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 25 OF 27

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

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

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

Attorneys for Appellant

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PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant.	**POSTPONE THE COURT'S RULING ON THE MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)**
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant, vs. LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation; SIERRA GLASS & MIRROR, INC.; F. ROGERS CORPORATION; DEAN ROOFING COMPANY; FORD CONTRACTING, INC.; INSULPRO, INC.; XTREME EXCAVATION; SOUTHERN NEVADA PAVING, INC.; FLIPPINS TRENCHING, INC.; BOMBARD MECHANICAL, LLC; R. RODGERS CORPORATION; FIVE STAR PLUMBING & HEATING, LLC, dba SILVER STAR PLUMBING; and ROES 1 through , inclusive, Counter-Defendants.	

PLAINTIFFS/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 POSTPONE THE COURT'S RULING ON THE MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT 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 Cyrus S. Whittaker, Esq. of the law firm of Bremer Whyte Brown & O'Meara, LLP and Daniel F. Polsenberg, Esq., Joel S.

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

Henriod, Esq. and Abraham G. Smith, Esq. of Lewis Roca Rothgerber Christie LLP, and hereby file their **OPPOSITION TO DEFENDANT/COUNTER-CLAIMANT'S JULY 16, 2019 ORAL MOTION TO POSTPONE THE COURT'S RULING ON THE MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)**

I. INTRODUCTION

On June 3, 2019, Defendant/Counter-Claimant (the "Association") filed a 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 ("First Motion for Reconsideration"). On June 13, 2019, the Association filed a Motion for Reconsideration and/or to Alter or Amend the May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) ("Second Motion for Reconsideration")(collectively "the Reconsideration Motions").

On July 9, 2019, the Association filed its Reply in support of the Second Motion for Reconsideration ("Reply"). For the first time in this Reply the Association requested that the Court continue the hearing on the Association's Motions for Reconsideration until October 1, 2019. The Builders filed an Objection to this belated, unilateral request to continue the hearing because it was unnoticed and improperly sought for the first time in the Reply. *See Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984); *Khoury v. Seastrand*, 132 Nev., Adv. Op. 52, 377 P.3d 81, 88 n.2 (2016). Moreover, the parties executed and filed a Stipulation and Order to Continue the Hearing Dates on the Reconsideration Motions specifically to July 16, 2019. ("Stipulation and Order"). Pursuant to that Stipulation and Order, all parties, including the Association, and the Court specifically agreed to hear the Reconsideration Motions on July 16, 2019.

The Court properly kept the Reconsideration Motions on calendar for July 16, 2019, at which time the parties appeared and presented their arguments regarding both Reconsideration Motions.

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

The Court denied the Association's First Motion for Reconsideration. The Builders submitted a proposed Order denying the Association's First Motion for Reconsideration to the Association's counsel the same day, on July 16, 2019, but no response has yet been received. The Order simply states that the Court denied the Association's First Motion for Reconsideration, without any additional language to consider. If the Association's counsel do not sign and return the proposed Order as of the date this Opposition is filed, the Builders will submit the proposed Order to the Court for its review and execution, noting that the Association has not agreed to sign the Order as drafted.

Whereas the Association first requested in its Reply to move the *hearing* on the Reconsideration Motions until October 1, 2019, during the July 16, 2019 hearing on the Second Motion for Reconsideration, the Association orally moved the Court to postpone its *ruling* on the Second Motion for Reconsideration to October 1, 2019 (the "oral motion"). The basis for the oral motion was an undocumented uncertainty as to why the Legislature did not include an effective date in the language of AB 421, which was not included in the Association's briefs. Only after the Court and the Association's counsel discussed the issue during the July 16, 2019 hearing (a discussion which included what appeared to be reference by the Association's counsel to hearsay communications of non-specific nature with unidentified outside sources) did the Association seek a continuance of the ruling on the Second Motion for Reconsideration.

The Court's failure to affirmatively grant the oral motion during the hearing functions as a denial of the oral motion unless the request is renewed in a proper, *written*, motion with notice, which the Association has not done. *See* NRCP 7. The Builders assume that this Court understands this and does not intend further to entertain any request for postponement without a properly noticed written motion. Nonetheless, the Builders submit this Opposition to the unrenewed oral motion in an abundance of caution. The submission of this Opposition is *not* an admission that the oral request remains properly pending (it is not), nor does it entitle the Association to a written reply on their oral motion.

The alleged lack of understanding of legislative intent on a given subject is not grounds to defer ruling on an issue beyond allowable limits, especially when there is a perfectly solid basis for

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

the Nevada Legislature's decision, and the Association has certainly not provided any grounds to suggest otherwise. EDCR 1.90(a)(4) requires the Court to issue its ruling within at most 30 days. However, given the fact that this Court has already been briefed on the statute of repose issue, there is nothing so complex regarding the Second Motion for Reconsideration that would warrant departure from the shorter 20-day limit on issuing decisions provided in EDCR 1.90(a)(4).

The Association's repeated requests to defer the Court's decisions on the Reconsideration Motions to October 1, 2019 are admissions that indeed AB 421 does not become effective until October 1, 2019. Therefore, the Association's argument during the July 16, 2019 hearing that the "enactment date" (whatever date the Association claims that to be) somehow trumps the actual "effective date" of October 1, 2019 carries no weight. Irrespective of the Association's attempt to subvert the Nevada Legislature's decision not to include an effective date in AB 421 and instead defer to the binding statute on the topic (NRS 218D.330(1)), the Court made it clear during the July 16, 2019 hearing that it understood the effective date of AB 421 to be October 1, 2019.

The Court has taken the Second Motion for Reconsideration under advisement. In the meantime, the Builders, after repeated objections by the Association that the *Builders* should not be allowed to move the Court orally, are filing a Motion to Certify the Court's May 23, 2019 Order under Rule 54(b). Irrespective of whether the Court agrees that the Court's May 23, 2019 Order is final pursuant to NRCP 54(b), there is no reason that the Court cannot render its decision on the Second Motion for Reconsideration. A deferral of the Court's decision until October 1, 2019 will only prejudice the Builders further from achieving finality on the issue of the Association's already time-barred claims. At 12:01 a.m. October 27, 2016, the Association's claims became time-barred. Therefore, even if the Court were to defer its decision until October 1, 2019, the Association's claims would still be time-barred.

The Court must deny the Association's improperly noticed and legally deficient Request to postpone the Court's ruling on the Second Motion for Reconsideration until October 1, 2019.

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

II. ARGUMENT

A. IT IS LEGALLY IMPROPER TO POSTPONE THE COURT'S RULING ON THE SECOND MOTION FOR RECONSIDERATION UNTIL OCTOBER 1, 2019

i. The Association has Failed to Provide Any Legal Basis to Support a Postponement of the Court's Decision on the Second Motion for Reconsideration

During the July 16, 2019 hearing on the Second Motion for Reconsideration, the Association orally moved the Court to delay *ruling* on that Motion. The Association and the Court discussed the the Nevada Legislature's decision not to provide an enactment date in AB 421 itself, leaving it subject to the October 1 effective date provided in NRS 218D.330(1). It was apparent that neither the Court nor counsel for the Association knew why such a date was left out of the Bill. Rather, the Association's counsel merely speculated that the Nevada Legislature overlooked it. There were references by the Association's counsel to what appeared to be hearsay conversations with unidentified persons. Despite having no real knowledge about why AB 421 did not explicitly provide an enactment date (and even then, the "why" is irrelevant and cannot overcome the fact that AB 421 does not have an express enactment date thereby defaulting to the express language of NRS 218D.330(1)), the Association orally and without legal basis moved the Court to defer its ruling on the Second Motion for Reconsideration until October 1, 2019. It is obvious that the only basis upon which the Association makes this Request is the groundless proposition that the Nevada Legislature made an error of judgment and that the Court should take it upon itself to correct that error and rewrite AB 421 from the bench. The Association failed to provide *any legal* basis for its impromptu request to continue the Court's ruling on the Second Motion for Reconsideration. The Court should disregard the Association's oral motion because it "need not consider arguments not supported by relevant authority." *Franchise Tax Bd. v. Hyatt*, 130 Nev., Adv. Op. 71, 335 P.3d 125, 140 n.8 (2014).

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

The 2019 Nevada Legislative Manual provides guidance and clarity on the legislative process and provides very precise rules governing the effective dates of assembly bills when those bills are silent as to same. (See **Exhibit "A"**, Excerpt of 2019 Nevada Legislative Manual, Pg. 23). The Legislative Manual states:

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

The fact that the Legislative Manual explicitly envisions situations where bills lack a specific effective date shows that the omission of an effective date in the text of AB 421 is not, as the Association would have the Court believe, mere oversight, but rather a natural occurrence decision guided by the auspice of one of its governing documents and well within the scope of the Nevada Legislature's discretion. Furthermore, the Nevada Revised Statutes clarify that in the event a bill lacks an effective date, October 1 of the year in which the bill is passed is the effective date. *See* NRS 218D.330(1). That statute provides:

> **"**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." *Id.*

The Association's speculative suggestion that the Nevada Legislature simply "dropped the ball" by omitting the effective date on AB 421 is groundless, speculative and would only undermine and render meaningless both the Legislative Manual and NRS 218D.330. Such a result would run contrary to established law, an impermissible result to reach. *See Diamond v. Swick,* 117 Nev. 671, 677, 28 P.3d 1087, 1090 (2001) (stating that the court's business "does not include filling in alleged legislative omissions based on conjecture as to what the legislature would or should have done."); *See also, Westpark Owners' Ass'n v. Eighth Judicial Dist. Ct. Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 426-27 (2007) (holding that "[w]hen the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning). Improper interpretation of a statute results in reversal or a vacated

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

judgment. *See, e.g., Whittier Trust Co. v. Getty*, 124 Nev. 170, 181, 179 P.3d 562, 568-70 (2008); *Tam v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Rep. 80, 358 P.3d 234, 242 (2015).

Here, there is absolutely no basis to presume that the Nevada Legislature acted in error by omitting the effective date from AB 421. "It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *City of Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985). One of those statutes is NRS 218D.330, which specifically allows the Nevada Legislature to omit an effective date on such a document. It would be legally improper for this Court to even entertain deferral of its decision on the Second Motion for Reconsideration until October 1, 2019 when the only foundation to support such a request is based upon nothing more than the Association's guess, derived after an extemporaneous conversation in Court when faced with a question to which the Association did not know the answer. Even if the Association represented that it knew definitively why no enactment date was included in AB 421, which the Association does not, any such passion would have been based on hearsay information of which the Builders were not apprised of before the hearing and had no opportunity to address during the hearing.

ii. <u>The Court is Legally Required to Render a Timely Decision on a Matter Under Submission</u>

After a motion has been briefed, argued, and submitted, asking the Court to purposely withhold a *decision* on the submitted motion is an extraordinary request. And in this case, it is indefensible.

The Nevada Rules of Civil Procedure "secure the just, speedy, and inexpensive determination of every action and proceeding." NRCP 1. Similarly, the Rules of Practice for the Eighth Judicial District Court "secure the proper and efficient administration of the business and affairs of the court," and further "promote and facilitate the administration of justice." EDCR 1.10. The Builders are legally entitled to, and the Court is bound to render, a timely decision on the Second Motion for Reconsideration. It is the expectation of Nevada Courts to rule on pending motions in a timely manner. *See Burdsal v. Sixth Judicial Dist Court*, 2015 WL 4512396. A district court's silence or

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

refusal to rule is construed as a denial of the relief sought. *Sicor, Inc. v. Sacks*, 127 Nev. 896, 900, 266 P.3d 618, 620 (2011). However, a district court may defer a final ruling if the action comports with reason and public policy. *See id.* at 903, 26 P.3d at 622. Here, there is absolutely no reason for the Court to defer its decision on the Second Motion for Reconsideration.

EDCR 1.90(a)(4) proscribes a time limit for a district court to render a decision on a given matter:

> "Unless the case is extraordinarily complex, a judge or other judicial officer shall issue a decision in all matters submitted for decision to him or her not later than 20 days after said submission. In extraordinarily complex cases, a decision must be rendered not later than 30 days after said submission."

Given the fact that this Court has already been fully briefed on the timeliness of the Association's claims under the currently-in-effect 6-year statute of repose in numerous briefings, and since it already issued a thoughtful 16-page Order on the application of the controlling law to the facts of the case, there is nothing complex in this matter to justify issuing a ruling beyond, at-most, the 20-day limit. *See e.g., Becerra v. United States DOI,* 276 F. Supp. 3d 953, 958 (2017) (noting denial of continuance of a motion hearing to not only be contrary to the local rule, but also inefficient because "the court had already fully prepared for the long-scheduled hearing on summary judgment").

Based on the foregoing, there is no legal basis for the Court to render a decision on the Second Motion for Reconsideration beyond the allowable limits proscribed in EDCR 1.90(a)(4).

B. THE ASSOCIATION'S REQUEST FOR POSTPONEMENT OF THE COURT'S RULING ON THE SECOND MOTION FOR RECONSIDERATION IS DILATORY AND IN BAD FAITH, AND THEREFORE, THE COURT MUST DENY THE REQUEST

"When it appears to the court that a written notice of motion has been given, the court may not, unless the other business of the court requires such action, continue the matter specified in the notice except as provided in this rule or upon a showing by motion supported by affidavit or oral testimony that such continuance is in good faith, reasonably necessary and is not sought merely for delay." EDCR 2.22(d). Without any legal justification, it is readily apparent that the Association is purposefully employing dilatory tactics to get the Court to delay rendering its decision until after

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

October 1, 2019. The Association has repeatedly requested through improper requests to delay the Court's ruling. The Association's efforts cannot be disguised as anything but a desperate "finger nails clinging on the ledge" attempt to keep its claims alive for as long as possible, all without the slightest regard to the ongoing prejudice to the Builders. This is contrary to law and in direct conflict with EDCR 2.22(d). That rule does not permit the Court to continue matters except upon execution of proper noticing. By requesting hearing continuances in reply briefs and during oral hearings, the Association has not given the Court a basis to even amuse those requests. *See* EDCR 2.22(d). Moreover, it is very apparent that the Association has failed to show good faith or reasonable necessity for a continuance of the ruling. The only thing the Association stands to gain through postponement of the Court's ruling is the hope that somehow the Court's ruling will change by virtue of the fact that the AB 421'as effective date of October 1, 2019 is approaching.

Courts are reluctant to side with parties that exhibit dilatory and perfidious conduct. *(See e.g., Becerra v. United States DOI*, 276 F. Supp. 3d 953, 958 (2017) (an example where the court ultimately sided against the party that repeatedly used procedural tactics to delay the decision on plaintiff's summary judgment motion until after a new rule went into effect, to the point of violating local rules). Here, we have a situation where the Association is manufacturing delay solely to gain an advantage in the proceedings. This is highly improper and cannot be given credence, especially given that there is literally no cited legal basis for the Association's improper request.

C. POSTPONEMENT OF THE COURT'S RULING ON THE SECOND MOTION FOR RECONSIDERATION WILL SERVE NO PURPOSE, EXCEPT TO PREJUDICE THE BUILDERS

After the hearing on July 16, 2019, it is clear that the parties and the Court are in agreement that the effective date of AB 421 is indeed October 1, 2019. So, although AB 421 § 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[ring] 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

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Suite 250
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(702) 258-6665

application as the statute expressly provides. Interpreting the statute in that way would render it ambiguous because only then could it conceivably apply inconsistently to varying homeowners depending upon when improvements to their property were made.

Irrespective of when the Court renders its decision, at this point the Association's claims are already time-barred based on the controlling 6-year statute of repose. *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 Governor Sisolak 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.

A deferral of the Court's decision until October 1, 2019 will only serve to further prejudice the Builders from achieving finality on issue of the Association's already time-barred claims. The Builders have already incurred considerable fees and costs having to defend against the Association's tenuous claims. Further delay will only undermine the Builders' victory on the statute of repose issue, preclude repose to the Builders after over 10 years litigating the two Towers and result in even more expense aimed at achieving rightful finality to the matter. At 12:01 a.m. October 27, 2016, 30 days after the Ch 40 mediation was conducted, the Association's claims became time-barred. Even if the Court were to defer its decision until October 1, 2019, the Association's claims would still be time-barred. Given the clear prejudice to the Builders and the lack of any benefit to the Association

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

in postponing the Court' ruling on the Second Motion for Reconsideration, the Court should deny the Association's Request.

III. CONCLUSION

The Association's request to postpone the Court's ruling on the Second Motion for Reconsideration should be denied. The Association has failed to furnish any legal basis for its improper request. The Court is required to render decisions timely and without unnecessary delay. The Association's request is just another dilatory tactic to delay the Court's decision until AB 421 becomes effective and, on that basis alone, the Court should deny the Association's request. Even if the Court is encouraged to defer the ruling, it will serve no purpose beyond further prejudicing the Builders.

DATED: July 19, 2019.

BREMER WHYTE BROWN & O'MEARA, LLP

By:_____

PETER C. BROWN, ESQ.
NEVADA STATE BAR NO. 5887
JEFFREY W. SAAB, ESQ.
NEVADA STATE BAR NO. 11261
DEVIN R. GIFFORD, ESQ.
NEVADA STATE BAR NO. 14055
CYRUS S. WHITTAKER, ESQ.
NEVADA STATE BAR. NO. 14965

LEWIS ROCA ROTHGERBER CHRISTIE LLP

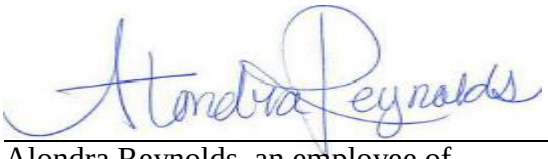
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 HOWARD HUGHES PARKWAY, SUITE 600
LAS VEGAS, NEVADA 89169
(702) 949-8200

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 19th 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.



Alondra Reynolds, an employee of
Bremer, Whyte, Brown & O'Meara LLP

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

MOT

PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive, Suite 250
Las Vegas, Nevada 89144
Tel: (702) 258-6665
Fax: (702) 258-6662
PBrown@BremerWhyte.com
JSaab@BremerWhyte.com
DGifford@BremerWhyte.com
CWhittaker@BremerWhyte.com

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.com

Attorneys for Plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc.

HEARING REQUIRED
DATE: August 6, 2019
TIME: 8:30 a.m.

File with Master Calendar

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.

And related counterclaims.

Case No. A-16-744146-D

Dept. No. 22

MOTION TO CERTIFY JUDGMENT AS FINAL UNDER RULE 54(b)
(on Order Shortening Time)

Hearing Requested

Hearing Date:
Hearing Time:

Plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc. ("builders") ask this Court to certify as final its order dated May 23, 2019 granting the builders' motion for summary judgment pursuant to NRS 1.202(1) and dismissing defendant Panorama Towers Condominium Unit Owners' Association's counterclaims as untimely. *See* NRCP 54(b). Builders ask that this simple request be heard on shortened time.

Dated this 19th day of July, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

STATE OF NEVADA)
) *ss.*
COUNTY OF CLARK)

ABRAHAM G. SMITH, being duly sworn, deposes and says,

1. I am a Nevada attorney representing plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc. ("builders") in this action. I make this affidavit in support of the foregoing application to hear builders' "Motion to Certify Judgment as Final under Rule 54(b)" on shortened time.

2. Good cause exists under EDCR 2.26 for shortening the time. The order granting summary judgment was entered nearly two months ago, on May

23, 2019, and has already survived one attempt by defendant Panorama Towers Condominium Unit Owners' Association (the "association") to have this Court reconsider it, with a second attempt under advisement. Builders see no argument for applying a not-yet-effective statute to a claim previously adjudicated under the six-year statute of repose in NRS 11.202(1), which was controlling at the time of decision and remains the law today. But regardless of the proceedings on reconsideration, the question of whether there is "no just cause for delay" for Rule 54(b) certification should not, itself, be delayed.

3. Were it not that the association has orally indicated its intent to oppose this request for Rule 54(b) certification, this formal motion might not even be necessary. Although the association is entitled to an opportunity to respond, the straightforward issue of certification should be addressed expeditiously so that the Supreme Court can begin its review.

4. The motion does not require this Court to rule on any substantive issues, just the determination of "no just reason for delay" in certifying the judgment as final under Rule 54(b).

5. This motion and affidavit are made in good faith and not for the purpose of harassment or delay.

Dated this 19th day of July, 2019.

ABRAHAM G. SMITH

Subscribed and sworn to before me
this 19th day of July, 2019.

NOTARY PUBLIC

JESSICA M. HELM
Notary Public State of Nevada
No: 08-8522-1
My appt. exp. November 5, 2020

ORDER SHORTENING TIME

ORDERED that builders' "Motion to Certify Judgment as Final under Rule 54(b)" will be heard on August 6, 2019, at 8:30 a.m., in Department 22 of the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155.

Dated this 19th day of July 2019.

Jessica K. Johnson
DISTRICT COURT JUDGE

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE, LLP

By: _____
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Attorneys for Plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc.

POINTS AND AUTHORITIES

A. Rule 54(b) Allows the District Court to Certify as Final a Judgment as to Fewer than All of the Claims

1. Rule 54(b)

As recently amended, NRCP 54(b) allows the Court to certify an adjudication of fewer than all of the claims as a final judgment for appeal:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay . . . .

The determination that "there is no just reason for delay" and a direction for the

entry of judgment makes the dismissal of the claim or counterclaim on summary judgment immediately appealable. *State ex rel. List v. AAA Auto Leasing & Rental, Inc.*, 93 Nev. 483, 485, 568 P.2d 1230, 1231 (1977).[1]

2. The Court Enjoys Wide Discretion in Determining that there Is No Just Reason for Delay

While the requirement that the judgment finally resolve at least one claim is not discretionary, the determination that "there is no just reason for delay" is. True enough, some circuits have devised multifactor tests for district courts to consider, *see, e.g.*, *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013), but "the absence of detailed criteria to guide the trial judges' exercise of discretion reflects a conscious decision by the Supreme Court not to restrict the operation of the rule within too narrow a framework." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2659 (4th ed.) (describing *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980)).

Because the linchpin of Rule 54(b) is "sound judicial administration," *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7–10 (1980), the kinds of concerns that motivate a district court to withhold certification usually involve the interrelationship between the resolved and the unresolved claims, such as the likelihood that resolution of the remaining claims might moot the appeal on the resolved claims or (conversely) that the appellate court will have to hear the same issue twice. *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013). Although it is not necessary that "the claims be separate and independent," "some independence between the adjudicated and unadjudicated matters is desirable." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2659 & n.19 (4th ed.) (citing *Cold Metal Process Co. v. United Eng'g &*

[1] At the time, Rule 54(b) included the language that a judgment as to "fewer than all of the claims" may be certified as final. That language has been restored with the 2019 amendments to NRCP 54(b).

Foundry Co., 351 U.S. 445 (1956)).

The court should also be particularly sensitive to the "prejudice to winning defendants in delaying when they could be certain they were absolved of liability." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2659 & n.39 (4th ed.).

3. Summary Judgment on a Claim's or Counterclaim's Untimeliness under the Construction-Defect Statute of Repose Is Suitable for Certification

Applying these principles, district courts regularly certify (and appellate courts accept certification of) orders granting summary judgment against or dismissing a plaintiff's claims as untimely. *E.g.*, *Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 829 F. Supp. 561, 564–65 (E.D.N.Y. 1993); *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1139–40 (D. Kan. 2013), *aff'd in relevant part*, 778 F.3d 1147 (10th Cir. 2015) (accepting appellate jurisdiction but reversing on the merits).[2] That is because "the statute of limitations determination is a legal issue that is entitled to prompt appellate review." *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1139–40 (D. Kan. 2013) (inviting court of appeals to review whether dismissal of fiduciary-duty claims on statute-of-limitations grounds was proper). The application of the statute eliminates the claims entirely.

Under the same principles, the Nevada Supreme Court has accepted appeals under NRCP 54(b) from orders granting summary judgment under "NRS Chapter 11's statutes of repose for construction defect claims." *E.g.*, *Dykema v.*

---

[2] *See also Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567, 571–72 (Colo. App. 2003) (even dismissal "without prejudice" could be certified under Colorado's equivalent rule because "further action by the plaintiff would be barred by the statute of limitations"); *Lockett v. Gen. Fin. Loan Co. of Downtown*, 623 F.2d 1128, 1129–30 (5th Cir. 1980) (same).

Del Webb Communities, Inc., 132 Nev., Adv. Op. 82, 385 P.3d 977, 978 (2016); *Lotter v. Clark County*, 106 Nev. 366, 368, 793 P.2d 1320, 1321 (1990). The statutes' application to time-bar construction-defect claims are pure "[q]uestions of statutory interpretation," *see Dykema*, 132 Nev., Adv. Op. 82, 385 P.3d at 979 (citing *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 426–27 (2007)), and so appropriate for Rule 54(b) certification.

B. There Is No Just Reason to Delay Entry of a Final Judgment Dismissing the Associations' Counterclaims as Untimely

Certification is appropriate here. There is no question on finality: the Court's May 23 order grants summary judgment on the association's counterclaims in their entirety. The court specifically confirmed this in its order: the counterclaims arise from construction defect, and those claims are time-barred under the statute of repose in NRS 11.202. (May 23, 2019 Order Granting Summary Judgment, at 3, ¶ 1, and 15:19–25.) And there is no just reason to delay the entry of that final judgment.

1. The Association's Counterclaims Are Different from the Builders' Claims

The association has tried to argue that its counterclaims are one and the same with the builders' claims, but this Court has repeatedly rejected that:

> Here, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposed its counter-claims are compulsory as they arise out of the same transaction or occurrence that is the subject matter of the Builders' claims. This Court disagrees. The Builders' claims are for breach of the prior settlement agreement and declaratory relief regarding the sufficiency of the NRS 40.645 notice and application of AB 125. The Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its windows in the two towers. If this Court ruled against the Builders on their Complaint, the Association would not have lost their claims if they had not pled them as counter-claims in the instant lawsuit.

(May 23, 2019 Order Granting Summary Judgement, at 13–14, ¶ 17.) In fact, it is the very separateness of the two sides' claims that renders the association's counterclaims untimely:

> In this Court's view, the Association had two options: it could make a counter-claim which is permissive or assert its constructional defect claims in a separate Complaint. Here, it elected to make the permissive counter-claim. The counter-claim does not relate back to the filing of the Complaint, September 28, 2016.

(*Id.*) The association recognized this, focusing on this paragraph of the Court's order in its initial motion for reconsideration, seeking to change the Court's mind about the separateness of the claims. (June 3, 2019 Mot. for Recon., at 6–9.) The association failed to persuade this Court that reconsideration was warranted on this basis.

Their construction-defect counterclaims—and in particular, the narrow statute-of-repose issue on which those counterclaims were resolved—are separate from the builders' pending contract and declaratory-relief claims. The association's rejected argument that they are similar is not a proper basis for denying Rule 54(b) certification.

2. Certifying the Question Would Conserve, Not Waste, Judicial Resources

In addition, certifying the judgment dismissing the association's construction-defect counterclaims is the efficient course. If the district court's ruling is correct, it greatly reduces the complexity of this case by eliminating all claims arising from construction defect.

3. Delay Would Unjustly Prejudice Builders

Perhaps more important, builders need certainty in the victory that absolves them entirely from liability.

Recall that the order granting summary judgment already meets the finality requirements of Rule 54(b); the only question is whether to certify it for

appeal. Delaying certification of the judgment's finality would be particularly prejudicial here, where the association is attempting to keep a judgment from becoming final for the sole purpose of taking advantage of a not-yet-effective change in the law. Although builders have explained at length why those changes will never apply to this case and could not constitutionally apply, even if the Legislature had so intended, postponing the certification of a final judgment only to embroil builders and the Court in these questions is an absurd and prejudicial result. This Court would not delay the entry of a judgment on a jury verdict merely because the losing side believes some as-yet-ineffective statute would give them a better result than the law that governed the parties' expectations throughout the trial. If the losing side is correct about the law, entry of a judgment does not deprive that party of its post-judgment remedies. So, too, here: The association's arguments are appropriately handled in the proper procedural channels after the judgment. The association's belief that it could undo the judgment against it by manufacturing delay is not a reason to withhold certification; it is the reason to certify.[3]

CONCLUSION

The rules of civil and appellate procedure recognize the law's fluidity. They nonetheless counsel courts to entry judgment promptly, not to delay entry for changes in the law to take effect. Here, the Court's order dismissing the association's counterclaims is a final judgment ripe for certification. Particularly in light of the prejudice that delay would cause, certification should not be postponed for matters that are properly resolved after the judgment. This Court

[3] For the same reasons and those in the attached opposition (incorporated here), it would be inappropriate to entertain the association's last-ditch effort to have this Court hold off ruling on the second motion for reconsideration. (*See* Ex. 1, Opp. to Oral Mot. to Postpone Ruling.)

should grant the motion.

Dated this 19th day of July, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

BREMER WHYTE BROWN & O'MEARA LLP
PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
1160 N. Town Center Drive,
Suite 250
Las Vegas, Nevada 89144

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on July 19, 2019, I served the foregoing "Motion to Certify Judgment as Final under Rule 54(b)" through the Court's electronic filing system:

Francis I. Lynch
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive
Suite 110 #293
Henderson, Nevada 89074

William L. Coulthard
Michael J. Gayan
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169

Scott Williams
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901

Attorneys for Defendant/Cross-Claimant Panorama Towers Condominium Unit Owners' Association

/s/Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

EXHIBIT 1

EXHIBIT 1

PETER C. BROWN, ESQ.
Nevada State Bar No. 5887
JEFFREY W. SAAB, ESQ.
Nevada State Bar No. 11261
DEVIN R. GIFFORD, ESQ.
Nevada State Bar No. 14055
CYRUS S. WHITTAKER, ESQ.
Nevada State Bar No. 14965
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pbrown@bremerwhyte.com
jsaab@bremerwhyte.com
dgifford@bremerwhyte.com
cwhittaker@bremerwhyte.com

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 HOWARD HUGHES PARKWAY, SUITE 600
LAS VEGAS, NEVADA 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.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.	) 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**

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

Defendant.

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

Counter-Claimant,

vs.

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

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

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 POSTPONE THE COURT'S RULING ON THE MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT 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 Cyrus S. Whittaker, Esq. of the law firm of Bremer Whyte Brown & O'Meara, LLP and Daniel F. Polsenberg, Esq., Joel S.

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

Henriod, Esq. and Abraham G. Smith, Esq. of Lewis Roca Rothgerber Christie LLP, and hereby file their **OPPOSITION TO DEFENDANT/COUNTER-CLAIMANT'S JULY 16, 2019 ORAL MOTION TO POSTPONE THE COURT'S RULING ON THE MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)**

I. INTRODUCTION

On June 3, 2019, Defendant/Counter-Claimant (the "Association") filed a 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 ("First Motion for Reconsideration"). On June 13, 2019, the Association filed a Motion for Reconsideration and/or to Alter or Amend the May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) ("Second Motion for Reconsideration")(collectively "the Reconsideration Motions").

On July 9, 2019, the Association filed its Reply in support of the Second Motion for Reconsideration ("Reply"). For the first time in this Reply the Association requested that the Court continue the hearing on the Association's Motions for Reconsideration until October 1, 2019. The Builders filed an Objection to this belated, unilateral request to continue the hearing because it was unnoticed and improperly sought for the first time in the Reply. *See Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984); *Khoury v. Seastrand*, 132 Nev., Adv. Op. 52, 377 P.3d 81, 88 n.2 (2016). Moreover, the parties executed and filed a Stipulation and Order to Continue the Hearing Dates on the Reconsideration Motions specifically to July 16, 2019. ("Stipulation and Order"). Pursuant to that Stipulation and Order, all parties, including the Association, and the Court specifically agreed to hear the Reconsideration Motions on July 16, 2019.

The Court properly kept the Reconsideration Motions on calendar for July 16, 2019, at which time the parties appeared and presented their arguments regarding both Reconsideration Motions.

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

The Court denied the Association's First Motion for Reconsideration. The Builders submitted a proposed Order denying the Association's First Motion for Reconsideration to the Association's counsel the same day, on July 16, 2019, but no response has yet been received. The Order simply states that the Court denied the Association's First Motion for Reconsideration, without any additional language to consider. If the Association's counsel do not sign and return the proposed Order as of the date this Opposition is filed, the Builders will submit the proposed Order to the Court for its review and execution, noting that the Association has not agreed to sign the Order as drafted.

Whereas the Association first requested in its Reply to move the *hearing* on the Reconsideration Motions until October 1, 2019, during the July 16, 2019 hearing on the Second Motion for Reconsideration, the Association orally moved the Court to postpone its *ruling* on the Second Motion for Reconsideration to October 1, 2019 (the "oral motion"). The basis for the oral motion was an undocumented uncertainty as to why the Legislature did not include an effective date in the language of AB 421, which was not included in the Association's briefs. Only after the Court and the Association's counsel discussed the issue during the July 16, 2019 hearing (a discussion which included what appeared to be reference by the Association's counsel to hearsay communications of non-specific nature with unidentified outside sources) did the Association seek a continuance of the ruling on the Second Motion for Reconsideration.

The Court's failure to affirmatively grant the oral motion during the hearing functions as a denial of the oral motion unless the request is renewed in a proper, *written*, motion with notice, which the Association has not done. *See* NRCP 7. The Builders assume that this Court understands this and does not intend further to entertain any request for postponement without a properly noticed written motion. Nonetheless, the Builders submit this Opposition to the unrenewed oral motion in an abundance of caution. The submission of this Opposition is *not* an admission that the oral request remains properly pending (it is not), nor does it entitle the Association to a written reply on their oral motion.

The alleged lack of understanding of legislative intent on a given subject is not grounds to defer ruling on an issue beyond allowable limits, especially when there is a perfectly solid basis for

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

the Nevada Legislature's decision, and the Association has certainly not provided any grounds to suggest otherwise. EDCR 1.90(a)(4) requires the Court to issue its ruling within at most 30 days. However, given the fact that this Court has already been briefed on the statute of repose issue, there is nothing so complex regarding the Second Motion for Reconsideration that would warrant departure from the shorter 20-day limit on issuing decisions provided in EDCR 1.90(a)(4).

The Association's repeated requests to defer the Court's decisions on the Reconsideration Motions to October 1, 2019 are admissions that indeed AB 421 does not become effective until October 1, 2019. Therefore, the Association's argument during the July 16, 2019 hearing that the "enactment date" (whatever date the Association claims that to be) somehow trumps the actual "effective date" of October 1, 2019 carries no weight. Irrespective of the Association's attempt to subvert the Nevada Legislature's decision not to include an effective date in AB 421 and instead defer to the binding statute on the topic (NRS 218D.330(1)), the Court made it clear during the July 16, 2019 hearing that it understood the effective date of AB 421 to be October 1, 2019.

The Court has taken the Second Motion for Reconsideration under advisement. In the meantime, the Builders, after repeated objections by the Association that the *Builders* should not be allowed to move the Court orally, are filing a Motion to Certify the Court's May 23, 2019 Order under Rule 54(b). Irrespective of whether the Court agrees that the Court's May 23, 2019 Order is final pursuant to NRCP 54(b), there is no reason that the Court cannot render its decision on the Second Motion for Reconsideration. A deferral of the Court's decision until October 1, 2019 will only prejudice the Builders further from achieving finality on the issue of the Association's already time-barred claims. At 12:01 a.m. October 27, 2016, the Association's claims became time-barred. Therefore, even if the Court were to defer its decision until October 1, 2019, the Association's claims would still be time-barred.

The Court must deny the Association's improperly noticed and legally deficient Request to postpone the Court's ruling on the Second Motion for Reconsideration until October 1, 2019.

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

II. ARGUMENT

A. IT IS LEGALLY IMPROPER TO POSTPONE THE COURT'S RULING ON THE SECOND MOTION FOR RECONSIDERATION UNTIL OCTOBER 1, 2019

i. The Association has Failed to Provide Any Legal Basis to Support a Postponement of the Court's Decision on the Second Motion for Reconsideration

During the July 16, 2019 hearing on the Second Motion for Reconsideration, the Association orally moved the Court to delay *ruling* on that Motion. The Association and the Court discussed the the Nevada Legislature's decision not to provide an enactment date in AB 421 itself, leaving it subject to the October 1 effective date provided in NRS 218D.330(1). It was apparent that neither the Court nor counsel for the Association knew why such a date was left out of the Bill. Rather, the Association's counsel merely speculated that the Nevada Legislature overlooked it. There were references by the Association's counsel to what appeared to be hearsay conversations with unidentified persons. Despite having no real knowledge about why AB 421 did not explicitly provide an enactment date (and even then, the "why" is irrelevant and cannot overcome the fact that AB 421 does not have an express enactment date thereby defaulting to the express language of NRS 218D.330(1)), the Association orally and without legal basis moved the Court to defer its ruling on the Second Motion for Reconsideration until October 1, 2019. It is obvious that the only basis upon which the Association makes this Request is the groundless proposition that the Nevada Legislature made an error of judgment and that the Court should take it upon itself to correct that error and rewrite AB 421 from the bench. The Association failed to provide *any legal* basis for its impromptu request to continue the Court's ruling on the Second Motion for Reconsideration. The Court should disregard the Association's oral motion because it "need not consider arguments not supported by relevant authority." *Franchise Tax Bd. v. Hyatt*, 130 Nev., Adv. Op. 71, 335 P.3d 125, 140 n.8 (2014).

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

The 2019 Nevada Legislative Manual provides guidance and clarity on the legislative process and provides very precise rules governing the effective dates of assembly bills when those bills are silent as to same. (See **Exhibit "A"**, Excerpt of 2019 Nevada Legislative Manual, Pg. 23). The Legislative Manual states:

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

The fact that the Legislative Manual explicitly envisions situations where bills lack a specific effective date shows that the omission of an effective date in the text of AB 421 is not, as the Association would have the Court believe, mere oversight, but rather a natural occurrence decision guided by the auspice of one of its governing documents and well within the scope of the Nevada Legislature's discretion. Furthermore, the Nevada Revised Statutes clarify that in the event a bill lacks an effective date, October 1 of the year in which the bill is passed is the effective date. *See* NRS 218D.330(1). That statute provides:

> "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." *Id.*

The Association's speculative suggestion that the Nevada Legislature simply "dropped the ball" by omitting the effective date on AB 421 is groundless, speculative and would only undermine and render meaningless both the Legislative Manual and NRS 218D.330. Such a result would run contrary to established law, an impermissible result to reach. *See Diamond v. Swick,* 117 Nev. 671, 677, 28 P.3d 1087, 1090 (2001) (stating that the court's business "does not include filling in alleged legislative omissions based on conjecture as to what the legislature would or should have done."); *See also, Westpark Owners' Ass'n v. Eighth Judicial Dist. Ct. Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 426-27 (2007) (holding that "[w]hen the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning). Improper interpretation of a statute results in reversal or a vacated

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

judgment. *See, e.g., Whittier Trust Co. v. Getty*, 124 Nev. 170, 181, 179 P.3d 562, 568-70 (2008); *Tam v. Eighth Judicial Dist. Court*, 131 Nev., Adv. Rep. 80, 358 P.3d 234, 242 (2015).

Here, there is absolutely no basis to presume that the Nevada Legislature acted in error by omitting the effective date from AB 421. "It is presumed that in enacting a statute the legislature acts with full knowledge of existing statutes relating to the same subject." *City of Boulder City v. Gen. Sales Drivers*, 101 Nev. 117, 118–19, 694 P.2d 498, 500 (1985). One of those statutes is NRS 218D.330, which specifically allows the Nevada Legislature to omit an effective date on such a document. It would be legally improper for this Court to even entertain deferral of its decision on the Second Motion for Reconsideration until October 1, 2019 when the only foundation to support such a request is based upon nothing more than the Association's guess, derived after an extemporaneous conversation in Court when faced with a question to which the Association did not know the answer. Even if the Association represented that it knew definitively why no enactment date was included in AB 421, which the Association does not, any such passion would have been based on hearsay information of which the Builders were not apprised of before the hearing and had no opportunity to address during the hearing.

ii. <u>The Court is Legally Required to Render a Timely Decision on a Matter Under Submission</u>

After a motion has been briefed, argued, and submitted, asking the Court to purposely withhold a *decision* on the submitted motion is an extraordinary request. And in this case, it is indefensible.

The Nevada Rules of Civil Procedure "secure the just, speedy, and inexpensive determination of every action and proceeding." NRCP 1. Similarly, the Rules of Practice for the Eighth Judicial District Court "secure the proper and efficient administration of the business and affairs of the court," and further "promote and facilitate the administration of justice." EDCR 1.10. The Builders are legally entitled to, and the Court is bound to render, a timely decision on the Second Motion for Reconsideration. It is the expectation of Nevada Courts to rule on pending motions in a timely manner. *See Burdsal v. Sixth Judicial Dist Court*, 2015 WL 4512396. A district court's silence or

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

refusal to rule is construed as a denial of the relief sought. *Sicor, Inc. v. Sacks*, 127 Nev. 896, 900, 266 P.3d 618, 620 (2011). However, a district court may defer a final ruling if the action comports with reason and public policy. *See id.* at 903, 26 P.3d at 622. Here, there is absolutely no reason for the Court to defer its decision on the Second Motion for Reconsideration.

EDCR 1.90(a)(4) proscribes a time limit for a district court to render a decision on a given matter:

> "Unless the case is extraordinarily complex, a judge or other judicial officer shall issue a decision in all matters submitted for decision to him or her not later than 20 days after said submission. In extraordinarily complex cases, a decision must be rendered not later than 30 days after said submission."

Given the fact that this Court has already been fully briefed on the timeliness of the Association's claims under the currently-in-effect 6-year statute of repose in numerous briefings, and since it already issued a thoughtful 16-page Order on the application of the controlling law to the facts of the case, there is nothing complex in this matter to justify issuing a ruling beyond, at-most, the 20-day limit. *See e.g., Becerra v. United States DOI,* 276 F. Supp. 3d 953, 958 (2017) (noting denial of continuance of a motion hearing to not only be contrary to the local rule, but also inefficient because "the court had already fully prepared for the long-scheduled hearing on summary judgment").

Based on the foregoing, there is no legal basis for the Court to render a decision on the Second Motion for Reconsideration beyond the allowable limits proscribed in EDCR 1.90(a)(4).

B. THE ASSOCIATION'S REQUEST FOR POSTPONEMENT OF THE COURT'S RULING ON THE SECOND MOTION FOR RECONSIDERATION IS DILATORY AND IN BAD FAITH, AND THEREFORE, THE COURT MUST DENY THE REQUEST

"When it appears to the court that a written notice of motion has been given, the court may not, unless the other business of the court requires such action, continue the matter specified in the notice except as provided in this rule or upon a showing by motion supported by affidavit or oral testimony that such continuance is in good faith, reasonably necessary and is not sought merely for delay." EDCR 2.22(d). Without any legal justification, it is readily apparent that the Association is purposefully employing dilatory tactics to get the Court to delay rendering its decision until after

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Las Vegas, NV 89144
(702) 258-6665

October 1, 2019. The Association has repeatedly requested through improper requests to delay the Court's ruling. The Association's efforts cannot be disguised as anything but a desperate "finger nails clinging on the ledge" attempt to keep its claims alive for as long as possible, all without the slightest regard to the ongoing prejudice to the Builders. This is contrary to law and in direct conflict with EDCR 2.22(d). That rule does not permit the Court to continue matters except upon execution of proper noticing. By requesting hearing continuances in reply briefs and during oral hearings, the Association has not given the Court a basis to even amuse those requests. *See* EDCR 2.22(d). Moreover, it is very apparent that the Association has failed to show good faith or reasonable necessity for a continuance of the ruling. The only thing the Association stands to gain through postponement of the Court's ruling is the hope that somehow the Court's ruling will change by virtue of the fact that the AB 421'as effective date of October 1, 2019 is approaching.

Courts are reluctant to side with parties that exhibit dilatory and perfidious conduct. *(See e.g., Becerra v. United States DOI,* 276 F. Supp. 3d 953, 958 (2017) (an example where the court ultimately sided against the party that repeatedly used procedural tactics to delay the decision on plaintiff's summary judgment motion until after a new rule went into effect, to the point of violating local rules). Here, we have a situation where the Association is manufacturing delay solely to gain an advantage in the proceedings. This is highly improper and cannot be given credence, especially given that there is literally no cited legal basis for the Association's improper request.

C. POSTPONEMENT OF THE COURT'S RULING ON THE SECOND MOTION FOR RECONSIDERATION WILL SERVE NO PURPOSE, EXCEPT TO PREJUDICE THE BUILDERS

After the hearing on July 16, 2019, it is clear that the parties and the Court are in agreement that the effective date of AB 421 is indeed October 1, 2019. So, although AB 421 § 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[ring] 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

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

application as the statute expressly provides. Interpreting the statute in that way would render it ambiguous because only then could it conceivably apply inconsistently to varying homeowners depending upon when improvements to their property were made.

Irrespective of when the Court renders its decision, at this point the Association's claims are already time-barred based on the controlling 6-year statute of repose. *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 Governor Sisolak 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.

A deferral of the Court's decision until October 1, 2019 will only serve to further prejudice the Builders from achieving finality on issue of the Association's already time-barred claims. The Builders have already incurred considerable fees and costs having to defend against the Association's tenuous claims. Further delay will only undermine the Builders' victory on the statute of repose issue, preclude repose to the Builders after over 10 years litigating the two Towers and result in even more expense aimed at achieving rightful finality to the matter. At 12:01 a.m. October 27, 2016, 30 days after the Ch 40 mediation was conducted, the Association's claims became time-barred. Even if the Court were to defer its decision until October 1, 2019, the Association's claims would still be time-barred. Given the clear prejudice to the Builders and the lack of any benefit to the Association

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1160 N. Town Center Drive
Suite 250
Las Vegas, NV 89144
(702) 258-6665

in postponing the Court' ruling on the Second Motion for Reconsideration, the Court should deny the Association's Request.

III. CONCLUSION

The Association's request to postpone the Court's ruling on the Second Motion for Reconsideration should be denied. The Association has failed to furnish any legal basis for its improper request. The Court is required to render decisions timely and without unnecessary delay. The Association's request is just another dilatory tactic to delay the Court's decision until AB 421 becomes effective and, on that basis alone, the Court should deny the Association's request. Even if the Court is encouraged to defer the ruling, it will serve no purpose beyond further prejudicing the Builders.

DATED: July 19, 2019.

BREMER WHYTE BROWN & O'MEARA, LLP

By: _____

PETER C. BROWN, ESQ.
NEVADA STATE BAR NO. 5887
JEFFREY W. SAAB, ESQ.
NEVADA STATE BAR NO. 11261
DEVIN R. GIFFORD, ESQ.
NEVADA STATE BAR NO. 14055
CYRUS S. WHITTAKER, ESQ.
NEVADA STATE BAR. NO. 14965

LEWIS ROCA ROTHGERBER CHRISTIE LLP

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 HOWARD HUGHES PARKWAY, SUITE 600
LAS VEGAS, NEVADA 89169
(702) 949-8200

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

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

CERTIFICATE OF SERVICE

I hereby certify that on this 19th 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.

Alondra Reynolds, an employee of
Bremer, Whyte, Brown & O'Meara LLP

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

MOT

PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive, Suite 250
Las Vegas, Nevada 89144
Tel: (702) 258-6665
Fax: (702) 258-6662
PBrown@BremerWhyte.com
JSaab@BremerWhyte.com
DGifford@BremerWhyte.com
CWhittaker@BremerWhyte.com

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.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.

And related counterclaims.

Case No. A-16-744146-D

Dept. No. 22

MOTION TO CERTIFY JUDGMENT AS FINAL UNDER RULE 54(b)
(on Order Shortening Time)

Hearing Requested

Hearing Date:
Hearing Time:

Plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc. ("builders") ask this Court to certify as final its order dated May 23, 2019 granting the builders' motion for summary judgment pursuant to NRS 1.202(1) and dismissing defendant Panorama Towers Condominium Unit Owners' Association's counterclaims as untimely. *See* NRCP 54(b). Builders ask that this simple request be heard on shortened time.

Dated this 19th day of July, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR ORDER SHORTENING TIME

STATE OF NEVADA)
) *ss.*
COUNTY OF CLARK)

ABRAHAM G. SMITH, being duly sworn, deposes and says,

1. I am a Nevada attorney representing plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc. ("builders") in this action. I make this affidavit in support of the foregoing application to hear builders' "Motion to Certify Judgment as Final under Rule 54(b)" on shortened time.

2. Good cause exists under EDCR 2.26 for shortening the time. The order granting summary judgment was entered nearly two months ago, on May

23, 2019, and has already survived one attempt by defendant Panorama Towers Condominium Unit Owners' Association (the "association") to have this Court reconsider it, with a second attempt under advisement. Builders see no argument for applying a not-yet-effective statute to a claim previously adjudicated under the six-year statute of repose in NRS 11.202(1), which was controlling at the time of decision and remains the law today. But regardless of the proceedings on reconsideration, the question of whether there is "no just cause for delay" for Rule 54(b) certification should not, itself, be delayed.

3. Were it not that the association has orally indicated its intent to oppose this request for Rule 54(b) certification, this formal motion might not even be necessary. Although the association is entitled to an opportunity to respond, the straightforward issue of certification should be addressed expeditiously so that the Supreme Court can begin its review.

4. The motion does not require this Court to rule on any substantive issues, just the determination of "no just reason for delay" in certifying the judgment as final under Rule 54(b).

5. This motion and affidavit are made in good faith and not for the purpose of harassment or delay.

Dated this 19th day of July, 2019.

ABRAHAM G. SMITH

Subscribed and sworn to before me
this 19th day of July, 2019.

NOTARY PUBLIC

ORDER SHORTENING TIME

ORDERED that builders' "Motion to Certify Judgment as Final under Rule 54(b)" will be heard on _____ ____, 2019, at __:___ __.m., in Department 22 of the Eighth Judicial District Court, 200 Lewis Avenue, Las Vegas, Nevada 89155.

Dated this ____ day of _____, _____.

_____
DISTRICT COURT JUDGE

Submitted by:

LEWIS ROCA ROTHGERBER CHRISTIE, LLP

By:_____
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV 89169-5996

Attorneys for Plaintiffs Laurent Hallier; Panorama Towers I, LLC; Panorama Towers I Mezz, LLC; and M.J. Dean Construction, Inc.

POINTS AND AUTHORITIES

A. Rule 54(b) Allows the District Court to Certify as Final a Judgment as to Fewer than All of the Claims

1. Rule 54(b)

As recently amended, NRCP 54(b) allows the Court to certify an adjudication of fewer than all of the claims as a final judgment for appeal:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay . . . .

The determination that "there is no just reason for delay" and a direction for the

entry of judgment makes the dismissal of the claim or counterclaim on summary judgment immediately appealable. *State ex rel. List v. AAA Auto Leasing & Rental, Inc.*, 93 Nev. 483, 485, 568 P.2d 1230, 1231 (1977).[1]

2. The Court Enjoys Wide Discretion in Determining that there Is No Just Reason for Delay

While the requirement that the judgment finally resolve at least one claim is not discretionary, the determination that "there is no just reason for delay" is. True enough, some circuits have devised multifactor tests for district courts to consider, *see, e.g.*, *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013), but "the absence of detailed criteria to guide the trial judges' exercise of discretion reflects a conscious decision by the Supreme Court not to restrict the operation of the rule within too narrow a framework." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2659 (4th ed.) (describing *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980)).

Because the linchpin of Rule 54(b) is "sound judicial administration," *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7–10 (1980), the kinds of concerns that motivate a district court to withhold certification usually involve the interrelationship between the resolved and the unresolved claims, such as the likelihood that resolution of the remaining claims might moot the appeal on the resolved claims or (conversely) that the appellate court will have to hear the same issue twice. *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013). Although it is not necessary that "the claims be separate and independent," "some independence between the adjudicated and unadjudicated matters is desirable." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2659 & n.19 (4th ed.) (citing *Cold Metal Process Co. v. United Eng'g &*

[1] At the time, Rule 54(b) included the language that a judgment as to "fewer than all of the claims" may be certified as final. That language has been restored with the 2019 amendments to NRCP 54(b).

Foundry Co., 351 U.S. 445 (1956)).

The court should also be particularly sensitive to the "prejudice to winning defendants in delaying when they could be certain they were absolved of liability." 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2659 & n.39 (4th ed.).

3. Summary Judgment on a Claim's or Counterclaim's Untimeliness under the Construction-Defect Statute of Repose Is Suitable for Certification

Applying these principles, district courts regularly certify (and appellate courts accept certification of) orders granting summary judgment against or dismissing a plaintiff's claims as untimely. *E.g.*, *Newspaper & Mail Deliverers' Union v. United Magazine Co.*, 829 F. Supp. 561, 564–65 (E.D.N.Y. 1993); *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1139–40 (D. Kan. 2013), *aff'd in relevant part*, 778 F.3d 1147 (10th Cir. 2015) (accepting appellate jurisdiction but reversing on the merits).[2] That is because "the statute of limitations determination is a legal issue that is entitled to prompt appellate review." *Fulghum v. Embarq Corp.*, 938 F. Supp. 2d 1090, 1139–40 (D. Kan. 2013) (inviting court of appeals to review whether dismissal of fiduciary-duty claims on statute-of-limitations grounds was proper). The application of the statute eliminates the claims entirely.

Under the same principles, the Nevada Supreme Court has accepted appeals under NRCP 54(b) from orders granting summary judgment under "NRS Chapter 11's statutes of repose for construction defect claims." *E.g.*, *Dykema v.*

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[2] *See also Pham v. State Farm Mut. Auto. Ins. Co.*, 70 P.3d 567, 571–72 (Colo. App. 2003) (even dismissal "without prejudice" could be certified under Colorado's equivalent rule because "further action by the plaintiff would be barred by the statute of limitations"); *Lockett v. Gen. Fin. Loan Co. of Downtown*, 623 F.2d 1128, 1129–30 (5th Cir. 1980) (same).

Del Webb Communities, Inc., 132 Nev., Adv. Op. 82, 385 P.3d 977, 978 (2016); *Lotter v. Clark County*, 106 Nev. 366, 368, 793 P.2d 1320, 1321 (1990). The statutes' application to time-bar construction-defect claims are pure "[q]uestions of statutory interpretation," *see Dykema*, 132 Nev., Adv. Op. 82, 385 P.3d at 979 (citing *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 426–27 (2007)), and so appropriate for Rule 54(b) certification.

B. There Is No Just Reason to Delay Entry of a Final Judgment Dismissing the Associations' Counterclaims as Untimely

Certification is appropriate here. There is no question on finality: the Court's May 23 order grants summary judgment on the association's counterclaims in their entirety. The court specifically confirmed this in its order: the counterclaims arise from construction defect, and those claims are time-barred under the statute of repose in NRS 11.202. (May 23, 2019 Order Granting Summary Judgment, at 3, ¶ 1, and 15:19–25.) And there is no just reason to delay the entry of that final judgment.

1. The Association's Counterclaims Are Different from the Builders' Claims

The association has tried to argue that its counterclaims are one and the same with the builders' claims, but this Court has repeatedly rejected that:

> Here, PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION proposed its counter-claims are compulsory as they arise out of the same transaction or occurrence that is the subject matter of the Builders' claims. This Court disagrees. The Builders' claims are for breach of the prior settlement agreement and declaratory relief regarding the sufficiency of the NRS 40.645 notice and application of AB 125. The Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its windows in the two towers. If this Court ruled against the Builders on their Complaint, the Association would not have lost their claims if they had not pled them as counter-claims in the instant lawsuit.

(May 23, 2019 Order Granting Summary Judgement, at 13–14, ¶ 17.) In fact, it is the very separateness of the two sides' claims that renders the association's counterclaims untimely:

> In this Court's view, the Association had two options: it could make a counter-claim which is permissive or assert its constructional defect claims in a separate Complaint. Here, it elected to make the permissive counter-claim. The counter-claim does not relate back to the filing of the Complaint, September 28, 2016.

(*Id.*) The association recognized this, focusing on this paragraph of the Court's order in its initial motion for reconsideration, seeking to change the Court's mind about the separateness of the claims. (June 3, 2019 Mot. for Recon., at 6–9.) The association failed to persuade this Court that reconsideration was warranted on this basis.

Their construction-defect counterclaims—and in particular, the narrow statute-of-repose issue on which those counterclaims were resolved—are separate from the builders' pending contract and declaratory-relief claims. The association's rejected argument that they are similar is not a proper basis for denying Rule 54(b) certification.

2. Certifying the Question Would Conserve, Not Waste, Judicial Resources

In addition, certifying the judgment dismissing the association's construction-defect counterclaims is the efficient course. If the district court's ruling is correct, it greatly reduces the complexity of this case by eliminating all claims arising from construction defect.

3. Delay Would Unjustly Prejudice Builders

Perhaps more important, builders need certainty in the victory that absolves them entirely from liability.

Recall that the order granting summary judgment already meets the finality requirements of Rule 54(b); the only question is whether to certify it for

appeal. Delaying certification of the judgment's finality would be particularly prejudicial here, where the association is attempting to keep a judgment from becoming final for the sole purpose of taking advantage of a not-yet-effective change in the law. Although builders have explained at length why those changes will never apply to this case and could not constitutionally apply, even if the Legislature had so intended, postponing the certification of a final judgment only to embroil builders and the Court in these questions is an absurd and prejudicial result. This Court would not delay the entry of a judgment on a jury verdict merely because the losing side believes some as-yet-ineffective statute would give them a better result than the law that governed the parties' expectations throughout the trial. If the losing side is correct about the law, entry of a judgment does not deprive that party of its post-judgment remedies. So, too, here: The association's arguments are appropriately handled in the proper procedural channels after the judgment. The association's belief that it could undo the judgment against it by manufacturing delay is not a reason to withhold certification; it is the reason to certify.[3]

CONCLUSION

The rules of civil and appellate procedure recognize the law's fluidity. They nonetheless counsel courts to entry judgment promptly, not to delay entry for changes in the law to take effect. Here, the Court's order dismissing the association's counterclaims is a final judgment ripe for certification. Particularly in light of the prejudice that delay would cause, certification should not be postponed for matters that are properly resolved after the judgment. This Court

[3] For the same reasons and those in the attached opposition (incorporated here), it would be inappropriate to entertain the association's last-ditch effort to have this Court hold off ruling on the second motion for reconsideration. (*See* Ex. 1, Opp. to Oral Mot. to Postpone Ruling.)

should grant the motion.

Dated this 19th day of July, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

BREMER WHYTE BROWN & O'MEARA LLP
PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
1160 N. Town Center Drive,
Suite 250
Las Vegas, Nevada 89144

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on July 19, 2019, I served the foregoing "Motion to Certify Judgment as Final under Rule 54(b)" through the Court's electronic filing system:

Francis I. Lynch
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive
Suite 110 #293
Henderson, Nevada 89074

William L. Coulthard
Michael J. Gayan
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169

Scott Williams
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901

Attorneys for Defendant/Cross-Claimant Panorama Towers Condominium Unit Owners' Association

/s/Adam Crawford
An Employee of Lewis Roca Rothgerber Christie LLP

PETER C. BROWN, ESQ.
Nevada State Bar No. 5887
JEFFREY W. SAAB, ESQ.
Nevada State Bar No. 11261
DEVIN R. GIFFORD, ESQ.
Nevada State Bar No. 14055
CYRUS S. WHITTAKER, ESQ.
Nevada State Bar No. 14965
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. TOWN CENTER DRIVE
SUITE 250
LAS VEGAS, NV 89144
TELEPHONE: (702) 258-6665
FACSIMILE: (702) 258-6662
pbrown@bremerwhyte.com
jsaab@bremerwhyte.com
dgifford@bremerwhyte.com
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

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

ORIGINAL

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.

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

On June 3, 2019, Defendant Panorama Towers Unit Owners Association filed 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. The parties appeared before the Court on July 16, 2019. The Court having reviewed the papers and pleadings currently on file herein, having heard the arguments of counsel relating to the facts and law, and with good cause appearing and there being no just cause for delay, the Court concludes as follows:

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

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant Panorama Towers Unit Owners Association's Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment pursuant to NRS 11.202(1) or, in the alternative, Motion to Stay the Court Order is DENIED.

DATED this 22nd day of July 2019.

Jessica Johnson
DISTRICT COURT JUDGE

A-16-744146-D
MR

Submitted by:

BREMER WHYTE BROWN & O'MEARA, LLP

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

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

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

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

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

Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

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

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

vs.

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

Defendant.

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

DEFENDANT'S (1) OPPOSITION TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO CERTIFY JUDGMENT AS FINAL UNDER RULE 54(b) AND (2) RESPONSE TO PLAINTIFFS/COUNTER-DEFENDANTS' OPPOSITION TO DEFENDANT/COUNTERCLAIMANT'S JULY 16, 2019 ORAL MOTION TO POSTPONE THE COURT'S RULING ON THE MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND

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

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.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)

Defendant Panorama Towers Condominium Unit Owners' Association ("Association"), by and through its counsel of record, hereby submits its (1) Opposition to Plaintiffs/Counter-Defendants Laurent Hallier, Panorama Towers I, LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc.'s ("Builders") Motion to Certify Judgment as Final Under Rule 54(b) and (2) Response to Plaintiffs' Opposition to Defendant/Counterclaimant's July 16, 2019 Oral Motion to Postpone the Court's Ruling on the Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law, and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1).

This Opposition and Response 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 this 1st day of August, 2019.

KEMP, JONES & COULTHARD, LLP

William L. Coulthard, Esq. (#3927)
Michael J. Gayan, Esq. (#11125)
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, Nevada 89169

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Builders hastily seek to certify the Court's May 23, 2019 Findings of Fact, Conclusion of Law and Order ("Repose Order") as a final judgment under Rule 54(b) for the sole purpose of shielding it from the subsequent material change in the controlling law. Rule 54(b) requires this Court's express finding that no just reason for delay exists, but no more just reason could exist than a change of law that requires the opposite result. The Builders' sudden, selfish, and unjust interest in expediting the repose issue, after having waited years to bring the underlying repose motion, does not overcome this facial impediment to Rule 54(b) certification or Nevada's strong judicial policy against piecemeal appeals, particularly where the Repose Order overlaps with unresolved issues and claims. In addition, the Repose Order is also too vague for Rule 54(b) certification because it fails to specify which of the Association's claims for relief it adjudicated—the Association's Counterclaim does *not* contain any counts entitled "constructional defect claims" and includes claims involving non-construction issues (e.g., breach of contract) not governed by NRS 11.202(1).

Because the Builders cannot demonstrate that there is no just reason to delay the appeal of the Repose Order, this Court should decline to certify the Repose Order as final pursuant to Rule 54(b). Instead, the Court should allow the Repose Order to be considered on appeal with all other interlocutory orders after all remaining claims in this lawsuit have been resolved on the merits.

II.

STATEMENT OF FACTS

This multifaceted litigation involves a complex procedural history, numerous claims and cross-claims, as well as multiple uniquely situated parties; individuals, corporations, both not-for-profit and for-profit, and limited liability companies. All claims and counterclaims in this litigation pertain to the statutory, contractual, and common law duties of the parties who developed, designed, and constructed the Panorama Towers.

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

A. The Chapter 40 Notice and Pre-Litigation Process

Due to multiple design and construction defects within the two tower structures, including insufficient conditions in the mechanical room piping, sewer system, fire blocking insulation, and windows, the Association was forced to serve the Builders with a Notice of Constructional Defect pursuant to NRS 40.645 ("Notice"). In response to the Notice, the Association accommodated the Builders' request to inspect the towers. Thereafter, as required by statute, the Association and the Builders participated in the mandatory pre-litigation mediation. Two days later, the Builders instituted this action in direct response to the Association's Notice. *See* Complaint, filed Sept. 28, 2016.

B. The Builders' Complaint and the Association's Counterclaim

The Builders' Complaint alleges numerous claims, including claims for damages and declaratory relief. The Builders sought (1) declaratory relief as to Assembly Bill 125's application to this case, claim preclusion based on the prior lawsuit, the Association's alleged failure to comply with NRS 40.600, *et seq.*, and the Association's alleged duty to defend and indemnify the Builders and (2) money damages or other relief related to the Association's alleged suppression of evidence and/or spoliation and breach of contract relating to a settlement agreement in a prior litigation. *Id.*

On March 1, 2017, after timely moving to dismiss the Builders' Complaint, the Association timely filed its Answer and Counterclaim consisting of multiple individual prayers for relief against some or all of the Builders. *See* Answer and Counterclaim, filed Mar. 1, 2017. The Association's Counterclaim includes the following claims for relief:

1. Breach of Express and Implied Warranties against the entities and individuals identified as "the Builders," which include the Developers, Designers, General Contractors, Contractors, and Manufacturers (all of which are defined in the Counterclaim) *related to the design and construction* of the Panorama Towers, *id.* at ¶¶ 36–49;

2. Negligence and Negligence Per Se against the Developers, Designers, General Contractors, and Contractors *related to the design and construction* of the Panorama Towers, *id.* at ¶¶ 50–54;

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

3. Products Liability against the Manufacturers *related to certain materials used in the construction* of the Panorama Towers, *id.* at ¶¶ 55–64;

4. Breach of Contract against the Developers only *related to certain representations and warranties made in and/or incorporated into the sales contracts* for the Panorama Towers units, *id.* at ¶¶ 65–72;

5. Intentional/Negligent Nondisclosure against the Developers only related to their failure to disclose material information related to the condition of the Panorama Towers during the process of selling the individual units, *id.* at ¶¶ 73–80; and

6. Breach of the Duty of Good Faith and Fair Dealing and Violation of NRS 116.1113, *id.* at ¶¶ 81–83.

C. The Builders' Carefully Planned Series of Motions for Summary Judgment

In the years following the Association's Counterclaim, the Builders filed a total of five (5) individual motions seeking to summarily dispose of specific portions of the Association's construction defect claims.[1] These attacks included three (3) motions challenging the sufficiency of the Association's Notice, one (1) motion contesting the Association's standing to assert claims related to the window defects, and finally the repose motion. The Builders' long and carefully sequenced string of motions began on March 20, 2017, and continued until as recently as February 11, 2019. The factual findings and rulings of the orders relating to these five (5) motions, including the Repose Order, overlap with the unresolved claims remaining in this case.

1. The Builders' First Motion for Summary Judgment Challenging the Sufficiency of the Association's Notice

On March 20, 2017, the Builders filed their first of many motions, this time arguing that the Association's Notice was insufficient as to each defect. *See* Motion for Partial Summary

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[1] *See* Motion for Partial Summary Judgment on Their Third Claim for Relief, filed Mar. 20, 2017; Motion for Summary Judgment on Amended Notice of Claims, filed Aug. 3, 2018; Motion for Declaratory Relief Regarding Standing, filed Oct. 22, 2018; Motion for Reconsideration of Their Motion for Summary Judgment on Amended Notice of Claims, filed Dec. 17, 2018; Motion for Summary Judgment Pursuant to NRS 11.202(1), filed Feb. 11, 2019.

Judgment on Their Third Claim for Relief, filed Mar. 20, 2017. In its Order, the Court partially granted and partially denied the Builders motion finding that the "specific detail" portion of NRS 40.645 was not met by the Association's Notice as it pertains to the residential tower windows, residential tower fire blocking insulation, mechanical room piping, and the sewer defects. *See* Order, filed Sept. 15, 2017. The Court stayed proceedings for a six-month period to allow the Association an opportunity to amend its Notice. The Association's mechanical room constructional defect claims, however, were deemed barred by the four-year statute of limitations pursuant to NRS 11.202.

On October 10, 2017, the Association moved for clarification of the order entered on September 15, 2017. At the hearing on November 21, 2017, the Court denied the Association's request for clarification.

On March 15, 2018, the Court held a status check hearing to discuss the six-month stay entered on September 15, 2017. Based upon the agreement of counsel for all parties, the Court extended the stay for an additional 30 days.

On April 12, 2018, the Court held another status check hearing to discuss the stay. A week before that hearing, the Association issued its Amended Notice. During that hearing, the Builders requested a three-month extension of the stay and their obligations to respond to the Amended Notice. *See* Order, filed June 4, 2018.

2. The Builders' Second Motion for Summary Judgment Challenging the Sufficiency of the Association's Amended Notice

On August 3, 2018, the Builders filed their second motion for summary judgment. *See* Motion for Summary Judgment on Amended Notice of Claims, filed Aug. 3, 2018. The Builders lodged the same complaints in this motion as they had in their first motion but this time directed at the Amended Notice. The Builders' second motion was originally set for hearing on September 6, 2018, but the parties stipulated to continue the hearing until October 2, 2018. *See* Stipulation and Order, filed September 4, 2018.

In its November 30, 2018 Order, the Court partially granted and partially denied the Builders' second motion, holding that the Association's Amended Notice provided sufficient

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

notice regarding the window-related defect. The Court ruled the Amended Notice was insufficient with respect to the sewer and fire blocking insulation defects.

3. The Builders' Third Motion for Summary Judgment Challenging the Association's Standing

On October 22, 2018, before the Court ruled on their second motion, the Builders filed a third motion. *See* Motion for Declaratory Relief Regarding Standing, filed Oct. 22, 2018. This time the Builders argued that under local codes and the Declaration of Covenants, Conditions, and Restrictions ("CC&Rs") relating to the two towers, the Association lacked standing to assert the window defect claims. The Builders' third motion was originally set for hearing on December 13, 2018, but the Court vacated the hearing due to the Builders' failure to timely provide the Court with courtesy copies of the relevant briefing. *See* Minute Order, filed Dec. 10, 2018. On January 8, 2019, the parties stipulated to reset the third motion for hearing on February 12, 2019. *See* Stipulation and Order, filed January 8, 2019.

On March 11, 2019, the Court issued an order denying the motion for declaratory relief regarding standing. *See* Order Regarding Standing, filed Mar. 11, 2019. That order stated "the Court finds that genuine issues of material fact need to be explored in terms of the standing issue." Order Regarding Standing, at 3:1–2. As addressed in the briefing and during the hearing, those factual issues involve, among other things, various design and construction details.

4. The Builders' Fourth Motion Seeking Reconsideration of the Order Resolving Their Second Motion

On December 17, 2018, prior to the court ruling on the Builders' third motion, the Builders filed yet another motion. *See* Motion for Reconsideration, filed Dec. 17, 2018. The Builders' fourth motion sought reconsideration of the Court's ruling on the Builders' second motion for summary judgment. *Id.* On January 8, 2019, the parties stipulated to lengthen the briefing schedule and set the Builders' fourth motion for hearing on February 12, 2019.

On March 11, 2019, the Court issued its Order denying the Builders' fourth motion seeking reconsideration of their second motion. *See* Order on Amended Notice of Claims, filed Feb. 11, 2019.

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

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

5. The Builders' Fifth Motion Claiming NRS 11.202 Time-Barred the Association's Construction Defect Claims.

Finally, on February 11, 2019, the Builders filed their fifth dispositive motion, for the first time arguing the Association's construction defect claims were time-barred from the outset of the case. *See* Motion for Summary Judgment Pursuant to NRS 11.202(1), filed Feb. 11, 2019. Despite the fact that this motion, if successful, could have summarily resolved some of the Association's claims **years earlier**, the Builders have recently admitted that they intentionally waited to file the motion. The motion stated, "Three pertinent events serve as the basis for this Motion: (1) the dates of substantial completion of Towers I and II . . . ; (2) the Association's Chapter 40 notice was served . . . ; and (3) the Association filed its **Counterclaim** against the Builders alleging **construction defects** in the Towers . . . ." *Id.* at 7:4–9 (emphasis added). Nowhere in the Builders' motion did they specify which of the Association's claims were allegedly barred by the statute of repose under NRS 11.202(1). The Motion referred to the Association's claims collectively as "The Association's Action," an "action for construction defects," the Association's "lawsuit," the Association's "Counterclaim" and as "the Association's action for constructional defects set forth in its March 1, 2017 Counterclaim." *Id.* at 13:2–3, 13:8–9, 13:23–24, 17:4, 17:8–9.

On May 23, 2019, the Court issued its order ruling on the Builders' fifth dispositive motion. The Court's Repose Order is the subject of the instant Motion and, of the five total orders, is the only order the Builders seek to certify as a final judgment. The Repose Order, much like the motion underlying it, seemingly categorizes the Association's claims as one collective unit and/or fails to identify the Association's many individual claims to which it applies. *Id.* The Repose Order refers to the Association's defect claims collectively as "the Association's constructional defect claims," or the "Association's claim." Repose Order at 15:19–21, 15:13–14. Although the Court's Findings of Fact and Procedural History include a short synopsis of the procedural history relating to its previous orders, nevertheless the Conclusions of Law simply state, "As this court decided the six-year statute of repose bars the

Association's constructional defect claims, it does not analyze the statute of limitations issue presented." *Id.* at 15:19–21 (emphasis added).

III.

LEGAL STANDARD

NRCP 54(b) states provides:

> When an action presents more than one claim for relief—whether as a claim, counterclaim, cross-claim, or third-party claims—or when multiple parties are involved, the court **may** direct entry of a final judgment as to one or more, but fewer than all, **claims** or parties **only if** the court expressly determines that **there is no just reason for delay**. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

NEV. R. CIV. P. 54(b) (emphasis added).[2] Despite the courts' discretionary ability to certify judgments as final, the Nevada Supreme Court has made it abundantly clear that "Nevada has an interest in 'promoting judicial economy **by avoiding the specter of piecemeal appellate review.**'" *Barbara Ann Hollier Trust v. Shack*, 356 P.3d 1085, 1090 (Nev. 2015) (quoting *Valley Bank of Nevada v. Ginsburg*, 874 P.2d 729, 733 (Nev. 1994)) (emphasis added); *see Winston Prods. Co. v. DeBoer,* 134 P.3d 726, 732 (Nev. 2006) (expressing concern for judicial economy and avoiding piecemeal litigation); *see also State, Taxicab Authority v. Greenspun*, 862 P.2d 423, 425 (Nev. 1993); *Hallicrafters Co. v. Moore*, 728 P.2d 441 (Nev. 1986).

In 1980, the United Stated Supreme Court expressed identical concerns relating to FRCP 54(b) certifications. *See Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1 (1980).[3] In

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[2] NRCP 54(b) mirrors the language of FRCP 54(b).

[3] When a Nevada statute or rule tracks a "federal statute or legislation from another state, Nevada's courts will often look to the case law from that jurisdiction for guidance in interpreting the Nevada Statute. *See Stevenson v. State*, 354 P.3d 1277, 1280 (Nev. 2015). Additionally, "because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts[]" "[w]e may consult the interpretation of a federal counterpart to a Nevada Rule of Civil Procedure as persuasive authority." *Exec. Mgmt. Ltd. V. Ticor Title Ins. Co.*, 38 P.3d 872, 876 (Nev. 2002); *see Shack*, 356 P.3d at 1089.

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

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

the leading case on the use of FRCP 54(b) as a procedural device, the Supreme Court laid out the steps and conditions required before such certification of an order. *Id.* First, the district court must determine whether it is "dealing with a 'final judgment' . . . in the sense that it is a decision upon a cognizable claim for relief, and it must be 'final' in the sense that it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id.* at 7 (quoting *Sear, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)). Next, "the district court must go on to determine whether there is any just reason for delay." *Id.*

In *Curtiss-Wright*, the Supreme Court stated with great certainty, "**[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims.** The function of the district court under the [54(b)] Rule is to act as a 'dispatcher.'" *Id.* at 8 (quoting *Mackey*, 351 U.S. at 899) (emphasis added). In order to make the discretionary determination that a multiple claims action is appropriate for appeal, the district court must cautiously consider both "the interest of sound judicial administration[,]" and the "equities involved[.]" *Id.* Consideration of judicial administrative interests helps "assure that the application of Rule [54(b)] effectively 'preserves **the historic federal policy against piecemeal appeals.**'" *Id.* (quoting *Mackey*, 351 U.S. at 901) (emphasis added).

IV.

ARGUMENT

A. The Repose Order is Not Appropriate for Rule 54(b) Certification Because it Fails to Identify Which of the Association's Specific Claims for Relief Were Allegedly Resolved.

NRCP 54(b) may only be properly applied to an action in which there has been a final decision on a **legal claim** where multiple claims were raised. *See* NEV. R. CIV. P. 54(b). It is undisputed that the Builders and the Association have each asserted multiple claims in this action. However, both the Builders' Motion for Summary Judgment Pursuant to NRS 11.202(1) and the Court's Repose Order, which is the subject of the instant Motion, are silent as to which of the Association's legal claims were resolved in this action.

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

In the Repose Order, the Court acknowledged "the Contractors propose the remaining **claim for constructional defects** within the windows is time-barred by virtue of the six-year statute of repose enacted retroactively by the 2015 Nevada Legislature through AB 125." Repose Order at ¶ 3 (emphasis added). Thereafter, the Court concluded that because "the six-year statute of repose **bars the Association's construction defect claim**, it does not analyze the statute of limitations issue presented." *Id.* at ¶ 20 (emphasis added). The Repose Order does not address the Association's claims arising from events other than the construction of the two towers (i.e., contract-based claims). *See supra*, Section II.B.4–6. In fact, neither the Repose Order nor the underlying motion analyze which of the Association's claims for relief are subject to NRS 11.202(1). The repeated references to "construction defect claims" are too vague and insufficient to make the Repose Order final and appealable. *See Curtiss-Wright Corp.*, 446 U.S. at 7.

Nevada law plainly provides that only claims for relief pertaining to the actual construction of a building are subject to the statute of repose. *See Davenport v. Comstock Hills-Reno*, 46 P.3d 62, 64–65 (Nev. 2002) (holding "plain language of statutes of repose and their fundamental purpose presses the conclusion that the legislature intended to shield those involved in creating improvements from action grounded in design or construction defect, but not from actions asserting" other causes of action). As it stands, the Repose Order does not contain sufficient detail of which claims have been resolved to permit appellate review.

Therefore, the Builders' Motion to Certify the Judgment as Final must be denied at this time due to the present ambiguities of the Repose Order.

B. The Builders Fail to Carry Their Burden of Showing Why the Court Should Certify the Repose Order as Final and Appealable Pursuant to Rule 54(b).

1. Nevada and Courts Throughout the Country Have a Strong Policy Against Piecemeal Appellate Review, Particularly for Inter-Related Claims and Issues.

"Nevada has an interest in 'promoting judicial economy by avoiding the specter of piecemeal appellate review.'" *Shack*, 356 P.3d at 1090 (quoting *Ginsburg*, 874 P.2d at 733). Like Nevada, courts from surrounding states disfavor piecemeal appellate review. *See, e.g.,*

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

Copper Hills Custom Homes, LLC v. Countrywide Bank, FSB, 428 P.3d 1133, 1138 (Utah 2018) (dismissing appeal for order improperly certified under Rule 54(b)); *Allison v. Engel*, 395 P.3d 1217, 1224 (Colo. App. 2017) ("Consideration of the needs of sound judicial administration is necessary to further the historic policy against piecemeal appeals, a policy Rule 54(b) was intended to preserve."); *Harding Glass Co., Inc. v. Jones*, 640 P.2d 1123, 1127 (Colo. 1982) ("The purpose of requiring that an entire claim for relief be finally adjudicated before Rule 54(b) certification is proper is to avoid the dissipation of judicial resources through piecemeal appeals"). As the *Copper Hills* court explained, the "principal rationale for limiting the right to appeal is to not only promote [ ] judicial economy by preventing piecemeal appeals in the same litigation to this Court" but to avoid the issues created by multiple rulings in the same litigation on "narrow issues taken out of . . . context" that may needlessly increase the risk of inconsistent or erroneous decisions. 428 P.3d at 1138.

When it comes to the interpretation of the analogous FRCP 54(b), the federal courts are hesitant to grant Rule 54(b) requests in order to avoid piecemeal appeals in cases that should be reviewed as a whole. *See Curtiss-Wright Corp.*, 446 U.S. at 8 ("Plainly, sound judicial administration does not require that Rule 54(b) requests be granted routinely."); *Elliott v. Archdiocese of New York*, 682 F.3d 213, 220 (3d Cir. 2012); *Wood v. GCC Bend, LLC*, 422 F.3d 873, 879 (9th Cir. 2005). As the United States Supreme Court explained in *Curtiss-Wright Corp.*, "[n]ot all final judgments on individual claims should be immediately appealable, even if they are in some sense separable from the remaining unresolved claims." 446 U.S. at 8. In order to make the discretionary determination that a multiple claims action is appropriate for appeal, the district court must cautiously consider both "the interest of sound judicial administration[,]" and the "equities involved[.]" *Id.* Before certifying an order pursuant to Rule 54(b), district courts should "consider such factors as **whether the claims under review were separable from the others remaining to be adjudicated** and whether the nature of the claims already determined was such that no appellate court would have to decide the same issues more

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

than once even if there were subsequent appeals." *Id.* (emphasis added); *see Wood, LLC*, 422 F.3d at 879–83 (reversing Rule 54(b) certification due to overlapping facts and claims).[4]

Here, the equities involved as well as sound judicial administration require denial of the instant Motion. The Builders' request to certify the Repose Order as a final, appealable judgment with respect to unspecified claims for relief, if granted, would force the unjustified piecemeal appellate review of overlapping facts and claims. Such an order would compel judicial inefficiency and increase the risk of erroneous or inconsistent decisions. The Builders overlook all of these critical legal and factual issues simply to skirt AB 421's application to the Association's construction defect claims. That is unjust and certainly never a basis for Rule 54(b) certification. The Builders' abrupt and newfound urgency to resolve the repose issue exposes their true intent, particularly when they intentionally delayed filing a motion on this issue and otherwise extended this litigation with many months of additional stays and continuances.

While it is unclear which of the Association's actual claims for relief were resolved by the Repose Order, the Court's ruling regarding the statute of repose could not have resolved the Association's contract-based claims. *See supra*, Section IV.A; *see also Davenport*, 46 P.3d 62, 64–65 (Nev. 2002). The Builders also have at least five (5) unresolved claims that must be adjudicated. *See* Complaint (counts two and four through seven). The Association's remaining claims will involve facts related to the construction of the towers and the sales contracts. The Builders' unresolved claims will involve facts related to the construction of the towers, the first litigation between the parties, and the prior settlement agreement. These un-adjudicated claims factually overlap with the Repose Order and will force more than one appellate review of a similar set of facts.

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[4] When there is a similarity of legal or factual issues between the resolved and unresolved claims, the Ninth Circuit has held that this will weigh heavily against certification under Rule 54(b). *See Frank Briscoe Co., Inc. v. Morrison-Knudsen Co., Inc.*, 776 F.2d 1414, 1416 (9th Cir. 1985); *Alcan Aluminum Corp v. Carlsberg Fin. Corp.*, 689 F.2d 815, 816–817 (9th Cir. 1982); *Morrison-Knudsen Co v. Archer*, 655 F.2d 962 (9th Cir. 1981).

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

In addition to the parties' eight (8) unresolved claims, the Court has issued additional orders addressing the Association's Notice, Amended Notice, and standing to bring suit. *See supra*, Section II.C. These orders each create potential issues for appeal and must be considered in determining the appropriateness of certifying only the Repose Order. For example, the Court's order denying the motion challenging the Association's standing found genuine issues of fact regarding, among other things, the design and construction of the towers. Like the unresolved claims, the Court's other orders involve detailed factual issues related to the construction defects that will overlap with any appellate review of the Repose Order, generate judicial inefficiencies, defeat the purpose of Rule 54(b) certification, and violate the longstanding policy against piecemeal appellate review.

Even if there were no overlap of the resolved and unresolved claims, Rule 54(b) certification of the Repose Order could result in more than one jury deciding the same factual issues in separate judgments stemming from this single case. Specifically, the Association's contract-based claims surround the failure of the Builders to disclose the existence of the alleged construction defects to the purchasers of units at the Panorama Towers. These contract-based claims still require the presentation of evidence by the parties and evaluation by the finder of fact regarding the existence of the alleged construction defects. The parties could potentially proceed to trial on these claims before the appellate courts conclude their review of the Repose Order. Should the Court certify the Repose Order pursuant to Rule 54(b) and the Association prevail on their appeal, the parties would be forced to try the same factual issues before a second jury that would generate a second judgment on virtually identical factual issues. Obviously, this situation would create an unreasonable risk of inconsistent results and force two appeals involving significantly overlapping facts and issues. Rule 54(b) precludes such a result.

Simply put, there is no viable reason to risk inconsistent decisions by juries regarding whether a condition is a constructional defect or waste judicial resources merely because the Builders would like to prevent the Court from considering the recent change of the controlling law.

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

2. The Builders Will Not Face Hardship or Injustice by Waiting for this Issue to be Appealed Until After All of the Parties Claims Get Resolved.

While the Builders vaguely claim they would be unjustly prejudiced from any delay in appellate review of the Repose Order, they fail to articulate how they would suffer a genuine hardship or injustice by from a single appeal after the resolution of all claims between the parties. The Court's Repose Order does not resolve all of the Association's claims, thus the alleged certainty from liability that the Builders claim they will get by way of their Rule 54(b) request is illusory. What the Builders really seek is more properly described as a request as a matter of course, an accommodation of counsel, or gamesmanship to avoid the application of AB 421. Most courts hold that judgments should not be certified under Rule 54(b) for any of these reasons. *See Cullen v. Margiotta*, 618 F.2d 226, 228 (2nd Cir. 1980); *Burlington Northern Railroad Co. v. Bair*, 754 F.2d 799, 800 (8th Cir. 1985); *Weissman v. Fruchtman*, 124 F.R.D. 559, 561 (S.D.N.Y. 1989). Because the Builders fail to affirmatively demonstrate that they face danger of hardship or injustice, their request to certify the Repose Order must be denied.

C. The Builders' Opposition to the Association's Alleged Oral Motion is an Improper Supplemental Opposition and Does Nothing to Substantively Assist the Court in Rendering its Decision.

The Builders' opposition, filed on July 19, 2019, is nothing but an unauthorized supplemental opposition to the Association's Motion for Reconsideration premised on the passage of AB 421. The Builders attempt reeducate and chide the Court about various procedural and local rules in an attempt to pressure the Court into expediting its decision on the Association's reconsideration motion that it took under advisement following the hearing on July 16, 2019. The Court, not the parties appearing before it, decides how to manage the docket. *See* EDCR 1.90 ("It is the clear responsibility of each individual trial judge to manage the individual calendar in an efficient and effective manner. Each judge is charged with the responsibility for maintaining a current docket."). And as the Builders point out, a district court may defer a final ruling if the action comports with reason and public policy. *See Sicor, Inc. v. Sacks*, 127 Nev. 896, 900, 266 P.3d 618, 620 (2011).

Here, after hearing the argument of counsel on July 16, 2019, the Court decided to take the Association's Motion for Reconsideration premised on the passage of AB 421 under advisement. The Court has discretion on the issue of when it will render its decision. The Court should ignore the Builders' inappropriate attempt to pressure the Court into rushing its decision on this important issue. In this case, the Court has demonstrated a practice of timely publishing its decision on motions taken under advisement. The Association respectfully requests that due to the improperness of the Builders' supplemental opposition and superfluous nature of its arguments, the Court should summarily disregard that filing.

V.

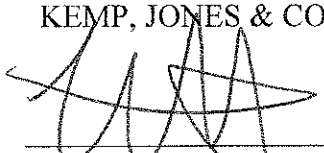
CONCLUSION

Based on the foregoing, the Association respectfully requests the Builders' Motion to Certify Judgment as Final Under Rule 54(b) be denied in its entirety.

DATED: August 1, 2019

Respectfully submitted,

KEMP, JONES & COULTHARD, LLP



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

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

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

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of August, 2019, the foregoing **DEFENDANT'S (1) OPPOSITION TO PLAINTIFFS/COUNTER-DEFENDANTS' MOTION TO CERTIFY JUDGMENT AS FINAL UNDER RULE 54(b) AND (2) RESPONSE TO PLAINTIFFS/COUNTER-DEFENDANTS' OPPOSITION TO DEFENDANT/ COUNTERCLAIMANT'S JULY 16, 2019 ORAL MOTION TO POSTPONE THE COURT'S RULING ON THE MOTION FOR RECONSIDERATION OF AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1)** was served on the following by Electronic Service to all parties on the Court's service list.

Patty Gerson

An employee of Kemp, Jones & Coulthard, LLP

RIS

PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive, Suite 250
Las Vegas, Nevada 89144
Tel: (702) 258-6665
Fax: (702) 258-6662
PBrown@BremerWhyte.com
ISaab@BremerWhyte.com
DGifford@BremerWhyte.com
CWhittaker@BremerWhyte.com

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.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.

And related counterclaims.

Case No. A-16-744146-D

Dept. No. 22

REPLY BRIEF ON "MOTION TO CERTIFY JUDGMENT AS FINAL UNDER RULE 54(b)"
(on Order Shortening Time)

Hearing Date: August 6, 2019
Hearing Time: 8:30 a.m.

Defendant Panorama Towers Condominium Unit Owners' Association does not understand Rule 54(b)'s purpose or how it operates. It mischaracterizes the Court's order in order to subject it to nonexistent restrictions against certification. The association ignores that NRCP 54(b) is an approved mechanism for making an order appealable, and it applies to these construction-defect counterclaims.

A. The Order Resolves All of the Association's Counterclaims

1. As Everyone Acknowledged, the Court Found that the Repose Statute Barred All of the Counterclaims

Until this opposition, it had been clear to everyone that this Court's May 23, 2019 order resolved *all* of the association's counterclaims on the basis of the construction-defect statute of repose, NRS 11.202. The order itself carefully lists each of the counterclaims (5/23/19 Order, at 4:6–15, ¶ 2) and recognizes that builders sought summary judgment on those claims claims (*id.* at 5:1–6, ¶ 4). And on the critical question of whether the counterclaims can relate back to the builders' complaint, the Court addresses *each one* and concludes that they cannot because they (unlike the builders' claims) are all claims for damages based on construction defect:

> The Association's counter-claims of negligence,[1] intentional/negligence disclosure,[2] breach of sales contract,[3] products liability,[4] breach of express and implied warranties under and violations of NRS Chapter 116,[5] and breach of duty of good faith and fair dealing[6] are for monetary damages as a result of constructional defects to its windows in the two

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[1] Answer & Counterclaim, at 26 (second cause of action).

[2] *Id.* at 30 (fifth cause of action).

[3] *Id.* at 29 (fourth cause of action).

[4] *Id.* at 27 (third cause of action). This claim was asserted only against then-unnamed manufacturers, not builders.

[5] *Id.* at 23 (first cause of action).

[6] *Id.* at 31 (sixth cause of action).

towers.

(5/23/19 Order, at 13:18–27, ¶ 17.)

It its two motions for reconsideration, the association knew this, and lamented that the Court had held that "the HOA's claims are barred by the six-year statute of repose provided by NRS 11.202(1)." (6/3/19 Mot. Recon., at 4:4–6; *accord id.* at 6:4–5 ("The HOA's counterclaim for construction defects . . ."); 6/13/19 Mot. Recon., at 8:24–9:2 (treating "the Association's claims" as synonymous with "its construction defect counterclaims").) Tellingly, the association objected to the finality of the May 23 order only because it did not resolve all of the *builders'* claims; there is no dispute that it resolved all of the association's counterclaims. (6/13/19 Mot. Recon., at 7:19–22.) *All* of the association's counterclaims are construction-defect claims, and they are all barred.

2. No Contractual Counterclaims Remain

Now that the association faces Rule 54(b) certification, the association for the first time pretends that its contractual counterclaims remain.[7] (Opp. 14:14–16.) They plainly do not, as even the association concedes that those claims "relate[] to the construction of the towers," which (as this Court recognized in granting summary judgment) subjects them to the repose statute. (5/23/19 Order, at 13:18–27, ¶ 17.) That also defeats the association's primary argument about "piecemeal litigation"—that the association's contract claims would proceed to one jury and then (if the association wins the appeal) its tort claims would proceed to a second jury.[8] With the contractual counterclaims gone,

[7] In fixating on the contract claims, the association apparently concedes that the tort claims were resolved.

[8] Of course, the association is also wrong to suggest that successive juries could come to different conclusions about the facts. Any judgment in the first trial would be law of the case for a second, eliminating the association's concern about "inconsistent results."

there is no such risk.

3. The Court Was Correct to Treat All of the Counterclaims as Relating to Construction Defects

That all of the association's counterclaims were construction-defect claims is not just everyone's understanding; it is also correct.

NRS 11.202(1) (2015 AB 125, § 17) provides that

> 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* . . . .

(Emphasis added). Importantly, the Legislature did not limit construction-defect claims to tort claims. The Legislature knew how to carve out specific causes of action, as it did for contribution and indemnity claims. NRS 11.202(2)(a). While the Legislature could have enacted a similar exception for claims based on a contract, it did not.

Each of the association's counterclaims seeks damages for a "deficiency in the design, planning, supervision or observation of construction or the construction" of the Panorama Towers. The association itself acknowledges that its warranty, negligence, nondisclosure, and products claims[9] "relate[] to the design and construction of the Panorama Towers." (Opp. 5:22–6:2, 6:6–8; *accord* Answer & Counterclaim at 23–28, 30, ¶¶ 38, 40, 42, 44–48, 51–53, 56, 61, 62, 74.) The contractual claim is likewise based on "selling units containing the Defects

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And even if the contractual counterclaim remained, that would not defeat certification on the resolution of the other counterclaims. The appeal on the statute of repose has nothing to with the "*facts* related to the construction of the towers and the sales contracts" (Opp. 14:18–21 (emphasis added)); it has to do with the legal interpretation of NRS 11.202.

[9] *See supra* note 4 (not asserted against builders).

described above"—i.e., a result of the alleged construction defects. (Answer & Counterclaim, at 29–30, ¶ 71; *accord id.* ¶¶ 68–69 (describing alleged contractual obligations to construct the towers "in accordance with all applicable standard of care in the building industry, and in accordance with all applicable building codes and ordinances").) The claim for breach of the covenant of good faith and fair dealing merely incorporates the other pieces of the complaint, all of which sound in construction defect. (Answer & Counterclaim, at 31, ¶ 83.) This Court was correctly found that they all "are for monetary damages as a result of constructional defects." (5/23/19 Order, at 13:18–27, ¶ 17.)

4. As with Any Other Final Judgment, the Judgment under Rule 54(b) Renders Interlocutory Rulings Final

Related to its feigned confusion about the scope of the May 23 order, the association misapprehends the effect of that order once certified. The association appears to complain that the builders earlier moved (with some success) for summary judgment on other bases, eliminating some of the association's claims, but "of the five total orders, [the May 23 order] is the only order the Builders seek to certify as a final judgment." (Opp. 9:19–20.) But there is no need (and no way) to certify those *other* orders as final; those nonappealable orders related to the association's counterclaims merge into the final judgment. *See Estate of Adams ex rel. Adams v. Fallini*, 132 Nev., Adv. Op. 81, 386 P.3d 621, 624 (2016).

B. The Supreme Court Has Already Decided that Finality of a Claim Can Be Made Appealable

The Supreme Court's reluctance to *create new* avenues to an appeal is not a reason to ignore the rule of civil procedure that *already allows* an appeal in circumstances such as these.

1. Builders Are Not Asking for this Court to Expand the Definition of Final Judgment

Most of the cases cited by the associated are not Rule 54(b) cases at all,

but rather address attempts to expand the existing universe of appealable orders. *Barbara Ann Hollier Trust v. Shack* addressed whether post-judgment motions that toll the time to appeal also toll the time to move under Rule 54(d) for attorney's fees. 131 Nev., Adv. Op. 59, 356 P.3d 1085 (2015); *see also Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 134 P.3d 726 (2006) (holding that post-judgment motions toll the time to appeal from an order granting costs and fees). *Valley Bank of Nevada v. Ginsburg* held that a pre-dismissal order approving a settlement is not a final judgment; only a subsequent stipulation to dismiss would be. 110 Nev. 440, 874 P. 2d 729 (1994). And *State, Taxicab Authority v. Greenspun* addressed the finality of an order remanding a matter to an administrative agency for further review. 109 Nev. 1022, 862 P.2d 423 (1993).

2. Rule 54(b) Allows an Appeal from a Final Order Adjudicating a Claim

In contrast with those situations that lacked a specific rule of civil procedure clearly governing the question of appealability, the Supreme Court has expressly approved the mechanism in NRCP 54(b)—with the built-in safeguard of district-court approval—for appealing the disposition of fewer than all of the claims.

C. <u>This Court Should Certify its Order as Final</u>

This simple, concrete issue is ripe for certification.

1. There Is No Reason to Delay Appellate Review of the Statute of Repose that Resolves All of the Counterclaims

It is not builders that are engaged in "gamesmanship." (Opp. 16:9.) The association fumes that "[t]he Builders hastily seek to certify the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order ('Repose Order') as a final judgment under Rule 54(b) for the sole purpose of shielding it from the subsequent material change in the controlling law." (Opp. 4:4–6.) That's one way to

look at it. Another way, though, is that the builders want this Court to recognize the finality of a judgment, previously entered under the law that then (and now) governs the counterclaims, so that the Supreme Court can expeditiously address the association's disagreement with that order.

Consider a plaintiff who obtains a favorable jury verdict in June and knows that the prime rate is likely to decrease on July 1. In some sense, the plaintiff may be said to "hastily seek" entry of judgment in June to "shield[] it from the subsequent" decrease in the interest, which might reduce the prejudgment interest. *See* NRS 17.130. But then again, the verdict came back in June, so there is "no just reason" to let the defendant delay entry of the judgment just for a different interest rate to take effect. *See* NRCP 54(b). If the defendant has good reasons to modify or vacate the judgment, it can raise those issues in post-judgment motions in June just as easily as it can July.

Here it is no different. This Court entered a final order on the association's counterclaims in May. The next month, the governor signed a bill to take effect in October that, according to the association, is a basis to reconsider the order. The builders, needless to say, disagree, but if the association is right it can raise that issue post-certification just as easily as it can now. The prospect that some future law will eventually reach back to change the judgment is no just reason to delay certification of the judgment that is correct today.

2. The Appeal on the Counterclaims Promotes Judicial Economy

Hallicrafters Co. v. Moore, 102 Nev. 526, 728 P.2d 441 (1986) (cited at Opp. 10:19) supports certification. There, the court held that it was 54(b) review was improper because the court had granted summary judgment on just one of the plaintiffs' claims and

> [i]n this case, the claims alleged in respondent's complaint are so closely related that this court would necessarily decide the law of the case on the claims still pending in the district court in the course of deciding the appeal.

102 Nev. 526, 528, 728 P.2d 441, 443 (1986).

Here, however, the Court has granted summary judgment on *all* of the association's counterclaims. The Supreme Court's resolution of the statute-of-repose question will not moot or otherwise "decide the law of the case" on the builders' remaining claims.

3. Rule 54(b) Is Not a Judicial Straitjacket

The association seeks to engraft nonexistent restrictions on Rule 54(b), transforming a flexible, case-by-case inquiry into the very bright-line rules that the U.S. Supreme Court rejected in *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980). There the district court certified as final the judgment on Curtiss-Wright's contract claims, reserving General Electric's counterclaims for trial. *Id.* at 4. The Third Circuit rejected the certification, holding that "the possibility of a setoff required that the status quo be maintained unless petitioner could show harsh or unusual circumstances," and that Curtiss Wright had not demonstrated those exceptional circumstances. *Id.* at 9. The U.S. Supreme Court reversed, affirming the breadth of the district court's discretion in this area and rejecting the "infrequent harsh case" standard in isolation is neither workable nor entirely reliable as a benchmark for appellate review.[10]

4. Denying Certification Would Be Inequitable

Incidentally, this case does not even present the concerns that misled the Third Circuit in *Curtiss-Wright*. As this Court has repeatedly held, the counterclaims are separate and independent from the builders' claims, and as the association *lost* on the counterclaims, the remaining claims do not present a possibility of setoff that might make certification inequitable. To the contrary, it

[10] *Cullen v. Margiotta*, the case relied upon by the association (at Opp. 16:10), invokes this overruled standard from the Third Circuit. 618 F.2d 226, 228 (2d Cir. 1980), *abrogated by Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980).

would be extraordinarily inequitable and prejudicial to deny the builders a final judgment on the construction-defect counterclaims merely because the builders also have separate, viable claims for affirmative relief.

CONCLUSION

Contrary to many of the authorities cited by the association, the builders are not asking this Court to grant certification *without* an explanation as to why there is no just cause for delay. *Cf. Cullen v. Margiotta*, 618 F.2d 226, 228 (2d Cir. 1980) (certification without explanation), *abrogated by Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1 (1980); *Weissman v. Fruchtmann*, 124 F.R.D. 559 (S.D.N.Y. 1989) (same). The straightforward, concrete question of the statute of repose is a discrete, independent issue that disposes of all of the association's counterclaims and merits appellate review now. There is no just reason for delay; in fact, delaying certification would merely reward the association for seeking to unravel this Court's judgment on the basis of a law that is not yet in effect. This Court should certify the May 23 order as a final judgment under Rule 54(b).

Dated this 5th day of August, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Abraham G. Smith*

BREMER WHYTE BROWN & O'MEARA LLP
PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
1160 N. Town Center Drive,
Suite 250
Las Vegas, Nevada 89144

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on August 5, 2019, I served the foregoing "Reply Brief on Motion to Certify Judgment as Final under Rule 54(b)" through the Court's electronic filing system to the following counsel:

Francis I. Lynch
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive
Suite 110 #293
Henderson, Nevada 89074

William L. Coulthard
Michael J. Gayan
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Parkway, 17th Floor
Las Vegas, NV 89169

Scott Williams
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901

Attorneys for Defendant/Cross-Claimant Panorama Towers Condominium Unit Owners' Association

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP

DISTRICT COURT

CLARK COUNTY, NEVADA

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

BEFORE THE HONORABLE SUSAN H. JOHNSON, DISTRICT COURT JUDGE

TUESDAY, AUGUST 6, 2019

RECORDER'S TRANSCRIPT
MOTION TO CERTIFY

APPEARANCES:

For the Plaintiff:	DANIEL F. POLSENBERG, ESQ. Lewis Roca Rothgerber Christie LLP PETER C. BROWN, ESQ. CYRUS S. WHITTAKER, ESQ. Bremer, Whyte, Brown & O'Meara
For the Defendant:	MICHAEL J. GAYAN, ESQ. WILLIAM L. COULTHARD, ESQ. Kemp, Jones & Coulthard, LLP
Also Present:	Hiram Triana, Jr.

RECORDED BY: NORMA RAMIREZ

TUESDAY, AUGUST 6, 2019 AT 8:53 A.M.

THE COURT: Panorama Towers Condominium Unit Owners Association, case number A-16744146-D. Would you announce your appearances for the record, please?

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

MR. BROWN: Good morning, Your Honor. Peter Brown for the builders.

MR. WHITTAKER: Good morning, Your Honor. Cyrus Whittaker on behalf of the builders.

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

MR. COULTHARD: Good morning, Your Honor. Bill Coulthard. Also present in court is Mr. Hiram Triana, Junior. I wanted to introduce Mr. Triana to the Court. He's a senior at Bishop Gorman. He's a star student, star soccer player. I'm good friends with his father and he's asked to shadow us this week, so we thought we'd bring him to this hearing this morning, and so we appreciate the Court's accommodations.

THE COURT: Okay. And I assume he's going to go into the practice of law?

MR. COULTHARD: He is considering that.

THE COURT: Okay. Well, very good. All right. Well, you all may be seated, and I received the motion to certify the judgment as final under Rule 54(b). I've gotten the

opposition, and yesterday we got the reply.

MR. BROWN: Your Honor, before you start I just want to bring to the Court's attention, I have a 9:30 pre-trial conference across the street with Judge Crockett, and I do not intend for that to mean for the Court to rush any of the hearing this morning. Mr. Polsenberg is handling the argument on 54(b), but if I leave I wanted the Court to understand why.

THE COURT: No problem.

MR. BROWN: Thank you.

THE COURT: Okay. Anything more now that you guys have had an opportunity to research this? I did get a chance to read your paperwork and actually most of your decisions that you guys attached. Mr. Polsenberg?

MR. POLSENBERG: I'd love to go in the papers if you want, Your Honor.

THE COURT: Okay. Counsel?

MR. GAYAN: All right. I'll try to get Mr. Brown to his hearing without missing anything here.

THE COURT: Well, that's okay. Take as long as you want, that's why Mr. Polsenberg is here. And last time, I think you felt a little bit blindsided by the oral motion, which is why we're here today.

MR. GAYAN: And we appreciate that, Your Honor, and the opportunity to brief this. Hopefully, the papers show that it was worthwhile to go through the issues. I will try to be

brief here, but the 54(b) motion should be denied for three primary reasons.

First, the Court still has the Association's motion for reconsideration under advisement, so we don't even have a final order. The May 23rd order is still subject to reconsideration. The Court has it under advisement. The builders --

THE COURT: Well, I had it under advisement because of this motion. The first motion for -- there was two motions for reconsideration. One I denied, but then we had the other element of the fact that we've got a new law change happening in October, so that is something I wanted to consider. Then we got the argument about the motion for the 54(b).

MR. GAYAN: Yeah, I think the -- and I don't have the transcript, so -- but my recollection is the 54(b) came up near the end after the Court said --

THE COURT: It did.

MR. GAYAN: -- it was taking this -- that AB421 motion for reconsideration under advisement. So we've got the 54(b) motion which kind of came at the tail end, and then the builders filed a separate purported response brief on July 19th. I think this motion and that brief, they're both aimed at rushing the Court along on the AB421 issue and the motion that's still under advisement, so that's reason number one why the timing of this isn't appropriate.

Number two, it's in our papers, but the May 23rd order is not a final judgment as required for 54(b), and I'll get into that. Curtiss-Wright, it's in our papers, but a final judgment quote from Curtiss-Wright, "Final judgment in the sense" -- this is the first requirement for certifying an order, interlocutory order pursuant to 54(b).

> "Final judgment in the sense that it is a decision upon a cognizable claim for relief, and it must be final in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action."

Here, we just don't have a cognizable claim other than -- and you can see in the papers, Your Honor, that the parties disagree about what claims are left or what's been resolved. If you look at the papers, the builders' motion, really all it is is it resolves the builders' first claim for dec relief, which is the application of AB125. There's no specificity in the motion about which of the Association's claims, the entire motion, and it's cited in the order as well.

The Court acknowledged on several occasions that it was only considering the window defect. The window defect is not a claim. It's a portion of the defect claims that were in this case, but if you look at causes of action, the HOA does not have a window defect cause of action.

There are five causes of action listed out; actually, I think there's six.

THE COURT: There's six.

MR. GAYAN: Right, so some are tort based and some are contract based. We'll get into that a little bit more in a second here, but the Court acknowledged that the order for the motion was brought on the builders' first cause of action, that's on page 7 of the order. It says,

> "As noted, the contractors propose the remaining claim for constructional defects within the windows is time barred by virtue of a six-year statute of repose enacted retroactively by the 2015 Nevada Legislature through AB125."
>
> And then the next sentence starts with
>
> "As set forth in their first cause of action, the builders seek a declaration from this Court as to the rights, responsibilities, and obligations," et cetera.

So at best, it's just what it says. What it is and what it says as far as the motion and the order, it is the May 23rd order resolves the builders' first cause of action for dec relief on AB125, nothing else. It cannot, does not, never discussed the HOA's contract-based claims. The builders in their reply just kind of breeze right over it and say everybody always knew and no one ever contested that all of

the Association's claims were resolved by the May 23rd order. That's simply untrue.

If we go back to the four prior motions and orders that the builders brought, we've got the third, the builders' third cause of action for dec relief for noncompliance with 40.645. Those were the first three motions that this Court considered, so that has nothing to do with the first cause of action, has nothing to do with the proposed order or the issues raised in the proposed order. So the window defect was the only thing, only defect left after the Court's orders related to the sufficiency of the notice. So the proposed order could not impact anything other than the specific window defect under the builders' first cause of action.

The builders in their reply offered no response to the Davenport case, which makes it crystal clear that the statute of repose, 11.202 today is what it is, can only apply to claims that stem directly from the original construction -- or not necessarily original, but the construction or design. In that case, there was a negligent maintenance claim and a failure to warn claim. And the Supreme Court reversed the district court's decision and said the negligent maintenance claim was not subject to a statue of repose, the construction statute of repose.

And that's what we have here. We have multiple claims that stem from the sales contracts of the units, not

the construction of the building. Sure, there's some element of construction involved in that for failure to disclose known defects.

THE COURT: Do you have a negligent maintenance claim?

MR. GAYAN: We do not, but we have contract-based claims that are not related to the actual construction of the building. They're related to the sales contracts, it's very explicit --

THE COURT: Right.

MR. GAYAN: -- in the counterclaim.

THE COURT: It's in the fourth cause of action.

MR. GAYAN: Right. So that's never been briefed, never been considered, wasn't considered in the briefing up to the May 23rd order. It was only AB125 and tolling; those are the only things the Court considered. There was no discussion or parsing of particular claims, so I think the briefing makes it, and the order make it pretty clear that all the Court was doing was resolving the builders' first cause of action in applying AB125.

THE COURT: Well, let me just ask you this. It seemed to me that we dealt with the third cause of action brought by the builders on the failure to comply with Chapter 40, because I gave the homeowner's association additional time to provide a sufficient notice with respect to some things. We got everything hashed out it seemed to me then so that the only

claim that was left was the windows. So the first cause of action in my view is probably gone because we dealt with that.

MR. GAYAN: By the three prior orders.

THE COURT: Right.

MR. GAYAN: That's right.

THE COURT: Suppression of evidence and spoliation, well, that's an evidentiary issue. I don't see anything big deal with that. Their breach of contract with respect to the settlement agreement, to me that's still live. The duty to defend and duty to indemnify, if that's under the settlement agreement -- and frankly, I can't recall at this point -- those would still be live. And then of course, one is the dec action on the application of AB125. So you've got some things that are live here, right?

MR. GAYAN: Certainly with the builders' complaint.

THE COURT: Right.

MR. GAYAN: But also with the HOA's counterclaim. And in their reply, the builders just say, well, this was never discussed before. That's just completely wrong. I'll refer the Court to the reply in support of our motion to retax, bottom of page 3,

> "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."

It was argued by Mr. Coulthard multiple times in the

hearing on July 16th. So to say that the Association is now coming up with this new issue that there are counterclaims left is just false. That's been the Association's position all along, so.

THE COURT: Okay.

MR. GAYAN: Now, in their reply, the builders also just very briefly claim that the merger doctrine applies to an interlocutory order that gets certified pursuant to rule 54(b), and they cite the case of State v. Adams and that case, frankly, has no application. It just states the general concept that when there is a final judgment at the end of a case, all prior orders merge into the final judgment and become appealable.

The builders have provided no authority whatsoever that the merger doctrine applies in any way to a 54(b) certified judgment. And even if they did, it's highly unlikely that there is authority where you have a claim by -- this isn't a party, so now we're under the new rule. Old N.R.C.P. 54(b) was only party by party. And we did that all the time.

We did that frequently, dozens of times in the Kitec case. It was used for legitimate reasons when a party settled. We got final approval from Judge Williams under Rule 23, and we didn't want to hold up payment of the settlement funds and disbursement to the class members. We moved for

54(b) certification, let the time to appeal pass because of the settlement, no big deal, and we were off and able to help the class members. That's a legitimate use of Rule 54(b).

Here, we have it being used by the builders to try to avoid application of the new law that would change of the outcome of this order. So from the Association's viewpoint, that is not a legitimate use of Rule 54(b) and it's not a just use of Rule 54(b). I'll get into that a little bit more in a minute.

But as far as the merger doctrine goes, not party by party. I think there would be an argument if it was party by party that any prior interlocutory orders applicable to that party would merge into the 54(b) certified judgment related to a specific party that's done with the case. So where you have just an individual claim, here we have the builders' first cause of action is the only thing that's been resolved. The Court acknowledged the three prior orders resolved, on the Association's notice resolved the builders' third cause of action.

Why would interlocutory orders related to the third cause of action merge in to a 54(b) certified order related to the first cause of action? That makes no sense whatsoever. They have nothing to do with each other from an appellate standpoint.

And the other order regarding standing was denied

and the Court found as genuine issues and material fact. How could that possibly merge into a final judgment when the Court said there's questions of fact? So there's been no explanation of that. We got about two sentences and the citation to an inapplicable case.

So absent any authority on merger, because it's clear that none of the Court's prior orders merge into the repose order from May 23rd, which means they're separate and would only merge into a final judgment in the case. So they should be considered by the Court under the second prong of Curtiss-Wright, which is sound judicial administration, and there is a strong judicial policy in Nevada against piecemeal appeals. And Curtiss-Wright, U.S. Supreme Court acknowledged that same strong policy against piecemeal appeals, and the consideration there, as I mentioned, sound judicial administration and the equities involved.

And sound judicial administration, that involves whether -- for the most part whether the proposed claim is being certified as final is separable from all of the other claims in the case, so that it would avoid multiple appellate reviews of the same or similar issues or facts or circumstances. Here we just do not have that. It's covered in the papers. The repose order will overlap, does overlap.

So as I mentioned before, three of our defects were resolved in a separate order that will not merge into this,

even if the Court certifies it. That means we've got defects in different places and in different stages of appellate review if the Court certifies this. Only the window defect has been found time barred, because that is the only thing left. The Court didn't go back and consider everything else.

THE COURT: Well, I -- you know, there's the, what, the sewer line; that's time barred. And then the mechanical issues, that was time barred. I thought everything was pretty much time barred.

MR. GAYAN: Maybe, but that's not what the motion was and that's not what the order is, because all of those were resolved and wrapped up in separate orders, they were compartmentalized. And I'm going to read from the builders' brief, and this is on their brief filed on June 21st. This is their opposition to the Association's motion to retax. Just a quick quote here. It says,

> "The builders' litany of separate and unrelated, potentially dispositive motions were actually carefully crafted with the goal of successfully disposing of the Association's claims piece by piece."

So they're acknowledging that it was a carefully crafted sequence of motions they chose how to compartmentalize this. They could have started with, and we argued it on the repose motion, they could have started with the repose motion

first, and the whole case potentially could have been resolved right then. That's not what they chose to do. They chose to challenge the Association's notice, then challenge the amended notice, then ask for reconsideration of the order denying their challenge of the amended notice, or at least denying it as to the window claim.

So they chose how to compartmentalize this case. They've got three defects resolved by prior orders that have nothing to do with the repose issue. The Court never considered those in the repose order.

THE COURT: Well, it wasn't presented that way.

MR. GAYAN: It wasn't presented. The Court didn't consider it. Maybe they would have applied. It's possible, but that's just not what was left. Everybody knew that, that those claims, those defects -- those aren't actually claims; those are defects.

So I know in CD court here, we're sometimes maybe a little casual about that, but a defect is not a claim, it's a defect that falls under a cause of action potentially. So we had multiple defects. Three of those defects are resolved somewhere else, would not merge, would not be subject to appeal if the Court certified this pursuant to 54(b).

They haven't asked to certify any of the other orders, only this one. So we've got a repose ruling on only the window defect claim on the builders' first cause of

action. That's all we have. We have -- I'll acknowledge it's a very narrow order for what's actually in the case. But even with that there's overlap, and it would force a waste of judicial resources, especially with the appellate court, to have a review of an order related to a single defect, and then have to review the Court's prior summary judgment orders related to the three other defects in the case.

The appellate court is certainly going to have to look at a lot of similar things, facts, evidence, to support both. And that is exactly what 54(b) is designed to prevent, and the strong judicial policy is designed to prevent with piecemeal appellate review. There is no legitimate reason to certify just the repose order now and force a separate appeal of it.

THE COURT: Go ahead.

MR. GAYAN: Okay.

THE COURT: I'm still listening.

MR. GAYAN: Okay. Now, Your Honor, the second prong of Curtiss-Wright is whether there is any just reason for delay. And that's the exact quote. Now, I know Rule 54(b) is actually written kind of in the negative, it's a little odd construction. The Court has to make an express determination that there is no just reason for delay. So being lawyers, you could maybe play with that and whether written in the positive sense would have the same meaning, but the Curtiss-Wright

court basically said that it does. It says, quote, court has to find, quote, whether there is any just reason for delay.

I've already gotten into some of that with the interest of sound judicial administration, not wasting judicial resources, but also the equities involved. I'll circle back to this acknowledgment from the builders that they're sequencing and timing of all their briefing was actually carefully crafted and decided early on before they started.

I'll also, and we've talked about it, but they waited two and a half years to bring the repose motion. They waited through two sessions of the Nevada legislature, the 2017 session and the 2019 session, before we actually had this issue resolved. There's no reason that they've ever given why they actually waited to do that.

And then during the course of this case, they've also stipulated to 12 months of stays, or requested on their own. That's in our opposition, first the six-month stay to let the Association amend their notice. They didn't object to that length of time. The Association asked for another month. All the parties agreed to extend that another month.

Then when we -- when the parties came back, counsel came back for a status check with Your Honor, Mr. Brown asked for a three-month extension of the stay so he could get all of his things ready to respond to the amended notice. And then

there was some snafus with briefing and parties stipulating to extended briefing and continued hearings. So all told, 12 months agreed-upon delay by the builders, and now all of a sudden we have an oral 54(b) motion, we have, you know, motions on orders shorting time. All of a sudden it's a huge rush on an order that they put aside almost three years ago now.

So to say there's no just reason for delay when it's obvious that the builders' sudden urgency here is solely related to a change in the controlling law and avoiding the Court considering that new controlling law, the builders in their papers say that, or at least imply that the HOA has admitted that the retroactivity isn't already effective. We've never admitted that. We've not acknowledged that. Our position is that it is effective today. Obviously --

THE COURT: What's your authority for that, that it's retroactive to today? Because I thought it didn't go into effect until October.

MR. GAYAN: The bill itself doesn't say it's effective on October 1st. And beyond that, we have talked to people who are involved in drafting of the legislation, and they've told us they never intended it to not go in -- the retroactivity portion, to not go into effect immediately.

If you look at the -- there's four portions of it in the bill. The first three all say effective -- the new notice

provision, as of October 1st; next one, as of October 1st; as of October 1st. Retroactivity does not say that, so the people that we have talked to and to the extent it moves -- is important to the Court, we may submit some information on that.

But Mr. Lynch [phonetic] has talked to folks who were involved with this. Their understanding was it would be effective immediately. I know that's a decision for the Court to make on whether it is or it's not and what these people intended doesn't necessarily control, but you know, it says what it says and it's been signed into law. And that's what we have.

THE COURT: Well, it -- I mean, this situation is a lot different than what happened in 2015 where it was like, bam, February 24th; it is effective right now. And it's my understanding that the law went into effect. It says that it's going to be retroactive, but it's effective as of October. That's what I understood it to be.

MR. GAYAN: Well --

THE COURT: And if I'm wrong, please tell me.

MR. GAYAN: Well, I think you're wrong. But that's our position. I understand.

THE COURT: Okay.

MR. GAYAN: I think that's part of the motion for reconsideration that is still under advisement. So I just

wanted to make it clear that the HOA had not admitted or acknowledged that the retroactivity component of AB421 was not already in effect, and AB421 was not already applicable to the Association's claim that there is not a ten-year statute of repose as we stand here today. That's certainly implied or maybe even expressly stated in the builders' briefing. I just wanted to make that clear for the record that we have not agreed to that.

Your Honor, one final comment I think. Builders make some arguments, they claim that there's some harm from any delay. They haven't articulated what that is. We already know from the briefing that was done for the last hearing when we were here a few weeks ago, there's no vested right in the running of a statute of limitations or a statute of repose. That's already been briefed.

There's -- they have no right to say, well, we've already moved and we've obtained a ruling on it, and it's already passed, and so just because the legislature extended the statute of repose which changes the result, we are entitled to the ruling that we already have. They're not. There's no vested right to that, and so there's no legitimate harm or prejudice to them.

Obviously, they would like to avoid our claims. That's what they're trying to do with this Rule 54(b) motion, but avoiding a substantive change in the law. The builders

have not cited a single time, single case anywhere ever, federal or Nevada, that shows 54(b) was used to avoid a new controlling law that would require the opposite result.

HOA's position, strong belief, is that is a completely inappropriate use of Rule 54(b). It is the opposite of what the Court is required to find, that there is no just reason for delay. What more just reason for delay could there be than either currently a changed law or an imminently changed law that would require the exact opposite result and allow the Association to proceed on its claims on the merits. Thank you.

THE COURT: Okay. Thank you.

MR. POLSENBERG: Your Honor, I'll be brief. Let me start with the retroactivity issue. I think you are right on that. I really think the law in Nevada is absolutely clear. If the bill says it has a different retroactive date or applicable date, effective date, that's the date.

And that's what happened before when they shortened the statute of repose. When they increased the statute of repose, they didn't put anything as to the effective date, and so it's automatically October 1st.

I think their argument today that you are wrong on that, without really articulating why, is their way of preserving the issue for when they can think of an argument why. Let me start the real argument with the legitimate use

of 54(b). At least five times counsel talked about the legitimate use of 54(b), and this is a case where it legitimately applies.

The Supreme Court changed Rule 54(b) this year. They actually broadened it, which is unusual; and what they were doing is finding a way to have more interlocutory review of issues. They added in the provision that they took out years ago that you can certify an order as final whenever it's the final resolution of a claim as opposed to the resolution of all the claims of a party.

And Justice Gibbons has said, Chief Justice Gibbons has said the reason they changed the rule is because the court has more horsepower now. They hear cases in panels. They have the court of appeals. There's more capacity to hear interlocutory appeals. This is a way to sanction the legitimate use of interlocutory mandatory appeals as opposed to just writ petitions.

And this is the kind of case you would want to have a writ petition on. Here, you've made the determination that the statute of repose bars their counterclaims. It bars all their counterclaims. And so that is a case that the court, the Supreme Court would want to hear on an interlocutory basis. And you have the ability to have the Court hear that under Rule 54(b).

Yes, 54(b) has always been against piecemeal

appeals, and we cite the Hallicrafters case. In Hallicrafters, Frannie [phonetic] and I actually made a motion to dismiss our own appeal because the exact same issues were going on in the appeal and in the district court. And there, they said that the overlap was too extreme. And that is an extreme case.

The Homeowner's Association says now that the same or similar issues will be in front of the Supreme Court and in front of you. No. The issue in front of the Supreme Court is going to be the statute of repose, and that won't be in front of you anymore.

They bring up the merger doctrine. Wow. I don't think I have ever had a discussion of the merger doctrine outside my own office before. And the merger doctrine simply says interlocutory orders merge into a final judgment so you don't have to appeal from all the interlocutory orders, just the final judgment. I don't see that as bearing on this case at all, on whether to certify or not, because the primary issue, the issue on appeal is going to be the statute of repose.

They come in here and accuse us of carefully crafting a sequence of motions. Well, I mean, I like Peter Brown, but I think what he did is what everybody does in Chapter 40 cases. The first thing you do is you attack the notice. That's the logical first motion. And even if it

weren't, I don't see where any of that bears on whether you do a 54(b) certification.

Is there just reason for delay? There's a part right in Miller that talks about more of the purposes and benefits of 54(b). And what it basically says is when a party has won on the claim that party shouldn't have to wait. And that's the purpose of 54(b), and that's the benefit of 54(b). The purpose of delay is not delay in raising the issue, it's delay in adjudicating on appeal the district court's ruling.

Now, I did raise this as an oral motion at the last hearing and at the end of the last hearing. And what I argued then was if we're looking for all these crazy procedural ways to try to apply a statute that hasn't taken effect yet to a claim that has already been dismissed, why don't we use real procedure? And the real procedure that I'm talking about is 54(b). You have already ruled, and these claims are already time-barred. And so it would make sense to apply 54(b) to that ruling.

What claims are left? I don't think any counterclaims are left. We laid them out in our brief. They talk about the third counterclaim. The third counterclaim is against manufacturers, it's not even against us. Every one of these counterclaims lays out that it is for construction defect, and so I think they are all time-barred.

If somehow they weren't all time-barred, clearly the

ones that are barred, and I think under your May 23rd findings of fact and conclusions of law and order they all are. But even if they weren't, the ones that are time-barred are susceptible to 54(b) certification. Thank you, Your Honor.

THE COURT: Counsel, I want to write a decision on this one, so that's what I'm going to do, and I'm going to get it out fairly quickly. I'm in trial this week and part of next week, but I should be able to get to it. Okay?

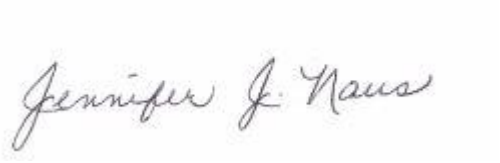
MR. GAYAN: Thank you, Your Honor.

MR. POLSENBERG: Thank you very much, Your Honor.

THE COURT: Yes, thank you.

[Proceedings concluded]

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.



JENNIFER J. NAUS
Transcriber

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Steven D. Grierson
CLERK OF THE COURT

ORDR

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.

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

Counter-Defendants.

Case No. A-16-744146-D

Dept. No. XXII

ORDER RE: DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) FILED JUNE 13, 2019

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

Case Number: A-16-744146-D

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

Third-Party Plaintiff,

Vs.

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

Third-Party Defendants.[1]

ORDER RE: DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) FILED JUNE 13, 2019

This matter concerning Defendant's Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed June 13, 2019 was heard on the 16th day of July 2019 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MESS, LLC and M.J. DEAN CONSTRUCTION, INC. appeared by and

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

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through its attorneys, DANIEL F. POLSENBERG, ESQ. of the law firm, LEWIS ROCA ROTHGERBER CHRISTIE, and PETER C. BROWN, ESQ. and DEVIN R. GIFFORD, ESQ., ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant/Third-Party Plaintiff PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and through its attorneys, MICHAEL J. GAYAN, ESQ. and WILLIAM L. COULTHARD, ESQ. of the law firm, KEMP JONES & COULTHARD, and FRANCIS I. LYNCH, ESQ. of the law firm, LYNCH HOPPER. Having reviewed the papers and pleadings on file herein, heard oral arguments of the lawyers and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. This case arises as a result of alleged constructional defects within both the common areas and the 616 residential condominium units located within two tower structures of the PANORAMA TOWERS located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada. On February 24, 2016, Defendant/Counter-Claimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its original NRS 40.645 Notice of Constructional Defects upon Plaintiffs/Counter-Defendants (also identified herein as the "Contractors" or "Builders"), identifying deficiencies within the residential tower windows, fire blocking, mechanical room piping and sewer. Subsequently, after the parties engaged in the pre-litigation process ending with an unsuccessful NRS 40.680 mediation held September 26, 2016, the Contractors filed their Complaint on September 28, 2016 against the Owners' Association, asserting, for the most part, its NRS 40.645 notice was deficient. On March 1, 2017, PANORAMA TOWER CONDOMINIUM UNIT OWNERS' ASSOCIATION filed its Answer and Counter-Claim,

2. As set forth within its September 15, 2017 Findings of Fact, Conclusions of Law and Order, this Court dismissed the Association's claims for constructional defect located within its

mechanical room as being time-barred by virtue of the "catch-all" statute of limitations of four (4) years set forth in NRS 11.220. With respect to challenges to the sufficiency and validity of the NRS 40.645 notice, this Court stayed the matter to allow PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION to amend it with more specificity. As expressed within its November 30, 2018 Findings of Fact, Conclusions of Law and Order, this Court ultimately determined the amended NRS 40.645 notice served upon the Builders on April 15, 2018 was valid only with respect to the windows' constructional defects.

3. On April 23, 2019, this Court heard two motions filed by the parties, to wit: (1) the Builders' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019 and (2) the Association's Conditional Counter-Motion for Relief Pursuant to NRS 4.0695(2) filed March 1, 2019. After hearing the parties' arguments, this Court took the matter under advisement, and on May 23, 2019, issued its third Findings of Fact, Conclusions of Law and Order in this case which granted the Builders' motion, and denied the Association's Conditional Counter-Motion. As pertinent here, this Court concluded the Owners' Association's remaining constructional defect claims lodged against the Builders were time-barred by the six-year statute of repose set forth in NRS 11.202(1).

4. On June 3, 2019, the Association filed 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 or alternatively, a Motion to Stay the Court's Order.[2] Ten days later, on June 13, 2019 the Association filed a second Motion for Reconsideration and/or to Alter or Amend the

[2]The Association moved this Court to stay the Order upon the basis the Nevada Legislature had passed Assembly Bill (referred to as "AB" herein) 421 on June 1, 2019, which "immediately and retroactively extends the statute of repose to 10 years." *See* Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment or alternatively, a Motion to Stay the Court's Order filed June 3, 2019, p. 4. The Association urged this Court to stay the Order until such time as AB 241 was enacted or rejected by the Governor. As set forth *infra,* the Governor signed the bill on June 3, 2019 which was to take effect October 1, 2019.

Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment. The second Motion for Reconsideration differed from the first in that it alerted the Court, on June 1, 2019, the Nevada Legislature passed AB 421, and such was signed by the Governor on June 3, 2019. AB 421 amends NRS 11.202 by extending the statute of repose period from six (6) to ten (10) years and it is to be applied retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019, the date in which the amendment takes effect.

5. The Builders opposed the two motions on several grounds. First, they noted this Court entered a final order on May 23, 2019, the Notice of Entry of Order was filed May 28, 2019, and thus, by the time the Motion for Reconsideration and/or Stay was filed June 3, 2019, there was no pending matter to stay. Second, while AB 421 was enacted and will apply retroactively, it does not become effective until October 1, 2019, meaning as of now, there is no change in the law. That is, the current period for the statute of repose is six (6) years as enacted February 24, 2015, and not ten (10). Third, as the Association's claims have already been adjudicated, AB 421 cannot be interpreted to revive those causes of action.

CONCLUSIONS OF LAW

1. Rule 60 of the Nevada Rules of Civil Procedure (NRCP) accords the district courts authority to relieve a party from a final judgment, order or proceeding where some error or injustice is shown. Specifically NRCP 60(b) states as follows:

> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. ...

2. Further, a district court, by virtue of its inherent authority, may grant a motion for rehearing if the judge concludes re-argument is warranted. *See* Gibbs v. Giles, 96 Nev. 243, 244, 607 P.2d 118, 119 (1980), *citing* former District Court Rule (DCR) 20(4). Indeed, unless and until an order is appealed, the district court retains jurisdiction to reconsider the matter. *Id.* at 244.

3. The Owners' Association has moved this Court to reconsider its decision expressed within its Findings of Fact, Conclusions of Law and Order filed May 23, 2019. The basis for the Association's position stems from the Nevada Legislature's passage of AB 421 on June 1, 2019 as signed by the state's Governor on June 3, 2019. As noted above, AB 421, *inter alia,* extends the statute of repose from six (6) to ten (10) years, and such is to be applied retroactively from its effective date of October 1, 2019. AB 421, Section 7, states in part:

> NRS 11.202 is hereby amended to reach as follows:
> 11.202 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than ***10*** years after the substantial completion of such an improvement. ... (Emphasis in original)

AB 421, Section 11, Subsection 4 also provides "[t]he period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply *retroactively* to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019." (Emphasis added).

4. While there is no question the Nevada Legislature has amended NRS 11.202(1) to extend the statute of repose period from six (6) to ten (10) years, and it is to be applied retroactively, this Court is mindful the new enactment is not effective yet. NRS 218D.330(1) specifically provides "[e]ach 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." In

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this case, while it specifically passed a law that is to be applied retroactively, the Nevada Legislature did not prescribe an effective date earlier or different than October 1, 2019. By it not prescribing an earlier date, the Legislature indicated its intention NRS 11.202, as amended February 24, 2015, and setting forth a six (6) years' statute of repose would remain in effect until October 1, 2019. In short, the newly-enacted law becomes operational October 1, 2019 and its retroactive effect will take place at that time.

5. Simply put, there is no basis upon which this Court can relieve the Owners' Association from the grant of the Builders' Motion for Summary Judgment as set forth within the Findings of Fact, Conclusions of Law and Order filed May 23, 2019. *See* NRCP 60(b). Re-argument is not warranted. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Defendant's Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed June 13, 2019 is denied.

DATED this 9th day of August 2019.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

SUSAN H. JOHNSON
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CERTIFICATE OF SERVICE

I hereby certify, on the 9th day of August 2019, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing ORDER RE: DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) FILED JUNE 13, 2019 to the following counsel of record, and that first-class postage was fully prepaid thereon:

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

DANIEL F. POLSENBERG, ESQ.
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
DPolsenberg@LRRC.com

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

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

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

Laura Banks

Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

OGM

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada corporation, Plaintiffs, Vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation. Defendant.	Case No. A-16-744146-D Dept. No. XXII ORDER RE: MOTION TO CERTIFY JUDGMENT AS FINAL UNDER NRCP 54(b)
PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Counter-Claimant, Vs. LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Counter-Defendants.	

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

Third-Party Plaintiff,

Vs.

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

Third-Party Defendants.[1]

ORDER RE: MOTION TO CERTIFY JUDGMENT AS FINAL UNDER NRCP 54(b)

This matter concerning the Motion to Certify Judgment as Final Under NRCP 54(b) filed by Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. on July 22, 2019 was heard, on Order Shortening Time, on the 6th day of August 2019 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. appeared by and through its attorneys, DANIEL F. POLSENBERG, ESQ. of the law firm, LEWIS ROCA ROTHGERBER CHRISTIE, and PETER C. BROWN, ESQ. and

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

SUSAN H. JOHNSON
DISTRICT JUDGE
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CYRUS S. WHITTAKER, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant/Third-Party Plaintiff PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and through its attorneys, MICHAEL J. GAYAN, ESQ. and WILLIAM L. COULTHARD, ESQ. of the law firm, KEMP JONES & COULTHARD. Having reviewed the papers and pleadings on file, heard oral arguments of the lawyers and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. This case arises as a result of alleged constructional defects within both the common areas and the 616 residential condominium units located within two tower structures of the PANORAMA TOWERS located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada. On February 24, 2016, Defendant/Counter-Claimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its original NRS 40.645 Notice of Constructional Defects upon Plaintiffs/Counter-Defendants (also identified herein as the "Contractors" or "Builders"), alleging deficiencies within its residential tower windows, fire blocking, mechanical room piping and sewer. Subsequently, after the parties engaged in the pre-litigation process ending with an unsuccessful NRS 40.680 mediation held September 26, 2016, the Contractors filed their Complaint on September 28, 2016 against the Owners' Association, asserting the following claims that, for the most part, deal with their belief the NRS 40.645 notice was deficient:

1. Declaratory Relief—Application of AB 125;
2. Declaratory Relief—Claim Preclusion;
3. Failure to Comply with NRS 40.600, *et seq.*;
4. Suppression of Evidence/Spoliation;
5. Breach of Contract (Settlement Agreement in Prior Litigation);

6. Declaratory Relief—Duty to Defend; and

7. Declaratory Relief—Duty to Indemnify.

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

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

2. Negligence and Negligence *Per Se;*

3. Products Liability (against the manufacturers);

4. Breach of (Sales) Contract;

5. Intentional/Negligent Disclosure; and

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

3. This Court previously dismissed the constructional defect claims within the mechanical room as being time-barred by virtue of the "catch-all" statute of limitations of four (4) years set forth in NRS 11.220.[2] With respect to challenges to the sufficiency and validity of the NRS 40.645 notice, this Court stayed the matter to allow PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION to amend it with more specificity. This Court ultimately determined the amended NRS 40.645 notice served upon the Builders on April 15, 2018 was valid only with respect to the windows' constructional defects.[3]

4. On April 23, 2019, this Court heard two motions filed by the parties, to wit: (1) the Contractors' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019 and (2) the Association's Conditional Counter-Motion for Relief Pursuant to NRS 40.695(2) filed March 1, 2019. After hearing the parties' arguments, this Court took the matter under advisement, and on

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

May 23, 2019, issued its third Findings of Fact, Conclusions of Law and Order which granted the Builders' motion, and denied the Association's Conditional Counter-Motion. As pertinent here, this Court concluded the Owners' Association's remaining constructional defect claims lodged against the Builders were time-barred by the six-year statute of repose set forth in NRS 11.202(1).

4. On June 3, 2019, the Association filed its Motion for Reconsideration and/or Stay of the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment or alternatively, a Motion to Stay the Court's Order.[4] Ten days later, on June 13, 2019, the Association filed a second Motion for Reconsideration and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment. These two motions essentially were the same except the second alerted the Court the Nevada Legislature passed AB 421 on June 1, 2019, and such was signed by the Governor and formally enacted on June 3, 2019. As pertinent here, AB 421 amends NRS 11.202 by extending the statute of repose period from six (6) to ten (10) years and it is to be applied retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019, the date in which the amendment takes effect.

The Builders opposed the two motions on several grounds. First, they noted this Court entered a final order on May 23, 2019, the Notice of Entry of Order was filed May 28, 2019, and thus, by the time the Motion for Reconsideration and/or Stay was filed June 3, 2019, there was no pending matter to stay. Second, while AB 421 was enacted and will apply retroactively, it does not become effective until October 1, 2019, meaning, currently, there is no change in the law. That is,

[4]The Association moved this Court to stay the Order upon the basis the Nevada Legislature had passed Assembly Bill (referred to as "AB" herein) 421 on June 1, 2019, which "immediately and retroactively extends the statute of repose to 10 years." *See* Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment or alternatively, a Motion to Stay the Court's Order filed June 3, 2019, p. 4. The Association urged this Court to stay the Order until such time as AB 241 was enacted or rejected by the Governor. As set forth *infra,* the Governor signed the bill on June 3, 2019 which was to take effect October 1, 2019.

as the law stands, the period for the statute of repose is six (6) years as enacted February 24, 2015, and not ten (10). Third, as the Association's claims have already been adjudicated, AB 421 cannot be interpreted to revive those causes of action.

This Court denied the Association's first Motion for Reconsideration and/or Stay filed June 3, 2019 at the July 16, 2019 hearing; it took the June 13, 2019 motion under advisement, and ultimately, it was denied via Order filed August 9, 2019. In summary, this Court concluded the newly-amended NRS 11.202 becomes effective October 1, 2019, whereby the current state of the law is such the statute of repose is six (6) years, and not ten (10). If the Nevada Legislature had intended AB 421's retroactive effect to be applied now, it would have said so just as it had in enacting AB 125 in February 2015.

5. The Contractors have moved this Court to certify the May 23, 2019 Findings of Fact, Conclusions of Law and Order as final under Rule 54(b) of the Nevada Rules of Civil Procedure (NRCP). They argue the Order is final in that it granted summary judgment with respect to the Association's claims in their entirety, and there is no just reason for delaying the entry of final judgment. The Owners' Association opposes upon the bases (1) the May 23, 2019 Order is "silent as to which of the Association's legal claims were resolved in this action,"[5] and "[t] repeated references to 'construction defect claims' are too vague and insufficient to make the [] Order final and appealable;"[6] (2) the Order "could not have resolved the Association's contract-based claims;"[7] and (3) the Builders will not face hardship or injustice by waiting for the issue to be appealed after all parties' claims are resolved.

. . .

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[5] *See* Defendant's (1) Opposition to Plaintiffs'/Counter-Defendants' Motion to Certify Judgment as Final Under Rule 54(b) and (2) Response to Plaintiffs'/Counter-Defendants' Opposition to Defendant's/Counter-Claimant's July 16, 2019 Oral Motion to Postpone the Court's Ruling on the Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order filed August 1, 2019, p. 11.

[6] *Id.*, p. 12.

[7] *Id.*, p. 14.

CONCLUSIONS OF LAW

1. NRCP 54 was recently amended to reflect virtually the identical wording of Rule 54 of the Federal Rules of Civil Procedure (FRCP). NRCP 54(b) provides:

> (b) *Judgment on Multiple Claims or Involving Multiple Parties.* When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Clearly, NRCP 54(b) permits district courts to authorize immediate appeal of dispositive rulings on separate claims in a civil action raising multiple claims. This rule "was adopted...specifically to avoid the possible injustice of delay[ing] judgment o[n] a *distinctly separate* claim [pending] adjudication of the entire case....The Rule thus aimed to augment, not diminish, appeal opportunity." *See* Jewel v. National Security Agency, 810 F.3d 622, 628 (9th Cir. 2015), *quoting* Gelboim v. Bank of America Corp., ____ U.S. ____ 135 S.Ct. 897, 902-903,190 L.Ed.2d 789 (2015) (interpreting FRCP 54).

2. Over sixty (60) years ago, the United States Supreme Court outlined steps to be followed in making determinations under FRCP 54(b), of which NRCP 54(b) is now the same. *See* Sears, Roebuck & Company v. Mackey, 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297 (1956), *cited by* Curtiss-Wright Corporation v. General Electric Company, 446 U.S. 1, 7, 100 S.Ct. 1460, 1464, 64 L.Ed.2d 1 (1980). The district court first must determine it is dealing with a "final judgment." It must be a "judgment" in the sense it is a decision upon a cognizable claim for relief, and it must be "final" or an "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Id.*, *quoting* Sears, Roebuck & Company, 351 U.S. at 436, 76 S.Ct. at 900.

. . .

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

3. Once it finds "finality," the district court must determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable even if they are separable from the remaining unresolved claims. It is left to the sound judicial discretion of the district court to determine the appropriate time when each final decision in a multiple claims action is ready for appeal. Curtiss-Wright Corporation, 446 U.S. at 8, 100 S.Ct. at 1464-1465, *citing* Sears, Roebuck & Company, 351 U.S. at 437, 76 S.Ct. at 899, 900. Thus, in deciding whether there is no just reason to delay the appeal of the May 23, 2019 Findings of Fact, Conclusions of Law and Order, which granted the Builders' February 11, 2019 Motion for Summary Judgment, this Court must take into account the judicial administrative interests as well as the equities involved. Consideration of the former is necessary to assure application of NRCP 54(b) will not result in the appellate courts deciding the same issues more than once on separate appeals.

4. Here, the Owners' Association argues against NRCP 54(b) certification upon the bases the May 23, 2019 Order is not final as it is "silent as to which of the Association's legal claims were resolved in this action"[8] and further, the Order "could not have resolved the Association's contract-based claims."[9] This Court disagrees with both of the Association's positions. The May 23, 2019 16-page Order specifically details this Court's reasoning and conclusion the Owners' Association's constructional defect claims are time-barred by the six-year statute of repose. Notably, this Court specifically set forth on page 13 of the Order "[t]he Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its

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[8] *See* Defendant's (1) Opposition to Plaintiffs'/Counter-Defendants' Motion to Certify Judgment as Final Under Rule 54(b) and (2) Response to Plaintiffs'/Counter-Defendants' Opposition to Defendant's/Counter-Claimant's July 16, 2019 Oral Motion to Postpone the Court's Ruling on the Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order filed August 1, 2019, p. 11.

[9] Id., p. 14.

windows in the two towers." In short, the May 23, 2019 Order was not silent as to which of the Association's counter-claims were resolved; the Order specifically enumerated and decided all the claims.

Further, while the Association argues the Order "could not have resolved the Association's contract-based claims."[10] a review of the Association's Fourth Cause of Action entitled "Breach of Contract" within the Counter-Claim indicates it is an action seeking monetary damages as a result of constructional defects. It states, *inter alia,* the Developers entered into written contracts[11] representing the individual units were constructed in a professional and workmanlike manner and in accordance with all applicable standards of care in the building industry. The Developers breached the Sales Contracts "by selling units containing the Defects described above, *and as a direct result of said breaches, The (sic) Association and its individual members have suffered the losses and damages described above."*[12] (Emphasis added) Clearly, the "Breach of Contract" action, seeking monetary damages as a result of constructional defects, was addressed and analyzed within this Court's May 23, 2019 Order as time-barred by virtue of the six-year statute of repose. This Court concludes its May 23, 2019 Findings of Fact, Conclusions of Law and Order is final as it was an ultimate disposition of all the Association's causes of action set forth within the Counter-Claim.

5. The next issue that must be determined is whether there is any just reason for delay. In this regard, this Court considers whether the May 23, 2019 Findings of Fact, Conclusions of Law and Order dealt with matters distinctly separable from the remaining unresolved claims. This Court, therefore, turns to the claims for relief set forth in the Builders' Complaint to determine which of

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[10] *Id.*, p. 14.

[11] Notably, the Fourth Cause of Action does not state with whom the Developers entered into the Sales Contracts. Presumably, the contracts were between the Developers and the members of the Association, and not with the Association itself. The homeowners are not Counter-Claimants in this case.

[12] *See* Defendant Panorama Tower Condominium Unit Owners' Association's Answer to Complaint and Counterclaim filed March 1, 2017, p. 32, Paragraph 71.

them remain unresolved, and if they are separate from the Association's causes of action contained in the Counter-Claim.

The First Claim for Relief sought declaratory relief regarding the application of Assembly Bill (AB) 125 enacted and effective as of February 24, 2015. In its various Findings of Fact, Conclusions of Law and Orders issued in this case, this Court determined AB 125 reflects the state of the law between February 24, 2015 to September 30, 2019' and was applied in this Court's analyses whereby this cause of action is resolved. The Second Claim for Relief seeks a declaration from this Court the Association's claims are precluded, as in this Builders' view, the rights and obligations of the parties in this matter were resolved by way of Settlement Agreement reached in a prior litigation. This Second Claim for Relief is distinctly different from the causes adjudged in the May 23, 2019 Order, and thus, it is not yet resolved. The Third Claim for Relief accuses the Association of failure to comply with the pre-litigation process set forth in NRS 40.600 through 40.695. This Court dealt with the issues presented in the Third Claim for Relief within its September 15, 2017 and November 30, 2018 Findings of Fact, Conclusions of Law and Orders; ultimately, it found the Association failed to provide an adequate NRS 40.645 notice with respect to the constructional defects allegedly found in the Towers' sewer system[13] and fire walls. It determined the notice was adequate concerning the constructional defects found in the Towers' windows. The Third Claim for Relief is resolved.

The Fourth Claim for Relief is entitled "suppression of evidence/spoliation," and essentially the Contractors seek sanctions against the Association for its alleged failure to retain the parts and mechanisms removed or replaced during the sewer repair, and prior to sending the Builders the NRS 40.645 notice. Assuming there were no other suppression of evidence or spoliation issues with

[13]The sewer system had been repaired prior to the Association sending the NRS 40.645 notice meaning the Builders were not accorded their right to repair under NRS Chapter 40.

respect to constructional defects in the windows, fire walls or mechanical room, the Fourth Claim for Relief also is resolved as this Court concluded, in its November 30, 2018 Order, the NRS 40.645 notice was insufficient with respect to the sewer deficiencies and the Builders were not notified of the constructional defects prior to repair. If there are remaining suppression of evidence or spoliation issues, such deal with whether this Court should issue sanctions upon the Association for its failure to preserve. In this Court's view, such matters are moot given its prior conclusions claims relating to the mechanical room are barred by the four-year statute of limitations, the NRS 40.645 notice was insufficient with respect to constructional defects allegedly within the fire walls, and lastly, the window deficiencies are time-barred by the six-year statute of repose. In other words, whether there remain spoliation issues, this Court concludes the Fourth Claim for Relief is moot.

The Fifth Claim for Relief for breach of the Settlement Agreement made in resolving party differences in the prior litigation remains undecided for the same reason this Court concluded the "claim preclusion" issues identified in the Second Claim for Relief were not determined. Likewise, the Sixth and Seventh Claims for Relief, seeking declaratory relief given the Association's duty to defend and indemnify under the Settlement Agreement, have not been decided. In short, the remaining causes are the Second, Fifth, Sixth and Seventh Claims for Relief set forth in the Contractors' Complaint and they are distinctly separate from the Associations' constructional defect claims decided in the Findings of Fact, Conclusions of Law and Orders filed September 15, 2017, November 30, 2018 and May 23, 2019.

6. In summary, the May 23, 2019 Findings of Fact, Conclusions of Law and Order resulted in a culmination of a final adjudication, wholly resolving the causes set forth within the Association's Counter-Claim. The claims remaining are those are made by the Builders and deal specifically with the adherence of the parties' concessions set forth within the prior litigation's Settlement Agreement. These causes are distinctly different from the constructional defect claims

alleged in the Counter-Claim. In this Court's view, entry of a separate judgment now would not require any appellate court to decide the same issues more than once on separate appeals.

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED the Motion to Certify Judgment as Final Under NRCP 54(b) filed by Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. on July 22, 2019 is granted.

DATED this 12th day of August 2019.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CERTIFICATE OF SERVICE

I hereby certify, on the 12th day of August 2019, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing ORDER RE: MOTION TO CERTIFY JUDGMENT AS FINAL UNDER NRCP 54(b) to the following counsel of record, and that first-class postage was fully prepaid thereon:

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

DANIEL F. POLSENBERG, ESQ.
JOEL D. HENRIOD, ESQ.
ABRAHAM G. SMITH, ESQ.
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
DPolsenberg@LRRC.com

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

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

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

Laura Banks

Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

NEOJ

PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
BREMER WHYTE BROWN & O'MEARA LLP
1160 N. Town Center Drive, Suite 250
Las Vegas, Nevada 89144
Tel: (702) 258-6665
Fax: (702) 258-6662
PBrown@BremerWhyte.com
JSaab@BremerWhyte.com
DGifford@BremerWhyte.com
CWhittaker@BremerWhyte.com

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169-5996
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.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.

And related counterclaims.

Case No. A-16-744146-D

Dept. No. 22

NOTICE OF ENTRY OF ORDER RE: MOTION TO CERTIFY JUDGMENT AS FINAL UNDER NRCP 54(b)

Please take notice that an "Order re: Motion to Certify Judgment as Final under NRCP 54(b)" was entered on August 12, 2019. A true and correct copy is attached hereto and made part hereof.

Dated this 13th day of August, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/Abraham G. Smith*

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ABRAHAM G. SMITH (SBN 13,250)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

BREMER WHYTE BROWN & O'MEARA LLP
PETER C. BROWN (SBN 5887)
JEFFREY W. SAAB (SBN 11,261)
DEVIN R. GIFFORD (SBN 14,055)
CYRUS S. WHITTAKER (SBN 14,965)
1160 N. Town Center Drive,
Suite 250
Las Vegas, Nevada 89144

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on August 13, 2019, I served the foregoing "Notice of Entry of Order re: Motion to Certify Judgment as Final under NRCP 54(b)" through the Court's electronic filing system upon all parties on the master e-file and serve list.

/s/ Lisa M. Noltie
An Employee of Lewis Roca Rothgerber Christie LLP

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Steven D. Grierson
CLERK OF THE COURT

OGM

DISTRICT COURT

CLARK COUNTY, NEVADA

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

Plaintiffs,

Vs.

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

Defendant.

Case No. A-16-744146-D

Dept. No. XXII

ORDER RE: MOTION TO CERTIFY JUDGMENT AS FINAL UNDER NRCP 54(b)

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

Counter-Claimant,

Vs.

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

Counter-Defendants.

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

Third-Party Plaintiff,

Vs.

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

Third-Party Defendants.[1]

ORDER RE: MOTION TO CERTIFY JUDGMENT AS FINAL UNDER NRCP 54(b)

This matter concerning the Motion to Certify Judgment as Final Under NRCP 54(b) filed by Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. on July 22, 2019 was heard, on Order Shortening Time, on the 6th day of August 2019 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. appeared by and through its attorneys, DANIEL F. POLSENBERG, ESQ. of the law firm, LEWIS ROCA ROTHGERBER CHRISTIE, and PETER C. BROWN, ESQ. and

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

CYRUS S. WHITTAKER, ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant/Third-Party Plaintiff PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and through its attorneys, MICHAEL J. GAYAN, ESQ. and WILLIAM L. COULTHARD, ESQ. of the law firm, KEMP JONES & COULTHARD. Having reviewed the papers and pleadings on file, heard oral arguments of the lawyers and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. This case arises as a result of alleged constructional defects within both the common areas and the 616 residential condominium units located within two tower structures of the PANORAMA TOWERS located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada. On February 24, 2016, Defendant/Counter-Claimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its original NRS 40.645 Notice of Constructional Defects upon Plaintiffs/Counter-Defendants (also identified herein as the "Contractors" or "Builders"), alleging deficiencies within its residential tower windows, fire blocking, mechanical room piping and sewer. Subsequently, after the parties engaged in the pre-litigation process ending with an unsuccessful NRS 40.680 mediation held September 26, 2016, the Contractors filed their Complaint on September 28, 2016 against the Owners' Association, asserting the following claims that, for the most part, deal with their belief the NRS 40.645 notice was deficient:

1. Declaratory Relief—Application of AB 125;
2. Declaratory Relief—Claim Preclusion;
3. Failure to Comply with NRS 40.600, *et seq.*;
4. Suppression of Evidence/Spoliation;
5. Breach of Contract (Settlement Agreement in Prior Litigation);

6. Declaratory Relief—Duty to Defend; and

7. Declaratory Relief—Duty to Indemnify.

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

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

2. Negligence and Negligence *Per Se;*

3. Products Liability (against the manufacturers);

4. Breach of (Sales) Contract;

5. Intentional/Negligent Disclosure; and

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

3. This Court previously dismissed the constructional defect claims within the mechanical room as being time-barred by virtue of the "catch-all" statute of limitations of four (4) years set forth in NRS 11.220.[2] With respect to challenges to the sufficiency and validity of the NRS 40.645 notice, this Court stayed the matter to allow PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION to amend it with more specificity. This Court ultimately determined the amended NRS 40.645 notice served upon the Builders on April 15, 2018 was valid only with respect to the windows' constructional defects.[3]

4. On April 23, 2019, this Court heard two motions filed by the parties, to wit: (1) the Contractors' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019 and (2) the Association's Conditional Counter-Motion for Relief Pursuant to NRS 40.695(2) filed March 1, 2019. After hearing the parties' arguments, this Court took the matter under advisement, and on

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

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

May 23, 2019, issued its third Findings of Fact, Conclusions of Law and Order which granted the Builders' motion, and denied the Association's Conditional Counter-Motion. As pertinent here, this Court concluded the Owners' Association's remaining constructional defect claims lodged against the Builders were time-barred by the six-year statute of repose set forth in NRS 11.202(1).

4. On June 3, 2019, the Association filed its Motion for Reconsideration and/or Stay of the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment or alternatively, a Motion to Stay the Court's Order.[4] Ten days later, on June 13, 2019, the Association filed a second Motion for Reconsideration and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment. These two motions essentially were the same except the second alerted the Court the Nevada Legislature passed AB 421 on June 1, 2019, and such was signed by the Governor and formally enacted on June 3, 2019. As pertinent here, AB 421 amends NRS 11.202 by extending the statute of repose period from six (6) to ten (10) years and it is to be applied retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019, the date in which the amendment takes effect.

The Builders opposed the two motions on several grounds. First, they noted this Court entered a final order on May 23, 2019, the Notice of Entry of Order was filed May 28, 2019, and thus, by the time the Motion for Reconsideration and/or Stay was filed June 3, 2019, there was no pending matter to stay. Second, while AB 421 was enacted and will apply retroactively, it does not become effective until October 1, 2019, meaning, currently, there is no change in the law. That is,

[4]The Association moved this Court to stay the Order upon the basis the Nevada Legislature had passed Assembly Bill (referred to as "AB" herein) 421 on June 1, 2019, which "immediately and retroactively extends the statute of repose to 10 years." *See* Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment or alternatively, a Motion to Stay the Court's Order filed June 3, 2019, p. 4. The Association urged this Court to stay the Order until such time as AB 241 was enacted or rejected by the Governor. As set forth *infra*, the Governor signed the bill on June 3, 2019 which was to take effect October 1, 2019.

as the law stands, the period for the statute of repose is six (6) years as enacted February 24, 2015, and not ten (10). Third, as the Association's claims have already been adjudicated, AB 421 cannot be interpreted to revive those causes of action.

This Court denied the Association's first Motion for Reconsideration and/or Stay filed June 3, 2019 at the July 16, 2019 hearing; it took the June 13, 2019 motion under advisement, and ultimately, it was denied via Order filed August 9, 2019. In summary, this Court concluded the newly-amended NRS 11.202 becomes effective October 1, 2019, whereby the current state of the law is such the statute of repose is six (6) years, and not ten (10). If the Nevada Legislature had intended AB 421's retroactive effect to be applied now, it would have said so just as it had in enacting AB 125 in February 2015.

5. The Contractors have moved this Court to certify the May 23, 2019 Findings of Fact, Conclusions of Law and Order as final under Rule 54(b) of the Nevada Rules of Civil Procedure (NRCP). They argue the Order is final in that it granted summary judgment with respect to the Association's claims in their entirety, and there is no just reason for delaying the entry of final judgment. The Owners' Association opposes upon the bases (1) the May 23, 2019 Order is "silent as to which of the Association's legal claims were resolved in this action,"[5] and "[t] repeated references to 'construction defect claims' are too vague and insufficient to make the [] Order final and appealable;"[6] (2) the Order "could not have resolved the Association's contract-based claims;"[7] and (3) the Builders will not face hardship or injustice by waiting for the issue to be appealed after all parties' claims are resolved.

. . .

[5] *See* Defendant's (1) Opposition to Plaintiffs'/Counter-Defendants' Motion to Certify Judgment as Final Under Rule 54(b) and (2) Response to Plaintiffs'/Counter-Defendants' Opposition to Defendant's/Counter-Claimant's July 16, 2019 Oral Motion to Postpone the Court's Ruling on the Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order filed August 1, 2019, p. 11.

[6] *Id.*, p. 12.

[7] *Id.*, p. 14.

CONCLUSIONS OF LAW

1. NRCP 54 was recently amended to reflect virtually the identical wording of Rule 54 of the Federal Rules of Civil Procedure (FRCP). NRCP 54(b) provides:

> (b) *Judgment on Multiple Claims or Involving Multiple Parties.* When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Clearly, NRCP 54(b) permits district courts to authorize immediate appeal of dispositive rulings on separate claims in a civil action raising multiple claims. This rule "was adopted...specifically to avoid the possible injustice of delay[ing] judgment o[n] a *distinctly separate* claim [pending] adjudication of the entire case....The Rule thus aimed to augment, not diminish, appeal opportunity." *See* Jewel v. National Security Agency, 810 F.3d 622, 628 (9th Cir. 2015), *quoting* Gelboim v. Bank of America Corp., ____ U.S. ____ 135 S.Ct. 897, 902-903,190 L.Ed.2d 789 (2015) (interpreting FRCP 54).

2. Over sixty (60) years ago, the United States Supreme Court outlined steps to be followed in making determinations under FRCP 54(b), of which NRCP 54(b) is now the same. *See* Sears, Roebuck & Company v. Mackey, 351 U.S. 427, 76 S.Ct. 895, 100 L.Ed. 1297 (1956), *cited by* Curtiss-Wright Corporation v. General Electric Company, 446 U.S. 1, 7, 100 S.Ct. 1460, 1464, 64 L.Ed.2d 1 (1980). The district court first must determine it is dealing with a "final judgment." It must be a "judgment" in the sense it is a decision upon a cognizable claim for relief, and it must be "final" or an "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Id.*, *quoting* Sears, Roebuck & Company, 351 U.S. at 436, 76 S.Ct. at 900.

...

3. Once it finds "finality," the district court must determine whether there is any just reason for delay. Not all final judgments on individual claims should be immediately appealable even if they are separable from the remaining unresolved claims. *It is left to the sound judicial* discretion of the district court to determine the appropriate time when each final decision in a multiple claims action is ready for appeal. Curtiss-Wright Corporation, 446 U.S. at 8, 100 S.Ct. at 1464-1465, *citing* Sears, Roebuck & Company, 351 U.S. at 437, 76 S.Ct. at 899, 900. Thus, in deciding whether there is no just reason to delay the appeal of the May 23, 2019 Findings of Fact, Conclusions of Law and Order, which granted the Builders' February 11, 2019 Motion for Summary Judgment, this Court must take into account the judicial administrative interests as well as the equities involved. Consideration of the former is necessary to assure application of NRCP 54(b) will not result in the appellate courts deciding the same issues more than once on separate appeals.

4. Here, the Owners' Association argues against NRCP 54(b) certification upon the bases the May 23, 2019 Order is not final as it is "silent as to which of the Association's legal claims were resolved in this action"[8] and further, the Order "could not have resolved the Association's contract-based claims."[9] This Court disagrees with both of the Association's positions. The May 23, 2019 16-page Order specifically details this Court's reasoning and conclusion the Owners' Association's constructional defect claims are time-barred by the six-year statute of repose. Notably, this Court specifically set forth on page 13 of the Order "[t]he Association's counter-claims of negligence, intentional/negligent disclosure, breach of sales contract, products liability, breach of express and implied warranties under and violations of NRS Chapter 116, and breach of duty of good faith and fair dealing are for monetary damages as a result of constructional defects to its

[8] *See* Defendant's (1) Opposition to Plaintiffs'/Counter-Defendants' Motion to Certify Judgment as Final Under Rule 54(b) and (2) Response to Plaintiffs'/Counter-Defendants' Opposition to Defendant's/Counter-Claimant's July 16, 2019 Oral Motion to Postpone the Court's Ruling on the Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order filed August 1, 2019, p. 11.

[9] *Id.*, p. 14.

windows in the two towers." In short, the May 23, 2019 Order was not silent as to which of the Association's counter-claims were resolved; the Order specifically enumerated and decided all the claims.

Further, while the Association argues the Order "could not have resolved the Association's contract-based claims."[10] a review of the Association's Fourth Cause of Action entitled "Breach of Contract" within the Counter-Claim indicates it is an action seeking monetary damages as a result of constructional defects. It states, *inter alia,* the Developers entered into written contracts[11] representing the individual units were constructed in a professional and workmanlike manner and in accordance with all applicable standards of care in the building industry. The Developers breached the Sales Contracts "by selling units containing the Defects described above, *and as a direct result of said breaches, The (sic) Association and its individual members have suffered the losses and damages described above."*[12] (Emphasis added) Clearly, the "Breach of Contract" action, seeking monetary damages as a result of constructional defects, was addressed and analyzed within this Court's May 23, 2019 Order as time-barred by virtue of the six-year statute of repose. This Court concludes its May 23, 2019 Findings of Fact, Conclusions of Law and Order is final as it was an ultimate disposition of all the Association's causes of action set forth within the Counter-Claim.

5. The next issue that must be determined is whether there is any just reason for delay. In this regard, this Court considers whether the May 23, 2019 Findings of Fact, Conclusions of Law and Order dealt with matters distinctly separable from the remaining unresolved claims. This Court, therefore, turns to the claims for relief set forth in the Builders' Complaint to determine which of

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[10] *Id.*, p. 14.

[11] Notably, the Fourth Cause of Action does not state with whom the Developers entered into the Sales Contracts. Presumably, the contracts were between the Developers and the members of the Association, and not with the Association itself. The homeowners are not Counter-Claimants in this case.

[12] *See* Defendant Panorama Tower Condominium Unit Owners' Association's Answer to Complaint and Counterclaim filed March 1, 2017, p. 32, Paragraph 71.

them remain unresolved, and if they are separate from the Association's causes of action contained in the Counter-Claim.

The First Claim for Relief sought declaratory relief regarding the application of Assembly Bill (AB) 125 enacted and effective as of February 24, 2015. In its various Findings of Fact, Conclusions of Law and Orders issued in this case, this Court determined AB 125 reflects the state of the law between February 24, 2015 to September 30, 2019' and was applied in this Court's analyses whereby this cause of action is resolved. The Second Claim for Relief seeks a declaration from this Court the Association's claims are precluded, as in this Builders' view, the rights and obligations of the parties in this matter were resolved by way of Settlement Agreement reached in a prior litigation. This Second Claim for Relief is distinctly different from the causes adjudged in the May 23, 2019 Order, and thus, it is not yet resolved. The Third Claim for Relief accuses the Association of failure to comply with the pre-litigation process set forth in NRS 40.600 through 40.695. This Court dealt with the issues presented in the Third Claim for Relief within its September 15, 2017 and November 30, 2018 Findings of Fact, Conclusions of Law and Orders; ultimately, it found the Association failed to provide an adequate NRS 40.645 notice with respect to the constructional defects allegedly found in the Towers' sewer system[13] and fire walls. It determined the notice was adequate concerning the constructional defects found in the Towers' windows. The Third Claim for Relief is resolved.

The Fourth Claim for Relief is entitled "suppression of evidence/spoliation," and essentially the Contractors seek sanctions against the Association for its alleged failure to retain the parts and mechanisms removed or replaced during the sewer repair, and prior to sending the Builders the NRS 40.645 notice. Assuming there were no other suppression of evidence or spoliation issues with

[13]The sewer system had been repaired prior to the Association sending the NRS 40.645 notice meaning the Builders were not accorded their right to repair under NRS Chapter 40.

respect to constructional defects in the windows, fire walls or mechanical room, the Fourth Claim for Relief also is resolved as this Court concluded, in its November 30, 2018 Order, the NRS 40.645 notice was insufficient with respect to the sewer deficiencies and the Builders were not notified of the constructional defects prior to repair. If there are remaining suppression of evidence or spoliation issues, such deal with whether this Court should issue sanctions upon the Association for its failure to preserve. In this Court's view, such matters are moot given its prior conclusions claims relating to the mechanical room are barred by the four-year statute of limitations, the NRS 40.645 notice was insufficient with respect to constructional defects allegedly within the fire walls, and lastly, the window deficiencies are time-barred by the six-year statute of repose. In other words, whether there remain spoliation issues, this Court concludes the Fourth Claim for Relief is moot.

The Fifth Claim for Relief for breach of the Settlement Agreement made in resolving party differences in the prior litigation remains undecided for the same reason this Court concluded the "claim preclusion" issues identified in the Second Claim for Relief were not determined. Likewise, the Sixth and Seventh Claims for Relief, seeking declaratory relief given the Association's duty to defend and indemnify under the Settlement Agreement, have not been decided. In short, the remaining causes are the Second, Fifth, Sixth and Seventh Claims for Relief set forth in the Contractors' Complaint and they are distinctly separate from the Associations' constructional defect claims decided in the Findings of Fact, Conclusions of Law and Orders filed September 15, 2017, November 30, 2018 and May 23, 2019.

6. In summary, the May 23, 2019 Findings of Fact, Conclusions of Law and Order resulted in a culmination of a final adjudication, wholly resolving the causes set forth within the Association's Counter-Claim. The claims remaining are those are made by the Builders and deal specifically with the adherence of the parties' concessions set forth within the prior litigation's Settlement Agreement. These causes are distinctly different from the constructional defect claims

alleged in the Counter-Claim. In this Court's view, entry of a separate judgment now would not require any appellate court to decide the same issues more than once on separate appeals.

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

IT IS HEREBY ORDERED, ADJUDGED AND DECREED the Motion to Certify Judgment as Final Under NRCP 54(b) filed by Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. on July 22, 2019 is granted.

DATED this 12th day of August 2019.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CERTIFICATE OF SERVICE

I hereby certify, on the 12th day of August 2019, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing ORDER RE: MOTION TO CERTIFY JUDGMENT AS FINAL UNDER NRCP 54(b) to the following counsel of record, and that first-class postage was fully prepaid thereon:

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

DANIEL F. POLSENBERG, ESQ.
JOEL D. HENRIOD, ESQ.
ABRAHAM G. SMITH, ESQ.
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
DPolsenberg@LRRC.com

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

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

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

Laura Banks
Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

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

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

Counsel for Defendant Panorama Towers Condominium Unit Owners' Association

DISTRICT COURT

CLARK COUNTY, NEVADA

LAURENT HALLIER, an individual; PANORAMA TOWERS I, LLC, a Nevada limited liability company; PANORAMA TOWERS I MEZZ, LLC, a Nevada limited liability company; and M.J. DEAN CONSTRUCTION, INC., a Nevada corporation, Plaintiffs, vs. PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada non-profit corporation, Defendant.	Case No.: A-16-744146-D Dept. No.: XXII **[HEARING REQUESTED]** **DEFENDANT'S MOTION TO ALTER OR AMEND THE COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER ENTERED ON MAY 23, 2019**

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 PLUMBING & HEATING, LLC, dba Silver Star Plumbing; and ROES 1 through 1000, inclusive,

Counterdefendants.

Defendant Panorama Towers Condominium Unit Owners' Association ("Association"), by and through its counsel of record, hereby respectfully submits this Motion to Alter or Amend the Court's Findings of Fact, Conclusions of Law, and Order Entered on May 23, 2019 (the "Order"), which granted Plaintiffs Laurent Hallier, Panorama Towers I LLC, Panorama Towers I Mezz, LLC, and M.J. Dean Construction, Inc.'s (collectively, the "Builders") Motion for Summary Judgment Pursuant to NRS 11.202(1).

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

DATED this 9th day of September, 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

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

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

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

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This Court has already held that, as of October 1, 2019, AB 421 retroactively extends the statute of repose for the Association's construction defect claims to 10 years. This Court has also held that the Association's two towers have dates of substantial completion of January 16, 2008 (Tower I) and March 16, 2008 (Tower II).[1] Because the Association filed its Counterclaim on March 1, 2017, AB 421's retroactive application will require the opposite result of the Order by the time this Court hears the instant Motion. Rule 59(e) exists for this precise situation—to permit courts to alter or amend orders impacted by a substantive change in the controlling law and/or to prevent a manifest injustice of law. Relief under Rule 59(e) was not available until the Court certified its Order as final pursuant to Rule 54(b) on August 13, 2019.

Because the controlling law has changed and no longer supports dismissal of the Association's claims, the Association respectfully requests an order altering or amending the Order and holding the Association's claims were timely filed and may proceed on the merits.

II.

STATEMENT OF FACTS

On February 24, 2015, AB125 became the law. AB125 established, among other things, a shorter, six-year statute of repose period. *See* NEV. REV. STAT. § 11.202(1). The shortened repose period applied retroactively. *See* AB125 § 21(5); Order at 10:12-18. In conjunction with the shortened repose period, AB125 created a constitutionally required one-year grace period in which claimants were allowed to file claims without being time-barred.

On February 24, 2016, the Association served a Chapter 40 Notice on the Builders for various constructional defects in the two Panorama Towers. On September 26, 2016, the parties engaged in a pre-litigation mediation pursuant to NRS 40.680. On September 28, 2016, the

[1] The Association respectfully disagrees with a number of the Court's prior rulings, and none of the recitations of those rulings in this Motion change the Association's position on those previously briefed issues.

Builders filed the Complaint against the Association. On March 1, 2017, after briefing and hearing related to the Association's motion to dismiss, the Association timely filed its Answer and Counterclaim against the Builders.

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

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

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

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

On February 11, 2019, the Builders filed their fourth motion for summary judgment, this time challenging the timeliness of the Association's construction defect counterclaims under NRS 11.202(1). On March 1, 2019, the Association filed its opposition to the motion and a countermotion. On April 23, 2019, the Court heard the Builders' motion and the Association's countermotion. On May 23, 2019, the Court entered its Order granting the Builders' motion and denying the Association's countermotion ("Order"). *See* **Exhibit 1** (Order). The Order contains the following determination: "[T]he dates of substantial completion are January 16, 2018 (Tower I) and March 16, 2018 (Tower II) . . . ." *Id* at 12:4-7.

On June 3, 2019, Governor Sisolak signed AB 421 into law. *See* Ex. 1 (AB421 NELIS). AB 421 provides, among other things, for an extension of the statute of repose period from six (6)

years to 10 years. *See* **Exhibit 2** (AB 421) at § 7 (as enrolled). Of importance, the new 10-year statute of repose "***appl[ies] retroactively to actions*** in which the substantial completion of the improvement to the real property occurred before October 1, 2019." *Id.* at § 11 (emphasis added).

On June 3, 2019, the Association filed a motion for reconsideration of the Order based on what it viewed as errors of fact and law. That motion referenced the 2019 Legislature's passage of AB 421 and its anticipated enactment into law. On June 13, 2019, the Association filed a separate motion for reconsideration based on AB 421's enactment. On July 16, 2019, the Court heard both of the Association's motions and denied the former while taking the latter under advisement.[2] On August 9, 2019, the Court entered its order denying the Association's motion for reconsideration specifically related to AB 421 ("Reconsideration Order"). *See* **Exhibit 3** (Reconsideration Order). In the Reconsideration Order, the Court determined:

- "AB 421 amends NRS 11.202 by extending the statute of repose period from six (6) to ten (10) years and it is to be applied retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019, the date in which the amendment takes effect." *Id* at 5:4-8; *see id* at 6:11-25.
- "In short, the newly-enacted law [AB 421] becomes operational October 1, 2019 and its retroactive effect will take place at that time." *Id* at 7:4-6.[3]

On July 22, 2019, the Builders filed their motion requesting to certify the Order as a final judgment pursuant to Rule 54(b). On August 1, 2019, the Association filed its opposition to the motion. On August 6, 2019, the Court heard the Builders' motion. On August 12, 2019, the Court entered its order granting the Builders' motion and certifying the Order as final judgment under NRCP 54(b) ("Rule 54(b) Order"). *See* **Exhibit 4** (Rule 54(b) Order). The Rule 54(b) Order contains the following determinations:

- "As pertinent here, AB 421 amends NRS 11.202 by extending the statute of repose

[2] The Court also heard the Association's motion to retax the Builders' costs and granted it on the grounds that the Builders prematurely filed the memorandum of costs.

[3] Although the Builders argued the Order was a final judgment, *see id* at 5:9-12, the Reconsideration Order contains no determination accepting that position.

period from six (6) to ten (10) years and it is to be applied retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019, the date in which the amendment takes effect." *Id* at 5:14-17.

- "In summary, the Court concluded the newly-enacted NRS 11.202 becomes effective October 1, 2019 . . . ." *Id* at 6:7-8.
- "In summary, the May 23, 2019 Findings of Fact, Conclusions of Law and Order resulted in a culmination of a final adjudication, wholly resolving the causes set forth within the Association's Counter-Claim." *Id* at 11:23-25.
- "**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** the Motion to Certify Judgment as Final Under NRCP 54(b) filed by Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MEZZ, LLC and M.J. DEAN CONSTRUCTION, INC. on July 22, 2019 is granted." *Id* at 12:4-8 (emphasis in original).

On August 13, 2019, the Builders filed a notice of entry of the Rule 54(b) Order.

III.

LEGAL STANDARD

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

Here, the Order did not become a final, appealable judgment until notice of entry of the Rule 54(b) Order on August 13, 2019. The Association timely brings this Motion pursuant to Rule 59(e) based on the retroactive application of the longer statute of repose period prescribed by AB 421. This substantive change in the controlling law, which will be in effect when the Court considers this Motion, merits altering or amending the Order and the subsequent Rule 54(b) Order

that made the Order a final judgment. Under the new 10-year repose period, the Association timely filed its construction defect counterclaims against the Builders based on the Court's prior determination of the dates of substantial completion. More specifically, the Court held the dates of substantial completion were in early 2008, and the Association filed its Counterclaim on March 1, 2017—well within the new, retroactively applicable 10-year repose period. And as the Court has already recognized, the new repose period applies to all structures with a substantial completion date that "occurred before October 1, 2019." Ex. 3 (Reconsideration Order) at 5:4-8. Therefore, the Order's effect of time-barring the Association's claims is no longer supported by Nevada law and, in order to avoid a manifest injustice of law, must be reversed to allow the Association to proceed with its claims on the merits.

IV.

ARGUMENT

A. The 10-Year Statute of Repose Set Forth in AB 421 Applies to the Association's Counterclaims.

1. AB 421's repose period applies to structures with a substantial completion date before October 1, 2019.

Rule 59(e) allows the Court to alter or amend the Order due to a subsequent change in the controlling law. 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* Ex. 2 (AB 421) at §11(4); *see* Ex. 3 (Reconsideration Order) at 5:4-8, 6:11-25; Ex. 4 (Rule 54(b) Order) at 5:14-17. This Court previously determined the towers have substantial completion dates prior to October 1, 2019. *See* Ex. 1 (Order) at 12:4-7. Therefore, AB 421's 10-year statute of repose retroactively applies to the Association's claims involving the two towers.

2. Nevada law permits the retroactive application of statutes.

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** . . . ." Ex. 2 (AB 421) at §11(4) (emphasis added). Nevada law does not prohibit the retroactive lengthening of a repose period, only the shortening of such a period.[4] Based on the foregoing express language, courts must apply the 10-year statute of repose retrospectively.

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[4] No Nevada case prohibits the retroactive application of an extended statute of repose to revive otherwise time barred claims. Federal and state courts around the country find no such prohibition. *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). *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)).

V.

CONCLUSION

Because the controlling Nevada law that resulted in the Order has changed and requires a different result, the HOA respectfully requests an order reversing the Order and the subsequent Rule 54(b) Order pursuant to NRCP 59(e) to allow the Association to prosecute its construction defect Counterclaims on the merits.

DATED this 9th day of September, 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

FRANCIS I. LYNCH, ESQ. (#4145)
LYNCH & ASSOCIATES LAW GROUP
1445 American Pacific Drive, Suite 110 #293
Henderson, Nevada 89074
T: (702) 868-1115
F: (702) 868-1114
SCOTT WILLIAMS (*admitted pro hac vice*)
WILLIAMS & GUMBINER, LLP
1010 B Street, Suite 200
San Rafael, California 94901
T: (415) 755-1880
F: (415) 419-5469

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

Certificate of Service

I hereby certify that on the 9th day of September, 2019, the foregoing **DEFENDANT'S MOTION TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW** was served on the following by Electronic Service to all parties on the Court's service list.

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

Exhibit 1

FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

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

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

Third-Party Plaintiff,

Vs.

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

Third-Party Defendants.[1]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

These matters concerning:

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

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

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

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

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

FINDINGS OF FACT AND PROCEDURAL HISTORY

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

1. Declaratory Relief—Application of AB 125;

2. Declaratory Relief—Claim Preclusion;

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

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

4. Suppression of Evidence/Spoliation;

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

6. Declaratory Relief—Duty to Defend; and

7. Declaratory Relief—Duty to Indemnify.

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

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

2. Negligence and Negligence *Per Se;*

3. Products Liability (against the manufacturers);

4. Breach of (Sales) Contract;

5. Intentional/Negligent Disclosure; and

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

DATED this 23rd day of May 2019.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CERTIFICATE OF SERVICE

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

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

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

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

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

Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
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File Into Existing Case

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

1 20 items per page 1 - 1 of 1 items

Service Contacts: A-16-744146-D

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

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File Into Existing Case

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

1 20 items per page 1 - 1 of 1 items

Service Contacts: A-16-744146-D

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

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Exhibit 2

Assembly Bill No. 421–Committee on Judiciary

CHAPTER.....

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

Legislative Counsel's Digest:

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

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

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

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

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

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

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

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

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

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

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

Section 1. (Deleted by amendment.)

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

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

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

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

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

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

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

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

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

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

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

2. The notice given pursuant to subsection 1 must:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) Comply with the provisions of NRS 40.6472;

(b) Make an offer of settlement;

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

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

(e) Participate in mediation,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(f) Any interest provided by statute.

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

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

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

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

40.687 Notwithstanding any other provision of law:

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

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

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

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

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

Sec. 6. (Deleted by amendment.)

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

11.202 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than ~~[6]~~ ***10*** years after the substantial completion of such an improvement, for the recovery of damages for:

(a) ~~[Any]~~ ***Except as otherwise provided in subsection 2, any*** deficiency in the design, planning, supervision or observation of construction or the construction of such an improvement;

(b) Injury to real or personal property caused by any such deficiency; or

(c) Injury to or the wrongful death of a person caused by any such deficiency.

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

3. The provisions of this section do not apply:

(a) To a claim for indemnity or contribution.

(b) In an action brought against:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. If:

(a) A unit is vacant;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. As used in this section:

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

(b) "Remediation" does not include restoration.

(c) "Vacant" means a unit:

(1) Which reasonably appears to be unoccupied;

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

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

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

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

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

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

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

Exhibit 3

ORDR

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.

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

Counter-Defendants.

Case No. A-16-744146-D

Dept. No. XXII

ORDER RE: DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) FILED JUNE 13, 2019

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

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

Third-Party Plaintiff,

Vs.

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

Third-Party Defendants.[1]

ORDER RE: DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) FILED JUNE 13, 2019

This matter concerning Defendant's Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed June 13, 2019 was heard on the 16th day of July 2019 at the hour of 8:30 a.m. before Department XXII of the Eighth Judicial District Court, in and for Clark County, Nevada, with JUDGE SUSAN H. JOHNSON presiding; Plaintiffs/Counter-Defendants LAURENT HALLIER, PANORAMA TOWERS I, LLC, PANORAMA TOWERS I MESS, LLC and M.J. DEAN CONSTRUCTION, INC. appeared by and

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

SUSAN H. JOHNSON
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through its attorneys, DANIEL F. POLSENBERG, ESQ. of the law firm, LEWIS ROCA ROTHGERBER CHRISTIE, and PETER C. BROWN, ESQ. and DEVIN R. GIFFORD, ESQ., ESQ. of the law firm, BREMER WHYTE BROWN & O'MEARA; and Defendant/Counter-Claimant/Third-Party Plaintiff PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION appeared by and through its attorneys, MICHAEL J. GAYAN, ESQ. and WILLIAM L. COULTHARD, ESQ. of the law firm, KEMP JONES & COULTHARD, and FRANCIS I. LYNCH, ESQ. of the law firm, LYNCH HOPPER. Having reviewed the papers and pleadings on file herein, heard oral arguments of the lawyers and taken this matter under advisement, this Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT AND PROCEDURAL HISTORY

1. This case arises as a result of alleged constructional defects within both the common areas and the 616 residential condominium units located within two tower structures of the PANORAMA TOWERS located at 4525 and 4575 Dean Martin Drive in Las Vegas, Nevada. On February 24, 2016, Defendant/Counter-Claimant PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION served its original NRS 40.645 Notice of Constructional Defects upon Plaintiffs/Counter-Defendants (also identified herein as the "Contractors" or "Builders"), identifying deficiencies within the residential tower windows, fire blocking, mechanical room piping and sewer. Subsequently, after the parties engaged in the pre-litigation process ending with an unsuccessful NRS 40.680 mediation held September 26, 2016, the Contractors filed their Complaint on September 28, 2016 against the Owners' Association, asserting, for the most part, its NRS 40.645 notice was deficient. On March 1, 2017, PANORAMA TOWER CONDOMINIUM UNIT OWNERS' ASSOCIATION filed its Answer and Counter-Claim,

2. As set forth within its September 15, 2017 Findings of Fact, Conclusions of Law and Order, this Court dismissed the Association's claims for constructional defect located within its

mechanical room as being time-barred by virtue of the "catch-all" statute of limitations of four (4) years set forth in NRS 11.220. With respect to challenges to the sufficiency and validity of the NRS 40.645 notice, this Court stayed the matter to allow PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION to amend it with more specificity. As expressed within its November 30, 2018 Findings of Fact, Conclusions of Law and Order, this Court ultimately determined the amended NRS 40.645 notice served upon the Builders on April 15, 2018 was valid only with respect to the windows' constructional defects.

3. On April 23, 2019, this Court heard two motions filed by the parties, to wit: (1) the Builders' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed February 11, 2019 and (2) the Association's Conditional Counter-Motion for Relief Pursuant to NRS 4.0695(2) filed March 1, 2019. After hearing the parties' arguments, this Court took the matter under advisement, and on May 23, 2019, issued its third Findings of Fact, Conclusions of Law and Order in this case which granted the Builders' motion, and denied the Association's Conditional Counter-Motion. As pertinent here, this Court concluded the Owners' Association's remaining constructional defect claims lodged against the Builders were time-barred by the six-year statute of repose set forth in NRS 11.202(1).

4. On June 3, 2019, the Association filed 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 or alternatively, a Motion to Stay the Court's Order.[2] Ten days later, on June 13, 2019 the Association filed a second Motion for Reconsideration and/or to Alter or Amend the

[2]The Association moved this Court to stay the Order upon the basis the Nevada Legislature had passed Assembly Bill (referred to as "AB" herein) 421 on June 1, 2019, which "immediately and retroactively extends the statute of repose to 10 years." *See* Motion for Reconsideration of the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment or alternatively, a Motion to Stay the Court's Order filed June 3, 2019, p. 4. The Association urged this Court to stay the Order until such time as AB 241 was enacted or rejected by the Governor. As set forth *infra,* the Governor signed the bill on June 3, 2019 which was to take effect October 1, 2019.

Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment. The second Motion for Reconsideration differed from the first in that it alerted the Court, on June 1, 2019, the Nevada Legislature passed AB 421, and such was signed by the Governor on June 3, 2019. AB 421 amends NRS 11.202 by extending the statute of repose period from six (6) to ten (10) years and it is to be applied retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019, the date in which the amendment takes effect.

5. The Builders opposed the two motions on several grounds. First, they noted this Court entered a final order on May 23, 2019, the Notice of Entry of Order was filed May 28, 2019, and thus, by the time the Motion for Reconsideration and/or Stay was filed June 3, 2019, there was no pending matter to stay. Second, while AB 421 was enacted and will apply retroactively, it does not become effective until October 1, 2019, meaning as of now, there is no change in the law. That is, the current period for the statute of repose is six (6) years as enacted February 24, 2015, and not ten (10). Third, as the Association's claims have already been adjudicated, AB 421 cannot be interpreted to revive those causes of action.

CONCLUSIONS OF LAW

1. Rule 60 of the Nevada Rules of Civil Procedure (NRCP) accords the district courts authority to relieve a party from a final judgment, order or proceeding where some error or injustice is shown. Specifically NRCP 60(b) states as follows:

> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is

based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application. ...

2. Further, a district court, by virtue of its inherent authority, may grant a motion for rehearing if the judge concludes re-argument is warranted. *See* Gibbs v. Giles, 96 Nev. 243, 244, 607 P.2d 118, 119 (1980), *citing* former District Court Rule (DCR) 20(4). Indeed, unless and until an order is appealed, the district court retains jurisdiction to reconsider the matter. *Id.* at 244.

3. The Owners' Association has moved this Court to reconsider its decision expressed within its Findings of Fact, Conclusions of Law and Order filed May 23, 2019. The basis for the Association's position stems from the Nevada Legislature's passage of AB 421 on June 1, 2019 as signed by the state's Governor on June 3, 2019. As noted above, AB 421, *inter alia,* extends the statute of repose from six (6) to ten (10) years, and such is to be applied retroactively from its effective date of October 1, 2019. AB 421, Section 7, states in part:

> NRS 11.202 is hereby amended to reach as follows:
> 11.202 1. No action may be commenced against the owner, occupier or any person performing or furnishing the design, planning, supervision or observation of construction, or the construction of an improvement to real property more than ***10*** years after the substantial completion of such an improvement. ... (Emphasis in original)

AB 421, Section 11, Subsection 4 also provides "[t]he period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply *retroactively* to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019." (Emphasis added).

4. While there is no question the Nevada Legislature has amended NRS 11.202(1) to extend the statute of repose period from six (6) to ten (10) years, and it is to be applied retroactively, this Court is mindful the new enactment is not effective yet. NRS 218D.330(1) specifically provides "[e]ach 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." In

this case, while it specifically passed a law that is to be applied retroactively, the Nevada Legislature did not prescribe an effective date earlier or different than October 1, 2019. By it not prescribing an earlier date, the Legislature indicated its intention NRS 11.202, as amended February 24, 2015, and setting forth a six (6) years' statute of repose would remain in effect until October 1, 2019. In short, the newly-enacted law becomes operational October 1, 2019 and its retroactive effect will take place at that time.

5. Simply put, there is no basis upon which this Court can relieve the Owners' Association from the grant of the Builders' Motion for Summary Judgment as set forth within the Findings of Fact, Conclusions of Law and Order filed May 23, 2019. *See* NRCP 60(b). Re-argument is not warranted. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED Defendant's Motion for Reconsideration of and/or to Alter or Amend the Court's May 23, 2019 Findings of Fact, Conclusions of Law and Order Granting Plaintiffs' Motion for Summary Judgment Pursuant to NRS 11.202(1) filed June 13, 2019 is denied.

DATED this 9th day of August 2019.

SUSAN H. JOHNSON, DISTRICT COURT JUDGE

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

CERTIFICATE OF SERVICE

I hereby certify, on the 9th day of August 2019, I electronically served (E-served), placed within the attorneys' folders located on the first floor of the Regional Justice Center or mailed a true and correct copy of the foregoing ORDER RE: DEFENDANT'S MOTION FOR RECONSIDERATION AND/OR TO ALTER OR AMEND THE COURT'S MAY 23, 2019 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT PURSUANT TO NRS 11.202(1) FILED JUNE 13, 2019 to the following counsel of record, and that first-class postage was fully prepaid thereon:

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

DANIEL F. POLSENBERG, ESQ.
LEWIS ROCA ROTHGERBER CHRISTIE, LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
DPolsenberg@LRRC.com

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

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

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

Laura Banks

Laura Banks, Judicial Executive Assistant

SUSAN H. JOHNSON
DISTRICT JUDGE
DEPARTMENT XXII

Exhibit 4