for Clark County, Nevada.[5] While the district judge there allowed the extrapolation testing to take place, he cautioned no new defects could be included within that litigation. When the homeowners' association sought to include the newly-discovered eight (8) constructional defects within the litigation before Department XVI, the district judge reiterated, as these defects were new, such would not be added within that lawsuit.[6]

***2 5.** On January 12, 2016, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION served its Notice of Constructional Defects upon SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. pursuant to NRS 40.645, concerning the eight (7) deficiencies. As it was not properly authenticated by the homeowners' association's board as required by NRS 40.645(2)(d), the Notice was amended and served upon the developer/contractor with the proper authentication on February 23, 2016. The parties were unable to resolve their differences through the pre-litigation process which concluded June 16, 2016 when the mediation took place.

6. On June 20, 2016, four (4) days after the NRS 40.680 mediation took place, SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. filed their Complaint for Declaratory Relief, seeking declaration from this Court concerning the rights, responsibilities and obligations of the parties, and, as pertinent here, that SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION'S claims for damages resulting from the eight (8) constructional defects are time-barred. SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION filed its Answer and Counter-Claim on August 2, 2016, seeking damages for constructional defects.

7. On November 21, 2016, Plaintiffs filed their Motion for Summary Judgment, arguing the homeowners' association's constructional defect claims are time-barred by the virtue of the six-year statute of repose in that the project was substantially completed November 26, 2007, and the Notice of Constructional Defects was not served until February 23, 2016. SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION opposes arguing, *first*, the period for the statute of repose is not six (6) years as the exception to the retroactive application of the revised statute of repose found in Assembly Bill 125, enacted by the 2015 Nevada Legislature, operates to toll the new statute of repose period. *Second*, the statute of limitations did not accrue until the homeowners' association knew or should have known of facts giving rise to the damage, and such constitutes a factual issue for the jury to decide.

CONCLUSIONS OF LAW

1. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate 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 55(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.*, 121 Nev. at 731.

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 U.S. 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 existence 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."'

P.2d 591, *quoting Collins v. Union Fed. Savings & Loan*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983).

***3 3.** NRS 30.040(1) provides as follows:

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

While actions for declaratory relief are governed by the same liberal pleading standards that are applied in other civil actions, they must raise a presently justiciable issue. *Cox v. Glenbrook Co.*, 78 Nev. 254, 267-268, 371 P.2d 647, 655 (1962). In this case, this Court concludes a present justiciable issue does exist as the homeowners' association has served Plaintiffs with Notice of Constructional Defects pursuant to NRS 40.645, and intends to pursue its claims through litigation. In Plaintiffs' view, the claims for damages caused by the eight (8) constructional defects discussed above are time-barred by virtue of the six-year statute of repose enacted retroactively by the 2015 Nevada Legislature. Plaintiffs now seek a declaration from this Court as to the rights, responsibilities and obligations of the parties as they pertain to the homeowners' association's claims. As the parties have raised arguments concerning the application of both statutes of limitation and repose, this Court begins its analysis with a review of them.

4. The statutes of limitation and repose 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 of 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 Co. v. Furgerson*, 104 Nev. 772, 775 n.2, 766 P.2d 904, 906 n.2 (1988). Of the two, statutes of repose set an outside time limit, generally running from the date of substantial completion of the project and with no regard to the date of the injury, after which causes of action for personal injury or property damage allegedly caused by 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 (1997), *citing Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 302 S.E.2d 868, 873 (1983). While there are instances where both the statutes of repose and limitations may result to time-bar a particular claim, there, likewise, 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, i.e. NRS 11.220. *See Hartford Ins. Group v. Statewide Appliances, Inc.*, 87 Nev. 195, 198, 484 P.2d 569, 571 (1971).[7] 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."

***4 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, 662-663, 799 P.2d 556, 558 (1990), *citing Oak Grove Investment v. Bell & Gossett Co.*, 99 Nev. 616, 621-623, 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 limitation 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."').

7. Prior to February 24, 2015, when the 2015 Nevada Legislature enacted Assembly Bill (AB) 125, 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.[8] *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) provided 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) provided 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, depend 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) in effect prior to February 24, 2015.

8. In addition, prior to the enactment of AB 125, NRS 11.202 set forth the exception to the application of the statute of repose. It provided an 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. As alluded to in Paragraph 7 above, AB 125 made sweeping revisions to statutes addressing residential constructional 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 2015). As set forth in Section 17 of AB 125, NRS 11.202 was revised to state in pertinent part as follows:
5** 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)

…

10. Section 21(5) of AB 125 specifies the period of limitations on actions set forth in 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 provides 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. Section 21 of AB 125 specifically provides in pertinent part:
5. Except as otherwise provided in subsection 6, the period of limitations on actions set forth in NRS 11.202, as amended by section 17 of this act, applies retroactively to actions in which the substantial completion of the improvement to the real property occurred before the effective date of this act.

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

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

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 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 thirty (30) days after mediation is concluded or waived in writing. *See* NRS 40.695(1).[9]

12. In this case, as noted above, the date of substantial completion for the project is November 26, 2007. The eight (8) alleged constructional defects were discovered by the homeowners' association when extrapolation testing took place, which this Court understands was January and February 2015.[10] The homeowners' association made a claim for constructional defects when it served its authenticated NRS 40.645 notice on February 23, 2016. As the constructional defects notice was served upon Plaintiffs on February 23, 2016, the statutes of limitation and repose applicable to the claim as of that date would be tolled. *See* NRS 40.695.

***6 13.** 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 on actions set forth in NRS 11.202 as amended by Section 17 applies *retroactively* to actions in which the substantial completion of the improvement to the real property occurred before AB 125's effective date, *except* as otherwise provided in Section 21(6). Section 21(6) 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, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION served its NRS 40.645 constructional defect notice 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 thirty (30) days after the NRS 40.680 mediation was concluded or waived in writing. *See* NRS 40.695. 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, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION had up to and including July 16, 2016 in which to file its lawsuit. It did not do so until August 2, 2016 when the Answer and Counter-Claim to Plaintiffs' Complaint for Declaratory Relief was filed. As the action was not commenced on or before July 16, 2016, SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION'S claim for damages allegedly caused by the eight (8) constructional defects is time-barred.[11]

14. SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION argues the one-year grace period addressed in Section 21(6) operates to toll the new statute of repose period of six (6) years. This Court disagrees. There is nothing stated in Section 21(6) to suggest it tolls the new statute of repose period. To the contrary, Section 21(6) states the retroactive application of the amended NRS 11.202 will not limit actions that occurred prior to the effective date of the act if it is commenced within one year thereafter. In this case, the homeowners' association was given the benefit of not only the one year "safe harbor" provision, but also the period of time tolled to allow the NRS Chapter 40 pre-litigation process to proceed. *See* NRS 40.695.

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose filed November 21, 2016 is granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED SKY LAS VEGAS CONDOMINIUM UNIT OWNERS' ASSOCIATION'S Counter-Claim filed August 2, 2016 is dismissed, as there remains no genuine issue of material fact, and Counter-Defendants SKY LAS VEGAS CONDOMINIUMS, INC. and M.J. DEAN CONSTRUCTION, INC. is entitled to judgment as a matter of law, pursuant to NRCP 56.

DATED this 9th day of June 2017.

<<signature>>

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

Footnotes

1 *See* Exhibits H and I attached to SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose filed November 21, 2016.

2 *See* SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose, p. 15; *also see* Association's Opposition to Plaintiffs' Motion for Summary Judgment by Application of the Statute of Repose filed December 28, 2016.

3 These constructional defects are:
a. Geotechnical issues relating to improperly compacted support fill placed during construction;
b. Vehicle gates;
c. Attachment of exterior handrails;
d. Improperly secured surface drains;
e. Lack of slope and float finish of structural concrete decks;
f. Stained metal ceiling panels below the parking area;
g. Lack of slope at the penthouse balcony structural concrete deck; and
h. Inadequately installed drain lines.
See Association's Opposition to Plaintiffs' Motion for Summary Judgment by Application of the Statute of Repose, p. 4.

4 *See* Exhibit D, p. 8 attached to SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief by Application of the Statute of Repose; *also see* Association's Opposition to Plaintiffs' Motion for Summary Judgment by Application of the Statute of Repose, pp. 7-8.

5 The parties have also referred to this case as "*Sky I.*"

6 *See* Findings of Fact, Conclusions of Law and Order Re: November 4, 2015 Hearing on Motion for Clarification of October 2, 2015 Minute Order filed January 22, 2016 in Case No. A-13-680709-D, attached as Exhibit D to SKY LAS VEGAS CONDOMINIUMS, INC.'S and M.J. DEAN CONSTRUCTION, INC.'S Motion for Summary Judgment on Plaintiffs' Complaint for Declaratory Relief.

7 In *Hartford Ins. 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 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, i.e. NRS 11.220, the statute of limitations of four (4) years.

8 NRS 11.2055 identifies (and identified prior to the enactment of AB 125) the "date of substantial completion" of an improvement to real property as 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." In this case, as noted above, the parties agree the date the Certificate of Occupancy, November 26, 2007, is the date of substantial completion.

9 NRS 40.695(1) provides: "Except as otherwise provided in subsection 2, statutes of limitation or repose applicable to a claim based on a constructional defect governed by NRS 40.600 to 40.695, inclusive are tolled from the time notice of the claim is given, until 30 days after mediation is concluded or waived in writing pursuant to NRS 40.680."

10 While January 2015 is the time frame when the eight (8) alleged constructional defects were discovered, it is unknown whether such date represents when the homeowners' association should have known through the exercise of reasonable diligence these defects existed on the property.

11 As this Court finds SKY LAS VEGAS CONDOMINIUMS UNIT OWNERS' ASSOCIATION'S claims are time-barred by the pertinent six-year statute of repose, it does not address the application of the four-year statute of limitations to this matter.

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

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

Counter-Defendants.

PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S, OPPOSITION TO DEFENDANTS/COUNTER-CLAIMANTS' 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)

COMES NOW, Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. (hereinafter collectively referred to as "the Builders"), by and through their counsel of record, Peter C. Brown, Esq., Jeffrey W. Saab, Esq., Devin R. Gifford, Esq. and Leesa S. Goodwin, Esq. of the law firm of Bremer Whyte Brown & O'Meara, LLP, and hereby file their **OPPOSITION TO DEFENDANTS/COUNTER-CLAIMANTS' 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)**

This Opposition is made and based on the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and all evidence and/or testimony accepted by this Honorable Court at the time of the hearing on the Motion.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On June 3, 2019, eleven days after this Court entered its May 23, 2019 Order summarily disposing of the Association's final defect claim, the Association filed a Motion for Reconsideration or, in the Alternative, Motion to Stay the Court's Order. On June 13, 2019, twenty-one days after this Court entered its May 23, 2019 Order, the Association filed a Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Order. (hereinafter "Renewed Motion")

Many of the same arguments the Builders previously raised in its Opposition responding to the Association's first Motion for Reconsideration apply in response to the Association's Renewed Motion. On that basis, and in the interest of brevity, the Builders incorporate by reference some of the arguments raised in its Opposition filed on June 21, 2019 into the instant Opposition, subject to additional arguments and authorities as provided below.

Focused on the red herring of Rule 54(b) finality, the Association ignores that the Court must *still* be presented with a justifiable basis for amending its Order. The Association argues that because AB 421 became immediately effective upon its signing by the Governor, a change in controlling law had occurred, warranting a revision of the Order. The Association is incorrect in its assessment of what "controlling law" means. The mere act of the Governor signing AB 421 *long after* the Association commenced its action against the Builders, did not create a change in controlling law. Instead, based upon the date of substantial completion and the time the Association commenced its action against the Builders, the unchanged controlling law to this case is the 6-year statute of repose period. Since the effective date of AB 421 does not occur until October 1, 2019, the Association's entire premise for its Motion fails. No change to controlling law has yet occurred and therefore, no relief can be accorded to the Association under NRCP 54(b) or NRCP 59(e).

The Association lastly asserts that because AB 421's statute of repose provision claims to apply retroactively, its previously time-barred claims are somehow revived. Such an interpretation would render AB 421 unconstitutional by infringing upon the Builders' vested due process rights not to be sued for time-barred claims.

Therefore, the Association's Renewed Motion must be denied.

II. ARGUMENT

A. THE ASSOCIATION FAILS TO SHOW THAT RECONSIDERATION OF THE DISTRICT COURT'S ORDER IS WARRANTED

Merely invoking NRCP 54(b) does not give the Court authority to disturb its considered judgment; the Court must *still* be presented with a justifiable basis for doing so. *See, e.g., Ahmead v. Eighth Judicial Dist. Court*, 2015 WL 1421418 (Order Granting Petition for Writ of Mandamus, March 25, 2015); *Elec. Privacy Info. Ctr. v. United States Dep't of Homeland Sec.*, 811 F. Supp. 2d 216, 224 (D.D.C. 2011) ("relief upon consideration of an interlocutory decision pursuant to Rule 54(b) is available 'as justice requires'"); *see also Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) (recognizing that "federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules"). "'As justice requires' indicates concrete considerations of whether the court has patently misunderstood a party, has made a decision outside the adversarial issues presented to the court by the parties, has made an error not of reasoning, but of apprehension, or where controlling or significant change in the law or facts **has occurred since the submission of the issue to the court."** *Elec. Privacy Info. Ctr.*, 811 F. Supp. 2d at 1253 (internal quotation marks omitted). "These considerations leave a great deal of room for the court's discretion and, accordingly, the 'as justice requires' standard amounts to determining whether relief upon reconsideration is necessary under the relevant circumstances." *Id.* (internal quotation marks omitted). Notwithstanding, the district court's discretion is "subject to the caveat that, where litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Id.* (internal quotation marks omitted); *see also Kona Enters. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000) (recognizing that reconsideration is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources") (internal quotation marks omitted).

Moreover, "[i]n reviewing a motion for revision under Rule 54(b), courts generally apply the same standards applicable to a Rule 59(e) motion for reconsideration, which is only granted for one of three reasons: (1) to correct a clear error of law; (2) to account for newly discovered evidence or

a change in controlling law; or (3) to prevent manifest injustice." *Jackson v. Novastar Mortg., Inc.*, 645 F. Supp. 2d 636, 642 (D. W.Tenn. 2007) (citing *Gencorp, Inc. v. Am. Int'l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1999); *Al-Sadoon v. FISI*Madison Fin. Corp.*, 188 F. Supp. 2d 899, 901-02 (M.D. Tenn. 2002)); *see also AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010) (recognizing that a change in controlling law constitutes a ground for a NRCP 59(e) motion). In other words, because "the standard under Rule 59(e) (motion to amend) and Rule 54(b) (motion for reconsideration) are essentially identical," a court will apply the same analysis. *Marketquest Group, Inc. v. Bic Corp.*, 2014 WL 3726610 (Order Denying Motion for Reconsideration, D. So.Cal, July 25, 2014); *see also Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) ("[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in controlling law.") (Quoting *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

Here, irrespective of whether the Order the Association seeks reconsideration of is an interlocutory order or final judgment, the analysis is the same. Specifically, the Association asserts that reconsideration is warranted due to the fact that Governor Sisolak signed AB 421 into law following entry of this Court's Order. Accordingly, the Association avers that a change in controlling law warrants this Court's reconsideration of its May 23, 2019 Order, under NRCP 54(b) and NRCP 59(e). Therefore, in order to warrant this Court's reconsideration, the Association must show that there has been a change in *controlling* law. Such a showing has not been made.

B. THE COURT MUST DENY THE ASSOCIATION'S MOTION TO AMEND ITS MAY 23, 2019 ORDER BASED UPON APPLICATION OF AB 421 BECAUSE THAT BILL DOES NOT BECOME EFFECTIVE UNTIL OCTOBER 1, 2019

The Association erroneously asserts that AB 421 immediately and retroactively lengthens the statute of repose period to ten years upon the Governor's signature on June 3, 2019.

First, the effective date of AB 421 is October 1, not June 3. NRS 218D.330(1) ("Each law and joint resolution passed by the Legislature becomes effective on October 1 following its passage, unless the law or joint resolution specifically prescribes a different effective date."). Retroactivity

analysis is different from a statute's effective date. Even a retroactive statute begins to have its retroactive effect only once it becomes effective. So although § 11 purports to "apply retroactively," nothing in that statute changes the October 1 effective date. Indeed, the very fact that the statute labels as retroactive its application to "improvement[s] to the real property occur[ing] before October 1, 2019" shows that the statute begins to operate only on October 1. If the statute were effective immediately, then its application to improvements to real property occurring between June 3 and October 1 would be normal, *prospective* application, not retroactive application as the statute expressly provides.

Second, this change is not *controlling law*, as required to warrant this Court's reconsideration. Rather, the Supreme Court of Nevada has repeatedly refused to apply the statutes of repose retroactively. *See Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 776, 766 P.2d 904,907-08 (1988); *Lotter v. Clark County*, 106 Nev. 366, 370, 793 P.2d 1320, 1323 (1990); *Alsenz v. Twin Likes Village*, 108 Nev. 1117, 1120, 843 P.2d 834, 836 (1992) (enunciating that "current versions of the statutes of repose may not be applied retroactively"); *see also Garson v. Steamboat Canal Co.*, 43 Nev. 298, 304, 185 P. 801, 802 (1919) ("But it is not correct to say that the law of 1919 controls," as "all of the facts of the case transpired before it became effective."); *Cameron v. Atl. Richfield Co.*, 2019 WL 2083050 (Wash. App. 2019) ("A court looks to the date of substantial completion to determine which version of the statute of repose applies."); *M.E.H. v. L.H.*, 685 N.E.2d 335, 339 (Ill. 1997) ("If the claims were time-barred under the old law, they remained time-barred even after the repose period was abolished by the legislature."); *Stricklin v. Stricklin*, 490 S.W.3d 8, 14 n.6 (Tenn. App. 2015) (recognizing that a statute not in effect at the time of rendering a decision is not controlling law). Indeed, in *Alsenz*, the Supreme Court of Nevada applied SB 105, which became effective on April 10, 1991, to actions commenced *after* that effective date to hold that SB 105 was unconstitutional. *See* 108 Nev. at 1121-22, 843 P.2d at 837. Thus, actions commenced *before* the effective date of a new statute of repose bill are not affected by the new law. *See id.*

In comporting with *Alsenz* and additional established case law, the mere act of the Governor signing AB 421 *long after* the Association commenced its action against the Builders, did not create

a change in controlling law. Instead, based upon the date of substantial completion coupled with the time the Association commenced its action against the Builders, the unchanged controlling law to this case is the 6-year statute of repose period. Undeniably, all of the facts in this construction defect action transpired many years before AB 421 became effective. Moreover, even if AB 421 became effective on June 3, 2019, which the Builders do not concede, AB 421 would still not be *controlling law* under binding and persuasive authority.

Therefore, the Association fails to show the requisite change in controlling law to warrant reconsideration. Consequently, in the interests of finality and conservation of judicial resources, justice cannot justify granting such an extraordinary remedy. Based on the foregoing, the Builders respectfully request that this Court deny the Association's Renewed Motion.

C. AMENDING THIS COURT'S MAY 23, 2019 ORDER BASED ON AN APPLICATION OF AB 421 WOULD VIOLATE THE BUILDERS' DUE PROCESS BY INFRINGING ON THE BUILDERS' VESTED RIGHTS

In the interest of brevity, the Builders hereby incorporate by reference the arguments presented in Argument D of their Opposition to the Association's June 3, 2019 Motion for Reconsideration. Whereas the Association argued in its first Motion for Reconsideration that the Court should stay its Order until AB 421 passed, the Association now argues that because AB 421 was signed by the Governor on June 3, 2019, the law immediately changed, retroactively reviving its already time-barred claims. In either case, the Association's misguided interpretation of retroactivity of AB 421 would violate the Builders' due process rights by infringing upon their vested rights, for the same reasons presented in the Builders' Opposition filed June 21, 2019.

As discussed in that Opposition, even when the legislature *intends* to revive expired claims through a retroactive statute, it cannot, because "[t]o give it that effect would be to deprive defendant of its property without due process of law." *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U.S. 633, 637 (1925). Many states follow the United States Supreme Court's lead by prohibiting retroactive application of a statute to create liability. For example, Kansas has explained: "All applicable, effective laws at the time the statute of repose expired informed the defendants that the plaintiff's claims were completely and totally extinguished." *Ripley v. Tolbert*, 921 P.2d 1210, 1224

(Kan. 1996). "Thus, the defendants had no notice, except for knowledge that the legislature can amend laws in the future, that the plaintiff's claims might not be completely extinguished or might be revived later by a new enacted statute when the statute of repose expired." *Id.* When a plaintiff's extinguished claims are revived by subsequent legislation, which was not in effect when the statute of repose expired, the defendants' vested rights are impermissibly taken and due process is violated. *Id.*; *see also Harding v. K.C. Wall Prods., Inc.*, 831 P.2d 958, 968 (Kan. 1992) ("The legislature *cannot* revive a cause of action barred by a statute of repose, as such action would constitute the taking of property without due process." (emphasis in original)); *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 773-74 (Neb. 1991) (concluding that the immunity granted by the expiration of a statute of repose is a property right, protected by due process of law).[1]

The Builders' Opposition filed June 21, 2019 further makes clear that "refusing to allow the revival of time-barred claims through retroactive application of extended statutes of limitations" is "the majority rule." *Roark v. Crabtree*, 893 P.2d 1058, 1063 (Utah 1995) (collecting cases and citing 51 AM. JUR. 2D *Limitation of Actions* § 44 (1970) ("[T]he great preponderance of authority favors the view that one who has become released from a demand by the operation of the statute of limitations is protected against its revival by a change in the limitation law.")).

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[1] *See also Johnson v. Lilly*, 823 S.W.2d 883 (Ark. 1992); *Wiley v. Roof*, 641 So. 2d 66, 68-69 (Fla. 1994); *Doe A. v. Diocese of Dallas*, 917 N.E.2d 475 (Ill. 2009); *Henry v. SBA Shipyard, Inc.*, 24 So. 3d 956, 960-61 (La. Ct. App. 2009); *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771 (Neb. 1991); *Kelly v. Marcantonio*, 678 A.2d 873, 883 (R.I. 1996); *Doe v. Crooks*, 613 S.E.2d 536 (S.C. 2005); *Minnesota ex rel. Hove v. Doese*, 501 N.W.2d 366, 370 (S.D. 1993); *Roark v. Crabtree*, 893 P.2d 1058, 1062-63 (Utah 1995); *Starnes v. Cayouette*, 419 S.E.2d 669 (Va. 1992), *superseded in part by* VA. CONST. art. IV, § 14 (effective Jan. 1, 1995) (expressly vesting legislature with the right to enact retroactive legislation "based on an intentional tort committed by a natural person").

III. CONCLUSION

This Court's May 23, 2019 Order was comprehensive and determinative. The Association seeks an alteration of the Court's Order on grounds that a change in controlling law has occurred. No such change has occurred. The Association's Renewed Motion must therefore be denied.

Dated: July 1, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2019 a true and correct copy of the foregoing document was electronically delivered to Odyssey for service upon all electronic service list recipients.

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Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

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 OPPOSITION TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B)

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

Counterclaimants,

vs.

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

Counterdefendants.

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Defendant Panorama Towers Condominium Unit Owners' Association (the "HOA"), by and through its counsel of record, hereby submits its Opposition to Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc.'s (the "Builders") Motion for Attorneys Fees Pursuant to NRS 18.010(2)(b).

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This Opposition is made and based upon the following Memorandum of 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: July 1, 2019

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Builders request for attorney's fees pursuant to NRS 18.010(2)(b) is based on the false premise that the HOA's counterclaims arising out of construction defects at Towers I and II were brought without reasonable grounds and/or to harass the Builders, and were time barred from the time the HOA served its initial Chapter 40 Notice. The Builders' Motion suffers from numerous flaws.

First, from a procedural standpoint, the Builders' request is premature because both the Builders and the HOA have claims that remain unresolved.

Second, as to the HOA's alleged lack of "reasonable grounds," the HOA's construction defect claims are supported by credible evidence in the form of several expert reports included in the HOA's Chapter 40 Notice and Amended Notice. *See* Mot., Ex. A. And the Court recently ruled that the HOA's Amended Notice contained sufficient information to support its most significant claim for defectively designed and constructed windows. [Identify ruling]

Third, the Court's order contradicts the Builders' assertion that the HOA's defect claims were time-barred from the outset. The Court held the HOA timely served its Chapter 40 Notice, but the HOA

did not file its counterclaim within 30 days of the pre-litigation mediation. The Builders' repeated claim that the HOA's defect claims were untimely from the outset is simply untrue.

Further, the timeliness of the HOA's counterclaims involved an issue of law that was new and uncertain, required extensive legal analysis, and involved the Court's discretion. Undoubtedly, the uncertainty surrounding the amended NRS 11.202, AB125's one-year grace period, the Court's discretion to extend NRS 40.695's tolling period, the Builders' unusual decision to file suit before the HOA, and the HOA's filing of its counterclaims in the normal course pursuant to the Nevada Rules of Civil Procedure, created a reasonable and justified basis for the HOA to believe that its counterclaims were timely filed. *See Key Bank of Alaska v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382, 385 (1990) (finding abuse of discretion in awarding attorney's fees under NRS 18.010(2)(b) where "complaint presented complex legal questions concerning statutory interpretation and legislative intent").

The Builders engage in a self-serving revisionist history because NRS 18.010(2)(b) only allows fee-shifting if the HOA's claims violated Rule 11. They did not. Accordingly, under Nevada law, an award of attorney's fees under NRS 18.010(2)(b) is not permitted in this case.

Even if the Court determines an award of attorney's fees is appropriate in some amount, any such award must be limited to fees that are reasonable and justified. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969). Had the Builders filed their statute of repose motion first, more than two years of needless litigation and attorney's fees would and should have been avoided. Thus, all attorney's fees unrelated to the statue of repose motion are entirely unnecessary and unjustified in resolving this case and can never satisfy the *Brunzell* factors.

II.

STATEMENT OF 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.

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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.

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 a motion for summary judgment—their fifth pre-discovery motion for summary judgment—claiming all of the HOA's claims were time-barred from the beginning. If true, the years of prior motion practice and litigation had no importance whatsoever. On May 23, 2019, the Court entered its order determining the HOA's construction defect counterclaims were time-barred.

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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
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
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
April 23, 2019	Court heard the Builders' Fifth Motion and the HOA's Countermotion

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When	What
May 23, 2019	Court entered Order granting the Builders' Fifth Motion and Denying the HOA's Countermotion

C. The Builders' Requested Attorney's Fees Beg Numerous Questions and are Far from Reasonable, Necessary, or Justified.

The Builders claim to have incurred attorney's fees totaling $240,098.11. *See* Mot. at 7:26–8:10. The Builders' fee request suffers from several problems. First, the Builders' invoicing does support the purported fee total. All of the alleged monthly fee totals include expenses, which should already be part of the Builders verified memorandum of costs. For example, the row supposedly for fees incurred in "May 2019 – Forward" shows $19,544.64. However, the invoices reflect only $16,132.00 in fees. *See* Mot., Appendix Vol. II, Ex. M at 128–222. The Builders' error results in more than $20,000 in additional purported fees, which are duplicative of the costs already sought via a different procedural vehicle. *See infra*, Figure 1.

Second, the Builders' invoices raise numerous questions and are in many instances outright confusing. For example, the Builders provide four (4) separate invoices with alleged fees incurred from March 21, 2016, to May 31, 2016. *See* Mot., Appendix Vol. II, Ex. F at 01–23, 82–108, 134–177, 196–239. These invoices seem to suggest a split between Chubb and ESIS, but the Builders offer no explanation. The unexplained invoices raise several questions. For example:

1. If a split occurred, what was it?
2. Why did the split between two (2) carriers (i.e., Chubb and ESIS) generate four (4) different invoices for the same work? *See id.* (invoicing for March 21, 2016, to May 31, 2016).
3. Why is one set of invoices dated May 31, 2016, and the other set dated March 1, 2017? *Compare* Ex. F at 01–23, 82–108 *with* Ex. F at 134–176, 196–239.
4. Why is the split of the same time different on the invoices dated May 31, 2016, than it is on the invoices dated March 1, 2017? *See id.* (appearing to split 2/3 for Chubb and 1/3 for ESIS in May 2016 and 50/50 in March 2017).

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5. Why are all invoices not split in the same way? *Compare* Ex. F at 01–23, 82–108 (Mar. 21, 2016, through May 31, 2016) with Ex. F at 66–81, 240–268, 313–331 (Sept. 2, 2016, through Nov. 30, 2016).
6. If these are split invoices, why do the work descriptions sometimes differ between invoices? *Compare* Ex. F at 01 (first entry) *with* Ex. F. at 82 (first entry).
7. How much of the time/fees identified on these invoices did the carriers reject and refuse to pay and for what reasons? Insurance carriers sometimes cut or reject certain billing entries or work. The Builders offer no information on the fees they actually incurred/paid.
8. Why are some entire portions of the invoices redacted (including amounts of time and fees) while most other sections have more modest redactions? *See* Ex. M at 160–163, 165–185, 214–218. How can the Court (or the HOA) evaluate the Builders' fee request with entire sections redacted?

Figure 1: Table Summarizing the Builders' Invoices

Exhibit & Pages	Invoice Date Range	Insurance Carrier	Paralegal Hours	Attorney Hours	Total Fees	Costs
Ex. F at 1–23	3/21/16 to 5/31/16	Chubb	30.8	25.1	$8,088.50	$256.72
Id. at 82–108	3/21/16 to 5/31/16	ESIS	15.4	12.55	$4,044.25	$128.36
Id. at 134–177	3/21/16 to 5/31/16	ESIS	15.4	12.5	$4,035.50	$128.36
Id. at 196–239	3/21/16 to 5/31/16	Chubb	15.4	12.55	$4,044.25	$128.36
Id. at 34–42	6/1/16 to 8/31/16	Chubb	0.5	30.1	$5,098.00	$1,060.04
Id. at 178–195	6/15/16 to 8/31/16	ESIS	0.25	15.05	$2,549.00	$530.06
Id. at 269–285	6/15/16 to 8/31/16	Chubb	0.25	15.05	$2,549.00	$530.06
Id. at 66–81	9/2/16 to 11/30/16	Chubb	2.5	35.9	$6,389.00	$693.75
Id. at 240–268	9/2/16 to 11/30/16	ESIS	1.55	27.45	$4,894.50	$789.81
Id. at 313–331	9/2/16 to 11/30/16	Chubb	1.55	27.45	$4,894.50	$789.81
Id. at 24–33	9/14/16 to 11/30/16	ESIS	2.0	19.7	$3,652.50	$708.81
Id. at 43–65	12/5/16 to 2/28/17	ESIS	0.0	21.95	$3,685.75	$41.37
Id. at 109–133	12/5/16 to 2/28/17	Chubb	1.8	22.05	$3,875.25	$254.40
Id. at 286–312	3/2/17 to 5/31/17	ESIS	11.1	22.68	$4,945.83	$321.74
Id. at 340–370	3/2/17 to 5/31/17	Chubb	10.55	35.07	$7,123.67	$273.98
Id. at 332–339	6/13/17 to 8/31/17	ESIS	0.2	17.5	$3,081.50	$114.10
Id. at 371–380	9/8/17 to 11/30/17	ESIS	0.2	15.9	$2,801.50	$339.75
Ex. L at 1–12	9/8/17 to 2/28/18	Chubb	0.2	17.75	$3,125.25	$365.08
Id. at 13–15	1/25/18 to 2/28/18	ESIS	0.0	1.85	$323.75	$25.28
Id. at 16–20	3/2/18 to 5/31/18	Chubb	0.1	5.95	$1,050.75	$2,977.65
Id. at 21–30	3/2/18 to 5/31/18	ESIS	0.85	22.65	$4,044.50	$3,350.77
Id. at 31–36	6/1/18 to 8/31/18	Chubb	0.75	16.7	$2,993.75	$368.63
Id. at 37–96	9/6/18 to 12/31/18	ESIS	43.85	98.7	$21,057.75	$403.79
Id. at 97–130	9/6/18 to 12/31/18	Chubb	24.5	64.8	$13,529.26	$144.51

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Exhibit & Pages	Invoice Date Range	Insurance Carrier	Paralegal Hours	Attorney Hours	Total Fees	Costs
Id. at 186–206	12/2/18 to 12/21/18	Chubb	6.25	47.0	$7,556.75	$268.80
Id. at 131–185	1/1/19 to 1/31/19	ESIS	10.95	95.6	$16,916.62	$12.74
Id. at 207–264	1/1/19 to 1/31/19	Chubb	10.95	95.6	$16,916.63	$12.76
Ex. M at 1–64	2/1/19 to 4/30/19	ESIS	3.09	115.45	$19,667.00	$1,465.92
Id. at 65–127	2/1/19 to 4/30/19	Chubb	2.81	115.44	$19,637.26	$1,466.00
Id. at 128–188	4/2/19 to 6/15/19	Chubb	6.85	55.75	$10,027.50	$2,695.58
Id. at 189–222	4/2/19 to 6/15/19	ESIS	0.45	35.55	$6,104.50	$717.06
Totals	**3/21/16 to 6/15/19**		**221.05**	**1,157.34**	**$218,697.77**	**$21,361.05**

Third, for what could and should have been a single-issue case (i.e., statute of repose), the Builders' purported attorney's fees are excessive, outrageous, and, in many instances, completely unnecessary and unjustified. For example, the Builders allegedly spent close to 1,200 hours of attorney time and more than 220 hours of paralegal time. How is that even possible in a case where *no discovery ever occurred* and the parties briefed only a handful of motions? Of that obscene amount, the Builders claim to have spent nearly 365 hours totaling nearly $58,000 in fees *before* the HOA filed its Counterclaim. *See supra*, Figure 1 (invoicing through 2/28/17). To address the simple statute of repose issue, **the Builders spent an eye-popping $38,796.50** in attorney's fees from December 1, 2018, to April 23, 2019 (the date of the hearing).[1] This absurd amount of fees for a single, simple motion is

[1] *See* Mot., Appendix Vol. II, Ex. L at 76 ($55.50), 91 ($189.75), 133 ($173.25), 134 ($247.50), 135 ($189.75), 155 ($49.50), 157 ($412.50), 158 ($41.25), 159 ($8.25), 160 ($148.50), 164 ($156.75), 168 ($189.75), 171 ($99.00), 172 ($297.00), 173 ($305.25), 174 ($404.25), 175 ($82.50), 176 ($165.00), 177 ($412.50), 178 ($189.75), 182 ($148.50), 183 ($404.25), 189 ($55.50), 202 ($37.00), 203 ($318.50), 204 ($189.75), 209 ($198.00), 210 ($198.00), 211 ($189.75), 232 ($49.50), 235 ($222.75), 236 ($214.50), 238 ($66.00), 239 ($90.75), 242 ($41.25), 243 ($115.50), 247 ($189.75), 250 ($148.50), 251 ($247.50), 252 ($354.25), 253 ($24.75), 254 ($90.75), 255 ($156.75), 256 ($420.75), 257 ($156.75), 261 ($165.00), and 262 ($387.75); *see also* Ex. M at 01 ($123.50), 02 ($379.50), 03 ($16.50), 04 ($16.50), 05 ($181.50), 06 ($486.75), 09 ($860.75), 10 ($203.50), 11 ($231.00), 12 ($28.50), 13 ($66.00), 17 ($8.25), 19 ($173.25), 20 ($107.25), 21 ($58.75), 22 ($272.25), 23 ($66.00), 24 ($33.00), 25 ($230.25), 26 ($123.75), 27 ($123.75), 28 ($8.25), 29 ($148.50), 30 ($371.25), 31 ($231.00), 32 ($115.50), 33 ($132.00), 34 ($198.00), 35 ($643.50), 36 ($8.25), 37 ($214.50), 38 ($140.25), 39 ($338.25), 41 ($156.75), 42 ($57.25), 43 ($189.75), 44 ($181.50), 45 ($82.50), 46 ($156.75), 47 ($429.00), 48 ($405.75), 49 ($396.00), 50 ($216.00), 51 (199.25), 52 ($148.50), 53 ($420.25), 54 ($300.50), 55 ($239.25), 56 ($395.25), 57 ($305.25), 58 ($108.5), 65 ($123.75), 66 ($542.00), 67 ($506.25), 68 ($273.25), 69 ($191.00), 70 ($486.75), 73 ($860.75), 74 ($203.50), 75 ($231.00), 76 ($28.50), 77 ($24.75), 81 ($78.25), 82 ($82.50), 83 ($123.75), 84 ($107.25), 85 ($123.75), 86 ($198.00), 87 ($41.25), 88 ($53.50), 89 ($259.75), 90 ($99.00), 91 ($107.25), 92 ($49.50), 93 ($140.25), 94 ($470.25), 95 ($148.50), 96 ($132.00), 97 ($74.25), 98 ($330.00), 99 ($511.50), 100 ($74.25), 101 ($123.75), 102 ($404.25), 103 ($16.50), 105 ($214.50), 107 ($140.25), 108 ($165.00), 109 ($107.25), 110 ($132.00), 111 ($445.50), 112 ($412.50), 113 ($354.75), 114

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completely misaligned with the Builders' contention that the issue was obvious and apparent.[2] A review of the actual billing entries also reveals examples of highly questionable work and billed amounts.[3] Whatever the case, had the Builders raised the repose issue first, they could and would have avoided all of the other $122,107.27 in attorney's fees they allegedly incurred after the HOA filed its Counterclaim (total fees less amount incurred before March 1, 2017, less amount incurred for the statute of repose motion).

III.

ARGUMENT

A. The Builders' Request for Attorney's Fees is Premature.

The Court has not entered a final judgment resolving all of the claims in this case, which precludes the Builders' Motion and any award of attorney's fees. The Court's order granting the Builders' Motion for Summary Judgment, based upon the expiration of the statute of repose in NRS 11.202(1), resulted only in the dismissal of the HOA's counterclaims arising from the construction

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($115.00), 115 ($239.25), 116 ($156.75), 117 ($387.75), 118 ($374.75), 119 ($354.75), 120 ($277.00), 121 ($198.00), 122 ($90.75), 128 ($8.25), 129 ($181.50), 130 ($82.50), 131 ($140.25), 132 ($247.50), 133 ($313.50), 134 ($222.75), 135 ($247.50), 136 ($107.25), 137 ($90.75), 138 ($214.50), 139 ($165.00), 140 ($123.75), 141 ($231.00), 142 ($298.50), 143 ($90.75), 144 ($371.25), 145 ($519.50), 146 ($404.25), 189 ($8.25), 190 ($181.50), 191 ($82.50), 192 ($140.25), 193 ($247.50), 194 ($313.5), 195 ($222.75), 196 ($247.50), 197 ($107.25), 198 ($90.75), 199 ($214.50), 200 ($165.00), 201 ($123.75), 202 ($231.00), 203 ($298.50), 204 ($90.75), 205 ($371.25), 206 ($519.50), 207 ($404.25) (entries referencing statute of repose briefing and hearing and total amounts billed for that time (totals based on page numbers where fee amount appears, not where billing entry begins)).

[2] The Builders' excessive billing entries identified in the previous footnote show a billing practice of death by a thousand cuts. Opposing counsel's questionable billing practices were not the HOA's concern until the Builders filed the instant Motion. The Court should carefully review all of the Builders' billing entries before finding any of them to be reasonable, necessary, or justified.

[3] For example, on April 18, 2019, an associate barred in 2016 **billed 0.8 hours (38 to 48 minutes) for allegedly reviewing *Wood v. Safeway*** in order to prepare for the hearing on April 23, 2019. *See* Mot., Appendix Vol. II, Ex. M at 129, 190 (first entry on page). Regardless of this associate's prior work experience in other cases, the repose motion was the Builder's fifth motion for summary judgment in this case and not the first one argued by this same associate. Assuming this work even happened, it should not take anyone 40 minutes to review the *Wood v. Safeway* decision for purposes of preparing for the April 23 hearing. The same associate **spent more than an hour** allegedly reviewing several other decisions in a similar fashion in order to prepare for the April 23 hearing. *See id.* (billing for review of *Volpert v. Papagna*, *Dykema v. Del Webb*, and *Allstate Ins. Co. v. Ferguson)*. These billing entries call into question the legitimacy of all other entries.

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defects. The HOA's counterclaims for Intentional/Negligent Nondisclosure, Breach of Contract, and Breach of Duty of Good Faith and Fair Dealing in violation of NRS 116.1113 were not disposed of by the Court's ruling on the Builder's repose motion. *See* Answer and Counterclaim, filed March 1, 2017. The Court's rulings to date do not impact these causes of action. Further, most of the Builders' claims against the HOA have not been adjudicated. Because no order or combination of orders from this Court adjudicate all of the claims, rights, and/or liabilities of all parties, no final judgment exists. *See* NEV. R. CIV. P. 54(b).

While the Builders proclaim themselves the "prevailing party" in the action, in order for a court to identify the prevailing party, there must first be a resolution of **all claims** submitted to this Court for adjudication. In order to be considered a "prevailing party," the causes of action litigated must be reduced to a final judgment. In *Eberle v. State ex rel. Nell. J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992), the Nevada Supreme Court held that "**a party cannot be considered a prevailing party in an action that has not proceeded to judgment.**" (emphasis added); *see also Bentley v. State, Office of State Engineer*, 2016 WL 3856572, at *11 (Nev. 2016) (holding that "'[t]o be a prevailing party, a party need not succeed on every issue,' **but the action must proceed to judgment.**") (quoting *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev.Adv.Op. 10, 343 P.3d 608, 615 (2015)) (emphasis added).

Several surrounding jurisdictions have reached the same conclusion. For example, in *Reyher v. State Farm Mut. Auto Ins. Co.*, (Colo. Ct. App. 2012), the Colorado Court of Appeals held that "a determination of whether a party is a prevailing party under Colorado Rule of Civil Procedure 54(d) **'must await resolution of claims' that remain pending and unresolved in the trial court.**" Additionally, the California Court of Appeals reversed an award of attorney's fees "because any prevailing-party determination **must be made upon the final resolution of *all* claims,** including those remanded to the trial court." *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.*, 2017 WL 5712140, at *1 (Cal. Ct. App. 2017) (emphasis added).

Because both the Builders and the HOA have unresolved legal claims remaining in this case, the Court—as a matter of law—cannot presently identify a prevailing party. On this basis alone, the Court must deny the Builders' request for attorney's fees.

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B. The HOA's Counterclaims Do Not Give Rise to an Award of Attorney's Fees Under NRS 18.010(2)(b).

1. Nevada Law Sets a Stringent Legal Standard for an Award of Attorney's Fees Under NRS 18.010(2)(b).

The decision to award attorney's fees under NRS 18.010(2)(b) is within the sound discretion of district courts. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 995, 860 P.2d 720, 724 (1993). NRS 18.010(2)(b) provides:

> In addition to the cases where an allowance is authorized by specific statute, the court may make an allowance of attorney's fees **to a prevailing party**:
> ....
>
> (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was **brought without reasonable ground or to harass the prevailing party**. It is the **intent of the Legislature** that the court award attorney's fees pursuant to this paragraph and **impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure** in all appropriate situations **to punish for and deter frivolous or vexatious claims** and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public.

NEV. REV. STAT. § 18.010(2)(b) (emphasis added). To support such an award, however, "there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party." *Chowdhry v. NLVH, Inc.,* 109 Nev. 478, 486, 851 P.2d 459, 464 (1993).

In *Bergmann v. Boyce,* 109 Nev. 670, 856 P.2d 560 (1993), the Nevada Supreme Court recognized that a claim is groundless if the complaint contains allegations which are not supported by any credible evidence at trial. *See also Allianz Ins. Co.,* 109 Nev. at 996, 860 P.2d at 724 (quoting *Western United Realty, Inc. v. Isaacs,* 679 P.2d 1063, 1065–69 (Colo. 1984) (attorney's fees allowable if action is frivolous or groundless, *i.e.*, cannot be supported by any credible evidence at trial)). The *Bergmann* court held: "In assessing a motion for attorney's fees under NRS 18.010(2)(b), the trial court must determine whether the plaintiff had reasonable grounds for its claims. Such an analysis depends upon the actual circumstances of the case . . . ." *Bergmann,* 109 Nev. at 675, 856 P.2d

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at 563. In *Duff v. Foster,* 110 Nev. 1306, 885 P.2d 589 (1994), the Nevada Supreme Court approvingly cited the case of *State, Dep't. of Health and Rehabilitative Services v. Thompson,* 552 So.2d 318 (Fla. Dist. Ct. App. 1989), for the following proposition: "'If an action is not frivolous when it is initiated, then the fact that it later becomes frivolous will not support an award of fees.'" *Duff,* 110 Nev. at 1309, 885 P.2d at 591 (quoting *Thompson,* 552 So.2d at 319). Under NRS 18.010(2)(b), the Nevada Supreme Court considers whether the claim pursued by the losing party against the prevailing party was based on reasonable grounds. *See Rodriguez v. Primadonna Co.*, LLC, 125 Nev. 578, 588, 216 P.3d 793, 800–01 (2009).

The Nevada Supreme Court explained that while it understands "the Legislature's desire to deter frivolous lawsuits, [the provisions of NRS 18.010(2)(b)] must be balanced with the need for attorneys to pursue novel legal issues or argue for clarification or modification of existing law." *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev. Adv. Op. 69, 427 P.3d 104, 113 (2018) (*citing Stubbs v. Strickland,* 129 Nev. 146, 153-54, 297 P.3d 326, 330–31 (2013) (determining that a party did not file suit for an improper purpose because he argued for a change or clarification in existing law)); *see also Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 968, 194 P.3d 96, 107 (2008) (holding district court did not abuse its discretion in denying attorney's fees under NRS 18.010(2)(b) where case involved complex and unsettled questions).

NRS 18.010(2)(b) also expressly equates its allowance for the recovery of attorney's fees to situations meriting Rule 11 sanctions. Rule 11 sanctions are disfavored and "the courts must exercise extreme caution in sanctioning attorneys under Rule 11 . . . ." *Larez v. Holcomb*, 16 F.3d 1513, 1522 (9th Cir. 1994). "For a legal argument to warrant sanctions under Rule 11, "**it must be clear under existing precedents that there is no chance of success.**" *Allstate Ins. Co. v. Valley Physical Medicine & Rehabilitation*, P.C. 475 F.Supp.2d 213, 234-5 (E.D.N.Y. 2007) (emphasis added), quoting *Shafi v. British Airways, PLC*, 83 F.3d 566, 570 (2d Cir. 1996). "Rule 11 must be read in light of concerns that it will . . . chill vigorous advocacy." *Larez*, 16 F.3d at 1522 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. at 393, 110 S.Ct. at 2454 (1990)).

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2. The HOA's Counterclaim was brought with reasonable grounds and its timeliness involved an issue of law that was uncertain and required extensive legal analysis to resolve.

The Builders claim they should be awarded all of their attorney's fees because the Builders told the HOA that the statute of repose expired before the HOA served its Chapter 40 Notice. *See* Mot. at 6:11-14. The Builders' position suffers from at least three obvious and critical errors. First, this Court disagreed with the Builders position that the HOA's defect claims were time barred when first brought. *See* Mot., Ex. B (Order) at ¶¶ 13–14. The Court's decision turned on the timing of and complex legal issues related to the HOA's Counterclaim (e.g., compulsory versus permissive, relation back, and good cause to extend the tolling period). *See id* at ¶¶ 15–19. None of these key issues even existed at the time the HOA served its Chapter 40 Notice in February 2016 or when the parties participated in the pre-litigation mediation in September 2016. Therefore, the Builders' opinion shared with the HOA at those times have no bearing on the outcome of this Motion.

Second, the Builders own words—in a separate and currently pending brief—completely contradict their position in the instant Motion. In their effort to justify the unreasonable two-year delay in bringing the statute-of-repose motion, the Builders recently told the Court that:

> [S]ubstantial changes made by AB 125 to the statute of repose and its interplay with the tolling provision were relatively new at the time of the Association's Chapter 40 Notice. An extensive analysis and evaluation of AB 125 and its potential application (considering both the Panorama Towers construction history and the litigation history involving the property) was necessary before the Builders could file any dispositive motion on those issues.

Builders' Opp. to Mot. to Retax and Settle Costs at 9:2–6, filed on June 21, 2019. Taking the Builders at their word, which is charitable based on their statements in the instant Motion, binding Nevada law precludes an award of attorney's fees under NRS 18.010(2)(b) due to the "extensive analysis and evaluation of [the relatively new] AB 125" that had to be done after the Builders filed their complaint. See *Rosenberg*, 134 Nev. Adv. Op. 69, 427 P.3d at 113; *Key Bank*, 106 Nev. at 53, 787 P.2d at 385.

Third, in addition to the interplay of AB125 and NRS 40.695's tolling provision, this Court had discretion to extend the tolling period due to, among other things, the Builders' pre-suit notice of the HOA's defect claims, the parties' pre-suit settlement discussions, and the complete lack of prejudice to

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the Builders. At the time the HOA filed its counterclaim, no party could predict how this Court would exercise its discretion.

Beyond these obvious and insurmountable obstacles to the Motion, the Builders never served the HOA's counsel with a Rule 11 letter. *See* NEV. REV. STAT. § 18.010(2)(b) (equating statutory fee-shifting provision to Rule 11 sanctions). The Builders cannot seek, and the Court cannot award, Rule 11 sanctions absent the required safe-harbor letter. *See* NEV. R. CIV. P. 11(c)(2). The lack of a Rule 11 letter and the 30-month delay in bringing the statute-of-repose motion suggests the Builders have contrived their present outrage with the HOA's Counterclaims rather than harboring any legitimate concerns about the defect claims being time-barred at the time they received the HOA's Chapter 40 Notice.

D. If an Award of Attorney's Fees Has a Statutory Basis, the Court May Only Award Reasonable and Justified Attorney's Fees Incurred in the Action.

Assuming, *arguendo,* that the Court determines the Builders are the "prevailing party" and entitled to an award of attorney's fees under NRS 18.010(2)(b), both of which are impossible propositions, the Court should significantly limit the Builders' requested attorney's fees. First, NRS 18.010(2)(b) contains no language suggesting the Builders should recover any attorney's fees incurred before the HOA filed its Counterclaim—the pleading criticized by the Builders. Second, Nevada law limits such awards to reasonable and justified attorney's fees.

1. NRS 18.010(2)(b)'s Plain Language Does Not Allow Recovery of Attorney's Fees Incurred Before the HOA Filed its Counterclaim.

The Builders seek to recover in part, their attorney's fees allegedly incurred prior to the HOA filing its Counterclaim on March 1, 2017. However, NRS 18.010(2)(b) **does not** expressly permit an award of **any** attorney's fees alleged incurred. The statutory language instead only permits a court the discretion to award attorney's fees as a sanction to punish and deter frivolous or vexatious **claims**. If the legislature intended the court to be able to award pre-litigation attorney's fees it would have stated so in the statute.

Contrary to NRS 18.010(2)(b), NRS 40.655 specifically provides "a claimant may recover," *inter alia*, "[a]ny reasonable attorney's fees;" [a]ny additional costs reasonably incurred by the claimant, including, but not limited to, any costs and fees incurred for the retention of experts to;

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…[ascertain the nature and extent of the constructional defects;" and "[a]ny interest provided by statute" "to the extent proximately caused by a constructional defect[.]" Although attorney's fees and other costs typically are incurred after litigation commences, the NRS Chapter 40 statutory scheme, and particularly NRS 40.655 does not limit such awards to those fees and costs expended after the Complaint is filed. Therefore, there exists no basis under the law for the Builders to recover their attorney's fees allegedly incurred prior to the HOA filings its counterclaims. Based on a review of the invoices provided, the pre-counterclaim fees total $57,794.00. *See supra*, Section II.C; *see also* Figure 1.

2. The Court May Not Award the Builders' Unreasonable and Unjustified Attorney's Fees.

This Court must determine the **reasonable** value of the attorney services provided. *See Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). The general factors to be considered in making such a determination are: (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived. *See id*. Any such fee award **must be limited to fees that are** reasonable and **justified**. *See id*.

Similar to the HOA's argument in its Motion to Retax and Settle Costs, the Builders' litigation strategy resulted in the Builders, not to mention the HOA, incurring significant fees in this matter that were not reasonable or justified. The Builders presently claim complete and utter victory after prevailing on the statute of repose issue—a legal question the Court could have resolved via a motion to dismiss at the very outset of this case. The Builders invoiced their insurance carriers **$38,796.50 to litigate the repose issue.** *See supra*, Section II.C. This unbelievable amount is excessive on its face and especially due to the Builders' claim that the repose issues were clear from the outset of the case. Plus, as the Court is no doubt aware, the Builders' repose motion was preceded by a litany of separate and unrelated potentially dispositive motions filed by the Builders in the years since their Complaint

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was filed. *See supra*, Section II.A–B. Since April 26, 2017, when the first of the Builders many motions for summary judgment were filed, the Court's time has been consumed by addressing the Builders' superfluous motions. Had the Builders, instead of saving their repose motion for last, started with the repose motion, more than two years of litigation could and should have been avoided for both sides and the Court.

Given that most of the Builders' attorney's fees were easily avoidable and incurred solely based upon the Builders' chosen (and inadequately justified) legal strategy, all attorney's fees unrelated to the statue of repose motion were entirely unnecessary and unjustified. Under *Brunzell*, the Court may not award any of the additional $122,107.27 in attorney's fees that the Builders have utterly failed to justify. *See supra*, Section II.C.

IV.

CONCLUSION

The Builders' strained attempt to convince the Court to award attorney's fees under NRS 18.010(2)(b), which would be an abuse of this Court's discretion, is nothing more than an attempt to force a square peg through a round hole. The facts in this case come nowhere close to meeting the requirements to award attorney's fees under the statute or as a Rule 11 sanction.

Based on the foregoing, the HOA respectfully requests the Builders' Motion for Attorneys Fees Pursuant to NRS 18.010(2)(b) be denied in its entirety.

DATED: July 1, 2019

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

/s/ Michael Gayan

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Certificate of Service

I hereby certify that on the 1st day of July, 2019, the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION FOR ATTORNEYS FEES PURSUANT TO NRS 18.010(2)(B)** was served on the following by Electronic Service to all parties on the Court's service list.

/s/ Michael Gayan
An employee of Kemp, Jones & Coulthard, LLP

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Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

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)

Hearing Date: July 16, 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.

I.

INTRODUCTION

As result of Assembly Bill 421 being signed into law and retroactively extending the applicable statute of repose, the HOA respectfully requests the Court reconsider and/or alter or amend its May 23 Order. Contrary to the Builders' wordy arguments, the new 10-year statute of repose is applicable in this case and may be retroactively applied under Nevada law for one obvious reason: AB 421 expressly provides for the retroactive application of the 10-year statute of repose for all buildings with a substantial completion date prior to the October 1, 2019. While the Builders claim that retroactively applying the 10-year statute of repose would violate their vested rights, the argument fails because the "running of a statute of limitations does not grant a defendant a vested right of repose." *20th Century Ins. Co. v. Superior Court*, 90 Cal.App.4th 1247, 1263–64, 109 Cal.Rptr.2d 611 (2001), *cert. denied*, 429 535 U.S. 1033, 122 S.Ct. 1788, 152 L.Ed.2d 648 (2002).

Accordingly, the HOA respectfully requests an order reconsidering and/or altering or amending the Order entered on May 23, 2019.

II.

ARGUMENT

A. The 10-Year Statute of Repose Set Forth in AB 421 is Applicable.

1. AB 421's repose period is applicable where the substantial completion date is before October 1, 2019.

While the Builders attempt to manufacturer additional conditions to the application of AB 421, the only expressly stated condition to the retroactive application of the 10-year statute of repose period is that "the substantial completion of the improvement to the real property occurred before October 1, 2019." *See* Mot., Ex. 2 at §11(4). As the Builders agree, this Court has determined the towers have substantial completion dates prior to October 1, 2019. *See* Opp. at 12:3–5. Therefore, AB 421's 10-year statute of repose must retroactively apply to this case.

2. Nevada law permits the retrospective application of statutes.

Contrary to the Builders' argument, the Nevada Supreme Court held that courts can apply statutes retrospectively if the statute clearly expresses a legislative intent to do so. *See Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988) (citing *Travelers Hotel v. City of Reno*, 103 Nev. 343, 346, 741 P.2d 1353, 1355 (1987). Unlike the 1983 version of NRS 11.204 discussed in *Allstate* which is void of legislative directive or intent as to the retroactive application of the statute, AB 421 expressly states that "the period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, **apply retroactively** . . . ." Mot., Ex. 2 at §11(4) (emphasis added). Based on the foregoing express language, courts are permitted to apply the 10-year statute of repose retrospectively.

3. The Court should continue the HOA's reconsideration motions if it has any hesitation regarding whether AB 421 is controlling.

The Builders also assert that reconsideration or amendment of the Order based on AB 421's existence is improper because it is not the controlling law in this case at this very moment. Due to the interlocutory nature of the Order, this Court possesses authority under 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 clearly does not, Rule 59(e) allows the Court to alter or amend the Order due to a subsequent change in the controlling law. In the event the Court has any concern over whether AB 421 controls in this matter, then the HOA requests the Court continue the hearing on the instant Motion until October 1, 2019, to eliminate any uncertainty regarding the applicability of AB 421.

B. The Builders' Due Process Rights Will Not be Infringed by the Retroactive Application of AB 421.

As a last-ditch effort, the Builders assert that reconsidering, altering, or amending the Order to revive the HOA's construction defect claims would violate their due process right to not be untimely sued. *See* Opp. at 7:14–8:16. The Builders tellingly fail to cite to a single controlling decision supporting this proposition because Nevada does not have any cases on point regarding whether an extended statute of limitations may constitutionally be applied retroactively to revive otherwise time barred claims. *See Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 428 (2015) (collecting cases from 18 states that follow "federal approach embodied in [*Campbell v. Holt*, 115 U.S. 620 (1885) and *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945)] and allow the retroactive expansion of the statute of limitations to revive otherwise time-lapsed claims—seemingly without limitation."). As the *Doe* court recognized, 14 states, including California and Arizona, specifically "hold that the retroactive expansion of the statute of limitations to revive time barred claims ***is not a violation of a defendant's substantive due process rights because there is no vested right to a statute of limitations defense*** as a matter of state constitutional law." *Id.* (collecting cases) (emphasis added).[1]

Instead, the Builders rely on *Lotter v. Clark Co. Bd. of Commissioners*, 106 Nev. 366, 793 P.2d 1320 (1990) for the alleged proposition that statutes of repose may not be applied

[1] *See 20th Century Ins. Co.*, 90 Cal.App.4th at 1263–64 (holding the "running of a statute of limitations ***does not grant a defendant a vested right of repose***" and "even if the running of the limitations period created a vested right in defendant, such a right yields to important state interests, without any violation of due process." (emphasis added)).

retroactively. *See* June 21, 2019 Opp. at 13:13-16. But the Nevada Supreme Court explained that the *Lotter* decision was premised on "the absence of legislative directive or intent to apply the 1983 statutes retroactively." *See Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev. 1117, 1120, 843 P.2d 834, 836 (1992) (noting it would be unfair to enact a shortened limitations period without providing for a grace period). As discussed above, AB 421 does not suffer from this issue due to the incorporation by the Nevada Legislature of express language that the 10-year statute of repose be applied retroactively. *See supra*, Section II(A)(2).

The practical considerations also show the Builders' due process rights will not be violated by the retroactive application of the Legislature's chosen 10-year statute of repose. At the time the Builders completed Towers I and II, the statutes of repose in effect set forth graduated repose periods of up to 10 years. Thus, at the time they completed the project, the Builders had the reasonable expectation that an action could be filed up to 10 years from that date, exclusive of any applicable statutory tolling provisions. The 2015 Legislature's shortening of the statute of repose via AB 125, on which the Order relies, occurred years after the Builders completed construction. Therefore, the retroactive application of AB 421's 10-year statute of repose, which effectively undid AB 125's intervening shortening of the repose period, does not alter or affect the Builders' original expectations as to the repose period.

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III.

CONCLUSION

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

DATED this 9th day of July, 2019.

Respectfully submitted,

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/s/ Michael Gayan

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

Certificate of Service

I hereby certify that on the 9th day of July, 2019, the foregoing **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)** was served on the following by Electronic Service to all parties on the Court's service list.

/s/ Angela D. Embrey
An employee of Kemp, Jones & Coulthard, LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO RE-TAX AND SETTLE COSTS

Hearing Date: July 16, 2019
Hearing Time: 8:30 a.m.

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

Counterclaimants,

vs.

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

Counterdefendants.

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I.

INTRODUCTION

The Builders' opposition fails to provide any meaningful explanation regarding (1) the lack of a final judgment, (2) the lack of a prevailing party, or (3) their failure to provide supporting documentation for many of their costs, as required by Nevada law. The first two issues preclude an award of any costs at this time. And, even if an award of costs were appropriate, the lack of basic documentation deprives the HOA and the Court from evaluating the reasonableness and necessity of the purported costs.

Additionally, the Builders cannot recover several costs that exceed the statutory cap or are not recoverable under the statute. For example, the Builders consume a large portion of their Opposition trying to justify why they should recover all of their alleged non-testifying experts' fees. However, Nevada law is clear, a prevailing party may not recover expert fees in excess of $1,500 for **non-**

testifying experts. None of the Builders' chosen experts testified in this case, which precludes an award of any expert fees in excess of $1,500 per expert.

Because NRS 18.110 does not permit an award of costs at this time,[1] the Court may not award any costs at this time. Should the Court determine the time is ripe to award costs, it should re-tax the Builders' costs and award no more than $9,189.65.

II.

ARGUMENT

A. The Builders' Memorandum of Costs is Premature Because Pending Claims Remain for Both the Builders and HOA.

The Builders sidestep Nevada law and declare themselves the prevailing parties while numerous claims remain pending for the Court. First, the Builders completely ignore the fact that many of their claims remain and instead focus on the HOA's Counterclaim. *Compare* Mot. at 4:20–6:2 *with* Opp. at 4:17–6:11. Unfortunately for the Builders, they cannot and did not cite to any law supporting their position that courts should determine prevailing parties on a claim-by-claim or side-by-side basis. Nevada law makes it quite clear that all claims by and between all parties must be reduced to a final judgment before a court may determine the prevailing party. *See Eberle v. State ex rel. Nell. J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992) (holding "a party cannot be considered a prevailing party in an action that has not proceeded to judgment."); *Bentley v. State, Office of State Engineer*, 2016 WL 3856572, at *11 (Nev. 2016) (holding "'[t]o be a prevailing party, a party need not succeed on every issue,' **but the action must proceed to judgment.**") (quoting *Las Vegas Metro. Police Dep't v. Blackjack Bonding, Inc.*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 615 (2015)) (emphasis added); *see also* NEV. R. STAT. § 18.110(1) (allowing costs to "party in whose favor judgment is rendered").

Second, as of today's date, the HOA has numerous contract-based counterclaims that remain pending because NRS 11.202 does not apply to them. By its express terms, NRS 11.202 applies only to actions seeking damages caused by construction defects. *See* NEV. R. STAT. § 11.202(1)(a)–(c). The

[1] The Builders' Verified Memorandum of Costs claims to seek costs pursuant to NRCP 68(f)(2). *See* Memorandum at 4:15–16 (Brown Dec.). No offer of judgment was ever made by the Builders and, even if one had been made, Rule 68(f)(2) has no application here.

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HOA's counterclaims for breach of contract, intentional/negligent nondisclosure, and breach of the duty of good faith and fair dealing involve damages due to the Builders' actions and omissions in the sale of the units—not the construction of the towers. *See* Answer and Counterclaim, filed March 1, 2017. Therefore, none of these contract-based claims were or could have been disposed of by the Court's ruling on the Builder's repose motion. The Court's order entered on May 23, 2019, does not expressly grant summary judgment of these claims, and the Builders' Motion, which the order granted, does not even mention these non-defect, contract claims. *See, e.g.*, Motion for Summary Judgment Pursuant to NRS 11.202(1) at 10:24, 12:3–4, filed on Feb. 11, 2019 (seeking summary judgment on the HOA's "construction defect" claims).

Because claims remain pending, including some of the HOA counterclaims, no final judgment has been entered in this case. The lack of a final judgment precludes the Court from designating any party as the prevailing party. Without a prevailing party at this time, NRS 18.110 does not allow an award of costs. Therefore, the Court should enter an order re-taxing the Builders' costs to nothing.

B. NRS 18.110 Does Not Allow Recovery of Pre-Litigation Costs.

Even if the Builders' request for costs is not premature, the statute limits the Builders' recovery of costs to those "necessarily incurred **in the action or proceeding**." NEV. R. STAT. § 18.110(1) (emphasis added). The catchall provision in the statutory definition of costs does not change this limitation. *See* NEV. R. STAT. § 18.005(17) ("Any other reasonable and necessary expense incurred **in connection with the action**, including reasonable and necessary expenses for computerized services for legal research.") (emphasis added).

The terms "action" and "proceeding" are terms of art with inherent limitations. According to Black's Law Dictionary, an action is "[a] civil or criminal judicial proceeding." BLACK'S LAW DICTIONARY at 32 (9th ed. 2009). Black's also notes that an action "is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree." *Id.* (quoting 1 Morris M. Estee, *Estee's Pleadings, Practice, and Forms* § 3, at 1 (Carter P. Pomeroy ed., 3d ed. 1885)). Black's assigns several definitions to a proceeding: (1) "[t]he regular and orderly progression of a lawsuit," (2) "[a]ny procedural means for seeking redress from a tribunal or agency," (3) "[a]n act or

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step that is part of a larger action," and (4) "[t]he business conducted by a court or other official body; a hearing." *Id.* at 1324.

Here, the Builders seek recovery of $15,639.05 in costs incurred prior to the commencement of any action or judicial proceeding. None of these costs were incurred "in the action or proceeding" and, therefore, cannot be recovered pursuant to NRS 18.110. The Chapter 40 pre-litigation process, while statutorily required, is not conducted as part of any judicial proceeding, and was not a prerequisite of any of the Builders' claims for relief. The Chapter 40 process also will not, if concluded, result in a judgment or decree. It does not involve the court or a lawsuit. It does not seek redress from any tribunal or agency. It has nothing to do with the business of the court. The Builders' comparison of NRS 18.110 to NRS 40.655 also does not change this express limitation of NRS 18.110. *See* Opp. at 7:19–8:3. Whether the specific provisions of NRS 40.655 allows a successful Chapter 40 claimant to recover pre-litigation costs has no bearing on the more general provisions of NRS 18.110 that limit costs to those incurred "in the action or proceeding." NEV. R. STAT. § 18.110(1). Therefore, the Builders' pre-litigation costs are not recoverable under NRS 18.110.

C. The Builders Unreasonably Incurred Costs that Could Have Been Avoided had They Filed Their Statute of Repose Motion First.

Instead of cogently and civilly arguing why they should be awarded costs, the Builders instead resort to name calling and other inappropriate, unprofessional comments. *See* Opp. at 8:23, 9:24 (referring to the HOA as a "sore loser."). This strategy simply highlights the Builders' inability to articulate a factual or legal reason for waiting 30 months to file a motion that required no discovery or expert input and had the potential to eliminate the HOA's Counterclaim. The Builders admit their filing of a series of dispositive motions was carefully crafted and designed to dispose of the HOA's claims piece by piece. *See* Opp. at 8:19–20. This argument just further reinforces the Builders' backward thinking. It makes little practical or economic sense to bring a multitude of dispositive motions in an attempt to chip away at various arguments and claims when a single motion, brought in immediate response to the HOA's Counterclaims, had the potential to defeat the HOA's case.

The Builders' argument that they were diligent in pursing all defenses is belied by their decision to wait years to file their repose motion. Counsel for the Builders admit to knowing of AB 125 and its

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impact to the statute of repose period before litigation commenced. *See* Motion for Attorneys Fees at 11:6-8, filed on June 16, 2019. In making this argument, the Builders rely on and provide the Court with their response to the HOA's Chapter 40 Notice. *See id.* at Ex. D. For example, that statutory response contains an objection that, pursuant to the revisions to AB 125's new statute of repose period, all of the HOA's claims are time-barred. *See* **Exhibit 1** (Letter) at 3–4.[2] Also, the Builder's First Claim for Relief in their Complaint filed on **September 28, 2016**, sought declaratory relief as to the application of AB 125 and asserted all of the HOA's claims were time-barred by the new statute of repose period. *See* Compl. at ¶ 64. There is no logical justification for the Builders to wait 30 months, all the while incurring costs, before filing their repose motion.

The Builders make the strange argument that another district court's order in *Byrne v. Sunridge Builder Inc.*, Case No. A-16-742143-D, served as the impetus for their repose motion due to the uncertainty surrounding the application of AB 125. *See* Opp. at 9:10–20. While implausible on its face due to the Builders' admission that the new AB 125 issues were known to it in May 2016, they claim to have first received Judge Scotti's ruling in *Byrne* with the appellate papers. *See* Opp. at 9:15–16. This claims is patently false. The Certificate of Service for the *Byrne* Order lists the Builders' counsel (Peter Brown, Esq.) as having electronically received a copy of the Order on November 3, 2017. *See* **Exhibit 2** (Order) at 5:10. Even if the *Byrne* decision had some impact, the Builders do not explain why they did not file their repose motion when they first received a copy of the *Byrne* order—in 2017. The Builders provide no credible or reasonable explanation for their 30-month delay in filing the repose motion.

[2] The Builders offer no explanation or justification for the redactions applied to this statutory response. Because they have now relied on the document to obtain relief in this case, the Court must have the benefit of seeing the entire document. The Builders cannot shield this document (or any portion of it) from the Court by incorrectly designating it as a settlement communication. Under Nevada law, NRS 48.105 prohibits admitting offers of compromise into evidence to prove liability or the invalidity of a claim or its amount. An offer of compromise "is an offer by one party to settle a claim . . . ." *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 509 (2012). Such an offer requires "valuable consideration" as part of its terms. NEV. R. STAT. § 48.105. The Builders' Chapter 40 response meets none of these requirements because it (1) offers nothing to resolve the HOA's claims, (2) is not being offered into evidence, and (3) is not being provided to prove liability or the invalidity or amount of the claim. NRS 40.680 offers no protections to the Builders' letter.

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Had the Builders filed the repose motion first, they could and should have saved more than two years of litigation and related expenses. Additionally, the Builders could have completely avoided $31,588 in claimed expert fees by filing the statute of repose motion first. This unjustified delay makes the Builders' costs unreasonable and unnecessary, which precludes an award of costs under NRS 18.110(1).

D. The Builders May Not Recover Any Inadequately Documented Costs.

Contrary to the Builders' assertion, Nevada law requires more than just a declaration from counsel that the alleged costs were reasonably, actually, and necessarily incurred. *See* Opp. at 18-20. "**[D]ocumentation is precisely what is required under Nevada law** to ensure that the costs awarded are only those costs actually incurred." *See Village Builders 96 v. U.S. Laboratories*, 121 Nev. 261, 277, 112 P.3d 1082, 1093 (2005) (emphasis added). With respect to copy charges, "documentation **substantiating the reason for each copy** 'is precisely what is required under Nevada law.'" *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d 1049, 1054 (2015) (quoting *Village Builders*, 121 Nev. at 277–78, 112 P.3d at 1093) (emphasis added). "To support an award of costs, justifying documentation must be provided to the district court to '**demonstrate how such [claimed costs] were necessary** to and incurred in the present action.'" *Matter of DISH Network Derivative Litig.*, 401 P.3d 1081, 1093 (Nev. 2017) (quoting *Bobby Berosini, Ltd. v. PETA*, 114 Nev. 1348, 1352, 971 P.2d 383, 386 (1998)) (emphasis added). "Justifying documentation means 'something more than a memorandum of costs.'" *Id.* (quoting *Cadle Co.*, 345 P.3d at 1054). "Without evidence to determine whether a cost was reasonable and necessary, a district court may not award costs." *Cadle Co.*, 345 P.3d at 1054 (citing *PETA*, 114 Nev. at 1352, 971 P.2d at 385). "[T]o be recoverable, any requested costs must have been actually incurred." *Frazier v. Drake*, 357 P.3d 365, 377 (Nev. App. 2015) (citing *Cadle Co.*, 345 P.3d at 1054).

The Builders' costs memorandum fails to meet the statutory requirements for an award of costs and otherwise fails to adequately substantiate with the documentation required by law. First, the attorney declaration submitted with the Builders' Memorandum does not verify that the costs were actually incurred. *See* Memorandum at 4:17–18. The exhibits attached to the Memorandum only include invoices that fail to demonstrate any proof of payment. The absence of this verification and

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documentation is particularly troublesome because the Builders' invoicing, attached to their pending motion for attorney's fees, shows their counsel only billed the insurance carriers for $21,361.05 in costs. *See* HOA's Opp. at 9:6, filed on July 1, 2019; *compare with* Memorandum claiming costs of $59,253.90. How did the Builders' costs more than double from their invoicing? This material omission from the attorney declaration and the Builders' inconsistent documentation of their costs, standing alone, requires an order denying an award of costs because they have not sufficiently demonstrated they *actually incurred* any of these costs. The Memorandum and some invoices are insufficient. *See Matter of DISH Network Derivative Litig.*, 401 P.3d at 1093.

In addition to these significant flaws, the Builders seek more than $9,000 in costs by relying solely on a printout from counsel's office. *See* Memorandum, Ex. 9. Nevada law unequivocally requires the underlying back-up documentation and an explanation of how each costs was necessary to the litigation. *See id.* With respect to copies, the documentation must include the reason for each copy. *See Cadle Co.*, 345 P.3d at 1054. The printout falls well short of what Nevada law requires. For example, copy charges are simply noted as "PHOTOCOPIES" and do not include the reason for each copy. *See, e.g.*, Memorandum, Ex. 9 at 8. The Builders' failure to provide the required information precludes an award of these inadequately documented costs. *See Cadle Co.*, 345 P.3d at 1054.

E. The Builders Are Not Entitled to Recover Costs Not Permitted by NRS 18.005.

Even if the Court were to overlook the Builders' failures to substantiate their costs, Nevada law precludes an award of several particular types and/or amounts of costs contained within the Builders' Memorandum.

1. A party may not recover expert fees above $1,500 for non-testifying experts

The Builders' lengthy analysis on why they contend they should recover more than the $1,500 max for each non-testifying witness is inconsequential. "Nevada law establishes that an expert **must testify** to recover more than $1,500 in expert fees." *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 393 P.3d 673, 681 (Nev. 2017) (emphasis added) (citing NRS 18.005(5); *Khoury v. Seastrand*, 377 P.3d 81, 95 (Nev. 2016)). As stated in the Motion to Retax, the Builders' purported experts did not testify at deposition or trial, and therefore, the Builders cannot recover more than the $1,500 statutory maximum for expert fees.

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Moreover, the Builders' experts were entirely unnecessary and were not involved in any way to support of the Builders' repose motion that forms the singular basis for the requested costs. *See Frazier*, 357 P.3d at 377 (finding that trial courts consider the impact the expert's testimony had on the case). Thus, the Builders' request to recover expert fees must be summarily denied. At a minimum, the Builders may not recover more than $5,500 in expert costs.

2. Special Master and Mediator fees are not recoverable under NRS 18.005.

Here, the Builder's seek "Special Master Fees" totaling $5,385.06 and "Mediator Fees (JAMS)" totaling $3,714.59. Neither the special master fees nor mediator fees identified by the Builders are costs that are recoverable under NRS 18.005 and must be rejected. *See HKM II v. Swisher & Hall*, A396487, 2003 WL 24017776, at *5 (Nev. Dist. Ct. Nov. 25, 2003) (declining to award mediator fees to prevailing party because mediator fees not specifically enumerated in NRS 18.005).

3. Local travel costs are not recoverable.

In addition to their failure to provide any supporting documentation for their costs termed "Local Travel Costs" the Builders fail to provide any legal support for an award of attorney travel costs. "Attorney travel and meal expenses are normally reimbursed by the client and not assessed as disbursements." *Braunberger v. Interstate Eng'g, Inc.*, 607 N.W.2d 904, 910-11 (N.D. 2000) (citations omitted) (emphasis added); *see also* NRS 18.005(15) (limiting to travel costs for depositions).

4. Attorney Services Fee is unsupported.

The Builders fail to explain or provide supporting documentation concerning the exact nature and costs that are encompassed in the "Attorney Services Fees." Therefore, the Builders cannot recover the alleged $231.20 in costs. *See Cadle Co.*, 345 P.3d at 1054.

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III.

CONCLUSION

Based on the foregoing arguments, the HOA respectfully requests an order denying an award of any costs to the Builders. Should the Court award any costs, the Court should re-tax the Builders' costs pursuant to Nevada law and award no more than $9,189.65 – Plaintiffs' only properly documented and legally supported costs.

DATED: July 9, 2019

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

/s/ Michael J. Gayan

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Certificate of Service

I hereby certify that on the 9th day of July, 2019, the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO RE-TAX AND SETTLE COSTS** was served on the following by Electronic Service to all parties on the Court's service list.

An employee of Kemp, Jones & Coulthard, LLP

EXHIBIT 1

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May 24, 2016

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

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

BWB&O File No.: 1287.551

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

Dear Mr. Song and Mr. Williams:

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

I. NOTICE OF BANKRPUTCY BY RESPONDENT PANORAMA TOWERS II, LLC

On June 3, 2015, Panorama Towers II, LLC filed a Voluntary Petition for Chapter 7 Bankruptcy in the U.S. Bankruptcy Court, District of Nevada (Bankruptcy Petition #15-13223-led). Under U.S. Bankruptcy law, immediately upon filing the bankruptcy action, any judicial, administrative or other actions or proceedings against Panorama Towers II, LLC are automatically stayed. Thus, Claimants' Chapter 40 claims against Panorama Towers II, LLC, are stayed. Furthermore, it is Respondents' position that the claims against all other Respondents are also stayed.

II. OBJECTION TO CLAIMANTS' CHAPTER 40 NOTICE

Claimants' Chapter 40 Notice is procedurally improper and fails to meet the requirements in NRS 40.600 et seq. as amended on February 6, 2015, by AB 125, in terms of both the sufficiency and the timing of the Notice.

A. Claimant's Notice is Deficient

Pursuant to NRS 40.645(3) a Claimant's Notice must:

***

(b) ***Identify in specific detail each defect, damage and injury*** **to** each residence or appurtenance that is the subject of the claim , ***including, without limitation, the exact location of each such defect, damage and injury;***
(c) Describe in reasonable detail the cause of the defects if the cause is known ***and*** the nature and extent that is known of the damage or injury resulting from the defects;

***

(Emphasis added)

These requirements apply to any Chapter Notice given on or after February 6, 2015 (see AB 125, Section 21(3)).

Claimant's Notice fails to comply with NRS 40.645(3) (b) and (c). Claimant Notice does not identify in specific detail, the alleged damage and the exact location of the damage, as it relates to the window, fireblocking and sewer claims.

B. The Statute of Repose Bars all of Claimant's Claims

AB 125, enacted on February 24, 2015, significantly amended Nevada's construction defect statutory scheme as contained in NRS 40.600, et seq. Among other things, AB 125 abolished the previously applicable statutes of limitation and shortened the length of the statute of repose to six years. See AB 125, Section 17, amending NRS 11.202(1) to read:

> ***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).

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

The new six-year statute of repose as contained in AB 125 has a one-year "grace period" to allow a construction defect claim to proceed under the old statute of repose, but only if it "accrued before the effective date of this act [February 24, 2015], and was commenced within 1

year after the effective date of this act. . . ." AB 125, section 21(6)(a). The Association mailed its Chapter 40 Notice to Respondents on February 24, 2016, just within 1 year of the effective date of the act. However, the Association did not allege that the claims "accrued before the effective date of the act."

The word "accrued" in the construction defect context is not defined under NRS 40.600, et seq., and has not, to date, been defined in Nevada case law interpreting AB 125. Prior to the enactment of AB 125, the Nevada Supreme Court in Beazer Homes Nev., Inc. v. Eighth Jud. Dist. Ct. reasoned that a claim generally accrues when a "litigant discovers, or reasonably should have discovered, facts giving rise to the action. . . ." 120 Nev. 575, 585-86 (2004). In construction 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." Id. This analysis applies only to statutes of limitation, not statutes of repose.

Nonetheless, the word "accrues" as set forth in AB 125 does not apply to a statute of limitation or statute of repose. Instead, it must apply to the start of the construction defect claim process via the statutory written notice. Consequently, a claimant must have served written notice pursuant to NRS 40.645 prior to the effective date of the act (February 24, 2015) in order to have the pre-AB 125 version of Chapter 40 apply to the case.

Because AB 125 applies to this litigation, all of the claims in Claimant's Chapter 40 Notice are barred by NRS 11.202's six-year statute of repose. The Clark County, Nevada Building Department issued a Certificate of Occupancy for Tower I (4525 Dean Martin Drive) on January 16, 2008, and for Tower II (4572 Dean Martin Drive) on March 31, 2008. Using the Certificate of Occupancy dates as the dates of substantial completion, the six-year statute of repose would bar any claim that is not brought within six years of January 16, 2008 (Tower 1) and March 31, 2008 (Tower II), or by **January 15, 2014** and **March 30, 2014** respectively. Thus, all of Claimant's claims are time barred under NRS 11.202.

III. CLAIMANT'S CLAIMS WERE RELEASED IN A PRIOR LAWSUIT

On September 9, 2009, Claimant filed a Complaint for Construction defects in the *Panorama Towers Condominium Unit Owners' Association, Inc. v. Panorama Towers I, LLC, et al.* litigation, District Court case number A-09-598902. The claims were settled in 2011, prior to trial, and the Settlement Agreement and Release entered into by the parties release all claims asserted in the litigation as well as any claims "related to the allege defect claims ever asserted" in the action. Each of the claims asserted in Claimant's Notice were either expressly released or are related to the alleged defects asserted in the prior action, in exchange for a monetary settlement. Therefore, Claimant may not bring these release claims again in a new action.

IV. RESPONSE TO ALLEGED DEFECTS

In addition to the foregoing, Respondents further respond to Claimant's Chapter 40 Notice as follows:

A. Respondents' Response to Claimant's Alleged Defects Involving Window Assemblies in the Residential Tower Units

Defect No.	Defect Allegation	Defendants' Response Pursuant to NRS 40.6472
1	**Windows:** The window assemblies were defectively designed such that water entering the assemblies does not have appropriate means of exiting the assemblies. There are no sill plans, proper seepage components or other drainage provisions designed to direct water from and through the window assemblies to the exterior of the building. This is design deficiency that exists in all (100%) of the residential tower assemblies.	Respondents disclaim any liability for this alleged defect. This alleged defect is time barred under NRS 11.202(1) and was released as part of the settlement of the prior litigation. In addition, Claimant's Notice fails to comply with NRS 40.645(3) (b) and (c) in that it does not identify in specific detail, the alleged damage and the exact location of the damage relating to this alleged defect. Claimant also failed to provide notice of the alleged defect prior to performing repairs, and Respondents have been denied their statutory right to repair under NRS 40.6472.

B. Respondents' Response to Claimant's Alleged Defects in the Klai Juba Plan Detail

Defect No.	Defect Allegation	Defendants' Response Pursuant to NRS 40.6472
2	**Fire Blocking:** The plans call for fire blocking insulation, as required by the building code, in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures. The purpose of this insulation is to deter the spread of fire from one tower unit to the unit above or below. However the insulation was not installed as required by the plans and the building code. This installation deficiency exists in all (100%) of the residential tower units, in which insulation was omitted either from the ledger shelf cavity, from the steel stud framing cavity, or from both. This deficiency presents an unreasonable risk of injury to a person or property resulting from the spread of fire.	Respondents disclaim liability for this alleged defect. This alleged defect is time barred under NRS 11.202(1) and was released as part of the settlement of the prior litigation. In addition, Claimant's Notice fails to comply with NRS 40.645(3) (b) and (c) in that it does not identify in specific detail, the alleged damage and the exact location of the damage relating to this alleged defect.

C. Respondents' Response to Claimant's Alleged Defects Involving the Mechanical Room Piping Asserted in the ATMG Report Dated November 17, 2011

Defect No.	Defect Allegation	Defendants' Response Pursuant to NRS 40.6472
3	**Mechanical Room Piping:** The piping in the two lower and two upper mechanical rooms in the two tower structures has sustained corrosion damage.	Respondents disclaim liability for this alleged defect. This alleged defect is time barred under NRS 11.202(1) and was released as part of the settlement of the prior litigation.

Defect No.	Defect Allegation	Defendants' Response Pursuant to NRS 40.6472
		In addition, during Respondents' inspection of the alleged defects, Respondents observed that the majority, if not all, of the alleged corroded pipes had already been replaced. Claimant failed to provide notice of the alleged defect prior to performing this work, and Respondents have been denied their statutory right to repair under NRS 40.6472. According to the report by ATGM attached to Claimant's Chapter 40 Notice, Claimant had knowledge of the alleged defects on or about September 20, 2011 – more than 3 ½ years prior to the date of its Chapter 40 Notice to Respondents. Furthermore, despite Respondents' multiple requests, Claimant has failed to provide the date(s) when this work took place and the identity of the contractor(s) who performed the work. In addition, Claimant has failed to respond to Respondents' requests regarding whether and where the removed pipes have been stored for safekeeping. Respondents contend Claimant's actions and/or omissions have resulted in spoliation of evidence relating to this alleged defect.

D. Respondents' Response to Claimant's Alleged Defects Involving the Main Sewer Line

Defect No.	Defect Allegation	Defendants' Response Pursuant to NRS 40.6472
4	**Sewer Problems:** The main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to adjacent common areas. This deficiency has been repaired. In addition to causing damage, the defective installation presented an unreasonable risk of injury to a person or property resulting from the disbursement of unsanitary matter.	Respondents disclaim liability for this alleged defect. This alleged defect is time barred under NRS 11.202(1) and was released as part of the settlement of the prior litigation. In addition, Claimant's Notice fails to comply with NRS 40.645(3) (b) and (c) in that it does not identify in specific detail, the alleged damage and the exact location of the damage relating to this alleged defect. Claimant also failed to provide notice of the alleged defect prior to performing repairs, and Respondents have been denied their statutory right to repair under NRS 40.6472. Claimant's assertion that the alleged defect "presented an unreasonable risk of injury" did not alleviate Claimant of its obligation to provide timely Notice to Respondents. Furthermore, despite Respondents' multiple requests, Claimant has failed to provide the date(s) when this work took place and the identity of the contractor(s) who performed the work. In addition, Claimant has failed to respond to Respondents' requests regarding the current location of any materials that were removed and replaced as part of the repair. Respondents contend Claimant actions and/or omissions have resulted in spoliation of evidence relating to this alleged defect.

At this time, Respondents are not electing to either repair the alleged defects or to have someone else repair the alleged defects. Respondents reserve the right to allow the original subcontractors, if they are interested, to perform repairs. Nothing in this Response is intended to preclude any subcontractor and/or design professional from electing to perform repairs, pursuant to statute, should those entities ever become formal parties to the instant litigation.

Please be advised that this document is solely intended to serve as Respondents' Response to Plaintiff's Chapter 40 Notice and associated defect allegations as required by NRS 40.6472. Accordingly, this document is not intended to serve as Defendants' final position regarding the alleged defects in any way. Furthermore, this document is a settlement communication protected from further disclosure by NRS 40.680 & NRS 48.105.

Should you have any questions or concerns regarding the above, please do not hesitate to contact the undersigned. Thank you for your time and attention.

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

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EXHIBIT 2

Electronically Filed
11/3/2017 3:00 PM
Steven D. Grierson
CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

JANETTE BYRNE, as Trustee of the UOFM TRUST,

Plaintiff,

vs.

SUNRIDGE BUILDERS, INC., et al.,

Defendants.

Case No.: A-16-742143-D
Dept. No.: II

Date of Hearing: October 18, 2017

ORDER GRANTING LANDS WEST BUILDERS, INC.'S AND SUNRIDGE BUILDERS, INC.'S JOINT MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)

INTRODUCTION

This is a construction defect action in which the contractors contend that Janette Byrne, as Trustee of the UOFM Trust's (hereinafter "claimant," "plaintiff," or "Byrne") claims are barred by the applicable statute of repose. The Court agrees that claimant's claim is barred by the new six-year statute of repose, retroactively applied as the enacting bill requires, after giving claimant the benefit of the so-called one-year "grace period." The claimant was required to file her Complaint by February 26, 2016. Claimant did not file her Complaint until August 22, 2016. There is no genuine issue of material fact that claimant's Complaint is barred by the statute of repose. Accordingly, summary judgment is granted in favor of Lands West Builders, Inc. and Sunridge Builders, Inc. (collectively "Contractors" herein) and against Plaintiff.

UNDISPUTED FACTS

This is a single family home construction defect action initiated under NRS 40.600 by Plaintiff. The subject residence is located at 578 Lairmont Place in Henderson, Nevada ("Residence"). The Residence is a six bedroom, 11,255 square foot custom home located within McDonald Highlands, a guard-gated golf course community.

Plaintiff is not the original owner of the Residence. In or about early 2007, the original owners, Charles and Erin Catledge, hired TyCorp Development, Inc. to serve as the general contractor for the construction of the Residence. In or about July of 2007, Defendant Sunridge

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

Case Number: A-16-742143-D

Builders, Inc. replaced TyCorp Development, Inc. as the general contractor. Construction of the Residence commenced shortly thereafter.

Substantial Completion was achieved on May 26, 2009.

In 2015 the Nevada Legislature adopted AB 125, with an effective date of February 24, 2015, reducing the statute of repose for construction defects to six years.

The claimant presented her Chapter 40 notice of construction defects on December 2, 2015. Claimant commenced her action by filing her Complaint on August 22, 2016.

APPLICATION OF THE NEW STATUTE OF REPOSE

In 2015 the Nevada Legislature by AB 125 reduced the statute of repose from ten (10), eight (8), and six (6) years, for known, latent, and patent deficiencies, to six (6) years for all actions for damages. The six (6) year period begins to run from the date of substantial completion of a work of improvement.

The legislative history of AB 125 expressed in the actual bill, § 21, sub. 5, (although not in the statute itself), mandates that the new six (6) year statute of repose be applied retroactively. The Nevada Legislature provided a grace period of one year to protect claimants who would otherwise lose their rights by retroactive application.

As explained below, Plaintiff in this action failed to commence her action within this grace period. Accordingly her claims are barred.

Contractors achieved substantial completion on May 26, 2009. Under the most lenient statute of repose of NRS 11.203(1) (ten years), claimant would have been required to file her Complaint by May 26, 2019. But AB 126 reduced that time period to six years: in this case meaning May 26, 2015. Claimant filed her Complaint on August 22, 2016 – thirteen months after the expiration of the six-year period.

The retroactive application would have had the effect of barring claimant's claim. The so-called "grace period" gave claimant more time to avoid this harsh result. The "grace period" built into the statute reads, in pertinent part, as follows: "The provisions of subsection 5 do not limit an action: (a) that accrued before the effective date, and was commenced within 1 year after the effective date of this act." AB 125, Sec. 21, Subsection 6.

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District Judge

Department Two
Las Vegas, NV 89155

The effective date of AB 125 was February 24, 2015. This means that if a claimant's action accrued before February 24, 2015, and would have been otherwise limited, then the claimant could still bring an action if commenced by February 24, 2016. Claimant failed to meet this deadline.

APPLICATION OF THE TOLLING STATUTE

Claimant incorrectly argues that she should receive a further extension beyond the "grace period" by application of the tolling provision of NRS 40.695. NRS 40.695 provides that the statute of repose is tolled from the date the notice of claim is given, until one-year after the notice of claim is given. This provision does not help the claimant.

Suppose the original ten-year statute of repose applied to claimant. Then, absent tolling, the deadline to file would have been May 26, 2019. But claimant would have one year of tolling benefit. Claimant presented her notice of claim of construction defects on December 2, 2015, prior to the expiration period. Thus, absent retroactive application of the new six-year statute of repose, the deadline for claimant to file her Complaint would have been May 26, 2020.

AB 125 curtailed the statute of repose such that claimant here was required to file her Complaint much earlier than May 26, 2020. Again, pursuant to AB 125, any action that accrued prior to the effective date of AB 125 (February 24, 2015) was not limited by the reduced statutory period provided the claimant filed its Complaint within one-year after the effective date (February 24, 2016). It is undisputed that claimant's claim accrued before the effective date of the statute. It is also undisputed that claimant failed to file her Complaint within one year of the effective date of the statute. Thus, claimant's claim was late and is barred by the new six-year statute of repose.

Even if the tolling provision were to be considered after the new statute of repose was applied to claimant's claim, the claim would still be barred. As said, the six year statute of repose applied to claimant's claim accruing on May 26, 2009, would have given a deadline of May 26, 2015. In this case, the tolling provision does not apply because the new six-year statute of repose would have expired before the tolling could start. Any tolling could not start

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until the claimant presented her notice of construction defect. Claimant presented her notice of construction defects on December 2, 2015. By this date the deadline for claimant to file her Complaint had already expired – so there was nothing to toll!

The Court's interpretation of the tolling provision is consistent with *Dykema v. Del Webb Communities, Inc.*, 132 Nev. Adv. Op 82, 385 P.3d 977, 980-81 (2016). In that case, the Nevada Supreme Court held: "[B]ecause Dykema and Turner served their Chapter 40 notices within the ten-year repose period, it was tolled for one year and Dykema's and Turner's February 27, 2015, Complaint against Del Webb was timely filed." The Nevada Supreme Court recognized that the one-year tolling only applied if the notice of claim was presented within *(i.e.* before) the expiration of the statute of repose. Applied here, *Dykema* means that a claimant receives no tolling if the applicable statute of repose expires before the notice of construction defect is presented.

EQUITABLE ESTOPPEL

The Court rejects claimant's argument regarding equitable estoppel, as there is no genuine issue of fact that equitable estoppel does not apply here.

CONCLUSION

It is undisputed that claimant did not file her Complaint within the six-year statute of repose as retroactively applied. The new statute of repose, retroactively applied, expired before the notice of construction defects. So there is no tolling, and claimant failed to commence her Complaint within the new six-year statute of repose. Also, claimant failed to file her Complaint within the statutory grace period. Summary Judgment is granted in favor of Lands West Builders, Inc. and Sunridge Builders, Inc. and against Plaintiff Janette Byrne, as trustee of the UOFM Trust.

IT IS SO ORDERED

Dated this 3 day of November, 2017.

RICHARD F. SCOTTI
DISTRICT COURT JUDGE

Richard F. Scotti
District Judge

Department Two
Las Vegas, NV 89155

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served through the Eighth Judicial District Court's efiling system to the proper parties as follows:

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Lena Louis, Esq.
Bryce Buckwalter, Esq.
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Melody Howard
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DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

DEFENDANT'S REPLY IN SUPPORT OF 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 Date: July 16, 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.

I.

INTRODUCTION

The Builders oppose the HOA's first reconsideration request with five distinct arguments: (1) the Order constituted a final, appealable judgment and cannot be stayed; (2) AB 421 is not effective until October 1, 2019, (3) AB 421 does not apply to previously adjudicated claims, and (4) AB 421 would violate the Builders' due process rights if it did apply retroactively; and (5) reconsideration of the Order is not warranted on procedural or substantive grounds. Arguments two, three, and four have little or no application to this Motion.

As for the Builders' remaining arguments, the HOA will only address the Builders' first and fifth arguments because the arguments related to AB 421 have no application to this Motion. They all appear aimed at the HOA's other pending Motion, filed on June 13, 2019. The HOA will address issues pertaining to AB 421 in its reply in support of that motion.

Reconsideration is warranted here for three reasons. First, the HOA's counterclaims are compulsory under NRCP 13(a) because a "logical relationship" exists between the counterclaims and the Builders' claims, thus meeting the requirement of "same transaction or occurrence." Second, where compulsory counterclaims exist, the general rule of courts throughout the country is that filing of an action tolls the limitations period for a compulsory counterclaim. The Nevada Supreme Court has never held otherwise for claims of this type. Lastly, the HOA's diligent, consistent, and timely pursuit of its claims from the outset of this matter, particularly in light of the lack of any prejudice to the Builders, demonstrates good cause justifying the tolling of the applicable statute of repose pursuant to NRS 40.695(2).

II.

ARGUMENT

A. The Court's Decision Should Be Reconsidered.

1. The HOA's Counterclaim and the Builders' Claim all arise out of the same facts and/or occurrences.

The Court's finding that the HOA's counterclaims were not compulsory is clear error because the Builders' claims and the HOA's counterclaims not only arise from the same transaction or occurrence, but the claims and counterclaims have a logical relationship and should be litigated in one lawsuit. "The purpose of NRCP 13(a) is to make an 'actor' of the defendant so that circuity of action is discouraged and **the speedy settlement of all controversies between the parties can be accomplished in one action**." *Great W. Land & Cattle Corp. v. Sixth Judicial Dist. Court*, 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970). As the Court noted in *MacDonald v. Kraus*, 77 Nev. 312, 320–321, 362 P.2d 724, 729: "[T]he words [of the rule] are general to the last degree" so as to require parties to litigate their differences in one lawsuit, thus avoiding a multiplicity of actions. Furthermore, where there is a "logical relationship" between the counterclaim and the main claim, the requirement of same transaction or occurrence is met. *See Mendenhall v. Tassinari*, 403 P.3d 364, 370-371 (Nev. 2017). The causes of action arise from the "transaction" set forth in the complaint when "the combination of acts and events, circumstances and defaults, upon which the rights of the parties are based, when viewed in one aspect, result in plaintiff's right of action, and,

when viewed in another aspect, result favorably to defendant." *MacDonald*, 77 Nev. at 320–321, 362 P.2d at 729.

Here, one fact is beyond dispute: without the HOA's Chapter 40 Notice and prospective claims, the Builders would never have filed the Complaint. *See* Compl. at ¶¶ 10–14, 18–21, 82–89. That fact alone shows an overwhelming logical relationship between the claims and the counterclaims. Examination of the parties' respective claims shows they arise out of the same transaction or occurrence because they all revolve around the alleged presence of construction defects at Towers I and II. *Compare* Compl. at ¶¶ 10–14, 21, 45–52, 59–60, and 71–80 *with* Answer and Counterclaim at ¶¶ 29, 31–33. In fact, three of the Builders' claims specifically reference and relate to the HOA's forthcoming construction defect claims without any connection to the parties' prior settlement agreement. *See* Compl. at ¶¶ 61–70, 81–93 (First, Third, and Fourth claims). These affirmative claims (*e.g.*, statute of repose, failure to comply with Chapter 40, and spoliation) are simply affirmative defenses asserted in most construction defect actions. *See id.* Both the existence and content of the Builders' Complaint demonstrate their logical relationship to the HOA's Counterclaims, readily satisfying the same transaction or occurrence requirement to constitute a compulsory counterclaim.

Additionally, the parties' pleadings disclose a sufficient logical relationship so that, in the interest of avoiding circuity and multiplicity of action, the HOA's counterclaims should be considered compulsory. After all, the purpose of Rule 13(a) is to encourage swift adjudication of claims against the same parties in one action. *See Great W. Land & Cattle Corp. v. Dist. Court*, 86 Nev. 282, 285, 467 P.2d 1019, 1021 (1970). Thus, in the interest of judicial economy and fairness, the HOA's construction defect counterclaims—the claims that drove the Builders to file the Complaint—should be litigated in the same action.

2. Nevada law does not preclude the application of the relation-back doctrine.

Contrary to the Court's Order and the Builders' argument, the holding in *Jamison* does not establish a general rule against the relation-back doctrine. In fact, the Nevada Supreme Court has never decided the issue. Under the federal rules, compulsory counterclaims relate back to the filing of the original complaint, and a 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)) (holding "***a compulsory counterclaim relates back to the filing of the original complaint***") (internal citations omitted) (emphasis added); *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 380 (4th Cir. 2000)) (holding "***the filing of an action tolls the limitations period for a compulsory counterclaim***") (emphasis added). In addition, a majority of courts to squarely address the issue have concluded that a plaintiff's institution of a suit tolls or suspends the running of the statute of limitations governing a compulsory counterclaim. *See* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE § 1419 (3d ed. 1995).

In *Jamison*, the Nevada 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 such actions. *See Nevada State Bank v. Jamison Family Partnership*, 106 Nev. 792, 801 P.2d 1377 (1990). The Nevada Supreme Court made clear that it would enforce the strict 90-day statute of limitation because the applicable three-month limitation period for deficiency judgment actions evidenced a policy consideration beyond stale claims or lost evidence. *See id* at 798, 801 P.2d at 1381–82. This discussion by the *Jamison* court shows the holding is limited to its peculiar facts and did not set create a general rule of law against the relation-back doctrine.

Here, the Court erred in applying *Jamison* because that decision does not establish a general rule against all compulsory claims relating back to the date of the original complaint. Nevada has never established such a general rule and, if it were to consider the issue, is much more likely to follow the overwhelming majority of courts by holding the HOA's compulsory counterclaims relate back to the date of the Builders' Complaint. For these reasons, the HOA respectfully requests that the Court reconsider its ruling and find, that the HOA's compulsory counterclaim relates back to the date of the filing of the Builders' Complaint.

3. Good cause exists to toll the statute of repose period pursuant to NRS 40.695(2).

As the Court recognized in its Order, it may, for good cause, toll the statute of repose pursuant to NRS 40.695(2) for a period of more than one year after notice of the claim is given. *See* Order at ¶ 12. Good cause exists to extend the tolling period based on the HOA's diligent conduct in satisfying all pre-litigation requirements, conducting the statutorily mandated pre-litigation mediation, and then vigorously seeking, albeit unsuccessfully, to defeat the Builders' claims through motion practice prior to timely answering the Builder's Complaint and filing its counterclaims. The following timeline demonstrates the HOA's diligent efforts in the case:

Date	Event
Feb. 24, 2016	HOA served the Builders with its Chapter 40 Notice Towers I and II
Mar. 23, 2016	HOA received letter from Builders' counsel
Mar. 23, 2016	Counsel for HOA and Builders corresponded to coordinate pre-litigation inspections
Mar. 24, 2016	HOA sent Builders certain window pictures
Mar. 24, 2016	Builders performed inspections of Towers I and II
Mar. 29, 2016	Counsel for HOA and Builders corresponded regarding window testing
Apr. 29, 2016	HOA received letter from Builders' counsel
May 24, 2016	Builders responded to HOA's Chapter 40 Notice
June 9–16, 2016	Parties corresponded to coordinate pre-litigation mediation
June 30, 2016	Parties corresponded about contractors that received the Chapter 40 Notice
June 30, 2016	HOA submitted its confidential mediation brief to the mediator
Aug. 5–11, 2016	Parties corresponded to schedule pre-litigation mediation[1]
Sept. 26, 2016	Mandatory pre-litigation mediation held, ending without resolving the HOA's construction defect claims
Sept. 28, 2016	Builders served Tender of Defense and Indemnity on the HOA
Sept. 28, 2016	Builders filed this action against the HOA
Oct. 2016	Builders telephonically granted HOA an extension to respond to the Complaint
Nov. 28, 2016	HOA responded to Builders' Tender of Defense and Indemnity
Dec. 7, 2016	HOA timely filed Motion to Dismiss (based on extensions from Builders)
Dec. 20, 2016	Stipulation and Order entered to continue hearing on the HOA's Motion to Dismiss from January 10, 2017 to January 24, 2017
Jan. 4, 2017	Builders filed opposition to HOA's Motion to Dismiss
Jan. 10, 2017	Parties stipulated to appoint Special Master

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

Date	Event
Jan. 17, 2017	HOA filed reply in support of Motion to Dismiss
Jan. 24, 2017	Hearing on HOA's Motion to Dismiss
Feb. 9, 2017	Order denying HOA's Motion to Dismiss
Mar. 1, 2017	HOA timely filed Answer and compulsory Counterclaim[2]

The HOA diligently, consistently, and timely pursued its claims from February 24, 2016, to the present time. Had the HOA filed a separate action following the pre-litigation mediation, sought to consolidate it with this action, the case would be in the same position, with the same claims, as it is today. These additional steps would have added nothing of substance and only served to waste judicial time and resources. The HOA's failure to take these form-over-substance steps should not result in the complete dismissal of its claims, particularly because the Nevada Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." NEV. R. CIV. P. 1. Further, Nevada's strong judicial policy of resolving claims on the merits favors an extension of the tolling period. *See Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

In addition to these practical and policy-based considerations, the Builders still have not articulated any unfair prejudice by the continued tolling of the statute of repose. The Builders had actual knowledge of the HOA's claims long before the tolling period expired. During that time period, the Builders requested and conducted inspections of the alleged defects and the parties engaged in the mandatory pre-litigation mediation. Lastly, the plain language of NRS 40.695 indicates that the Court may, for good cause, extend the tolling period for as long as necessary to effectuate Nevada's public policy of deciding claims on their merits. *See Scrimer v. Eighth Judicial Dist. Court ex rel. County of Clark*, 116 Nev. 507, 516-17, 998 P.2d 1190, 1195 (2000); *see also* NEV. R. CIV. P. 1 (instructing courts to construe all rules to secure the "just" determination of every action). Therefore, the HOA respectfully requests the Court to reconsider its finding that the HOA

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

has not demonstrated good cause to extend the statutory tolling of the statute of repose.

B. The Court Should Stay or Continue the HOA's Reconsideration Motion if the Court has any Hesitation Regarding Whether AB 421 is Controlling.

The Builders also assert that reconsideration or amendment of the Order based on AB 421's existence is improper because it is not the controlling law in this case at this very moment. Due to the interlocutory nature of the Order, this Court possesses authority under 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 clearly does not, Rule 59(e) allows the Court to reconsider the Order due to a subsequent change in the controlling law. In the event the Court has any concern over whether AB 421 controls in this matter, then the HOA requests the Court continue the hearing on the instant Motion until October 1, 2019, to eliminate any uncertainty regarding the applicability of AB 421.

III.

CONCLUSION

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

DATED: July 9, 2019

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP

/s/ Michael J. Gayan

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

Certificate of Service

I hereby certify that on the 9th day of July, 2019, the foregoing **DEFENDANT'S REPLY IN SUPPORT OF ITS 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/ Angela D. Embrey
An employee of Kemp, Jones & Coulthard, LLP

EXHIBIT C

BREMER WHYTE

BREMER WHYTE BROWN & O'MEARA LLP

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

March 23, 2016

RECEIVED MAR 28 2016

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

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

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

Dear Counsel:

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

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

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Peter C. Brown, Esq.

pbrown@bremerwhyte.com
PCB:as

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

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

Thank you for scheduling it on such short notice.

Peter

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

Peter:

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

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

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

Best,

Scott

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

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

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

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

~Vicki

Williams & Gumbiner LLP
ATTORNEYS AT LAW

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

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

Will do.

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

Peter,

CMA Consulting is going out to lunch right now.

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

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

Scott:

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

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

Peter

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

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

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

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

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

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

Scott:

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

Peter C. Brown, Esq.
Licensed in NV, CA, AZ, CO and WA
Bremer Whyte Brown & O'Meara, LLP
1160 North Town Center Drive, Suite 250
Las Vegas, NV 89144
pbrown@bremerwhyte.com
702.258.6665 ext 2208
702.258.6662 fax

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BREMER WHYTE BROWN & O'MEARA LLP

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www.bremerwhyte.com

March 29, 2016

VIA E-MAIL

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

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

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

Dear Counsel:

On February 24, 2016, Panorama Towers Condominium Unit Owners' Association (the "HOA") served a Notice to Contractor Pursuant to Nevada Revised Statutes, Section 40.645. The Notice identified four categories of purported construction defects.

The Notice did not contain necessary information regarding the alleged sewer line, including the date of occurrence and the date of repair. Please provide that information at your earliest convenience. In addition, please confirm the current location of any sewer line materials that were removed and replaced as part of the repair.

During the recent inspection of the alleged mechanical room piping issues, it became apparent that the vast majority of the alleged corroded pipes had already been replaced. Please provide the date(s) when that work was done and the identity of the contractor(s). Please also confirm whether and where the removed pipes have been stored for safekeeping.

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

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

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Peter C. Brown, Esq.

pbrown@bremerwhyte.com
PCB:as

BREMER WHYTE
BREMER WHYTE BROWN & O'MEARA LLP

1160 N. TOWN CENTER DRIVE
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(702) 258-6662 FAX
www.bremerwhyte.com

April 29, 2016

VIA E-MAIL

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

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

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

Dear Mr. Song and Mr. Williams:

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

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

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

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

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

Thank you for your time and attention.

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

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

dcartier@bremerwhyte.com
pbrown@bremerwhyte.com

From: Scott Williams
To: Peter Brown (pbrown@bremerwhyte.com)
Cc: Francis Lynch (flynch@lhsslaw.com); Wendy Jensen; Vicki Fedoroff
Subject: Panorama Towers - mediator
Date: Thursday, June 9, 2016 4:56:32 PM

Peter:

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

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

Regards,

Scott

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

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

Scott:

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

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

Peter

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

Peter:

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

Regards,

Scott

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

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

Peter:

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

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

Regards,

Scott

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

Williams & Gumbiner LLP
ATTORNEYS AT LAW

June 30, 2016

Privileged and Confidential
Settlement Communication

Bruce Edwards, Esq.
JAMS
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111
bedwards@jamsadr.com

Re: ***Panorama Towers – Second Generation Claims***

Dear Mr. Edwards:

With an initial conference call scheduled this afternoon, I am writing to provide you with relevant background information pertaining to this matter.

You previously mediated a suit by the Panorama Towers Condominium Unit Owners' Association against the project developers and architect for defects in the design and construction of the Panorama Towers condominium development in Las Vegas. The Association was represented by Charles Litt of the Fenton Grant firm, and the developers were represented by Peter Brown of Bremer Whyte. In this second round of claims against the builders, Francis Lynch and I will be representing the Association, and Peter Brown will again be representing the developers.

BACKGROUND

Development of Panorama Towers. Andrew Sasson and Laurence Hallier formed Sasson/Hallier Development LLC (Sasson LLC), a Nevada limited liability company, in October 2002. In September 2003, Sasson LLC announced plans to build the Panorama Towers development.

Sasson LLC hired Klai Juba Architects as the project architect and various general contractors, including MJ Dean Construction, Inc., as the general contractor for the construction of the two towers. Numerous building permits for the project were issued between December 2005 and July 2008.

Insurance for the construction of the project was provided by ACE American Insurance Company pursuant to a "Funded Multi-Line Deductible Program," effective July 26, 2004. The program included a "wrap" policy issued by ACE, with coverage limits of $4 million, and two excess policies issued by Westchester Fire Insurance Company and Endurance Specialty Insurance Ltd, each with limits of $25 million, providing total general liability coverage in the amount of $54 million.

The completed Panorama project consists of 616 residential units contained in two tower buildings, 33 additional units in six townhouse buildings, and two 4-story above grade parking structures, one adjacent to each tower.

The project was completed in phases during 2007 and 2008. Certificates of occupancy were issued by the City for the first tower in January 2008, and for the second tower in March 2008. A third tower was completed in 2009, but by that time the local condominium market had collapsed. The lenders foreclosed on that tower, which was taken over by a Santa Monica investor and renamed The Martin Condominiums.

Formation of development entities. Early during the development of the project, Hallier bought out Sasson's interest in Sasson LLC, and agreed to indemnify Sasson as a term of the buy-out. During 2004 and 2005, Hallier formed a number of Nevada limited liability companies, all or most of which were involved in the development of the project. These entities, each of which was managed either by Hallier, Hallier Properties LLC, or one of the other companies formed, consisted of the following:

- Hallier Properties LLC formed 6/8/04
- Panorama Towers I LLC formed 6/17/04
- Panorama Towers Mezz I LLC formed 6/17/04
- Panorama Towers II LLC formed 9/15/04
- Panorama Towers II Mezz LLC formed 2/1/05
- Panorama Towers III LLC formed 5/4/05
- Hallier Panorama Holdings LLC formed 10/12/05

Hallier also formed a Nevada corporation, Hallier Group Holdings Inc., in December 2005. Each of these entities has since had its corporate status revoked by the Nevada Secretary of State.

First suit against developers. The Association, having become aware of construction defects in the development, retained Christopher Allen, of Allen Group Architects, to investigate. Allen prepared a preliminary defect report in March 2009, which itemized numerous design and construction deficiencies. In June 2009, Waller + Opsal Consulting prepared a repair cost estimate in the amount of $29,976,138 to repair the deficiencies described in the Allen defect report.

On September 9, 2009, the Fenton firm filed suit on behalf of the Association against two of the development entities, Panorama Towers I LLC and Panorama Towers II LLC, and the architect, Klai Juba. A decision was made not to sue the project contractors because they were all included in the "wrap" insurance policy issued by ACE. The architect was sued because it was not included in the wrap program.

The parties retained you to mediate the case. In June 2011, the case was settled for the total sum of $25,680,715. This consisted of $23,789,500 paid by ACE and one or both of the excess insurers on behalf of the developers and contractors enrolled in the

wrap insurance program, and $1,891,215 paid by Klai Juba's insurer, Zurich, consisting of the remaining limits on Klai Juba's policy. Significantly, the release provided in the settlement agreement was for *known claims only*.

ACE suit against developers. In February 2009, ACE sent invoices to the developers for outstanding insurance premiums due on the policies in the amount of $729,491. Having received no response from the developers, ACE submitted a demand for arbitration in May 2010 under the terms of the insurance contract. The developers having ignored the arbitration demand, an arbitration hearing was held in Pennsylvania on June 1, 2011, without their participation. On August 22, 2011, the arbitration panel issued arbitration awards in favor of ACE covering the premiums owed, interest and attorney fees.

In February 2012, ACE filed a petition in federal district court in Pennsylvania to confirm the arbitration awards and enter judgment on the awards. Consequently, judgments were filed in June 2012 against Sasson LLC for $1,034,477 and against Panorama Towers II LLC for $145,687. In July 2012, ACE filed a petition in federal district court in Nevada to register the Pennsylvania judgments.

In May 2014, ACE filed suit in federal district in Nevada to enforce the judgment against Hallier and his various development entities. The suit was vigorously litigated until June 2015, at which time Hallier placed his various development entities in bankruptcy. ACE's claims against Hallier were just settled in the bankruptcy court for the sum of $20,000, pursuant to an order approving the settlement filed on June 27, 2016.

Newly discovered defects. Since the original lawsuit was settled in June 2011, the Association has become aware of defective conditions related to the tower window assemblies, the exterior wall installation in the towers, the piping in the tower mechanical rooms, and the sewer line installation. These deficiencies are more particularly described below.

Chapter 40 notice to builders. On February 24, 2016, the Association served a "Notice to Contractor" pursuant to NRS 41.645 to the following entities who appear to have played a role in creating the newly discovered defects:

Developers

- Laurent Hallier, aka Laurence Hallier
- Panorama Towers I, LLC
- Panorama Towers MEZZ I, LLC
- Panorama Towers II, LLC
- Panorama Towers II MEZZ, LLC

General Contractor

- M.J. Dean Construction, Inc

Residential Tower Windows

- Sierra Glass & Mirror, Inc

Residential tower exterior wall insulation

- F. Rogers Corp (towers 1 & 2)
- Dean Roofing Co (tower 1)
- Ford Contracting, Inc (tower 2)
- Insulpro, Inc (tower 2)

Mechanical Room Piping

- Bombard Mechanical, LLC (towers 1 & 2)
- Silver Star Plumbing, Inc (tower 1)
- R. Rodgers Corp (tower 2)
- Five Star Plumbing & Heating, LLC, dba Silver Star Plumbing

Sewer Installation

- Xtreme Xcavation (towers 1 & 2)
- Southern Nevada Paving, Inc (towers 1 & 2)
- Flippins Trenching, Inc (tower 1)
- Bombard Mechanical, LLC (tower 2)

NEWLY DISCOVERED DEFECTS

The Association has become aware of the following defective conditions since the first lawsuit was settled in June 2011.

Tower window deficiencies. In 2013 the Association became aware of a leakage problem in Unit 300, a tower unit, and hired CMA Consulting to investigate. CMA performed exterior water testing of the windows and concluded that the window assemblies were defectively designed such that water entering the assemblies does not have an appropriate means of exiting the assemblies. There are no sill pans, proper weepage components or other drainage provisions designed to direct water from and through the window assemblies to the exterior of the building.

In 2015, CMA inspected 15 units in the two towers to determine whether the problems in Unit 300 exist elsewhere in the towers, as revealed by evidence of water intrusion within the exterior wall assemblies. Units were selected from different floors and with different exposures to obtain a mixed sampling. The inspections, which typically included multiple locations within each unit inspected, consisted of pulling back carpet, removing electrical outlet faceplates, pulling back baseboards and/or cutting through the sheetrock behind the baseboards. Significantly, the steel stud framing was found to be corroded in 71% of the locations inspected.

As a consequence of the defective window assembly design, water that should have drained to the exterior of the building has been entering the metal framing components of the exterior wall and floor assemblies, including the curb walls that

support the windows, and is causing corrosion damage to the metal parts and components within these assemblies. Further, this damage to the metal components of the tower structures presents an unreasonable risk of injury to a person or property resulting from the degradation of these structural assemblies.

CMA commenced repair of the window assemblies in Unit 300 on February 1, 2016, and the overall repair, including interior finish work, will be completed in two weeks. The total anticipated cost of the repair is $192,708. This does not include the cost of moving and storing the owner's furniture, or temporary housing for the owner.

If the Association were to undertake a project-wide repair of the window assemblies in all 616 units in the two towers, using the same repair protocol used for the repair of Unit 300, the cost would be enormous. Utilizing the economies of scale associated with a large project of this magnitude would result, to a degree, in a reduction in the overall repair cost per unit (compared to the repair cost of Unit 300). However, Unit 300 is an average sized unit, and many of the units are much larger. More importantly, Unit 300 is on the third floor and could be repaired using a boom. For all of the higher units, it will be necessary to access the units using a swing stage hung from the top of the building, which will substantially increase the repair costs.

CMA guestimates at this point, adding in the cost of moving and storing the furniture for each unit, and renting a suitable apartment for the occupants during the repair, that it will probably cost about $200,000 to $300,000 per unit to repair the windows in the towers. At an average of $250,000 per unit, it would cost over $150 million to repair the windows in the other 615 tower units.

Fire blocking deficiencies. While investigating the leakage problem in Unit 300, CMA observed that fire blocking insulation was missing in the ledger shelf cavities and steel stud framing cavities at the exterior wall locations between residential floors in the two tower structures.

The plans called for insulation, as required by the building code, at these locations (See, *e.g.*, plan detail attached as Exhibit A.) The purpose of this insulation is to act as a fire block provision to deter the spread of fire from one tower unit to the units above or below, and to prevent condensation from occurring within the exterior wall assemblies. However, the insulation was not installed as required by the plans and building code.

Accordingly, while pulling baseboards to inspect for leakage in other tower units, CMA also looked for missing fire blocking at those locations. These inspections revealed that 71% of the locations inspected had no insulation in the ledger shelf cavity, and 21% had no insulation in the steel stud framing cavity. CMA guestimates a repair cost in the neighborhood of $2 million to remedy this condition in the two towers.

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

Sewer deficiencies. The main sewer line connecting the Development to the city sewer system ruptured due to installation error during construction, causing physical damage to adjacent common areas. This deficiency was repaired at a cost of approximately $450,000.

AVAILABLE SOURCES OF RECOVERY

As noted above, the developers obtained wrap insurance coverage through ACE and two excess carriers with combined coverage limits totaling $54 million. The wrap insurers paid $23,789,500 to settle the case in June 2011, leaving approximately $30.2 million in available coverage under the two excess policies.

As noted above, the tower window assembly claim alone amounts to over $100 million. We are therefore considering the following additional sources of potential recovery.

The development entities. Recovering from the project developers, over and above the available coverage afforded by the wrap policies, would be problematic because of insolvency and bankruptcy. Two of Hallier's development entities, Panorama Towers I, LLC, and Panorama Towers Mezz I, LLC, were dissolved years ago and presumably have no assets. Hallier placed his other development entities, the following, in Chapter 7 bankruptcy (liquidation) in June 2015:

- Hallier Aviation, LLC;
- Hallier Properties, LLC;
- Panorama Towers II, LLC;
- Panorama Towers II Mezz, LLC;
- Panorama Towers III, LLC;
- Hallier Panorama Holdings, LLC; and
- Hallier Group Holdings, Inc.

These bankruptcies were consolidated under the Hallier Aviation proceeding (Hallier Aviation was an entity previously created by Hallier in 2000), and remain pending.

Hallier's personal liability. We believe Hallier has substantial assets, which is confirmed by the fact that he placed his development entities in bankruptcy but did not declare personal bankruptcy, and also by discovery conducted in the ACE suit against Hallier.

As described above, ACE filed suit against both Hallier personally and the entities involved in the development of the Panorama project for premiums due on the insurance policy issued by ACE for the project. The ACE suit was stayed as against Hallier pending the conclusion of bankruptcy proceedings against the entities, and as noted above, the ACE suit was just settled this month.

In November 2012, prior to the bankruptcy stay, ACE took Hallier's deposition in the suit, and also took the depositions of Hallier's accountant, Mark Jolley, and his former chief financial officer, Bob Beenken. The depositions revealed hiding of assets and fraudulent transfers of funds involving tens of millions of dollars made by Hallier from his development entities to his personal accounts. The ACE attorneys have developed a strong case for piercing the corporate veil of Hallier's development entities and recovering from him personally.

Recovery from contractors. The insurance policies issued to MJ Dean and the subcontractors listed above likely included "wrap" insurance exclusions applicable where, as here, the insured is enrolled in a wrap program. Wrap exclusions generally fall into three categories: (i) those that are fully enforceable, (ii) those that are not enforceable, and (iii) those that make the insured's policy excess to the wrap policy. If MJ Dean's and/or the subcontractors' policies contain either of the latter two forms of exclusion, coverage would be afforded under those policies. Moreover, MJ Dean is a large-scale contractor that has constructed many of the major casino and hotel projects in Las Vegas, and we assume it has substantial assets.

* * *

Francis Lynch and I look forward to working with you and defense counsel to resolve this matter.

Very truly yours,

SCOTT WILLIAMS

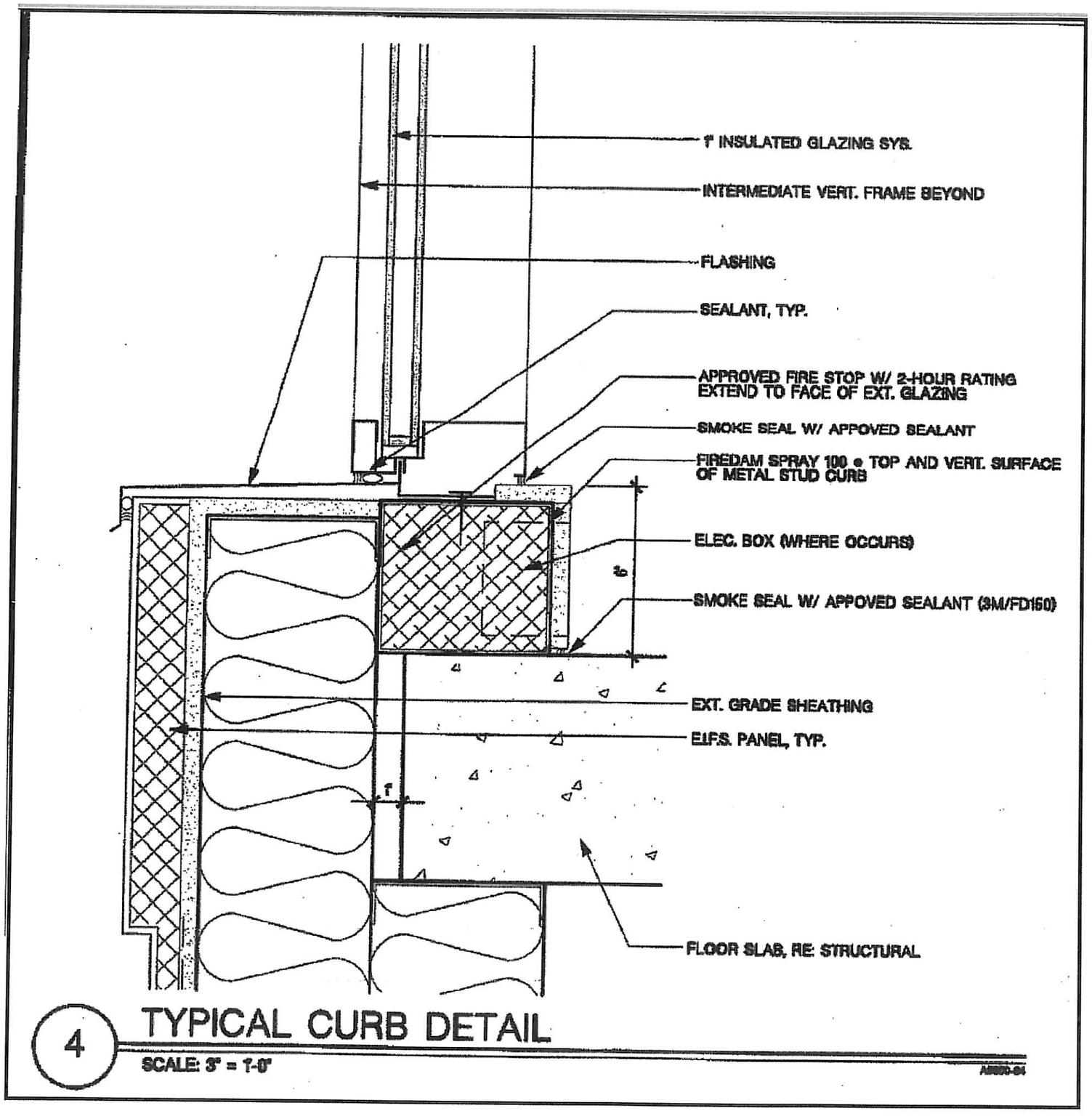
SW:vef

CC: Francis Lynch, Esq. (via email)
Perter Brown, Esq. (via email)

Enclosures

W:\Client files\Panorama Towers\Correspondence - General\2016-06-30 SW-Edwards (background).docx

Exhibit A



4 TYPICAL CURB DETAIL

SCALE: 3" = 1'-0"

KLAI JUBA architects

PANORAMA

BASSON / HALLER INVESTMENTS LAS VEGAS, NEVADA

KJA Job Number: 03031

Issue Date:		06-07-04
Revision:		
1	CLARIFY COMMENTS	11-03-04

2	ADDITIONAL REVISION	2-03-05
3	ADDITIONAL REVISION	04-12-05
4	ADDITIONAL REVISION	08-11-05
5	ADDITIONAL REVISION	11-01-05

REVISION 5: 11-01-05

NAC 623.350

JOHN E. HALD ARCHITECT No. 3932 STATE OF NEVADA

KLAI JUBA ARCHITECTS
4444 West Russell Road Suite J
Las Vegas • Nevada 89118
Phone 702 • 221 • 0384
Fax 702 • 221 • 7555

DEVELOPMENT SERVICES DEPARTMENT Approved by MAR 2 2 2006 Andrew Hunt "REVISION"

DETAILS

A9.00.0

Exhibit B

ADVANCED TECHNOLOGY
& MARKETING GROUP

2764 n. Green Valley Pkwy #116, Henderson, NV 89014

17 November 2011

Mike Murphy
Panorama Towers Condominium Unit Owners Assoc.
4525 Dean Martin Drive
Las Vegas, NV 89103

Re: Report for Evaluation of Corrosion Damage to Mechanical Room Piping

Dear Mr. Murphy:

ATMG is pleased to present this report for the corrosion damage evaluation for the piping in the two lower and two upper Mechanical Rooms in the Panorama Towers. This task was performed in accordance with our proposal dated 5 October 2011.

PROJECT INFORMATION

On 9-20-11, a walk down was conducted of the lower and upper mechanical rooms of the two towers. The lower mechanical rooms exhibited more corrosion damage than the two upper mechanical rooms. Several replaced parts were on the floor in one of the upper mechanical rooms. Some connections were observed to be leaking. Our evaluation and reporting is in substantial accordance with the *Guideline for Structural Condition Assessment of Existing Buildings*, SEI/ASCE 11-99 published jointly by the Structural Engineering Institute and the American Society of Civil Engineers.

There are several dissimilar metal connections that are accelerating the corrosion attack on the less noble alloy in the connection. Our observations found stainless steel and copper based alloys (more noble) in contact with ductile iron and carbon steel (less noble). When dissimilar metals are in contact in a wet environment, the difference in electric potential of these alloys creates a battery effect that powers the

dissolution of the less noble alloy into the environment as a corrosion product.

When measured on a copper/copper sulfate electrode scale, stainless steel and copper based alloys (copper, brass, bronze) exhibit an electric potential to their wet environment of approximately -0.2 volts; carbon steel, cast iron, and ductile iron exhibit an electric potential of approximately -0.5 volts to their wet environment. This difference of 0.3 volts creates an electric current to flow out of the less noble metal which is the one with the more negative voltage. As the current leaves, it takes metal ions with it that become a corrosion product – usually some form of rust. This condition is called a galvanic corrosion cell. One amp of current can remove 20 pounds (lbs) of iron in one year. Therefore, these dissimilar metal galvanic corrosion cells can cause serious damage over time.

ATMG was directed to identify which sections of piping, fittings, pumps, valves, and regulators need to be replaced. In addition, those items were to be identified for replacement on a time schedule of: Replace now, Replace within 5 years, or Replace long term.

OBSERVATIONS

Primary Piping Parts

The identification of parts that need replacement has been noted on spreadsheets for each of the mechanical rooms. The recommended replacement schedule is also shown. An accompanying photographic log has been cross referenced to parts listed on the spreadsheets. In theory, the plastic lined steel nipples should not create a galvanic cell. However, if the liner is damaged during installation or not installed correctly, wet metal to metal contact can result leading to leaks as has been noted.

Yellow Brass Fittings and Valves

There are numerous small fittings and valves within the 4 rooms made of yellow brass that are experiencing a corrosion mechanism known as dezincification. A white powdery substance (zinc oxide) can be seen on the surface of these parts that confirms the water has corroded the zinc in the copper matrix to the point that it has reached the exterior surface. This process will continue, and eventually water will begin to drip through these corroded zones. Since these parts are small and easily

replaced, our recommendation is to leave them in service until the leaks begin to drip, and then replace them as is the current practice with the Maintenance Department.

Stainless Steel Piping Leaks

Some welded joints of the stainless steel piping exhibited leaks. Currently these are being weld repaired as they occur as part of the regular maintenance.

Other Observations - Bolting

In addition to the specific assigned tasks, a problem with bolting was noticed. We found mixed bolting in several flanged connections and bolts holding butterfly valves in position.

To properly share loads, bolts and cap screws in a connection should all be the same strength. Therefore, we recommend that the Maintenance Department should check each set of connections for mixed bolting. A query needs to be made with a plumbing engineering firm to find out which grade of bolts is required for each type of connection.

RECOMMENDATIONS

1. The major piping parts suffering corrosion should be replaced in accordance with the schedule shown on the accompanying spreadsheets.
2. Yellow brass fittings and valves should be replaced when dripping leaks caused by dezincification are noticed as part of the regular maintenance schedule.
3. The proper grade of bolting for the various connections should be determined, and replacements made accordingly.
4. Continue the repair welding of stainless steel leaks.

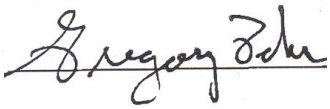
CLOSURE

We thank you for the opportunity to be of service. If there are any questions or needed modifications regarding this report, please contact Gregory Fehr at 702-204-4795, and we will make changes accordingly.

The assumptions, conclusions, recommendations, and opinions presented herein are: (1) based on the data provided and collected; (2) based on standard forensic methodology; (3) based on our corrosion experience and (4) prepared in accordance with generally accepted corrosion failure analysis principles and practice. We make no other warranty, either express or implied.

Sincerely,

ATMG



Gregory Fehr
Principal, Metallurgy
Licensed engineer (P.E.) in AL, OK
NACE Certified Cathodic Protection Specialist
NACE Certified Corrosion Technologist

GPF:ki

Encl: Spreadsheet – Panorama 1 Lower Mechanical Room
Spreadsheet – Panorama 1 Upper Mechanical Room
Spreadsheet – Panorama 2 Lower Mechanical Room
Spreadsheet – Panorama 2 Upper Mechanical Room
Photolog - Panorama 1 Lower Mechanical Room
Photolog - Panorama 1 Upper Mechanical Room
Photolog - Panorama 2 Lower Mechanical Room
Photolog - Panorama 2 Upper Mechanical Room

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

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

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

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

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

Dear Ms. Raucci:

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

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

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

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

Very truly yours,

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

swilliams@williamsgumbiner.com

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

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

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

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

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

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

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

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

you

Donna Raucci

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

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

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

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

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

Scott

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

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

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

Thank you.

Jeremy Beal

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

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

Dear Mr. Beal:

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

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

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

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

Very truly yours,

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

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

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

Edward

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

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

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

Thank you.

Jeremy Beal

Jeremy E. Beal

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

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

Edward

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

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

Thank you.

Jeremy

Jeremy E. Beal

Partner | Bullard, Brown & Beal LLP

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

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

Mr. Beal,

I received your voicemail.

Peter Brown is representing the development entities.

His email is: pbrown@bremerwhyte.com

Please let me know if you have any further questions.

Thanks

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

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

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

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

Peter and Darlene:

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

Thanks,

Scott

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

From:	Scott Williams
To:	pbrown@bremerwhyte.com; Darlene Cartier
Cc:	flynch@lhsslaw.com; Vicki Fedoroff; Wendy Jensen; Bruce A. Edwards , Esq. (bedwards@jamsadr.com); Castillo David
Subject:	RE: Panorama Towers - service list
Date:	Thursday, June 30, 2016 6:15:51 PM
Attachments:	2016-06-30 defendant status.doc

I don't like to send the attachment on the first try …

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

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

Peter and Darlene:

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

Thanks,

Scott

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

From: Peter Brown
To: Jeremy Beal
Cc: Scott Williams; Francis Lynch; Darlene Cartier; Wendy Jensen; Vicki Fedoroff
Subject: Re: Panorama Towers - Southern Nevada Paving (BWB&O File #1287.551)
Date: Sunday, July 3, 2016 1:17:32 AM

Everyone:

Our office did not place SNP on notice for the sewer allegation. We place Flippins Trenching on notice. We currently do not intend to place SNP on notice, although we reserve our clients' right to do so should information come to light warranting same.

Given the above, my recommendation is that the HOA withdraw the Chapter 40 Notice to SNP. My clients do not expect SNP to participate in the pre-litigation mediation, nor do we intend on inviting SNP to the mediation.

Peter Brown

Sent from my iPhone

On Jul 1, 2016, at 9:36 AM, "Jeremy Beal" <jbeal@bbblaw.net> wrote:

> Mr. Williams
>
> I defer to Peter Brown for any further response to your email.
>
> Thank you.
>
> Jeremy
>
> **Jeremy E. Beal**
> Partner | Bullard, Brown & Beal LLP
> 234 East Commonwealth, Second Floor | Fullerton, CA 92832
> jbeal@bbblaw.net | TEL 714-578-4050 | FAX 714-578-4060
> CELL 714-553-2954
>
>

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Thursday, June 30, 2016 6:38 PM
To: Jeremy Beal
Cc: Francis Lynch (flynch@lhsslaw.com); Peter Brown (pbrown@bremerwhyte.com);

Darlene Cartier; Wendy Jensen; Vicki Fedoroff
Subject: RE: Panorama Towers - Southern Nevada Paving

Jeremy:

Thank you for sending SNP's contract. I sent the contract to our expert, who noted that SNP's scope of work included backfilling and compacting. He also pointed out that improper backfilling and compacting of the sewer line is the most likely cause of the sewer line failure.

The sewer line failure is a new claim that occurred after the settlement of the first suit in June 2011. The release provided in the settlement agreement was for known claims only.

As to SNP's enrollment in the wrap program, there are insufficient remaining policy limits to respond to the newly discovered claims. We therefore provided notice to those subcontractors who are implicated in the newly discovered claims, as their policies will likely provide coverage that is excess to the wrap coverage.

Regards,

Scott

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

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

Scott

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

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

Based on the attached documents, I ask that you withdraw your Chapter 40 notice to SNP, or in the alternative, provide us with whatever documentation you have that leads

you to believe that SNP may somehow be implicated in the current defects being alleged by your client.

Thank you.

Jeremy Beal

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

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

Dear Mr. Beal:

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

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

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

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

Very truly yours,

Scott Williams
Williams & Gumbiner LLP
100 Drakes Landing Road, Suite 260

Greenbrae, CA 94904
(415) 755-1880
swilliams@williamsgumbiner.com

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

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

Edward

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

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

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

Thank you.

Jeremy Beal

Jeremy E. Beal

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

From: Jeremy Beal [mailto:jbeal@bbblaw.net]
Sent: Wednesday, April 13, 2016 12:58 PM

To: 'Edward Song'
Cc: 'Daniel E. Lopez'
Subject: RE: Panorama Towers / NRS 40

Edward

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

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

Thank you.

Jeremy

Jeremy E. Beal

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

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

Mr. Beal,

I received your voicemail.

Peter Brown is representing the development entities.

His email is: pbrown@bremerwhyte.com

Please let me know if you have any further questions.

Thanks


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

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

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

Everyone:

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

Does Bruce have any later dates open in September?

Peter

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

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

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

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

Good Morning Counsel,

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

Thank you.

David Castillo
Case Manager

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

JAMS Neutral Analysis: Unbiased, confidential case evaluation from the best legal minds in the business.

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

Bruce:

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

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

Thanks,

Scott

Scott Williams
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100 Drakes Landing Road, Suite 260
Greenbrae, CA 94904
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swilliams@williamsgumbiner.com

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

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

Peter and Darlene:

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

Thanks,

Scott

Scott Williams
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BREMER WHYTE

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September 26, 2016

VIA HAND DELIVERY

Francis I. Lynch, Esq
LYNCH HOPPER SALZANO SMITH

And/Or

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

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

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

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

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

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

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

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

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

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

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

We look forward to your response to our tender.

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Peter C. Brown

pbrown@bremerwhyte.com
PCB

Law Offices of
LYNCH HOPPER, LLP

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1210 S. VALLEY VIEW BLVD, STE. 208
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FRANCIS I. LYNCH, ESQ. - LICENSED IN NV
CHARLES "DEE" HOPPER, ESQ. - LICENSED IN NV & TX

OF COUNSEL
LOREN TILLEY, ESQ. -LICENSED IN HI

11/28/16

Dear Mr. Brown:

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

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

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

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

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

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

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

Sincerely,

LYNCH HOPPER, LLP

Francis I. Lynch, Esq.

From:	Peter Brown
To:	Scott Williams; Bruce Edwards (bedwards@jamsadr.com)
Cc:	Vicki Fedoroff; Wendy Jensen; Rachel Bounds; Crystal Williams; flynch@lhsnvlaw.com; Cairo Person; Darlene Cartier
Subject:	RE: Panorama Towers Condominium Unit Owners" Association vs. Panorama Towers I, LLC, et al. - REF# 1100085420
Date:	Friday, January 6, 2017 11:17:16 AM

Bruce:

We have no dates set for further settlement discussions. We are not contemplating any future dates at this time. If the matter is not summarily dealt with via motion practice , we may be in touch. However, there is no reason for JAMS to contact the parties at this stage asking whether new dates need to be set.

Peter

From: Scott Williams [mailto:swilliams@williamsgumbiner.com]
Sent: Friday, January 06, 2017 11:13 AM
To: Bruce Edwards (bedwards@jamsadr.com)
Cc: Vicki Fedoroff; Wendy Jensen; Rachel Bounds; Crystal Williams; flynch@lhsnvlaw.com; Cairo Person; Peter Brown; Darlene Cartier
Subject: RE: Panorama Towers Condominium Unit Owners' Association vs. Panorama Towers I, LLC, et al. - REF# 1100085420

Bruce:

As you will recall from the mediation conference in September, the developers' counsel made a power point presentation showing why the Association's claims will be dismissed, which I assume is the optimistic basis underlying their suggestion that you close your file on this matter.

Not surprisingly, we have a different view as to how things will turn out. I suggest you keep your file open.

Happy new year,

Scott

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

From: Darlene Cartier [mailto:dcartier@bremerwhyte.com]
Sent: Monday, December 19, 2016 11:56 AM
To: Cairo Person <cperson@jamsadr.com>
Cc: Vicki Fedoroff <vfedoroff@williamsgumbiner.com>; Wendy Jensen <wjensen@williamsgumbiner.com>; Rachel Bounds <rbounds@bremerwhyte.com>; Crystal Williams <cwilliams@bremerwhyte.com>; Scott Williams <swilliams@williamsgumbiner.com>; flynch@lhsnvlaw.com; Peter Brown <pbrown@bremerwhyte.com>
Subject: Panorama Towers Condominium Unit Owners' Association vs. Panorama Towers I, LLC, et

al. - REF# 1100085420

Dear Cairo:

Thank you for your e-mail. You may close your file. We will contact you if your services are needed at a future date.

Sincerely,
Darlene

Darlene Cartier
Bremer Whyte Brown & O'Meara, LLP
1160 N. Town Center Drive
Las Vegas, NV 89144

702.258.6665
702.258.6662 fax
www.bremerwhyte.com

From: Cairo Person [mailto:cperson@jamsadr.com]
Sent: Wednesday, December 14, 2016 4:58 PM
To: scott@williams-law.net; flynch@lhsnvlaw.com; Peter Brown; Darlene Cartier
Cc: vfedoroff@williamsgumbiner.com; wendy@williams-law.net; Rachel Bounds; sschacht@bremerwhyte.com
Subject: Panorama Towers Condominium Unit Owners' Association vs. Panorama Towers I, LLC, et al. - REF# 1100085420

Dear Counsel,

Please advise if our office can assist with any further scheduling or if we should close our file.

Thank you,

Cairo Person

Ms. Cairo Person
Case Coordinator
JAMS

Two Embarcadero Center
Suite 1500
San Francisco, CA 94111
Email: cperson@jamsadr.com
415-774-2629 (Direct Dial)

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From:	Scott Williams
To:	Peter Brown (pbrown@bremerwhyte.com)
Cc:	Francis Lynch; Colin Hughes; Vicki Fedoroff; RBonsole (rbonsole@yahoo.com); Omar Hindiyeh (Ohindiyeh@cmaconsulting.com)
Subject:	Panorama - scheduled repair
Date:	Tuesday, March 21, 2017 3:13:49 PM
Attachments:	Panorama Unit 200.msg

Peter:

The Association has become aware of a problem in Unit 200, Tower 2. The current wall design is intended for a window wall of under 12 feet in height. However, a 20-foot window was installed in the wall, causing too much flex in the system. The solution is to replace the window with a curtain wall.

Attached is an email from Richard Bonsole of CMA Consulting with the tentative repair schedule.

Regards,

Scott

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March 31, 2017

RECEIVED APR - 4 2017

VIA E-MAIL

Scott Williams, Esq.
swilliams@williamsgumbiner.com
LAW OFFICE OF WILLIAMS & GUMBINER, LLP
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Charles Dee Hopper, Esq.
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LYNCH HOPPER, LLP
1210 S. Valley View Blvd., #208
Las Vegas, NV 89102

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

BWB&O Client: Panorama Towers I, LLC, Panorama Towers II, LLC, and M.J. Dean Construction, Inc.

BWB&O File No.: 1287.551

Subject: Notice of Intended Storefront Window Replacement in Tower II, Unit 200; Failure to Provide Proper Chapter 40 Notice; Any Claim is Time-Barred; Failure to Comply with Chapter 40 Inspection Repair Requirements

Dear Counsel:

On March 21, 2017, I receive an email from Mr. Williams regarding an alleged issue with a window in Unit 200, Tower II. I immediately contacted Mr. Lynch to discuss the email and informed him of my concerns regarding the alleged notice.

NRS 40.645 requires that a Formal Notice of Defect must be provided via certified mail, return receipt requested, before a claimant commences an action or amends a complaint to add a cause of action for constructional defect. The email that was sent to my attention can in no way be considered a formal Chapter 40 Notice.

The email included an email from a Richard Bonsole, Senior Project Manager for CM Consulting. That email indicated that there is a schedule for proposed repairs running from April 3, 2017 through April 18, 2017. The apparent intent of the HOA to move forward with repairs is in complete violation of NRS 40.647 which requires the HOA, once a proper Chapter 40 Notice has been provided, to allow an inspection of and reasonable opportunity to repair the alleged defect. At the inspection the claimant or the claimant's expert is required to be present at the inspection in order to identify the exact location of the constructional defect. See NRS 40.647 1(a)(b)(c).

Notwithstanding the above, and in no way is this letter intended to imply that the HOA has a valid claim with regard to this new alleged issue, the March 21, 2017 email completely disregards the fact that any such claim related to the storefront window is time-barred. As you know, AB125 amended the applicable statute of repose and statutes of limitation such that there is now a single six year statute of repose. The Certificate of Occupancy for Tower II was issued on March 31, 2008. Consequently, the HOA's apparent intent to include this issue as part of the ongoing litigation was time-barred as of March 31, 2014.

Given the above, please allow this letter to serve as a request and recommendation that the HOA immediately agree that it is not intending to make a formal Chapter 40 Notice with regard with this issue and that it will not attempt to include it as part of the ongoing litigation. Any such attempt will be opposed and a request for sanctions with regard to any fees and costs associated with same will be sought.

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

Very truly yours,

BREMER WHYTE BROWN & O'MEARA LLP

Peter C. Brown. Esq.

pbrown@bremerwhyte.com

PETER C. BROWN, ESQ.
Nevada State Bar No. 5887
JEFFREY W. SAAB, ESQ.
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cwhittaker@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. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant, vs.	Case No. A-16-744146-D Dept. XXII **PLAINTIFFS/COUNTER-DEFENDANTS LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC, AND M.J. DEAN CONSTRUCTION, INC.'S, REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES PURSUANT TO NRS 18.010(2)(B)**

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

Counter-Defendants.

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

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

This Reply is made and based on the attached Memorandum of Points and Authorities, the pleadings and papers on file herein, and all evidence and/or testimony accepted by this Honorable Court at the time of the hearing on the Motion.

Dated: July 9, 2019

BREMER WHYTE BROWN & O'MEARA, LLP

By:_____

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

DECLARATION OF PETER C. BROWN, ESQ.

IN SUPPORT OF REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES PURSUANT TO NRS 18.010(2)(B)

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, PETER C. BROWN, Esq., declare under penalty of perjury under the laws of the State of Nevada:

1. I am an attorney at the law firm of Bremer, Whyte, Brown & O'Meara, LLP ("BWB&O"), and I am in good standing and licensed to practice law in the State of Nevada.
2. BWB&O is counsel for Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC and M.J. Dean Construction, Inc. (hereafter collectively referred to as the "Builders" in the above-captioned matter).
3. I have personal knowledge of the facts set forth herein, and if called to testify I could competently do so.
4. The attorneys' fees presented herein are true and correct to the best of my knowledge and belief.
5. The attorneys' fees have been reasonably and necessarily incurred in litigation this action.
6. At the outset of this case BWB&O was not advised that the file was to be split for billing purposes between Chubb and ESIS.
7. Several billing statements had already been generated but had not yet been paid by either of the insurance carriers, when BWB&O was first advised to split the billing between Chubb and ESIS.
8. Because all billing from the onset of the litigation had to be split as per carrier directive, the original unsplit invoices were voided and were never paid by Chubb or ESIS.
9. Chubb and ESIS have separate guidelines for both billing and the timing of billing statement submissions.

10. When the splits were made for all future billing statements they very often were staggered, resulting in the one half of billing entries being submitted to the two carriers at different times, again pursuant to each carrier's respective submission requirements.

11. When the billing statements were provided to me for attachment to the Motion for Attorney Fees, I did not realize that they included the original billing statements that had not been split and which were subsequently voided. Since those billing statements had never been paid, they should not have been included as exhibits to the Motion for Attorney Fees. As set forth in the Builder's Reply Brief, the billing amounts for those billing statements have been taken out of the total amount being sought by The Builders.

12. Redactions in the billing statements were personally performed by me in identifying entries that addressed attorney-client communications and attorney work product. While any such information is protected from disclosure, separate copies of the same billing statements with the entries highlighted rather than redacted are being provided to the Court under seal for an *in camera* review of the entries so that the Court can see for itself the attorney-client communication and attorney work product basis for the redactions.

13. The most recent billing statement also included redacted segments which comprise BWB&O internal cuts that we routinely make to every billing statement before it is submitted to the carrier based on the reviewing partner's determination of the entries.

14. Some of the costs requested by the Builders in its separate Memorandum for Costs were inadvertently included in the Motion for Attorney Fees. The Builders are not seeking reimbursement of the same costs twice.

15. Although BWB&O represented a minor subcontractor in the *Bryne* matter, we had already settled that party out of the case before the November 2017 ruling on the Motion for Summary Judgment in that case. My first actual knowledge of the *Byrne* decision on the Motion for Summary Judgment did not occur until approximately December of 2018. Once I noticed a ruling was being appealed in 2018, as a personal interest and in my capacity as managing partner of BWB&O's Las Vegas office, I looked to see what was

being appealed. I routinely do that if I notice appeals have been filed on issues that might have an impact on other construction defect cases we are handling. When I realized the subject matter of the appeal was potentially pertinent to the present case, I asked my assistant to get me copies of the underlying papers to see if they were pertinent to this matter given the subject of the appeal.

16. BWB&O routinely receives hundreds of filings a day in cases where we have already reached a settlement on behalf of a client. It is not the custom and practice of BWB&O to review every filing for every case where we happen to still be on the eservice list after we have resolved the matter in that case for BWB&O's client. As noted above, at the time of the appeal in *Bryne* it was my personal practice as managing partner of the Firm to try and be aware of appeals filed in construction defect cases.

17. All Motion practice filed in this case was performed with the express authority of the carriers after the intent of each Motion was communicated to the carriers.

18. That this Reply is made in good faith and not for undue advantage.

Peter C. Brown, Esq.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Builders seek to recover their attorneys' fees which were reasonably, necessarily and actually incurred in defending and litigating against the Association's constructional defect claims. The Builders are the prevailing party against the Association through their Motion for Summary Judgment whereby the Builders obtained an Order granting same in their favor. This Court's May 23, 2019 Order summarily dismissed the remaining claims for construction defects asserted against the Builders by the Association through its Counter-Claim.

In its Opposition to the Builders' Motion for Attorney Fees ("Opposition"), the Association raises a potpourri of arguments (along with thinly veiled attacks at the honesty and integrity of BWB&O) in an attempt to deprive the Builders their rightfully-earned fees. While the majority of the arguments are frivolous (and, frankly, beneath the standard by which opposing counsel has routinely conducted themselves in this case and other litigated matters) the Association raises a few questions regarding what appear to be discrepancies in the Builders' billing. As noted in the Declaration of Peter C. Brown, Esq., the original billing of this matter was not split between two carriers. Once the billing was split, the two carriers utilized separate billing guidelines as well as separate timing for submission of the billing. This did result in some issues with the billing which the Builders appreciate the Association bringing to their attention since it has never been anything but the intent of the Builders to seek reimbursement of anything other than what exactly was billed to the carriers by BWB&O for its work on behalf of the Builders. Those issues are addressed.

The Builders' request for fees is not premature because as to the Association's Counter-Claim there is a final judgment. The Association's myopic view on this topic leads it to fallaciously assert that because there are remaining claims in the Builders' separate Complaint, there is no final resolution. The Court, however, has summarily disposed of all four of the Association's constructional defect claims initially asserted in the Association's Chapter 40 Notice. There is no further basis upon which the Association can seek relief.

The Association liberally interprets NRS 18.020(2)(b) in a misguided attempt to argue that its claims do not fit within this section's statutory parameters. However, the Builders provided ample notice to the Association in both of the Builders' Chapter 40 responses (both as to the original and amended Chapter 40 Notices), clearly articulating each and every procedural deficiency that later served as the basis for the Court summarily disposing of the Association's claims. While it was within the Association's right to ignore these candid responses and to gamble in its subsequent litigation, the Association should be held accountable in paying the Builders' attorney's fees after their risky litigation went completely awry.

The Association attempts to deprive the Builders' their attorney's fees by first arguing that the Builders should not be allowed attorney's fees incurred during the pre-litigation period, and second, that the Builders' attorney's fees were unreasonable. These points are again misguided. The Chapter 40 pre-litigation process is part and parcel of any litigation that stems from an original Chapter 40 Notice. Furthermore, the Association mislabels the work expended by the Builders in defending against the Association's untimely defect claim as being excessive when in fact it was reasonable.

Its protestations notwithstanding, the Association was unreasonable in bringing and maintaining its claims because those claims were from the outset procedurally deficient, barred by the statute of repose, and untenable. The Association ignored all of these issues in the Opposition. The Builders restate all the positions raised in the Motion for attorney fees with regard to: 1) the absolute lack of a basis for the mechanical room claims given the HOA's knowledge of the alleged issues but failure to either give timely notice of same to the Builders or to preserve the evidence; 2) the absolute lack of a basis for the sewer line claim given the Association's failure to provide notice to the Builders and the failure to preserve the evidence; 3) the Association's clear intent to completely disregard the AB 125 requirement for inspection and identification of the alleged fire-blocking issue thereby fatally undermining that issue from the outset; and 4) the Association's unilateral decision to wait to file the non-compulsory Counter-Claim until over four months after the statutory deadline following mediation thereby precluding any recovery for the remaining window issues per the statute

of repose. The Association's unreasonable behavior caused the Builders to incur substantial attorney's fees in defending against the deficient claims. As the Association was unreasonable in bringing and maintaining its constructional defect claims, the Builders should be awarded their attorney's fees pursuant to NRS 18.010(2)(b).

II. LEGAL ARGUMENT

A. CLARITY REGARDING THE BUILDERS' INVOICES AND FEES TOTALS.

The Association commences its opposing arguments stating that the Builders' invoices are confusing and include 8 separate questions. (*See* Opp., Pg. 7-8). Normally, when multiple carriers are part of a case, billing is set up so that one file number can be used for multiple carriers. That one billing statement is then split between the carriers participating in the defense. That is how BWB&O originally set up matter for billing. Ultimately, in September of 2016 Chubb and ESIS directed the Builders' counsel to create two file numbers, one for Chubb (1287.551 – Tower I) and one for ESIS (1287.558 – Tower II). Unfortunately, what was still unclear until approximately March of 2017 was that the work was supposed to be entered once and then split electronically rather than the billing being input under each file separately.

The Builders were never paid for the early invoices because they were not split according to the carriers' directive. Once the Builders learned that the files were supposed to be entered once, then split electronically, the Builders' counsel's accounting office (the "Bremer Whyte Accounting Staff") went back to several of the early invoices, voided them, and then re-billed the files according to the carrier-required 50/50 split. As noted below, these early voided invoices have been removed from the Builders' request for attorneys' fees, reducing the sought amount.

However, just because the files eventually were split, it did not mean that the billing statements would necessarily result in the exact same amounts. Chubb and ESIS are different carriers with separate guidelines for billing and timelines for submitting invoices. Therefore, when the splits were made, they very often were staggered, resulting in the files getting billed to Chubb and ESIS at different times. This explains why some of the 1287.551 statements are different than the 1287.558 statements. Moreover, because Chubb and ESIS had different billing guidelines, the

Builders' counsel may have made internal cuts to 1287.551 that would not necessarily have been cut on 1287.558 because one carrier might routinely approve a particular task while the other carrier may not.

i. RESPONSES TO THE ASSOCIATION'S 8 QUESTIONS REGARDING BILLING PRACTICES

1. If a split occurred, what was it?

Once the Builders' understood that a split was to occur, per the carriers' directive, the billing was to be split 50/50 between the files.

2. Why did the split between two (2) carriers (i.e., Chubb and ESIS) generate four (4) different invoices for the same work? *See id.* (invoicing for March 21, 2016, to May 31, 2016)?

The Association challenges the fact that there are multiple invoices for the same work. As for a few of the statements, the Builders agree. Unfortunately, when the Builders pulled all the billing statements in this case to attach to its underlying Motion, all billing statements, including those that had been voided out, were included. This was an inadvertent mistake. Therefore, the Builders have recalculated their fees based upon the documents already provided to the Court as exhibits to the underlying Motion, from the inception of this case through June 13, 2019. Part of that recalculation includes removal of the following voided statements as follows:

- 1287.551 – Statement 1 (Ex. F at 1-23)
- 1287.551 – Statement 2 (Ex. F at 34-42)
- 1287.551 – Statement 3 (Ex. F at 66-81)
- 1287.558 – Statement 1 (Ex. F. at 24-33)
- 1287.558 – Statement 3 (Ex. F at 82-108)

The removal of these duplicate, previously voided invoices reduces the Builders' fees, as can be shown in the table below, and will also answer the Association's questions about alleged duplicate billing.

3. Why is one set of invoices dated May 31, 2016, and the other set dated March 1, 2017? *Compare* Ex. F at 01–23, 82–108 *with* Ex. F at 134–176, 196–239?

Once the Builders learned that the files were supposed to be split, on or about March 2017, the Builders went back, voided out several of the original statements that had not been split, and then re-printed bills on March 1, 2017 with the correct splits for submission to the carriers. As can be

shown in the table below, this explains where there were so many statements submitted in March of 2017.

4. **Why is the split of the same time different on the invoices dated May 31, 2016, than it is on the invoices dated March 1, 2017? *See id.* (appearing to split 2/3 for Chubb and 1/3 for ESIS in May 2016 and 50/50 in March 2017)?**

See above responses. All of these entries have been voided.

5. **Why are all invoices not split in the same way? *Compare* Ex. F at 01–23, 82–108 (Mar. 21, 2016, through May 31, 2016) with Ex. F at 66–81, 240–268, 313–331 (Sept. 2, 2016, through Nov. 30, 2016).**

Three of the five statements cited by the Association in question 5 have been eliminated from the Builders' requested fees. The statements were voided long ago due to the fact that some of the early billing statements were not split. Any entries in these voided statements that reflect 1/3 or 2/3 were based on incorrect splitting of the entry electronically. The fact that these entries may not have all appeared to be split 50/50 formed the basis for why these statements were voided out. Two of the statements the Association referenced is question 5 that were not voided, did have equal splits 50/50.

6. **If these are split invoices, why do the work descriptions sometimes differ between invoices? *Compare* Ex. F at 01 (first entry) *with* Ex. F. at 82 (first entry)?**

The statements containing pgs. 1 and 82 of Exhibit F were voided. At the time these early invoices were billed, attorneys and paralegals would bill the files individually as two separate files instead of having software generate the splits. Consequently, the same time entry might have slightly different descriptions.

7. **How much of the time/fees identified on these invoices did the carriers reject and refuse to pay and for what reasons? Insurance carriers sometimes cut or reject certain billing entries or work. The Builders offer no information on the fees they actually incurred/paid?**

From the total amount billed, Chubb cut file 1287.551 by $4,134.27. ESIS cut file 1287.558 by $3,853.32. These were internal cuts by the carriers based upon their own guidelines. That said, this is still work the Builders incurred and they are still entitled to these fees notwithstanding cuts by the carriers.

8. Why are some entire portions of the invoices redacted (including amounts of time and fees) while most other sections have more modest redactions? *See* Ex. M at 160–163, 165–185, 214–218. How can the Court (or the HOA) evaluate the Builders' fee request with entire sections redacted?

Regarding the "more modest" redactions that were made to some of the entries, the Builders are entitled to withhold privileged work product and attorney-client communications. These redactions are being provided to the Court under seal for *in camera* review.

The portions of the Builders' invoices that have large blacked out sections are not items that are being redacted. Rather, these sections represent billing entries that the Builders' counsel internally cut from the billing. The bills under these large blacked-out sections are not included in the Builders' Motion for Fees, do not comprise part of the total costs in their Motion and are not being requested of the carriers to be paid.

ii. THE BUILDERS MISTAKENLY INCLUDED DUPLICATIVE COSTS IN THEIR MOTION FOR FEES, AS SOME OF THOSE COSTS WERE ALREADY ACCOUNTED FOR IN THE BUILDERS' VERIFIED MEMORANDUM OF COSTS ON FILE WITH THE COURT

The Association also comments that the Builders' calculated fees included both fees and some expenses, per the invoices in Appendix II, which are therefore duplicative costs that were also requested via the Builders' Memorandum of Costs previously submitted to the Court. (*See* Opp. Pg. 7, Ln. 6-12). The Builders agree and regret that some costs were included in the calculations provided in the Builders' underlying Motion for Attorney Fees. That was inadvertent. As the table below indicates, a recalculation of the Builders' fees without the costs is provided.

iii. THE BUILDERS' RECALCULATED FEES BASED ON REDUCTION OF DUPLICATIVE COSTS AND ELIMINATION OF FIVE EARLY VOIDED STATEMENTS

Based on the foregoing corrections, including a reduction of costs and elimination of 5 voided invoices, the Builders incurred attorney's fees altogether in the total amount as follows:

Invoice Date	Invoice Number	Fees
February 2017	4-1287.5511	$3,875.25
February 2017	2-1287.5581	$3,685.75
March 2017	7, 8, 9-1287.5511 + 5, 6,7-1287.5581	$22,966.75
May 2017	8-1287.5581	$4,945.83

Invoice Date	Invoice Number	Fees
August 2017	9-1287.5581	$3,081.50
September 2017	10-1287.551	$7,123.67
December 2017	10-1287.5581	$2,801.50
February 2018	11-1287.5511	$3,125.25
March 2018	11-1287.5581	$323.75
May 2018	12-1287.5511	$1,050.75
August 2018	13-1287.5511 + 12-1287.5581	$7,038.25
November 2018	14-1287.5511	$13,529.26
December 2018	15-1287.5511 + 13-1287.5581	$28,614.50
January 2019	16-1287.5511 + 14-1287.5581	$33,833.25
March 2019	17-1287.5511	$19,637.26
April 2019	15-1287.5581	$19,667.00
May 2019 - Forward	(Not yet reduced to specific invoices for BWB&O file #1287.551 & #1287.558)	$16,132.00
TOTAL		**$191.431.52**

Based on the foregoing chart, the Builders have re-allocated their fees according to the three periods specified in their Motion. (*See* Motion for Fees, Pgs., 11, 15, and 16).

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

Invoice Date	Invoice Number	Fees
February 2017	4-1287.5511	$3,875.25
February 2017	2-1287.5581	$3,685.75
March 2017	7, 8, 9-1287.5511 + 5, 6,7-1287.5581	$22,966.75
May 2017	8-1287.5581	$4,945.83
August 2017	9-1287.5581	$3,081.50
September 2017	10-1287.551	$7,123.67
December 2017	10-1287.5581	$2,801.50
TOTAL		**$48,480.25**

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

Invoice Date	Invoice Number	Fees
February 2018	11-1287.5511	$3,125.25

Invoice Date	Invoice Number	Fees
March 2018	11-1287.5581	$323.75
May 2018	12-1287.5511	$1,050.75
August 2018	13-1287.5511 + 12-1287.5581	$7,038.25
November 2018	14-1287.5511	$13,529.26
December 2018	15-1287.5511 + 13-1287.5581	$28,614.50
January 2019	16-1287.5511 + 14-1287.5581	$33,833.25
TOTAL		**$87,515.01**

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

Invoice Date	Invoice Number	Fees
March 2019	17-1287.5511	$19,637.26
April 2019	15-1287.5581	$19,667.00
May 2019 - Forward	(Not yet reduced to specific invoices for BWB&O file #1287.551 & #1287.558)	$16,132.00
TOTAL		**$55,436.26**

B. THE BUILDERS' REQUEST FOR ATTORNEY'S FEES IS NOT PREMATURE BECAUSE THE COURT HAS SUMMARILY DISMISSED THE ASSOCIATION'S CONSTRUCTIONAL DEFECT CLAIMS.

The Association's lead argument is that the Builders' Motion for attorney's fees is premature because the Court's May 2019 Order resulted only in the dismissal of the Association's Counter-Claim arising from the construction defects (*See*, Opp., Pgs. 10-11). The Association argues that the May 2019 Order did not resolve all of the Association's Counter-Claims, and that the May 2019 Order also did not address various claims in the Builders' Complaint. *Id.* Thus, the Association argues there can be no "prevailing party" (a prerequisite prior to requesting attorney fees) because there must first be a resolution of all claims submitted to this Court for adjudication.

However, the prevailing party determination in this case is crystal clear. This Court granted the Builders' Motion for Summary Judgment, which completely disposed of the Association's requested relief in its Counter-Claim. The Association's claims for constructional defect form the

substantive bases for each of the Association's corresponding Counter-Claims[1]. Thus, it is disingenuous for the Association to state that "the Court's rulings to date do not impact these other causes of action." (*See*, Opp., Pg. 11, Ln. 4). Without the underlying defect claims—all of which this Court has summarily disposed of on procedural grounds—the Association has no basis for relief as to its Counter-Claims. It is tantamount to someone bringing an auto negligence claim without there being an underlying auto accident.

The Court correctly captured this in its May 2019 Order:

> "The Builders' claims in its Complaint 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 counterclaims 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.**"
>
> (*See*, Ex. "B", Findings of Fact, Conclusions of Law and Order, Pg. 13, Lines 22-28, Emphasis Added).

Now that the Association lost its ability to assert the existence of alleged construction defects, the Association has no basis to maintain any of the causes of action in its Counter-Claim that arise from those alleged construction defects.

The Association cites a litany cases in an effort to justify the proposition that a prevailing party determination requires a resolution of all claims between all parties. The Association erroneously interprets these cases to mean that all claims in general must be resolved—including claims that are totally independent of the Association's construction defect claims. The Association's Counter-Claims encompass the full scope of all of its claims against the Builders. Because the entirety of the Association's Counter-Claim has now been substantively dismissed by virtue of the fourth and final alleged construction defect being summarily disposed of, there has been a resolution as to all of the Association's Counter-Claims. As correctly stated above in this Court's

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[1] Specifically, the Association's causes of action in its March 1, 2017 Counter-Claim are (1) Breach of Express/Implied Warranties, (2) Negligence/Negligence Per Se, (3) Products Liability, (4) Breach of Contract, (5) Intentional/Negligent Nondisclosure, (6) Duty of Good Faith and Fair Dealing.

May 2019 Order, the Association is now deprived from seeking any further relief on its construction defect claims, as all of the Association's Counter-Claims were derivative of the alleged construction defects it asserted. This is further supported by the Nevada Supreme Court's definition of prevailing party in *Hornwood v. Smith's Food King*, 105 Nev. 188, 772 P.2d, holding that "[a] plaintiff may be considered the prevailing party for attorney's fee purposes if it succeeds on any significant issue in litigation which achieves some of the benefit is [sic] sought in bringing the suit.'" Id. at 192, 772 P.2d at 1287 (quoting *Women's Federal Sav. & Loan Ass'n v. Nevada Nat'l Bank*, 623 F. Supp. 469, 470 (D.Nev.1985)). The *Hornwood* case stands for the premise that even if the Builders achieved resolution on only some, but not all, of the issues in this case they are still entitled to attorneys' fees.

The Builders' Complaint has no effect whatsoever as to the summary disposition of the Association's construction defect claims. Had the Court ruled against the Builders on their Complaint, the Association could still have pled their own independent claims for relief. Thus, the Association's constructional defect claims were entirely distinct from the Builders' claims for relief. With the entry of this Court's Order granting the Builders' Motion for Summary Judgment, a significant change occurred in the relationship between the two parties because the Association lost its right to continue to assert its affirmative claims against the Builders. Thus, the Builders are unquestionably the prevailing parties in the context of the Association's Counter-Claim and it is not premature for the Builders to bring a request for their rightfully-earned attorney's fees.

C. THE BUILDERS SHOULD BE AWARDED THE FULL AMOUNT OF THEIR ATTORNEYS' FEES UNDER NRS 18.010(2)(B).

i. THE BUILDERS SHOULD BE AWARDED FEES INCURRED PRIOR TO THE ASSOCIATION FILING ITS COUNTERCLAIM.

The Association also incorrectly claims that the Builders are not entitled to any attorney's fees incurred prior to the Association filing its Counter-Claim on March 1, 2017. However, the Association erroneously interprets the language of NRS 18.010(2)(B). While NRS 18.010(2)(B) states, as the statute's intent, "to punish for and deter frivolous or vexatious claims and defenses...," that does not imply that the scope of permissible attorney's fees is temporally restricted to when the claim itself arose. It is axiomatic in the context of Chapter 40 that a "claim" necessarily requires a

pre-litigation process. While the Association's Counter-Claim was filed on March 1, 2017, the Builders began incurring significant costs in connection with this action much earlier than that date in order to respond to the Association's Chapter 40 Notice and prepare for and attend the mandatory mediation.

The Association served its original Chapter 40 Notice on February 24, 2016. The Chapter 40 pre-litigation process is part and parcel of any litigation that stems from an original Chapter 40 Notice. This includes attorney's fees incurred during the pre-litigation process. Support for this is found in NRS 40.655 (which the Association misinterprets), which specifically allows for costs and fees incurred to ascertain the extent of constructional defects. (*See*, NRS 40.655(e)(1)). Obviously, the effort to ascertain the nature and extent of constructional defect allegations by parties like the Builders occurs during the Chapter 40 pre-litigation process. As NRS 40.655(e) allows a claimant to recover reasonably incurred fees associated with the pre-litigation investigation, then it stands to reason that the Builders, as the prevailing party, are entitled their attorney's fees associated with pre-litigation investigation pursuant to NRS 18.005—any other interpretation would be contrary to the statutes and public policy.

ii. THE ASSOCIATION'S UNREASONABLE PURSUIT OF ITS UNTENABLE CLAIMS GIVES RISE TO AN AWARD OF ATTORNEY'S FEES UNDER NRS 18.010(2)(B)

The Association's next argument is that despite it having brought procedurally-defective claims, NRS 18.010(2)(b) does not serve as a basis for attorney's fees for this case. This is a meritless argument that springs from the Association's myopic interpretation of NRS 18.010(2)(b), which allows for attorney's fees when a party brings claims "without reasonable ground." (*See*, Id.) Here, it is not just the fact that the Association's claims were procedurally deficient that satisfies NRS 18.010(2)(b); rather, it is also the fact that (1) the Association was put on immediate notice of such procedural deficiencies, (2) the Association ignored such clear deficiencies, and (3) the Association pushed forward in an unreasonable pursuit given this knowledge.

The Builders advised the Association on multiple occasions (in the Builders' Chapter 40 Response letters) that its claims were barred by the six-year statute of repose as enacted by AB 125,

which this Court ultimately found in granting summary disposition. The Association does not refute that it was so advised multiple times that its claims were barred by the statute of repose. Similarly, the Association does not refute it pursued claims that this Court found to be barred by application of the statute of repose. Furthermore, the Association fails to even address the following: 1) the absolute lack of a basis for the mechanic room claims given the HOA's knowledge of the alleged issues but failure to either give timely notice of same to the Builders or to preserve the evidence; 2) the absolute lack of a basis for the sewer line claim given the Association's failure to provide notice to the Builders and the failure to preserve the evidence; and 3) the Association's clear intent to completely disregard the AB 125 requirement for inspection and identification of the alleged fire-blocking issue thereby fatally undermining that issue from the outset.

As the Association cites in its Opposition, the Nevada Supreme Court in *Bergmann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993) has recognized that a claim is groundless if not supported by any credible evidence at trial. Here, the Association's claims were not supported by credible evidence at trial because the Association could not avoid summary disposition. As addressed in the Builders' Motion for Attorney's Fees, the Nevada Supreme Court has found that where a plaintiff's allegations survive a motion for summary judgment, basis for an award of attorneys' fees pursuant to NRS 18.0201(2)(b) exists. *See*, *Miller v. Jones*, 114 Nev. 1291, 1300, 970 P.2d 571, 577 (1998). Thus, it stands to reason that where summary judgment is granted, there is a basis for awarding attorneys' fees pursuant to NRS 18.010(2)(b). On this basis alone, the Association's procedurally deficient claims, all summarily adjudicated in favor of the Builders over the course of several years, squarely fit within the definition of claims brought "without reasonable ground" as characterized in NRS 18.010(2)(b).

Attorney fees are justified under NRS 18.010(2)(b) because the Association *knowingly* pursued time-barred claims and claims for which the Association knowingly failed to preserve evidence, knowingly failed to provide an opportunity for repair and/or knowingly failed to comply with AB 125's inspection and identification requirements. As discussed in the Builders' Motion for Attorney's Fees, the Builders put the Association on notice of its claims' procedural deficiencies at

the very inception of this case—first, in the Builders' response to the Original Chapter 40 Notice, and second, in the Builders' response to the Amended Chapter 40 Notice. The Association, however, failed to even respond to such Notices. Instead, the Association chose to push forward with its procedurally-deficient claims, forcing the Builders to endure costly litigation.

The Association's cited cases are factually distinguishable from the facts in this case. For example, in *Duff v. Foster*, 110 Nev. 1306, 885 P.2d 589 (1994) (*See*, Opposition, Pg. 13, Lines 3-4), the Supreme Court reversed an award of attorney's fees because it determined that the plaintiff had reasonable grounds for which to bring his action, even though it later turned out that additional facts came to light, making the Plaintiff's claim groundless. The key difference in the present case, is that the Association knew of all the procedural deficiencies prior to both the service of its original Chapter 40 Notice and the filing of its Counter-Claim. The Association's original Chapter 40 Notice and it Counter-Claim were deficient from the start.

In *Rodriguez v. Primadonna Co. LLC*, 125 Nev. 578, 588, 216 P.3d 793, 800-801 (2009) (See, Opposition, Pg. 13, Lines 7-8), the Supreme Court reversed the award of attorney fees because it felt that the plaintiff's tactical decision to sue a particular tortfeasor—while ultimately fatal to the plaintiff's claim—nonetheless evoked an unclear question of law at the time the plaintiff filed his claim, and thus the Supreme Court held that the plaintiff's claim was not groundless. Here, there is no new novel issue of law presented. The statute of repose was clearly defined at the time of the Association's filing its time-barred Counter-Claim. The Association knew it did not give the Builders the opportunity to repair the sewer line and the mechanics room claims. The Association knew it did not preserve the evidence of the alleged mechanics room and the sewer line claims. The Association knew that it never intended to comply with AB 125 regarding inspection and identification for the fire-blocking claim.

This is the same analysis that distinguishes this case from the holdings in *Frederic & Barbara Rosenberg Living Tr. V. MacDonald Highlands Realty LLC* and *Baldanado v. Wynn Las Vegas, LLC* (See, Opposition, Pg. 13, Lines 12-17). Those cases raised novel legal issues that, while ultimately fatal to the plaintiff's claims, were unclear until the Court ultimately ruled on them. This differs

from the statute of repose, which was defined and known by the Association prior to the filing of its Counter-Claim. This differs from the notice and evidence preservation rules and the defect inspection/identification sections of AB 125, which were defined and known by the Association prior to the issuance of the original Chapter 40 Notice. If the Association was so concerned about the impact that AB 125's statute of repose would have on its case, then it should have proceeded more cautiously instead of serving its Chapter 40 Notice the day before the safe harbor expiration and filing its construction defect Counter-Claim 4 months after the statutory deadline.

Even worse, the Association has the audacity to suddenly argue in its Opposition that the Builders are not entitled to their attorney's fees because the Builders did not serve a Rule 11 letter. (*See*, Opposition, Pg. 15, Lines 3-10). Essentially, the Association is using the Rule 11 process as a way to circumvent the natural consequences of its speculative—and predictably, unsuccessful--litigation strategy. This is problematic for two key reasons. First, it is clear from the Association's failure to even respond to the Builders' candid attempts to put the Association on notice of its time-barred claims that any such Rule 11 letter would have served no purpose whatsoever.

Second, the Association incorrectly interprets NRS 18.010(2)(b) to **equate** statutory fee-shifting to Rule 11 sanctions. Such juxtaposition is an improper interpretation of this statute. The Association's opinion notwithstanding, the parameters of Rule 11 do not control the statutory framework of NRS 118.020(2)(b). NRS 18.020(2)(b) states that "[i]t is the intent of the Legislature that this court award attorney's fees pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate situations..." *See*, NRS 18.010(2)(b). The clear interpretation of this statute is that the Court award attorney fees, and, in addition, can award sanctions. This is entirely different from the Association's assertion that the statute equates the award of attorney's fees as one and the same as Rule 11 sanctions. The Association cites no case authority whatsoever for the proposition that "NRS 18.010(2)(B) also expressly equates its allowance for the recovery of attorney's fees situations meriting Rule 11 sanctions." (*See*, Opposition, Pg. 13, Lines 18-19). The cases that the Association cite following merely stand for basic legal assertions about Rule 11 sanctions in general, none of which are relevant

to the unfounded proposition that Rule 11 controls the parameters of a court's discretion in permitting attorney's fees under NRS 18.010(2)(b). Thus, the Association's attempt to imply a Rule 11 letter is mandatory before this Court can allow the Builders to recover their attorney's fees is without merit. Furthermore, the frivolous implication that a Rule 11 letter would have somewhat modified the Association's litigation strategy is unsupported by the Association reckless and heedless decision to bring all manner of unreasonable claims starting with its original Chapter 40 Notice.

The Association contends that its Counter-Claim was brought with reasonable grounds. (*See*, Opp., Pg. 14). The actual context under which the Association brought its claims, however, does not support this position. First, the Association claims that "the Builders' opinion shared with the HOA at those times have no bearing on the outcome of this Motion." (*See*, Opp., Pg. 14, Ln 11-12). On its face, this is a nonsensical assertion since the statute of repose, AB 125 and the rules regarding preservation of evidence governing the Association's claims had not changed since the Association served its original Chapter 40 Notice in February 2016. The Association's reference to "complex legal issues" (e.g. compulsory versus permissive, relation back, and good cause to extend the tolling period) had absolutely no bearing on the outcome of this case. (*See*, Opp., Pg. 14, Ln. 7-9). The mere fact that the Association chose to form those baseless legal arguments does not make them pertinent legal issues that somehow existed at the outset of the case. None of the Association's arguments on these three issues carried any weight either at the time the Association served its original Chapter 40 Notice or at the time the Association filed its Opposition to the Builders' Motion for Summary Judgment on the Statute of Repose

The Association again brings up the timing of the Builders' statute-of-repose motion. However, the Association fails to acknowledge the fact that the Builders sent two separate Chapter 40 Response letters, both of which put the Association on notice of its time-barred claims. Thus, the fact that the Builders decided to bring its statute-of-repose motion after other summary judgment motions has no effect on the fact that the Association turned a blind eye to the clear procedural deficiencies in its claims. This is further emphasized by the fact that the Association delayed the filing of its Counter-Claim for months after the September 28, 2016 pre-litigation mediation. Taking

all of the facts into proper context—from the first Chapter 40 Response letter in March 2016 to the Association's untimely Counter-Claim filing in March 2017—it is clear that the Association unreasonably pursued its claims. On that basis, NRS 18.020(2)(B) requires the Association to pay the Builders' attorney's fees for having to litigate against the Association's unreasonable pursuit.

The Association argues that "at the time the HOA filed its counterclaim, no party could predict how this Court would exercise its discretion." (*See*, Opposition, Pg. 15, Lines 1-2). As mentioned previously, the Association failed to provide this Court with any evidence showing why an extended tolling period was warranted. The mere fact that the Association raised the issue does not make it a legitimate issue and had no effect on the Association's reasoning for unreasonably pursuing its claims. Put simply, there were no legitimate grounds for which the Association argued and, as a result, this issue had no effect on the fact that the Association unreasonably pursued its claims.

iii. THE BUILDERS' REQUESTED ATTORNEY'S FEES ARE REASONABLE, NECESSARY, AND JUSTIFIED.

1. THE TIMING OF THE BUILDERS' DISPOSITIVE MOTION DOES NOT IMPACT THE RECOVERY OF THE BUILDERS' ATTORNEY'S FEES.

The Association's next argument to deprive the Builders of their attorney's fees is a repeated critique of the Builders' litigation strategy—in essence, that because the Builders did not bring their statute-of-repose motion first, any and all corresponding attorney's fees are per se unreasonable. (*See*, Opp., Pg. 16, Ln.19-27).

Preposterous on its face, this assertion assumes that the Builders could have predicted which of its motions were going to prevail and when. Based on the Association's logic, any request for attorney's fees should be rejected unless the basis for those fees was the first dispositive motion. As argued in Court and in other motions, the Builders' timing of the various dispositive Motions came as a result of strategic decisions the Builders' made regarding which the timing of same. Just because the Builders chose not to file the Repose Motion first does not alter the fact that the Association deliberately ignored the potential that the Builders would end up filing such a motion at

some point in the litigation. The Builders made that point abundantly clear when they served responses to the Association's original and amended Chapter 40 Notices.

The Association brought untimely constructional defect claims, despite repeated efforts by the Builders to advise them of this fact. Ostensibly, the Association took this risk, despite the clear procedural deficiencies. Now that the Court has summarily disposed of its claims, the Association is refusing to accept the fair, and just, consequences—that the Builders are entitled to their rightfully-earned attorney's fees.

The Association contend the Builders lacked diligence by filing to raise the Statute of Repose Motion at the outset of the case. Given the history of their successful motion practice on numerous issues, it is patently ludicrous to accuse the Builders of not diligently addressing the Association's claims. Furthermore, the Builders were equally diligent with regard to the Statute of Repose Motion for Summary Judgment once becoming aware of a specific ruling from another Eighth District judge. *Byrne v. Sundridge Builder Inc*., Case No. A-16-742143-D, raised the same questions of law based on a set of facts similar to the instant case. The Honorable Richard Scotti's decision in that case granting the defendant's Motion for Summary Judgment Pursuant to NRS 11.202(1) served as an important basis for the Builders' decision to file their own Motion for Summary Judgment. Judge Scotti's decision in *Byrne* was appealed on December 11, 2018. Despite the appearance that the Builders had been on notice of the *Byrne* decision in 2017, given that counsel for the Builders happened to be on the eservice list, the Builders' counsel did not actually review or consider the *Byrne* decision until on or about December 11, 2018 when the appeal came to the attend to lead counsel for the Builders. BWB&O had a client in the *Byrne* case that had settled out prior to that time and thus there was no reviewing filings in the *Byrne* matter at the time the Decision was generated. Work on the Builders' Motion for Summary Judgment commenced after comparing the facts of the *Bryne* to the present case. Obviously, significant work needed to go into researching and development of the Builders' Motion for Summary Judgment on the Statute of Repose before filing. Moreover, the Builders already had other pending Motions with the Court. The Builders therefore did not lack diligence in filing its Motion only two months after the *Byrne* case was appealed, and

the day before the hearing on the Builders' already-pending Motions. Consequently, the Association has no basis to deprive the Builders their rightfully-earned attorney's fees by virtue of the Association's retrospective analysis of the Builders' litigation strategy.

2. THE BUILDERS' ATTORNEY FEES ARE BOTH JUSTIFIED AND REASONABLE IN LIGHT OF THE ISSUES AND POTENTIAL MAGNITUDE OF THE ASSOCIATION'S CLAIMS IN THIS CASE

The Association whines incessantly that the Builders' fees were outrageous since the outset of this case. Instead of challenging with any specificity fees incurred prior to the onset of the Builders' work on the Motion for Summary Judgment on the Statute of Repose ("Repose Motion"), the Association is silent, and only rails against the $38,796.50 spent on the Repose Motion. The Association argues that the Repose Motion should have been filed much earlier because it was, in retrospect for the Association after having been handed such a huge loss on the issue, such an obvious winner. The Association's observation in that regard only proves the fact that it brought its claims so frivolously despite being duly warned back in 2016.

The fact that the Association's alleged cost of repair for every single window on two large towers, which would have amounted in multiple tens of millions of dollars, justified every penny of the criticized $38,000 dollars of the Builders' work on this particular Motion. It not as if the Builders spent the $38,000 drafting and filing a single document. Rather, this amount includes over 4 months of hard, careful and often excruciating work executing a detailed Motion, responding to a vigorous opposition and counter-motion, and preparing for and attending the hearing. That amounts to less than $10,000 per month for the 4 months of work on the single biggest defect claim in the case with a potential repair value nearing 100 million dollars. The Builders were also tasked with responding to the Association's numerous opposing arguments, including the compulsory counter-claim argument, the relation-back doctrine, and the argument that there existed good cause to extend tolling. Given how extensive and expansive these arguments were, the Builders were not only required but justified in spending the time necessary to show the Court their invalidity. Had the Association not raised such numerous arguments, the Builders would not have had to incur $38,000 in fees. If the Association did not want the Builders to spend money to oppose its arguments, the

Association should not have made those arguments in the first place.

The Association also forgets the fact that it made such a huge, and supposedly primary, issue out of the premise that the Builders could not possibly win summary judgment because they did not provide the Court with the documents necessary to show substantial completion of the towers (i.e., the Association in its Opposition and at the hearing on the Repose Motion argued that summary judgment was impossible because the Builders did not provide the Court Notice of Completion dates). The Association made this argument despite the fact that it could have researched the substantial completion issue itself to determine that this argument had no merit. No Notices of Completion existed, a fact that was public record and one the Association could have researched on its own. Besides, had the Association spent time to consider the fact that even if there existed Notices of Completion, they would have needed to be dated years after the date of the Certificate of Occupancy in order to have even a *potential* impact on the disposition of the time-barred Counter-Claims. This was a completely frivolous and baseless argument that required significantly more work for the Builders to deal with than was necessary. Had the Association looked for the documents it challenged the Builders as lacking, as was its duty in opposing a motion for summary judgment per the *Wood v. Safeway* case - which incidentally was a big element of the Builders' oral argument and reply brief - the Builders would not have had to spend such an enormous amount of time attacking the Association's meritless position.

The Association also chooses to single out one of the Builders' attorneys for his work on the Repose Motion, in particular his preparation time for the hearing. In Footnote 3 on page 10 of the Association's Opposition, the Association use **a single example** of why **all of the Builders' invoices are somehow "highly questionable."** (*See* Opp., Page. 10, Footnote 3). As noted above, the Association's first argument in its Opposition to the Repose Motion and perhaps its primary argument at the hearing on same was the fact that the Builders could not possibly win summary judgment because they did not produce Notices of Completion. Despite the fact that the Builders knew this was a meritless argument, significant work still needed to be undertaken to research the case law regarding Summary Judgment. To that end, the Builders needed to review relevant cases

regarding standards for summary judgment to argue at the time of the hearing that, contrary to the assertion that it was the Builders who fell short of the standard for bringing a motion for summary judgment, it was in fact that Association who missed the mark.

The Association believes that all of the Builders' billing entries are questionable because an associate attorney for the Builders spent too much time reviewing the *Wood v. Safeway* case. The Association suggests that since this was the Builders' fifth motion for summary judgment and that this associate previously argued a Motion for Reconsideration in this case, that spending a 0.8 on review of the *Wood v. Safeway* case was a farce. First of all, the Association did not even add up the Builders' time for review of the *Wood v Safeway* case correctly. The Association claims that the Builders' attorney spent a 0.8 reviewing case, when in fact the billing totaled **only 0.4** (0.2 for 1287.551 and 0.2 for 1287.558) (*See* Exhibit "F", Pg. 129 and 190 – showing that the actual billed amount for each file was in fact 0.2, totaling 0.4). This amounts to just over 18 minutes for a case that was specifically addressed by the Builders' attorney at the hearing and formed a primary argument in response to the Association's Opposition. It is apparent from the Association's attempt at calling out the Builders' attorney that the Association's ability to accurately review the Builders' invoices is wrong, calling into question any other "challenges" the Association wishes to raise.

To further explain the $38,000 billing related to the Repose Motion, the Builders' attorney who appeared for and argued the Motion spent a great deal of time reviewing all relevant case law, prior motions, pleadings and orders from other cases (many of which the Association cited to in its Opposition), outlining the arguments intended to be raised at the hearing, revising that outline numerous times, and then ultimately practicing the arguments before the hearing. All this was absolutely necessary to convey to the Court the Builders' position, the refutations of the Association's outrageous opposing arguments, and to be as clear to the Court as possible. This case threatened the Builders to the tune of a potential cost of repair approaching 100 million dollars; consequently, it was in the very best interest of the Builders for the attorneys to spend the time necessary to effectively argue the Repose Motion. The fact that the Builders were successful on the Repose Motion speaks volumes and, incidentally, satisfies one of the *Brunzell* factors the Association

cites to in its Opposition. (*See,* Opp., Pg. 16, Ln. 15-17 – noting that one factor in determining reasonableness of fees is "whether the attorney was successful and what benefits were derived."). The same position stands with all prior motions the Builders filed. Each of those involved very complex issues of fact and law, and also presented very challenging hurdles to overcome, which included the use of multiple experts in various fields for considerable time. Those Motions were likewise successful.

The Association contends that because this case had not yet entered formal discovery, that there is no way the Builders could have spent so much money defending it. It is important to note that the Builders filed and responded to multiple dispositive motions during the last 3.5 years this case has been ongoing. Despite that the case has not yet entered formal discovery, it is obvious that considerable work has been done over the past 3.5 years since the case's inception, all to the benefit of the Builders.

In reality, spending anything less than $200,000 in attorney's fees for a case as big as this over a period of 3.5 years would have been a serious dereliction of duty owed to the Builders by its counsel.

III. CONCLUSION

Based on the foregoing, the Builders are entitled to attorneys' fees under NRS 18.010(2)(B), as their fees were both reasonable and justified.

Dated: July 9, 2019

BREMER WHYTE BROWN & O'MEARA, LLP

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of July 2019 a true and correct copy of the foregoing document was electronically delivered to Odyssey for service upon all electronic service list recipients.

Crystal Williams

Crystal Williams, an employee of
Bremer, Whyte, Brown & O'Meara LLP

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE SUSAN JOHNSON, DISTRICT COURT JUDGE

JULY 16, 2019

RECORDER'S TRANSCRIPT OF HEARING RE

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

APPEARANCES:

For the Plaintiff: PETER C. BROWN, ESQ.
DEVIN R. GIFFORD, ESQ.
DANIEL F. POSENBERG, ESQ.
CYRUS WHITAKER, ESQ.

For the Defendant: WILLIAM L. COULTHARD, ESQ.
FRANCIS I. LYNCH, ESQ.
MICHAEL J. GAYAN, ESQ.

[Additional parties on following page]

ADDITIONAL PARTIES:

For the Defendant: SCOTT WILLIAMS, ESQ.

RECORDED BY: NORMA RAMIREZ, COURT RECORDER

TUESDAY, JULY 16, 2019 AT 9:12:16 A.M.

THE COURT: I am going to call Hallier versus Panorama Towers Condominium Unit Owners Association, case number A16-744146-D.

MR. WILLIAMS: Hello.

THE COURT: Hello, this is Judge Johnson in Department 22 of the Eighth Judicial District Court. I've just called the case of Hallier versus Panorama Towers Condominium Unit Owners Association, case number A16-744146-C [sic]. Sir, would you identify yourself for the record?

MR. WILLLIAMS: Scott Williams appearing for the HOA.

THE COURT: Okay. And, counsel, who is here would you identify yourselves, please.

MR. BROWN: Good morning, Your Honor. Peter Brown on behalf of the Builder entities.

MR. GIFFORD: Devin Gifford on behalf of the same.

THE COURT RECORDER: I'm sorry, Gifford?

MR. GIFFORD: Gifford.

THE COURT: Okay.

THE COURT RECORDER: Devin?

MR. GIFFORD: Devin. Yes.

THE COURT: Okay. And, Mr. Polsenberg, I don't see a microphone close to you, could you get next to a microphone and identify yourself.

MR. POLSENBERG: Good morning, Your Honor. Dan Polsenberg for the Builders.

MR. WHITAKER: Good morning, Your Honor, Cyrus Whitaker on behalf of

the Builders.

THE COURT: Did you get -- get next to a microphone, counsel. I'm sorry.

MR. WHITAKER: Good morning, Your Honor. Cyrus Whitaker on behalf of the Builders.

THE COURT: Okay. Counsel.

MR. CULTHARD: Good morning, Your Honor. Bill Coulthard appearing on behalf of the Counterclaimant Defendant, Panorama Home --Towers Condominium Unit Owners Association, also present in court is Mr. Gayan, Mike Gayan, and Mr. Francis Lynch.

THE COURT: All right. All right. You all may be seated. And we've got several motions here. We have got a -- Defendant's Motion for Reconsideration and/or to Alter or Amend the Court's May 23rd Findings of Fact and Conclusion of Law and Order Granting the Motion for Summary Judgment Pursuant to NRS 11.202(1). We got another Motion for Reconsideration or in the Alternative Motion to Stay the Court's Order and then of course Defendant's Motion to Retax and Settle Costs. I think it'd be more appropriate to hear the motions for reconsideration first.

MR. BROWN: We agree, Your Honor.

THE COURT: Okay. Counsel.

MR. GAYAN: Your Honor, do you have any preference on which motion for reconsideration?

THE COURT: It's your show.

MR. GAYAN: Okay. Good morning, Your Honor. I'm going to handle the second motion for reconsideration that you mentioned which happens to be the first one that we filed. I think that was filed on June 3rd.

THE COURT: Okay.

MR. GAYAN: So, I just want to make sure we're on the same page before I get started.

Your Honor --

THE COURT: Third or thirteen?

MR. GAYAN: Third. Third. June 3rd. So, it's the motion for reconsideration, or in the alternative a motion to stay the order.

THE COURT: Okay. Big binder, small binder? I'm in the big binder.

MR. GAYAN: It should be the bigger binder.

THE COURT: Got it. All right.

MR. GAYAN: Point of reference. So, Your Honor, this motion we brought we certainly understand the Court's order and we -- this motion is targeted at three specific issues in the Court's order. I don't want to belabor the points, they're in the papers but effectively what we're here seeking reconsideration on is the Court's determination regarding whether the HOA's counterclaims were compulsory, whether they then relate back to the date the Builders filed their complaint in September of 2016 and then finally on the issue of good cause under NRS 40.695 to extend the tolling period for longer than one year. As far as the issue of compulsory versus permissive, I -- we recently understand the Court's ruling, the orders, specifically paragraph seventeen talks about how the Builders -- the Court determined they were separate transactions or occurrences because the Builders' complaint arises out of -- or the claims relate to the breach of the settlement agreement and seeks deck relief related to the HOA's Chapter 40 notice, and then the HOA's claims relate to -- or seek damages for construction defects.

Our motion brings forth some new facts that I don't think were considered by the Court on that point. First of all, paragraph six of the complaint --

and this is attached as Exhibit E to the opposition. It's the appendix to the opposition.

THE COURT: E?

MR. GAYAN: Yeah, Exhibit E.

THE COURT: Hold on, let me get there.

MR. GAYAN: And we didn't get into this level of detail but -- or these specific facts but paragraph six, this is the Builders allegation regarding jurisdiction and venue for this --

THE COURT: Okay.

MR. GAYAN: -- Court. And I'll give you --

THE COURT: Hold on.

MR. GAYAN: -- the cite.

THE COURT: Is that in the appendix?

MR. GAYAN: It should be the appendix to the Builders opposition. I know we both use letters. I think Mr. Brown's office is conditioned to use letters.

THE COURT: Okay. Page six. Let's see if I've --

MR. GAYAN: Paragraph six.

THE COURT: -- got it. Paragraph six.

MR. GAYAN: Yeah. Page two of the actual complaint and page three of the exhibit.

THE COURT: Exhibit E, okay, paragraph six --

MR. GAYAN: The complaint.

THE COURT: -- where it starts "this Court has jurisdiction."

MR. GAYAN: Sure. That's exactly it.

THE COURT: Okay.

MR. GAYAN: So, this is an allegation by the Builders. The admission says that their -- this complaint -- so at the end of the first line says: "That this complaint involves claims for alleged construction defects and/or deficiencies at the Panorama Tower Condominiums towers one and two." So, they specifically allege that their complaint involves claims for constructions defects. And then I think more importantly -- so, that's an admission that their case involves construction defects. They said it straight out that's why this Court has jurisdiction and that's why it's filed -- it's a D case, all of those things. But that's an admission. Don't think they -- I think they're estopped from arguing something different and getting a different results here. But even more on point than paragraph 6, if you look -- if the Court looks at paragraph 68 in the complaint -- it's on page 11 of the complaint, 12 of the exhibit. So --

THE COURT: 68, I'm there.

MR. GAYAN: Yeah. So -- and then keep your finger in there, 68, 78 and I guess -- you don't need to look at all of them, but 104 and 112 it's the same allegation over and over again. 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." That is effectively the definition that a compulsory counterclaim -- or the same language that's used to define a compulsory counterclaim. And when -- they don't just say builders rights all arose out of one transaction or occurrence, they say all the parties rights. And I think it's important to note that in the preceding sixty-seven paragraphs the Builders contain detailed allegations about the Association's Chapter 40 notice, each of the alleged defects, construction of the towers, their dates of substantial completion or at least dates of substantial completion, dates of

certificate of occupancy for each. So, they're talking about the construction of the towers, the alleged construction defects in the towers as alleged in the HOA's notice in this case and they then allege all of the rights of all the parties relate to a single series of -- single transaction or occurrence or a series that can all be determined in a single judgment in this action. And I don't think the Court had the benefit of these allegations and not only are they here but it's repeated in every single cause of action by a corporation by reference or a specific just copy and paste 68, 78, 104 and 112.

THE COURT: You know, I'm just gonna tell you, I was pretty thoughtful about this issue and the one thing that convinced that it was not compulsory is that you were not forced to plead your claim in this action or lose it. It seemed to me that -- let's say that I ruled against the Builders on their complaint and you hadn't filed a counterclaim, you still could have brought a claim for construction defects.

MR. GAYAN: Your Honor, I -- that's another point and just respectfully disagree in light of the *Mendenhall* case. And we actually -- that's *Mendenhall against Tassinari*. And there's now a legal malpractice claim against the law firm, Howard and Howard, who was handling that case because they thought the same thing and they let the first action go to final judgment and they filed a new case against parties who were not in the first action and Judge Bare ruled that there was some sort of privity and that it was claim preclusion and it went up and appeal, and that the *Mendenhall versus Tassinari* case from 2017 that we cited in our complaint and -- or excuse me, in our papers and the Supreme Court agreed and said it was barred, that it was a -- that is was part of the prior case that could have been brought, should have been brought and so it's out. And I know it's not exactly analogous to this situation but that's a pretty scary situation and it -- for law firms

and litigant because the facts giving rise to the claims that were later barred weren't even known until years into the case and they said it should have been brought as a counterclaim in the first case and it wasn't and it was barred and now the law firm is getting sued.

So, that's the landscape of Nevada law here and that's a 2017 decision. I think it's compelling. I'm not sure that's accurate that the HOA could have brought a separate action after determination of the Builders' complaint and the Supreme Court would have said, well, those -- those are not related, those are not sufficiently or logically related. That's the test. It's a pretty broad test. The *Mendenhall* case says specifically that: "The definition of a transaction or occurrence does not require an identity of factual backgrounds." And then the next line says: "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." And I understand the Court's order mentioned that the HOA could have filed a separate case but there's no doubt in my mind that if that had actually been done the two cases would simply have been consolidated in front of this Court. So for considerations of judicial economy, in fairness they would have been litigation in the same case. So, I think it's a bit form over substance to say we should have filed a separate case, had it consolidated and then be here in the same position that we are today with our counterclaims.

Anyway, so that -- that's --you know, in looking at the deck relief claims that the Builders have, just the fourth reason why I think we've got compulsory counterclaims is the deck relief claims are all effectively affirmative defenses to our defect claims. The entire complaint -- maybe the best fact is the Builders never would have filed a complaint but for our defect notice. I mean, it's -- of course

they're -- at least from my perspective they're logically related because but for the HOA's defect notice we wouldn't even be here. The complaint -- the Builders never would have filed anything. So, the notice, the defects in the notice -- we've talked about defects, we've talked about the construction. You've seen boards from the Builders brought in detailing, you know, architectural designs of windows and things to determine standing. We're already talking about the construction of the building, there's no doubt about it so --

THE COURT: Well, I guess I'm just looking at it that they brought claims for declaratory relief and if I rule against the Builder I don't see that the homeowners are precluded from filing their claims for constructions defects. I see that as two totally separate things. I mean, the Builders have a right to challenge the notice if they think it is insufficient. If I find that it is not insufficient I don't think that the homeowners association is precluded from filing their defects -- construction defects complaint when I rule -- rule for them essentially. I mean, that's what -- I mean, I did take a hard look at this --

MR. GAYAN: Right.

THE COURT: -- because I thought it was a great issue.

MR. GAYAN: I would encourage the Court to take a hard look at *Mendenhall*. I don't know if the Court already did that --

THE COURT: I have not.

MR. GAYAN: -- but --

THE COURT: I'll be honest with you.

MR. GAYAN: -- but that is a very recent case and frankly a very scary one that we we've talked about at our firm, and now that -- we're defending Howard and Howard again.

So, certainly not clear to the HOA that they could have brought their claims separately. I think the best evidence of that is the HOA moved along, responded to the complaint timely, filed a motion to dismiss timely after a couple of extensions granted by opposing counsel, after the Court's decision answered timely, timely filed the counterclaim. It was all done -- those are all actions showing the HOA believed these were compulsory counterclaims in light of the law that was in effect at the time. I think logical relation -- I understand the Court's comment about, well, if you had ruled against the Builders on deck relief, well, the Builders' complaint has a lot more claims than just deck relief on the notice. So, I just want to make sure that's crystal clear.

THE COURT: Well, they've got deck relief, application of AB125, claim preclusion, failure to comply with NRS 40.600 and of course the suppression of evidence and spoliation but -- breach of contract which is the settlement agreement in the prior litigation and then of course deck relief on the duty to defend and duty to indemnify. That's what I've got.

MR. GAYAN: Right. So, it's not just a deck relief claim. I think -- the Court mentioned that the spoliation claim was actually pretty important but that ties directly to the HOA's defect claim and they're seeking affirmative relief relating to spoliation of evidence related to an affirmative claim that they knew the HOA was [indecipherable] or that was contained in the notice. So, that's not just deck relief, it's not related to the settlement agreement, it's related to the specifics defects in the HOA's notice. So --

THE COURT: Well -- and isn't this -- the spoliation, isn't that kind of a moot issue because that got into the sewer situation anyway and that's dismissed out? I mean, the only thing that's left is the windows and -- so, I don't see that suppression

of evidence or spoliation really relates.

MR. GAYAN: Well, you know, hindsight is 20/20, but at the time the HOA had their motion to dismiss denied and answered and filed a counterclaim none of that has been decided. That wasn't decided for years to come.

One thing I'd like to point out from the *Mendenhall* decision, one other thing. The Supreme Court actually noted a ruling against *Mendenhall* here which resulted in the legal malpractice claim. They actually noted --

THE COURT: Go ahead. I'm sorry.

MR. GAYAN: I'm sorry. Okay. I just wanted to give the Court time to deal with any issues.

They noted specifically -- and this is on page 271 of the opinion. It said: "Indeed appellant's motion to" -- this was Mendenhall's, "motion to amend the pleadings specifically states that the claims arose out of the same set of facts or transactions as those set forth in the complaint." That is exactly what we have here. The Builders said it four times in black and white and then incorporated that allegation by referencing multiple, additional times. So, the allegation that the HOA's claims and the Builders' claims are all part of one transaction or occurrence or one series of transactions or occurrences that can -- should be determined in a single judgment in this action. They've made that allegation in black and white just like Mendenhall made and that should be held against the Builders here, they shouldn't be able to argue something different. And I'm not even -- I'm not sure that we talked about these allegations at the last hearing so I think it -- that's a material fact, something that the *Mendenhall* court relied on in ruling against *Mendenhall* and the Court should do that here against the Builders.

I'm happy to answer any other questions on the compulsory or

permissive otherwise I'll talk about relation back briefly.

THE COURT: Okay.

MR. GAYAN: Okay. Thank you.

MR. WILLIAMS: Your Honor, would you mind if I chimed in a bit on the phone?

THE COURT: Well, I'm kind of a one horse, one rider kind of person.

MR. WILLIAMS: Okay. Okay.

THE COURT: Okay.

MR. GAYAN: So, Your Honor, the relation back issue -- the reason we brought this one up in the motion for reconsideration is we didn't really have the chance to brief it in the initial papers. This was -- the *Jamison* case was brought up for the first time on the reply. We delved into it a little bit at the hearing but we didn't get a chance to actually brief it and the Court didn't have the benefit of that either. So, *Jamison* is -- I guess first of all before we get to *Jamison* even, the federal rules -- it's pretty clear the federal authority on Rule 13 [indecipherable] 13 is that compulsory counterclaims do relate back to the date of the initial complaint. Or in other words, the filing of the complaint tolls the applicable statute for filing of any counterclaims -- compulsory counterclaims. That's pretty clear from the *Bourne Valley* case and the *Yates* case both of which cite certain court opinions. That's in our -- those are in our papers.

So, the reason that's important is Nevada traditionally and habitually relies on authority interpreting the FRCP when interpreting its own rules especially when the rules are similar. And here -- now, NRCP was recently overhauled basically to make a lot of the same changes that are in the FRCP. So, I think those decisions and those authorities are hopefully persuasive for the Court. As far as

Jamison goes, it's -- very peculiar facts. This is a deficiency judgment statute that at the time was ninety days and now it's six months today. But at the time *Jamison* decided it was ninety days to bring a deficiency judgment action after the foreclosure sale. And here the bank brought them as -- in *Jamison* the bank brought them as the counterclaim more than ninety days after the foreclosure sale. They brought them as counterclaims after the property owner -- and this was the -- was it the Golden Spike casino? Yeah. So, this is the Golden Spike, they brought suit over something or other to the loan agreements and there's bankruptcy and all that stuff, but none of that really matters for today. But the bank brought their counterclaims for the deficiency judgment and filed those more than ninety days after the foreclosure sale.

Now, the Supreme Court had a bit of a discussion about the purpose of the statute of limitations and -- generally against stale evidence and stale claims and those kinds of things and they specifically noted two things. First, they quote a Florida case, *Allie versus Ionata*, and say: "Thus once a party files an affirmative action he cannot thereafter profess to be surprised or prejudiced by compulsory counterclaims that stem from that action." The next point that they make one line later, is related to what is the actual purpose of a ninety day statute of limitation? And they say it's clearly something other than stale evidence and stale claims because its shortness say: "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." Here the Court was faced with a six year statute of repose with a one year grace period on top of it and then potentially up to one year of tolling and then a party -- or parties, the Builders, who brought their statute of

repose motion two and a half years into the case. So, the Court shouldn't even consider this issue, we haven't gotten to discovery. It's been eleven years since the buildings were built. So, stale evidence, stale claims, that's clearly not the driving policy consideration here in this case. Or excuse me, that is. With such a long one of six years that is the main thing we're talking about here. It's not a ninety day statute of limitations which would have other legislative purposes behind it or other intent behind it.

So, I think *Jamison* which is the only case even touching remotely on this point is far from a blanket rule that overrides all the federal authority or says that Nevada is deviating from the federal authority or deviating from the majority of -- I'm citing *Wright v. Miller*, the majority of states saying that compulsory counterclaims tolls. So, I understand the Court ruled against us on the compulsory issue but to the extent it is compulsory we believe Nevada, if they did consider this issue for a case where the statute of repose sets a ten years they would follow the majority of the states and the federal authority and find it relates back. Another important point of *Jamison*. Right after that last line that I quoted they say: "Nonetheless, equity is also a consideration." And they go on to talk about how finding a deficiency judgment counterclaim being time barred they say, well, that's not error because the District Court also allowed the bank to effectively assert that right through an affirmative defense of equitable recoupment. So, they said the bank can get their money back that way. Here we do not have that. Equity is also a consideration. Here refusing to relate back on a six year statute of repose brought eleven years after the buildings were built results in effectively dismissal with prejudice of the claim because the statute has now run and a new complaint cannot be filed. So, I would just ask the Court to consider equity, at least the Supreme Court says that is

a consideration when they were squarely asked about -- or dealing with relation back.

The third point -- Your Honor, the third issue is good cause. I don't want to go through all of that again but the Court's, just looking at it at paragraph 19, the Court specifically said on this issue: "The Association does not show this Court that good cause exists for its failure to institute litigation for October 26th of 2016." I'm not sure -- I'm not sure if 4695.2 is that limited to the HOA's needing to show good cause for not filing sooner, it's just good cause to extend the tolling period beyond one year. And there's -- the order doesn't really have an explanation of why the HOA failed to show good cause or why the Court wasn't convinced but I've already explained it and that will be the HOA. We attached Exhibit C to our reply what should be all the pre-litigation correspondence. There was -- there were dozens of emails and letters between counsel for the HOA and the Builders, there were pre-litigation inspections, there was a pre-litigation mediation. Then we answered the complaint on time and filed a counterclaim on time in the normal course. I don't know what else the HOA could have done other than, what the Court said, filing a separate complaint, just having it consolidated which -- which I view as form over substance. It doesn't change anything. And the good cause analysis is the opportunity the Court has to do some equity and make sure that claims are heard on the merits. That is in the *Scrimer* case, Nevada's strong, sound public of considering claims on the merits and that's all we're asking for here.

It was interesting that we had a motion to dismiss ahead of us with Mr. Brenske and their failure to serve. That's the analogy we drew with the *Scrimer* case, failure to serve within the 120 days. It sounds like Mr. Brenske didn't even for leave to enlarge. And without asking for leave to enlarge then the party under Rule

4 needs to show good cause why didn't they file before the 120 days to ask to enlarge and good cause why it should be enlarged. So, it's a two-step, good cause analysis. 4695.2 does not have that but the Court's order at least says it was written, it sounded a little bit like that's what was being applied, that the HOA needed to show good cause why it didn't file a separate before October 26th of 2016. And I -- just looking at the text of 4695.2 is not that limited, the Court has discretion. *Scrimer* sets forth factors that I think area very analogous and if the Court -- Supreme Court is asked to consider the issue I suspect they may borrow those factors And I think one thing -- an important take away from *Scrimer* is the Court actually held that it was an abusive, the District Court's discretion, to dismiss the claim in one of the cases where the Plaintiff has met those factors where it was highly prejudicial to a petitioner because the statute of limitations had expired and where there appeared to be little or no prejudice to the Defendant from late service. And that's the exact situation we have here. I -- it's going to be a with prejudice dismissal in fact for the HOA. And the Builders, even as they sit here today, have never articulated any actual unfair prejudice by receiving the counterclaim which they knew was coming for more than a year by the time they got filed because had our Chapter 40 notice, we went through the process, they did the inspections, they did the mediation and they actually filed a preemptive complaint so they could not claim surprise or prejudice. That's directly from the Jamison case as well. So, Your Honor, we would just ask if the Court is not inclined to reconsider on compulsory and relation back we understand that, but on the good cause the Court certainly has the discretion to do equity and let the HOA's claim to be heard on the merits in this case.

As far as the stay is concerned, we would ask for a stay of the order

pending AB421. I think that is maybe better addressed by Mr. Coulthard since he's going to be handling the AB421 issues. I'm certainly happy to answer any questions [indecipherable] on that issue.

THE COURT: Okay. Thank you.

MR. GAYAN: Thank you.

THE COURT: And before counsel gets up I was gonna go ahead and take the criminal case because it was just gonna take a couple of minutes, but now counsel is not here.

[Recessed at 9:44:35 a.m.]

[Reconvened at 9:46:00 a.m.]

MR. GIFFORD: Good morning, Your Honor.

THE COURT: Good morning.

MR.GIFFORD: Devin Gifford on behalf of the Builders again.

I would just like to address the fact, Your Honor, first that the first motion they had filed they had initially asked for a stay of the Court's order pending Governor Sisolak signing the Bill. I don't think that that issue is being asserted no longer, I think that the new -- the new request that they made is to re-hear these motions at a later date after October 1st. That's the subject of the other motion that they had filed but I just wanted to make sure that that clear, that I don't think that that has become an issue. If the Court's inclined to consider that let me know and I'd be happy to talk about it but I don't think that's --

THE COURT: Okay. Well, I haven't heard that yet. I mean, I've read about it but I -- Mr. Coulthard I understand is going to address that.

MR. GIFFORD: Okay. I would just like to say that we did object to the fact it was to file an objection to the re-hearing on these motions for a time after because it

was in the reply brief on the second motion for reconsideration. I just wanted to give that to the Court's attention.

THE COURT: Okay.

MR. GIFFORD: Thank you.

Your Honor, the Association is asking you to reconsider your ruling. I am specifically going to be talking about the three substantive issues that were raised individually but I'd first like to discuss the fact that the standard for reconsideration has not been met in this case. It's a strict standard that must be met and the Association has not done that. They say that they've alleged new facts, new law, things that have -- things that have changed the Court's mind but in fact they haven't done that. The things that they've raised to you today have already been briefed, already been submitted to the Court, the cases were already cited in prior briefings. I would just like to say that the one case if we look at it, the *Masonry and Tile Contractor's* case that the Association cites as support for -- a standard for reconsideration is that it may be granted if substantially different evidence is subsequently introduced or the decision is clearly erroneous. There has been no substantial -- substantially different evidence introduced in this case whatsoever since the time that you made your order, there is no indication of anything else has changed. The Association relies on two other cases to justify its point that grounds for reconsideration is warranted. First, they rely on the *Moore v. City of Las Vegas* case. The problem with that is that even that case says: "Only in rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for re-hearing be granted." The Association also cited to the *Kona Enterprise* case. If we look at that case it says: "A motion for reconsideration should not be granted absent highly unusual circumstanced unless

the Court is presented with newly discovered evidence, committed clear error or if there's an intervening change in controlling law." This Court -- the Association has not shown the Court that they've made a clear error of judgment; they have not shown that the substantive law in the area of these three substantive issues has changed and they certainly have not provided any new facts or evidence to change the Court's mind.

Here is what the Association is essentially saying. They're asking for a re-do, Your Honor. They're asking you for a second bite of the apple even after the Court was briefed on all these issues. Here's what the Association is saying. They're saying that the Court read the cases wrong, they're saying that the Court thought about the cases wrong and that the Court ruled on the cases wrong. The Association has the audacity to say this all despite their utter failure to provide anything new than what was already briefed to the Court and already deeply considered and provided with a thoughtful sixteen page order on May 23, 2019.

Regarding the compulsory counterclaim, Your Honor. This was the first of the substantive rulings the Association wanted to change because they simply disagree with you. Now, counsel had made it very big point to raise the *Mendenhall* case. I just want to make a point that that case was also cited to in the briefing for the motions for summary judgment, opposition and reply. That case was already previously presented to this Court. It's not some new case just because it's 2017. Again, the order came out in 2019. Now, the Association relies on this case heavily but they're misguided in their interpretation of it. The *Mendenhall* court it compared two claims; one parties and the other parties claim. They looked at the allegation of one party's breach of contract for failure to comply with that contract and (2) the other parties failure -- or excuse me, the other parties alleged fraudulent inducement

into that same contract. Here we have a completely different situation. We have the Builders complaint which asserts that the Association failed to accurately define, describe the Chapter 40 defects and they breached the settlement agreement by virtue of bringing new claims. So, that is a -- if we think about this from a temporal standpoint the issues that the Builders are raising in their complaint are current issues that the Association currently failed to adequately describe their defects and (2) that they currently have breached their settlement agreement with us, the Builders.

THE COURT: And that one is still live, right?

MR. GIFFORD: I'm sorry?

THE COURT: Breach of the settlement agreement.

MR. GIFFORD: Yes, I believe that one is still live, Your Honor.

THE COURT: Okay.

MR. GIFFORD: Whereas on the other hand the Association's counterclaim the facts and circumstances at the sole focus of that claim go to decisions on design and potentially workmanship that occurred over ten years ago. We have the Builder's complaint talking about now issues surrounding the time right now of what's occurring and then the counterclaim which talks about all these claims way ten years ago, all these decisions that were made ten years ago. There can be no overlap of facts. The Mendenhall court talked about a breach of contract of the same agreement that the parties were disputing. This is not the same situation at all; it is a completely not analogous case at all. So, I would encourage the Court not to be reliant upon that case to the extent that the Association asks you to.

Besides there's a -- in the Boca Park Marketplace Syndications Group case which was provided to this Court in the motion for summary judgment filed by

the Builders -- excuse me, it was in the reply brief to that motion. It stated: "That counterclaim to a deck relief action are presumptively permissive." This is a Nevada Supreme Court case that sets out a clear policy for a ruling that counterclaims to deck relief actions are permissively presumptive and not compulsory. It shows the general trend of the Nevada courts to avoid what it is the Association is trying to convince you of. Now, the Court's ruling on this compulsory counterclaim issue was very clear. I think -- it said in the May 23, 2019 order: "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 counterclaims are for monetary damages as a result of construction defects to its windows in the two towers." The association also cites to the *U.S. v. Aquavella* case for the first time in their motion for reconsideration. I'm not really sure exactly why they do it other than they probably just went out to search for the broadest case that they could find and use that. It's a Second Circuit case, it's from 1979. It was already in existence at the time and they're bringing it for the first time here which I think is inappropriate given some other case law that they can't be raising new legal arguments for the first time on re-hearing but nevertheless, that Court, *U.S. v. Aquavella*, that Court specifically stated we take the broad view. It takes a broader view than the Ninth Circuit does. It says that directly in its language. The focus of that Court -- they focused on to determine whether the claims are compulsory with whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that they must be heard in the same action, that they must. Even under this broader approach, Your Honor, the Association still can't win this argument. Here is the problem. The facts as I've stated, the two -- the claim and the counterclaim revolve around completely different

elements; it's a completely different foci. They were temporarily distinct and they're substantively distinct.

I think the more appropriate case which is one we cited to in our motion for summary briefing is a Ninth Circuit case. Not the Second Circuit, it's a Ninth Circuit case. So, the trend in the Ninth Circuit case is not as broad. It says: "A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim. In that the same operative facts serve as the basis of both claims." The operative facts in the claim are whether the Association failed to describe their defects adequately and whether they breached a settlement agreement from the prior litigation. The Association's counterclaim is talking about defects in the design that went into the buildings ten years ago. Period. The Association does sort of a unique sort of game I would call it. It's kind of a piecemeal analysis. They try to take apart all the parts of our complaint including paragraph 68, paragraph 78. They're going through and making this piecemeal analysis, they provide that in their motion and they list out all the things -- all the common facts that have to do -- that somehow have a correlation with the counterclaim then they go with the counterclaim and list out some things. Well, here's the problem. The ten items that they list for the -- for the Builders complaint saying that, oh, these claims relate to the counterclaim because they're similar, they're just basic facts. If you go to compare what they provided for the counterclaim there's only four items. There are four generic items that they're calling the essential facts, the Holy Grail of why this is a -- the same transaction or occurrence. They're using these same -- these facts -- and I'll give you the four factors that they provide to say that, oh, these claims are so logically related. They say, well, our counterclaim said (1) there was a prior lawsuit by the HOA. Right.

Okay. (2) The HOA served a Chapter 40 on February 24, 2016. Okay. (3) It lists just a basic description of defects. (4) Parties participated in a pre-litigation mediation. Okay. Those are the four facts that the Association is relying upon beyond paragraph 68 which counsel has just raised and I will address that in a minute. But, those are the four facts that they're saying are so logically related to the Builders complaint that these actions are one in the same. These are just generic fact. In fact, those ones are not even in the substantive causes of action, those facts are all found in the general allegation section up top setting the stage for the counterclaim.

Now, counsel made some points about -- of paragraph 68 of our complaint. Now, he made it sound like these are all new facts that the Court was unaware of or wasn't privy to, but these were things that were already presented to the Court in our prior briefing. These were already things the Court has -- I'm sure has already had a chance -- an opportunity to review our claims, our counterclaims. Paragraph 68, beside at the time this complaint was filed, there was -- there was no counterclaim. It says: "All the" -- and this is on page 11, I believe it's Exhibit I of -- I don't know if you still have it in front of you, Your Honor. I don't have the exhibit but the motion -- but it's Exhibit I of I believe the reply brief. But paragraph --

THE COURT: Of the reply brief or in the appendix?

MR. GIFFORD: Oh, I'm sorry. It's in the -- it should be in the appendix.

THE COURT: Okay.

MR. GIFFORD: Correct.

THE COURT: Hold on, let me see if I can't find it. What is it generally?

MR. GIFFORD: It's the Builders complaint.

THE COURT: Oh. Sorry, guys, I don't have tabs for the letters.

MR. GIFFORD: Well, I'll just --

THE COURT: Okay. What page?

MR. GIFFORD: It's page 11 of the complaint.

THE COURT: All right. I'm there.

MR. GIFFORD: So, he went through paragraph 68 --

THE COURT: Right.

MR. GIFFORD: -- right? He's talking about that and he's saying that we're making a judicial admission and therefore the Court must rule in their favor that the claims are compulsory counterclaims. First of all, when this complaint was filed there was no counterclaim yet. Paragraph 68 says: "All the rights and obligations of the parties hereto." That has to do with this particular complaint only. And not only that, the -- and not only that, Your Honor, this -- this is something -- these are allegations in a complaint. As you know positions change through litigation, the determinations of the parties change in litigation. These are not admissions, these are things that a Court has to rule upon, they're allegations. Ultimately the Court is gonna be inclined to rule one way or the other. They have to rule that way. So, this is not something that I would consider a judicial admission that this is the same transaction or occurrence. We've already established and the law already says that's not true, it's wrong.

I think the Court was -- well, I know the Court was correct when it really considered the fact that the counterclaims were permissive counterclaims. The Court notes as you stated earlier, if the Court had ruled against the Builders on their complaint the Association would not have lost their claims if they had not been pled. Well, earlier we heard from Mr. Gayan and he said, well, you know, fairness would have dictated that we could have maybe consolidated the cases at a later point.

Well, that's an admission that the claims were permissive. They could have brought them later. They weren't relegated to do that. Besides the Court -- the Court is the one that would ultimately be the one making the determination as to whether or not their -- that claim would be time barred. If we were to raise -- if -- in other words, if they were to file their counterclaim not part of our claim and we made a complaint to the Court and said, look, we object, Your Honor, this is a compulsory counterclaim that they should have filed with our compulsory counterclaim, it is untimely. If that had happened you would have said, no, I -- it's a permissive counterclaim, they didn't have to file it at that time. You had already made -- you gave the association an out, I think you clarified it in your order, I think you were very clear. I just wanted to make that point clear, Your Honor.

THE COURT: I like being known that I'm pretty clear.

MR. GIFFORD: Clarity of orders is always appreciated.

Now, even if you're inclined to consider the compulsory counterclaim or reconsider your ruling in that regard, you still have to hit the second prong, it still has to relate back. That's the only way that the Court would have -- would re-rule on the issue.

Now, the relation back doctrine. The Association -- well, first I'd like to address the fact that they say that they had never had an opportunity to brief the *Jamison* case. Well, Your Honor, that's actually just plain false. We've actually put that in our reply brief to the Court, they were the first ones to bring up the *Jamison* case. In their opposition to the motion for summary judgment on page 13, they have a whole paragraph. This is the first time that it was brought to the Court; they're the ones who brought it forth. They said this -- they talked about a whole paragraph on the bottom of page 13 the *Jamison* case. So, the fact that he's saying that we didn't

have an opportunity to brief it, that's not true. It was in their opposition, it was their reply, it was in the hearing on April 23rd, it was in their motion for reconsideration, it was in our opposition to the motion for reconsideration, it's the reply brief to the motion for reconsideration and now it's here before the Court. So, the Court has obviously had an opportunity to read the *Jamison* -- the case very thoroughly, it made a great analysis of it, it utilized the only binding case law in front of the Court on this issue and it has -- it couldn't have a clearer holding than what it says. If we look at the holding in that case it couldn't be more precise. It says: "Instituting an action before the expiration of a statute of limitations does not toll the running of that statute against compulsory counterclaims filed by the Defendant after the statute has run." It's the only case binding in front of this Court. Mr. Gayan just admitted and agrees that it's the only case on point in front of this Court. Well, now they're asking you despite the fact that it's the only case on point, it's the only binding one to make the 180 degree turn, completely deviate from the Supreme Court's holding which couldn't be clearer and make an opposite ruling and pave your own way. It's just not justified and they have not met their burden to show the Court why it should change its ruling, why its ruling was a clear error of law. It's a clear holding.

And the Association has really tried to limit the applicability of this case despite the fact that they've admitted that it is indeed the only one that pertains to this issue in Nevada. They've tried to limit it by saying that the Builders cannot be surprised or prejudiced by compulsory counterclaims stemming from that action. When the *Jamison* court said that what they were talking about in that context was that the claims were already compulsory. The complaint -- the two claims that they were talking about were compulsory, they arose out of the same transaction or occurrence and because of that same transaction or occurrence they could not --

the other party could not claim prejudice or surprise because they've already had to deal with those issues, they've already had those issues in front of them. It was the same issues that were going to be resolved. Here a totally different situation, right? The Association also says that the fact that the *Jamison* court is inapplicable -- they say it's inapplicable because it's limited to -- the Court's holding is limited because of stale claims and lost evidence were not the primary concern regarding the ninety day statute of limitation period for deficiency actions. Well, Your Honor, the Jamison court was broader than that and it's broader than the Association interprets it to be. It's completely applicable in this case and it says -- and it stands for a general premise that statute of limitations are enacted for multiple reasons. (1) To preserve evidence (2) to prevent stale claims and (3) most importantly, which the Association ignores, it to promote or oppose by giving security and stability to human affairs that stimulates activity and punish negligence. Your Honor, you put that in your order and the fact that you put it in your order makes -- makes it clear that you recognize the Jamison court is broader than simply a limited view that, oh, because there are -- there's no issues of preserving evidence or preventing stale claims in this matter, it's an applicable law. The Court said there are issues that are beyond those two that the Court considers. It look a hard line rule at the statute of repose, it takes a hard line rule which is the Nevada trend to do so. So, Your Honor, the *Jamison* case, it's binding law, it's the only one on point here before the Court. The holding is clear; I don't think there's any indication from counsel as to why it made a clear error of judgment on that [indecipherable].

The last part I'd like to address, Your Honor, is the fact that the Court -- I apologize; I'm misspeaking a lot today. The Association misapplied -- let me start over. All right. The Association argues that the Court has misapplied NRS

40.695.2. The Association argues that the Court basically does not understand that statute. They're saying instead of the focus being on the Association's conduct, that's not what 40.695.2, the good cause analysis, requires. No, it should be on something completely different. Let's ignore what the Association did and focus on the prejudice to the Builders. Where did they get that? Well, they get it from one of the *Scrimer* factors, the case that they were talking about. The *Scrimer* court dealt with a completely different statute. It dealt with NRCP 4E which is the ability -- or to show good cause for why expanding service -- time to serve a complaint is warranted. Well, that's not the situation we have here. There's no correlation between NRCP 4E and NRS 40.695.2. There is no correlation. Besides of the ten *Scrimer* factors that there are in that case five of them are not even applicable. The last time we were at the hearing you were briefed on this issue. Five of those factors Counsel was going through and he says, oh well, this one is not applicable, I guess, you know, let's move on to the next one. Oh, this one is not applicable, this one is not applicable. Oh, okay. Well, here's a prejudice one, let's focus on that. But, Your Honor, frankly you got it right, you said, look, you first start with whether or not there was good cause for the party to skirt a statute of repose. Whether there was a good reason that they had to miss the deadline. Only then, once that determination is made, then you look to the other factors. You said that in your order: "Because no good cause was shown by the HOA the ability of the Builders to defend themselves is immaterial." Right. There has to be good cause. The definition of good cause means was there a good reason to begin with. We just heard counsel reiterate what he argued. He reiterated the last time he was here was that there was no good cause. They don't have an explanation and frankly this Court has found that there wasn't a good explanation really because there wasn't,

they just said they thought that they were doing the right thing.

One point that the Association is really, really trying to flush out, Your Honor, was the fact that the Builders have not shown prejudice or identify the prejudice to them by virtue of their claims. Well, that's untrue, the last hearing we addressed it and you had commentary on that as well, Your Honor. The Builders have been drug through the mud in this case for over three years; we've incurred over $200,000.00 in fees, $60,000.00 in costs. Obviously these are issues for another motion, but we've filed motion after motion all for these claims that were all time barred -- well, the window claims are time barred and the mechanical room defects are time barred, but other claims they just failed to sufficiently describe in their notice. They failed to uphold the statute.

Now, the Association is asking you for tolling beyond -- beyond the time that's required. They're asking you for not the year, they're asking you for a year and five days. If you look at it -- if you look at the statute it says that's it's the earlier of, thirty days after mediation or one year. In your order you clarified, you got it -- you got it right and said, look, the Association somehow thinks that they had the one year. No, they only had up until October 26, 2016 to file their lawsuit. They missed that mark; they missed it by four and a half months -- or just over four months. And so if we look at it that way they're not just asking for one extension, they're asking for two extensions. They're asking for an extension beyond the October 26th deadline up to the one year and they're also asking for an extension beyond the one year. Now, I'm really glad at the last hearing, Your Honor, you brought forth a Kitech case and it really sort of made this whole issue very clear about what the policy was behind -- behind that statute, NRS 40.695.2, the extension of tolling. In the Kitech case there were 36,000 homeowners. That's not the situation we have

here. The purpose of extending tolling beyond the one year is to allow parties to really get the Chapter 40 process done and in a case where you have 36,000 homeowners that's not feasible. That's what the case was designed -- that's what the statute was designed to protect. We don't have 36,000 homeowners, we have one Association. We don't have -- who knows how many defects. We have one defect, the window defect that's it. There's no good cause that's been shown, there's no arguments or new law or anything different that the Association has elicited today that wasn't already briefed and there's no basis for this Court to grant them extension of time for leave, they simply have not proven it.

The last thing I'd like to address, Your Honor, is the fact that the Association really had gone full boar into the diligent argument or saying that they have been diligent from the outset of this case. They provide a table of dates and they provided now three or four times showing all the things that they've done in the past three and a half years and generally there's an item every month. But again, I've said it my last hearing, I'll say it now. The focus is not what they did when they filed their complaint; it's not the dates three years ago. The focus is on what occurred in the thirty day window between the mandatory Chapter 40 mediation and the thirty days that they had to file their counterclaims. What happened during that time? There is nothing written that occurred at all, nothing at all. Every other date in there is a red herring. They're trying to get you to say, well, just because we -- you know, we filed a complaint, hey, we participated, we showed up at the mediation. Well, yeah, it's their case, they have to participate. It would have gotten thrown out a long time ago if they didn't do those things. But let's talk about diligence; let's talk about the things that are in that list. The Association -- excuse me, the Builders. When we were brought in this case, when we -- we served a letter of association,

this was back in 2016 in March, we told counsel we were associating in as counsel and then we had asked -- we sent them two letters asking for information on the sewer issues, on where the pipes have gone, the mechanical room issues. We didn't get any of those responses. I don't see where they say, oh, we considered the Builders letters and decided to ignore them. Those are not things on their list. What else do we have? Well, we have the fact that the Association failed to notify the builders of the sewer issues prior to the repairs being done yet they still brought the claims and they didn't preserve that evidence. That is not diligent, Your Honor. They also failed to notify the builders of the mechanical room piping repairs. That is not diligent. They also failed to serve a Chapter 40 notice for the mechanical repairs timely despite the fact that they know about them in 2011. They first served their Chapter 40 notice in 2016. The Association also failed to timely notify the builders of the Unit 300 repairs. That's not diligent. The Association failed to timely notify the builders of the Unit 300 water testing. In the emails and the correspondence that were attached to the Association reply it shows, hey, we should probably call the builders and let them know that there's -- there's water testing going on at the units. They didn't even call the builders and let them know until the water testing had already occurred. We couldn't even get all the experts we needed out there. That's not diligent, Your Honor. The Association knew about the window claims in 2013. They waited until 2016 to serve their Chapter 40 notice. That's not diligent. Even despite the fact that they knew of AB125 is coming out. A lot of the parties -- it was the talk of the town back then. They said, well, we should probably do something. We should either get our Chapter 40 notice or a lawsuit initiated. No, the Association here's what they did. They waited until the last possible day to serve a Chapter 40 notice. It wasn't commencing the action but they waited the last

possible day. That's procrastination, it's not diligent. Lastly, Your Honor, the Association filed its counterclaim over four months after AB125 specified the thirty was their window. That's not diligent either.

I'm just gonna go over a couple of my notes to make sure I've addressed everything. One additional point, Your Honor, as the -- as the Association counsel has indicated to us that -- the fact that the complaint that we filed would not have been done had it not been for the Association's counterclaim therefore they're compulsory they arise out of the same transaction or occurrence. I don't really understand that argument. We filed an action dealing with their Chapter 40 notice. We filed an -- a complaint dealing with their settlement agreement. We didn't -- we didn't file a complaint for defects or whatever it is that they want to try to conflate, they were really trying to conflate these two claims and it's just not the case.

I'd just like to say, Your Honor, that I believe that you have looked at your Sky order in ruling on this motion, we were briefed on that. And if we really consider -- if you were even inclined to reconsider the arguments here today ultimately what's to stop the Court and what's to stop the parties from reconsidering other rulings that this Court has already made. I think you were very consistent in your Sky ruling, I don't think there's any reason or basis, at least not that the Association has showed you for you to reconsider your order today. If you have any questions, Your Honor, I'm happy to answer. I went through a lot of material. I apologize if I was little bit fast.

THE COURT: Okay. Thank you.

MR. GIFFORD: Okay. Thank you.

THE COURT: Mr. Gayan.

MR. GAYAN: I'll try to be brief, Your Honor. I know you have other things to cover.

As far the Court's ability to reconsider its order, the Court has the authority to do that for any reason, it's an interlocutory order. You heard counsel admit there's other live claims so there's no final order or judgment in the case. So, it's interlocutory, the Court can reconsider at any time for any reason. You don't need new evidence or law. I think we have cited some new evidence and law that wasn't -- I think at least it wasn't' discussed in the same way with the Court that last time. Maybe certain things were referenced. Certainly not discussed in detail that we've talked about in these papers here today. The other standard for reconsideration is clearly erroneous and with all due respect, the HOA thinks that the Court got it wrong and obviously the Builders think Your Honor got it right. So, plenty of reasons to reconsider. I think the number of times we've been over here the Court can appreciate this is a complex case. This isn't, you know, a rear ender or a trip and fall or something, this is pretty complex.

THE COURT: Somebody sitting in the wrong chair.

THE GAYAN: Somebody sitting in another person's chair. Yeah. So, exactly, it's a little more factually complex than some of those types of cases and frankly for the amount of time that we've spent litigating the issues I think it's appropriate for the Court to take a second look before it completely -- effectively dismissing the HOA's claims with prejudice. So, we would just ask the Court's patience or indulgence with that regard and not deny the motion entirely on that procedural basis.

Your Honor, just -- I'm gonna touch on a few of the things that counsel mentioned. I'll try not to rehash anything. But paragraph 68 of the complaint

counsel says those aren't admissions, those are just allegations. I think one thing that's critical. I'm gonna ask the Court if you still have the binder --

THE COURT: Right here.

MR. GAYAN: -- in front of you. Let's take a look at allegation 92. And this is a spoliation claim. I know we've kind of looked over it a little bit but I mentioned it earlier. Paragraph 92. So, before we even get to that paragraph 91, it incorporates 1 through 90 to this claim for relief. So, spoliation -- suppression of evidence/spoliation which was pled as a fourth claim for relief incorporates paragraph 68 and 78 both of which say all rights of all the parties arise out of a single transaction or occurrence and should be handled in this one case. So, with that allegation as the basis and foundation for the fourth cause of action the Builders allege Plaintiffs are informed and believe and thereon allege that Defendant, HOA, and/or its agents have intentionally suppressed and/or destroyed evidence related to Defendants, the HOA's claims against the Plaintiff. They're specifically referencing our claims against them which they knew were coming, which are coming in the form of a counterclaim or however they come. So, they specifically reference our claims, they're pleading a cause of action related to our claims for damages. So, to say that there's no logical relationship between the Chapter 40 notice and all the defect claims in the Chapter 40 notice and the Plaintiff's complaint, the Builders complaint, I think is just factually wrong and it's contrary to what the Builders alleged in black and white in their complaint.

THE COURT: You know, the one thing -- in looking at this fourth claim for relief it appeared to me it really wasn't a claim for relief because they didn't set forth a claim for relief. I mean, all they said was basically you guys suppressed or destroyed evidence and they had to hire a lawyer so they want their attorney's fees.

But, I mean, they don't ask me to give an evidentiary ruling, they don't ask for a Rule 37 sanctions. I mean, they don't ask for anything, it just -- it's a paragraph saying you guys destroyed evidence, okay?

MR. GAYAN: I agree. I'm not saying that it's a properly pled claim for relief but that is certainly how it's pled and they incorporated it. Their statement that all the rights and obligations arise out of a single series of transactions or occurrences, that should be resolved in a single case and they specifically reference our claims for money damages against them in paragraph 92. So, to say that there's no connection between the complaint and the counterclaims, no logical relationship which is all that's required I think is just error based on their own admissions and their own allegations to my recollection that the Court's order did not address.

And, Your Honor, this fact is important. I mentioned it in *Mendenhall*, I'll just reiterate it. The *Mendenhall* court held that type of written statement against Mr. *Mendenhall* who put it in writing in motion papers, not in a complaint, not in a pleading, in motion papers saying that the claims were related and arose out of the same transaction or occurrence and the Supreme Court said done, claim precluded, case dismissed.

THE COURT: By the way, I want to correct myself. I have not read that case in connection with this motion but I know I did with what we did before but unfortunately I don't quite remember all the facts of the case but --

MR. GAYAN: Okay. Fair enough. Fair enough.

Your Honor, so -- I mean, the Supreme Court has shown that when a party puts something in writing they can't later say something completely different to get a different result. No mercy there in the *Mendenhall* case, case dismissed and now there's -- it's a legal malpractice case because of it.

As far as the *Jamison* case is concerned, counsel kept referring to it as binding. Cases are only binding when they're all on fours and on the facts and the law, and that is simply not the case with *Jamison*, that is not binding. This Court has seen tea leaves that the Court might read but I've already talked about why it's significantly factually different from this case and has no application. The Court -- the *Jamison* court did not say that they're deviating from all of the majority of state courts that find relation back and compulsory counter claims and deviating from the federal authority saying the same thing. No discussion of that, they just simply laser focus on the ninety day statute of limitations and said they're a clear policy consideration to [indecipherable] stale evidence and claims at issue here and so we're not gonna give one counterclaim any leeway.

As far as good cause goes, Your Honor, counsel says there's no relationship between Rule 4 and 4695 sub 2. I think it's just wrong. Think of it practically. What is the practical effect of extending the time to serve a summons and complaint as compared to the practical effect of tolling the statute of repose? It's effectively the same. Assuming the Defendant didn't already have notice that the claim was coming in the second case but in Chapter 40 land the Builders had notice of the HOA's claim since February of 2016 long before the complaint would have been filed or expiration of the tolling under 695 sub 2. So, it's even -- it's different, it's more reason for good cause to extend the tolling period here where the facts are significant to show that the Builders were involved, they were already defending the claim and decided to go on the offensive long before the tolling ended. When you're talking -- Rule 4 talking about extending the time to serve beyond four months, beyond 120 days, now you've got maybe somebody filed in the last day of the statute of limitations or statute of repose which can be 2, 4, 6, 8, 10

years after the event and now you've got another four months going and then usually a motion to enlarge, you gotta another 120 or 240 of whatever it is. So, now you're talking -- you're adding potentially a year I've seen in a case that I have right now the Court gave another 240 days. So, now you got a year tacked on after the statute of limitations or repose has expired before the Defendant ever gets notice of the claim against them or at least official service of the claim against them. So, the practical effect is really the same except here Chapter 40 requires that we give them notice. And they had that for many, many, many months before the tolling expired. So, even more reason for application of the Scrimer facts and the case to go forward on its merits and the same factors to apply here.

Your Honor, as far as prejudice, the arguments that we heard those are all just completely unrelated. The question is whether there's prejudice from extending the tolling period. They identified no prejudice from whether -- had the HOA filed a separate complaint on October 26, 2016 or filed their counterclaims on March 1, 2017. No difference, we'd be in the exact same situation we are here today as far as their obligation or responsibility to defend the HOA's claims. So, there's absolutely zero prejudice from this and it's much like the *Scrimer* court held it was an abusive discretion and the situation was effectively a dismissal with prejudice on one side and there's absolutely no prejudice to the other side and it was obvious to dismiss that case.

As far as the one year tolling goes and the 4 -- AB4 -- excuse me, NRS 4695 sub2, I took a look at that -- and I know it's not in the papers, but to the extent it gives the Court any information on the intent of 4695 sub 2, that actually was not added, the Court's discretion to extend the tolling period, it was added through AB125 in 2015. And I think it's pretty clear from the changes that happened during

that session that the legislature wasn't doing the homeowners any favors for the most part as far as I can recall, and your CD calendar is a lot smaller and there's a good reason for that and AB125 is the main reason. So, you know, I think that there's no discussion that I could find in the legislative history about a good cause factor or adding sub part 2 to 4695. 4695 has been around for a while but the 2015 legislature actually added it in -- through AB125. So, to argue that, you know, it's for the Kitech situation or it's for other -- that's all speculation. That was not discussed in the legislature as far as I could tell. Certainly it seems to -- it seems it would have helped in the Kitech situation but I'm not sure it even would have mattered in the Kitech situation because that was actually a little bit different, we never used 4695, we field the case and then they -- the Defendants moved to dismiss and then the Court stayed during the completion of the Chapter 40 process. So, the Court used a different statute. I think it was 646 or whatever that is that allows the Court to -- if the dismissal would operate as it was a prejudiced dismissal the Court needs to stay the case pending the completion of the Chapter 40 pre-litigation process and that's what this Court did in the Kitech/Quintero matter. So, we didn't -- we didn't deal with 4695, we dealt with post filing the stay.

THE COURT: You know, I'll be honest with you, I read that point as -- and I -- now I can't remember what the other 40.695 says, but it does say under subsection one that basically you got a year to complete. I mean, max one year to complete your Chapter 40. And I took subsection two as appreciating that sometimes we've got odd cases like the Kitech case. There's no frickin' way we could have got that thing done in a year. Never. And this one is even complicated enough to where if there was a decision to repair the windows -- how many windows are there? Like 400 something.

UNIDENTIFIED COUNSEL: Thousands.

THE COURT: Thousands of windows. There's no way that all the windows could have been repaired probably within a year time frame. I mean, I'm just guessing.

MR. GAYAN: Right.

THE COURT: I think that's what that subsection two was --

MR. GAYAN: Your Honor --

THE COURT: -- it was recognizing we've got some complicated cases sometimes.

MR. GAYAN: I certainly appreciate that line of reasoning but standing where I'm standing here today and having my client's entire case thrown out because the Court wouldn't find good cause, I can't imagine a single Plaintiff ever waiting and relying on sub 2 ever. It would never happen. They would file and then they would get the automatic stay that's required because otherwise you would have a with prejudice dismissal and I'm sure the Court's very familiar with the statute. But that's exactly what we did in Kitech. I think, you know, it's kind of theoretical, academic discussion we're having here. I don't think any Chapter 40 claim in -- after what -- what's happened in this case or even the risk and having to be at the mercy of the Court asking for good cause and exercising discretion to extend the tolling period, I don't think any claimant would ever intentionally do that to file a claim. This case is very different because the Defendants came in and sued us first or the -- sued the claimants. So, that flipped things around. And I've already explained the HOA thought we were following the process and asserting what we believe were compulsory counterclaims and to my recollection every time a notice has been challenged and we've asserted them as counterclaims and I talked to Mr. Coulthard

about that in the time that I had off here.

So, anyways, as far as nothing being in writing during the thirty day window after the mediation, I did ask Mr. Lynch my firm wasn't involved at that time. My understanding his recollection is that the complaint was filed and served almost immediately and Mr. Lynch's office or Mr. Williams' office reached out to the Builders counsel and got an extension to respond. So, yeah, there's nothing in writing but, you know, it's not like we were sitting around doing nothing, we were actively defending at that point.

So, Your Honor, I'd be happy to answer any questions. I know it's already been a long morning; we've got some more mileage to cover so I don't want to take up any more time but I'm happy to answer to any questions.

THE COURT: I think I need to hear the other motion for reconsideration before I make decisions on this one because we got a new twist, right?

MR. GAYAN: There is a twist.

THE COURT: Who's gonna talk about that?

MR. GAYAN: Mr. Coulthard.

MR. COUTHARD: I am, Your Honor. Would -- I know we've been going a couple of hours. Would it be --

THE COURT: Do you need a break.

MR. COULTHARD. For just a five minute break.

THE COURT: Okay. Why don't we take a break? Maybe I can take these other folks because they've got some short things going.

MR. COULTHARD: Thank you, Your Honor.

THE COURT: Okay.

* * * * *

[Matter recessed at 10:37:18 a.m.]

[Matter recalled at 10:53:46 a.m.]

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

THE COURT: Okay. Okay. And so we've got Defendant's Motion for Reconsideration and/or to Alter or Amend the Court's May 23rd Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Summary Judgment Pursuant to NRS 11.202(1) and that was filed on June 13 of 2019. Counsel.

MR. COULTHARD: Thank you, Your Honor. Bill Coulthard appearing on behalf of the homeowners association. First I'd like to step back and thank Your Honor for the patience that it's -- you and your staff have shown all the litigants and the parties in this case and -- in consideration of all the motions. Obviously today this is an extremely important -- these two motions for reconsideration are extremely important to the homeowners association. And, you know, this is a complex case and there's been multiple motions for summary judgment and so I would thank the Court for its continuing efforts and continuing considerations, but I would also ask the Court that while the efforts continue that Your Honor consider and bear in mind Nevada's strong public policy of adjudicating claims in litigation and causes of action on the merits. And that's really what the homeowners association is asking for in this reconsideration is for an opportunity based upon the -- the law we've cited, based upon the new law AB421 for an opportunity --

THE COURT: Is it 241 or 421?

MR. COUTHARD: I'm sorry, 421.

THE COURT: Okay. Well --

MR. COULTHARD: What did I say --

THE COURT: -- you said it right.

MR. COULTHARD: -- 241?

THE COURT: Well, you --

MR. COULTHARD: Thank you.

THE COURT: -- must have --

MR. COULTHARD: 421 --

THE COURT: said it right because --

MR. COULTHARD: -- Your Honor.

THE COURT: -- I was thinking it was 241. But, Mr. Coulthard, maybe this is something that you could address for me. This is where my rub is with your argument. This statute comes into effect October 1 is what I understand it to be. So, it is not the law of the land yet. Isn't this motion prematurely brought? And I know that there's a motion to stay but I've already -- I mean, we've already let the horses out of the barn so to speak with my order so there's nothing to stay. But that's what my concern is. Right now we've got a six year statute of repose October 1, it may be ten years and then it gets into the whether or not it's retroactive and frankly I know your position is it is, right?

MR. COUTHARD: That's correct, Your Honor. And so with all due respect to Your Honor, we respectfully disagree. The Nevada legislature enacted -- and that is I believe the operative word, enacted the law and controlling law has changed effective in early June. And I think it was June 1,, 2019 when the Nevada legislature passed AB421. That same day Governor Sisolak signed the AB421 into law. It was enacted at that time but you're correct that the law becomes effective on October 1, 2019. So --

THE COURT: By the way, do you know why the legislature did that? I mean, face it, back in February of 2015 man it was like wham, bam, thank you, ma'am and

we got everything done and enacted within twenty days but here the effective date is October 1.

MR. COULTHARD: Well, I -- you know, and think based upon the due diligence we've looked at I think they didn't consider the issue. And frankly when the state went blue and there was discussions and negotiations with the change that we're dealing with now everyone got on board and it was a -- I think the last parties that got on board were the subcontractors and once they had a consensus so to speak between the competing parties. With the one exception I think was the insurance providers were still opposed to it. Everyone in the industry other than the insurance providers unanimously supported that -- the retroactive nature of it and I -- there is no language in the history that we've been able to see where the even addressed the what I believe to be likely the only case that's in -- in this situation that we're in now which -- and we tried to address that when we addressed the concerns by the Builders in this case saying, oh my goodness, we're gonna open the flood gates and there's gonna be a whole slew of refiled cases. I don't think that's the situation, I think -- and that's likely why the legislature was silent on it. But clearly the intent is that for retroactive application of the statute and they say as much in section eleven when they say that it is retroactive for any communities -- and I have the exact language. "The statute will apply retroactively to actions in which the substantial completion of the improvements to real property occur before October 1, 2019."

THE COURT: And what page are you looking at?

MR. COULTHARD: So, that is in Exhibit 2 to the moving papers which is the assembly bill 421 write up which I think it enacts the statute. And I am --

THE COURT: On page --

MR. COULTHARD: -- let me get there. It is -- in our motion for reconsideration Exhibit 2 -- the very last page of Exhibit 2 --

THE COURT: Okay.

MR. COULTHARD: -- which is section eleven. And it's referencing -- section 11 subsection 4.

THE COURT: Okay.

MR. COULTHARD: And it states: "The period of limitations on actions set forth in NRS 11.202 as amended by section 7 of this act." And if you go back to section 7 that's where they change -- and that's -- section 7 is on page 8. And really the -- parens -- section 7 -- 1 only really -- the only change to that you can see is from the 6 year to the 10 years after the substantial completion of such an improvement for the recovery of damages. So -- and it kind of bounces you around, but section 11 on the very -- very last section states: "The period of limitations on actions set forth in NRS 11.202 as amended by section 7 of this act." You go back to section 7 of this act it changes from 6 to 10 years. And then I'm back to section 11 reading forward:

THE COURT: Right.

MR. COULTHARD: "Will apply --

THE COURT: I see it.

MR. COULTHARD: -- retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019." So, there is an argument being made that the statutes can't be applied -- the statute of repose can't be applied retroactively and I think the case cited by -- well, I know the case cited and relied upon by the Builders for that proposition is *Lotter versus Clark County.* *Lotter versus Clark County,* when you read that case -- you should

take a look at it. And we cited the language. It's premised on "absence of legislative directive or intent to apply statutes retroactively." So, Lotter is -- they didn't have a legislative intent and we have an expressed legislative intent to apply retroactively. So, we're not having to go back to the legislative intent and wonder what they were trying to do the language is clear and unambiguous that this ten year statute of repose is to apply retroactively to actions in which the substantial completion of the improvements to the real property occurred before October 1, 2019. So, no question they're applying this statute of limitations retroactively. They said as much, the statute says as much.

THE COURT: And, Mr. Coulthard, I -- maybe I'm just thinking about something. But it just -- this is what doesn't make sense to me is that in 2015 the Nevada Legislature indicated basically upon assigning of that -- of the act by the Governor, I mean, it was enacted. It was effective right then and there. Why did they wait this time to have it effective as of October 1? I'm just curious.

MR. COULTHARD: Your Honor, other than the response I gave you earlier I don't know. I know that we've asked some of the questions and I think the response we got was because there was a consensus, because we've expressly had this apply retroactively everyone was on board and the AB421 was overwhelmingly approved with a consensus of the impacted parties and the retroactive language was designed to -- or was expressly stated to have this apply.

The gap that we find ourselves in now for 75 days from enactment until effectiveness I think was not contemplated --

THE COURT: Yeah, it's just --

MR. COUTHARD: -- it was based upon our research. They just didn't --

THE COURT: It just seems kind of weird if they had just done the enactment

right now I could decide the issue. And I know what your position is, but it would have taken the issue out of the equation if they had done that as opposed to saying, well, it's effective as of October 1. So, I am concerned about making a decision about this now. Maybe you can convince that --

MR. COUTHARD: Well --

THE COURT: -- I should as opposed to saying let's continue this out after October 1, but it just seems a little weird to me.

MR. COULTHARD: Well, and we're -- you know, in reconsideration so I -- and obviously given the importance of this motion, you know, we were mindful of the time limitations is it 59 -- 59(b) --

THE COURT: Well, under Rule 60(b) -- you could have done a Rule 60(b) and you'd still have been within the six month time, but as you've pointed out the *Gibbs versus Giles* decision indicates that I can change my mind as long I've got jurisdiction at any time before it goes up to the wise ones up in Carson City.

MR. COULTHARD: Well -- and I think that you make a good and earlier in your question to Builder's counsel, you asked about the spoliation claims and is that still viable and their response was yes. Well, clearly and based upon your own order that lists the claims and causes of action all in the -- in the Builder's claims several of those claims are still viable. And about the spoliation, while it may not be pled well and they didn't assert specific damages or request in that claim -- and you always go back to your prayer and there's always the catchall, and I haven't looked their complaint but I am certain that there'll be the catchall that says for and all other relief that the Court may deem appropriate. And, you know, the fact that they didn't -- and we're actually precluded from putting anything other than I think the number may be 15,000 now in our complaint when we seek damages but it's a statutory

number. For years it was 10,000, it think it may have gone up. But my point is that you don't typically seek prayer for damages in claims and so it doesn't surprise that the spoliation claim was a -- was a -- not well pled by the Builders. It didn't include every bit of claimed damaged they may have which I can assure that if -- if that goes forward they'll be pursuing -- and they intend to pursue. He told you today that that claim was still viable and he believes it's viable and they can go forward with that.

So, I kind of got off on bit of a tangent there. And then --

THE COURT: Well --

MR. COULTHARD: -- I felt like I -- your questions was, well -- to Mr. Gayan, well, it's not a very well pled claim and so maybe it's not -- your case is not ongoing. Well, clearly this case -- there are --

THE COURT: Well, we've got the breach of contracts so --

MR. COUTHARD: Breach of contract --

THE COURT: -- left.

MR. COULTHARD: -- of materials and --

THE COURT: Right.

MR. COULTHARD: -- both counterclaims are ongoing. So, my point of bringing that up clearly this is -- and this present case is -- in its present decision, your May 23, 2019 order that we're asking for reconsideration on is an interlocutory order. And you're right -- and -- but again, in an abundance of caution, you know, we didn't want to blow a date as the lawyers, So, we wanted to -- you know, we were watching this, we got it filed and even in our moving papers I think we said it's immediately an act at will. We were right, we didn't think in a catchall general NRS law that says everything down at the legislature unless expressly modified is -- becomes effective on October 1. But no doubt in my mind this law has been

enacted, it is on the books. It is enacted but it has been advanced by the legislature to the Governor and he has signed it and it's enacted. The controlling law has been exacted. Whether -- or it becomes effective and it will --it does become effective -- effective on October 1.

So, are we premature? That we will leave to Your Honor's discretion. But we didn't want to take a chance because I assure you had we waited until October 1st when it became effective and brought the claim we would have heard all your dilatory, you waited too long. These Builders would have said you had a chance, you weren't dilatory and you blew your opportunity for reconsideration and we didn't want to be in that position. Frankly, you know, that's a problem for lawyers to blow dates. So, that's why, Your Honor, if -- and frankly in the -- during -- when we filed this motion, myself and Mr. Gayan and Mr. Lynch, we were all in trial in front of Judge Kishner, maybe we filed it prematurely. I leave that to you. We didn't want to blow the date and -- but that's why we -- some of the language in that moving paper says, okay, it's immediately the law. Well, no, you're right, and we -- we stand corrected. But our point is it is the law, it has been enacted, it becomes effective in October 1 of 2019 and certainly Your Honor has the discretion to say, okay, we -- I'll deal with this on October 1. Renew your motion then or take it under advisement for the next seventy-five days, you know -- but it was too important to not file with it the Court.

So, I had started my argument --

THE COURT: And I interrupted you.

MR. COULTHARD: No, I don't think I need to do it, I mean, because I think it's clear that, Your Honor, it isn't an interlocutory order, this Court has the ability to -- and I'm really talking now about the basis for reconsideration. You clearly have

the basis that so long as you have jurisdiction of the case which clearly you do, ongoing jurisdiction, you have the ability to reconsider, rescind or modify interlocutory orders. I think 54(b) gives you that decision all -- that -- that discretion also. And I don't believe there's any argument now that this is a final order, but even if it were for argument sake I think 59(e) authorizes the present motion. If -- I wanted the basic grounds where I think there's been grounds under 59(e) for reconsideration, it's a changing and controlling law. We clearly have that with the recent enactment of AB421.

So, again, the next -- and it's a pretty short issue. I got that it's obviously an important brief, but I'm pretty -- I got [indecipherable] which was I think lucky for me. But AB421 clear, expressed language retroactively extends the applicable statute of limitations to ten years. Your findings and conclusions -- in your findings and conclusions of May 28, 2019 you found that and ruled that substantial completion of tower one occurred in January of 20 -- I'm sorry, January of 2008 and tower two was March 2008. Clearly this statute is -- we had substantial completion of these towers before October 1, 2019 so this ten year statute of repose by expressed language is applicable to tower one and tower two, the facilities -- or purposes that are at issue in this case. And so then we take a look at the filing dates. Did the Association file with -- its counterclaims within that ten years from substantial completion the Association filed its answer and counterclaim on March 1, 2017 approximately nine years from the -- within -- so within the ten year statute of repose.

So, the last issue -- unless the Court has any questions on the -- sort of on the timing of it, is what I would -- what we called in our brief -- and you know when things are complex and get -- the stakes get high and you start to see some of

the language in -- back and forth in time I consider these all excellent lawyers and colleagues and long time --

THE COURT: I would say everybody --

MR. COULTHARD: -- friends.

THE COURT: -- in the room are.

MR. COULTHARD: We're pretty good but I think we called it a last ditch effort. And a last ditch effort to avoid the application of AB421's ten year statute of repose the Builders argue that amending the order to revise the HOA claims would violate their due process a lot. And they really -- they don't have a controlling decision in Nevada and cited. And then I kind of got ahead of myself because I mentioned *Lotter versus Clark County* and -- but I thought at the end of our reply brief we addressed that that case wasn't applicable at all because in AB421 we clearly have, as I pointed out to Your Honor, the specific legislative expressed statute that says these statutes are -- this statute of repose is applied retroactively. And so then I think it is applied retroactively, are there due process rights that have been violated by this -- or would that violate -- would Your Honor applying this ten year statute of repose violate the due process rights of these Builders? And I would suggest no and I will tell you why. There's two reasons. First is the case law. The case law we've cited which was right on point and it is in our reply brief I want to say in the -- it is in the footnote 1 on 407 and we cite *20th Century Insurance Company*, it's a Cal.App.4th opinion and it states: "The running of a statute of limitations does not grant a defendant a vested right of repose and even if the running of the limitation period created a vested right in defendant such a right yields to important state interest without any violation of due process." Now, we've mentioned the competing important state interest which is clearly adjudicating merits -- adjudicating

cases on the merits and not on a technicality, I gotcha type of situation. So, the important state interest is triggered that's one reason why their rights aren't violated. And we cited upon what we believe to be applicable California, Arizona law that -- that suggests this is not a violation of their substantive due process.

So, the law doesn't support that but neither do the facts, Your Honor. And I always -- in many trials we are with you I talk about and I point to the jury and I talk about the common sense instruction. And I think it's important and I know Your Honor has -- will use your common sense when you consider this. When these Builders completed tower one and two there was a ten year statute of repose in place -- repose in place then AB125 gets enacted some years later and it gets decreased to six years. That's a benefit to the builders and, you know, was -- we've heard a lot about it and you've had -- you live it and I don't profess to know that law other than what I know now is recently AB421 has gone back to a ten year statute of repose and that is what the Builders when they completed this -- these two towers that are subject to this that ten year statute of repose was in place, it is now back in place. Their reasonable expectations to a shorter statute of repose are non-existent. They are post completion of this project. When they completed it they were -- they anticipated and were aware that they were dealing with a ten year statute of repose. The law is now they're dealing with a ten year statute of repose. There is no prejudice to these -- to the Builders for the recent change so there is no violation of due process. So, I would suggest that is a -- an argument that is easily dismissed by Your Honor based upon the controlling case law and common sense and the reality of the completion dates when these Builders completed their towers.

So, Your Honor if there's any questions. And I guess we would defer -- and I know there was an objection to the continuance but obviously again this is a --

I will say it -- because this is such an important decision that if the Court feels that, okay, we need to defer this until the -- on October 1 date hits and the law moves from in my opinion enacted to effective so be it, but I that's the case then we don't want to be -- we don't want to stand before the Court and say, oh, you should have -- or you hear the argument we should have brought this as a timely motion for reconsideration in thirty days I think 59(a) requires 25 days or 20 -- 25. That's why I keep Michael around.

And so, you know -- but I think -- Your Honor, I think that you are on solid ground to reconsider this and give these homeowners associations their day in court. These defects are real, they are seeking again monetary costs in association with these defects and the strong public policy of hearing cases on the merits should be followed. Again, thank you for your time, Your Honor. If you have any questions I'll try and address those.

THE COURT: Well, the only concern that I really have -- maybe it's more procedural. Let's say that whatever -- I make a decision today, well, let's say that I find, oh, the ten year statute of repose applies, then is the Supreme Court gonna -- when it goes up on appeal because just about everything I do goes up on appeal, is the Supreme Court gonna come and say you shot your wad too soon?

MR. COULTHARD: I would hope not. I guess I don't know. And maybe Mr. Polsenberg would think -- as much time as he spends at the Supreme Court would have, you know, better -- of course I don't -- I'm pretty sure I wouldn't like his response but -- I don't have a crystal ball with that and that is -- and if -- again, if Your Honor is concerned about that -- and we're okay, Your Honor, either renewing or having you stay the motion until October 1st because at that juncture -- but recognize that ten years if we had to re-file has now run. So, it is important that, you

know, we -- you're not -- we're not saying file your claim again or your Chapter 40 notice, we would be beyond the -- based upon your earlier rulings, beyond the ten year statute of repose. So, it's -- I think it's important that you stay or continue it and we have an opportunity to move forward on the merits, Your Honor.

THE COURT: Okay. Thank you.

MR. COULTHARD: Thank you.

MR. POLSENBERG: It's not my last ditch argument; it's my first ditch argument. I'm not saying as an afterthought you can't apply this new statute when it's effective to this claim. That's the main point I want to make. I mean, it's -- this new amendment, this 2019 amendment is not controlling law. It's not controlling law now so, yes, you would be in trouble is you reconsider today applying a statute that hasn't taken effect. And it's not controlling law to this claim and it can't be because their claim was barred by the statute of repose on October 26, 2016 and their claim was over. This goes even further than most cases because you've already adjudicated that their claims are barred by the statute of repose.

So, we're going through all these gymnastics on ways to revive their claim and stay the order. And I agree with you, there's nothing to stay. I mean, you can stay things under Rule 62 but I would be staying enforcement. Under appellate Rule 8 you could stay the -- an injunction or payment or the enforcement of orders, but what they seem to be wanting to say is they want you to stay the validity of the order and there's no doubt it's a valid order right now. You've argued that under 54(b) you can change your mind as long as you have jurisdiction. That's not really true. You -- and earlier Mr. Gayan talked about standards for reconsideration and including clearly erroneous. You can correct an error.

THE COURT: That's what my point is. And they're saying that my decision is

erroneous and that I should correct it.

MR. POLSENBERG: But it isn't erroneous on the application of a law that doesn't exist and didn't exist at the time you decided things.

So, yes, if you really want to go through a correct procedural method you could certify this order as a valid judgment under 54(b) and I ask the Court to do that. And I know -- actually the Nevada Supreme court has said that a party can submit a 54(b) certification ex parte to a Court but I'm not going that far but I am orally moving now for a 54(b) certification because I think I want to make it clear to the Supreme Court what we're really talking about. We're talking about claims that were barred as a matter of law back in 2016. And under the old statutes of repose would have been barred under -- in 2016 as well. Now, Mr. Coulthard says ten years but we all know that's ten years for known defects and there's no way this is a known defect, and the Nevada Supreme Court in a unpublished decision last year made clear that they didn't think that the claims were for known defects and so the ten year statute didn't apply. So, we're talking about the eight year statute of repose. So, their claims for tower one --

THE COURT: Well, I'm gonna ask you --

MR. POLSENBERG: Slow down.

THE COURT: -- Mr. Polsenberg, what --

MR. POLSENBERG: Yes.

THE COURT: -- are you really addressing statutes of limitations on known defects because repose actually goes to the date of substantial completion?

MR. POLSENBERG: And I'm talking about statutes of repose. Remember when we had the 6, 8 and 10 --

THE COURT: Oh, yes.

MR. POSELBERG: -- years.

THE COURT: I do.

MR.POSELBERG: Yeah.

THE COURT: And the savings clause. Let's not forget about the savings clause.

MR. POLSENBERG: And fraudulent concealment. And --

THE COURT: Which blew off --

MR. POLSENBERG: -- I would mention --

THE COURT: -- yes.

MR. POLSENBERG: -- equitable tolling too but I don't think that works well with you based on this department.

So, what we're looking at here is we have resolved claims, we have adjudicated claims. You could render them final right now and there would be no question. But even if you didn't render it final and you wanted to wait until October to decide these things which I think isn't proper you still are in the situation where their claim doesn't exist anymore. This isn't a statute of limitations case. They cite one California case in their footnote one about statutes of limitations. We all know the difference between a statute of limitations and the statute of repose and the legislative policy behind a statute of repose is to give repose. Now, the California case that they're talking about says there are all kinds of defenses to a statute of limitations, yes, but a statute of repose is different. And they come in with a state policy and adjudication of the merits but that wasn't the legislative policy in enacting the statute of repose. Our statutes of repose have a very long and winding history and I have unfortunately been involved throughout all of it. We had the statutes of repose originally, they were declared unconstitutional, the legislature re-enacted

them. In *Lotter* the Supreme Court said just by enacting a new statute of repose it doesn't apply retroactively so they changed the statute to make it apply retroactively and then they shortened the statute and -- but by imposing new statutes of repose the question was can you cut off a party's rights. And this is in the *Alsenz* case which I think is A-L-S-E-N-Z. And In *Alsenz* they said you can't just cut off the claimants claim without giving them notice that would violate due process. Now, why is it different for a defendant? Why is it different for a counter defendant? We had repose. We -- they -- the statute of repose had completely run on their claim, it didn't exist anymore. You even ruled that that was the case. And now they're coming in and saying, all right, we want to change all the vested rights because the legislature changed the rights. Yes, they made -- they learned from the *Lotter* case you cannot just pass a new statute of repose and have it apply to construction that was substantially completed beforehand. So, they added that language. I'm not saying it doesn't have any retrospect of effect but it can't retroactively apply to claims that have been resolved where the statute of repose has run and the claim does not exist anymore. The legislature doesn't have the ability to -- we all say revive, to resurrect claims that don't exist because previous legislation got rid of it.

So, I think under all those circumstances you can't -- you can't it apply it all, it's not -- it's not even effective yet. But if you could apply it you can't apply it to this case, it's not controlling law, it's not controlling law to these claims that have already been resolved. And if you want to put a period at the end of the sentence I would just certify it as under 54(b).

THE COURT: Okay.

MR. POLSENBERG: Thank you.

MR. COULTHARD: Very briefly, Your Honor. I think I would strenuously

object to the 54(b) oral motion today. I mean, obviously that's an important issue and we would want fully briefed. I would oppose it orally today because it's -- 54(b) is completely inappropriate because there are, as admitted to by the Builders, ongoing claims in this action. All claims have not been revived -- or dismissed. So, 54(b) is inappropriate and we would object to it. And given its importance we would want briefing on that.

Your Honor, when we look at the *Doe* case which went through and recognized fourteen states again including California. There was --

THE COURT: Which case is it?

MR. COULTHARD: I'm on page 4 of 7.

THE COURT: Okay.

MR. COULTHARD: I'm at about --

THE COURT: Doe. Okay.

MR. COULTHARD: Doe. On -- beginning on line 14. But the quotation on 19 states -- they specifically: "Hold that the retroactive expansion of the statute of limitations to revive time barred claims is not a violation of the defendant's substantive due process rights because there is no vested right to a statute of limitations defense as a matter of state constitutional law." We haven't seen anything that distinguishes that from the statute of repose so I think that would be applicable. And you could recognize that this AB421 expands retroactively the statute of repose from six to ten years and our claims under the now enacted law are not time barred. And to suggest that it's -- they're fully adjudicated, it's a final determination you wouldn't be asking for 54(b) and suggesting that appellate rights are impacted if it was finally adjudicated. So, I -- again, going back to I think with the enactment of this law now have a window that revise these claims, that these five

claims are viable and that Your Honor should use your discretion to allow these homeowners to have their day in court. And I think the legislature has expressly stated that these buildings because they are -- we've substantially completed before October 1st of 2019 they now have enacted law that gives them ten years of statute of repose which will be effective in a very short time period and we should have our day in court, Your Honor. Thank you.

THE COURT: Okay.

MR. POLSENBERG: Your Honor, I'll be happy to draft the 54(b) argument because the rule has changed in March.

THE COURT: I'm sorry. Okay.

MR. POLSENBERG: 54(B) certification in Nevada used to be it had to be the resolution of all the claims of the party and now it's the resolution of all the claims of the party or a claim. It's the same as the federal rule so I think these are amenable to certification.

MR. COULTHARD: Yeah. I mean, we still have counterclaims. Again, the need for oral -- the need for briefing is -- if you're even gonna consider it which I don't think you should. At this point I'd file a motion.

THE COURT: Okay. This is what we're gonna do. Number one, on the first motion for reconsideration I think I got it right, but the second motion for reconsideration does put some -- well, it puts a twist on it so I really do need to consider it and I'm going to do that.

And to be candid with you, Mr. Polsenberg, I know that there's been a lot of changes to the rules of civil procedure and it seems like my focus has been more on 16 and 16.1 and I haven't -- as well as some of the expiration dates on filing motions and things like that. I haven't even read the new -- Rule 54.

MR. POLSENBERG: Well, Peter knows that that's the license plate on my Jeep is 54(b) so --

THE COURT: 54(b)?

MR. POLSENBERG: Yeah. So, I'm kind of geeky.

THE COURT: I was gonna say, well, Cannon's was 41(b) at one point.

MR. POLSENBERG: I'm more of a 41(a) kind of guy.

THE COURT: Well, in any event, I want to take that under advisement --

MR. POLSENBERG: All right.

THE COURT: -- as well as the Rule 54(b) argument under advisement. Given that, guys, I don't think I can hear the motion to retax because the case is not over yet. So, I don't -- I think I'm gonna just vacate that for right now until I make a decision on the other.

MR. BROWN: Your Honor, Peter Brown on behalf of the Builders. We currently have a hearing date set for the 23rd on the motion for fees.

THE COURT: Right.

MR. BROWN: And so I know from this -- from what Mr. Coulthard has said he would like nothing better than to stretch this out so that everything gets pushed and pushed and pushed much closer -- as close as possible to October 1, 2019. The Builders do not want that, Your Honor, and so we would -- we want to move forward with the 54(b). As Mr. Polsenberg pointed out that we do not have to have determination of all the claims.

As we set forth -- you read in our opposition to motion to tax and you would have read if they asked for a hearing date, Your Honor. That was our fault on the motion for fees how we set forth that your order definitively stated that all of the claims no matter how they titled them were based upon a construction defects. And

so our position, Your Honor is that there are no viable claims left in the counterclaim. But as Mr. Polsenberg pointed out, that's irrelevant to the 54(b) certification so we would like to move forward as quickly as possible, Your Honor, on the 54(b) certification and to perhaps move the hearing on the motion to tax costs to the 23rd. We just don't want to keep pushing this out, Your Honor.

THE COURT: I understand. Basically what you're asking is I do this thing right away which fortunately I don't have anything on my under advisement list right now so I can get on it and I'm interested in the issues.

MR. BROWN: All right. Thank you, Your Honor.

THE COURT: So --

MR. BROWN: So, can we move the motion to tax to the 23rd?

THE COURT: I think we could do that.

MR. BROWN: Thank you.

THE COURT: I should be able --

MR. POLSENBERG: And do you want to brief the 54(b) certification and do that on the 23rd?

MR. GAYAN: We'd like an --

THE COURT: Do you want to do that?

MR. GAYAN: We would like an opportunity to be heard. I'm not sure if the 23rd is appropriate but -- we don't even have the motion yet.

MR. COULTHARD: I mean, that's -- we -- that's next week.

THE COURT: Well, I was just gonna look at it myself.

MR. COULTHARD: I'd like to --

THE COURT: And it sounds like if Rule 54(b) under the Nevada Rules of Civil Procedure is paralleling what's going on with the federal rules then there should be

plenty of authority for me to look at.

MR. COULTHARD: We'd like an opportunity to read their brief and oppose it and I don't --

THE COURT: Well, I wasn't gonna have anybody do any briefing, I was just going to -- I mean, I've heard what the parties have said and I was gonna look at the rule and look at some federal authority and get my law clerks to pull some cases for me.

MR. GAYAN: Well, Your Honor, we'd like the opportunity to cite all of the just reasons for delay. It requires a specific expressed finding. There's no just reason for delay in certifying under 54(b) so we would -- I mean, we've talked a lot about things here today but we'd like an opportunity to actually be heard on the issue before there's a ruling on that.

MR. COULTHARD: I think it is important --

MR. GAYAN: [indecipherable] issue.

MR. COULTHARD: And one of the -- just shifting the motion for costs one week our position is that the entirety of that motion is premature because until you have a final judgment you can't have a prevailing party determination. So, kicking it down the one week is not gonna change the procedural status of where we are, it's just not. The 54(b) --

MR. POLSENBERG: Well, I don't think --

MR. COULTHARD: -- may but I want to look at it. I'm not a 54(b) specialist; it's not on my license plate. And this is something --

THE COURT: What's on your license plate, Mr. Coulthard?

MR. COULTHARD: Conserve wildlife and a few numbers or something. A fish I think is what they have on there.

THE COURT: Okay.

MR. BROWN: Your Honor, it's clear that they don't want -- they want to stretch this out as much as possible and so I again with one request that motion for costs be moved to the 23rd. That I invite the Court and your law clerks to look at what Mr. Polsenberg has accurately provided to the Court is it is now black letter. It is very clear, 54(b), that you can have certification on a single claim in a case, not all of the claims. And so we do not need briefing on this, Your Honor, and I believe that we as officers of the court knowing what the new statute says can rely upon the Court and your clerks to look at that and to either agree with Mr. Polsenberg or not. It's very clear, Your Honor. I think Mr. Polsenberg is probably pulling it up on his phone right now and we could all look at the language which he's provided to the court.

MR. POLSENBERG: Well, and we --

MR. COULTHARD: I believe, Your Honor -- I believe that the rules authorize written motions in pleadings and --

MR. POLSENBERG: Rule 7 allows for oral motion and a hearing.

MR. COULTHARD: Well, I object to it and I want my statutory time frame. We've sat through how many motions for summary judgment in a claim that we're sitting in the defense and counterclaims. We didn't bring this action, they commenced it and now he wants to jam this. He' senses the tactical advantage and he wants to jam us and I think we'd like a fair opportunity to respond. And I don't think we're asking for much. And so, Your Honor, with that --

MR. BROWN: This is the first --

THE COURT: You know, why don't we do some written motions on this and the sooner you get your motion out the sooner I'll hear it. So why don't we do this,

we'll vacate the motion for attorney's fees and costs until after that. In the meantime I'll look at some things myself because I'm sure I'll have some questions for both of you.

MR. COULTHARD: Thank you, Your Honor.

THE COURT: Okay. And --

MR. BROWN: Your Honor, is there any -- is there any reason why we cannot have everything heard on the 23rd? I -- we can file the motion, it's a very simple motion on the 54(b) and ask if it could be heard on --

THE COURT: But they --

MR. BROWN: -- an order shortening time.

THE COURT: -- need time to respond to it and I get that.

MR. GAYAN: Your Honor -- yeah. Your Honor, we've been responding to the Builders motion for summary judgment for three years, I think we'd like more than a week to --

THE COURT: I understand.

MR. GAYAN: -- respond on a key issue.

THE COURT: And I think I've made my decision.

MR. GAYAN: Thank you.

THE COURT: So, do a written motion.

MR. POLSENBERG: Can we set a hearing date?

THE COURT: I would say get your motion on and we will get you one right away. And if you need something done on an order shortening time I'm sure we could do that except I want to make sure that the -- the Association has plenty of time to respond to it.

* * * * *

MR. POLSENBERG: Very good.

[Proceedings concluded at 11:41:10 a.m.]

* * * * *

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

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DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Plaintiffs, vs.	) Case No. A-16-744146-D)) Dept. XXII)) **PLAINTIFFS/COUNTER-DEFENDANTS**) **LAURENT HALLIER, PANORAMA**) **TOWERS I, LLC, PANORAMA**) **TOWERS I MEZZ, LLC, AND M.J.**) **DEAN CONSTRUCTION, INC.'S,**) **OPPOSITION TO**) **DEFENDANT/COUNTER-CLAIMANT'S**) **JULY 16, 2019 ORAL MOTION TO**