Case No. _____

In the

Supreme Court

of the

State of Nevada

DEKKER/PERICH/SABATINI LTD.,
NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN,
MELROY ENGINEERING, INC. d/b/a MSA ENGINEERING CONSULTANTS,
JW ZUNINO & ASSOCIATES, LLC, and
NINYO & MOORE, GEOTECHNICAL CONSULTANTS,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT,
STATE OF NEVADA,
CLARK COUNTY, and
THE HONORABLE TREVOR ATKIN,

Respondents,

CITY OF NORTH LAS VEGAS,

Real Party in Interest.

FROM DECISIONS OF THE EIGHTH JUDICIAL DISTRICT COURT,
CLARK COUNTY, NEVADA
CASE NO. A-19-798346-C
HONORABLE TREVOR ATKIN · DEPARTMENT 8 · PHONE: (702) 671-4338

PETITIONERS'APPENDIX TO
PETITION FOR WRIT OF MANDAMUS OR,
ALTERNATIVELY, PROHIBITION

VOLUME 16

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CHRONOLOGICAL INDEX - APPENDIX OF EXHIBITS

Exhibit:	Volume:	Bates: PET.APP.	Date:	Description:
25	16	002472 – 002504	05/15/2019	Exhibit 5 - Minutes of the Senate Committee on Judiciary – Eightieth Session
	16	002505 – 002510	09/30/2019	Exhibit 6 - Richardson Construction, Inc. and The Guarantee Company of North America USA's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	16	002511 – 002514	09/30/2019	Exhibit 7 - JW Zunino & Associates LLC's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
26	**16**	**002515 – 002527**	**11/25/2019 5:02 PM**	**JW Zunino & Associates LLC's Opposition to City of North Las Vegas' Motion to Alter Judgment**
	16	002528 – 002530	10/09/2019	Exhibit A – Affidavit of Rita Tuttle
27	**16**	**002531 – 002558**	**11/26/2019 11:17 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment**
	16	002559 – 002563	10/15/2019	Exhibit 1 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	16	002564 – 002582	08/20/2019	Exhibit 2 – City of North Las Vegas' Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	16	002583 – 002643	10/10/2019	Exhibit 3 – Court Recorder's Transcript of Hearing: All Pending Motions
	16	002644 – 002646	10/15/2019	Exhibit 4 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time

	16	002647 – 002650	08/05/2019	Exhibit 5 - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
			08/06/2019	Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss
			08/08/2019	Melroy Engineering, Inc. d/b/a MSA Engineering Consultants Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
28	**16**	**002651 – 002660**	**11/26/2019 12:28 PM**	**Dekker/Perich/Sabatini, Ltd.'s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment; Opposition by Incorporation and Request to Reset Prior Motion to Dismiss**
	16	002659 – 002664	10/15/2019	Exhibit 1 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	16	002665 – 002677	08/06/2019	Exhibit 2 – Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss
29	**16**	**002678 – 002681**	**11/26/2019 12:35 PM**	**Dekker/Perich/Sabatini, Ltd.'s Joinder to JW Zunino & Associates LLC's Opposition to City of North Las Vegas' Motion to Alter**
30	**16**	**002682 – 002685**	**11/26/2019 12:43 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Joinder to JW Zunino & Associates LLC's Opposition to City of North Las Vegas' Motion to Alter**

ALPHABETICAL INDEX - APPENDIX OF EXHIBITS

Exhibit:	Vol.:	Bates: PET.APP.	Date:	Description:
10	**11**	**001560 – 001562**	**08/20/2019 1:34 PM**	**City of North Las Vegas' Appendix of Exhibits to Opposition to Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss**
	11	001563 – 001580	07/11/2019	Exhibit 1 – City of North Las Vegas' Complaint
	11	001581 – 001614	02/07/2007	Exhibit 1 – Professional Architectural Services Agreement
	11	001615 – 001680	08/29/2007	Exhibit 2 – Ninyo & Moore's Geotechnical Evaluation
	11	001681 – 001694	01/30/2008	Exhibit 3 – City of North Las Vegas' Letter to Richardson Construction Inc re Construction Contract
	11	001695 – 001696	07/13/2009	Exhibit 4 – Notice of Completion
	12	001697 – 001832	12/11/2017	Exhibit 5 – American Geotechnical Inc's Geotechnical Investigation
	12	001833 – 001836	1988 - Present	Exhibit 6 – American Geotechnical Inc. Resume of Edred T. Marsh, Principal Geotechnical Engineer
	12	001837 – 001838	07/03/2019	Exhibit 7 – Declaration of Edred T. Marsh, P.E.
	12	001839 – 001840	10/17/2007	Exhibit 8 – Ninyo & Moore Letter to Dekker/Perich/Sabatini re Review of 95 Percent Bid Set Construction Documents
	13	001841 – 002053	11/02/2007	Exhibit 9 - Dekker/Perich/Sabatini's Structural Calculations
	14	002054 – 002131	11/02/2007	Exhibit 9 - Dekker/Perich/Sabatini's Structural Calculations
	14	002132 – 002210	11/10/2007	Exhibit 10 - Plans / Record Drawings
8	**7**	**000847 – 000849**	**08/20/2019 1:24 PM**	**City of North Las Vegas' Appendix of Exhibits to Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultant's Motion to Dismiss or in the Alternative, Motion for Summary Judgment**
	7	000850 – 000867	07/11/2019	Exhibit 1 – City of North Las Vegas' Complaint

	7	000868 – 000901	02/07/2007	Exhibit 1 – Professional Architectural Services Agreement
	7	000902 – 000967	08/29/2007	Exhibit 2 – Ninyo & Moore's Geotechnical Evaluation
	7	000968 – 000981	01/30/2008	Exhibit 3 – City of North Las Vegas' Letter to Richardson Construction Inc re Construction Contract
	7	000982 – 000983	07/13/2009	Exhibit 4 – Notice of Completion
	8	000984 – 001119	12/11/2017	Exhibit 5 – American Geotechnical Inc's Geotechnical Investigation
	8	001120 – 001123	1988 - Present	Exhibit 6 – American Geotechnical Inc's Resume of Edred T. Marsh, Principal Geotechnical Engineer
	8	001124 – 001125	07/03/2019	Exhibit 7 – Declaration of Edred T. Marsh, P.E.
	8	001126 – 001127	10/17/2007	Exhibit 8 – Ninyo & Moore Letter to Dekker/Perich/Sabatini re Review of 95 Percent Bid Set Construction Documents
	9	001128 – 001340	11/02/2007	Exhibit 9 - Dekker/Perich/Sabatini's Structural Calculations
	10	001341 – 001418	11/02/2007	Exhibit 9 - Dekker/Perich/Sabatini's Structural Calculations
	10	001419 – 001497	11/10/2007	Exhibit 10 - Plans / Record Drawings
	10	001498 – 001513	2019	Exhibit 2 – Assembly Bill 421 – 80th Session 2019
	10	001514 – 001546	05/15/2019	Exhibit 3 - Minutes of the Senate Committee on Judiciary, 80th Legislature
1	**1**	**000001 – 000017**	**07/11/2019 4:35 PM**	**City of North Las Vegas' Complaint Against Defendants – Exempt from Arbitration Under N.A.R. 3(A): Seeks Damages in Excess of $50,000**
	1	000018 – 000051	02/07/2007	Exhibit 1 – Professional Architectural Services Agreement
	1	000052 – 000117	08/29/2007	Exhibit 2 – Ninyo & Moore's Geotechnical Evaluation
	1	000118 – 000131	01/30/2008	Exhibit 3 – City of North Las Vegas' Letter to Richardson Construction Inc re Construction Contract
	1	000132 – 000133	07/13/2009	Exhibit 4 – Notice of Completion

	2	000134 – 000269	12/11/2017	Exhibit 5 – American Geotechnical Inc's Geotechnical Investigation
	2	000270 – 000273	1988 - Present	Exhibit 6 – American Geotechnical Inc. Resume of Edred T. Marsh, Principal Geotechnical Engineer
	2	000274 – 000275	07/03/2019	Exhibit 7 – Declaration of Edred T. Marsh, P.E.
	2	000276 – 000277	10/17/2007	Exhibit 8 – Ninyo & Moore Letter to Dekker/Perich/Sabatini re Review of 95 Percent Bid Set Construction Documents
	3	000278 – 000491	11/02/2007	Exhibit 9 - Dekker/Perich/Sabatini's Structural Calculations
	4	000492 – 000568	11/02/2007	Exhibit 9 - Dekker/Perich/Sabatini's Structural Calculations
	4	000569 – 000647	11/10/2007	Exhibit 10 - Plans / Record Drawings
18	**15**	**002307 – 002312**	**09/26/2019**	**City of North Las Vegas' Limited Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time**
	15	002313 – 002318	09/26/2019	Exhibit 1 – Register of Actions Case A-19-798346-C
	15	002319 – 002320	09/20/2019	Exhibit 2 – Weil & Drage, APC's Letter to All Counsel re Hearing of Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on September 27, 2019
25	**15**	**002407 – 002421**	**11/13/2019 11:58 AM**	**City of North Las Vegas' Motion to Alter Judgment**
	15	002422 – 002430	10/17/2019	Exhibit 1 - Notice of Entry of Order Granting Nevada by Design, LLC d/b/a Nevada By Design Engineering Consultants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment and All Joinders to the Same
	15	002431 – 002448	07/11/2019	Exhibit 2 – City of North Las Vegas' Complaint

	15	002449 – 002455	09/30/2019	Exhibit 3 - Order Granting Nevada by Design, LLC d/b/a Nevada By Design Engineering Consultants' Motion to Change Date
	15	002456 – 002471	2019	Exhibit 4 - Assembly Bill 421 – 80th Session 2019
	16	002472 – 002504	05/15/2019	Exhibit 5 - Minutes of the Senate Committee on Judiciary – Eightieth Session
	16	002505 – 002510	09/30/2019	Exhibit 6 - Richardson Construction, Inc. and The Guarantee Company of North America USA's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	16	002511 – 002514	09/30/2019	Exhibit 7 - JW Zunino & Associates LLC's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
6	**6**	**000821 – 000826**	**08/15/2019 5:02 PM**	**City of North Las Vegas' Motion to Strike and Opposition to Jackson Family Partnership LLC d/b/a Stargate Plumbing's Motion to Dismiss**
	6	000827 – 000828	08/06/2019	Exhibit 1 – Affidavit/Declaration of Service to Jackson Family Partnership LLC d/b/a Stargate Plumbing
62	**20**	**003467 – 003470**	**04/02/2020 4:21 PM**	**City of North Las Vegas' Notice of Entry of Decision and Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss**
	20	003471 – 003480	04/02/2020	Exhibit 1 - Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss
66	**21**	**003589 – 003592**	**05/05/2020 3:48 PM**	**City of North Las Vegas' Notice of Entry of Decision and Order Denying Richardson Construction, Inc. and The Guarantee Company of North America USA's Motion to Dismiss / Motion for Summary Judgment Based on Laches and All Joinders**
	21	003593 – 003597	05/05/2020	Exhibit 1 – Court's Decision and Order Denying Richardson Construction, Inc. and The Guarantee Company of North America USA's Motion to Dismiss / Motion for Summary Judgment Based on Laches and All Joinders

46	**18**	**003064 – 003067**	**01/24/2020 3:55 PM**	**City of North Las Vegas' Notice of Entry of Decision and Order Granting Its Motion to Alter Judgment**
	18	003068 – 003073	01/23/2020	Exhibit 1 – Court's Decision and Order
9	**11**	**001547 – 001559**	**08/20/2019 1:34 PM**	**City of North Las Vegas' Opposition to Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss**
52	**19**	**003255 – 003274**	**02/17/2020 4:39 PM**	**City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' and Joinders Motion to Dismiss on Order Shortening Time**
60	**20**	**003409 – 003413**	**03/16/2020 4:57 PM**	**City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion for Clarification Regarding Court's Minute Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss Brought Pursuant to NRS 11.258, on Order Shortening Time**
	20	003414 – 003415	03/13/2020	Exhibit 1 – Email re Proposed Order Denying MSA's Motion to Dismiss on NRS 11.258
	20	003416 – 003425	Undated	Exhibit 2 – Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss
	20	003426 – 003428	03/16/2020	Exhibit 3 – Email re Request to Withdraw Motion for Clarification on Order Shortening Time Without Prejudice
7	**6**	**000829 – 000846**	**08/20/2019 1:24 PM**	**City of North Las Vegas' Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgement**
45	**18**	**003047 – 003063**	**12/19/2019 4:59 PM**	**City of North Las Vegas' Reply in Support of Its Motion to Alter Judgment**

20	**15**	**002326 – 002330**	**09/27/2019 4:18 PM**	**City of North Las Vegas' Surreply to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time**
61	**20**	**003429 – 003466**	**03/30/2020 3:09 PM**	**Court Recorder's Transcript of Hearing re All Pending Motions, March 10, 2020**
63	**20**	**003481 – 003491**	**04/10/2020 3:04 PM**	**Court Recorder's Transcript of Hearing re All Pending Motions, March 17, 2020**
23	**15**	**002339 – 002398**	**10/10/2019 1:20 PM**	**Recorder's Transcript of Hearing Re: All Pending Motions, September 30, 2019**
65	**21**	**003541 – 003588**	**04/21/2020 8:19 AM**	**Court Recorder's Transcript of Proceedings re All Pending Motions, February 20, 2020**
64	**21**	**003492 – 003540**	**04/21/2020 8:19 AM**	**Court Recorder's Transcript of Proceedings re City of North Las Vegas' Motion to Alter Judgment, January 21, 2020**
29	**16**	**002678 – 002681**	**11/26/2019 12:35 PM**	**Dekker/Perich/Sabatini, Ltd.'s Joinder to JW Zunino & Associates LLC's Opposition to City of North Las Vegas' Motion to Alter**
49	**19**	**003147 – 003154**	**02/04/2020 3:11 PM**	**Dekker/Perich/Sabatini, Ltd.'s Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time**
3	**5**	**000718 – 000720**	**08/06/2019 2:44 PM**	**Dekker/Perich/Sabatini, Ltd.'s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, In the Alternative, Motion for Summary Judgment**

28	**16**	**002651 – 002660**	**11/26/2019 12:28 PM**	**Dekker/Perich/Sabatini, Ltd.'s Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment; Opposition by Incorporation and Request to Reset Prior Motion to Dismiss**
	16	002659 – 002664	10/15/2019	Exhibit 1 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	16	002665 – 002677	08/06/2019	Exhibit 2 – Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss
4	**6**	**000721 – 000735**	**08/06/2019 2:44 PM**	**Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss**
	6	000734 – 000751	07/11/2019	Exhibit A – City of North Las Vegas' Complaint
	6	000752 – 000786	02/07/2007	Exhibit B – City of North Las Vegas' Complaint Exhibit 1 – Professional Architectural Services Agreement
	6	000787 – 000789	07/11/2019	Exhibit C – Affidavit of Aleema A. Dhalla, Esq.
	6	000790 – 000793	1988 – Present	Exhibit D – American Geotechnical, Inc.'s Resume of Edred T. Marsh, Principal Geotechnical Engineer
	6	000794 – 000801	03/23/2007	Exhibit E - Excerpts from Legislative History of N.R.S. 11.258
	6	000802 – 000803	07/03/2019	Exhibit F – Declaration of Edred T. Marsh, P.E.
	6	000804 – 000817	12/11/2017	Exhibit G - American Geotechnical, Inc's Geotechnical Investigation
13	**14**	**002219 – 002232**	**08/28/2019 8:48 AM**	**Dekker/Perich/Sabatini, Ltd.'s Reply to City of North Las Vegas' Opposition to Its Motion to Dismiss**
53	**19**	**003275 – 003285**	**02/18/2020 3:00 PM**	**Dekker/Perich/Sabatini, Ltd.'s Reply to City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' and Joinders to Motion to Dismiss on Order Shortening Time**
	19	003286 – 003287	07/03/2019	Exhibit A – Declaration of Edred T. Marsh, P.E.

	19	003288 – 003294	07/11/2019	Exhibit B – City of North Las Vegas' Complaint
12	**14**	**002214 – 002218**	**08/26/2019 4:15 PM**	**Jackson Family Partnership LLC d/b/a Stargate Plumbing's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, In the Alternative, Motion for Summary Judgment**
36	**18**	**002894 – 002900**	**12/02/2019 2:22 PM**	**Jackson Family Partnership LLC d/b/a Stargate Plumbing's Joinder to JW Zunino & Associates LLC's Opposition to Motion to Alter Judgment with Supplemental Points and Authorities**
7	**18**	**002901 – 002907**	**12/02/2019 2:22 PM**	**Jackson Family Partnership LLC d/b/a Stargate Plumbing's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to City of North Las Vegas' Motion to Alter Judgment with Supplemental Points and Authorities**
2	**18**	**003037 – 003039**	**12/03/2019 10:01 AM**	**JW Zunino & Associates LLC's Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Opposition to Motion to Alter Judgment**
50	**19**	**003155 – 003166**	**02/07/2020 3:04 PM**	**JW Zunino & Associates LLC's Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time**
22	**15**	**002336 – 002338**	**09/30/2019 4:35 PM**	**JW Zunino & Associates LLC's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment**
31	**17**	**002686 – 002688**	**11/27/2019 10:43 AM**	**JW Zunino & Associates LLC's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment**
38	**18**	**002908 – 002910**	**12/02/2019 2:34 PM**	**JW Zunino & Associates LLC's Joinder to Richardson Construction, Inc. and The Guarantee Company of North America USA's Opposition to Motion to Alter Judgment**

26	**16**	**002515 – 002527**	**11/25/2019 5:02 PM**	**JW Zunino & Associates LLC's Opposition to City of North Las Vegas' Motion to Alter Judgment**
	16	002528 – 002530	10/09/2019	Exhibit A – Affidavit of Rita Tuttle
57	**20**	**003385 – 003391**	**02/19/2020 11:29 AM**	**JW Zunino & Associates LLC's Reply to City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time**
5	**6**	**000818 – 000820**	**08/08/2019 1:32 PM**	**Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Joinder to Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' Motion to Dismiss or, In the Alternative, Motion for Summary Judgment**
40	**18**	**003029 – 003032**	**12/02/2019 3:19 PM**	**Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Joinder to JW Zunino & Associates, LLC's Opposition to City of North Las Vegas' Motion to Alter Judgment**
41	**18**	**003033 – 003036**	**12/02/2019 3:19 PM**	**Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Joinder to Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' Opposition to City of North Las Vegas' Motion to Alter Judgment**
39	**18**	**002911 – 002936**	**12/02/2019 3:19 PM**	**Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Opposition to Motion to Alter Judgment**
	18	002937 – 002941	10/15/2019	Exhibit 1 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	18	002942 – 002960	08/20/2019	Exhibit 2 – City of North Las Vegas' Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	18	002961 – 003021	10/10/2019	Exhibit 3 – Court Recorder's Transcript of Hearing: All Pending Motions

	18	003022 – 003024	10/15/2019	Exhibit 4 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Haring on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time
	18	003025 – 003028	08/05/2019	Exhibit 5 – Cover Sheet Filings of: Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment; Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss; and Melroy Engineering, Inc. d/b/a MSA Engineering Consultants Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
7	**18**	**003074 – 003090**	**02/04/2020 12:14 PM**	**Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time**
	19	003091 – 003108	07/11/2019	Exhibit A – City of North Las Vegas' Complaint
	19	003110 – 003111	07/11/019	Exhibit B – Affidavit of Aleema A. Dhalla, Esq.
	19	003112 – 003115	1988 - Present	Exhibit C – American Geotechnical Inc's Resume of Edred T. Marsh, Principal Geotechnical Engineer
	19	003116 – 003123	03/23/2007	Exhibit D – Legislative History of 11.258 Senate Bill 243
	19	003124 – 003137	12/11/2017	Exhibit E – American Geotechnical Inc's Geotechnical Investigation
	19	003138 – 003139	07/03/2019	Exhibit F – Declaration of Edred T. Marsh, P.E.
59	**20**	**003399 – 003408**	**03/16/2020 8:58 AM**	**Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion for Clarification Regarding Court's Minute Order Denying Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss Brought Pursuant to NRS 11.258, on Order Shortening Time**

55	**20**	**003308 – 003318**	**02/18/2020 5:02 PM**	**Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Reply to City of North Las Vegas' Opposition to Its Motion to Dismiss**
	20	003319 – 003325	02/12/2020	Exhibit 1 – Notice of Entry of Order Granting Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Motion to Dismiss; Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Motion to Dismiss City of North Las Vegas' Complaint
	20	003326 – 003340	11/22/2019	Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Motion to Dismiss City of Las Vegas' Complaint
	20	003341 - 003347	11/06/2019	Exhibit A – City of North Las Vegas' Complaint
	20	003348 – 003353	N/A	Exhibit B – Michael Panish Expert Witness & Consultants Construction Systems Curriculum Vitae
	20	003354 – 003361	03/23/2007	Exhibit C - Legislative History of 11.258 Senate Bill 243
	20	003362 – 003366	12/09/2019	A-19-804979-C Kelli Nash' Opposition to Defendant's Motion to Dismiss its Complaint
	20	003367 – 003373	12/26/2019	A-19-804979 Kittrell Garlock and Associates, Architects, AIA, Ltd.'s Reply to Kelly Nash's Opposition to its Motion to Dismiss Kelly Nash's Complaint
	20	003374 – 003378	10/15/2019	Exhibit 1 – Stipulation and Order to Dismiss Kittrell Garlock and Associates, AIA, Ltd.
30	**16**	**002682 – 002685**	**11/26/2019 12:43 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Joinder to JW Zunino & Associates LLC's Opposition to City of North Las Vegas' Motion to Alter**
48	**19**	**003140 – 003146**	**02/04/2020 3:09 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time**

17	**15**	**002282 – 002292**	**09/18/2019 3:07 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time**
	15	002293 – 002294	08/06/2019	Exhibit A – Clerk of the Court's Notice of Hearing
	15	002295 – 002296	09/06/2019	Exhibit B – Court's Notice of Rescheduling Motions to Dismiss and Joinders
	15	002297 – 002202	09/09/2019	Exhibit C – Emails re Rescheduling of Hearing
	15	002203 – 002304	09/10/2019	Exhibit D – Emails re Rescheduling of Hearing
	15	002305 – 002306	N/A	Exhibit E – Las Vegas Law Offices of Snell & Wilmer
2	**5**	**000648 – 000663**	**08/05/2019 4:15 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment**
	5	000664 – 000681	07/11/2019	Exhibit A – City of North Las Vegas' Complaint
	5	000682 – 000684	07/13/2009	Exhibit B – City of North Las Vegas' Complaint Exhibit 4 Notice of Completion
	5	000685 – 000690	03/25/2019	Exhibit C - Nevada Legislature Website (80th Session) Concerning the "Effective Date" of the AB 421
	5	000691 – 000693	07/11/2019	Exhibit D – Aleem A. Dhalla, Esq.'s Affidavit of Merit Attached to City of North Las Vegas' Complaint
	5	000694 – 000707	12/11/2017	Exhibit E - American Geotechnical, Inc's Geotechnical Investigation
	5	000708 – 000709	07/03/2019	Exhibit F – Declaration of Edred T. Marsh, P.E.
	5	000710 – 000717	03/23/2007	Exhibit G – Excerpts from Legislative History of N.R.S. 11.258
24	**15**	**002399 – 002406**	**10/17/2019 10:08 AM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Notice of Entry of Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and All Joinders to Same**

27	**16**	**002531 – 002558**	**11/26/2019 11:17 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment**
	16	002559 – 002563	10/15/2019	Exhibit 1 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment and all Joinders to Same
	16	002564 – 002582	08/20/2019	Exhibit 2 – City of North Las Vegas' Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	16	002583 – 002643	10/10/2019	Exhibit 3 – Court Recorder's Transcript of Hearing: All Pending Motions
	16	002644 – 002646	10/15/2019	Exhibit 4 – Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Hearing on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time
	16	002647 – 002650	08/05/2019	Exhibit 5 - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
			08/06/2019	Dekker/Perich/Sabatini, Ltd.'s Motion to Dismiss
			08/08/2019	Melroy Engineering, Inc. d/b/a MSA Engineering Consultants Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
19	**15**	**002321 – 002325**	**09/26/2019 5:16 PM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Reply to City of North Las Vegas' Limited Opposition to Motion to Change Date of Hearing**
54	**20**	**003295 – 003307**	**02/18/2020 3:57 PM**	**Nevada by Design, LLC d/b/a Nevada By Design Engineering Consultants' Reply to City of North Las Vegas' Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' and Joinders to Motion to Dismiss on Order Shortening Time**

14	**14**	**002233 – 002249**	**8/28/2019 9:02 AM**	**Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Rely to City of North Las Vegas' Opposition to Motion to Dismiss or, in the Alternative, Motion for Summary Judgement**
	14	002250 – 002255	07/01/019	Exhibit A – Assembly Bill No. 221 – Committee on Judiciary 80th Session (2019)
	14	002256 – 002257	2019	Exhibit B – 80th Session (2019)
	15	002258 – 002271	12/11/2017	Exhibit C – American Geotechnical Inc's Geotechnical Investigation
35	**17**	**002891 – 002893**	**12/02/2019 1:54PM**	**Ninyo & Moore, Geotechnical Consultants' Joinder to JW Zunino & Associates LLC's Opposition to City of North Las Vegas' Motion to Alter Judgment**
44	**18**	**003044 – 003046**	**12/06/2019 10:08 AM**	**Ninyo & Moore, Geotechnical Consultants' Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Opposition to Motion to Alter Judgment With Respect to Statute of Repose Arguments**
51	**19**	**003167 – 003174**	**02/07/2020 3:36 PM**	**Ninyo & Moore, Geotechnical Consultants' Joinder to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Time**
	19	003175 – 003240	08/29/2007	Exhibit A – Ninyo & Moore's Geotechnical Evaluation
	19	003241 – 003254	12/11/2017	Exhibit B – American Geotechnical Inc's Geotechnical Investigation
11	**14**	**002211 – 002213**	**08/23/2019 10:02 AM**	**Ninyo & Moore, Geotechnical Consultants' Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, In the Alternative, Motion for Summary Judgment**
15	**15**	**002272 – 002274**	**09/06/2019 12:14 PM**	**Ninyo & Moore, Geotechnical Consultants' Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, In the Alternative, Motion for Summary Judgment**

34	**17**	**002888 – 002890**	**12/02/2019 1:54 PM**	**Ninyo & Moore, Geotechnical Consultants' Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to City of North Las Vegas' Motion to Alter Judgment**
58	**20**	**003392 – 003398**	**02/19/2020 2:56 PM**	**Ninyo & Moore, Geotechnical Consultants' Reply to City of North Las Vegas Opposition to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' and Joinders to Motion to Dismiss on Order Shortening Time**
32	**17**	**002689 – 002693**	**11/27/2019 1:15 PM**	**Paffenbarger & Walden, LLC and P & W Bonds, LLC's Joinder in (1) Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment; and (2) JW Zunino & Associates LLC Opposition to Motion to Alter Judgment**
43	**18**	**003040 – 003043**	**12/04/2019 8:35 AM**	**Paffenbarger & Walden, LLC and P & W Bonds, LLC's Joinder in (1) Richardson Construction, Inc. and The Guarantee Company of North America USA's Opposition to Motion to Alter Judgment; and (2) Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Opposition to Motion to Alter Judgment**
16	**15**	**002275 – 002281**	**09/13/2019 4:22 PM**	**Paffenbarger & Walden, LLC and P & W Bonds, LLC's Limited Joinder in Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment**
21	**15**	**002331 – 002335**	**09/30/2019 11:29 AM**	**Richardson Construction, Inc. and The Guarantee Company of North America USA's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment**

56	**20**	**003379 – 003384**	**02/18/2020 5:06 PM**	**Richardson Construction, Inc. and The Guarantee Company of North America USA's Limited Response to Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' Motion to Dismiss on Order Shortening Times and All Joinder Thereto**
33	**17**	**002694 – 002887**	**11/27/2019 4:51 PM**	**Richardson Construction, Inc. and The Guarantee Company of North America USA's Opposition to Motion to Alter Judgment and Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Opposition to Motion to Alter Judgment**
	17	002706 – 002723	07/11/2019	Exhibit A – City of North Las Vegas' Complaint
	17	002724 – 002740	08/05/2019	Exhibit B - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	17	002741 – 002758	07/11/2019	Exhibit A – City of North Las Vegas' Complaint
	17	002759 – 002761	07/13/2009	Exhibit B – City of North Las Vegas' Complaint Exhibit 4 Notice of Completion
	17	002762 – 002767	03/25/2019	Exhibit C – AB421
	17	002768 – 002770	07/11/2019	Exhibit D – Affidavit of Aleema A. Dhalla, Esq.
	17	002771 – 002784	12/11/2017	Exhibit E – American Geotechnical Inc's Geotechnical Investigation
	17	002785 – 002786	07/03/2019	Exhibit F – Declaration of Edred T. Marsh, P.E.
	17	002787 – 002794	03/23/2007	Exhibit G – Senate Bill 243 - 11.258
	17	002795 – 002796	08/06/2019	Exhibit C – Clerk of the Court's Notice of Hearing
	17	002797 – 002815	08/20/2019	Exhibit D – City of North Las Vegas' Opposition to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	17	002816 – 002822	09/04/2019	Exhibit E – Richardson Construction, Inc.'s and The Guarantee Company of North America USA's Motion to Dismiss

	17	002823 – 002824	09/06/2019	Exhibit F – Clerk of the Court's Notice of Hearing
	17	002825 – 002831	11/27/2019	Exhibit G – Register of Actions
	17	002832 – 002833	09/10/2019	Exhibit H – Emails re Rescheduling of Hearing
	17	002834 – 002846	09/18/2019	Exhibit I - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Hearing of Motion to Dismiss or, in the Alternative, Motion for Summary Judgment
	17	002847 – 002848	08/06/2019	Exhibit A – Clerk of the Court's Notice of Hearing
	17	002849 – 002850	09/06/2019	Exhibit B – Court's Notice of Rescheduling Motions to Dismiss and Joinders
	17	002851 – 002856	09/09/019	Exhibit C – Emails re Rescheduling of Hearing
	17	002857 – 002858	09/10/2019	Exhibit D – Emails re Rescheduling of Hearing
	17	002859 – 002860	N/A	Exhibit E – Las Vegas Law Offices of Snell & Wilmer
	17	002861 – 002862	09/20/2019	Exhibit J – Weil & Drage, APC Letter to All Counsel re Hearing of Nevada By Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on September 27, 2019
	17	002863 – 002868	09/26/2019	Exhibit K - Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Reply to City of North Las Vegas' Limited Opposition to Motion to Change Date of Hearing
	17	002869 – 002871	11/27/2019	Exhibit L – Register of Actions A-19-798346-C
	17	002872 – 002874	11/27/2019	Exhibit M – Register of Actions A-19-798346-C
	17	002875 – 002880	09/30/3019	Exhibit N – Richardson Construction, Inc. and The Guarantee Company of North America USA's Joinder to Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment

	17	002281 – 002887	10/17/2019	Exhibit O – Notice of Entry of Order Granting Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants' Motion to Change Date of Haring on Motion to Dismiss or, in the Alternative, Motion for Summary Judgment on Order Shortening Time

EXHIBIT 5

May 15, 2019 Minutes of the Senate
Committee on Judiciary

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May 15, 2019 Minutes of the Senate
Committee on Judiciary

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Eightieth Session
May 15, 2019

The Senate Committee on Judiciary was called to order by Vice Chair Dallas Harris at 8:22 a.m. on Wednesday, May 15, 2019, in Room 2135 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Nicole J. Cannizzaro, Chair
Senator Dallas Harris, Vice Chair
Senator James Ohrenschall
Senator Marilyn Dondero Loop
Senator Melanie Scheible
Senator Scott Hammond
Senator Ira Hansen
Senator Keith F. Pickard

GUEST LEGISLATORS PRESENT:

Assemblyman Steve Yeager, Assembly District No. 9

STAFF MEMBERS PRESENT:

Patrick Guinan, Committee Policy Analyst
Nicolas Anthony, Committee Counsel
Andrea Franko, Committee Secretary

OTHERS PRESENT:

Sarah M. Adler, Nevada Coalition to End Domestic and Sexual Violence
John T. Jones, Jr., Nevada District Attorneys Association
Ardea G. Canepa-Rotoli, Nevada Justice Association
Eva G. Segerblom, Nevada Justice Association
Josh Griffin, Nevada Subcontractors Association

Aaron West, Nevada Builders Alliance
Joshua J. Hicks, Nevada Home Builders Association
Jeremy Aguerro
David Goldwater, Nevada Home Builders Association
Michael B. Elliott, Nevada Home Builders Association
Nat Hodgson, Southern Nevada Home Builders Association
Aviva Gordon, Henderson Chamber of Commerce
Gary Milliken, Nevada Contractors Association
Jesse Haw
Dale Lowery, D and D Plumbing
Cal Eilrich, President, Fernley Builders Association
Jessica Ferrato, Granite Construction
Greg Peek

VICE CHAIR HARRIS:
I will open the hearing of the Senate Committee on Judiciary with Assembly Bill (A.B.) 422.

ASSEMBLY BILL 422 (1st Reprint): Revises provisions governing criminal procedure. (BDR 14-1096)

ASSEMBLYMAN STEVE YEAGER (Assembly District No. 9):
Assembly Bill 422 deals with what are known as material witness warrants. These warrants can be issued calling for the potential arrest of a victim or a witness whose testimony is necessary to secure a conviction against a defendant.

The bill has been heavily amended since it began in the Assembly Judiciary Committee. There are two sections left in the bill and they mirror each other.

Section 2 addresses what happens if it is impractical to secure a person's presence in court by subpoena. In that circumstance, the courts set bail for the witness who could also be the victim. If the bail is not posted in the mandated time set by the court, the person can be arrested. Assembly Bill 422 seeks to add procedural safeguards by the court appointing an attorney when the bail is set, providing the attorney with the contact information and notice of any upcoming hearings. The bill allows the attorney to contact the witness and explain the consequences of not posting bail or attending a scheduled hearing. If the person is arrested, he or she must be brought before the judge as soon as

possible but not later than 72 hours. At that time, the judge would consider the least restrictive means to secure a person's presence in court. If the judge determines continued incarceration is necessary, the court must make detailed written findings detailing why it is necessary.

Special provisions are provided if the witness is the victim of domestic violence or sexual assault that forms the basis of the underlying case. We do not want to retraumatize victims of domestic violence or sexual assault by incarcerating them when they have been victimized and they are not the offenders. If a victim falls into that category, the person must be brought before the judge within 24 hours. A telephonic hearing is an option if it is a Friday or a Saturday. The appointed attorney should be allowed to participate in the court hearing to advocate for the victim's potential release. We recognize victims of domestic violence and sexual assaults are uniquely situated in terms of revictimization.

Section 2 also states in the event the material witness has either been arrested or has been forced to post bail, the underlying hearing in which the testimony is necessary should take place as soon as possible. The hearing should be rescheduled to an earlier date, as long as it does not jeopardize the rights of the accused. If someone is going to be incarcerated or have to post bail, he or she should not have to wait months to testify either at the hearing or at the trial.

Section 3 also prescribes certain requirements for making a determination whether a witness should be detained or continue to be detained, including requiring the witness appear before a court or officer as soon as practical but no later than 72 hours after being detained.

The Committee members have been provided an article from *The New Yorker* about the practice of arresting victims (Exhibit C contains copyrighted material. Original is available upon request of the Research Library.) and an article from *The New Orleans Advocate* about the New Orleans City Council passing a resolution condemning the practice of arresting victims of crime (Exhibit D contains copyrighted material. Original is available upon request of the Research Library.)

There are some complexities as to why people choose not to testify in court. Arresting survivors of a crime further retraumatizes those survivors and is the wrong approach without some procedural safeguards. This is an opportunity for Nevada to be a leader and recognize the default should not be incarceration and

we need additional procedural safeguards particularly for victims of sexual assault and domestic violence.

SENATOR PICKARD:
This is always a difficult point of discussion with clients who are victims of domestic violence. I want to make sure I understand the process. If a prosecutor was going to detain a material witness, my understanding is the prosecutor will try to work with the witness first. Only when a witness refuses to attend the hearing and the prosecutor believes this witness is critical to the case will the prosecutor bring the witness in anyway. It is common for victims to refuse to be anywhere near the incident again, particularly when they are still in the relationship and they want to maintain the relationship. The person is arrested, charged and now the victim does not want to participate. There is a lot of frontend discussion before they would be detained. Is that correct?

ASSEMBLYMAN YEAGER:
You are definitely touching on some of the complexities of this issue, and S.J.R. No. 17 of the 78th Session, also known as Marsy's Law and the Victims' Bill of Rights might take precedence. Of course, Marsy's Law indicates the victims have to have a chance to be heard.

To get to your question, my hope is yes. Sometimes a witness is contacted and does not come to court. The warrant is not issued at that time. Usually an order to show cause of hearing is issued. The witness or the victim has an opportunity to come to court and there are safeguards. I am hoping he or she gets the judge involved earlier. Sometimes the victim or the witness needs to hear from the judge or from an attorney about what the consequences will be. Most people do not know they can be arrested and incarcerated for not coming to court.

There are some procedural safeguards. This is a rare occurrence. As you said, it is difficult cases where the victim's testimony is necessary for conviction. This would allow the person to actually have representation which is not in our statute and allow the judge to get involved earlier, and hopefully it gives the witness a clear path of what he or she needs to do to avoid posting bail or being incarcerated.

SENATOR PICKARD:
You raised the other issue of the appointed attorney. I know we are not a money committee, but this does not have a fiscal note and does not affect the State. Who is paying for this?

ASSEMBLYMAN YEAGER:
I anticipate the court will appoint counsel. Las Vegas and Washoe County have attorneys on contract. In this rare circumstance, the court would appoint one of the attorneys. Because this work is operational, there is no fiscal note.

SENATOR SCHEIBLE:
Would this apply to witnesses who are in custody?

ASSEMBLYMAN YEAGER:
It would not apply because the liberty interest has already been lost in the case by the individual. If someone is incarcerated for another offense, whether in county jail or in prison, the provision of A.B. 422 would not apply.

SARAH M. ADLER (Nevada Coalition to End Domestic and Sexual Violence):
When a victim chooses not to testify in court against his or her abuser, it is because of fear of retaliation from the abuser, the abuser's friends or the abuser's family. Arrest and incarceration confirms the abuser's contention that the violence is all the victim's fault and he or she will pay for coming forward. Other concerns include trauma for the victim's children or loss of employment, creating fear of or resentment for the criminal justice system.

Prosecutors should refrain from arresting victims for refusing to testify, failing to cooperate or not showing up to court except in exceptional circumstances. We believe all prosecutors should have trauma-informed, victim-centered policies and practices in place that would make a material witness warrant arrest and incarceration the absolute last option to be used against a victim of domestic violence. However, the addition of court-appointed attorneys to this process and the expedited time frames will lessen the harm to victims and allows the Nevada Coalition to End Domestic and Sexual Violence to support A.B. 422.

JOHN T. JONES, JR. (Nevada District Attorneys Association):
We are in the neutral position on A.B. 422. District attorneys' offices work with victims and victims groups like SafeNest to make victims feel as comfortable and safe as possible during the criminal justice process. Despite our efforts,

victims are not always willing or ready to engage with the criminal justice system. They may not be emotionally ready or are afraid. In some instances, the victim may even be in love with the defendant.

The statutory time frames in which a case must be heard do not always consider the victims. Prosecutors have that responsibility. I have lowered offers or dismissed a case because a victim has refused to testify. Instances where the case is so grave or community safety is at risk, we need to pursue the case.

When we incarcerate a victim of abuse, we look at the history of abuse by this defendant against this victim. We also look to see if there is a history of domestic violence dismissals against this defendant because of victim uncooperativeness. Has there been a progression in the abuse that we can document—injuries, stalking behaviors or the seriousness of the offenses.

In the Clark County District Attorney's Office, around 35 percent of our domestic violence unit cases are dismissed. On general litigation track, once a case is filed, the number of cases dismissed is around 7 percent. You can already see in domestic violence cases we have significantly higher dismissal rates. Imagine if a defendant or his or her families learned a victim could ignore a subpoena. The pressure on the victim to not attend the hearing by families and the defendant's loved ones would be enormous. Oftentimes, I am the bad guy. I provide cover for defendants. That is why these two provisions of statute are so important.

Marsy's Law does provide victims with a voice in the proceedings, but it does not allow them to circumvent the court process. Victims may refuse an interviewer deposition unless they are under a court order, and that is what a subpoena is.

We use this tool in rare circumstances. We do not like to, but it is an important tool for prosecutors.

SENATOR SCHEIBLE:
I want to clarify that material witness warrants are not just for victims. It could also be for somebody who witnessed a crime or had information that was important to the trial who is refusing to come to court for whatever reason.

MR. JONES:
Correct. It is also for a material witness. A material witness is someone we need to prove the case.

CHAIR CANNIZZARO:
We will close the hearing on A.B. 422 and open the hearing on A.B. 421.

ASSEMBLY BILL 421 (1st Reprint): Revises provisions relating to construction. (BDR 3-841)

ASSEMBLYMAN STEVE YEAGER (Assembly District No. 9):
Construction defect law has been discussed for many years, and there have been dramatic changes over the years. My intent in bringing A.B. 421 to the Senate Committee on Judiciary is to find the right balance where consumers who are injured through no fault of their own have recourse. In the first reprint of A.B. 421, we have achieved that balance. There is still some work to be completed.

ARDEA G. CANEPA-ROTOLI (Nevada Justice Association):
The history of construction defect law in Nevada commonly known as Chapter 40 started in 1995. It was in response to homeowner complaints and construction defect litigation. More importantly, the original statute was actually a compromise between both consumer advocates and contractor advocates. The homeowners gave up the right to pursue punitive damages or emotional distress damages in exchange for the ability to recover expert fees, litigation costs and attorney's fees.

We wanted the builders to have the right to repair. We did not want to have lawsuits start without the homeowner talking to the builders first to see if they could have repairs made. There was a right to repair process that was initiated and a prelitigation process involving inspections and mediation. The intent of the statute was to allow builders to make things right. If a builder chose not to perform the repair or could not make the repair, the bill allows a homeowner to go forward with litigation.

Since 1995, there have been a number of changes on a bipartisan consensual basis. After 2015, there were changes made that from our standpoint stripped homeowners of a number of rights. The removal of those rights has made it difficult for the homeowners to pursue construction defect claims.

Assembly Bill 421 is trying to get us back to a middle ground. The intent of the bill is to protect consumers and contractors.

The draft of our proposed amendment to A.B. 421 (Exhibit E) I am going to present is a compromise between the Nevada Justice Association, the Nevada Subcontractors Association and the Nevada Builders Alliance.

There were some good things changed in 2015 and there are a number of things that A.B. 421 does not seek to change from the A.B. No. 125 of the 78th Session. For instance, there were changes made to put protections in place for subcontractors regarding indemnification. Assembly Bill 421 does not seek to change that.

There were requirements put in place that homeowners needed to review and sign their Chapter 40 notices before the notices were submitted. If the homeowners are involved in a prelitigation or litigation process, they should know what they are alleging in their Chapter 40 notices. Assembly Bill 421 does not seek to change that requirement or to reinstate the right to write common defect notices.

Changes made in 2015 took away the right to submit common defect notices, where notices were going out on behalf of "similarly situated" properties. Assembly Bill 421 does not seek to bring back the right to do common defect notices.

Although you may have heard that A.B. 421 is a full repeal of A.B. No. 125 of the 78th Session, it is not a full repeal. Assembly Bill 421 does not change the right to repair process. A Chapter 40 notice must be sent to the contractor. The contractor then has 90 days to perform the inspections and perform the repair. If the contractor chooses not to offer a repair, then prelitigation mediation must occur or that mediation can be waived in writing before any kind of lawsuit can be filed.

Assembly Bill 421 does not affect the builder's right to repair because the right to repair process is important for both the contractors and the homeowners.

Section 1 is not changing. Building codes set minimum standards protecting life, limb and property. These cases are expert-driven, and the experts are testifying as to what a defect is and whether it is going to cause harm to property.

Section 2 addresses the notice requirements and seeks to restore the ability of the homeowner to submit a notice. Under the law, homeowners are having to hire experts during the prelitigation stage in order to prepare a notice because of the language in statute. Assembly Bill 421 changes the language to identify in reasonable detail, the defects, damages or injuries. Homeowners can see they have cracked drywall, cracked stucco or they are having a hard time opening and closing doors. They may not know what is causing the defect. With this change in A.B. 421, we are getting back to the point where homeowners can reasonably identify what they are seeing and put that into the notice. The homeowners are having to review their Chapter 40 notices and identify what issues are being alleged. This should keep the expert fees incurred in the prelitigation stage from becoming excessive. If a builder or contractor does want to make repairs, there is not an excess of expert fees that have been incurred.

Section 3 provides a claimant or claimant's representative be present during the prelitigation inspection process and to reasonably identify the approximate location of the defect, damage or injury. This allows contractors to perform a prelitigation inspection, to have actual claimants or claimant's representatives there to be able to point out to the best of their ability the issues they have seen. We have heard the inspections were not beneficial because contractors could not identify the defect.

Section 4 removes burdensome prelitigation requirements that were put in place in 2015. State law requires homeowners tender to all warranties in place before he or she notifies the builder with a Chapter 40 notice. In theory that sounds like a great idea. Unfortunately, the logistics of it have created a burdensome process for homeowners. Let me give you an example: generally, 2-10 warranties cover structural defects. Homeowners are having to tender 2-10 warranties, pay the $250 to tender to that warranty and then wait for the 2-10 warranty people to investigate and reject the claim before the homeowner can submit a Chapter 40 notice. Someone with a roofing or a plumbing defect that has nothing to do with structural issues must still tender to the structural 2-10 warranty before he or she can submit the Chapter 40 notice.

Section 5 no longer has a provision for attorney's fees, but it has a revision that costs reasonably incurred by the claimant are recoverable.

Section 6 stays as amended by A.B. No. 125 of the 78th Session.

Section 7 relates to the statute of repose period. The statute of repose is the absolute outlying date a homeowner can bring a claim against a contractor. The statute runs from the substantial completion date of the property. The statute of repose is not related to a homeowner discovering an issue or the date the property was purchased. Interplayed with the statute of repose is the statute of limitations which is based on a cause of action. If you have negligence or a breach of warranty, it triggers from the date a homeowner knew or should have known of a problem. Although the statute of repose is being extended, the statute of limitations is always going to be in play. If someone knew or should have known about something in Year 2, he or she cannot wait until the end of the statute of repose period to bring a claim because of the statute of limitations. It is important to understand that although the statute of repose is the outer limit date, there is still a statute of limitations.

The original draft of A.B. 421 had the statute of repose period at ten years. We changed it to eight years. The final draft was left at ten years. I have had a number of homeowners call and we have been unable to help because they have been past the original six-year statute of repose. We had a homeowner testify in the Assembly that she missed the deadline by two months and she has extreme soils movement. She cannot open or close her windows or lock her door. We had another homeowner who was past the six years and the back of her home is falling down the hill.

Assembly Bill 421 extends the statute of repose period to ten years. Soils is a good example because soil cases do not show up until Years 8, 9 or 10. We had a geotechnical expert testify in the Assembly who explained that in more detail. Most of the Nation is at a ten-year statute of repose, including our neighboring states of California, Montana, Oregon and Wyoming.

There are some additional revisions in section 7, that amend *Nevada Revised Statutes* (NRS) 11.202, subsection 2. The words "any intentional act" are being stricken from the bill and replaced with the words "any act of fraud." At the end of section 7 stating "which he or she fraudulently concealed" will be stricken. Upon request of subcontractor representatives, there will be some language added to make it clear if a subcontractor, a lower-tiered subcontractor, comes in and covers up a defect but does not know it is a defect—and I will give you an example of a drywall installer installing drywall over a plumbing defect, he does not know it is a plumbing defect—that person is not going to be held accountable for fraud because he did not know there was a defect underneath.

There is some language that needs to be drafted by the Legislative Counsel Bureau (LCB).

Nevada's economy is recovering from the recession. I do not want to see homeowners going into foreclosure, not because of poor loans, but because they cannot repair their homes and cannot sell their houses with defects. It is important we put protections in place both for homeowners and contractors.

EVA G. SEGERBLOM (Nevada Justice Association):
Sections 1.5 and 5.5 are from a requested amendment from the Division of Insurance to define a builder's warranty as referenced in Chapter 40 and to clarify that this is not an insurance product. We are fully in support of this amendment, and it was incorporated into A.B. 421.

Section 8 clarifies the law regarding homeowners association (HOA) standing. An HOA only has standing to pursue claims for defects in common areas. However, there are many instances where an association has an obligation to maintain, repair or replace portions of a community that are not considered common areas. Conversely, when an association has a legal obligation to maintain, repair or replace, generally a homeowner cannot maintain that same area. For example, in townhomes and condominiums, associations typically have a duty to maintain, repair or replace exteriors and roofs of buildings. Under the law as changed in 2015, an association would not have standing to bring a claim for defects in these exteriors and roofs because they are not common areas.

As an example that affects single family homes, there are many communities in Nevada that have rock walls. Often these rock walls are connected throughout a community but built on individual lots. These rock walls are not common areas. Under current law, the association has the obligation for these rock walls, but the association cannot maintain a claim for defects in them because the walls are built on individual lots and not common areas. This presents a conflict in law when the association has to maintain something but does not have legal standing to pursue defects in the same area. Assembly Bill 421 corrects this conflict.

This bill does not repeal any of the legislation passed in the wake of the public HOA scandal in Las Vegas. The members of the Nevada Justice Association and lawyers who practice in this area fully support all of these remedial measures to

put a stop to the criminal wrongdoing. Nevada homeowners and residents should not be penalized or have their rights stripped due to the criminal wrongdoing of one contractor and one attorney over a decade ago. There are many measures put in place in NRS 116 and other criminal penalties put in place as a result of that scandal.

SENATOR PICKARD:
The deletion of the amendment to section 1 is critical. That would have changed the standard significantly and would have really prejudiced the builders.

In section 5 and the change for the constructional defect proven—my understanding is this was added in 2015 because just as most of the builders are good builders who want to repair, we do have some bad actors. Similarly, we have some attorneys who were kind of abusive in how they approached these cases. This would substantially change how we approach the costs—the ability to recover costs. Could you go into detail in how this bill does not reopen the door, or does it open the door, to the attorneys who are going to advise his or her clients to investigate the Chapter 40 claims when there is only one or two that are legitimate? Does this hurt the builders?

MS. CANEPA-ROTOLI:
In section 5, subsection 1, paragraph (e), the language for constructional defects proven by the claimant was stricken because by stating proven by the claimant, it is stating it has to go all the way through trial to be proven. It has caused problems with settlement negotiations. The intent of the statute was to allow homeowners the ability to recover investigative expert fees and litigation costs. By adding the proven language it made it difficult in some situations to settle cases. Our position has been if we go to trial and we prove the defect, the costs are going to be recoverable. The intent was to allow homeowners to recover expert fees and costs to be made whole. This is not going to open the floodgates because when you litigate a case to the end and have proven your defects, we file a Memorandum of Costs. At that point, the opposition always has the ability to challenge those costs. He or she would be able to challenge and say "these expert costs were for defects a, b and c and were not proven at trial." People would always have the ability to object and challenge the recovery.

In the prelitigation stage, there is always negotiation. To the extent that repairs are not offered and you are in a prelitigation mediation, an argument could be

made "okay, we do not believe that these issues are defects and you should not be able to recover expert fees." That argument could be made whether the homeowner's representatives are going to accept those arguments, but that is settlement in general. We are always going to have disagreements. It is important to remove that "proven" language because it has stripped us of our ability to get to settlement. When homeowners submit a demand, it includes the costs and expert fees. How do you prove it? Again, it is a logistics issue that the overall intent was obviously to allow homeowners to recover expert fees and costs. The proven language has given a bit of ambiguity as to what "proven" means in the earlier stage.

SENATOR PICKARD:
When we are talking about negotiations, we consider what the likelihood of success at trial is going to be as we approach those negotiations. As you alluded to, in the past there did not seem to be the ability to obtain the fees in the negotiations because the law did not provide for it. Now you are suggesting the pendulum has swung too far, but by striking it we are going to go back to where we were and the whole purpose of the amendment was because it was lopsided. It gave the ability for the legal team to have destructive testing on multiple issues, many of which had no basis. It was a way of putting pressure on the builder to settle. That will not change, but this was what we thought at the time was a reasonable insertion. I would suggest taking this out might return us to where we were. We might want to look at language that brings the pendulum back toward the middle. I think that is possible.

When we are challenging these costs, you are right, it is common for the judge to allow less than 100 percent. When you win the case, the judge is going to err on the side of recovery. There are attorneys who will inflate costs in order to get the maximum settlement or the maximum order for their clients. They will inflate the costs. If we have not proven the claim was legitimate, if this was not one of the points, why would we encourage that kind of behavior? Why would we encourage those destructive tests? If the claim was not legitimate in the first place, it is not a fishing expedition, it was never intended to be, so how do we balance those two by merely striking the language?

MS. CANEPA-ROTOLI:
My comment earlier about homeowners not having the right to recover expert fees and costs, the initial Chapter 40 of NRS litigation initiated in 1995, was part of the compromise. The whole point was to get us to a place where there

was the right to repair, but homeowners specifically gave up the right to go after punitive damages and emotional distress damages. The homeowners gave up that right because they had the ability to recover reasonable expert fees and costs. If we are taking this away by having defects proven by the claimant, it is really taking us back to pre-Chapter 40 of NRS.

The change made in A.B. 421 is not going to have the specificity requirement; making it reasonable notice is going to prevent people from incurring all those expert fees in the prelitigation stage. The intent is to make it so people are not going on a fishing expedition by allowing for reasonable notice and so we would not get into a situation where we are incurring expert fees until we get into litigation where we have to prove our case. If we get through trial and prevail, we should be able to recover the expert fees and costs for the homeowner. It does not do us any good to inflate those expert fees and costs because that just pulls more money out of the pockets of the homeowner who needs to make the repairs. We are expanding our time in taking these cases on a contingency fee basis. All it is doing is paying back the expert fees. It is not helping us with any of our recovery of fees. We try to keep those at an absolute minimum, and that was the whole point of getting the reasonable notice back so we do not have to incur expert fees in that prelitigation process.

SENATOR PICKARD:
I do not disagree to some extent simply because you are right about the lawyers who are trying to do the right thing. They are not going to inflate it. Those are not the ones we are talking about. We may be conflating issues when we gave up the noneconomic damages—the pain and suffering and punitive damages. Those really have nothing to do with recovering these costs. Since we are relaxing the standard from a detailed description of the defect to a reasonable level of specificity, we are opening that door a little wider and this adds to that. This is an area where we need to work and strike a better balance.

My other question had to do with the common-interest community issue and particularly if we are talking about condominiums and townhomes where the association owns the roof, the common walls and the exterior. We typically see the owner of those units owns from the inside surface, usually the drywall surface, inward so they own the paint and everything inside. In the townhomes where the homeowner owns up to typically the centerline of the common areas, we have a little problem. We were discussing the proposed amendment to say the common-interest communities have either ownership or legal obligation

pursuant to the governing documents or statute to maintain repairs. Can you tell me more about what we are trying to fix? They are either under legal obligation contractually to maintain or they own those areas. They would naturally have standing.

MS. SEGERBLOM:
I have seen the HOAs challenged in court because the language in the law exclusively pertains to common areas. The rock walls are not common areas. I have seen the standing challenged. We want to fix that conflict. We have proposed some language specifying it pertains to common elements, an area the association owns or has an obligation under the governing documents to maintain, repair or replace.

JOSH GRIFFIN (Nevada Subcontractors Association):
We support A.B. 421 as amended. Nevada's subcontractors are in essence the small business owners who make up the construction industry. Our members are the electrical contractors, plumbing contractors, landscapers, painters and drywall installers.

From 2005 until 2015, we worked incredibly hard to make some modifications to S.B. No. 241 of the 72nd Session. We looked at making the right to repair a little more meaningful and tighten up some things that we had some troubles with. We had three principles in all of those discussions during that interim. First, the definition of a defect should be clarified to be more specific to what a defect was. Second, the fees and costs were not automatically part of a prelitigation process. Third was the indemnification issue. For ten years we fought for those three principles. In 2015, those were all put into the bill along with a lot of other items.

If you read the bill referring to NRS 40.655, section 5 begins with, "the following damages to the extent approximately caused by a constructional defect," and then it lists all those conditions in subsection 1, paragraph (e). We are appreciative that the definition of the defect is what we would define as a reasonable standard.

AARON WEST (Nevada Builders Alliance):
We believe the current law is working well. We understand the reality we live in. This compromise is not everything, but we hope there is still room for more of our colleagues to provide input.

SENATOR PICKARD:
Section 7 changes from an intentional act of fraud to any act of fraud. Although there is language that seems to protect a subcontractor, such as a drywall subcontractor who sees there is a problem and knowingly covers it up, you are exposed where you did not have that exposure in the past.

MR. GRIFFIN:
Assembly Bill 421, as originally drafted, referred to concealment or willful concealment. Those terms gave us heartburn because the person who puts on the roof is willfully concealing everything under the roof. There is a methodical and definitive process you must go through to prove fraud. There are rules in statute to prove fraud. Using fraud as the standard for us was significantly more comforting than just willful concealment.

SENATOR HANSEN:
I am a subcontractor and have been through this entire process from 1995 to A.B. No. 125 of the 78th Session. Are there numerous homeowners going into foreclosure because they cannot sell their house due to defects? Are you aware of any situations like this with any of the builders you are representing today?

MR. WEST:
I am not aware of a specific instance of foreclosure.

SENATOR HANSEN:
As a subcontractor, I never went to trial. There was mention that we are going to go all the way through trial before we determine legal fees. Can you mention any cases in which subcontractors have been involved that have gone completely through a full blown trial in the last ten years?

MR. GRIFFIN:
I can check into that. Pre-2015, the standards were so broad it never made sense for anything to go to trial. There were just settlements as quickly as they started. We viewed it as a code violation. We did not go to trial because there was no value in going to trial.

SENATOR HANSEN:
It is an important point to make that no one went to trial because it was pointless—everything was settled by the insurance companies.

In my mind since 2015, it has been an exceptionally successful effort for everybody involved in the trades. The number of complaints the Contractor's Board has received, as I understand it, have dropped or been consistent. The Residential Recovery Fund was minimally used—very reasonable standards. We are trying to fix a problem that does not exist. All this discussion of trials and expert fees and how reasonable this is and houses falling and horrible builders that do not take care of their responsibilities are minimal. For at least the last four years we have seen a dramatic upswing. Insurance costs for subcontractors have dropped substantially. The number of actual cases presented as construction defects has dropped. When actual problems have existed, the current system, since 2015, including the Residential Recovery Fund and access to the Contractor's Board, have in fact met homeowner's needs.

JOSHUA J. HICKS (Nevada Home Builders Association):
This bill started out close to a repeal of A.B. No. 125 of the 78th Session. We still have some lingering concerns with aspects of this bill as it is presented today, including the amendment.

A lot of those concerns came from what the homebuilders experienced prior to 2015. I think it is important to understand what that world looked like because it drives many of the comments and many of the concerns.

As it was set up, Chapter 40 of NRS was to be a prelitigation procedure and was designed to result in early resolution and early identification of problems with homes and quick fixes for homeowners. That was always supported by the homebuilding industry, and that continues to be supported by the homebuilding industry. Having satisfied customers is extremely important. If there is a problem, a builder wants to get it fixed. The problem prior to 2015 is those incentives were reversed. Litigation became the primary incentive over early resolution, and we have a letter on the record. A letter in opposition to A.B. 421 from Steve Thompson was on the record at the Assembly Judiciary Committee hearing. I would urge everyone to read it. The letter included facts, such as Nevadans were 38 times more likely to be involved in a construction defect lawsuit in Nevada than in any other state. Resolutions took about two and half years from the time the Chapter 40 notice was filed to a resolution of a case. Very few homeowners actually sought out attorneys. Most were involved in cases through actions of HOAs.

All the problems were significant, and we tried to address the issues in 2015. We feel after those changes the system is working as we intended. Chapter 40 cases are still being filed, the Residential Recovery Fund is still available for appropriate cases and claims have been relatively consistent through the recovery fund, which does not suggest that there has been any major upswing. We think those systems are working. Builders are now hearing from customers when there are problems rather than hearing from lawyers, and homes are getting repaired.

We are worried if the bill goes back on any of those parts and changes the incentives from resolution to litigation. That impacts the prices of homes, customer satisfaction and customers getting their homes repaired.

Why would the Homebuilders Association be here in opposition when some of the other groups have agreed and testified in support? The answer is the homebuilders are the ones who actually build and sell the houses. The homebuilders are the ones who get the Chapter 40 notices. If there is a problem, the homebuilders are the ones who have to deal with the litigation. Until the issues in the bill are addressed, we are in opposition to A.B. 421.

We did hear about some of the issues with the HOA standing. That is in section 8 of the bill. That was a big concern because prior to 2015, we were seeing a lot of lawsuits filed by HOA boards without the knowledge or the participation of any homeowners who were becoming involved in the litigation. We certainly appreciate and agree with many of the comments of the intent of section 8. There can be property or items on a parcel owned by a homeowner that the HOA itself has an obligation to repair or replace. Most of those are outside of the house or unit. We have attempted, and will continue to attempt, to reach a resolution on that language. We are worried about the current language which we think it is overly broad. It can serve to provide HOA standing to single-family detached units of the exterior, the interior and the interior of attached units. The exterior of attached units are typically owned by the HOA, the roofs as well, and we do not have any issue with those areas getting addressed by the HOA. We are worried about a backdoor way into HOA standing under broad language, and we want to make sure if we are all in agreement that it is not the intent and this should be clarified.

The cost is another piece. There was a robust discussion about cost on the front end. The change was made to ensure that the costs were awarded in

A.B. No. 125 of the 78th Session cases or that were potentially awarded, which is what settlements are all based upon, are not costs that are just for defects that are not pursued. The builders do not want to look at the cost as a way to finance lawsuits and finance testing. Of course, if there is a proven defect, it is reasonable to expect reimbursement. The open-ended language is a cause for concern.

I will make some brief comments on the period of repose. It was eight years when the bill came out of the Assembly. I know that the amendment proposes to take it to ten years. The national average as we have is a little bit over 8 years, it is about 8.3 or 8.4 years, if I remember right. This bill is retroactive concerning the period of repose. That is of concern as well. There are constitutional issues that can sometimes arise on retroactivity, and I think it bears further discussion.

Finally, the notice and inspection section effectively goes back prior to 2015. The builders want to ensure defects are identified and resolved early on in the process. We do have some concerns that not having specific notices and exact locations identified may go contrary to ensuring defects are identified and resolved early in the process.

JEREMY AGUERRO:
I am an analyst, not an advocate, so I start from the neutral position. However, I was asked to provide an overview to the study we undertook. Essentially, we took a look at Nevada's housing market overall—both in terms of supply and demand. The inclusions of our analysis are probably not that surprising to you nor the members of the Legislature relative to the trends that we are seeing in Nevada. Nevada ranks at or near the Nation's highest in terms of population and employment growth, which is driving increased demand for housing across the State. I have seen increased costs as well as increased demand creating affordability challenges throughout the State overall.

Certainly, as those affordability challenges rise, there are disparate impacts in individual areas within the economy and within that sector of the market individually. This was notable since 2005 when we saw the number of attached housing units drop below 5 percent of the product coming online. It has subsequently increased to about 11 percent, and we have seen a continued increase in the number of attached products that are coming online or at least in the development pipeline. This is important for any number of reasons, most

notably as the cost of housing continues to rise, the amount of affordable housing, workforce housing, in our communities statewide is diminishing over time and that attached product has an affordability measure roughly one-third higher than traditional single-family development products.

As we look forward in terms of these trends, we have concerns about the State's long-term housing balance. There is an imbalance between supply and demand, and it continues to get worse. This is also creating challenges in terms of affordability for people here but also creating challenges from an economic development standpoint.

In summary, our analysis shows the housing balance continues to get worse. It is going to get particularly problematic for us, not only for the people who are here but the expectation that our economy will continue to grow.

DAVID GOLDWATER (Nevada Home Builders Association):
Three things: No. 1 is affordable housing. We do not know what causes affordable housing. As you all search for solutions to it, we know it is not one thing that solves the problem since you continue to find many solutions. It is a lot of little things. Construction defect litigation is one of those little things. Every little thing that we do adds to the cost of construction, the cost of litigation and the cost of settlement. It creates a more challenging environment for our fellow Nevadans to afford a place to live. That is easily understood in section 5.

One of the things we realized from this study was the lack of availability of the attached product—condominiums, townhouse—and as the cost of construction defect litigation rose, the availability went down. Those two things were correlated. Since 2015, we have seen a 600 percent increase in that product availability, and we need that desperately in our community.

Next is No. 2: We did not hear there are no construction defect litigation cases. The access to justice is available. What we do know from our own studies is people are getting settlements faster. It has gone down from over three years to just over one year. Homeowners are satisfied with the compensation they are receiving. Most importantly, they are getting their homes repaired. Anything we do that encourages litigation is one step further away from the ultimate resolution which is people getting their homes fixed.

Then comes No. 3: Anything we do that allows the HOA to have standing and something other than what is their right in common areas is a small crack of light that might allow for the kind of corruption that Mike Elliott is going to talk about. I think if their stated intent is to give resolution to areas that are common, that certainly deserves standing. But if there is even a glimmer that an HOA might have standing in this law based on what Mr. Elliott has shared with me and what he is about to share with you, then that is a potential for massive abuse. I do not think that is something we need.

MICHAEL B. ELLIOTT (Nevada Home Builders Association):
I have submitted my testimony (Exhibit F).

SENATOR HANSEN:
You mentioned the HOA situation has not been corrected. Did we fix it in the 2015 legislation, and is this going backwards or is it still the problem?

MR. ELLIOTT:
I believe the bill in 2015 and the bill in 2013 corrected the major deficiencies we identified when we met with the Senate representatives in 2012. This new statute will revert back prior to 2015, and we will have the same problem again.

SENATOR PICKARD:
I hear you saying we should prevent HOAs from filing lawsuits and yet they have an obligation in some instances. They own arguably the common areas. In some instances going back to Mr. Goldwater's point, in the condominium and townhome space, it is common for the HOAs take on the responsibilities for maintenance. Even if they do not own it, they take on the responsibility for maintenance, such as landscaping. In a townhome situation, one person has a patch of grass the HOA is mowing because the homeowner is not going to take care of the lawn, but the rest of the neighbors do take care of their own property. The HOA takes care of all the lawns. The governing documents specify the HOA is responsible. Even though it is the homeowner's property, behind the curb or sidewalk, the HOA takes on that responsibility. If they find a defect right now, they can sue if the builder cannot or will not make the repair. What is your opinion—where do we strike the balance in the HOA's ability to sue if the contractor does not honor the warranty or otherwise perform the work the builder was contracted to perform? Where are you proposing we strike that balance?

MR. HICKS:
As I mentioned in our comments, I think there is a recognition that some of these items maybe either owned by the HOA, or the HOA has an obligation to repair something which is on the parcel owned by the homeowner, and there needs to be something to address that situation. Our concern is the language in section 8 is too broad and effectively allows an HOA to have claim standing on anything. That includes the homes and the interiors of the homes, and effectively means we are going back to pre-2015. That is the reason for the concern in Mr. Elliott's testimony as well.

SENATOR PICKARD:
I do not disagree. It is an important point and why we have been working to address the issue. Does the language I discussed fall short? I do not want to reopen the door to the abuse that we saw in the past. If we were to limit the ability for the HOAs to get involved in those areas where they have an existing legal obligation, either under the governing documents or otherwise by contract or statute, does that keep this door closed?

MR. HICKS:
I think the answer to that is the builders have been and continue to be willing to sit down and figure out the appropriate language. If that language is broad and goes back to the exposure we saw prior to 2015, it is not going to work for the builders. With that said, we are certainly committed to doing everything we can to find the middle ground on some language that will work.

NAT HODGSON (Southern Nevada Home Builders Association):
Due to the rules of the Committee, and I did not see a draft document as a conceptual amendment, I am here as the CEO of the Southern Nevada Home Builders Association in opposition of A.B. 421.

Assembly Bill No. 125 of the 78th Session is working. The affordability for homes in Southern Nevada is too important to discuss conceptions without having something in front of us.

I want to express that my priority is resolution versus litigation. The changes to A.B. 421 have not been thought out methodically and can increase the cost of construction and, my biggest fear, the cost of insurance. Our job and goal is to get in and fix the problems as quick as possible. If it is not exactly identified, sometimes it is like a treasure hunt.

Our organization is open to something reasonable, but the way the bill is written today, it is too far-reaching. Our goal is to have homeowners always reach out to the builders, and get issues resolved. For whatever reason they do not feel like they have been satisfied, there still is the Nevada State Contractors Board, and the Board does look out for the consumer. Chapter 40s are still issued, so it did not stop that issue.

I am confident we can come to an agreement with all parties involved before this bill is in work session.

AVIVA GORDON (Henderson Chamber of Commerce):
We appreciate all the work that has been done making the bill more balanced in its effect, but we remain in opposition even if it is amended. The bill is problematic from an economic development standpoint at a time when our State is reporting record numbers of growth in terms of business and residential needs. This includes the need for affordable housing for workers, their families and business owners who are trying to recruit those workers to come into the State. We oppose a measure that will both increase the cost of residential housing particularly with respect to those attached houses and those houses that affect middle income workers and dramatically impacts the construction industry that works to both employ and house our residents.

There is already a shortage of affordable housing for young professionals and working families who seek that mid-priced housing option, which includes condominiums, townhouses, duplexes and single-family homes. This bill would adversely affect that demographic most significantly. Availability of insurance and the rates of that insurance affects the builders, contractors and subcontractors adversely. This is true with an increased statute of repose where there is the potential of the repose acting retroactively. There is a dramatic concern with respect to having insurance coverage at an affordable rate under any circumstance. It is not taking into account the legal fees that are required to defend meritless cases. The amendments in 2015 are working to ensure we have a robust building community and there are projects being developed and built.

We are committed to working with others on this bill to ensure there is meaningful and appropriate legislation that serves to protect all interested members.

GARY MILLIKEN (Nevada Contractors Association):
We are in opposition to the amended version of A.B. 421. We hope we can work out the issues, but we agree with the Southern Nevada Homebuilders.

JESSE HAW:
I am submitting my written testimony in opposition to A.B. 421 (Exhibit G).

DALE LOWERY (D and D Plumbing):
Prior to 2015 and the changes in Chapter 40, I was involved in four frivolous lawsuits for which D and D Plumbing had no responsibility. My insurance company had to defend me and each time I had to pay the deductible cost, which was $5,000. Any changes we make now will revert back to those problems and situations. We are going to see not only insurance rates go up, we are going to see the cost of housing go up and the end product is going to change. My liability costs of insurance went down after 2015. The plumbers are held responsible for problems, but we take care of the problems we incur. That is standard in the industry today. We all pay into the Nevada State Contractors Residential Recovery Fund that was created to take care of these problems, and there is money available. We are not depleting the fund. The changes requested are not going to help. Please vote no on A.B. 421.

CAL EILRICH (President, Fernley Builders Association):
I have been building homes in Fernley for 25 years and have built over 300 homes. I was designing and building subdivisions. I interviewed the consumers because it was important for me to keep good relations with whomever I built a home.

Because of the State laws, my insurance became unaffordable. Between 1995 and 2000, it went from thousands of dollars a year to tens of thousands of dollars a year. In 2001, the quote was $240,000 for liability insurance for only me. I could not pay that amount, yet I had homes to build. Of all the homes I built, only three people had an issue that I could not resolve. They went to the Nevada State Contractors Board. The Board investigated and said for all three of those cases, there was no real complaint. I have never had a lawsuit filed against me for a defect on a home, yet I needed to pay $240,000 a year for liability insurance. What do my subcontractors pay? It will raise their bids. I am building homes again, since the recession ended. I have liability insurance again and rates have gone down since 2015. Please vote no on A.B. 421.

JESSICA FERRATO (Granite Construction):
I echo the comments made previously. We are here in opposition and still have concerns with A.B. 421.

GREG PEEK:
I am a third-generation developer in Reno. We build primarily multifamily apartments and four-cell units. I would like to underline the affordability of the condo market. For every $1,000 increase you have in the cost of a home, you are taking about 2,283 home buyers off the market in Nevada. Supply will correct the affordability issue. We are in opposition to this bill, but we are ready to work with homeowners.

ASSEMBLYMAN YEAGER:
If anyone is engaging in criminal conduct in the filing or conspiring on construction defect litigation, they should be prosecuted to the fullest extent of the law. Assembly Bill 421 is about protecting the consumer. For most consumers in Nevada, your home is your largest most single investment you will have in your life. It is about giving those homeowners the option to go to court if every other avenue fails.

MS. CANEPA-ROTOLI:
There has been discussion about the ability of the homeowners accessing the Residential Recovery Fund through the Nevada State Contractors Board. The Recovery Fund in concept is great, but it has limitations which prohibit homeowners from seeking recovery. You must file a claim within four years. In many situations, plumbing and soil cases do not show up within that time frame. The form asks you what other remedies have you sought, including a lawsuit. You have many remedies to exhaust before you get to the Board, which also puts you past the four-year limitation. The recovery limit is $35,000, and many times it is not enough money to cover the issue. There was testimony in the Assembly Committee on Judiciary indicating 70 percent of the issues dealt with solar issues, remodels and small subcontractors. The intent of the Residential Recovery Fund was not to replace the ability of the homeowner to pursue claims for construction defects under NRS Chapter 40.

Mr. Elliott had an issue with the lack of criminal penalties—we have them in place now. Board members were controlling HOAs and pursuing litigation without the knowledge of their members. The A.B. 421 language on the HOA issue does not go back prior to A.B. No. 125 of the 78th Session and is limited

to property that a HOA owns or has a legal obligation to maintain, repair or replace. More importantly, there are protections in place under NRS 116.31088 that state before a lawsuit can be filed by the HOA board, it must get a majority vote of the members, not just the board members.

SENATOR PICKARD:
I want to make sure you did not mean to imply the homeowner had to file a lawsuit before he or she could recover funds from the Recovery Fund. That is not the case. My understanding is the Board will not intervene once a lawsuit is filed as they leave it for the resolution of the lawsuit.

MS. CANEPA-ROTOLI:
I was not saying they must go through a lawsuit, but on the Residential Recovery Fund Claim Form it asks what other remedies have been exhausted. The Recovery Fund is for contractors with no insurance or are out of business, and it is a last resort for homeowners. Under those circumstances, there are times the homeowners resort to a lawsuit in order to recover funds, if a builder does have insurance, before they are able to recover under the Recovery Fund.

VICE CHAIR HARRIS:
We will close the hearing on A.B. 421.

CHAIR CANNIZZARO:
I will open the work session. Senator Ohrenschall has requested that we pull A.B. 260 from the consent calendar.

ASSEMBLY BILL 260: Revises provisions governing mental health. (BDR 4-1031)

PATRICK GUINAN (Committee Policy Analyst):
When we have bills with no amendments, we put them on a single calendar with one do pass motion. Today we have A.B. 10, A.B. 17, A.B. 248 and A.B. 335.

ASSEMBLY BILL 10 (1st Reprint): Revises provisions governing the duties of the Director of the Department of Corrections when an offender is released from prison. (BDR 16-204)

Assembly Bill 10 was heard on April 24. The work session document (Exhibit H) summarizes the bill.

ASSEMBLY BILL 17 (1st Reprint): Revises provisions governing bail in criminal cases. (BDR 14-495)

Assembly Bill 17 was heard on May 2. The work session document (Exhibit I) summarizes the bill.

ASSEMBLY BILL 248 (1st Reprint): Prohibits a settlement agreement from containing provisions that prohibit or restrict a party from disclosing certain information under certain circumstances. (BDR 2-1004)

Assembly Bill 248 was heard on May 6. The work session document (Exhibit J) summarizes the bill.

ASSEMBLY BILL 335 (1st Reprint): Revises provisions relating to real property. (BDR 10-287)

Assembly Bill 335 was heard on May 8. The work session document (Exhibit K) summarizes the bill.

SENATOR OHRENSCHALL MOVED TO DO PASS A.B. 10, A.B. 17, A.B. 248 and A.B. 335.

SENATOR SCHEIBLE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CANNIZZARO:
Next on the work session is A.B. 260.

MR. GUINAN:
Assembly Bill 260 was heard on April 30. The work session document (Exhibit L) summarizes the bill.

SENATOR OHRENSCHALL:
I am hoping that the amendments proposed by Ms. Bertschy and Mr. Piro might be considered by the sponsor. I will vote for it today in Committee and reserve my right.

SENATOR PICKARD MOVED TO DO PASS A.B. 260.

SENATOR DONDERO LOOP SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CANNIZZARO:
Next is A.B. 41.

ASSEMBLY BILL 41 (1st Reprint): Revises provisions governing the fictitious address program for victims of certain crimes. (BDR 16-418)

MR. GUINAN:
Assembly Bill 41 was heard on May 2. The work session document (Exhibit M) summarizes the bill. The amendment proposed by the Office of the Attorney General proposes to amend the bill to clarify that the Division of Child and Family Services is to vet requests for certain actual addresses from law enforcement and to clarify that various entities will provide information as mandated by federal law.

SENATOR HARRIS MOVED TO AMEND AND DO PASS AS AMENDED A.B. 41.

SENATOR PICKARD SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CANNIZZARO:
Mr. Guinan will present A.B. 60 on the work session.

ASSEMBLY BILL 60 (2nd Reprint): Revises provisions related to criminal justice. (BDR 3-425)

MR. GUINAN:
Assembly Bill 60 was heard on May 7. The work session document (Exhibit N) summarizes the bill. The Office of the Attorney General has agreed to a friendly amendment proposed by law enforcement to clarify provisions addressing persons commonly addressed as "roommates."

SENATOR HARRIS MOVED TO AMEND AND DO PASS AS AMENDED A.B. 60.

SENATOR DONDERO LOOP SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CANNIZZARO:
Next on the work session is A.B. 286.

ASSEMBLY BILL 286 (1st Reprint): Makes various changes relating to trusts and estates. (BDR 2-1028)

MR. GUINAN:
Assembly Bill 286 was heard on May 10. The work session document (Exhibit O) summarizes the bill. With the sponsor's approval, Senator Pickard proposes a friendly amendment which is intended to address the protections provided for "proceeds of sale" of a homesteaded property for an unlimited period of time, section 1.5, page 9, line 19. The amendment requires the proceeds of sale to be reinvested in another property which is also made subject to the homestead exemption similar to IRS 1031 exchange program guidelines, which state that another property must be identified within 45 days and that the new property must be closed on within 180 days.

SENATOR HARRIS:
Could Senator Pickard explain the purpose of the amendment?

SENATOR PICKARD:
The purpose was, as written, the exemption would apply to proceeds of sale that would then be exempt from execution. In many instances, there are those who would try to avoid an obligation to child or family that we would normally execute on cash that may be in the bank, a way to avoid that responsibility and to shelter that money. Under this bill as written, all they had to do was sell the house, park the proceeds in a bank account and wait it out. The purpose of the bill was to make it so that someone could afford to keep a roof over their heads and not have that immediately executed on and lose that ability and then become potentially homeless. With that intent, the sponsor has agreed to limit the protection to money that was retained in order to purchase another home, a process similar to a 1031 exchange where you have to identify a home and then close on that home. We are maintaining the intent of the bill which was to protect those proceeds so that they would continue to put a roof over the head, not merely shelter money that would have been accessible to family or children where that obligation exists and arguably supersedes the unlimited ability to shelter that money.

SENATOR HARRIS:
There are many forms of shelter; not everyone likes to buy a home. Perhaps if you bought a home and it was not a great experience, you may choose to make a better financial decision for yourself. I will vote it out of Committee today, but I would like to reserve my right.

SENATOR PICKARD MOVED TO AMEND AND DO PASS AS AMENDED A.B. 286.

SENATOR HAMMOND SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

* * * * *

CHAIR CANNIZZARO:
I will close the work session and adjourn the hearing at 10:53 a.m.

RESPECTFULLY SUBMITTED:

_____
Andrea Franko,
Committee Secretary

APPROVED BY:

_____
Senator Nicole J. Cannizzaro, Chair

DATE: _____

EXHIBIT SUMMARY				
Bill	**Exhibit / # of pages**		**Witness / Entity**	**Description**
	A	2		Agenda
	B	11		Attendance Roster
A.B. 422	C	11	Assemblyman Steve Yeager	Copyrighted Exhibit
A.B. 422	D	5	Assemblyman Steve Yeager	Copyrighted Exhibit
A.B. 421	E	8	Nevada Justice Association	Proposed Amendment
A.B. 421	F	8	Michael B. Elliott / Nevada Home Builders Association	Testimony
A.B. 421	G	3	Jesse Haw	Testimony in Opposition
A.B. 10	H	1	Patrick Guinan	Work Session Document
A.B. 17	I	1	Patrick Guinan	Work Session Document
A.B. 248	J	1	Patrick Guinan	Work Session Document
A.B. 335	K	1	Patrick Guinan	Work Session Document
A.B. 260	L	1	Patrick Guinan	Work Session Document
A.B. 41	M	4	Patrick Guinan	Work Session Document
A.B. 60	N	1	Patrick Guinan	Work Session Document
A.B. 286	O	1	Patrick Guinan	Work Session Document

EXHIBIT 6

September 30, 2019 Richardson Parties' Joinder

EXHIBIT 6

September 30, 2019 Richardson Parties' Joinder

JOIN
THEODORE PARKER, III, ESQ.
Nevada Bar No. 4716
PARKER, NELSON & ASSOCIATES, CHTD.
2460 Professional Court, Suite 200
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Telephone: (702) 868-8000
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Email: tparker@pnalaw.net

Attorneys for Defendants,
Richardson Construction, Inc. and
The Guarantee Company of North America USA

DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, v. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **DEFENDANTS RICHARDSON CONSTRUCTION, INC. AND THE GUARANTEE COMPANY OF NORTH AMERICA USA'S JOINDER TO NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT**

COME NOW, Defendants, RICHARDSON CONSTRUCTION, INC. and THE GUARANTEE COMPANY OF NORTH AMERICA USA (hereinafter collectively referred to as "Defendants"), by and through their attorney of record, THEODORE PARKER, III, ESQ. of the law firm of PARKER, NELSON & ASSOCIATES, CHTD., and hereby join in Defendant, NEVADA

BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' (hereinafter "NBD") Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, electronically filed on August 5, 2019.

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants state that the claims raised by Plaintiff, CITY OF NORTH LAS VEGAS, (hereinafter "Plaintiff") are time barred pursuant to N.R.S. 11.202. Accordingly, any dismissal of the claims and Complaint against NBD would also apply to Defendants, as Plaintiff's claims and Complaint against Defendants are also time barred under the six (6) year statute of repose in N.R.S. 11.202 for the reasons stated in NBD's Motion(s). Defendants hereby incorporate by reference as though fully stated herein all factual allegations, law, and arguments raised in their Motion to Dismiss electronically filed on September 4, 2019, as though fully stated therein.

DATED this 30th day of September, 2019.

PARKER, NELSON & ASSOCIATES, CHTD.

/s/ Theodore Parker III
THEODORE PARKER, III, ESQ.
Nevada Bar No. 4716
2460 Professional Court, Suite 200
Las Vegas, Nevada 89128

Attorneys for Defendants,
Richardson Construction, Inc. and
The Guarantee Company of North America USA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Law Offices of PARKER, NELSON & ASSOCIATES, CHTD., and that on this 30th day of September, 2019 and pursuant to NRCP 5(b), I served a true and correct copy of the foregoing **DEFENDANTS RICHARDSON CONSTRUCTION, INC. AND THE GUARANTEE COMPANY OF NORTH AMERICA USA'S JOINDER TO NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** on the party(s) set forth below by:

☐ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Las Vegas, NV, postage prepaid, following ordinary business practices.

☐ Facsimile transmission, pursuant to the amendment to the Eighth Judicial District Court Rule 7.26, by faxing a true and correct copy of the same to each party addressed as follows:

☐ By E-mail: by electronic mail delivering the document(s) listed above to the e-mail address(es) set forth below on this date before 5:00 p.m.

■ By EFC: by electronic filing and service with the Court delivering the document(s) listed above via E-file & E-serve (Odyssey) filing system.

Party	Attorney	E-Mail
Plaintiff	Justin L. Carley, Esq. Aleem A. Dhalla, Esq. SNELL & WILMER L.L.P. 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, NV 89169 (702) 784-5200 Fax: (702) 784-5252	jcarley@swlaw.com adhalla@swlaw.com
Defendant, Jackson Family Partnership LLC d/b/a Stargate Plumbing	Richard L. Peel, Esq. Ronald J. Cox, Esq. PEEL BRIMLEY LLP 3333 E. Serene Avenue, Suite 200 Henderson, NV 89074-6571 (702) 990-7272 Fax: (702) 990-7273	rpeel@peelbrimley.com rcox@peelbrimley.com
	Shannon G. Splaine, Esq. LINCOLN GUSTAFSON & CERCOS, LLP 3960 Howard Hughes Parkway, Suite 200 Las Vegas, NV 89169 (702) 257-1997 Fax: (702) 257-2203	ssplaine@lgclawoffice.com

Party	Attorney	E-Mail
	Paul A. Acker, Esq. RESNICK & LOUIS, P.C. 8925 W. Russell Road, Suite 220 Las Vegas, NV 89148 (702) 997-3800 Fax: (702) 997-3800	packer@rlattorneys.com
Defendant, Nevada by Design, LLC d/b/a Nevada by Design Engineering Consultants	John T. Wendland, Esq. Anthony D. Platt, Esq. WEIL & DRAGE, APC 2500 Anthem Village Drive Henderson, NV 89052 (702) 314-1905 Fax: (702) 314-1909	jwendland@weildrage.com aplatt@weildrage.com
Defendant, Dekker/Perich/Sabatini, Ltd.	John T. Wendland, Esq. Jeremy R. Kilber, Esq. WEIL & DRAGE, APC 2500 Anthem Village Drive Henderson, NV 89052 (702) 314-1905 Fax: (702) 314-1909	jwendland@weildrage.com jkilber@weildrage.com
Defendant, Melroy Engineering, Inc. d/b/a MSA Engineering Consultants	Jeremy R. Kilber, Esq. WEIL & DRAGE, APC 2500 Anthem Village Drive Henderson, NV 89052 (702) 314-1905 Fax: (702) 314-1909	jkilber@weildrage.com
Defendant, Ninyo & Moore, Geotechnical Consultants	Jorge A. Ramirez, Esq. Jonathan C. Pattillo, Esq. WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP 300 S. Fourth Street, 11th Floor Las Vegas, NV 89101-6014 (702) 727-1400 Fax: (702) 727-1401	Jorge.Ramirez@wilsonelser.com Jonathan.Pattillo@wilsonelser.com
Defendants, P & W Bonds, LLC and Paffenbarger & Walden, LLC	Charles W. Bennion, Esq. ELLSWORTH & BENNION, CHTD. 777 N. Rainbow Blvd., Suite 270 Las Vegas, NV 89107 (702) 658-6100 Fax: (702) 658-2502	charles@silverstatelaw.com

Party	Attorney	E-Mail
	Patrick F. Welch, Esq. JENNINGS STROUSS & SALMON, PLC One East Washington Street, Suite 1900 Phoenix, AZ 85004-2554 (602) 262-5847 Fax: (602) 495-2781	pwelch@jsslaw.com

/s/ Eloisa Nuñez

An employee of PARKER, NELSON & ASSOCIATES CHTD.

EXHIBIT 7

September 30, 2019 JW Zunino's Joinder

EXHIBIT 7

September 30, 2019 JW Zunino's Joinder

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Attorneys for JW Zunino & Associates

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

Dekker/Perich/Sabatini Ltd.; Richardson Construction, Inc.; Nevada By Design, LLD d/b/a Nevada By Design Engineering Consultants; JW Zunino & Associates, LLC; Melroy Engineering, Inc. d/b/a MSA Engineering Consultants; O'Connor Construction Management Inc.; Ninyo & Moore, Geotechnical Consultants; Jackson Family Partnership LLC d/b/a Stargate Plumbing; Avery Atlantic, LLC; Big C LLC; Ron Halon Masonry LLC; The Guarantee Company of North America USA; P & W Bonds, LLC; Paffenbarger & Walden, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-19-798346-C

Dept. No. XIII

DEFENDANT JW ZUNINO & ASSOCIATES LLC'S JOINDER TO DEFENDANT NEVADA by DESIGN LLC, D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

Defendant JW Zunino & Associates ("JW Zunino"), by and through its attorneys of records, the law firm of Foran Glennon Palandech Ponzi & Rudloff PC, hereby joins Defendant NV By Design d/b/a Nevada By Design Engineering Consultants' ("NBD") Motion to Dismiss Or, In the

Alternative, Motion for Summary Judgment. This joinder incorporates and asserts all the arguments contained in NBD's motion with regard to the Plaintiff's claims being time barred by Nevada's statute of repose, as though fully contained therein. Further, this Joinder is made and based upon the pleadings and papers on file herein and on any arguments made by counsel at this time of the hearing on this matter that the Court may allow. In addition to the factual and legal arguments made by NDB, JW Zunino adds that any dismissal pursuant to N.R.S. 11.202 that would apply to NBD also applies the JW Zunino. Plaintiff's claims against JW Zunino are also time barred under the six-year statute of repose. JW Zunino understands that the factual allegations and arguments raised by Plaintiff in its August 29, 2019 Opposition to NBD's motion also apply to them as though fully stated in a separate opposition.

Dated: September 30, 2019

FORAN GLENNON PALANDECH PONZI & RUDLOFF PC

By: /s/ Dylan P. Todd
Dylan P. Todd, NV Bar No. 10456
Lee H. Gorlin, NV Bar No. 13879
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Attorneys for Defendant JW Zunino & Associates

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT JW ZUNINO & ASSOCIATES LLC'S JOINDER TO DEFENDANT NEVADA by DESIGN LLC, D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** by the method indicated below:

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☒ **BY ELECTRONIC SERVICE:** submitted to the above-entitled Court for electronic service upon the Court's Service List for the above-referenced case.

☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

Dated this 30th day of September, 2019.

/s/ Rita Tuttle
An Employee of Foran Glennon

EXHIBIT 26
PETITIONERS'APPENDIX

EXHIBIT 26
PETITIONERS'APPENDIX

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLD D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HALON MASONRY LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I THROUGH X, INCLUSIVE; AND ROE CORPORATIONS I THROUGH X, INCLUSIVE,

Defendants.

Case No. A-19-798346-C

Dept. No. XIII

DEFENDANT JW ZUNINO & ASSOCIATES LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER JUDGMENT

Date of Hearing: December 17, 2019
Time of Hearing: 9:00 A.M.

DEFENDANT JW ZUNINO & ASSOCIATES LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER JUDGMENT

COMES NOW, Defendant JW Zunino & Associates, LLC ("JWZ"), by and through its counsel of record, the law firm of Foran Glennon Palandech Ponzi & Rudloff PC, and hereby submits its Opposition to Plaintiff's Motion to Alter Judgment. This Opposition is based on the papers and pleadings on file herein, the attached points and authorities, and any oral argument the Court may entertain at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

"Statues of limitation [repose] should be applied retroactively ***as long as the application would not revive a stale claim***" *See e.g., U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir. 1996). In other words, once a limitations period has expired, it cannot be revived by legislative action. *Wood v. Eli Lilly & Co.,* 701 So. 2d 344, 346 (Fla. 1997) (quoting *Wiley v. Roof*, 641 So.2d 66, 68–69 (Fla. 1994). But reviving a stale claim is precisely what Plaintiff was, and still is, attempting to do. No amount of linguistic gymnastics can overcome the fact that at the time Plaintiff's complain was filed, the statue of repose had been expired for **four years**. In fact, the claim had been expired for nearly as long as the applicable limitations period. Plaintiff's causes of action expired on July 13, 2015, and cannot be revived, regardless of what a new statute of repose says on October 1, 2019.

Plaintiff also argues that the Court's Order should not apply to JWZ because it filed its Joinder the same day that the Court heard argument on the Motion to Dismiss. This argument is both comical and hypocritical. JWZ filed its Joinder within the deadline proposed by Plaintiff itself. As outlined in detail below, although JWZ sought an extension to file its response to the complaint by September 30, Plaintiff, on its own accord, enlarged the deadline until October 4. Now Plaintiff is seeking to enforce a prior deadline notwithstanding its own agreement. Plaintiff's agreement to the new response deadline requires that it be estopped from making any arguments whatsoever that JWZ's joinder is untimely. Plaintiff's motion also completely fails to acknowledge

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or even address the complete futility this Court would be faced with if it overturned its prior ruling on JWZ's joinder. Accordingly, Plaintiff's Motion must be denied.

II. STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

A. Facts Pertaining to NRS 11.202 and Plaintiff's Untimely Complaint

The Subject Project reached completion on July 13, 2009. *See* Order, at 2 (¶2). Thus, according to the applicable version of NRS 11.202, the last day that Plaintiff was permitted to commence this action was July 13, 2015. Plaintiff's window to sue closed on this date.

In May 2019, almost four (4) years after the expiration of the statute of repose period, the Nevada Legislature debated Assembly Bill 421, which proposed to extend the statute of repose period to ten years. *See* Motion, at Exhibits 4 and 5. The bill included the following provision:

> 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.

Motion, at Ex. 4. When this bill was ultimately signed into law, Plaintiff's repose period had already been expired by about four (4) years. JWZ's due process right to finality and peace of mind had thus been established for four (4) years. The ten-year law, itself, would not go into effect until October 1, 2019. Order, at 2 (¶4). Thus the period of time between the expiration of Plaintiff's claim and effective date of this amendment was more than fifty (50) months.

On July 11, 2019, Plaintiff filed its untimely Complaint, commencing this action. At this point, the Complaint already invalid due to the still-current and expired six-year statute of repose.[1]

B. Procedural History

JWZ's deadline to respond to Plaintiff's Complaint following receipt of service of process was September 27, 2019. *See* Affidavit of Rita Tuttle, at ¶2, attached hereto as ***Exhibit A***. On September 17, 2019, JWZ contacted Plaintiff to ask about extending its deadline to September 30, 2019, because lead counsel would be out of town and unavailable to respond by September 27th.

[1] The Complaint was further invalid, as it pertains to JWZ because it lacked the required Affidavit and expert report regarding JWZ's work as required by NRS 258.

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Id. at ¶¶2-3. Plaintiff's counsel agreed to allow JWZ to file its response by **October 4, 2019.** *Id.* at ¶3 (emphasis added).

JWZ filed its joinder to Nevada by Design's motion to dismiss on September 30, 2019, well before the October 4th deadline. *Id.* at ¶6. Nevada by Design's motion was heard and granted on September 30, 2019. When JWZ filed its joinder, it had not yet appeared in this action. Accordingly, JWZ was not provided with notice that motion would be heard on September 30, 2019, and could not have known of any earlier deadline file its joinder.

The Court issued its written Order on October 15, 2019. Notably, the Court found that "Plaintiff failed to timely file its Complaint and therefore, the Complaint and claims therein violate NRS 11.202." Order, at 2 (¶6).

III. LAW AND ARGUMENT

A. Legal Standard for Motion to Alter Judgment

A judgment is the final determination of the rights of the parties in the action or proceeding. *Meyer v. Flood*, 54 Nev. 55, 4 P.2d 305, 305 (1931). Rule 59(e) provides the amount of time a moving party has to file a Motion to alter judgment, but does not provide the standard a court should apply in determining such a motion. *See*, *Stevo Design, Inc. v. SBR Mktg. Ltd.*, 919 F. Supp. 2d 1112, 1117 (D. Nev. 2013) (analyzing the identical Fed. R. Civ. P. 59(e)). However, Rule 59(e) relief is "'an extraordinary remedy which should be used sparingly.'" *Id.* (quoting *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir.1999)). Rule 59(e) **"may not be used to 'relitigate old matters**, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Id.* (quoting 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1 (2d ed. 1995)) (emphasis added). Finally, a Rule 59(e) motion to amend "will be denied if it would serve no useful purpose." *Id.*

There are four basic situations in which Rule 59(e) relief may be available: "(1) where the motion is necessary to correct "manifest errors of law or fact upon which the judgment rests;" (2) where the motion is necessary to present newly discovered or previously unavailable evidence; (3) where the motion is necessary to 'prevent manifest injustice;' and (4) where the amendment is justified by an intervening change in controlling law." *Id.* (quoting *Allstate Insurance Co. v.*

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Herron, 634 F.3d 1101, 1111 (9th Cir.2011)); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010). There is no dispute that there was no manifest error in judgment, no newly discovered evidence, or manifest injustice, thus the Motion and this Opposition will focus on whether there was an intervening change in controlling law.

B. Plaintiff's Motion is an Improper Attempt to Relitigate Old Matters

This Motion does not present any arguments that the Court did not consider on September 30, 2019. Since the beginning, Plaintiff incorrectly believed that the new law would somehow revive its invalid Complaint. As addressed below, Plaintiff makes the same arguments now that it made in arguing against the Motion to Dismiss.

Plaintiff's Argument	Citation to Opposition to Motion to Dismiss	Citation to Motion to Alter Judgment
AB 421 amended NRS 11.202 to extend the statute of repose to ten years.	5:10-6:7	8:3-22
The new 10 year rule applies retroactively	6:8-8:14	8:23-11:10
Therefore, Plaintiff's Motion is Timely	8:15-26	11:11-22

The arguments are the same. Thus, this Motion is nothing more than an improper attempt to relitigate this matter. Accordingly, this honorable Court should deny Plaintiff's Motion and allow its Order to stand.

C. The October 1, 2019 Change in the Law Does Not Change the Untimeliness of the Complaint

1. The Six-Year Rule Applies to the Pre-October Complaint

The law in effect at the time Plaintiff filed its Complaint provided:

> ***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;

NRS 11.202 (July 2019) (emphasis added).

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The parties do not dispute that "substantial completion" occurred on July 13, 2009. Pursuant to the six (6) year statute of repose, Plaintiff was required to file its Complaint on or before July 13, 2015. *See*, NRS 11.202 (July 2019). However, Plaintiff's Complaint was filed on July 11, 2019, nearly four (4) years after the expiration of the statute of repose.

The amended version of NRS 11.202 did not go into effect until October 1, 2019. This was after Plaintiff filed its invalid Complaint on July 11, 2019; after Nevada By Design filed its Motion to Dismiss the invalid Complaint on August 5, 2019; and after this Court dismissed the invalid Complaint on September 30, 2019. The law that did not take effect until October 1, 2019 is simply irrelevant.

2. Retroactivity Applies to Pre-Existing Causes of Action, not to Pre-Filed Complaints

While a retroactive law applies to pre-enactment conduct, the legal effect produced by the law occurs ***only after the law's effective date***." *Arco Alaska, Inc. v. Alaska*, 824 P.2d 708, 711 (AK 1992). In a nutshell, this means that the law had absolutely no effect until October 1, months after the Complaint was filed in this case.

Retroactivity can, in fact, affect the pre-enactment conduct, which in this case was the completion of the project. This means that a ripe cause of action that had not yet expired before October 1st, because it was still within six years, would see the window extended to ten years after October 1st, even though the conduct would have occurred prior to October 1st. Retroactivity does not revive an already expired window (*see below*), nor does it revive a Complaint that violated the law of the time it was filed, both of which are exactly what Plaintiff is trying to do.

3. Retroactivity Cannot Revive a Pre-Expired Repose Window

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). Similarly, the Ninth Circuit Court of Appeals has long held that, "statutes of limitations [repose] should generally be applied retrospectively ***as long as the application would not revive a stale claim.***" *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir.

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1996)(emphasis added).[2] Moreover, "once a claim is extinguished by the statute of limitations, ***it cannot be revived. . . as a result of legislative action.***" *Wood v. Eli Lilly & Co.,* 701 So. 2d 344, 346 (Fla. 1997) (quoting *Wiley v. Roof*, 641 So.2d 66, 68–69 (Fla. 1994) (emphasis added). "This is because after an action has been time barred, the defendant possesses a constitutionally protected property interest to be free from that claim." *Id.* ***New rules, even applied retroactively, do not affect claims that are already time-barred***. *Id.* (emphasis added); *see also California Coastal Com. v. Superior Court*, 210 Cal. App. 3d 790, 1498, 258 Cal. Rptr. 567, 571 (Ct. App. 1989) ("***[A] change in the law will not revive claims already barred by the statute of limitations***.") (emphasis added); *Jolly v. Eli Lilly & Co*., 751 P.2d 923, 931 (Cal. 1988)(emphasis added) ("***[A] change in the law, either by statute or by case law, does not revive claims otherwise barred by the statute of limitations.***")

"This may seem unfair to those plaintiffs who would have had viable claims if the change of law had occurred earlier, but potential and actual liability must end with finality at some point. Persons should have the right to conduct their affairs without fear of liability for their actions once an appropriate limitation period has passed." *Id.* (*quoting Penthouse North Ass'n, Inc. v. Lombardi*, 461 So.2d 1350, 1351–52 (Fla. 1984)). In *Penthouse North*, the Florida Supreme Court held that despite a retroactive rule providing a longer limitations period, it did not "breathe[] new life into those causes of action previously barred by a statute of limitations or laches." 461 So.2d at 1351-52.

The Ninth Circuit Court of Appeals explained this well-established rule of law in *Chenault v. U.S. Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994). The Court explained:

> A newly enacted statute that shortens the applicable statute of limitations may not be applied retroactively to bar a plaintiff's claim that might otherwise be brought under the old statutory scheme because to do so would be manifestly unjust. ***Conversely, we hold that a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme because to do so would "alter the substantive rights" of a party and "increase a party's***

[2] Abrogated, on other grounds, by *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507, 203 L. Ed. 2d 791 (2019).

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> ***liability."*** In this case the rights of the defendant would be altered and its liability increased because it would be forced to defend an action that was previously time-barred.

Id. at 539 (internal citations omitted)(emphasis added).

In *Chenault*, a claimant was subject to a 30-day statute of limitations, which had expired. *Id.* at 538. The law was changed to extend the limitations period to 90 days. *Id.* The claimant argued that the new 90-day rule had applied even though the initial 30 days had expired before the rule change. *Id.* The Ninth Circuit disagreed holding that a new law cannot revive a previously expired limitations period as it would deprive the responding party of its substantive rights. *Id.* at 539. *See also, Bulgo v. Munoz,* 853 F.2d 710, 715 (9th Cir.1988) (declining to give retroactive effect to amendment to statute of limitations which would have revived plaintiff's barred claim); *Davis v. Valley Distrib. Co.,* 522 F.2d 827, 830 (9th Cir.1975), cert. denied, 429 U.S. 1090, 97 S. Ct. 1099, 51 L.Ed.2d 535 (1977) ("It is the general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred"); *FDIC v. Belli,* 981 F.2d 838, 842–43 (5th Cir.1993) (applying a statute extending the statute of limitations retroactively to pending cases except where to do so would revive an expired claim); *Gonzalez v. Aloha Airline, Inc.*, 940 F.2d 1312, 1316 (9th Cir.1991) (application of retroactive statute of limitations may not "result in manifest injustice" such as reviving time-barred claim).

A "new statute of limitations cannot revive a claim which was foregone under the prior statute of limitations." *Skolak v. Skolak*, 895 N.E.2d 1241, 1243 (Ind. Ct. App. 2008). Retroactive limitations periods "***cannot operate to revive an action for which the limitations period has already expired***. Such a result would violate the defendant's rights under the Due Process Clause." *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005). "This court has held that the legislature may retroactively increase the length of a statute-of-limitations period to cover claims already in existence, ***but it may not expand a limitation period so as to revive a claim already barred***." *Hall v. Summit Contractors, Inc.*, 158 S.W.3d 185, 188 (Ark. 2004) (emphasis added).

"***When a right to sue has expired under the applicable statute of limitations prior to the effective date of a new and longer statute, the new limitations period cannot revive the expired cause of action.***" *State of Minn. ex rel. Hove v. Doese*, 501 N.W.2d 366, 370 (S.D.1993) (emphasis

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added); *See also* Gross v. Weber, 112 F. Supp. 2d 923, 926 (D.S.D. 2000); *U.S. ex rel. Thistlethwaite v. Dowty Woodville Polymer, Ltd.*, 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998); *Chance v. Am. Honda Motor Co.*, 635 So. 2d 177, 179 (La. 1994); *State, Dep't of Human Servs. ex rel. Headrick v. Melson*, 871 P.2d 449, 450–51 (Ok. Ct. App. 1994); *Crawford v. Springle*, 631 So. 2d 880, 881 (Ala. 1993); *Matter of Estate of Weidman*, 476 N.W.2d 357, 364 (Iowa 1991).

There is no dispute that at the time Plaintiff filed its complaint the applicable statute of repose had long expired. Plaintiff's motion is the functional equivalent of attempting to use the October 1 amendment as a defibrillator to revive a corpse that had been buried for several years. Plaintiff's causes of action are dead and cannot be revived.

D. Plaintiff's Motion Should Be Denied Because it Serves No Useful Purpose As This Matter Should Also Be Dismissed Under NRS 258[3]

Granting Plaintiff the relief it seeks would be futile because its Complaint is invalid as to JWZ due to the absence of an affidavit and expert report that pertains to the work that JWZ performed on the project. The Statute requires that the Affidavit, from Plaintiff's attorney, must contain very specific statements that comply with the obligations under NRS 11.258(1)(a)-(d) and also attach a report (and all supporting documents) that complies with all requirements in (3)(a)-(e). If there is any failure, the "court shall dismiss an action governed by NRS 11.258" when an action is "commenced against a design professional …if the attorney for the complainant fails to: (a) File an affidavit required pursuant to NRS 11.258; [or] (b) File a report required pursuant to subsection 3 of NRS 11.258." NRS 11.259(1)(a)-(c). Here, JWZ is a "design professional" specializing in landscaping and therefore Plaintiff is required to file an Affidavit of Merit. NRS 11.2565(2)(b). Secondly, the project involves a fire station and therefore the claims involve design related matters of a nonresidential building or structure. These two facts require the Plaintiff to fully comply with NRS 11.258.

Here, Plaintiff's Complaint included an Affidavit of Merit along with various attached documents, including a report prepared by AGI, a geotechnical engineering firm. Plaintiff's

[3] JWZ reserves the right to argue this point further if it becomes necessary and only makes it at this stage to demonstrate the futility of granting Plaintiff the instant relief that it seeks.

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Affidavit of Merit must attest there is a "reasonable basis in law and fact" to commence the action against JWZ, a landscaping firm. See, NRS 11.58(1)(d). The Affidavit must also include a report that contains the "[t]he conclusions of the expert and the basis for the conclusions..." *Id.* at 3(d) & (e).

In reviewing Plaintiff's Affidavit of Merit, JWZ notes that Plaintiff's Counsel's representations are based on AGI's findings/conclusions in its report. However, in reviewing AGI's report on which the Affidavit is based, JWZ notes that none of the opinions expressed by AGI pertain to JWZ. Rather, those opinions exclusively focus on subsoil/geotechnical issues prepared by other design professionals. See, AGI's report attached to the Complaint; and Nevada By Design's Motion to Dismiss. Nowhere in the report does AGI present any opinions critical of JWZ. Id. In fact, there is absolutely nothing in AGI's report discussing JWZ services and design. *Id.* Stated differently, a reading of AGI's report indicates there are no opinions from Plaintiff's expert against JWZ despite the clear obligation in 11.258(3)(d) for Plaintiff to include a report with "the conclusions" of its expert and "the basis" for same. If there are no opinions and conclusions against JWZ, then Plaintiff's Affidavit and Report are irrelevant as to JWZ and constitute a failure to comply with the letter and intent of NRS 11.258.

E. Plaintiff Cannot Use the Local Rules to Undo a Joinder Filed in Accordance with Its Agreement with JWZ

Plaintiff disingenuously argues that the Court's Order cannot apply to JWZ because its Joinder was filed the same day as the hearing on the Motion to Dismiss. This argument lacks merit because 1) JWZ filed its joinder within the time allowed by the agreement of Plaintiff; 2) JWZ had no notice that the Court would be hearing the Motion to Dismiss on September 30, 2019; and 3) Relief is futile because the Order found the entire Complaint to be invalid, rather than specific causes of action against specific defendants.

JWZ finds it comical that Plaintiff who filed its Complaint almost four (4) years following its statute of repose period is now attempting to claim that JWZ's joinder was untimely by a few days. JWZ finds it further hypocritical that Plaintiff is making this argument in light of the fact that Plaintiff was also the beneficiary of a similar situation when it filed its Opposition to Nevada

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by Design's Motion five (5) days later than EDCR 2.20(e) allows. *See* Nevada By Design's Reply In Support of its Motion to Dismiss, at 3:15-21, n.1. Plaintiff needed more time than the EDCR allowed, asked for more time, and had its request granted by Nevada by Design. *Id.* Similarly, JWZ needed more time than the rules provided to respond to the Complaint. Similarly, JWZ asked Plaintiff for an extension, and Plaintiff granted that request. For JWZ to now cry foul after granting the very extension and receiving the same courtesy in this matter is a textbook example of hypocrisy. Plaintiff should be estopped from making this argument.

Further, this entire exercise is futile because the Complaint is invalid, notwithstanding JWZ's Joinder. The entire Complaint was filed almost four years after the statute of repose expired. In fact, this Court specifically found that "Plaintiff failed to timely file its Complaint and therefore, the Complaint and claims therein violate NRS 11.202." *Order*, at 2 (¶6).

This would be true even if JWZ did not file a Joinder. Granting Plaintiff relief on this issue would only lead to another Motion to Dismiss based on the law of this case. The entire effort would be futile. For that reason, the Court should deny Plaintiff's Motion, even as it pertains to JWZ's joinder.

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IV. CONCLUSION

Plaintiff's was required to file its Complaint over four (4) years ago under the law at the time. Plaintiff's Complaint is per se untimely and no later change in the law can remedy that fact. Accordingly, the Complaint must remain dismissed. Further, Plaintiff granted permission for JWZ to file its response to the Complaint by October 4th. Thus, it is estopped from arguing that JWZ's September 30th filing was untimely under the EDCR, especially after asking for and receiving the benefit of the same courtesy regarding its technically late Opposition to the Motion to Dismiss. For all of these reasons, Plaintiff's motion should be denied.

Dated: November 25, 2019

FORAN GLENNON PALANDECH PONZI & RUDLOFF PC

By: /s/ *Lee H. Gorlin*
Dylan P. Todd, NV Bar No. 10456
Lee H. Gorlin, NV Bar No. 13879
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Attorneys for Defendant JW Zunino & Associates

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT JW ZUNINO & ASSOCIATES LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER JUDGMENT** by the method indicated below:

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.

☒ **BY ELECTRONIC SERVICE:** submitted to the above-entitled Court for electronic service upon the Court's Service List for the above-referenced case.

☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

Dated this 25th day of November 2019.

/s/ Rita Tuttle
An Employee of Foran Glennon

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EXHIBIT A

EXHIBIT A

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Attorneys for JW Zunino & Associates

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

Dekker/Perich/Sabatini Ltd.; Richardson Construction, Inc.; Nevada By Design, LLD d/b/a Nevada By Design Engineering Consultants; JW Zunino & Associates, LLC; Melroy Engineering, Inc. d/b/a MSA Engineering Consultants; O'Connor Construction Management Inc.; Ninyo & Moore, Geotechnical Consultants; Jackson Family Partnership LLC d/b/a Stargate Plumbing; Avery Atlantic, LLC; Big C LLC; Ron Halon Masonry LLC; The Guarantee Company of North America USA; P & W Bonds, LLC; Paffenbarger & Walden, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No. A-13-689026-C

Dept. No. XIII

AFFIDAVIT OF RITA TUTTLE

I, RITA TUTTLE declare:

///

///

1. I am an employee of the law firm of Foran Glennon Palandech Ponzi & Rudloff, PC. Unless otherwise noted, I have personal knowledge of the facts asserted in this Declaration, and if called as a witness I could and would competently testify to the facts asserted here.

2. On September 17, 2019 I was instructed by attorney Dylan Todd, Esq. to contact counsel for Plaintiff, City of North Las Vegas to obtain an extension from September 27, 2019 to September 30, 2019, for our client JW Zunino to respond to Plaintiff's Complaint as Mr. Todd would be out of town and unavailable until that time.

3. On September 17, 2019 I spoke with attorney Alcem Dhalla, counsel for Plaintiff City of North Las Vegas requesting the extension from September 27, 2019 to September 30, 2019. Mr. Dhalla agreed to the extension of September 30, 2019 but said we could have until October 4, 2019 to respond to his client's Complaint.

4. I inadvertently did not send an email to Mr. Dhalla to confirm my understanding of our telephone conversation.

5. In an abundance of caution, I sent Mr. Dhalla an email on October 7, 2019 confirming the extension to October 4, 2019.

6. Our client, JW Zunino filed its response in the form of a joinder to Nevada by Design's motion to dismiss or in the alternative motion for summary judgment on September 30, 2019.

Dated: October 9, 2019

Rita Tuttle

Rita Tuttle

SUBSCRIBED and SWORN to before me this 9th day of October 2019.

NOTARY PUBLIC

JENNIFER L. PARSONS
Notary Public-State of Nevada
Appointment No. 17-1797-1
My Appointment Expires 03-25-2021

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EXHIBIT 27
PETITIONERS' APPENDIX

EXHIBIT 27
PETITIONERS' APPENDIX

OPPM
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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS,

Plaintiff,

vs.

DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

Dept. No.: VIII

DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEEERING CONSULTANT'S OPPOSITION TO MOTION TO ALTER JUDGMENT

Hearing Date: 12/17/2019

Hearing Time: 9:00 a.m.

Hearing Location:
Phoenix Building,
Courtroom 11th Floor 110
330 S. 3rd Street
Las Vegas, NV 89101

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DEFENDANT NEVADA BY DESIGN, LLC d/b/a

NEVADA BY DESIGN ENGINEEERING CONSULTANT'S

OPPOSITION TO MOTION TO ALTER JUDGMENT

COMES NOW Defendant Nevada By Design Engineering Consultant ("NBD"), by and through its attorneys of record, the law firm of Weil & Drage, APC, and hereby files its Opposition to Plaintiff City of North Las Vegas' (hereinafter, "Plaintiff") Motion to Alter Judgment ("Motion to Alter").

This Opposition is made and based on the Memorandum of Points and Authorities submitted herein, all pleadings, papers, and files herein, the evidence adduced at hearing, and any oral argument this Honorable Court will entertain.

DATED this 26th day of November, 2019.

WEIL & DRAGE, APC

/s/ *John T. Wendland*

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION

I.

INTRODUCTION

As the Court is well verse, the core issue of the Order Granting NBD's Motion to Dismiss or, in the alternative, Motion for Summary Judgment and all joinders to same (the "Order") pertained to Plaintiff's claims being time barred when it filed its Complaint on July 11, 2019 pursuant to the statute of repose. On said date, Plaintiff, in clear violation of NRS 11.202/AB 125's statute of repose filed its Complaint and asserted time barred claims. Thus the Complaint was "dead on arrival" when filed.

Undaunted, the Plaintiff has done its utmost to trumpet its time-barred Complaint and claims as having legal validity based on AB 421, a law that did not exist on July 11, 2019. Despite the Complaint and claims being "stale" resulting in an immediate dismissal request from NBD, the Plaintiff next engaged in various delay tactics by opposing at every corner, NBD's efforts to argue a known legal fact: That the Complaint was invalid and improperly filed. In fact, Plaintiff's violation of NRS 11.202 when it filed the Complaint was so clear that the Court could have dismissed the Complaint, *sua sponte*. Unfortunately, Plaintiff's tactic caused the scheduling and re-scheduling of various hearings, extensive briefing and finally, a long drawn out hearing on September 30, 2019. Despite these tactics, this Court correctly found and ruled that Plaintiff's claims and Complaint were time barred, warranting dismissal with prejudice. *See*, the Order attached hereto as **Exhibit 1**.

Now, a month after the Court's pronouncement of its decision, Plaintiff has reappeared with its Motion to Alter the Judgment pursuant to NRCP 59(e), essentially a "second bite of the apple". Plaintiff's Motion requests this Court to (again) review ***the same arguments***, ***the same issues*** and ***the same legal authorities*** previously briefed and argued before the Court. *See*, Motion to Alter Judgment, generally; *see also*, all briefing filed concerning the Order. This includes, in particular, Plaintiff's core argument that the Complaint and the claims therein, filed on July 13, 2019 (***nearly four years too late per NRS 11.202***), are somehow valid based on AB 421.

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This Court has already found that the statue of repose governing Plaintiff's Complaint required the filing of the action within six (6) years of substantial completion. *Id*. at Finding No. 3. This Court has further found that the Plaintiff failed to timely file its Complaint on July 11, 2019 and that its claims violated Nevada law. *Id*. at Finding No. 6. This Court has also found that Plaintiff's argument for retroactive application of AB 421 [the same argument presented in the Motion to Alter] is "not applicable to Plaintiff's Complaint." *Id*. at Finding No. 5. Thus, the Motion to Alter is nothing more than Plaintiff's last gasp to re-litigate the same legal issues in an effort to change and vacate the Order.

NRCP 59(e) expressly states that: "[a] motion to alter or amend a judgment must be filed no later than twenty-eight (28) days after service of written notice of entry of judgment." This is all that NRCP 59(e) states. For additional guidance, the Nevada Supreme Court in *AA Primo Builder, LLC v. Washington*, stated that a motion to amend pursuant to 59(e) is not, a special order after judgment; is not independently appealable; and is subject to review on appeal under the abuse of discretion standard. 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (*citing*, 11 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*, Sec. 2818, at 188 (2d Ed. 1995)). The *AA Primo* Court further held that NRCP 59(e) "…echo Fed. R. Civ. P. 59(e)…and we may consult federal law in interpreting them." *Id*. at 126 Nev. at 582, 245 P.3d at 1192-1193 (2010) (*citing, Coury v. Robison*, 115 Nev. 84, 91 n. 4, 976 P.2d 518, 522 n. 4 (1999)).

A motion to alter pursuant to Rule 59(e) is "an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *City of Fresno v. U.S.*, 709 F.Supp.2d 888, 916 (E.D.Cal. 2010); *see also*, *McDowell v. Calderon*, 197 F.3d 1253, 1255 n. 1 (9th Cir. 1999) (*citing*, 11 C. Wright, *supra*, Sect. 2818.1). Given that it is an extraordinary remedy, the application of Rule 59(e) is limited to certain circumstances such as: (1) to correct manifest errors of law or fact; (2) situations necessary to present newly discovered or previously unavailable evidence; (3) situations to prevent manifest injustice or (4) a change in controlling law. *See, AA Primo Builder, LLC,* 126 Nev. at 582, 245 P.3d at 1193 (*citing*, 11 C. Wright, *supra*,

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at Sect. 2810.1 at 124-127). These circumstances are a "high hurdle." *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001).

Rule 59(e) is also silent on standards that must be followed in deciding this motion and the Court enjoys "considerable discretion". *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). However, in exercising its discretion, the Court must be mindful that Rule 59(e) motions are "disfavored" and "are not the place for parties to make new arguments not raised in their original briefs and arguments." *Ramirez v. Medtronic, Inc*., 961 F.Supp.2d 977, 1005 (D. Ariz. 2013) (*citing, NW Accept. Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925-26 (9th Cir. 1998). Moreover, these motions should not ask the Court to "rethink what the court has already thought through - rightly or wrongly." *Id*. (*citing, U.S. v. Rezzonica*, 32 F.Supp.2d 1112, 1116 (D. Ariz. 1998) (internal quotes omitted)). And Rule 59(e) relief, is not a vehicle for obtaining post judgment re-argument. *Durkin v. Taylor*, 444 F.Supp. 879, 889-90 (E.D.Va. 1977) (*citing, Blair v. Delta Air Lines, Inc*., 344 F.Supp. 367, 368 (S.D.Fla. 1972)); *In re Hillis Motors, Inc*., 120 B.R. 556, 558 (Bankr. D.Haw. 1990).

Thus, a party seeking 59(e) relief must show more than disagreement with the decision and more than a mere recapitulation of the arguments already considered by the Court in its original decision. *City of Fresno, supra*, (*citing, U.S. v. Westlands Water Distr*., 134 F.Supp.2d 1111, 1131 (E.D. Cal. 2001)); *Illinois Cent. Gulf R. Co. v. Tabor Grain, Co.*, 488 F.Supp. 110, 122 (N.D.Ill. 1980). Any issue which was presented or could have been presented for consideration previously, is not the proper subject of Rule 59(e) relief as these <u>*issues were waived*</u>. *Smith v. Stoner*, 594 F.Supp. 1091, 1118 (N.D.Ind. 1984) (emphasis added).

Here, the Order was well reasoned, based on established law and applied the correct standard in its decision. Rather than appealing the Order, Plaintiff has opted to produce a Motion to Alter, which in actuality is a disguised Motion for Reconsideration. The primary arguments in the Motion to Alter have been raised extensively before this Court and are already "factored" into the Order. Thus, there are no new arguments presented in Plaintiff's Motion to Alter (even the EDCR and joinder arguments were previously raised and decided by the Court). To NBD, the

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Motion to Alter is absolutely inappropriate. Thus, NBD respectfully requests a finding that Plaintiff's Motion to Alter per Rule 59(e) motion is inappropriate; not compliant with Rule 59(e)[1] (therefore not a tolling motion); and that the Motion to Alter be denied.

II.

ESTABLISHED PROCEDURAL HISTORY AND FACTS

The subject project involves a fire station that was substantially completed on July 13, 2009. *See*, **Exhibit 1** at Finding No. 2. On July 11, 2019, Plaintiff filed its Complaint and asserted claims against NBD and various other defendant parties. *Id*. at Finding No. 1. On July 11, 2019, when Plaintiff filed its Complaint, the Statute of Repose per NRS 11.202, stated that "**no action may be commenced** for any deficiency in design, planning, supervision or observation of construction or the construction of an improvement to real property more than six (6) years after substantial completion." *Id*. at Finding No. 3 (emphasis added). The Court also found that when Plaintiff filed its Complaint on July 11, 2019, it filed said pleading "untimely" and in violation of NRS 11.202. *Id*. at Finding. No. 6. In response to Plaintiff's AB 421 argument, the Court concluded that AB 421 was not in effect on July 11, 2019 and that the retroactive application of AB 421 Sect. 11(4) [the core argument of the present Motion to Amend Judgment] "***is not applicable to Plaintiff's Complaint***." *Id*. at Finding 5 (emphasis added). Consequently, the Complaint and all claims against NBD (and the joining parties) were dismissed with prejudice. *Id.* at Order.

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[1] The Court in *AA Primo Builders, LLC* also held that a motion for reconsideration, even timely and seeking substantive alteration, may not qualify as a NRCP 59(e) tolling motion. 126 Nev. at 583, 245 P.3d at 1193 (*citing, Able Electric, Inc. v. Kaufman*, 104 Nev. 29, 31-32, 752 P.2d 218, 220 (1988)). In *Able Electric*, the Court found that no new evidence was presented in denying the motion to amend and therefore, the motion was not treated as a motion for rehearing and the appeal was precluded. *Able, supra*.

There are no new arguments in Plaintiff's motion to amend and these arguments were already presented and rejected by the Court. Thus, Plaintiff's motion to amend is not appropriately brought pursuant to NRCP 59(e) and there is no tolling. The Supreme Court has held that a party who waits file a notice of appeal until after a post-judgment motion is decided, runs the risk of being too late if the motion turns out to be non-tolling. *AA Primo Builders, LLC*, 126 Nev. at 584, 245 P.3d at 1194 (*citing*, *Able Elec*., 104 Nev. at 31-32, 752 P.2d at 220).

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III.

LEGAL ARGUMENT

A. The Statute of Repose barred Plaintiff from filing its Complaint and asserting claims with no legal effect and therefore the Complaint should be deemed Void Ab Initio:

To properly vet this pending Motion to Amend, it is critical to discuss and understand the intent, purpose and legal effect of a statute of repose. A statute of repose is a legislative enactment designed to protect persons engaged in the planning, design and construction of improvements to real property who otherwise would endure unending liability, even after they had lost control over the use and maintenance of the improvement. *Alsenz v. Twin Lakes Village, Inc*., 108 Nev. 1117, 1120, 843 P.2d 834, 836 (1992) (*citing, Nev. Lakeshore Co. v. Diamond Elec., Inc*., 89 Nev. 293, 295-96, 511 P.2d 113, 114 (1973)). The statute of repose commences on the date of substantial completion, regardless of when the injury or damages might occur or be discovered and ***prohibits commencement*** of any actions thereon after "a certain number of years." *Id*. (*citing, Nev. Lakeshore, supra*). The effect of a statute of repose is that it "bar[s] causes of action after a certain period of time, regardless of whether damage or an injury has been discovered." *Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 391, 46 P.3d 62, 64 (2002) (*citing, Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n. 2, 766 P.2d 904, 905 n. 2 (1988)). The *Davenport* Supreme Court explained that the reason for an enactment of a repose statute is:

> …to require trials of actions based on *defects in construction* to be held within a relatively short time after the work is completed…[as] [t]he parties involved in creating the improvement often cease having any control over the improvement after completion, and thus, the legislature has opted **to provide them a measure of economic certainty by closing the door to liability** based on 'deficiencies' or design and construction-related defects, that cause injury or damage **after a specified period of time has passed**…

Id. at 118 Nev. at 393, 46 P.3d at 65 (internal cites omitted; [ ] added for clarity; emphasis added).

Thus, the primary consideration of a statute of repose is "fairness to a defendant" by providing them with a belief that there "comes a time when defendant 'ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations…'" *RAC v. PJS*, 927 A.2d 97, 105 (N.J. 2007). As the statute of repose sets an outside time limit commencing from the date of substantial completion, the Plaintiff, "in addition to proving the elements of the

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cause of action…must also prove that the cause of action was brought within the time frame set forth by the statute of repose." *G&H Associates v. Hahn*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997) (*citing*, *Colony Hill Condo. I Ass'n v. Colony Co.*, 320 S.E.2d 273, 276 (1984)). There is no tolling of any kind on a repose statute. *Rudenauer v. Zafiropoulos*, 837 N.E.2d 278, 282 (Mass. 2005).

On July 11, 2019, the statute of repose barred/precluded the Plaintiff from the very act that it employed, which is the filing of a fugitive Complaint. As already established, the statute of repose began on July 13, 2009 and expired in July 2015, ***four years before the filing of the Complaint on July 11, 2019***. Upon expiration of the repose time period, the Plaintiff's claims were terminated and became barred[2]. *See*, **Exhibit 1**. Despite being terminated and barred, Plaintiff, without legal justification, filed a baseless Complaint, a pleading that should be considered ***void ab initio*** (without any legal effect-non-existent). *See*, *Washoe Medical Ctr. v. State*, 122 Nev. 1298, 1304 *(citing, Black's Law Dictionary* 5 (8th Ed. 2004) (defining "ab inito" as "from the beginning")). Unfortunately, rather than rejecting this fugitive pleading, the Court accepted Plaintiff's Complaint based on representations that said pleading and claims were warranted as appropriate under existing law. *See*, NRCP 11(b)(2). However, such representations were misleading, even false, as the claims were in actuality, terminated years earlier rendering the Complaint *with no legal effect*.

Given that the Complaint had no legal effect on July 11, 2019, there is no justification for the Plaintiff to circumvent this established fact by asserting legal justification based on a law that did not exist at the time of filing and for which there is no pending action. Allowing Plaintiff to resurrect the Complaint in its Motion to Alter would be tantamount to the Court completely ignoring the legal effect of a statute of repose and even sanctioning a fraud committed against it when the Complaint was filed. Rather than excusing such conduct, the Plaintiff should be held to task for its fugitive Complaint with said pleading being found void ab initio and precluded from

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[2] "Barred" means that which defeats, annuls, cuts off, or puts an end to… also prevents the plaintiff from further prosecuting the matter with effect. *Black's Law Dictionary* 148 (5th Ed. 1990).

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amendment. *See e.g.*, *Otak Nevada, LLC v. Eighth Jud. Distr. Ct.*, 127 Nev. 593, 260 P.3d 408 (2011), *abrogated on other grounds by, Reif v. Aries Consultants, Inc.*, 135 Nev. Adv. Op. 51 (Oct. 10, 2019).

B. <u>The Motion to Alter Judgment is Nothing More than a Near Word for Word Repeat of Arguments Previously Raised against NBD's Motion to Dismiss/Motion for Summary Judgment</u>.

As extensively discussed above, a Rule 59(e) motion is not a do-over where arguments previously raised or could have been raised, are re-argued under the guise of a motion to amend disguised as a repetitive motion for reconsideration. *See, City of Fresno, supra; see also,* arguments/legal authority cited on Pgs. 4-5 of this Opposition (which are hereby incorporated by reference herein). As admitted in its Motion to Alter, Plaintiff's 59(e) relief is primarily based on a prior argument pertaining to AB 421's Retroactive Application under Sect. 11(4). ***These arguments*** were initially raised in Plaintiff's Opposition to NBD's Motion to Dismiss and were also presented before the Court at the September 30, 2019 hearing.

Specifically, with knowledge that AB 421 did not go into effect at the time of the filing of the Complaint, Plaintiff's counsel chose to raise the retroactive application of AB 421 Sect. 11(4) as part of its opposing papers and oral argument. *See*, Opposition to NBD's Motion to Dismiss at Pg. 2: Lines 2-25; Pg. 5: Line 2-Pg. 8: Line 26 attached hereto as **<u>Exhibit 2</u>**; *see also*, Pgs. 37-40 of Hearing Transcript attached hereto as **<u>Exhibit 3</u>**. The Court has already heard, considered and rejected this argument in issuing the Order finding that AB 421 did not apply to Plaintiff's Complaint filed on July 11, 2019. *See*, **<u>Exhibit 1</u>**.

Undaunted, Plaintiff has regurgitated these very same arguments in its Motion to Alter (as opposed to filing a new action based on AB 421). In fact, a side-by-side comparison of Plaintiff's Opposition to NBD's Motion and the Motion to Alter indicates that the Plaintiff did nothing more than change the title of its submitted pleadings from the Opposition to NBD's Motion to Dismiss into the present Motion to Alter. As stated, a Motion to Alter is not intended as an opportunity to re-argue issues already considered and simply because Plaintiff now cites to NRCP 59(e) as justification, does not qualify this motion as a NRCP 59(e) motion. *AA Primo Builders, LLC,* 126

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Nev. at 583, 245 P.3d at 1193 (*citing, Able Electric, Inc. v. Kaufman*, 104 Nev. 29, 31-32, 752 P.2d 218, 220 (1988)).

As Plaintiff's Motion to Alter is nothing more than a repetitive motion to reconsider on arguments already decided by the Court, the present Motion to Alter should be denied as a disguised motion to reconsider and rejected as being an appropriate pleading under NRCP 59.

C. <u>There Is No Change in Controlling Law as the Action Does Not Exist</u>.

As stated above, the applicable statute of repose terminated Plaintiff's claims on July 13, 2015 as established from NBD's Motion to Dismiss. *See*, **<u>Exhibit 1</u>**. Four (4) years later, in purposeful violation of Nevada law, the Plaintiff untimely filed its Complaint which was dismissed with prejudice. *Id*. Once an action is dismissed with prejudice, it divests the Court of all jurisdiction to hear the underlying action and to conduct any further proceedings with respect to the matters resolved in the judgment unless it is properly set aside or vacated. *SFPP, LP v. Second Jud. Distr. Ct*., 123 Nev. 608, 612, 173 P.3d 715, 718 (2007). A dismissal "with prejudice" means that the plaintiff's right to pursue the action and the action itself are ***terminated***. *Torrey Pines Bank v. Superior Ct*., 216 Cal.App.3d 813, 820-21, 265 Cal.Rptr. 217, 221 (Ct. App., 4th Dist. 1989) (internal cites omitted) (emphasis added). The dismissal with prejudice constitutes a final judgment invoking the bar of res judicata. *Id*. (*citing, Royal v. Univ. Ford*, 207 Cal.App.3d 1080, 1087 255 Cal.Rptr. 469, 469 (1989)); *see also*, *Emerson v. Eight Jud. Distr. Ct*., 127 Nev. 672, 679, 263 P.3d 224, 229 (2011) (concerning a NRCP 41(a)(1)(i)or (ii) stipulation, "[i]n both instances, ***<u>the action is terminated</u>***, and the court is without further [subject matter] jurisdiction in the matter" (emphasis added)). The doctrine of res judicata precludes parties from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. *Horvath v. Gladstone*, 97 Nev. 594, 637 P.2d 531 (1981).

Here, the Court has issued the Order for dismissal with prejudice which means this action *was terminated and no longer exists*. As this action does not legally exist and the court is divested of jurisdiction, the controlling law has never changed. Stated differently, the Court in deciding Plaintiff's recent Motion to Alter is bound to its prior ruling and must apply the laws that existed

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during the pendency of the action. As the action was already terminated prior to the effective date of AB 421, (as already found by the Court in the Order), there is no change in controlling law. *Id*.

Nevertheless, if the Court considers the Motion to Alter, it is also important to note that AB 421 Sect. 11(4) also requires a pending live action. As stated in AB 421, Section 11(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. *See*, Pg. 10 of Motion to Alter; *see also*, text from AB 421 attached as "Exhibit 4" to Plaintiff's Motion to Alter.

(Without waiver of any other arguments herein), the very language cited by Plaintiff requires the ***existence of an action***. As shown, this matter has been dismissed with prejudice, thereby terminating its existence. *See, Torrey Pines Bank, supra; Royal, supra; SFPP, supra;* and *Emerson, supra*. In other words, there is no existing action to apply Plaintiff's AB 421 argument. Given that the dismissal is with prejudice, Plaintiff's only recourse for relief is the following: (1) to file a new action under AB 421; or (2) file an appeal to raise these arguments and have the Supreme Court decide this issue. Plaintiff is not entitled under NRCP 59(e) to argue retroactive application to a non-existing action.

D. <u>Granting Plaintiff the Right to Alter Would Violate NBD's Constitution Rights</u>.

Nevada's Constitution states that "[a]ll men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness." *See*, Nev. Const. Art. I Sect. 1. Nevada's Due Process Clause further states that "[n]o person shall be deprived of life, liberty, or property, without due process of law." *Id.* at Sect. 8. Nevada's due process clauses are similar to and mirror the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. *Hernandez v. Bennett-Haron*, 128 Nev. 580, 587, 287 P.3d 305, 310 (2012) (*citing, Rodriquez v. Distr. Ct.*, 120 Nev. 798, 808, n. 22, 102 P.3d 41, 48 n. 22 (2004)). This allows the Court to rely on federal precedence as guidance. *Id*.

As a general rule, statutes are presumptively prospective in application unless the legislature clearly manifested a contrary intent. *McKellar v. McKellar*, 110 Nev. 200, 203, 871 P.2d 296, 298 (1994); *Segovia v. Eighth Jud. Distr. Ct.*, 133 Nev. 910, 915, 407 P.3d 783, 787-88

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(2017). The time-honored presumption is that unless the legislature manifests a different intent, the legal effect of the conduct should be assessed under the law that existed when the conduct occurred. *Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (*citing, Hughes Aircraft Co v. U.S.*, 520 U.S. 939, 946, 117 S.Ct. 1871, 138L.Ed.2d 135 (1997)). This presumption is to avoid unnecessary post hoc changes to legal rules on which parties rely upon in shaping their conduct. *Id*. (*citing, Republic of Austria v. Altmann*, 541 U.S. 677, 696, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004)). In fact, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 228 (1994) (*citing, General Motors Corp v. Romein,* 503 U.S. 181, 191, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992). To determine retroactive application, the U.S. Supreme Court and the 9th Circuit have described a two-step analysis which is to: (1) first determine if the Congress has prescribed the statute's proper reach; and then (2) if so, whether the retroactive application of the statute runs afoul of the constitution. *Ditullio, supra* (*citing, Landgraf*, 511 U.S. at 280).

Here, Plaintiff argues that AB 421, Sect. 11(4) allows for retroactive application of the new ten-year statute of repose to claims terminated in 2015, years prior to the Effective Date of AB 421. In this Opposition, NBD has presented a number of counter-arguments to Plaintiff's position. In evaluating this issue, the Court must first analyze the express language in AB 421, Section 11(4) to determine if the retroactive application even applies to claims already terminated and barred. As part of its analysis, the Court is to take a common sense, functional approach and note as central to the determination, "fundamental notions of 'fair notice, reasonable reliance, and settled expectations'." *Sandpointe Apts. v. Eighth Jud. Distr. Ct.*, 129 Nev. 813, 820, 313 P.3d 848 (2013) (*citing, Pub. Emps.' Benefits Program v. Las Vegas Metro Police Dept.*, 124 Nev. 138, 155, 179 P.3d 542, 553 (2008)).

Applying the above standards, it is important to note that the retroactive application of AB 421 applies only to ***legitimately existing actions*** that have a substantial completion date prior to October 1, 2019. *See*, AB 421 Sect. 11(4). In other words, the intent of AB 421 Sect. 11(4) was

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to retroactively apply AB 421 to a limited number of actions that have substantial completion dates between October 1, 2015 through September 30, 2019. Section 11(4) does not apply to actions with substantial completion dates before October 1, 2015. This is based on the language in AB 421, Section 11(4) which must be read in conjunction with NRS 11.202/AB 125, Sect. 1, which stated, "**[n]o action** may be commenced…more than six (6) years after substantial completion…" (emphasis added). Thus, once the action was terminated under NRS 11.202/AB 125, there is "no action" and for AB 421 to apply retroactively, there must be a legally existing action at the time of Complaint; which is not the case here. *See*, **Ex. 1**. Accordingly, AB 421, Sect. 11(4) does not apply, as Plaintiff only had "stale" previously terminated claims when it filed its Complaint on July 11, 2019 and when AB 421 went into effect on October 1, 2019. *Davis v. Valley Distr. Co*., 522 F.2d 827, 830 (9th Cir. 1975) *cert. denied*, 429 U.S. 1090 (1977) (*citing James v. Continental Ins. Co*., 424 F.2d 1064, 1065-66 (3rd Cir. 1970) ("It is a general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred") [3]. AB 421 cannot revive a previously terminated/stale claim. *Id*. This means that under the first part of the *Ditullio* test, Plaintiff is unable to establish that AB 421 retroactively applies to previously terminated claims under NRS 11.202/AB 125. *Ditullio*, *supra* (*citing, Landgraf*, 511 U.S. at 280).

Nevertheless, even for the sake of argument that the Court accepts Plaintiff's claim that AB 421 revived non-existing claims, terminated in 2015, the second part of the *Ditullio* test precludes retroactive application as it would substantively and unconstitutionally remove vested rights and expectations held by NBD (and other parties). *Fifty-Six Hope Road Music, Ltd. v. AVELA, Inc*., 688 F.Supp.2d 1148, 1164 (D.Nev. 2010). Therefore, it is not enough to examine the language of AB 421 Sect. 11(4), the Court must also evaluate whether retroactive application will offend due process, equal protection of the law, contractual obligations or vested rights or whether it amounts to an ex post facto law or a bill of attainder. *See, Landgraf*, 511 U.S. at 266 (retroactive application is prohibited if it impairs the obligation of contracts; constitutes a taking in

[3] The claim must not be "stale" which means claims barred if the statute of limitations expired prior to the enactment of the statutory extension. *Hyatt v. Northrop Corp*., 883 F.Supp. 484, 486 (C.D. Cal. 1995) (*citing, Davis v. Valley Distr. Co., supra*).

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violation of the Fifth Amendment; is a bill of attainder; or is in violation of the Due Process Clause which "protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not sufficient to warrant it retroactive application'") (*citing, Usery v. Turner Elkhorn Mining Co*., 428 U.S. 1, 17, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). Even if there is a clear indication that the statute applies retroactively, it will not be applied if it interferes with such vested, substantive rights. *Owen Lumber Co. v. Chartrand*, 73 P.3d 753, 755 (Kan. 2003).

A statute of repose is a bar to causes of action after a certain time period and is enacted to protect persons involved in design, planning and construction of real property who would endure unending liability even with properties for which they are no longer involved. *Aliens*, 108 Nev. at 1120; *Davenport, supra*; *G&H Associates, supra.* Statutes of repose reflect legislative decisions that 'as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability" and accordingly, "a 'statute of repose' is intended as a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights." *School Bd. of City of Norfolk v. U.S. Gypsum Co*., 360 S.E.2d 325, 328 (Va. 1987) (*citing, Stevenson, Products liability and the Virginia Statute of Limitations-A call for the Legislative Rescue Squad,* 16 U.Rich.L.Rev. 323, 334 n. 38 (1982)); *Chumley v. Magee*, 33 So.3d 345, 351 (La. App. 2 Cir. 2010) (an acquisition of a defense to a cause of action becomes a vested property right and protected by due process guarantees); *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1244 (1994)(internal cites omitted)(the defense based on expiration of the statute of limitations is a vested right for which the legislature may not constitutionally revive a time barred claim); *Police & Fire Ret. System of City of Detroit v. IndyMac MBS, Inc*., 721 F.3d 95, 106 (2013) (statutes of repose create a "***substantive right*** in those protected to be free from liability after a legislatively-determined period of time") (*citing, Amoco Prod. Co. v. Newton Sheep Corp*., 85 F.3d 1464, 1472 (10th Cir. 1996)) (emphasis added). Importantly, retroactive application can collide with various constitutional rights including the Contract Clause and the Due Process Clause and if so, it is improper if it takes away or impairs vested rights under existing laws, creates a new obligation, a new duty or attaches a new disability on transactions and considerations that have passed.

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Landgraf, 511 U.S. at 280; *Vartelas v. Holder*, 566 U.S. 257, 265, 132 S.Ct. 1479, 182 L.Ed.2d 473 (2012); *Tillison v. Gregoire*, 424 F.3d 1093, 1098 n. 4 (9th Cir. 2005).

If a statute, such as AB 421 is held to be unconstitutional, ***it is null and void ab initio***; it is of no effect, affords no protection, and confers no right. *Nev. Power Co. v. Metro Dev. Co.*, 104 Nev. 684, 685 765 P.2d 1162, 1163-64 (1988) (internal citations omitted) (emphasis added).

As shown above, the expiration of the statute of repose in July 2015 on Plaintiff's claims created a vested, substantive property right to NBD. If the Court finds that AB 421 Sect. 11(4) is retroactively applicable to time-barred claims, then it would run afoul of Nevada's and the United States' Due Process Clauses as said finding would impair NBD's substantive and vested property rights. Thus, under the second part of the *Ditullio* two-part test, retroactivity of AB 421 to this matter should also be rejected also it would unconstitutionally impair NBD's substantive and vested rights (the termination of the claims in 2015).

In conclusion, per the plethora of case authority herein, Plaintiff's Motion to Alter should be denied for failing the *Ditullio* two-part test. Under the facts of the action, the first part of the test indicates that the retroactive application does not apply to previously terminated claims as this Court has already found. *See*, **Exhibit 1**. Moreover, even if AB 421 is retroactively applicable, once Plaintiff's claims were terminated in 2015, NBD acquired a vested, substantive right (a repose defense). Any retroactive application of AB 421 will unconstitutionally impair NBD's substantive/vested rights, in violation of the Due Process clause.

E. Plaintiff's EDCR 2.26 Argument is Irrelevant as it Pertains to A Separate Ruling That is Not the Subject of Plaintiff's Motion to Alter Judgment and also fails for various reasons stated herein.

Plaintiff's Motion to Alter also raises the issue of EDCR 2.26 as basis for voiding the Order. Setting aside any substantive arguments against this position, the Court must first note that Plaintiff's EDCR 2.26 is procedurally flawed and not properly brought before the Court. As stated in Plaintiff's moving papers, the only ruling that is the subject of its Motion to Alter is **the Order**. *See*, Pg. 2: Line 1-5 of the Motion to Alter. ***Nowhere in the Motion to Alter*** is there any relief requested by the Plaintiff to alter the Court's separate ruling concerning the advancement of

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the hearing on the Motion to Dismiss. *See*, Order on Scheduling attached hereto as **Exhibit 4**. Thus, Plaintiff's arguments based on EDCR 2.26 pertain to a separate ruling and are irrelevant to the Order[4]. *Id*.; *see also*, **Exhibit 1**. To the extent the Plaintiff attempts to correct this procedural issue, the time to alter the separate ruling has now expired under NRCP 59(e) [28 days from October 17, 2009] as well as Plaintiff's right to appeal said ruling [30 days from October 17, 2019]. *See*, NRAP 4(a)(1).

Additionally, aside from the EDCR 2.26 argument pertaining to a separate ruling not before this Court, NBD contends that the substantive arguments therein, are baseless, a "red herring," for these reasons:

First, the Court has broad discretion in calendaring matters before it. *Maheu v. Eighth Jud. Distr. Ct.*, 89 Nev. 214, 510 P.2d 627 (1973). In citing to a Supreme Court case, the Nevada Supreme Court held that

> …inherent in every court to control the disposition of causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done ***calls for the exercise of judgment which must weight competing interests and maintaining an even balance***. *Id*. (*citing, Landis v. N. American Co*., 299 U.S. 248, 254-55, 57 S.Ct. 163, 166, 81 L.Ed. 153 (1936)) (emphasis added).

Here, the Court weighed all issues before it and decided to hear the arguments in NBD's Motion to Dismiss pursuant to its broad discretion and after taking into consideration all surrounding circumstances leading up to the September 30, 2019 hearing (including those discussed herein). The Court has this right to control its court calendar.

Second, the EDCR 2.26 argument was previously argued before the Court. The Court learned that NBD's Motion to Dismiss had been filed nearly two (2) months earlier (early August 2015) and that the hearing dates had been moved several times (starting September 9, 2019, then to September 27, 2019 and finally, September 30, 2019). The Court and the Plaintiff both knew

[4] At this time, any attempt to argue 59(e) relief on the separate scheduling order has passed as has the time to file an appeal on same. *See*, NRCP 59(e); *see also*, NRAP 4(a)(1).

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and understood that NBD's Motion to Dismiss was ready to be substantively heard on September 9, 2019 and then on September 27, 2019. Plaintiff also knew that a core argument in NBD's Motion concerned the Effective Date of AB 421 and that NBD expressly requested that the Motion to Dismiss be heard and decided in September 2019, not October 2019 (which would be after the effective date of October 1, 2019). *See*, **Exhibit 3** at Pg. 5. As the parties appeared before the Court ready to argue the merits of NBD's Motion to Dismiss on September 27, 2019, the only reason the Motion to Dismiss was moved is because of Plaintiff's counsel's objections which created confusion. *See*, **Exhibit 3** at Pgs. 12-22. This Court on September 30, 2019 heard there would be irreparable harm to the defendants due to Plaintiff's delay tactics in pushing a decision past October 1, 2019 even though they were clearly ready to argue their position[5]. *Id*. Ultimately, Plaintiff proceeded forward and has now, presented the same argument in the Motion to Alter as presented on September 30, 2019, which this Court already ruled against. *Id*.

Third, as stated partially above, there is zero prejudice to the Plaintiff. Plaintiff was well apprised prior to September 27, 2019 that the Court was ready to proceed with oral argument on the underlying motion. It was Plaintiff's counsel who objected to proceeding forward at in September 2019 including at both hearings in September (September 27, 2019 and September 30, 2019), despite all counsel present, ready to argue. *Id*. This Court has already noted that it was critical to NBD that the motion to dismiss be decided in September 2019 and ultimately found the EDCR argument to be "more form over substance". *Id*. Thus, Plaintiff had multiple notices that the underlying Motion to Dismiss would be and needed to be decided in September 2019 and ultimately was heard and decided on September 30, 2019. Plaintiff's EDCR 2.26 argument is

[5] In fact, prior to the September 27, 2019 hearing, counsel for NBD secured everyone's approval to have the motion heard in September 2019, save for Plaintiff's counsel.

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baseless and Plaintiff suffered no prejudice as it was able to articulate its position (in fact the exact same arguments being proffered in its Motion to Alter)[6].

Fourth (without waiving any of the above-arguments), even accepting Plaintiff's EDCR 2.26 argument, it is Plaintiff's actions that caused the delay in deciding NBD's Motion to Dismiss. Plaintiff's EDCR argument is an attempt to profit from the delay by arguing that the hearing should have been scheduled on October 1, 2019 (even though Plaintiff was ready to argue on September 30, 2019). If the Court accepts Plaintiff's argument, it will result in unfairly prejudice, irreparable harm and an unfair disadvantage to NBD due to changed circumstances caused by Plaintiff's delay tactics. To be blunt, it is patently unfair and disingenuous on the part of Plaintiff to employ this tactic and then cry foul for having the matter heard on September 30, 2019.

The Doctrine of Laches is an equitable doctrine that may be invoked with a delay by one party works to the disadvantage of the other party causing a change in circumstances. *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-67 (1992). Laches is more than mere delay in seeking to enforce one's rights; it is a delay that works a disadvantage to another party. *Carson City v. Price*, 113 Nev. 409, 934 P.2d 1042 (citing, Home *Savings v. Bigelow*, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). The applicability of the Doctrine of Laches turns on the peculiar facts of each case. *Id*. (*citing, Miller v. Walser*, 42 Nev. 497, 181 P. 437 (1919)).

Per the record, the Plaintiff delayed the Court's decision on the Motion to Dismiss with the end-game goal of pushing the hearing past October 1, 2019 (AB 421's Effective Date). This plan was to undermine NBD's arguments and drastically change the status quo of the parties when the

[6] Plaintiff's efforts to push past October 1, 2019 would have created entirely new positions, issues and arguments such as some of the issues raised herein. Therefore, the prejudice to NBD and the other defendants were substantial.

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Motion to Dismiss should have been heard on September 9, 2019. Despite Plaintiff's best efforts to delay a decision such as refusing to stipulate to any hearing date in September 2019 (based on the absurd argument that its attorneys, in a firm of 50+ lawyers in Nevada, did not have a single lawyer that could appear to argue Plaintiff's position in September 2019); appearing on September 27, 2019 to again delay a decision (arguing that lead counsel was leaving to Hawaii (although the associate that drafted the Opposition to the Motion to Dismiss, could have also appeared)), ultimately, the hearing on all motions occurred on September 30, 2019 and to no one's surprise, Plaintiff was ready to argue its position. Plaintiff's EDCR 2.26 argument is an attempt to unravel the Order and the argument is absolutely disingenuous. If the Court gives any consideration to Plaintiff's EDCR 2.26 argument, NBD contends that the Laches should be invoked to preclude the argument.

Fifth, judicial economy and efficiency warrant hearing the Motion to Dismiss on September 30, 2019. *Boesiger v. Desert Appraisals, LLC*, 135 Nev. Adv. Op. 25, 444 P.3d 436, 441 (July 3, 2019). As stated, the underlying Motion was filed August 5, 2019 and fully briefed, ready for hearing when the hearing was surprisingly moved to October 21, 2019. Thereafter, NBD secured consent of all other parties save for Plaintiff's counsel to have the hearing set in September 2019. Plaintiff's counsel claimed in the remaining weeks in September 2019, not one attorney in their office (of 50+ lawyers) could appear to argue. NBD did not buy this argument and neither did the Court as it set the hearing on the underlying motion to be heard on September 27, 2019. On said date, all parties appeared ready to argue. Plaintiff did its utmost to avoid having the motion move forward and amazingly, the hearing was moved to September 30, 2019. Again, all counsels (including Plaintiff's counsel) appeared on September 30, 2019 ready to argue and did argue the merits of their respective positions. *See*, **Ex. 3**. Thus, there is absolutely no reason to move the hearing to October 1, 2019 or any other date in October 2019, as all parties

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were ready to argue (on three separate occasions). For said reasons, judicial economy and efficiency warranted hearing everything on September 30, 2019.

For these reasons, the EDCR 2.26 argument is without merit and respectfully, should be rejected. There is no prejudice to the Plaintiff who had prior notices and at least two prior circumstances to argue the merits of their opposition to a motion fully briefed and sitting around for over two months. The Court heard Plaintiff's arguments, including the arguments being re-raised in the Motion to Alter. Thus, Plaintiff had an opportunity to present their position and there is absolutely nothing that would require moving the hearing to October 1, 2019.

F. Granting Plaintiff's Request Will Create Absurd Results.

As is well documented, analysis of statutory interpretation should be to examine the context and spirit of the statute in question, the subject matter and policy and the interpretation should be in line with what reason and public policy would indicate that the legislature intended and avoid "absurd results." *Gallagher v. City of Las Vegas*, 114 Nev. 595, 600-601, 959 P.2d 519, 521 (1998). Hand in hand with the constitutional issues raised above, granting Plaintiff's request for relief will cause absurd results. In the Motion, Plaintiff included and cited to select exerts from the legislative history surrounding AB 421. *See*, Pg. 10 of Motion and "Exhibit 5" to Motion to Alter. While Plaintiff cited to excerpts that dealt with AB 421 in its general application (as the Court is well versed, AB 421, made many changes beyond the statute of repose issue), the legislative history specific to the issue before this Court (retroactive application) actually raises serious issues with the proposed retroactive application of AB 421. Specifically, Joshua Hicks of the Nevada Home Builders Association stated:

> I will make some brief comments on the period of repose. It was eight years when the bill came out of the Assembly. I know that the amendment proposes to take it to ten years. The national average as we have is a little bit over eight years, it's about 8.3 or 8.4 years, if I remember right. **This bill is retroactive concerning the period of repose. That is of concern as well. There are constitutional issues that can sometime arise on**

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> **retroactivity**, and I think it bears further discussion. *See*, "Exhibit 5" of Plaintiff's Motion to Alter at Pg. 19 (emphasis added).
>
> Aviva Gordon of the Henderson Chamber of Commerce further stated:
>
> There **is already a shortage of affordable housing** for young professionals and working families who seek that mid-priced housing option, which includes condominiums, townhouses, duplexes and single-family homes. This bill **would adversely affect that demographic most significantly**. **Availability of insurance and the rates of that insurance affects the builders, contractors and subcontractors adversely. This is true with an increased statute of repose where there is the potential of the repose acting retroactively**. There is a dramatic concern with respect to having insurance coverage at an affordable rate under any circumstance. **It is not taking into account the legal fees that are required to defend meritless cases**. The amendments in 2015 are working to ensure we have a robust building community and there are projects being developed and built. *Id*. at Pg. 23 (emphasis added).

Thus, contrary to Plaintiff's excerpts, the legislative history behind AB 421 ***specific to retroactive application***, included real and serious concerns as to whether this application was constitutional, whether this application would impact housing for Nevada citizens, increases insurance (availability and rates) and drive up legal costs/fees that would impact the construction industry as a whole. This means that the relevant legislative history of AB 421 as to retroactive application, runs counter to Plaintiff's arguments.

Applying the relevant legislative history to the Motion to Alter, NBD contends that Plaintiff's requested relief will result in the following absurd results:

First, granting the Motion would be tantamount to the Court waiving and sanctioning a fraud committed upon it by the Plaintiff. It is established that the Plaintiff had no legal authority or grounds to file its Complaint on July 11, 2019; it was a frivolous Complaint. *See*, **Exhibit 1**. AB 421 was not the law and the Complaint was four (4) years too late. *Id*. Per NRCP 11, Plaintiff certified to the Court that the Complaint was not being presented for an improper purpose and that the claims were warranted under existing law or some nonfrivolous argument for extending existing law or establishing new law. *See*, NRCP 11(b)(1)&(2). However, even a cursory

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examination of legislative materials relating to AB 421 along with NRS 218D.330, would easily reveal to Plaintiff that AB 421 did not exist on July 11, 2019. *See*, NBD's Motion/Reply to Dismiss. Even assuming Plaintiff utterly lacked any knowledge of AB 421's Effective Date, NBD's Motion to Dismiss filed on August 5, 2019 apprised Plaintiff of these clear deficiencies in the Complaint and the filed claims. Not once did Plaintiff move to withdraw the Complaint and instead, Plaintiff continued to argue that a non-existing law, actually existed on July 11, 2019 to apply to claims terminated four years earlier. For all the tactics and arguments raised by Plaintiff, the end result was dismissal of a frivolous action with prejudice which is appropriate. *See, Boesiger v. Desert Appraisals, supra*. ("[i]n dispensing with frivolous actions through summary judgment, courts promote the important policy objectives of sound judicial economy and enhance the judiciary's capacity to effectively and efficiently adjudicate legitimate claims"). Allowing Plaintiff to retroactively apply AB 421 would result in an absurd action of encouraging parties to bring frivolous actions.

Second, granting Plaintiff relief will mean that the Court is ignoring that it dismissed this action with prejudice. As shown, herein, there is no action for Plaintiff to retroactively apply AB 421 (frankly, there was no action either when the fugitive Complaint was filed). By granting relief, the Court will be changing/vacating its dismissal with prejudice by finding that the action still exists based on the consideration of non-collateral issues. The appropriate remedy is for Plaintiff to appeal or to file a new action. This would be usurped if the Court considered these arguments (which were previously raised).

Third, the Court would also be ignoring the well-established intent behind a statute of repose which is the terminate a cause of action after the expiration of the repose. By granting retroactive relief, the Court will create the absurd result that claims terminated years earlier than the effective date of AB 421 have miraculously revived. The Court would go against precedence

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(cited earlier) and would be creating a ruling that a repose statute's termination date is flexible and terminated/"stale" claims can revive even years later irrespective of when the Complaint was filed. This would create an absurd result.

Fourth, granting Plaintiff relief would result in constitutional violations to NBD and joining parties as stated above. NBD and other defendants also have an interest in ensuring claims have been terminated and that they are allowed to proceed forward with their business and entering into contracts with that understanding. The Nevada Constitution states, "No bill of attainder, ex-post-facto law, or law impairing the obligation of contracts shall ever be passed." *See*, Nev. Const. Art. I, Sect. 15. Allowing terminated claims to resurrect would impair the contracts entered into by the parties for projects that are legally stale[7].

Fifth, granting Plaintiff relief could dramatically impact NBD in having to uncover lost evidence and witnesses and incur legal fees/costs defending against an action that should not exist. It is one thing for Plaintiff to file its Complaint on October 1, 2019 and then argue retroactive application under the existing law. However, Plaintiff did not do so in this matter. Instead, Plaintiff filed before AB 421 was in effect, a fugitive Complaint in violation of Nevada law and is now trying to parlay its improper actions into an actual viable action arguing retroactive application. This creates significant issues to NBD as this action should never exist and is an illegitimate action. Witnesses and documents are long gone, including potential arguments and

[7] The Court should take note that insurance coverage/costs would be impacted if the Court retroactively applies a new statute of repose applying an additional four years to previously terminated actions. Negotiated premiums will need to be adjusted as the construction industry and the insurance industry will have to factor in projects that were previously terminated under AB 125/NRS 11.202 which the Court is now being asked to resurrect by retroactive application under AB 421. There are also reporting issues that could impact coverage especially if an insured believed a given project was terminated and failed to timely report same. These real-world issues were raised during the debate on retroactive application of AB 421 (as shown above). The

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defenses against these claims. If the Court's consideration of the application of a repose statute is fundamentally about fairness to defendants, then retroactively reviving these claims solely based on and awarding Plaintiff's improper conduct, would result in absurdity and unfairly prejudice to NBD.

Sixth, similar to the arguments above, the Doctrine of Laches/Waiver would preclude Plaintiff from seeking to resurrect claims that expired in 2015. Granting relief would be sanctioning delay by Plaintiff in prosecuting its claims in a timely manner to the detriment of NBD. These claims should have been brought in or before July 2015 and by delaying the claims to July 2019, Plaintiff has created a change in circumstance which has negatively prejudiced and disadvantaged NBD. Therefore, Laches and the Doctrine of Waiver preclude Plaintiff from its requested relief.

G. Plaintiff's Joinder Argument has been raised previously and is a Red Herring.

Plaintiff argues that certain parties should not be entitled to join NBD's Motion. The argument completely overlooks the fact that NBD's Motion was a "case ender." All defendant parties were entitled to same arguments and relief requested by NBD. There is no difference in the position of NBD, with respect to the Statute of Repose, with any of the other defendant parties as all parties were sued on the same date; in the same pleading; and under the same circumstances. Once the Court granted NBD's Motion, it effectively ended the case as all issues were terminated.

Furthermore, the Court enjoys discretion in considering all types of joinders and the Court allowed the inclusion of joinders as argue at the hearing and ultimately, accepted the Order approved by all parties (save for Plaintiff, the only dissenting party that submitted a competing order). *See*, **Exhibit 1**; *see also*, **Exhibit 3** at Pg. 45 ("And that's for all the joinders too if you're

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absence of a grace period for defendants to protect their vested rights adds to the issues in this

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going to argue") Pg. 52 ("Yeah, let's hear from all the joinders.") and (in response to inquiry as to all joinders) Pg. 59 ("Yeah, include it all in one order…[8]). Thus, while NBD anticipates the joining parties will argue their respective positions in more detail concerning their specific right to rely on the Order, NBD contends that Plaintiff's joinder argument is a red herring as each defendant party was in the exact same situation, circumstance and were entitled to the same relief. The Court ultimately accepted NBD's version that applied to all defendants over any carved-out version in the order submitted by Plaintiff.

H. <u>If the Court is to Consider Altering/Vacating the Order, then It Must First Re-open and Consider All Pending Motions to Dismiss Pursuant to NRS 11.258 That It Deemed Moot Based on its Statute of Repose Ruling</u>.

While the parties have fixated on the Statue of Repose, various design professional defendant parties also sought dismissal pursuant to Plaintiff's failure to comply with NRS 11.258. These motions were all deemed moot once the Court granted the Statute of Repose issue and serve as independent arguments on dismissal. Specifically, NBD, Dekker/Perich/Sabatini, Ltd. ("DPS"), Melroy Engineering, Inc. d/b/a MSA Engineering Consultants ("MSA") all argued that Plaintiff's Complaint should be dismissed pursuant to NRS 11.258 based on the failure to comply with the requirements of Nevada's affidavit of merit. *See*, cover-page of NBD's Motion to Dismiss or in the Alternative, Motion for Summary Judgment, *see also*, cover-page DPS's Motion to Dismiss on NRS 11.258 and *see*, cover page of MSA's Joinder and Motion to Dismiss collectively attached hereto as **<u>Exhibit 5</u>**. The arguments all center on Plaintiff's reliance on a single geotechnical engineer who failed to offer any opinions critical of NBD's, DPS's or MSA's services. Moreover, Plaintiff's geotechnical engineer is not qualified to provide any opinions concerning the work of DPS (the architect) and MSA (the mechanical engineer).

---

matter.

[8] Nowhere in the court's record did Plaintiff's counsel challenge NBD's counsel in asking for the inclusion ***of all joinders***. Thus, the argument on joinders have been waived and was already considered by the Court making said argument improperly brought pursuant to NRCP 59(e) as opposed to a motion for reconsideration. *Id*. at Pg. 59.

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Prior to any final alteration of the Order (if the Court choses to proceed accordingly), all of these pending but deemed moot arguments will need to be re-instate as the arguments were raised, briefed and on file with the Court and provides an independent basis for dismissal outside of the statute of repose finding. *See*, **Exhibit 3** at Pg. 59: Line 9-11. Granting of a right to alter would no longer deem these motions moot and for which, the Court should entertain argument and render as part of any final decision on the Order.

IV.

CONCLUSION

For the reasons stated herein, Plaintiff's Motion to Alter is improper and should be denied based on the various reasons expressed herein.

DATED this 26th day of November, 2019.

WEIL & DRAGE, APC

/s/ *John T. Wendland*

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of November, 2019, service of the foregoing **DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEEERING CONSULTANT'S OPPOSITION TO MOTION TO ALTER JUDGMENT** was made this date by electronically serving a true and correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

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Exhibit 1

Exhibit 1

ORIGINAL

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DISTRICT COURT
CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **ORDER GRANTING NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND ALL JOINDERS TO SAME** Hearing Date: 9/30/19 Hearing Time: 8:30 am

ORDER GRANTING NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND ALL JOINDERS TO SAME

THIS MATTER having come before the Court on September 30, 2019 on Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' ("NBD") Motion to Dismiss, or, in the alternative, Motion for Summary Judgment and all Joinders to same; and the Court having read and considered the submitted papers, having heard oral arguments from counsels and finding good cause, hereby finds and rules as follows

FINDINGS

1. The Court finds that Plaintiff City of North Las Vegas ("Plaintiff") filed its Complaint on July 11, 2019.

2. The Court finds that the Plaintiff represented that the Notice of Completion for the subject project was recorded on July 13, 2009.

3. The Courts finds that pursuant to NRS 11.202, no action may be commenced for any deficiency in design, planning, supervision or observation of construction or the construction of an improvement to real property more than six (6) years after substantial completion.

4. The Court finds that AB 421's Effective Date is October 1, 2019.

5. The Court finds that AB 421's Section 11(4) retroactive application is not applicable to Plaintiff's Complaint.

6. The Court finds that the Plaintiff failed to timely file its Complaint and therefore, the Complaint and claims therein violate NRS 11.202.

7. The Court did not address NBD's arguments based on NRS 11.258 as the granting of the Motion to Dismiss, or in the alternative, the Motion for Summary Judgment based on NRS 11.202 renders these arguments moot.

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8. The Court finds that Defendants Richardson Construction, Inc.'s and Guarantee Company of North America USA's (collectively, the "Richardson Parties") motion for summary judgment scheduled for hearing on October 21, 2019 is moot and the hearing is vacated.

9. The Court finds that Defendants P&W Bonds, LLC's and Paffenbarger & Walden, LLC's (collectively, the P&W Parties") motion to dismiss scheduled for hearing on October 21, 2019 is moot and the hearing is vacated.

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ORDER

IT IS HEREBY ORDERED that NBD's Motion to Dismiss, or in the alternative, Motion for Summary Judgment and all Joinders to these Motions are hereby GRANTED.

IT IS FURTHER ORDERED that Plaintiff's claims and the Complaint against NBD and all joining parties are hereby dismissed with prejudice.

IT IS FURTHER ORDERED that the Richardson Parties' motion for summary judgment is deemed moot and the hearing for said motion is hereby vacated.

IT IS FURTHER ORDRED that the P&W Parties' motion to dismiss is deemed moot and the hearing for said motion is hereby vacated.

DATED this 14 day of October, 2019.

J. Charles Thompson

DISTRICT COURT JUDGE
J. CHARLES THOMPSON

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Respectfully Submitted by:

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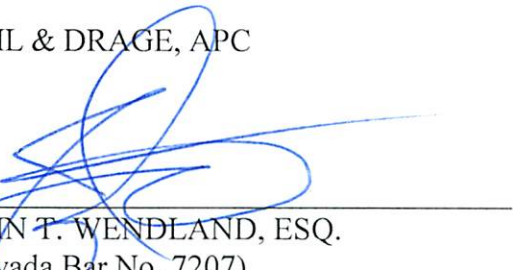

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Exhibit 2

Exhibit 2

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DISTRICT COURT

CLARK COUNTY, NEVADA

City of North Las Vegas,

Plaintiff,

vs.

Dekker/Perich/Sabatini Ltd.; Richardson Construction, Inc.; Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants; JW Zunino & Associates, LLC; Melroy Engineering, Inc. d/b/a MSA Engineering Consultants; O'Connor Construction Management Inc.; Ninyo & Moore, Geotechnical Consultants; Jackson Family Partnership LLC d/b/a Stargate Plumbing; Avery Atlantic, LLC; Big C LLC; Ron Hanlon Masonry, LLC; The Guarantee Company of North America USA; P & W Bonds, LLC; Paffenbarger & Walden, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive,

Defendants.

CASE NO.: A-19-798346-C

DEPT. NO.: VIII

PLAINTIFF'S OPPOSITION TO DEFENDANT NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

The City of North Las Vegas ("City") opposes Defendant Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' ("NBD") motion to dismiss or, in the alternative, motion for summary judgment ("NBD Motion"), along with Dekker/Perich/Sabatini Ltd.'s ("Dekker")'s and Melroy Engineering, Inc. d/b/a MSA Engineering Consultants' ("MSA")'s partial joinder to the NBD Motion with respect to its statute of repose argument ("Joinders").

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I. INTRODUCTION

The City's claims are timely under the applicable ten-year statute of repose and it fully complied with NRS 11.258, so the Court should deny both the NBD Motion and the Joinders.

Regarding the statute of repose, NBD, Dekker and MSA fail to examine the text of Nevada's recently passed bill. Had they, they would have seen that the Nevada legislature made the newly extended ten-year statute of repose applicable retroactively, meaning the City's claims are timely. More specifically, the Nevada Legislature amended the applicable statute of repose to extend it from six years to ten years. In so doing, they stated that the amendment applied "retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019."[1] NBD, Dekker, and MSA do not dispute that the construction of Fire Station 53 reached substantial completion on July 13, 2009 or that the City filed its complaint on July 11, 2019. Because the City's claims are timely under the applicable ten-year statute of repose, the Court should deny the NBD Motion and Joinders.

Regarding NRS 11.258, NBD attempts to improperly add requirements that are not actually contained in the statute. By selectively quoting it, relying on irrelevant legislative history, and confusing the requirements of NRS 11.258 with the affidavit requirement in medical malpractice cases, NBD improperly seeks to dismiss the City's claims, which would permanently bar the City's claims if erroneously allowed. But the City's complaint fully complies with NRS 11.258. The statute requires that, before commencing an action against a design professional, the attorney consult with an expert, attach the required attorney affidavit with the complaint, and attach the expert's report with the Complaint with the documents reviewed by the expert. The City did exactly that, so it complied with the plain, unambiguous requirements of NRS 11.258.

Because the City's claims are timely under the applicable ten-year statute of repose and because it fully complied with NRS 11.258, the Court should deny both the NBD Motion and the Joinders.

[1] AB 421, 80th Leg. (2019). AB 421 was signed into law by the Governor on June 3, 2019.

II. RELEVANT FACTS

This case concerns the deficient construction of Fire Station 53 in North Las Vegas ("Project"). Ex. 1 ¶¶ 22–23. The City retained Dekker/Perich/Sabatini Ltd. ("Dekker") to provide Professional Architectural Services for the design of Fire Station 53 ("Property"). *Id.* As part of the Design Agreement, Dekker was responsible for the professional quality, technical accuracy, timely completion, and coordination of all services furnished by the Dekker and its subconsultants. Ex. 1 ¶¶ 24–25. Dekker contracted with several subconsultants on the Project, including Nevada By Design, JW Zunino, MSA, O'Connor, and Ninyo & Moore. Ex. 1 ¶ 27.

Following completion of the design phase, the City awarded the Project to Richardson Construction, Inc. ("Richardson Construction"). Ex. 1 ¶¶ 36–38. Richardson Construction's scope of work included site clearing, earthwork, masonry, structural steel roofing, interior finishes, plumbing, fire protection, heating, ventilating and air conditioning systems, electrical systems, lighting, power, telephone, data-communications, landscaping, utilities, asphalt/concrete drives, concrete sidewalk and patios, furnishing equipment, and other work included in the Construction Documents. Ex. 1 ¶ 39. Richardson Construction subcontracted several companies to perform portions of its scope of work, including Jackson Family Partnership LLC d/b/a Stargate Plumbing, Avery Atlantic, LLC, Big C LLC, and Ron Hanlon Masonry, LLC. Ex. 1 ¶ 40.

The Project reached substantial completion on July 13, 2009 when the notice of completion was recorded. Ex. 1 ¶ 45 & p. 133. After the Project was completed, the City noticed distress to the building including wall cracks and separations, and interior slab cracking. Ex. 1 ¶ 46. The City retained Edred T. Marsh, P.E. of American Geotechnical, Inc. ("American Geotechnical") to perform a geotechnical investigation of the site. Ex. 1 ¶ 47. The purpose of this investigation was to evaluate the site geotechnical conditions and to determine the probable cause of the distress to the building and surrounding appurtenances. Ex. 1 ¶ 47. Mr. Marsh concluded that the distress to Fire Station 53 and surrounding appurtenant structures was due to a combination of excessive differential settlement and expansive soil activity. Ex. 1 ¶ 49. In short, settlement of the building occurred as a result of stresses from the weight of the structure and self-weight of the earth materials and was aggravated by introduction of water to the subsoil. Ex. 1 ¶ 52.

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III. PROCEDURAL HISTORY

The City filed its complaint on July 11, 2019, which included its attorney's affidavit as required by NRS 11.258, along with its expert's report, a separate statement from its expert, the documents reviewed by its expert, and several other exhibits. *See* Ex. 1. NBD filed its motion on August 5, 2019. *See* NBD Motion. Dekker joined NBD's motion to dismiss with respect to its statute of repose argument. *See* Dekker Joinder, filed August 6, 2019. Melroy Engineering, Inc. d/b/a MSA Engineering Consultants ("MSA") also joined NBD's motion to dismiss with respect to its statute of repose argument. *See* MSA Joinder, filed August 8, 2019.

IV. LEGAL STANDARD

"Nevada has not adopted the federal 'plausibility' pleading standard." *Compare McGowen, Tr. of McGowen & Fowler, PLLC v. Second Judicial Dist. Court*, 134 Nev. Adv. Op. 89, 432 P.3d 220, 225 (2018) *with* NBD Mot. 5:11–17. Rather, Nevada's notice-pleading standard only "requires plaintiffs to set forth the facts which support a legal theory." *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995) "Because Nevada is a notice-pleading jurisdiction, our courts liberally construe pleadings to place into issue matters which are fairly noticed to the adverse party." *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

Under NRCP 12(b)(5), dismissal is only appropriate "if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief." *Facklam v. HSBC Bank USA for Deutsche ALT-A Sec. Mortg. Loan Tr.*, 401 P.3d 1068, 1070 (Nev. 2017) (internal quotations omitted). In considering a motion to dismiss, the Court "must construe the pleadings liberally and accept all factual allegations in the complaint as true." *Blackjack Bonding v. City of Las Vegas Mun. Court*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000). "Furthermore, this court must draw every fair inference in favor of the non-moving party." *Id.*

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V. ARGUMENT

A. The City's claims are timely under the applicable ten-year statute of repose.

The City's claims are timely. The Legislature Nevada recently extended NRS 11.202—which sets a statute of repose on claims regarding construction and design deficiencies—from six years to ten years. The Legislature explicitly made the amendment to NRS 11.202 *effective retroactively* to actions in which substantial completion occurred before October 1, 2019. It is undisputed that substantial completion occurred before October 1, 2019, so the new ten-year statute of repose applies to this case. In turn, because substantial completion occurred less than ten years before the City filed its complaint, the City's claims are timely.

1. AB 421 amended NRS 11.202 to extend the statute of repose to ten years.

The Nevada Legislature recently amended NRS 11.202 to extend the applicable statute of repose. AB 421 was signed into law on June 3, 2019. *See* Ex. 2. Section 7 of AB 421 extends the statute of repose for claims regarding deficiencies in construction from six to ten years after substantial completion. *Id.* Specifically, the relevant portion of Section 7 states:

> 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.

Id. (emphasis in original).[2]

[2] AB 421 also added subsection 2 to NRS 11.202 which removes the deadline when an act of fraud caused the deficiency. The City does not allege a fraud claim in its Complaint, and subsection 2 is not applicable here. However, the City does not waive, and expressly reserves, its right to pursue a fraud claim should it later discover facts to support such a claim.

This change was only one of many made through AB 421. Among other things, the bill also amended NRS Chapter 40's notice and inspection requirements, amended the homeowner warranty definition and recovery process, amended the recovery of costs by homeowners. *Id.* The Legislature gave separate effective dates to each section of the statute. *Id.* Sec. 11. This is important because, while the Legislature made all other sections of AB 421 effective prospectively, the Legislature singled out Section 7 and made the ten-year statute of repose effective retroactively. *Id.* And they did so on purpose.

2. The ten-year statute of repose applies retroactively.

"'It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.'" *In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 648, 730 P.2d 438, 441 (1986)). Further, the Court "must attribute the plain meaning to a statute that is not ambiguous" and should only look to legislative history if it finds that the text is ambiguous. *State v. Catanio*, 120 Nev. 1030, 1032, 102 P.3d 588, 590 (2004); *State v. Lucero*, 127 Nev. 92, 95–96, 249 P.3d 1226, 1228 (2011). "In addition, no provision of a statute should be rendered nugatory by this court's construction, nor should any language be made mere surplusage, if such a result can be avoided." *Id.*

As a general rule, "statutes operate prospectively, ***unless the Legislature clearly manifests an intent to apply the statute retroactively***." *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) (emphasis added).

Here, the Legislature provided separate effective dates for each section of AB 421. While other sections of the bill are effective "on or after October 1, 2019," section 7 is ***effective retroactively*** to actions where substantial completion occurred before October 1, 2019. Specifically, Section 11 states:

> **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.

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> 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.**

Ex. 2 (emphasis added).

Importantly, the Legislature went out of its way to provide effective dates for each section of AB 421. The Legislature was perfectly capable of making the entire statute effective on a certain date. *See, e.g.*, AB 221 (2019) ("Sec. 2. This act becomes effective on July 1, 2019"). Instead, the Legislature purposely made the ten-year statute of repose effective retroactively, in contrast to other sections of the bill.[3] This shows that the Legislature intended for Section 7 of the bill to be effective on a different date as the rest of the bill.

The Legislature was clear and unambiguous in providing for a retroactive effective date for Section 7 and the Court should apply the plain meaning of AB 421. To the extent the Court finds the effective date of Section 7 to be ambiguous and chooses to look beyond the text of the bill, the legislative history shows that the Legislature, by lengthening the statute of repose, intended to specifically protect property owners in situations just like that present in this case. *See* Minutes of the Senate Committee on Judiciary at 10, 80th Leg. (Nev., May 15, 2019), Ex. 3, p. 10. In fact, protecting property owners against later discovered soil issues was specially discussed in the legislative history:

> I have had a number of homeowners call and we have been unable to help because they have been past the original six-year statute of repose. We had a homeowner testify in the Assembly that she missed the deadline by two months and she has extreme soils movement. She cannot open or close her windows or lock her door. We had another homeowner who was past the six years and the back of her home is falling down the hill.

[3] NBD provides a link to the Nevada Electronic Legislative Information System ("NELIS") website which shows "Effective October 1, 2019." (Mot. 9:6–11). However, the language of the bill controls, not the website.

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> Assembly Bill 421 extends the statute of repose period to ten years. **Soils is a good example because soil cases do not show up until Years 8, 9 or 10. We had a geotechnical expert testify in the Assembly who explained that in more detail.**

Id.

The Legislature passed AB 421 to give greater protection to property owners and quite specifically to protect them against defects such as soil issues that manifest many years after substantial completion. Considering this, and that the Legislature made the ten-year statute of repose *effective retroactively*, it would not make sense for the Court to read the statute in such a way as to create a gap between when then ten-year statute of repose was passed and when it became effective, such that it would exclude certain claimants from its protection. In short, the amended ten-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." Thus, because the Project certainly reached substantial completion before October 1, 2019, the ten-year statute of repose applies.

3. The City's claims are timely.

Under NRS 11.2055, the statute of repose begins on the latest date of either: "(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." A notice of completion is considered issued when it is recorded. *See Dykema v. Del Webb Communities, Inc.*, 132 Nev. Adv. Op. 82, 385 P.3d 977, 979–80 (2016) ("Construing the statutes in harmony with one another, and consistent with what reason and public policy suggest the Legislature intended, we conclude that it is the act of recording that signifies that a notice of completion has been 'issued.'")

Here, the notice of completion was recorded July 13, 2009. Ex. 1 p. 133. Under the ten-year statue of repose, the City had until July 13, 2019 to file its complaint; it did so on July 11, 2019. *See* Ex. 1. Thus, the City's claims are timely, so the Court should deny NBD Motion and the Joinders.

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B. The City complied with NRS 11.258.

The City properly and timely filed an attorney affidavit with its complaint that complies with NRS 11.258. *See* Ex. 1, p. 16–17. NRS 11.258 requires that, before commencing an action against a design professional, the attorney consult with an expert, attach the required attorney affidavit with the complaint, and attach the expert's report, along with documents reviewed by the expert. The City did so. Now, NBD—by selectively quoting the statute, relying on irrelevant legislative history, and confusing the requirements of NRS 11.258 with the affidavit requirement in medical malpractice cases—attempts to improperly impute additional requirements into NRS 11.258 that are not contained in the statute.

First, the City complied with the plain, unambiguous requirements of NRS 11.258. Second, the City consulted with a qualified expert as defined by the statute. Third, the statute does <u>not</u> require the expert to specifically name the contractor at fault in his report. Fourth, NBD's reliance on legislative history is unnecessary and unpersuasive. Finally, dismissal is not appropriate under NRS 11.259 because the City complied with all requirements of NRS 11.258.

1. The City's attorney affidavit satisfies NRS 11.258.

The City, concurrently with its first pleading, filed the required attorney affidavit and expert report with supporting documents. Specifically, NRS 11.258(1) requires that:

> 1. Except as otherwise provided in subsection 2, in an action involving nonresidential construction, the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney:
>
> (a) Has reviewed the facts of the case;
>
> (b) Has consulted with an expert;
>
> (c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and
>
> (d) Has concluded on the basis of the review and the consultation with the expert that the action has a reasonable basis in law and fact.

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Additionally, NRS 11.258(3) requires that:

> 3. In addition to the statement included in the affidavit pursuant to subsection 1, a report must be attached to the affidavit. Except as otherwise provided in subsection 4, the report must be prepared by the expert consulted by the attorney and must include, without limitation:
>
> (a) The resume of the expert;
>
> (b) A statement that the expert is experienced in each discipline which is the subject of the report;
>
> (c) A copy of each nonprivileged document reviewed by the expert in preparing the report, including, without limitation, each record, report and related document that the expert has determined is relevant to the allegations of negligent conduct that are the basis for the action;
>
> (d) The conclusions of the expert and the basis for the conclusions; and
>
> (e) A statement that the expert has concluded that there is a reasonable basis for filing the action.

Here, the City's attorney affidavit complies with all requirements from NRS 11.258 (1) and (3). The City's attorney swore that he reviewed the facts of the case, consulted with an expert that he reasonably believed to be qualified, and concluded that there was a reasonable basis to file this action. Ex 1, p. 16. The City's attorney also confirmed that he attached all the required documents to the complaint. Ex 1, p. 16–17. Below is a side by side comparison of the statute with the corresponding statement from the City's attorney affidavit.

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NRS 11.258 (1)	Affidavit of Aleem A. Dhalla, Esq.[4]
... the attorney for the complainant shall file an affidavit with the court concurrently with the service of the first pleading in the action stating that the attorney:	In compliance with the requirements of NRS 11.258 (1), I:
(a) Has reviewed the facts of the case;	a. Have reviewed the facts of this case;
(b) Has consulted with an expert;	b. Have consulted with an expert, American Geotechnical, Inc., regarding this case;
(c) Reasonably believes the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and	c. Reasonably believe the expert who was consulted is knowledgeable in the relevant discipline involved in the action; and
(d) Has concluded on the basis of the review and the consultation with the expert that the action has a reasonable basis in law and fact.	d. Have concluded, based on my review and consultation with the expert, that the action has a reasonable basis in law and fact.

NRS 11.258 (3)	Affidavit of Aleem A. Dhalla, Esq.[5]
In addition to the statement included in the affidavit pursuant to subsection 1, a report must be attached to the affidavit. Except as otherwise provided in subsection 4, the report must be prepared by the expert consulted by the attorney and must include, without limitation:	Additionally, in compliance with the requirements of NRS 11.258 (3), I have attached:
(a) The resume of the expert;	a. A resume of the expert consulted in this matter, Edred T. Marsh, P.E. of American Geotechnical Inc (Ex. 6);
(b) A statement that the expert is experienced in each discipline which is the subject of the report;	b. A statement that the expert is experienced in each discipline which is the subject of the report, specifically in the fields of geotechnical, civil, and forensic engineering (Ex. 7);
(c) A copy of each nonprivileged document reviewed by the expert in preparing the report, including, without limitation, each record, report and related document that the expert has determined is relevant to the allegations of negligent conduct that are the basis for the action;	c. A copy of each nonprivileged document reviewed by the expert in preparing the report (Exs. 2, 8, 9, 10);
(d) The conclusions of the expert and the basis for the conclusions; and	d. The conclusions of the expert and the basis for the conclusions (Ex. 5); and
(e) A statement that the expert has concluded that there is a reasonable basis for filing the action.	e. A statement that the expert has concluded that there is a reasonable basis for filing the action (Ex. 7).

[4] Ex 1, p. 16–17.
[5] Ex 1, p. 16–17.

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NBD appears to confuse the NRS 11.258 requirements with the affidavit of merit requirement in medical malpractice cases, which are simply inapplicable to this case. Specifically, NRS 41A.071 requires that an affidavit submitted with the complaint state as follows:

> 1. Supports the allegations contained in the action;
>
> 2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;
>
> 3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and
>
> 4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

To be clear, NRS 41A.071 applies to medical malpractice actions and ***is not*** applicable here; however, the statute is key to illustrating not only that NBD is confusing the requirements of the two statutes, but that the Legislature intended to make the requirements different. NRS 11.258 does not require claimant's expert to be experienced in the exact same fields as the defendant, unlike the medical malpractice statute. *Compare* NRS 11.258 (3)(c–e) *with* NRS 41A.071 (3). NRS 11.258 does not require claimant's expert to name each induvial design professional at fault, unlike the medical malpractice statute. *Compare* NRS 11.258 (3)(b) *with* NRS 41A.071 (2). The Legislature was capable of making NRS 11.258 mirror the medical malpractice requirements; it chose not to. In short, the City has complied with the requirements of NRS 11.258.

2. The City's expert is a qualified expert under the statute.

The statute defines the term "expert." NRS 11.258 (6) states that: "As used in this section, 'expert' means a person who is licensed in a state to engage in the practice of ***professional engineering***, land surveying, architecture or landscape architecture." (emphasis added). Additionally, NRS 11.258 (3)(b) requires "[a] statement that the expert is experienced in each discipline which is the subject of the report." Importantly, the statute does not require claimant's expert to be experienced in the exact same fields and sub-specialties as each design professional.

Here, the City's expert, Edred T. Marsh, P.E. of American Geotechnical Inc., is a ***professional engineer***, specializing in geotechnical, civil, and forensic engineering. Ex. 1, p.16–17.

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Thus, Mr. Marsh qualifies as an expert under the NRS 11.258 (6) definition. Additionally, he was qualified to create his report. According to the American Society of Civil Engineers, "Geotechnical engineering utilizes the disciplines of rock and soil mechanics to investigate subsurface and geologic conditions. These investigations are used to design, build foundations, earth structures, and pavement sub-grades."[6] Both the City's attorney and Mr. Marsh provided a statement that Mr. Marsh is "experienced in each discipline which is the subject of the report" as required by the statute. Further, Mr. Marsh's resume, attached to the Complaint, shows that he is a professional engineer well qualified in many disciplines, including geotechnical, civil, and forensic engineering.

Interestingly, but improperly, NBD attempts to expand the expert qualification requirements of NRS 11.258. NBD argues that "Mr. Marsh is not an 'expert' in all design professional fields and using his Declaration for the entire design team is wholly improper." NBD Mot. 11:15–16. However, NBD's argument is not based on the plain reading of the statute, which, as explained above, requires the City's expert to simply be a professional engineer experienced in each discipline *which is the subject of the report.*

NBD only cites one case, which does not support its faulty reading of the statute - *Otak Nevada, LLC v. Eighth Jud. District Ct.*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011). Contrary to NBD's argument, however, *Otak Nevada* does not require the City's expert to be experienced in all design professional fields. In that case, a defendant, the general contractor, attempted to use another party's expert report already filed in the case to support its third-party complaint. *Id.* The *Otak Nevada* court found that this violated NRS 11.258, as each party was required to consult with an expert and supply a supporting affidavit and report; the Court *did not* require the expert to be experienced in all design professional fields. *Id.*

In short, the City was not required to provide an expert "in all design professional fields" as NBD argues. While the City anticipates that it may require additional experts later in this litigation, depending what is found in discovery, requiring the City to include expert reports from multiple sub-fields at this point would be impossible and is not what the statute requires. Based on the NRS 11.258 (6) definition, the City's expert is qualified under the statute.

[6] https://www.asce.org/geotechnical-engineering/geotechnical-engineering/

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3. NRS 11.258 does not require the expert report to specially name or express an opinion regarding a particular defendant.

NRS 11.258 requires that claimant provide a report with "(d) The conclusions of the expert and the basis for the conclusions; and (e) A statement that the expert has concluded that there is a reasonable basis for filing the action." As explained earlier, this should be contrasted with the "affidavit of merit" requirement in medical malpractice cases (which is not applicable to this case), which requires "Identif[y] by name, or describes by conduct, each provider of health care who is alleged to be negligent." *Compare* NRS 11.258 (3)(b) *with* NRS 41A.071 (2).

Here, the City complied with the only statute that applies. The City attached an expert report with its complaint along with a statement from its expert that he concluded there was a reasonable basis for filing the action. Ex. 1, p. 135–269, 275. The City attached the report of its expert, Mr. Marsh, which it hired to perform a geotechnical investigation of the site. *Id.* The purpose of this investigation was to evaluate the site geotechnical conditions and to determine the probable cause of the distress to the building and surrounding appurtenances. Ex. 1 ¶ 47. Marsh concluded that the distress to Fire Station 53 and surrounding appurtenant structures was due to a combination of excessive differential settlement and expansive soil activity. Ex. 1 ¶ 49. Marsh concluded that settlement of the building occurred as a result of stresses from the weight of the structure and self-weight of the earth materials and was aggravated by introduction of water to the subsoil. Ex. 1 ¶ 52. The expert's report is extremely detailed and provides the technical basis for his conclusion.

NBD seeks to expand the requirements of NRS 11.258, this time by arguing that the City's expert was required to individually name each design professional who might later be determined to be at fault. Mot. 11:26–28. This is incorrect. The plain meaning of the statute does not require this, and NBD does not cite any case to support adding this requirement. In *Otak Nevada*, the court held that one party could not use another party's expert to support its third-party complaint; the Court *did not* require a party to file a separate report against each defendant or require the expert to name each defendant specifically.[7]

[7] While the *Otak Nevada* court reviewed NRS 41A.071's mandatory language requirement to evaluate whether or not it had discretion to allow claimant to amend, the court did not extend the requirements in medical malpractices cases to NRS 11.258 and construction cases.

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And again, unlike the medical malpractice statute, the Legislature chose not to require that experts in construction cases name each design professional in their report or make specific conclusions against each design professional. The medical malpractice statute specifically states that the claimant's expert must "[i]dentif[y] by name, or describes by conduct, each provider of health care who is alleged to be negligent"; NRS 11.258 does not include this requirement. *Compare* NRS 11.258 (3)(b) *with* NRS 41A.071 (2). In short, NBD seeks to unjustifiably expand the requirements of NRS 11.258.

4. NBD's reliance on legislative history is unnecessary and unpersuasive.

"The starting point for determining legislative intent is the statute's plain meaning; ***when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.***" *Id.* (emphasis added); *see also State v. Catanio*, 120 Nev. 1030, 1032, 102 P.3d 588, 590 (2004) ("We must attribute the plain meaning to a statute that is not ambiguous."). But when "the statutory language lends itself to two or more reasonable interpretations," the statute is ambiguous, and the Court may only then look beyond the statute in determining legislative intent. *Catanio,* 120 Nev. at 1033, 102 P.3d at 590.

Here, the requirements of NRS 11.258 are clear and unambiguous, so the Court does not need to delve into the legislative history. NRS 11.258 provides a list of requirements for the content of an attorney affidavit and expert report, with which the City complied. Importantly, NBD does not argue that the statute is ambiguous. Instead, NBD seeks to use legislative history to expand the unambiguous, plain meaning of NRS 11.258, while being unable to point to any specific ambiguity that would require the Court to evaluate materials outside of the statute. Because the statute is unambiguous, that is improper here.

Even if the Court reviews the legislative history for NRS 11.258, it does not support NBD's expansive interpretation. While NBD emphasizes select phrases from the legislative history, none aid their argument. The legislative history does not show that the Legislature intended to require a claimant's expert to be qualified "in all design professional fields" as NBD argues. Moreover, the legislative history does not show that a claimant's expert is required to name the particular defendant in his report or provide specific conclusions regarding each defendant, as NBD argues.

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In fact, NBD selectively did not emphasize several portions of the legislative history that actually counters its argument, such as: "It [NRS 11.25] is not a bar to bringing the suit; it accelerates something that is going to happen anyway in the lawsuit." NBD Mot. 13:8–9. In short, the Legislature did not intend the statute to be a highly-prohibitive bar to bringing a claim; instead, the statute was meant to require claimants to have an expert evaluate their claims to curtail frivolous claims and to accelerate the process.

NRS 11.258 was not intended to require claimant to prove their entire case in the complaint, which would be the inevitable result of NBD's arguments. The Court should apply the statute as written, not expand its requirements.

5. Dismissal under NRS 11.259 is not appropriate.

Because the City complied with NRS 11.258, dismissal is not appropriate. NRS 11.259 states that:

> 1. The court shall dismiss an action involving nonresidential construction if the attorney for the complainant fails to:
>
> (a) File an affidavit required pursuant to NRS 11.258;
>
> (b) File a report required pursuant to subsection 3 of NRS 11.258; or
>
> (c) Name the expert consulted in the affidavit required pursuant to subsection 1 of NRS 11.258.

Here, as explained above, the City filed the required attorney affidavit pursuant to NRS 11.258, filed the required expert report, and named the expert in the attorney affidavit. Thus, dismissal under NRS 11.259 is not appropriate.

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VI. CONCLUSION

The Court should deny the NDB Motion and Joinders because the City's claims are timely under the applicable ten-year statute of repose and it fully complied with NRS 11.258.

Dated: August 20, 2019.

SNELL & WILMER L.L.P.

By: _____

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** to the following:

VIA E-MAIL	**VIA E-SERVICE ONLY**
Jerome Jackson, Member Jackson Family Partnership LLC d/b/a Stargate Plumbing 1951 Stella Lake St., Suite 1 Las Vegas, Nevada 89106 Telephone: (702) 648-7525 Email: stargatepl@aol.com *Pro Se* Theodore Parker III, Esq. **Parker Nelson & Associates, Chtd.** 2460 Professional Court, Ste. 200 Las Vegas, Nevada 89128 tparker@pnalaw.net *Attorney for Defendant Richardson Construction, Inc.* Jorge A. Ramirez, Esq. **Wilson, Elser, Moskowitz, Edelman & Dicker LLP** 300 South 4th Street, 11th Floor Las Vegas, Nevada 89101 Jorge.ramirez@wilsonelser.com *Attorney for Defendant Ninyo & Moore, Geotechnical Consultants*	John T. Wendland, Esq. Anthony D. Platt, Esq. **Weil & Drage, APC** 2500 Anthem Village Drive Henderson, NV 89052 *Attorneys for Defendant Nevada By Design, LLC d/b/a Nevada by Design Engineering Consultants and Dekker/Perich/Sabatini, Ltd.* Jeremy R. Kilber, Esq. **Weil & Drage, APC** 2500 Anthem Village Drive Henderson, Nevada 89052 *Attorney for MSA Engineering Consultants*

DATED this 20th day of August, 2019.

/s/ Ruby Lengsavath
An employee of SNELL & WILMER L.L.P.

4825-1811-7536

Exhibit 3

Exhibit 3

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Steven D. Grierson
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

NORTH LAS VEGAS CITY OF ,	CASE#: A-19-798346-C
Plaintiff,	DEPT. VIII
vs.	
DEKKER/PERICH/SABATINI LTD.,	
Defendant,	

BEFORE THE HONORABLE TREVOR L. ATKIN, DISTRICT COURT JUDGE

MONDAY, SEPTEMBER 30, 2019

RECORDER'S TRANSCRIPT OF HEARING:
ALL PENDING MOTIONS

APPEARANCES ON PAGE 2:

RECORDED BY: JESSICA KIRKPATRICK, COURT RECORDER

APPEARANCES:

For the Plaintiff:

City of North Las Vegas	RICHARD C. GORDON, ESQ. ALEEM A. DHALLA, ESQ.

For the Defendants:

Paffenbarger & Walden LLC.	PATRICK F. WELCH, ESQ.
Jackson Family Partnership LLC Stargate Plumbing	SHANNON G. SPLAINE, ESQ. PAUL A. ACKER, ESQ. BLAYNE N. GRONDEL, ESQ.
Ninyo & Moore Geotechnical Cons.	JONATHAN P. PATILLO, ESQ.
MSA Engineering Inc.	JEREMY R. KILBER, ESQ.
Nevada by Design LLC	JOHN T. WENDLAND, ESQ.
Richardson Construction Inc. Guarantee Company of North America	THEODORE PARKER, ESQ.

Las Vegas, Nevada, Monday, September 30, 2019

[Case called at 9:45 a.m.]

MR. WENDLAND: Good morning, Your Honor, John Wendland on behalf of defendant Nevada by Design.

MR. KILBER: Good morning, Your Honor, Jeremy Kilber on behalf of MSA Engineering.

MR. PATTILLO: Jonathan Pattillo on behalf of Ninyo & Moore.

MR. ACKER: Paul Acker on behalf of Stargate Plumbing. Good morning, Your Honor.

THE COURT: Morning. Good to see you.

MR. PARKER: Good morning, Your Honor, Theodore Parker on behalf of Richardson and the Guarantee Corporation of North America.

THE COURT: Nice to see you, Mr. Parker.

MR. PARKER: Thank you.

MS. SPLAINE: Good morning, Your Honor, Shannon Splaine on behalf of Jackson Family Partners LLC doing business as Stargate Plumbing.

MR. GRONDEL: Good morning, Your Honor, Blayne Grondel on behalf of Stargate Plumbing.

MR. GORDON: Thank you, Your Honor, Richard Gordon, bar number 9036, on behalf of the City of North Las Vegas.

MR. DHALLA: Aleem Dhalla, 11488 on behalf of the City of

North Las Vega as well.

THE COURT: All right.

THE RECORDER: We have Patrick Welch on the phone.

THE COURT: Thank you.

MR. WELCH: Good morning, Your Honor, this is Patrick Welch on behalf of the P&W entities.

THE COURT: Thank you, sir.

I don't know who's going to argue this.

MR. WENDLAND: I'll go first, Your Honor, thank you.

THE COURT: Sure.

MR. WENDLAND: We represent Nevada by Design. We're the moving party. Your Honor, I'd like to open with this is my third attempt and no disrespect to the Court, my third attempt to have these motions heard. Essentially in August 5th, 2019, Nevada by Design filed a motion to dismiss, in the alternative motion for summary judgment. Shortly thereafter the Court set a hearing date of September 9th, 2019. On August 20th, 2019 the plaintiffs filed their opposition and August 28, 2019 we filed our reply -- the -- I bring this up because by the end of August 2019 the matter had been fully briefed.

On September 6th, 2019 the Court changed the hearing date from September 9th, 2019 to August -- October 21, 2019, Your Honor. That created two major issues for us. The first issue is we're in a AAA hearing called Frank v. Moser that starts on October 21st 2019. That was the first.

But more importantly than that, Your Honor, the -- a core

argument in the case involved what is the law. What is the law as it pertains to statute of repose? Today, September 30th, the law is NRS 11.202 says six years from substantial completion. Tomorrow on October 1st, 2019, AB 421 goes into legal effect and creates a ten year statute of repose. So because of the Court shifting the hearing date from September 9 to October 21st, it potentially could create new arguments, new pleadings, new supplementations, new issues that would change dramatically the position of the parties that we currently enjoy and would have enjoyed on September 9th had this matter been heard, to October where plaintiff can bring in new arguments and issues of which the matter which has already been fully briefed would have to address.

And so we all -- we felt because of that -- because of the scheduling conflict and also because of the potential change in the position of the parties, that we felt that it was necessary to bring our motion to seek to move the hearing date from October 21st to September 27th. Unfortunately all of us arrived September 27th. The plaintiffs raised some arguments at that hearing and it was brought to today, September 30th, 2019. So it's our position, Your Honor, that this motion should be heard today. If you hear it today it will address the two issues that we have with the conflict on October 21st and will allow the Court to hear the position of the parties that have been fully briefed.

Now the plaintiff's position is there's no reason to hear it October -- September 30th. It should be heard on October 21st with these other motions that have been filed. I know counsel's on the

phone, but he's one of the parties that filed a late motion that we believe likely shifted the Court to move it to the October 21st date. And I'll let counsel speak for himself, but he has sent an email saying that his motion has nothing to do with our motion, the underlying motion to dismiss and therefore he has no issues moving forward today. In fact everyone here is here ready to argue the motions. I know there's a bunch of joinders to the motion.

So we first request, Your Honor, to advance the hearing date to today. And then allow us to proceed to argue the underlying motion. Plaintiffs have had ample time. I mean, we're talking two months since full briefing to prepare for today's hearing. And to prepare to argue in full affect their position with respect to the underlying motions. So with that, Your Honor, we request that you move the hearing date.

Now if Your Honor likes I can make the arguments on the underlying motion and -- or if you'd like to first render a ruling on our underlying.

THE COURT: Well and as I understand it I was handed this as I walked in this morning.

MR. WENDLAND: You did.

THE COURT: Is your -- the fear is as of presently it's a six -- it's going to change to ten and it would irreparably alter.

MR. WENDLAND: Yeah, that potential is there, Your Honor. There will be at a minimum additional briefing. There will be at a minimum a change in position of the parties on the fully briefed set of matters. And we see no reason -- this is a -- the statute of repose here,

Your Honor, is actually not a very hard argument to determine. I mean, they themselves put the substantial completion date in their pleading, so we know it's September 13th, 2009. The plaintiffs have admitted that's the substantial completion date. They filed their underlying complaint on September 11th, 2019 -- or sorry. I keep saying September, I apologize, July. Thank you. I meant to say July 11th, 2019 they filed their complaint. Their substantial completion date was July 13th, 2009.

So the bottom line is NRS 11.202 is pretty clear. It's six years from substantial completion, Your Honor. If Your Honor, rules on the underlying motion they don't have it. The case is over. And I don't think that is an overly complicated matter to consider given that the statute is clear today, given that they've admitted their -- that their complaint would be time barred under that statute. And we see no reason we cannot go forward under the statute repose of the current date.

Now if you shift it obviously to October 1, they will bring AB 421. Now they've argued AB 421 in their opposition and argued something called a retroactive application. But, Your Honor, the effective date of AB 421 is October 1st, not today. And that's when it goes into effect. Now if they want to bring in a retroactive argument after October 1st, Your Honor can rule today. And then obviously they can bring whatever motions they feel necessary to argue that point. We feel we would have some counters to that, but nonetheless that's an issue that I don't believe necessarily has to be analyzed today. And I believe, Your Honor, can move forward. And I believe all counsels are ready to move forward with that.

So with that we'd ask that the hearing be advanced and that Your Honor consider the underlying motion. And based on the pleadings, based on the information, we're clearly passed the six year statute of repose and that if Your Honor will rule on the underlying motion, grant dismissal, they then if they have and argument after October 1st can come and argue that point.

The position of the parties won't change at that point because they would be arguing some new issues that we can brief and discuss those matters at that time. So we feel that it should be heard today, Your Honor.

THE COURT: All right.

MS. SPLAINE: Your Honor, --

MR. GORDON: Your Honor, --

MS. SPLAINE: Your Honor, Shannon Splaine. I joined in Mr. Wendland's underlying motion. I just wanted to address the Court's questions about the irreparable harm issue. The issue with not hearing the underlying motion today, which I'm not going to get into those arguments is the fact that the law today, which is what the law would have been if the motion had been heard in early September is different than what the law is going to be effective tomorrow. So counsel's hope is that the motion doesn't get heard until the law has changed, which will change their arguments.

But the law at the time the motion was filed is the same law that is in effect today, which is that the complaint is improper. The complaint as it stands today needs to be addressed. And then if we're

successful when the law changes plaintiff can file a new complaint arguing whatever they want to argue that they're entitled to because the law has changed. That's a different legal issue.

But what's happening right now is that plaintiffs are getting the benefit of the fact that Your Honor wasn't on the bench and the hearing had to be moved out an extended period of time, which is to the detriment of the defense because the law will have changed which we do not believe was the Court's intent when that happened. And unfortunately that's just factually what's going on. That's why there is irreparable harm if the Court does not rule today on the underlying motion.

I just wanted to address that because Your Honor asked that specific question.

THE COURT: I appreciate that. Thank you, counsel.

MR. GORDON: Thank you, Your Honor. So --

MR. WELCH: Your Honor, this is Patrick Welch on behalf of the P&W entities, may I chime in on my joinder please?

THE COURT: Yes.

MR. WELCH: Your Honor, we represent the P&W Bonds LLC and Paffenbarger and Walden LLC, which are the two entities that were the bonding agents that worked on the project with respect to issuance of the bonds that were ultimately issued by GCNA, the surety on behalf of Richardson. Our joinder is to the extent that because the surety's bond liability is purely derivative of the claims of the bond principle Richardson, that plaintiff's suit against the P&W entities, if you find that

the statute of repose precludes the claims against Richardson, the surety, as secondary obligor, shares those defenses and there would be no legal basis to hold P&W liable if Richardson is not liable.

I wasn't sure how familiar the Court was with surety law, so if you have any questions I'm happy to answer.

THE COURT: Thank you, Mr. Welch.

MR. PARKER: May I, Your Honor?

THE COURT: Yes, Mr. Parker.

MR. PARKER: I apologize, Your Honor. We -- I represent Richardson as I said earlier as well as the guarantor, the Guarantee Company of North America. And we filed our own separate brief. We've also joined -- we're joining as well in Nevada by Design's position. But our brief also included the statute of repose arguments. So I wanted to make sure the Court as aware of that. And our brief was of course fully briefed, our motion was fully briefed. The opposition was received. We did a reply as well. So I just wanted to make the Court aware of that. That's the one that was scheduled when you return from your judicial college, Your Honor.

THE COURT: Right.

MR. PARKER: Thank you.

THE COURT: Are there any other joinders that want to be heard?

MR. KILBER: Your Honor, we did join the underlying motion. And we'll -- I don't know if the Court's proceeding with that motion. But to the extent it is, our joinder is simply that the law existed in July. It was

not complied with and the complaint should be dismissed. It's a pretty straight forward issue.

THE COURT: Understood. All right.

MR. GORDON: Thank you, Your Honor. Your Honor, this is actually my first day on this particular case, much like you. I'm in a similar situation.

THE COURT: All right. Welcome to the show.

MR. GORDON: It's good to be here. It's good to be here. This is really -- what's before the Court today a very straight forward issue and I'm going to address just first procedurally --

THE COURT: That's what I'd like to address, --

MR. GORDON: Yes, why the Court --

THE COURT: -- should I be hearing this today.

MR. GORDON: Yes, why the Court can't hear it today and secondly to allay some of the Court's fears. You've heard multiple counts today argue irreparable harm. And I'm going to address substantively why that is not an issue for the Court to consider and try to address both of those issues.

First and foremost, Your Honor, I appreciate perhaps what defendants wanted to do. What however they did was something different. The only order and what we are here today on the only motion set for hearing today is a motion to change the hearing date on the substantive motions to dismiss. That is the only motion noticed.

If there's any doubt about that, Your Honor, the language of the order shortening time makes that abundantly clear that they did get

an order shortening time. But this is what was shortened: The Court orders that the time and date for the hearing on defendant Nevada by Design's motion to change the date of hearing was set. They want to convert that language and that order into an order that isn't there in order to accelerate the hearing, okay.

The Court to date has not granted that motion to accelerate the hearing. Which we do not, Your Honor, necessarily oppose. We filed a limited opposition because of the sort of unilateral efforts by defendants to change the hearing date and ex parte efforts to change the hearing date. But the only motion for hearing is the motion to change the hearing date.

If the Court were to say well we intended to grant it and move forward, then that would, by the order shortening time, then we would have been precluded an opposition. So I don't think the expressed language of that order makes clear that that did not accelerate the hearing date to today.

And again if there is any doubt about that, Your Honor, you can look at the Court's docket as of about 5 minutes ago. The hearing date on the substantive motion to dismiss is still set for October 21st. Today -- and that was reiterated also at the -- in the minutes of the hearing on Friday, that this hearing would come today on the hearing on the motion to change the date.

If the Court wants to accelerate the hearing and does so today, at a minimum the hearing still can't be heard until tomorrow, October 1st, because under EDCR 2.26 there's a minimum of one

judicial day notice that must be given to accelerate a hearing date. And a hearing date can't be changed simply by a conversation with chambers. You know, that's the only thing that defendants put forward to suggest the hearing date was changed, a conversation with chambers and a letter to that affect, an ex parte communication with chambers I might add.

So procedurally, Your Honor, there's only one -- it's simple. There's only one motion before the Court today. The Court should address that motion. And we have come and we have filed numerous dates where we are available. And that can be and should be resolved today as a matter of procedure.

Now substantively and I'm not going to get into the merits of the substantive motion, because I'm only prepared to argue the motion for changing the hearing date.

THE COURT: I understand. So it sounds to me like -- and counsel, correct me if I'm wrong, your argument is hey there is no hearing on the Defendant's motion because procedurally it's not until after today?

MR. GORDON: There is hearing on defendant's motion. It's currently set for October 21st and nothing changed that. And the order shortening time absolutely did not change that. Only the hearing to change the hearing date --

THE COURT: But before --

MR. GORDON: -- is set.

THE COURT: -- I can get to the underlying motion I have to

first make up the decision on whether I'm going to hear this today.

MR. GORDON: Absolutely. But, Your Honor, if I could just quickly address because --

THE COURT: Sure, no take your time.

MR. GORDON: -- they took a lot of time to, I think, push you in a certain direction based on irreparable harm based on the October 1st date.

They do not address this very clear language in the bill signed by the Governor, AB 421. That the amendment that changed the statute of repose.

THE COURT: So now you're into the underlying motion.

MR. GORDON: Well I am -- Your Honor, I agree and I'm happy to stop talking. I only mention it if the Court wants me to address what they -- I think the false argument they presented on irreparable harm.

THE COURT: I want to hear their reply relative to my ability --

MR. GORDON: Sure.

THE COURT: -- to hear this today.

MR. GORDON: Sure.

MR. WENDLAND: So, Your Honor, please take a look at the actual motion we filed to change the hearing. It wasn't please change the hearing to some random date. It expressly asked the Court's first available hearing date in September of 2019. That was what was granted. He keeps talking about well the orders only just for changing the hearing date. But he didn't read the pleading itself. The pleading

isn't just asking please move the date. I mean, move the date to any date. This was asking please move the date to the Court's first available in September of 2019.

On Sept 27th we all appeared in front of Judge Cherry -- Justice Cherry and at that point plaintiffs made all these arguments: I'm flying to Hawaii, I'm not ready; I can't do this. And it was Judge Cherry's decision at the time to play, quote/unquote: Solomon and move it to today and have Your Honor decide this.

But it's critical that the motion itself be read. And the motion expressly says please give us a date in September of 2019. That was the relief requested. Otherwise, as Ms. Splaine has explained, there is irreparable harm. And if we hear this on October 21st or hear it on October 1st or the 5th, the 6th, any time in October, they will then bring in new arguments and issues so --

THE COURT: I understand.

MR. WENDLAND: -- that's the issue we have. We would be prejudiced, Your Honor.

THE COURT: All right.

MR. WENDLAND: What -- the motion itself is clear.

THE COURT: All right.

MR. WENDLAND: It wasn't asking for some random date.

THE COURT: You did it before the time and based on that just -- I'm not going to -- just because the happenstance of Judge -- Justice Cherry was here. He kicked it. You purposefully asked for the date. And I want to honor that today. So I want to hear the motion.

MR. WENDLAND: Thank you, Your Honor.

MR. GORDON: Well, Your Honor, I -- can I respond to that --

THE COURT: Sure.

MR. GORDON: -- because I think there is a fundamental problem with what counsel just said to persuade you otherwise. The -- I think I certainly have and I know probably everyone in this room who's counsel has put things in pleadings that are not reflected in the order. It's the order, Your Honor, not what they put in the motion that is served on counsel and gives notice to counsel of what's coming before it.

THE COURT: But you were on notice that it was going to be heard in September.

MR. GORDON: No, no we were not. We were on notice only that the motion to change the hearing date would be heard in September. We were on no notice that a substantive motion would be heard; no notice and that's key. The only order in this case changes the hearing on the motion to change the hearing date. It did not -- and the Court's docket reflects that. The Court's docket still has the motion to set -- the motion to dismiss set for October 21st. And that motion, the motion to change the hearing date was never granted. If -- to date has not been granted yet okay.

So if the Court wants to grant the motion today, which again we don't necessarily oppose except for the limited opposition we made on dates, at a minimum it still can't be heard today. Because under EDCR 2.26, Your Honor, really two local rules that would be violated if the Court accelerates the hearing to now. One, we do not have judicial

notice, one day judicial of the change in the hearing date. And local rule EDCR 2.26 requires that. At a minimum the earliest we can come back is tomorrow, the earliest to abide by EDCR 2.26.

And secondly, Your Honor, the only thing that counsel provides to suggest anything different is a letter based on an ex parte communication with chambers. And, Your Honor, it's very clear EDCR 2.22, counsel may not remove motions from the calendar by calling the Clerk's Office or the Judge's chambers, closed quote. That is all they have done. There's no order scheduling a substantive motion for today.

The only thing is what local rule prohibits for a change in date under EDCR 2.20. And under EDCR 2.26 at a minimum if the Court wants to change the date they can, but they can't do it same day. And procedurally, Your Honor, that should end the analysis.

MR. PARKER: Your Honor, may I address that quickly?

THE COURT: Yes.

MR. PARKER: The -- if you were to accept everything counsel just said the Court could actually schedule this hearing later on today and we could do it this afternoon giving counsel an opportunity to be prepared. And you will have actually accomplished what Judge Cherry requested. He would have the notice and the ability to be prepared to argue the factual underlyings of the real motion. He can address all of our replies. And in fact this information, the underlying merits of this motion have been briefed a whole month ago. So I don't know why he's not prepared, but if the Court believes he should be given additional time let's schedule it for the end of the day. Schedule it for 3:30. We can all

come back and have this argued.

What we don't want to is face a change in the law that he's benefited from simply because there's been a change in the Court. And that's exactly what he's trying to take advantage of right now, Your Honor.

MR. GORDON: Your Honor, if I can address --

MS. SPLAINE: Your Honor, let me --

THE COURT: One second.

MS. SPLAINE: -- let me comment. In addition, Your Honor, the issue is that we were here on Friday. I wasn't personally, but someone from my office was here, and Justice Cherry moved it today. That would be the one judicial days' notice that these issues were coming up.

I understand counsel wants to say that there's ex parte communications. There was clarification sought because of the importance and the criticalness of the timing of this. Because the concern was, as we're hearing, that plaintiff was going to use these delays to get past the October 1st deadline because of the Court's unavailability. This is a tactic. So Justice Cherry moved it today because there was claims about who -- who could and couldn't be available and what was happening.

It is clearly another tactic that counsel that comes this morning says well you can't hear it today because I'm not prepared. This is the third time this hearing should have been heard. So even if he didn't think it was going to be heard at the first date in September he knew on

Friday that there was a likelihood it was going to be argued today. That was the judicial notice. So to now come in and say you came here today it has to be at least tomorrow and I don't care what day it is after tomorrow because the law changes is the irreparable harm. This is all tactical.

THE COURT: One last thing.

MR. GORDON: Yeah, a few very critical things to rebut. First of all what Judge Cherry did is not what counsel just represented, moving it to today. What's the it that got moved from Friday to today? The minutes reflect it. The minutes reflect it. Court ordered motion to change date of hearing, you know, to -- or in the alternative motion for summary judgment continued. Motion to change the date of the hearing was the motion continued, okay. So that is not a judicial day of notice for the substantive motion. And that is critical and that is critical.

And I have to because everyone has now just address why the irreparable harm for Your Honor is simply not and why it should not be a concern for the Court to either keep the hearing on October 21st. We provided numerous dates before and after.

THE COURT: All right and this bleeds over into the secondary argument potentially but --

MR. GORDON: The --

THE COURT: -- based on the irreparable harm argument. Let me hear it.

MR. GORDON: I just want to rebut this because --

THE COURT: Okay.

MR. GORDON: -- they're using that as a reason to ask you to hear it today, Your Honor.

THE COURT: I understand. Go ahead.

MR. GORDON: And that shouldn't be a concern, because again the expressed language of the bill, the expressed language of the bill makes it clear that the statute of repose applies retroactively to actions in which the substantial completion of the improvement to real property occurred before October 1, 2019. Okay.

So the analysis for a Court ultimately is when was substantial completion? All parties agree, substantial completion occurred before October 1, 2019. And that means that whether the Court hears the motion today, next week, next year if there was substantial completion before October 1, 2019, the application is retroactive.

So it's futile, Your Honor, for the Court to think it must have the hearing today. Because if the Court has the hearing today, disagrees with our analysis, we file a motion for reconsideration after October 1. And the retroactive application would then be the operative law subsequent if it goes beyond that to the Supreme Court where the retroactive application would be the governing law. So that issue of irreparable harm, Your Honor, based on the express language of the bill that was enacted shouldn't be a concern.

And, Your Honor, it matters. It matters. The local rules are not gimmicks and they are not things that should be taken sort of loosely. They're necessary for due process, you know, notice of a hearing of this magnitude, necessary for due process. And they have

not complied with the rules. Either EDCR 2.20 or 2.22 or EDCR 2.26, both prohibit the Court from going forward on the substantive motion today.

MR. WENDLAND: Your Honor, I will -- I was here Friday. I don't have to rely on a minute. I can tell you what Justice Cherry --

THE COURT: I'm prepared to move -- I'm prepared to rule on the motion. I think it would be a matter of form over substance and happenstance of what was happened when Justice Cherry ruled. So I do want to go forward with this motion today. I respect your argument that well what's it matter. I'll file a motion for reconsideration. There's a change in the law supporting that motion. But I want to be able to rule on the underlying motion irrespective of EDCR, whatever the rules and whatever happened by way of phone calls or what was said up here on Friday. I want to honor that. So I want to go forward and I appreciate your argument.

MR. GORDON: Yeah, sure. Thank you.

THE COURT: But I want to go forward with the motion today.

MR. WENDLAND: Appreciate it, Your Honor.

THE COURT: Now it appears the plaintiffs are ready to argue this motion. Now if you want to come back later this afternoon I'm happy to do it or we can argue it now.

MR. GORDON: Yeah, I mean, Your Honor, I think that -- you know, I don't know if the Court's aware of prior procedure here. And I know that counsel is. Counsel for the City Justin Carley left the firm Snell and Wilmer and Friday was his last day. I am here today only

because I got counsel in another case to extend discovery to allow me to move a deposition that and I am -- you know, I am fairly booked. I between now -- so I've had this case for since yesterday basically really to focus on what was scheduled, what was noticed. And that was to change the hearing date, prepare to move on that. So I understand the Court's desire to hear it. I would think that some time would be beneficial at a minimum.

THE COURT: Okay

MR. GORDON: But I don't --

THE COURT: What --

MR. GORDON: Can we have a moment, Your Honor?

THE COURT: Sure, sure.

MR. GORDON: Can I just confer.

MR. WENDLAND: I was just going to add that counsel wrote on the pleadings is sitting right next to him.

MR. GORDON: Yeah, I want to confer with counsel.

THE COURT: I get it. I get it.

MR. GORDON: I want to confer with counsel if you don't mind.

THE COURT: Why don't you confer with counsel. Why don't we take a -- like a 5 minute comfort break. Everyone else I apologize.

MR. GORDON: Sure

THE COURT: I want to get my calendar over with. But why don't we take a 5 minute recess. You address counsel. I'm going to take a comfort break personally.

THE MARSHAL: Court's in recess.

[Recess taken at 10:16 a.m.]

[Hearing resumed at 10:29 a.m.]

THE RECORDER: Okay. Back to page 9, A798346, North Las Vegas versus Dekker/Perich/Sabatini.

MR. GORDON: Thank you, Your Honor, I just I had a chance to confer with my co-counsel Mr. Dhalla. He has a conflict this afternoon. So given the Court's desire to proceed now, today, I think now is the better time. I just want to make very clear for the record, proceeding now, you know, we preserve our rights to object under the fact of proceeding would violate 2.26 and 2.22.

MR. WELCH: Excuse me, Your Honor, I don't mean to interrupt. This is Patrick Welch. Could you please have counsel move closer to the microphone? I can't hear him.

THE RECORDER: Probably the podium is the closest microphone to mouths.

MR. GORDON: Sure. Can you hear me, counsel?

MR. WELCH: Yes I can. Thank you.

MR. GORDON: Yep. Would you like me to repeat for the record, Your Honor?

THE COURT: No, Mr. Welch -- briefly repeat what -- just for Mr. Welch benefit.

MR. GORDON: Sure. You know, we're electing to proceed now rather than say afternoon. But in so doing I just want to make clear for the record that the City isn't waiving it's right to object. That

proceeding now is violative of EDCR 2.26 and 2.22.

And I would also just ask the Court, I don't know if this could be lengthy with all of the people here if maybe argument could be limited to those who filed motions and joinders. And those who didn't file a joinder maybe we can limit the number of arguments.

MR. WENDLAND: I think everyone filed a joinder, Your Honor, so.

MR. PARKER: And, Your Honor, let me just say this as well. I don't know if we filed a joinder, because we filed our own separate motion. But it's on the same argument. And I started out this morning by saying we're joining in the motion.

The only other thing I would point out, and Your Honor knows this because you've been practicing most of 2019 as well, the Chief Civil Judge suspended the local rules based upon the change in our overall rules. So I think that's something else counsel should be aware of.

THE COURT: Thank you, Mr. Parker.

MR. PARKER: Thank you, Your Honor.

MR. GORDON: I don't think the local rules have entirely been suspended, but that's for the record.

THE COURT: All right, why don't we go forward with the motion -- the underlying motion then.

MR. WENDLAND: Thank you, Your Honor. So we actually have a two part motion. The first part is a -- is both a motion to dismiss and in the alternative a motion for summary judgment. The first part of our motion deals with, as Your Honor has heard ad nauseam today, the

statute of repose.

The plaintiffs filed their complaint July 11th, 2019. In their complaint they expressly indicated that the notice of completion date was July 13th 2019. So -- sorry July 13th 2009, sorry about that, Your Honor. And at this juncture their complaint is more than four years untimely under NRS 11.202, which expressly states six years from the date of substantial completion. And based thereon, when they filed their complaint, Your Honor, they filed what we contend is a fugitive document. Now I haven't got into NRCP 11 -- Rule 11 violations. But they knew at the time they filed their complaint that they did not have a valid complaint that was timely under NRS 11.202.

Now plaintiffs aren't going to hang their hat on the AB 421. It's an act that was signed by the Governor in June of 2019. In particular they're going to cite to a section involving the retroactive application of that act. Now our motion is even easier to understand than that. AB 421 doesn't go into effect until midnight tonight, Your Honor. So as of today as I'm standing in front of Your Honor it is still NRS 11.202 under the six years.

Now tomorrow, which is the whole argument we had previously today, they could -- they're going to argue retroactive application of the ten years. But that's not today, Your Honor. So we talk about what is known as the effective date, the date the law goes into effect which is October 1st 2019. Even section 11 -- 11 section 4 talks about retroactive applications for projects -- substantial completion completed before October 1st 2019, which is a future date.

And that's kind of interesting that they're making the argument that AB 421 applies today. And that's not the case. If it did apply today then the Nevada Legislature would put into the language of AB 421 that the act applies September 30th of 2019. The act doesn't contain any such language. In fact if you -- under NRS 218D.330 it states -- section 1 it states respectively if it's not in the act it become effective on October 1st of its passage, okay.

And Under 218D.330 section 2 until that effective date the existing law remains in effect. That means the six year statute of repose. Now it is not in dispute that if Your Honor finds that the six year statue of repose governs this matter then they are untimely. In fact in the other motion they filed a surreply where they essentially admitted that if it goes -- that the effective date is tomorrow. And so their argument based on the AB 421 is irrelevant because that's not an argument that exists today.

So under the six years repose they're too late. They admitted that they filed it, you know, based on the dates beyond the six years repose. And under those rules this matter should be dismissed completely. And I know everyone's joined in pretty much and they would make the very same argument, Your Honor.

So that's our first section. I don't know if Your Honor wants to get us into the second section where we talk on certificate on merit?

THE COURT: Yes. Go ahead with that.

MR. WENDLAND: So the second section, this is now uniquely for the design professions. NRS 11.258 states whenever you

bring any claim, defect claim against a design professional in a non-residential project, which is this is, this is a fire station so it's a non-residential project, Your Honor. The obligation is under 11.258 they have to confer with an appropriate expert in the relevant design field. And based on that consultation they have to then make a determination under oath that states that there's a reasonable basis in law and fact to proceed. Their expert also --

THE RECORDER: Can I interrupt for just a second. I really apologize. Mr. --

THE COURT: I hear something.

THE RECORDER: -- yes. The gentleman that we have on the phone, Mr. Welch, can you turn the phone away from your mouth? Because we have very sensitive microphone and it -- all I hear is you breathing.

MR. WELCH: Sure, I'm happy to.

THE RECORDER: I apologize. Thank you.

MR. WELCH: I apologize for that.

THE RECORDER: Okay. Go ahead.

MR. WENDLAND: Okay. I apologize, Your Honor. Can I go back to statute of repose? There's a couple other pointers I forgot to add and I'll get to the certificate of merit. The two other pointers I did wanted to add is they cited as an example the effective date, AB 221. And in the AB 221 there is actually language that says it's effective earlier than October 1st, 2019, Your Honor.

So their own example in their opposition that they cited for

their argument shows that the Nevada Legislature has in another act expressly stated a date for the dates -- that acts effective date. And that's a very good example of what we don't have here. Under 421 there is no such language.

Now I went to the Nevada Legislature's website and I know Your Honor's seen these attachments. They're very simple. I -- just looked at them really quick. And it shows October 19 as an effective date. And I also cited a case from Alaska called *Arco Alaska* and it expressly says and this is -- goes to their argument. The law's retroactive date and its effective date are distinctly different concepts. While a retroactive law applies to pre-enactment conduct the legal affect produced by the law occurs only after the law's effective date.

So he's trying to put the cart before the horse, you know. And in this case until October 1st their entire argument of retroactive application 421 doesn't apply. So those were the only two pointers I forgot to add, Your Honor.

THE COURT: All right.

MR. WENDLAND: Now turning back to certificate of merit. So the statutes very clear that it requires them to consult. Now they went and American. Geotechnical Inc. is their expert that they've consulted. American Geotechnical Inc. is a geotechnical engineering firm. My client is a civil engineer.

More importantly than that Mr. Marsh in his declaration says and in the attached report says I'm only looking at geotechnical issues in this case. He has not looked at mechanical. He has not looked at any

other issues other than geotechnical matters. So when he writes in his declaration that there's a reasonable basis to proceed, he's expressly limiting his statement to what he examined at that time which is geotechnical issue. He didn't examine any other issues, Your Honor.

And I don't want to get into other motions that Your Honor's going to hearing in October. But with respect to Nevada by Design specifically we are no the geotechnical of record. We only handle civil engineering issues. And in this case his report, which counsel relies upon as the basis of his certificate of merit obligation, has zero opinions, criticisms, comments outside of the geotechnical world. So the report is expressly limited to geotechnical matters, which means by extension Mr. Marsh's declaration is expressly limited. And this is the declaration where he says there's a reasonable basis for proceeding, is expressly limited to geotechnical issues only.

And then by extension counsel's consultation with Mr. Marsh is expressly limited to geotechnical matters. Now if Mr. Marsh, who is their expert, had any opinion in my client's world there would have been a statement. Because he's obligated under NRS 11.258 to put his conclusions in the report, there would have been a finding, some sort of a comment, some of a statement that says what Nevada by Design did is wrong and here is why. We don't see that anywhere. We don't see that anywhere in his report, just simply a geotechnical issue. I was only retained to examine geotechnical matters. I cited that in my motion.

And based thereon, Your Honor, it isn't -- NRS 11.258 isn't just kind of going there and copying and pasting some language from

the statute. There has to be compliance with each and every element of it. And this is the *Otak* case, this is NRS 11.259, if any element is not complied with then that requires mandatory dismissal, Your Honor, under those -- under the statutes and under *Otak*.

In this case it's our contention that counsel's representation in its affidavit that he consulted with an expert in the relevant discipline, which would be civil engineering, and based on that consultation there's a reasonable basis in law and fact to proceed, which is what he's required to do, is not that because the actual documentation that counsel presents to the Court hears our compliance is expressly limited to geotechnical issues, Your Honor. And because there's no civil issues there's no expressed findings of civil violations of any kind, there could be no reasonable basis in law and fact to proceed against a civil engineer who's -- in which the expert examining the matter only examined geotechnical matters.

By extension Mr. Marsh's report and his report which is supposed to contain all his findings and conclusions is also incomplete if there is anything beyond geotechnical matters, which we content there probably isn't . This is a geotechnical case. Therefore his declaration that there's a reasonable basis for proceeding as an expert, right, as expert on behalf of the plaintiff, he's their guy. He has to have -- he's expressly saying there's reasonable basis to proceed against the civil engineer in a different discipline without a report that contains a single allegation relevant to my client.

So we contend based thereon in addition to the state of

repose issue, they did not comply with NRS 11.258 which serves as a secondary reason for dismissal of my client here today.

THE COURT: Thank you.

MR. WENDLAND: Thank you, Your Honor.

MS. SPLAINE: Your Honor, Shannon Splaine on behalf of Stargate. We joined in Mr. Wendland's motion as it related to the statute of repose issues. Obviously my client who is a plumber is not a design professional, so it's limited to the statute of repose.

I just wanted to in addition to what Mr. Wendland argued and what we talked about earlier, which is that AB 421 is not the law as we sit here today. It was not the law at the time that plaintiff filed the complaint. The law at the time the complaint was filed, which is what you have to rely upon at that time you file a pleading, says six years.

Now as noted in plaintiff's opposition it's their footnote two on page five, they say there is an exception for fraud. And plaintiff admits that there are no fraud allegations in this case. So the one exception that plaintiff could have tried to rely upon to say why their complaint was valid under the current law, that's still today, they admit is not an allegation in the case. There's no fraud pled. There's no fraud pled with specificity, so the six years is what applies. And they did not file within the six years.

Now after October 1st when the law that the claim is in effect now, which is not, goes into actual affect, plaintiff may have different arguments. But we have to operate on the law at the time you file the litigation. And that law says six years and they missed it.

The other argument that plaintiff tends to expand upon is argued about statute of limitations versus statute of repose. And as Your Honor knows the statute of repose was always intended as those outside limits that we all look at. Plaintiff tries to expand the statute of limitations to go beyond the statute of repose and that's not what the law as we stand here today says. The statute of repose is the outside limits. And any person knows they're potentially on the hook for and that's six years.

Thank you, Your Honor.

THE COURT: Thank you.

MR. KILBER: Your Honor, Jeremy Kilber on behalf of MSA. We also joined in the motion. I think the argument today has -- you've heard enough argument with statute of repose. Our joinder also pertains to the affidavit of merit. MSA is a mechanical engineer, a plumbing engineer and an electrical engineer who provided those services on the project. Similar to the civil engineer there's no -- nothing the affidavit of merit that comes close to addressing mechanical, electrical, or plumbing engineering. Those are a subset of engineering disciplines that require separate licensure, completely from a geotechnical engineer.

So to the extent the expert Mr. Marsh would even seemingly attempt to opine on the standard of care for a mechanical, electrical, or plumbing engineer he is not qualified. He cannot -- he does not have the licensure to even address those issues. So to the extent they're relying on Mr. Marsh's affidavit of merit with respect to MSA it's invalid

and we would press the Court to grant the motion with respect to MSA on the invalidity of the -- of the compliance with 11.258.

THE COURT: Thank you. Any other joinders?

MR. PARKER: Your Honor, I'll just be brief. No one has mentioned the dates, so I figured I'd at least put the dates on the record for the Court. Typically the order will include dates. But the complaint was filed 7/11/19.

THE COURT: Got it.

MR. PARKER: The certificate of occupancy was filed February 25th, 2009. I think that's important for the Court's consideration. So certainly, Your Honor, not only did they miss six years but it's closer to ten years.

And, Your Honor, we don't have the same argument in terms of design professional. My client is a general contractor the guarantee company I mentioned earlier is not a design professional. We're only joining in terms -- we can only join in terms of the statute of repose.

THE COURT: Understood.

MR. PARKER: Exactly, Your Honor.

THE COURT: Yes.

MR. PARKER: And that's the same motion --virtually our same motion we filed separately and we are now joining. Thank you, Your Honor.

THE COURT: Thank you.

Mr. Acker, nothing?

MR. DHALLA: Ready?

THE COURT: Yes.

MR. DHALLA: Thank you, Your Honor. Can I use the podium?

THE COURT: Oh, absolutely.

MR. DHALLA: Thank you.

MR. WELCH: Your Honor, I don't know all -- everyone in favor of the motion has had a chance to speak, but if we're there and I would like to speak, I'd like to have my opportunity now.

THE COURT: I forgot about you, Mr. Welch, my apologies.

MR. WELCH: Thank you.

THE COURT: Go -- proceed.

MR. WELCH: Thank you, Your Honor, again Patrick Welch on behalf of the P&W entities. As I noted earlier we are the bonding agent that worked in conjunction with co-defendant GCNA to help Richardson obtain the payment and performance bonds that were required on this public project. I'd like to note for the Court that we have filed a separate motion to dismiss the P&W entities as it acted solely as the resident agent on behalf of GCNA to sign off on the bond.

In this case, Your Honor, Hornbook law establishes that suretyship is a tripart right -- tripartite relationship. We had Richardson as the bond principal contractor. The City is the obligee and GCNA is the surety. Under this relationship I'm not sure how much familiarity the Court has with surety law, so please bear with me if I'm --

THE COURT: No go ahead and proceed.

MR. WELCH: -- telling you things that you already know.

THE COURT: I have a little bit. Go ahead.

MR. WELCH: The bond principle is the primary obligor, which it Richardson in this case. The bond principle is -- excuse me, the bond obligee is the person to whom the principle owes the duty. In that case that's the City. And then the third party to the tripartite relationship is the CGNA which is the secondary obligor. The surety obligation and the liability only becomes due in the event that the primary obligor, in this case Richardson, breeches its duty to perform.

Furthermore, surety law, including the restatement in cases from Nevada, recognize that a surety may generally plead any defense available to its bond principle and the liability of the surety cannot exceed the principal. Further -- so essentially what that means is a surety is not liable on a bond unless the bond principal is liable. And the surety can make use of any defense available to the bond principle, in this case Richardson.

So in this case as the local resident signing agent if Richardson is found here as the primary obligor to have no obligation because of the statute of repose to the City, our position is that P&W as the local resident agent likewise has no liability. And that's because those claims against P&W are completely derivative of and dependent upon a finding that Richardson as the primary obligor is liable.

If you have any questions I'm happy to answer them.

THE COURT: No, thank you. Mr. Welch, thank you. Is that all?

MR. WELCH: [No audible response].

THE COURT: Is that all Mr. Welch?

MR. WELCH: Yes it is. I'm sorry, Your Honor.

THE COURT: All right. Thank you.

MR. WELCH: Thank you very much.

MR. DHALLA: Good morning, Your Honor, I didn't want to interrupt, but I just wanted to make clear that that P&W Bonds and Paffenbarger Walden's motion to dismiss is not on hearing for today. And that has nothing to do with the statute of repose. It has never been set for any date that's in September. And I'm definitely not prepared to argue against that motion.

THE COURT: Okay.

MR. DHALLA: So if it's okay I'd like to argue against Nevada by Design's motion that has already been argued.

THE COURT: Yes.

MR. DHALLA: Okay. To start with the statute --

MR. WELCH: Your Honor, I'd like to clarify, again Patrick Welch. We specifically addressed this issue in our joinder, so it is on calendar for today.

THE COURT: Okay.

MR. DHALLA: I believe their joindered as to NBD's motion is only not towards bond issues. It's to the statute of repose issues.

THE COURT: Right.

MR. DHALLA: And to the extent that they're joining those issues and that's on calendar for today, that's with me. We can --

THE COURT: Okay.

MR. DHALLA: -- address all those today.

MR. WELCH: Agreed, Your Honor.

MR. DHALLA: Okay. So to start with the statute of repose the ten year the statute of repose applies here. And there is no debate whether or not the City complied with the ten year statute of repose.

I know Mr. Parker said that the February 2009 date about when substantial completion was achieved is not relevant because Nevada case law specifically states it's when substantial completion or the notice of substantial completion is recorded is the date you go off of. And Mr. Wendland already said that that's 9/13/2009. So that's the date that we should be going on for calculation of the substantial completion date.

And to that date the City complied with the ten year statute of repose. And the reason for that is that had NBD or any of the joinders read the actual language of the AB 421 they would have easily seen that the newly extended ten year statute of repose applies retroactively. I know they've cited in their motion that if you look at the Court's website it says October 21 or if you look at -- or they seem to think that the retroactivity doesn't apply, but in fact it does.

If you look at section 7 of AB 421, that's the section that extends the ten year statute of repose to ten years. But the effectuating statue -- or the effectuating section of AB 421 is section 11. And if you look at section 11 each provision of the statute has a different effectuating date. And that's important because AB 421 didn't change the statute of repose for construction defects but changed many other

portions.

It changed -- if you look at NRS 40.647, which is not applicable here, but if you look at section 11 of AB 421 and subsection 2 says that the provisions of NRS 40.647 as amended by section 3 apply to an inspection conducted pursuant to and another statute on or before -- sorry, sorry, it says on or after October 1, 2019.

And that's important not because that particular statute applies, because the Legislature intended to go through every single statute that was changed by the bill and have different effective dates for it. So in that particular instance it says on or after October 1, 2019. And in subsection 3 it similarly says on or after October 1st, 2019.

However subsection 4, which is the applicable statute here, NRS 11.202 specifically states and I'm going to quote it here: The period of limitations to an action set forth in NRS 11.202 as amended by section 7 of this act apply retroactively to actions in which substantial completion on the improvement to the real property occurred before October 1, 2019. And the important part of that was apply retroactively to substantial completions that occur on or before October 1, 2019.

And I know that you had a lot of people try and convince you that there would be substantial harm in not hearing the motion today versus hearing it after October 1. That's false because as of today the statute as to 11.202 is effective today.

THE COURT: Understood.

MR. DHALLA: It's effective retroactively. The rest of the statute is not. And I understand the -- that the Legislature's website

says October 1, 2019. And that's incorrect because portions of the bill are effective after tomorrow, but portions of the bill are effective retroactively.

And there's a reason that makes sense. The reason that makes sense is that if the Legislature passed a bill in June of this year but didn't make it effective until October of this year, but made it effective retroactively through this year, they would have created this window in between June and October. This retroactive window where cases like this one would -- you'd have an absurd result. The absurd result being that starting tomorrow you would have a bill that is effective but would be effective to this particular case.

So they're fine arguing tomorrow that on a motion to reconsider that the new statute applies. And they've all but admitted that. Mr. Wendland, when he stood up when you were arguing the motion to change hearing date, all but admitted that portion. That effective tomorrow, midnight today it would -- the 11.202 the ten year statute of repose would apply to this case. We can then address a motion to reconsider and go through the rigmarole of what happens to the new statute.

But that's for one incorrect because it's an absurd result. And this Court is not supposed to read statutes into an absurd result. The absurd result being that the legislature intended to create a window in between passage and effective date that creates cases that are untimely but would be timely if the hearing was on a different date, or we have a motion to reconsider, or if the Nevada Supreme Court then hears it. The

law at that time would be the ten year statute of repose. We'd be in the same place. It would get reversed because the law is retroactive.

Affects this case and whether Your Honor addresses it on a motion to reconsider or on a motion -- or on appeal, both courts this one or the Supreme Court would have to reverse because the ten year statute of repose is then applicable including pending litigation such as this case.

So I know they've convinced you that because they have a stronger position they think that the statute is not applicable today, is incorrect. The statute is applicable today. The Legislature specifically made this portion of AB 421 applicable retroactively.

But even if Your Honor doesn't consider that. Even if Your Honor thinks that -- that there's a difference between effective date and retroactivity date, I don't see the point in coming and arguing it today and you granting it today just to in ten days reverse it tomorrow. No one on their side addressed why that's the consideration and why that consideration shouldn't be what is in the forefront of the Court's mind, because it will moot within 6 hours, 8 hours, 10 hours.

I think they're trying to effectuate an order that then have to overturn to somehow think that you've got it wrong or to somehow think that it would be a stronger position for them later. It's a misreading of the statute. It leads to an absurd result that the Legislature did not intend. And even if it were it would be an absurd result to give the order -- to grant the motion today just to overturn it later. All three of them would be just what the Court should not do.

Second, I can address the NRS 11.258, that's the design professionals, then the affidavit of merit requirement. Regarding 11.258 if you look at the -- what they're calling the affidavit of merit requirement, what is actually what the expert is required to do before filing a motion against design professional. It has specific language in the language that is required in what the attorney affidavit he -- is required, what the expert report is required, and what the expert's declaration is required. It has -- it lays out the specific requirements.

Instead, NMD and that the other design professional are trying to add requirements that are not within the statute. They are doing two specific things. Well -- I'll start with this if you look at page 10 of our opposition there's a chart side by side what is required within 11.258 and what the City actually stated in both my attorney affidavit and the expert's declaration in support of the complaint And these are what's required when filing a complaint. If you looked on page 10 of the opposition there's side-by-side comparison of the two.

And it's not formulaic as that NBD or other design professionals will try to say. We did not perform a formulaic recitation of what's required within 11.258, but rather we did the things that are required. Instead they're trying to shift the language ever so slightly to create new requirements, the first being that the argument is that the City's expert is not an expert in all design professional fields. And specifically not the specific design professional fields that the design professional so NDB, Dekker and the other design professionals are.

Under their interpretation they would require, under 11.258, to

have a separate design -- separate expert for every single design professional. And that's where they misread *Otak Nevada* case. The *Otak Nevada* case does not specifically state that a different design -- a different expert on the complaint by the plaintiff or claimant is required. So it's not required to do a separate expert to each design professional. Rather what the Supreme Court said in *Otak Nevada* was that each particular claimant or plaintiff needs to have their own expert.

So for example, if you and I were claimants on one side and we each sued one particular design professional. I couldn't have and expert report and then you join or you have a counterclaim and then you -- sorry, if you have another third party complaint in that instance. It'd be a third-party complaint and use my affidavit of merit and expert. Because the affidavit of merit requirement specifically states that you need to talk to the expert. And there's a couple of reasons for that. But what the Supreme Court did not say in *Otak Nevada* was that every claimant needs to have a separate design professional that has a separate similar degree or similar specialty to the particular design professional.

And if you look at the statute, the statute specifically states that. And this is where they changed the language. If you look at 11.258 subsection 3(b) and that's the part where it says the expert in a statement has to say and I quote: the statement that the expert is experienced in each discipline which is the subject of the report. And that last part is key. The expert is not required to be an expert in every design professional field. That would be absurd. The design -- the

expert is required to be an expert quote: in each discipline which is the subject of his report. And that's exactly what Mr. Marsh here is and -- from American Geotechnical. The City's expert is a professional engineer with multiple specialties particularly in geotechnical engineering.

And more importantly, the statute itself defines what an expert is. So not only are they trying to say that the -- that the City's expert is not an expert in their particular field, whether it be landscape design or plumbing, electrical, all those. They're essentially requiring the City to get multiple experts in multiple different fields to match their particular specialties, which is not in the statute itself. They like to gloss over that particular part and they like to say well they're not our expert. They don't specifically talk about our specialty. That's not what's required in the statute. If the Legislature had required it that would be different, but that's not what the statute says.

More specifically, the statute itself defines what an expert is. NRS 11.258 subsection 3 says that the expert is a person who is among other things and it's an and -- sorry, subsection 6 says, as used in this section expert means a person who is licensed in a state to engage in the practice of quote: professional engineering, land surveying, architectural, or landscape design. So specifically they could be an expert in any of those fields, but they're required to be an expert in at least those fields.

Mr. Marsh, the City's expert, is an expert in -- is a professional engineer. And his resume states that and it was attached to the

complaint. So to the extent that the -- that NBD and the other design professionals try to forward an argument that he is not an expert or he's not an expert in their particular field the statute doesn't require and to the statute's actual language he is a qualified expert.

Finally, the argument that NBD makes is that he -- Mr. Marsh, the City's expert, did not specifically name Nevada by Design or the other design professionals in his actual report. And that's not what's required in the statute either. He is not required to name in his report the design professionals that worked on the project. Rather he is supposed to give an opinion as to what the fault is on the property, which is what he did. You can look at it. It was attached to the complaint, his report in full. There's a conclusion section that lists out his conclusions.

Whether or not he named the actual design professional is irrelevant, because what the statute, NRS 11.258, requires is for the attorney, me, to consult with him. And that's exactly what I did. We discussed whether or not there was merit into filing the complaint. We discussed those issues and we discussed whether or not these particular individuals, design professionals should be included. He said yes and we both gave affidavits to that affect. That's what's required in the statute.

You can look more specifically at the pleading papers to see exactly the language, but quotes during argument that try to manipulate the statute is what they're trying to do. NBD and the other design professionals are trying to do. And the Court should not grant the

motion on 11.258 and the statute of repose for those reasons.

THE COURT: Thank you.

MR. DHALLA: Thank you.

MR. WENDLAND: All right. Thank you, Your Honor.

THE COURT: And as part of your reply I'd like you to specifically address the argument that counsel made is okay let's say I say its six and then on a motion for reconsideration it's ten, how do we avoid this absurd result?

MR. WENDLAND: Well first of all I'd start off with it's not an absurd result. It's the law as it stands today. Now counsel did make a representation that I want corrected on the record to the extent I can say it. He said I admitted that he'll prevail in ten days or something to that effect. I did not say that.

THE COURT: No, I'm not considering that.

MR. WENDLAND: Okay. Thank you.

THE COURT: I just want to know okay I say -- let's say I grant your motion and just based on the fact that it's six year statute of repose, what's to prevent them from filing a motion for reconsideration and saying well here's the change, the law is now such?

MR. WENDLAND: Right. So, Your Honor, you have to --

THE COURT: And that's for all the joinders too if you're going to argue.

MR. WENDLAND: Right, right. And they'll probably supplement whatever I say.

THE COURT: All right.

MR. WENDLAND: But this is the whole thing -- the whole reason I brought up previously today that there could be unintended consequences by having this hearing on October 21st. And I'm not going to rehash that too far, but there are additional arguments that state that the law of the case is at the time they file their complaint that they had to comply with the six year statute of repose.

When I first got this complaint, Your Honor, I was shocked. I said whoa wait a minute. This is pretty straight forward six years. I couldn't figure out why they filed the complaint. Under NRCP Rule 11 standards I assume this -- they're very competent counsel that they would have known that this is untimely. And then they brought up the AB 421. And I think it's in my opinion established here today that AB 421 goes into effect tomorrow.

Now if you grant the motion today this is a motion that ends the case. That means they would have to refile tomorrow a whole other complaint bringing up the 421 standard. And that's an issue that they can address in a separate pleading in a separate action at that time. So our position is today it should be dismissed with prejudice. And then they can go ahead and refile if they feel that they have a valid argument they would have to bring a new complaint. It's a new action.

THE COURT: So your argument is it's the date of the filing of the complaint as opposed to the date the hearing of the motion?

MR. WENDLAND: Right, so these are the arguments I didn't want to get too far into Your Honor because of a -- these were issues that don't exist today. But they would exist tomorrow like counsel

brought up. Well ten days from now what's going to stop me from bringing up AB 421. And that's fine they can do that. But there are other arguments that look at the law the date of the filing of the complaint, Your Honor,. And that's the argument we would present tomorrow or ten days from now.

So what would prevent them is Your Honor would go to and look at the complaint on the date of the filing, what was the law at the time of the complaint. And then Your Honor would have to still rule the six year statute of repose applies. And that's essentially my argument.

The other argument and again I did not want to get too far into that argument, Your Honor. Because these are issue that don't exist today. Today is very simple. What's the law today? Today is six years, period. Tomorrow it's ten years.

Now I do want to address the retroactive application. I don't think counsel has once mentioned in his oral argument NRS 218D.330. And in particular section 1 which says the law becomes effective on October 1st. And I thought in my argument I was clear and if I wasn't I apologize to the Court. They cited AB 221 a separate -- has nothing to do with this case, but the fact that they cited it shows an example of the Nevada Legislature moving up the effective date.

Now what they're trying to do is conflate, right, they're trying to conflate retroactivity with applicability. And in this case we were -- we cited Alaska court and the statute at hand that says until midnight tonight it's six years. And no matter how they read that section from AB 421, AB 421 isn't the law. I think that's just straight forward, it's not the law.

And tomorrow when they bring up or ten days from now when they bring up some -- or attempt to bring up some sort of a motion we can address that issue at that time. So Your Honor's bound by the law that exists at today in ruling on this motion.

I don't know if I answered Your Honor's question.

THE COURT: Somewhat and I guess I'm -- and I don't want to have to put you in a position, okay in ten days let's hear your argument. And that may be the case. I --

MR. WENDLAND: That is the concern.

THE COURT: -- depending on my ruling.

MR. WENDLAND: Therefore --

THE COURT: But I won't ask you to do that.

MR. WENDLAND: I appreciate that, Your Honor. But there are cases that say you look at the law at the time of the complaint. And that's essentially the argument. I didn't feel it was relevant today. It wasn't relevant for my motion because the law today is six years.

THE COURT: Understood.

MR. WENDLAND: It's relevant ten days from now and I reserve all my rights to bring that up. But I didn't want to go too far into that.

THE COURT: All right.

MR. WENDLAND: Going to the certificate of merit, I thought my motion was focused on very particular parts of NRS 11.258. Counsel went on some sidebar conversation about experts. My client is a civil engineer. I'm not saying Mr. Marsh isn't an expert in geotechnical

and I think he even mentioned he's an expert in civil engineering. My argument is that he had no opinions or conclusions relevant to my client's scope of work.

Now there are other motions, Your Honor, that deal with the argument that counsel made about experts and their disciplines. And I don't want to jump the gun, because I do have another motion with the architect that addressed that particular issue. But with respect to Nevada by Design the argument is --

THE COURT: It's a scope not a qualification.

MR. WENDLAND: Right it is. And I think if you look at the statute it says, you know, he has to consult. And I know he says he consulted with Mr. Marsh and all that. But there's got to be an opinion. There's got to be some basis for bringing the claim.

And here's the [indiscernible], he brought it against multiple disciplines. Your Honor, I've been doing construction defect for years. And typically what we see is a plaintiff will hire a slew of experts. Each expert will author their own certificate of merit report, which then counsel would unify into one document and present it. I rarely see a jack of all trades type situation. In fact this will probably be the first time I've seen it in many of the cases I've ever dealt with. Generally speaking when they sue multiple disciplines they have multiple reports and each report stands on its own and then it's encapsulated in a single statute. That's how counsel can make the representation that he consulted with the relevant experts, that there's a reasonable basis in law and fact to proceed.

If he hasn't consulted, and let's just take the mechanical guy as example. If he doesn't consult with a mechanical engineer how is a geotechnical engineer going to have any opinions at all? And how would plaintiff be able to present to this Court the argument that, look here it is. Here is our reasonable basis for proceeding against the mechanical engineer using a geotechnical opinion that contains no opinion relevant to the source.

So it is our issue that it is a scope issue in particular for Nevada by Design. The report is the devoid of any opinions relevant to my client. And by extension it's a violation of the affidavit of counsel. But it's also a violation of declaration of Mr. Marsh, because he opines that there's a reasonable basis to proceed when he has no opinions with respect to Nevada by Design. So with that as a secondary argument it is our contention that he's violated parts of NRS 11.258.

And under the *Otak* ruling, which our firm was involved in creating and I personally have written parts of the brief that went into it, I can attest the Supreme Court and the Nevada Legislature did not intend to go and hire just one guy to come up at the report. There has to be a basis for that, a reasonable basis in fact. It cannot just be, hey I can get a guy in the street to come in and opine on something. And oh by the way I can sue everybody based thereon. That just defies the intent, the spirit and the language of the statute. So for that reason we request dismissal based on NRS 11.202 and NRS 11.258 as a secondary basis.

THE COURT: Thank you.

MR. WENDLAND: Thank you.

MS. SPLAINE: Your Honor, Shannon Splaine. I just want to address your question briefly about the motion for reconsideration. The -- and I join in Mr. Wendland's comments. The issue is what we talked about when we started today. What's the law at the time they filed the complaint? The law at the time they filed the complaint said six years. That's still the law today. So the complaint needs to be dismissed because all have to operate on the laws that are in effect. When somebody files a complaint we can't operate on hypotheticals of what may happen in the future. That would be the absurd result.

What happens after October 1st is plaintiff would need to file a new complaint, because the law is different and they're arguing under the law change that their complaint is now valid. But that doesn't renew, revive a complaint that was illegal filed at the time it was filed.

The statute does not say June when the law was signed; it says October 1st. And what plaintiff wants to lead the Court to believe is because section 4 talks about homes that had completion dates before October 1st, how they differ from homes that completed after October 1st. Think about it this way. They're homes that completed in 2008, so they're still barred under the new law that goes into effect in October, because it's more than ten years. They're going to be some homes or some buildings that don't meet the new law and didn't meet the old law, because Legislature had to pick a date to make it effective.

Counsel wants to misconstrue that October date to allow the Court to think well I'm in ten days I'm good. So allow me to have my illegal filing that wasn't proper. The filing was not proper. If this motion

had been heard on September 9th, it would have been stricken. The time for reconsideration would have passed and after October 1st, if plaintiff elected they would have filed a new complaint arguing the new law applies. Just because the timing of this motion got kicked out doesn't change that fact pattern. The law is the law at the time you file.

That's the importance of why dismissal is appropriate now and why reconsideration isn't the correct route if they choose to go that way. It would be filing a new complaint and then all of us would have all kinds of legal arguments about the Legislative intent and what that all means. And that's an issue for a different day. That's not the issue here today.

THE COURT: Thank you, counsel.

MR. DHALLA: Can I just add one -- go ahead Jeremy.

THE COURT: Yeah, let's hear from all the joinders.

MR. KILBER: Your Honor, again I'll just address the 11.258 issues with respect to MSA. I think it's a little disingenuous to argue that an expert, any expert can opine on any scope of work. The statute states the expert must be able to opine in each discipline at issue, each discipline, not whatever issues are there but each discipline. They have to have the qualifications and licensure to be able to opine on the issue they're addressing.

Additionally the statute requires that they consult an expert in the relevant discipline. So when you're consulting with Mr. Marsh, who is a geotechnical engineer, he is not an expert in the relevant discipline pertaining to mechanical, electrical, and plumbing. They are wholly separate fields of engineering. And a mechanical engineer cannot do

any work in geotechnical fields of work.

So the base of knowledge that Mr. Marsh has while he's an engineer his knowledge is respect to soil. And he is maybe relevant with respect to soil, but that is not a relevant discipline to mechanical engineering, electrical engineering, plumbing engineering that have nothing to do with soils. He has not basis for coming up with any opinions with respect to mechanical, electrical, or plumbing engineering when that's not his field of study. It's not his field of work and he does not have a license to practice in the field of mechanical, electrical, or plumbing engineering.

If you don't have that knowledge base you cannot then opine that there's some sort of reasonable basis to assert claims against a field of practice you have nothing to do with. That's why the statute uses words like each discipline and relevant discipline. So that when you're consulting with the expert you can ensure that that person has the qualifications to later give opinions to the Court with respect to that field of work.

If it's their position that they are going to retain Mr. Marsh as their expert for trial with respect to mechanical, electrical, and plumbing engineering I welcome that case. I can't wait to depose him on those issues and get his opinions on what the mechanical, electrical, and plumbing engineer should have done on the project, because he is not qualified to opine on those issues. So to use him as their basis for their affidavit of merit against engineers that don't practice in the same field of work it's invalid.

The purpose of providing an affidavit of merit is to let the Court know someone with knowledge and experience and training looked at this and they determined that yes we should proceed against that party. That does not occur here. There's nothing in Mr. Marsh's report, nothing in his qualifications that even address the scope of work of MSA. And for that purpose we submit that his affidavit is invalid with respect to MSA and they cannot rely upon Mr. Marsh's conclusions to assert claims against MSA.

THE COURT: Thank you, counsel

MR. PARKER: Your Honor, Theodore Parker again. While I've been listening to both sides of this debate I was considering the practical affect that will occur if the Court makes a decision on a law that's effective tomorrow versus ruling on the law today -- as of today, Your Honor.

I've held Your Honor in high esteem as a practitioner for many years. And I'm sure that your skills will transition well onto the bench. But we've been practical practitioners our entire lives and our entire legal careers. And what I think is happening here is that the plaintiffs are asking this Court, I think somewhat hypocritically, to make a decision on the plain language of the law as it will be in effect tomorrow. And tomorrow they will suggest to you, Your Honor, you're confined by how the law is written today. So if you're confined by the way the law is written today you apply today's laws.

Now what will happen and I don't want to invite error into this case. So what I foresee happening, which I believe is in part what

plaintiff's counsel has said. If you were to grant the motion based upon today's law, the case would be ended. But we know they will refile and then they will ask this Court to apply the law as it stands as after October 1. And then the Court will get another bite at the apple. But if the Court was to deny this motion now then you're inviting an appeal. And what I don't want to happen is this Court to suffer an appeal that may be reversed on his first day.

Practically I think what will happen is if the motion is granted they will refile. You will have -- in fact the Court could ask that jurisdiction remain in this Court. Or they can file a motion of reconsideration because the law will change pending the order being signed. But there would be no reason to take it up is my point, to the Court of Appeals or the Supreme Court. And they would have during the pendency of the order and opportunity to file the motion for reconsideration based upon the new law. And then there's no right -- no reason for an appeal and the Court will have an opportunity to then hear all of the arguments based on the laws of today versus tomorrow suffering no further perhaps appellate involvement, Your Honor.

THE COURT: Thank you, Mr. Parker.

MR. PARKER: Thank you.

THE COURT: Mr. Welch?

MR. WELCH: Your Honor, thank you. I don't have anything further to add.

THE COURT: Thank you.

MR. DHALLA: Two quick points, Your Honor. The first is the

law at the time of the filing normally does apply. But it doesn't apply in cases in which the statutes or the law has changed and the Legislature has made it effective retroactively. So because the law changed and is effective retroactively it is applicable to this case. The City would not need to refile and then use the new law and get a new bite of the apple, whatever idiom that they've been using. The fact remains that the law changed effective retroactively.

And there is a slew of case law that states that including statute of limitations, time barring statutes, that the Legislature is allowed to affect cases that are pending. And that issue wasn't brought up until they brought it up in the reply, so I don't have those cases in front of Your Honor, on any of the briefs. I could easily submit them if you'd like to, but that's a fact of how retroactivity works when the Legislature is allowed to affect cases that are pending because that is their prerogative to do so. And I can get you those cases if you'd like.

It's -- I don't think that's in debate, but I think that they've glossed over the fact that they take for granted that the law in effect today. The law that is in effect today for this 11.202 is the ten year statute or repose, 11 -- AB 421 changed many things and we don't disagree. We agree that many of the statutes that were affected by AB 421 are affected tomorrow, but this particular one, the statute of repose that was changed in AB 421 is effective retroactively. It's the only time in the statute that the word retroactively has been used. And the Legislature meant something when they used effective retroactively.

They didn't mean to create this window where some litigants

would be out of luck or absurd results, right. And I know Your Honor's concerned with what happens to absurd results. We wouldn't be filing a new complaint. Just tomorrow you would have to overturn yourself of the Nevada Supreme Court would have to overturn you. That would be the only result of ordering this today.

But we don't even get to that. I only brought that up just to show that their argument doesn't make sense. We don't even get to that because I'm not saying that the ten year statute doesn't apply. In fact it does. It applied when we filed our complaint. It's because that portion of AB 421 was effective retroactively.

Regarding NRS 11.258, that's the affidavit of merit requirements. I haven't been practicing as long as Mr. Wendland. His hair is much more grey than mine. But I know they address a lot of -- they represent a lot of design professionals. And in fact the *Otak Nevada* case was represented by him and his firm. The fact remains that they would like NRS 11.258 to be expanded and have much more strict requirements on suing design professionals. But that's not what the statute says.

Specifically they conflate the affidavit requirements in med mal cases with the affidavit requirement in design professional cases. And we briefed that issue because if you -- it's important because if you look at what they're requiring that's what's required in med mal cases. And if you contrast the two statutes, the -- I can get you the number for the med mal statute, but it's in our opposition. But the fact remains that the Nevada Legislature created two different requirements. And if you read

them against each other you can see that a lot of the requirements that the design professionals are trying to make in this case are what would be required in med mal cases and is very different than 11.258 and the requirements for design professionals.

And the City complied with all the requirements for -- against design professionals. And specifically it had the expert report, the expert created an opinion. The opinion needed not say the -- a specific defendants and design professionals within that opinion. Simply I needed to consult with him after he created a report and an opinion. And we needed to consult regarding whether or not this had merit and it does.

They would rather have us -- and now addressing Mr. Kilber's argument on behalf of MSA. They would like us to prove our entire case in the complaint. If that were the case we'd just file a notice of judgment and we'd be done with it. We're not going to have only one expert in the entire case. Mr. Marsh is only satisfying and is one expert and he's satisfying the 11.258 requirements. If this case continues into discovery the City would have much more experts regarding mechanical, plumbing, all the other design -- landscaping, and all the other design professional fields to support its case, but that's not what's required in 11.258. Under their interpretation we'd have to prove our entire case with the complaint and that's not what's in the statute.

So that's all Your Honor.

THE COURT: Thank you counsel for the argument. I thought it was -- it helped me out a lot on both sides. I'm going to go ahead and

I'm going to grant the motion to dismiss based on the current statute of repose both at the time of the filing of the complaint as -- and as of today's date on both counts. Plaintiffs are free to file whatever avenue of appeal or reconsideration or whatever they want. And either a new Judge or the Appellate Court, my bosses however they want to rule on it. But as of today I'm going to make that ruling.

MR. WENDLAND: And I assume.

THE COURT: Any questions?

MR. WENDLAND: Yeah, I assume the NRS 11.258 is moot now?

THE COURT: I consider that a moot point at this time.

MR. WENDLAND: Your Honor, I actually have a proposed order if you'd like to sign off on it.

THE COURT: I would want you to run it by counsel.

MS. SPLAINE: Your Honor, just to clarify --

THE COURT: But my ruling is as of today. I don't want to get into another thing --

MR. WENDLAND: Right.

THE COURT: -- the date and the date I signed it.

MR. WENDLAND: And all the joinders as well I assume which is --

THE COURT: Yeah, include it all in one order, so we don't have --

MR. WENDLAND: Thank you.

MR. PARKER: Thank you, Your Honor.

THE COURT: Thank you.

MR. PARKER: And congratulations again on your appointment, Your Honor.

THE COURT: Thank you, Mr. Parker.

MR. WENDLAND: Yeah, we all join in that.

THE COURT: Thank you.

[Hearing concluded at 11:28 a.m.]

* * * * * *

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

Jessica Kirkpatrick

Jessica Kirkpatrick
Court Recorder/Transcriber

Exhibit 4

Exhibit 4

ORDG

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DISTRICT COURT
CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **ORDER GRANTING DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO CHANGE DATE OF HEARING ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT ON ORDER SHORTENING TIME**

ORDER GRANTING DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO CHANGE DATE OF HEARING ON MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT ON ORDER SHORTENING TIME

THIS MATTER having come before the Court on September 30, 2019 on Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' ("NBD") Motion to Change the Date of the Hearing on its Motion to Dismiss, or, in the alternative, Motion for Summary Judgment on Order Shortening Time; and the Court having read and considered the submitted papers, having heard oral argument and having found GOOD CAUSE, hereby GRANTS NBD's Motion to Change the Date of the Hearing on the Motion to Dismiss or in the alternative, Motion for Summary Judgment on Order Shortening Time and hereby moves the hearing on NBD's Motion to Dismiss or in the alternative, Motion for Summary Judgment from October 21, 2019 to September 30, 2019.

IT IS SO ORDERED.

DATED this 14 day of October, 2019.

J. Charles Thompson TS

DISTRICT COURT JUDGE

Respectfully Submitted by:

WEIL & DRAGE, APC

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ANTHONY D. PLATT, ESQ.
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Exhibit 5

Exhibit 5

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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **[HEARING REQUESTED]** **NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** Hearing Date: _____ Hearing Time: _____

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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **[HEARING REQUESTED]** **DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S MOTION TO DISMISS** Hearing Date: _____ Hearing Time: _____

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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **DEFENDANT MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS JOINDER TO DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** Hearing Date: 09/09/19 Hearing Time: 8:30 a.m.

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EXHIBIT 28
PETITIONERS'APPENDIX

EXHIBIT 28
PETITIONERS'APPENDIX

JOIN
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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S JOINDER TO DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' OPPOSITION TO MOTION TO ALTER JUDGMENT; OPPOSITION BY INCORPORATION AND REQUEST TO RESET PRIOR MOTION TO DISMISS** **Hearing Date: 12/17/2019** **Hearing Time: 9:00 a.m.** **Hearing Location:** **Phoenix Building, 11th Floor 110** **330 S. 3rd Street** **Las Vegas, NV 89101**

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DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S JOINDER TO DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' OPPOSITION TO MOTION TO ALTER JUDGMENT; OPPOSITION BY INCORPORATION AND REQUEST TO RESET PRIOR MOTION TO DISMISS

COMES NOW, Defendant DEKKER/PERICH/SABATINI, LTD. (hereinafter, "DPS"), by and through its counsel of record, the law firm of WEIL & DRAGE, APC, and hereby joins (and incorporates by reference as if fully stated herein) all of the arguments and relief requested by Defendant Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' ("NBD") Opposition to Plaintiff City of North Las Vegas' ("Plaintiff") Motion to Alter Judgment. DPS further adds additional arguments in its opposition to the Motion to Alter.

DATED this 26th day of November, 2019.

WEIL & DRAGE, APC

By: */s/ John T. Wendland*
_____
JOHN T. WENDLAND, ESQ.
Nevada Bar No. 7207
JEREMY R. KILBER, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINDER AND OPPOSITION

I. LEGAL ARGUMENT

A. DPS JOINS IN FULL AND INCORPORATES BY REFERENCE AS IF FULLY STATED HEREIN, NBD'S OPPOSITION TO THE MOTION TO ALTER AND CONTENDS THAT THE MOTION TO ALTER SHOULD BE DENIED FOR SAID REASONS.

DPS joins and incorporates by reference as if fully stated herein, all of the factual, procedural and legal arguments (and attachments) raised in NBD's Opposition to Plaintiff's Motion to Alter. *See*, NRCP 10(c). The arguments, positions and legal authority raised by NBD, all apply to DPS's situation as Plaintiff's claims were time barred under NRS 11.202/AB 125 as of July 13, 2015 and the Complaint was an improper fugitive document when filed on July 11, 2019. *Alsenz v. Twin Lakes Village, Inc*., 108 Nev. 1117, 1120, 843 P.2d 834, 836 (1992) (*citing, Nev. Lakeshore Co. v. Diamond Elec., Inc*., 89 Nev. 293, 295-96, 511 P.2d 113, 114 (1973)); *Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 391, 46 P.3d 62, 64 (2002); *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 775 n. 2, 766 P.2d 904, 905 n. 2 (1988); *see also*, the Order attached hereto as **Exhibit 1**. A previously barred claim cannot be resurrected under subsequent extension of the statutory limitation period. *Davis v. Valley Distr. Co*., 522 F.2d 827, 830 (9th Cir. 1975) *cert. denied*, 429 U.S. 1090 (1977) (*citing James v. Continental Ins. Co*., 424 F.2d 1064, 1065-66 (3rd Cir. 1970) ("It is a general rule that subsequent extensions of a statutory limitation period will not revive a claim previously barred").

DPS adds that granting the Motion to Alter would also violate DPS's constitutional rights under the Due Process Clauses of the U.S. Constitution and the Nevada Constitution. *School Bd. of City of Norfolk v. U.S. Gypsum Co*., 360 S.E.2d 325, 328 (Va. 1987) (*citing, Stevenson, Products liability and the Virginia Statute of Limitations-A call for the Legislative Rescue Squad*, 16 U.Rich.L.Rev. 323, 334 n. 38 (1982)); *Chumley v. Magee*, 33 So.3d 345, 351 (La. App. 2 Cir. 2010) (an acquisition of a defense to a cause of action becomes a vested property right and protected by due process guarantees); *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1244

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(1994)(internal cites omitted)(the defense based on expiration of the statute of limitations is a vested right for which the legislature may not constitutionally revive a time barred claim); *Police & Fire Ret. System of City of Detroit v. IndyMac MBS, Inc*., 721 F.3d 95, 106 (2013) (statutes of repose create a "***substantive right*** in those protected to be free from liability after a legislatively-determined period of time") (*citing, Amoco Prod. Co. v. Newton Sheep Corp*., 85 F.3d 1464, 1472 (10th Cir. 1996)) (emphasis added). Therefore, the retroactive application of AB 421 to DPS's vetted/substantive rights provided when Plaintiff's claims were terminated in 2015 would render the retroactive language in AB 421 Sect. 11(4) unconstitutional.

Additionally, Plaintiff was on notice that the September 30, 2019 hearing could consider all issues and arguments, including the substantive arguments in NBD's Motion to Dismiss. Plaintiff had multiple notices and did its utmost to delay a decision. Thus, the EDCR 2.26 argument is baseless as Plaintiff had prior notice and Plaintiff should not profit from its actions by delaying and changing the circumstances to impact the arguments in NBD's Motion to Dismiss and DPS's Joinder. *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633, 636-67 (1992).

DPS also adds that none of the joinder arguments in Plaintiff's Motion are relevant for the reasons raised by NBD. Moreover, any EDCR argument as to time to join NBD's Motion to Dismiss is also irrelevant as to DPS as it immediately joined NBD's Motion to Dismiss on August 6, 2019 (one day after NBD filed its Motion).

B. <u>IF THE COURT DECIDES TO GRANT PLAINTIFF'S MOTION TO ALTER, THE COURT MUST CONSIDER THE NRS 11.258 ARGUMENTS THAT IT PREVIOUSLY FOUND TO BE MOOT.</u>

If however, the Court is considering the granting of the Motion to Alter (thereby denying the plethora of arguments raised by NBD and joined by DPS herein, including constitutional violations which will require DPS and others to file a Writ to the Supreme Court), the Court respectfully, must also consider all arguments in DPS's Motion to Dismiss Pursuant to NRS 11.258. *See*, Motion to Dismiss (pleading only) attached hereto as **<u>Exhibit 2</u>**. At the time the Court issued its Order, the Court found that the design professional's NRS 11.258 arguments were

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moot as the statute of repose arguments terminated this action with prejudice. *Id*. In rendering its arguments, DPS's Motion to Dismiss was fully briefed (with Opposition and Reply) and ready for hearing and a decision. At the hearing, NRS 11.258 arguments were presented but the Court did not rule on those arguments as the action was dismissed based on the statute of repose. If the Court is entertaining the alteration of the Order, these arguments will no longer be moot and will need to be raised, argued and decided by the Court.

As stated therein, the core arguments in DPS's Motion to Dismiss is that a geotechnical engineer is not qualified in the relevant discipline of the services provided by DPS (architectural services) nor did Mr. Marsh provide any opinions relevant to DPS. *Id.* Thus, Plaintiff failed to comply with NRS 11.258 as it did not consult with an expert in the relevant discipline and whose report did not contain any opinions against DPS (therefore both a scope and qualification deficiency). These arguments are separate from the statute of repose issues in the Order and DPS respectfully requests that the Court if it decides to grant the Motion to Alter, the Court must first consider the fully briefed arguments in DPS's Motion to Dismiss based on NRS 11.258 which provide a separate and independent basis for dismissal of the Complaint and the claims of the Plaintiff. *Id*.

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II.

CONCLUSION

For the reasons stated herein and in NBD's Opposition to the Motion to Alter, DPS contends that Plaintiff's Motion to Alter is improper and should be denied. To the extent the Court entertains and considers altering the Order, DPS's NRS 11.258 arguments will no longer be moot and will need to be considered by this Court prior to issuing a final decision.

DATED this 26th day of November, 2019.

WEIL & DRAGE, APC

/s/ *John T. Wendland*
By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of November, 2019, service of the foregoing **DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S JOINDER TO DEFENDANT NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' OPPOSITION TO MOTION TO ALTER JUDGMENT; OPPOSITION BY INCORPORATION AND REQUEST TO RESET PRIOR MOTION TO DISMISS** was made this date by electronically serving a true and correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

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/s/ *Ana M. Maldonado*

Ana M. Maldonado, an Employee of
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Exhibit 1

Exhibit 1

ORIGINAL

ORDG
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DISTRICT COURT
CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **ORDER GRANTING NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND ALL JOINDERS TO SAME** Hearing Date: 9/30/19 Hearing Time: 8:30 am

ORDER GRANTING NEVADA BY DESIGN, LLC d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND ALL JOINDERS TO SAME

THIS MATTER having come before the Court on September 30, 2019 on Nevada By Design, LLC d/b/a Nevada By Design Engineering Consultants' ("NBD") Motion to Dismiss, or, in the alternative, Motion for Summary Judgment and all Joinders to same; and the Court having read and considered the submitted papers, having heard oral arguments from counsels and finding good cause, hereby finds and rules as follows

FINDINGS

1. The Court finds that Plaintiff City of North Las Vegas ("Plaintiff") filed its Complaint on July 11, 2019.

2. The Court finds that the Plaintiff represented that the Notice of Completion for the subject project was recorded on July 13, 2009.

3. The Courts finds that pursuant to NRS 11.202, no action may be commenced for any deficiency in design, planning, supervision or observation of construction or the construction of an improvement to real property more than six (6) years after substantial completion.

4. The Court finds that AB 421's Effective Date is October 1, 2019.

5. The Court finds that AB 421's Section 11(4) retroactive application is not applicable to Plaintiff's Complaint.

6. The Court finds that the Plaintiff failed to timely file its Complaint and therefore, the Complaint and claims therein violate NRS 11.202.

7. The Court did not address NBD's arguments based on NRS 11.258 as the granting of the Motion to Dismiss, or in the alternative, the Motion for Summary Judgment based on NRS 11.202 renders these arguments moot.

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8. The Court finds that Defendants Richardson Construction, Inc.'s and Guarantee Company of North America USA's (collectively, the "Richardson Parties") motion for summary judgment scheduled for hearing on October 21, 2019 is moot and the hearing is vacated.

9. The Court finds that Defendants P&W Bonds, LLC's and Paffenbarger & Walden, LLC's (collectively, the P&W Parties") motion to dismiss scheduled for hearing on October 21, 2019 is moot and the hearing is vacated.

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ORDER

IT IS HEREBY ORDERED that NBD's Motion to Dismiss, or in the alternative, Motion for Summary Judgment and all Joinders to these Motions are hereby GRANTED.

IT IS FURTHER ORDERED that Plaintiff's claims and the Complaint against NBD and all joining parties are hereby dismissed with prejudice.

IT IS FURTHER ORDERED that the Richardson Parties' motion for summary judgment is deemed moot and the hearing for said motion is hereby vacated.

IT IS FURTHER ORDRED that the P&W Parties' motion to dismiss is deemed moot and the hearing for said motion is hereby vacated.

DATED this 14 day of October, 2019.

J. Charles Thompson

DISTRICT COURT JUDGE
J. CHARLES THOMPSON

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Respectfully Submitted by:

WEIL & DRAGE, APC

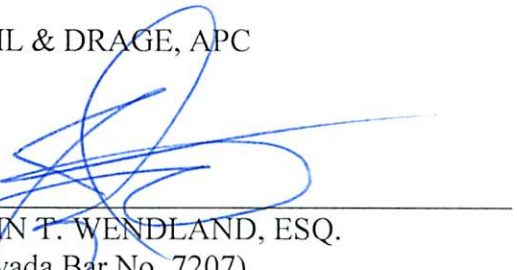

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Exhibit 2

Exhibit 2

MDSM
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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **[HEARING REQUESTED]** **DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S MOTION TO DISMISS** Hearing Date: _____ Hearing Time: _____

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DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S MOTION TO DISMISS

COMES NOW Defendant DEKKER/PERICH/SABATINI, LTD. (hereinafter, "DPS"), by and through its attorneys of record, the law firm of WEIL & DRAGE, APC, and pursuant to N.R.C.P. 12(b)(5) & 12(f), hereby files its Motion to Dismiss Plaintiff CITY OF NORTH LAS VEGAS' (the "Plaintiff") Complaint.

This Motion is based on the Memorandum of Points and Authorities submitted herein, all pleadings, papers, and files herein, the evidence adduced at hearing, and any oral argument this Honorable Court will entertain.

DATED this 6th day of August, 2019.

WEIL & DRAGE, APC

/s/ *John T. Wendland*

By: _____

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(Nevada Bar No. 7207)
JEREMY R. KILBER, ESQ.
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MEMORANDUM OF POINTS AND AUTHORITIES

I.

PROCEDURAL AND FACTUAL HISTORY / INTRODUCTION

This action arises from a complaint filed by the City of North Las Vegas (the "Plaintiff") on July 11th, 2019 against various design professionals and construction entities concerning alleged settlement and expansive soil issues at Fire Station 53 (the "Project"). Plaintiff claims that after completing the Project, it began to notice distress in the building including wall cracks, separation and interior slab cracking. *See*, Complaint at Para. 46 attached hereto as **Ex. A** (pleading only). To investigate these issues, Plaintiff hired American Geotechnical, Inc. ("AGI"), a Plaintiff oriented geotechnical firm, to perform a "***geotechnical investigation***" of Fire Station 53. *Id*. at Para. 47 (emphasis added). AGI investigated the site and concluded in December 2017 that the distress at Fire Station 53 and surrounding appurtenances arose due to a combination of excessive differential settlement and expansive soil. *Id*. at Para. 48. Thereafter, the Plaintiff implemented repairs to Fire Station 53 and filed this instant lawsuit against any entity involved in the project.

As stated by other parties, Plaintiff's Complaint is significantly untimely, by four years as the statute of repose expired in July, 2015. See, Nevada By Design's Motion to Dismiss filed separately. However, Plaintiff's Complaint as to DPS is further defective, as it failed to properly comply with the certificate of merit statutes under N.R.S. 11.258. As Plaintiff failed to comply with N.R.S. 11.258, the Complaint is *void ab initio*[1], *lacks legal effect* and dismissal is required from the Court.

II.

LEGAL STANDARD

N.R.C.P. 12(b) authorizes the dismissal of lawsuits when they fail to state a claim upon which relief may be granted. When, after construing the pleading liberally and drawing every fair

[1] "Void Ab Initio" means "from the beginning." *Washoe Med. Ctr*., 122 Nev. 1298 at fn. 23, 148 P.3d 790 (2006) (*citing, Black's Law Dictionary* 5 (8th Ed. 2004)).

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intendment in favor of the plaintiff, no claim has been stated, dismissal is proper. *Brown v. Kellar*, 97 Nev. 582, 583, 636 P.2d 874, 874 (1981).

Rule 12(b)(5) of the Nevada Rules of Civil Procedure authorizes dismissal of a Complaint when the Complaint fails to state a claim upon which relief can be granted. A Motion to Dismiss is properly granted where the allegations in the challenged pleading, taken at "face value" and construed favorably in the Plaintiff's behalf, fail to state a cognizable claim for relief. *Morris v. Bank of America Nevada*, 110 Nev. 1274, 886 P.2d 454, 456 (1994). While a court will presume the truth of the plaintiff's factual allegations, the presumption does not "necessarily assume the truth of legal conclusion merely because they are cast in the form of factual allegations in [the] complaint." *McMillan v. Dept. of Interior*, 907 F.Supp. 322, 327 (D. Nev. 1995). In fact, conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *Comm. For Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 311 F. Supp.2d 972, 984 (D. Nev. 2004). Dismissal is proper where the allegations are insufficient to establish the elements of a claim for relief. *Stockmeier v. Nevada Dept. of Corrections Psych. Rev. Panel*, 124 Nev. Adv. Op. 30, 183 P.3d 133, 135 (2008).

N.R.C.P. 12(f) further states: "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

III.

LEGAL ARGUMENT

THE PLAINTIFF FAILED TO COMPLY WITH N.R.S. 11.258 AS AGAINST DPS AND THEREFORE, PLAINTIFF'S CLAIMS AND COMPLAINT MUST BE DISMISSED PURSUANT TO N.R.S. 11.259

1. DPS is a Qualified Design Professional and the Project is a Non-Residential Project requiring the Plaintiff to Fully Comply with NRS 11.258

As the Court is well versed, whenever there are claims brought against a design professional, the claimant (in this case, the Plaintiff) is required to comply with ***all*** requirements in

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N.R.S. 11.258. This includes filing concurrently with the service of the first pleading in the action, an Affidavit of Merit that meets the requirements of N.R.S. 11.258(1)(a)-(d). The Plaintiff is also required to attach to the Affidavit of Merit, a report, supporting documents and a statement that complies with Section (3)(a)-(e). If there are any failures, the "court shall dismiss an action governed by NRS 11.258" when an action is "commenced against a design professional …if the attorney for the complainant fails to: (a) File an affidavit required pursuant to NRS 11.258; [or] (b) File a report required pursuant to subsection 3 of NRS 11.258." *See*, N.R.S. 11.259(1)(a)-(c).

Here, Plaintiff avers that DPS is a "design professional" specializing in architectural design services and therefore, Plaintiff was required to file an Affidavit of Merit. *See*, Complaint at Para. 22; *see also*, "Exhibit 1" attached to Plaintiff's Complaint attached hereto as **Ex. B**; *see also*, N.R.S. 11.2565(2)(b). Moreover, the Project is a fire station and therefore the claims involve design related matters of a nonresidential building or structure. *Id.*, Complaint at Para. 22-24; **Ex. B**.

Given the above undisputed facts, Plaintiff is required to fully comply with N.R.S. 11.258.

2. Plaintiff's N.R.S. 11.258 Affidavit of Merit Fails to Comply with the Requirements of the Statute:

Nevada's Affidavit of Merit statutes in N.R.S. 11.258 apply to actions involving nonresidential construction. Pursuant to said statutes, the attorney for a claimant *shall* file and serve an Affidavit of Merit **concurrently with the first pleading in the action** when an action is commenced against a design professional. The affidavit *must* state that the attorney:

(a) has reviewed the facts of the case;

(b) has consulted with an expert;

(c) reasonably believes the expert who was consulted is knowledgeable ***in the relevant discipline involved in the action***; and

(d) has concluded on the basis of his review and the consultation with the expert that the action has a reasonable basis in law and fact. N.R.S. 11.258(1)(a)-(d) (*emphasis added).*

Here, Plaintiff's counsel, Mr. Dhalla, prepared an Affidavit of Merit that was attached to the Complaint. In his Affidavit, Mr. Dhalla, attests that he made the "affidavit pursuant to NRS

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11.258." *See,* Affidavit of Merit attached hereto as **Ex. C**. Mr. Dhalla further attests that he consulted with Mr. Edred T. Marsh, P.E. of AGI and that "the expert is experienced in each discipline which is the subject of the report, **specifically** in the fields of geotechnical, civil and forensic engineering." *Id*. at Item 5(a)-(b) (emphasis added). Therefore, the Affidavit of Merit from Mr. Dhalla admits that Mr. Marsh is a specialist in the fields of geotechnical and civil engineering and related forensic engineering (essentially litigation support work in these fields). Nothing in the Affidavit of Merit identifies Mr. Marsh as an expert in the field of architecture or any other engineering discipline beyond geotechnical or civil engineering.

For this action, DPS served as the architect of record and structural engineer. Therefore, to comply with N.R.S. 11.258(1)(c) requirements as to DPS, Mr. Dhalla was required to consult with an expert "knowledgeable in the relevant discipline" which required consultation with architectural and structural engineering experts. He [Mr. Dhalla] clearly did not. From the Affidavit and the attached curriculum vitae of Mr. Marsh, it is clear that Plaintiff sole consulting expert, Mr. Marsh, is not an architect, is not a structural engineer and is not able to opine on the professional services provided by DPS or provide standard of care opinions as to these services. *See,* curriculum vitae attached hereto as **Ex. D**. Therefore, by failing to consult with architectural and structural experts, Plaintiff failed to comply with N.R.S. 11.258(1)(c) as Mr. Marsh is not knowledgeable in the relevant fields involving DPS's services.

By extension, Mr. Dhalla is unable to conclude, based on his review and consultation with Mr. Marsh that the action has a reasonable basis in law and fact as to DPS. *See,* N.R.S. 11.258(1)(d).

In *Otak Nevada, LLC v. Eighth Judicial District Court*, the Nevada Supreme Court held that each party was required to file a separate expert report and attorney affidavit that are particularized as to each party's claims. 127 Nev. 593, 599, 260 P.3d 408, 412 (2011). The *Otak* Court went on to argue that requiring an expert report and affidavit particularized to each party is not unreasonable as each party "must justify its claims of nonresidential construction malpractice based on that party's relationship with the defendant." *Id*.

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The legislative history[2] in discussing N.R.S. 11.258 adds further support that the Plaintiff was required to consult with an appropriate expert that is knowledgeable in the field of architecture and structural engineering with respect to the claims against DPS. This is established from the following legislative statements raised during discussions on the enactment of N.R.S. 11.258:

1. A construction defect claim against a design professional, unlike claims against a contractor or subcontractor, is a professional negligence claim. To prove a professional negligence claim, you have to show the design professional failed to meet the standard of care. There is only one way to prove that. You have to bring an expert to the hearing to show the standard of care and that the design professional fell below the standard of care. Attorneys have to find an expert to prove their case. The certificate of merit requires the expert earlier in the proceedings. They review the case **to show merit to a claim and a reasonable basis to proceed with a suit**. *See*, Legislative History of N.R.S. 11.258 attached hereto as **Ex. E** (handwritten brackets and asterisks).

2. In general terms, the bill requires an attorney to file an affidavit with its initial pleading. The affidavit would state that the attorney has consulted with an independent design professional **in the appropriate field** and upon such consultation and review has concluded that the complaint **against the design professional** has a reasonable basis in law and fact. The **affidavit must also contain a report submitted by the independent design professional setting forth the basis for that professional's opinion that there is a reasonable basis for commencing the action against the design professional**. *Id*. (Emphasis added).

3. NRS 11.258 was enacted to ensure that suit filed against a design professional have a **reasonable basis in law and fact** that merit the expenditure of judicial time and effort. **The standard of proof for professional negligence requires a finding that the design professional has failed to employ the standard of care and skill exercised by reputable members of the same professional**. This law ensures that actions brought against that design professional **have a reasonable likelihood of meeting that burden of proof at the time of trial**. *Id*. (Emphasis added).

4. It is also good litigation practice to ensure that professional negligence cases include analysis generally done before the complaint is filed **so that the complaint can be specific as to the errors alleged**. *Id*. (Emphasis added).

5. It is not a bar to bringing the suit; it accelerates something that is going to happen anyway in the lawsuit. You cannot typically get to the jury or to the end of one of these

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[2] The ultimate goal of interpreting statutes is to effectuate the Legislature's intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

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lawsuits **without having an expert opine on the propriety of the conduct of the design professional**. *Id*. (Emphasis added).

As shown above, multiple excerpts from the legislative history of N.R.S. 11.258 establish that said statutes were enacted to prevent frivolous suits against design professionals and required the claimant (here, the Plaintiff) to engage and consult with an appropriate expert (or experts) prior to commencement of the action. The Nevada Legislature was keen on the claimant retaining independent experts, qualified ***in the applicable fields of discipline***, to provide opinions as to the standard of care and any failures in same. In fact, the Nevada Supreme Court in interpreting the legislative history found that the intent of N.R.S. 11.258 and 11.259(1) was to "…advance judicial economy and prevent frivolous suits against design professionals by requiring a complaint to include an expert report and attorney affidavit regarding the suit's reasonable basis." *In re CityCenter Constr. & Lien Master Litig*., 129 Nev. 669, 678, 310 P.3d 574, 581 (2013).

Here, while Plaintiff consulted Mr. Marsh, he is not an architect and is not a structural engineer. This is established from Mr. Marsh's Declaration wherein he admits that he is not an expert in these fields. *See*, Declaration of Marsh attached hereto as **Ex. F**] engineering expert and therefore, would not be qualified to opine on DPS's services. Accordingly, Plaintiff failed to comply with N.R.S. 11.258(1)(c)&(d).

3. AGI's Expert Report fails to Comply with N.R.S. 11.258(3) Requirements:

In addition to Affidavit of Merit, Plaintiff is also required to attach the following to the Affidavit pursuant to N.R.S. 11.258(3):

(a) the expert's resume;

(b) a statement that the expert **is experienced in each discipline which is the subject of the report**;

(c) a copy of each non-privileged document reviewed by the expert in preparing his report including, without limitation, each record, report and related document that the expert has determined is relevant to the allegations of negligent conduct that are the basis for the action;

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(d) **the[3] conclusions of the expert and the basis for the conclusions**; and

(e) **a statement that the expert has concluded that there is a reasonable basis for filing the action**. NRS 11.258(3).

Here, Mr. Marsh's resume establishes that he is not an architect, a structural engineer or qualified to opine on any discipline outside of geotechnical matters. *See*, **Ex. D**. Mr. Marsh's Declaration further admits that he is not knowledgeable in the fields of architecture and structural engineering. *See*, **Ex. F**.

In addition to these documents, the AGI's report attached to support Plaintiff's Affidavit of Merit, is devoid of any statements critical of DPS's services (architecture or structural engineering). The AGI report is titled "Geotechnical Investigation" and only provides opinions concerning geotechnical issues. *See*, AGI report attached hereto as **Ex. G**. In fact, the AGI report even states that "[t]he intent of this report is to advise our client **on geotechnical matters** involving the proposed improvements." *Id*. at Pg. 8, Section 11.0 "Remarks" (emphasis added). Accordingly, as the AGI report is expressly limited to geotechnical matters, the report cannot be used to support the Affidavit of Merit against DPS, as its services for the Project were outside of this discipline.

By extension, Mr. Marsh's 11.258(3)(e) statement is limited to the geotechnical issues identified in the AGI Report and is not relevant to any discipline outside of the geotechnical issues. Stated differently, the 3(e) statement is a representation to the Court and all receiving parties that the action has a reasonable basis for its filing. However, the statement cannot be relevant to any discipline beyond the expertise of the retained and consulted expert. This would be akin to Mr. Marsh providing standard of care opinions. To provide a standard of care opinion, the expert must be knowledgeable in the relevant discipline which is the whole point of consulting the expert in the first place. Since Mr. Marsh, as admitted in his Declaration, is not knowledgeable in the areas of practice by DPS, then his 11.258(3)(e) statement is irrelevant as to DPS.

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[3] The use of the word "the" means: "[i]n construing statute, definite article 'the' particularizes the subject which it precedes and is word of limitation as opposed to indefinite or generalizing force 'a' or 'an'." *Black's Law Dictionary*, 1477 (5th Ed. 1990) (*citing*, *Brooks v. Zabka*, 450 P.2d 653, 655 (Colo. 1969)). Thus, the report must contain "**the**" opinions of AGI that is particular to each defendant party and not just a generic summary of opinions.

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For said reasons, Plaintiff failed to comply with N.R.S. 11.258(3)(b)(d)&(e). Mr. Marsh is not experienced in the area of practice of DPS (architectural and/or structural); his conclusions in the AGI Report are expressly limited to "geotechnical matters" which DPS did not provide; and his 3(e) statement is irrelevant as to DPS's services.

4. Plaintiff's Failures to Comply with N.R.S. 11.258 Warrant Dismissal of the Complaint as to DPS:

N.R.S. 11.259 specifically states:

1. ***The court shall dismiss*** an action involving nonresidential [and/or nonresidential] construction ***if the attorney for the complainant fails to***:
(a) File an affidavit required pursuant to NRS 11.258;
(b) File a report required pursuant to subsection 3 of NRS 11.258; or
(c) Name the expert consulted in the affidavit required pursuant to subsection 1 of NRS 11.258.

Here, Plaintiff failed to provide the following:

- Plaintiff's Affidavit of Merit failed to comply with N.R.S. 11.258(1)(c)&(d) as Plaintiff's counsel consulted with Mr. Marsh who is not an expert in the field of architecture or structural engineering. *See*, **Exs. D & F**. Moreover, as Mr. Marsh's opinions were limited to geotechnical matters (*see*, **Ex. G**), Plaintiff's counsel had no reasonable basis in law and fact to file the Complaint against DPS as his consultation was limited to geotechnical issues.

- Plaintiff failed to file expert report from a qualified architectural and structural engineering expert as required by NRS 11.258(3)(b) (*see*, **Exs. D&F**);

- AGI's Report contained no conclusions critical of DPS or any opinions as to architectural or structural engineering issues. *See*, **Ex. G**. In fact, the report was expressly limited to geotechnical matters, which are outside of DPS's services. *Id*. Accordingly, the opinions of AGI were irrelevant to DPS in violation of N.R.S. 11.258(3)(d).

- Finally, Mr. Marsh's 3(e) statement in his Declaration is limited to an opinion as to geotechnical engineering matters. Nothing in the AGI report nor in Mr. Marsh's qualifications would render the 3(e) statement as being relevant to DPS.

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In light of Plaintiff's failure to comply with NRS 11.258, DPS respectfully requests presents that pursuant to NRS 11.259, dismissal[4] is required and Plaintiff is not entitled to amendment or cure. *In re CityCenter Constr,* 129 Nev. 669, 310 P.3d 574.

5. <u>The failure of Plaintiff to comply with N.R.S. 11.258 renders its Complaint Void Ab Initio</u>:

The terms and requirements in N.R.S. 11.258 are unambiguous. ***NRS 11.258(1)*** requires that an affidavit and expert report shall be filed concurrently with the first pleading in the action. The use of the word "shall" imposes a duty to act and the filing of said affidavit and expert report is not optional. *See,* NRS 0.025(1)(d); *see also, SNEA v. Daines,* 108 Nev. 15, 19, 824 P.2d 276, 278 (1992).

As shown herein, Plaintiff failed to file an Affidavit that fully complied with N.R.S. 11.258(1)(c)&(d). Said failure is not exempted under NRS 11.258(2). Given this failure, the Complaint is defective and is rendered void *ab initio* which cannot be amended or cured to bring said defect into compliance with NRS 11.258 (as the pleading does not exist). *Otak*, 127 Nev. at 599. 260 P.3d at 412. Similarly, the expert report from AGI only discusses geotechnical issues and the qualifications and the 3(e) statement by Mr. Marsh is limited to geotechnical matters. None of the opinions or the qualifications of Mr. Marsh would implicate DPS.

Thus, the only remedy available if the Plaintiff fails to comply with N.R.S. 11.258 is dismissal, as the underlying purpose of N.R.S. 11.258 is to ensure actions are brought in good faith and based on competent expert opinions. *See,* N.R.S. 11.259, *see also, Otak, supra; In re CityCenter Constr., supra*.

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[4] Under Nevada law, the Court must follow the plain language in the statute and must avoid interpretations that render any of the language therein superfluous or meaningless. *George v. State*, 128 Nev. 345, 348-49, 279 P.3d 187, 190 (2012) (*citing, Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). If the language is clear and unambiguous, it must be enforced *as written*. *Id*.

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IV.

CONCLUSION

As shown herein, Plaintiff failed to comply with N.R.S. 11.258. For said failures, N.R.S. 11.259 mandates dismissal and DPS respectfully requests that the Court dismiss the Complaint under N.R.C.P. 12(b)(5) or N.R.C.P. 12(f).

DATED this 6th day of August, 2019.

WEIL & DRAGE, APC

/s/ *John T. Wendland*

By: _____

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Attorneys for Defendant,
DEKKER/PERICH/SABATINI, LTD.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2019, service of the foregoing **DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S MOTION TO DISMISS** was made this date by electronically serving a true and correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

Justin L. Carley, Esq.
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/s/ *Joanna Medina*

Joanna Medina, an Employee of
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EXHIBIT 29
PETITIONERS'APPENDIX

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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S JOINDER TO DEFENDANT J.W. ZUNINO & ASSOCIATES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER** **Hearing Date: 12/17/2019** **Hearing Time: 9:00 a.m.** **Hearing Location:** **Phoenix Building, 11th Floor 110** **330 S. 3rd Street** **Las Vegas, NV 89101**

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DEFENDANT DEKKER/PERICH/SABATINI, LTD.'S

JOINDER TO DEFENDANT J.W. ZUNINO & ASSOCIATES, LLC'S

OPPOSITION TO PLAINTIFF'S MOTION TO ALTER

COMES NOW, Defendant DEKKER/PERICH/SABATINI, LTD. (hereinafter, "DPS"), by and through its counsel of record, the law firm of WEIL & DRAGE, APC, and hereby joins in the arguments presented by Defendant J.W. Zunino & Associates, LLC ("JWZA") in its Opposition to Plaintiff's Motion to Alter. DPS further incorporates by reference as if fully stated in this joinder, the arguments, authorities and citations to the record/exhibit in JWZA's Opposition starting from Pg. 2: Line 8-Pg. 9: Line 9. *See*, NRCP 10(c).

DATED this 26th day of November, 2019.

WEIL & DRAGE, APC

By: */s/ John T. Wendland*
_____
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CERTIFICATE OF SERVICE

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EXHIBIT 30
PETITIONERS'APPENDIX

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PETITIONERS'APPENDIX

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DISTRICT COURT

CLARK COUNTY, NEVADA

CITY OF NORTH LAS VEGAS, Plaintiff, vs. DEKKER/PERICH/SABATINI LTD.; RICHARDSON CONSTRUCTION, INC.; NEVADA BY DESIGN, LLC D/B/A NEVADA BY DESIGN ENGINEERING CONSULTANTS; JW ZUNINO & ASSOCIATES, LLC; MELROY ENGINEERING, INC. D/B/A MSA ENGINEERING CONSULTANTS; O'CONNOR CONSTRUCTION MANAGEMENT INC.; NINYO & MOORE, GEOTECHNICAL CONSULTANTS; JACKSON FAMILY PARTNERSHIP LLC D/B/A STARGATE PLUMBING; AVERY ATLANTIC, LLC; BIG C LLC; RON HANLON MASONRY, LLC; THE GUARANTEE COMPANY OF NORTH AMERICA USA; P & W BONDS, LLC; PAFFENBARGER & WALDEN, LLC; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive, Defendants.	CASE NO.: A-19-798346-C DEPT. NO.: VIII **DEFENDANT NEVADA BY DESIGN, LLC dba NEVADA BY DESIGN ENGINEERING CONSULTANTS' JOINDER TO DEFENDANT J.W. ZUNINO & ASSOCIATES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER** **Hearing Date: 12/17/2019** **Hearing Time: 9:00 a.m.** **Hearing Location:** **Phoenix Building, 11th Floor 110** **330 S. 3rd Street** **Las Vegas, NV 89101**

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DEFENDANT NEVADA BY DESIGN, LLC dba NEVADA BY DESIGN ENGINEERING CONSULTANTS' JOINDER TO DEFENDANT J.W. ZUNINO & ASSOCIATES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER

COMES NOW, Defendant NEVADA BY DESIGN d/b/a NEVADA BY DESIGN ENGINEERING CONSULTANTS (hereinafter, "NBD"), by and through its counsel of record, the law firm of WEIL & DRAGE, APC, and hereby joins in the arguments presented by Defendant J.W. Zunino & Associates, LLC ("JWZA") in its Opposition to Plaintiff's Motion to Alter. NBD further incorporates by reference as if fully stated in this joinder, the arguments, authorities and citations to the record/exhibit in JWZA's Opposition starting from Pg. 2: Line 8-Pg. 9: Line 9. *See*, NRCP 10(c).

DATED this 26th day of November, 2019.

WEIL & DRAGE, APC

/s/ John T. Wendland

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of November, 2019, service of the foregoing **DEFENDANT NEVADA BY DESIGN, LLC dba NEVADA BY DESIGN ENGINEERING CONSULTANTS' JOINDER TO DEFENDANT J.W. ZUNINO & ASSOCIATES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO ALTER** was made this date by electronically serving a true and correct copy of the same, through Clark County Odyssey eFileNV, to the following parties:

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