Case No. 81459

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

JOINT PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION

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VERIFICATION AFFIDAVIT

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

I, John T. Wendland, Esq. declare:

1. I am an attorney with the law firm WEIL & DRAGE, APC, counsel of record for Petitioners Dekker/Perich/Sabatini LTD. and Nevada By Design, LLC d/b/a Nevada By Design, and duly licensed to practice law in the State of Nevada.

2. I verify that I have read the foregoing JOINT PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true.

3. I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NOT.

EXECUTED this 18th day of August, 2020.

WEIL & DRAGE, APC

John T. Wendland, Esq.
(Nevada Bar 7207)

SUBSCRIBED and SWORN to before me this 18th day of August, 2020.

ANA M. MALDONADO
Notary Public, State of Nevada
Appointment No. 03-79695-1
My Appt. Expires Aug 4, 2023

NOTARY PUBLIC, in and for said County and State of Nevada

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsels of record certify that the following are persons and entities as described in Nevada Rules of Appellate Procedure ("NRAP") 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Dekker/Perich/Sabatini, Ltd. ("DPS") is a privately held company, incorporated under the laws of Nevada. DPS has no parent corporations and there is no publicly held company that owns 10% or more stock in DPS.

2. Nevada By Design, LLC d/b/a Nevada by Design ("NBD") is a privately held company, incorporated under the laws of Nevada. NBD has no parent corporations and there is no publicly held company that owns 10% or more stock in NBD.

3. Melroy Engineering, Inc. d/b/a MSA Engineering Consultants (MSA) is a privately held company, incorporated under the laws of Nevada. MSA has no parent corporations and there is no publicly held company that owns 10% or more stock in MSA.

4. JW Zunino & Associates, LLC (JWZ) is a privately held company, incorporated under the laws of Nevada. JWZ has no parent corporations and there is no publicly held company that owns 10% or more stock in JWZ.

5. Ninyo & Moore, Geotechnical Consultants (N&M) is a privately held company, incorporated under the laws of Nevada. N&M has no parent corporations and there is no publicly held company that owns 10% or more stock in N&M.

6. DPS and NBD are represented before this Court and in the underlying District Court action by John T. Wendland, Esq. and Anthony Platt, Esq., of the law firm of Weil & Drage, APC, and are the only attorneys appearing in this matter for NBD and DPS.

7. MSA is represented before this Court and in the underlying District Court action by Jeremy R. Kilber, Esq., of the law firm of Weil & Drage, APC, and is the only attorney appearing in this matter for MSA.

8. JWZ is represented before this Court and in the underlying District Court action by Dylan P. Todd, Esq. and Lee H. Gorlin, Esq., of the law firm of Foran Glennon Palandech Ponzi & Rudloff PC, and are the only attorneys appearing in this matter for JWZ.

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9. N&M is represented before this Court and in the underlying District Court action by Jorge A. Ramirez, Esq., Harry Peetris, Esq. and Jonathan C. Pattillo, Esq., of the law firm of Wilson Elser Moskowitz Edelman & Dicker, LLP, and are the only attorneys appearing in this matter for JWZ.

DATED: August 18, 2020.
WEIL & DRAGE, APC

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ROUTING STATEMENT

Petitions for extraordinary relief are addressed to the sound discretion of this Court and may only issue whether there is no "plain, speedy, and adequate remedy" at law. *See*, NRS 34.330; *State ex. Rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1138 (1983). In deciding said petitions, "each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted." *See, Jeep Corp. v. Distr. Ct.*, 98 Nev. 440, 443, 652 P.2d 1183, 1185 (1982) (*citing, Shelton v. Distr. Ct.*, 64 Nev. 487, 185 P.2d 320 (1947)). This Court will also exercise its discretion to consider writ petitions, even if there exist adequate legal remedy, when an important issue of law needs clarification and the Court's review will serve considerations of public policy, sound judicial economy and administration. *See, Dayside Inc. v. Distr. Ct.*, 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), *overruled on other grounds by, Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008).

As will be detailed fully herein, the Petitioners respectfully presume this matter is or will be assigned to the Nevada Supreme Court as the issues presented herein concern questions of first impression involving common law, statutory language, the rights of Petitioners under the United States and Nevada Constitutions and significant statewide public importance pertaining to important

issues of law that are relevant beyond the underlying litigation that cannot be adequately addressed on appeal. NRAP 17(a)(11)&(12).

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I. INTRODUCTION AND RELIEF SOUGHT

The Petitioners are design professional firms engaged in architecture, structural engineering, civil engineering, landscape architecture, mechanical, electrical and plumbing engineering, and geotechnical engineering. Petitioners provided separate design services for Fire Station 53 in North Las Vegas ("the Project") over a decade ago. The Project has an undisputed substantial completion date of July 13, 2009. Despite being bound to a six-year statute of repose, the City of North Las Vegas ("CNLV") intentionally filed its Complaint almost ten years after substantial completion and nearly four years after the statute of repose expired. There is no dispute that CNLV's Complaint was untimely when filed. Further, CNLV's Complaint included a defective NRS 11.258 Affidavit of Merit which relied on a single geotechnical engineer for compliance whose report failed to provide any conclusions as to any of the Petitioners' professional services, in violation of NRS 11.258.

Petitioners filed Motions to Dismiss on each of these grounds. The District Court granted the Motion to Dismiss on statute of repose before altering its judgment following the effective date of AB 421 which extended the six-year repose period to ten-years. The District Court further ruled that CNLV's reliance on a single, non-critical geotechnical engineer satisfied NRS 11.258 obligations as against all Petitioners.

Given the legal issues caused by these rulings, Petitioners submit this Petition and request Writ of Mandamus (or in the alternative, Prohibition) directing the District Court on the following:

1) To vacate the Order Granting CNLV's Motion to Alter Judgment and to re-affirm the prior decision regarding the statute of repose.

2) To issue an Order granting Petitioners' Motion to Dismiss based on CNLV's failure to comply with NRS 11.258 and dismiss the underlying action.

II. ISSUES PRESENTED

1. Whether the District Court exceeded its jurisdiction by ruling the effective date of AB 421 revived CNLV's untimely Complaint.

2. Whether the District Court violated the Petitioners' vested substantive constitutional rights to a statute of repose defense by improperly applying AB 421 to ***revive*** rather than ***extend*** an expired repose period.

3. Whether the District Court committed legal error by ruling CNLV complied with all requirements of NRS 11.258.

III. SUMMARY OF FACTS AND PROCEDURAL HISTORY

Petitioners filed a detailed factual and procedural history in the papers attached with the Appendix for this Petition (*see*, V1-21 PA1-3579). This Petition will focus on the most essential facts and history.

The Project reached Substantial completion on July 13, 2009. CNLV's Complaint does not dispute this fact. (V1 PA132-33). When CNLV filed its Complaint on July 11, 2019, NRS 11.202 (circa July 2019) provided a six-year statute of repose. Accordingly, CNLV's Complaint was per se untimely by almost four years. *Id.*

Furthermore, the Complaint attached an Affidavit of Merit from CNLV's attorney exclusively relying on a single geotechnical engineer, Eldred Marsh ("Marsh") from American Geotechnical, Inc. ("AGI"). (*Id*. at 16 (¶4)). Marsh's report was expressly limited to performing a "geotechnical investigation" of the Project in December 2017, two years prior to the Complaint and eighteen months after the repose period expired. (*Id.* at 136). The conclusions in the report were to advise CNLV on the geotechnical conditions at the Project and were not intended for NRS 11.258 compliance. **Importantly**, AGI's report failed to include any opinions or conclusions concerning Petitioners' services. (*Id*. at 135-147). In fact, nothing in the AGI report provided Marsh or the City's counsel with any belief that the matter had a reasonable basis in law or fact to commence against the Petitioners. Nevertheless, CNLV proceeded with this defective Affidavit of Merit to support its Complaint.

On August 5, 2019, NBD filed its Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, joined by all Petitioners. (V5 PA648-720; V6 PA818-820; V14 PA2211-2213; V15 PA2336-2338). The Motion requested dismissal of the Complaint as time-barred under NRS 11.202 and non-compliant with NRS 11.258. (V5 PA648-717). The District Court granted the Motion on statute of repose grounds.[1] (V15 PA2399-2406).

On November 11, 2019, CNLV filed its Motion to Alter Judgment arguing that once AB 421's ten-year repose had taken effect on October 1, 2019, its prior Complaint became valid. (V15 PA2407-2514). The District Court agreed, finding the retroactive application of the ten-year repose period not only ***extended*** an active repose period, but also ***revived*** a previously expired repose period. (V18 PA3064-3073).

On February 4, 2020, MSA filed a new Motion to Dismiss based on the undecided NRS 11.258 issue, which all Petitioners joined. (V18 PA3074 – V19 PA3139; 3140-3254). On February 20, 2020, the District Court heard oral argument on MSA's Motion. (V21 PA3541-3588). The District Court denied MSA's/Petitioners' Motion to Dismiss finding that NRS 11.258 did not expressly require CNLV to consult with a relevant design professional in each design

[1] The NRS 11.258 issue was not addressed, as it was moot.

discipline identified in the Complaint based on portions of NRS 11.258(1) using singular language. (V20 PA3472-2479).

IV. STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

The District Court committed reversible error when interpreting and applying NRS 11.202 and exceeded its jurisdiction by vacating its original order granting dismissal under pursuant to the statute of repose. The District Court further committed reversible error while interpreting NRS 11.258 when it denied the Petitioners' Motion to Dismiss.[2] Finally, this Petition raises a number of issues of first impression, including constitutional issues, in the State of Nevada.

A. This Writ Petition Should Be Entertained on the Merits.

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *NRS 34.160; Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Contrary to a Writ of Mandamus, a Writ of Prohibition is the appropriate remedy for the district court's improper exercise of jurisdiction. NRS 34.320; *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). This Court has discretion to

[2] This matter was one of the first, if not the first, major legal issue the District Court addressed after taking the bench. The District Court made multiple comments acknowledging his decisions would be taken up on appeal and expecting the aggrieved party to do the same.

entertain a writ petition on its merits and issue a writ of mandamus or prohibition. *Okada v. Eighth Judicial Dist. Court*, 134 Nev. 6, 8, 408 P.3d 566, 569 (2018). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief is appropriate. NRS 34.170; *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014). "[T]he availability of a direct appeal from a final judgment may not always be an adequate and speedy remedy." *Okada*, 134 Nev. at 8, 408 P.3d at 569. "Whether a future appeal is sufficiently adequate and speedy necessarily turns on the underlying proceedings' status, the types of issues raised in the writ petition, and whether a future appeal will permit this court to meaningfully review the issues presented." *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 475, 168 P.3d 731, 736 (2007).

Extraordinary relief is appropriate where all or some of the following considerations are present: (i) there are no factual disputes, (ii) the District Court acted contrary to clear authority, (iii) an important issue of law needs clarification, (iv) the petition gives the Court an opportunity to define the parameters of a statute, (v) public policy will be served by the Court's invocation of its original jurisdiction, and (vi) sound judicial economy and administration favor entertaining the petition. *See e.g., Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 132 Nev. 784, 788, 383 P.3d 246, 248 (2016). A compelling reason for the Court

to exercise its discretion to consider the writ petition on the merits is where "there is a great potential for the district courts to inconsistently interpret legal issues." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006). Further, this Court reviews District Court orders denying a motion to dismiss (or reversing an order granting a motion to dismiss) where the District Court was obligated to dismiss the action pursuant to clear authority under a statute or a rule. *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 658, 188 P.3d 1136, 1140 (2008). Where, the writ petition addresses issues of law that are matters of first impression and are dispositive of the entire case, exercising the Court's discretion is warranted. *Otak Nev., LLC v. Eighth Judicial Dist. Ct.*, 129 Nev. 805, 312 P.3d at 496 (2013).

The Court recently considered a similar situation involving the denial of a motion to dismiss. *Chur v. Eighth Judicial Dist. Court*, 136 Nev., Adv. Op. 7, 458 P.3d 336, 339 (2020). In *Chur*, this Court exercised its jurisdiction as the District Court relied on a discrepancy between the plain language of the statute and this Court's case law (along with Federal Courts' citations thereto). *Id.* In short, due to the parties' desire that the legal question be clarified, and in the interest of judicial economy, this Court exercised its discretion. The same interests exist here.

This Petition meets the required criteria. There are no factual disputes regarding the issues presented in this Petition, only legal questions. The District

Court acted contrary to established authority, reviving CNLV's void Complaint due to the passage of AB 421's effective date and ignoring the holding in *Otak v. Eighth Judicial District Court*, 127 Nev. 593, 250 P.3d 491 (2011) regarding the requirement to have an affidavit of merit relevant to each design discipline implicated in the City's claims. This Petition further presents important issues of law needing clarification, including the interplay of AB 421's effective date and its retroactive effect, as well as NRS 11.258's requirements in a multi-defendant, multi-discipline action. This Petition gives the Court an opportunity to define the parameters of two statutes, NRS 11.202 (pre and post AB 421) an NRS 11.258. Public policy will be served by the Court's invocation of original jurisdiction in this case due to the interplay between effective dates and retroactivity being bound to come up again in future legislation, the vested rights of a defendant to be free of defending against stale claims, and the purpose of the affidavit of merit statute. This Petition also raises many issues of first impression in Nevada, including: 1) whether a statute of repose defense is a recognized vested property right of defendant parties; 2) whether the retroactive application of AB 421 is unconstitutional when it impacts vested rights; 3) the impact of the Effective Date of a new repose period on previously expired claims; 4) whether a subsequent change in law can revive a void Complaint improperly filed under pre-existing law; 5) the reach and parameters of a statute of repose on claims existing even

beyond the new repose period after the effective date; and 6) whether a claimant can prematurely file a claim in violation of the then existing statute of repose and benefit subsequently from a change in law. Finally, consideration of these issues strongly favor judicial economy and administration, as the underlying matter spans more than a decade, involves numerous design professionals, and has been declared complex by the District Court.

B. The Court Should Apply De Novo Review to the Legal Issues and Grant No Deference to the District Court's Legal Error.

The Nevada Supreme Court has long held that in the context of a writ petition, a District Court order denying a Motion to Dismiss is generally reviewed "for an arbitrary or capricious abuse of discretion," while questions of law, such as questions of statutory interpretation and subject matter jurisdiction, are reviewed de novo. *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 912, 362 P.3d 91, 93-94 (2015) statutory interpretation; *see also* NRAP 21. The District Court's legal conclusions are also reviewed de novo. *Otak*, 129 Nev. at 808, 312 P.3d at 497.

When the statute is plain and unambiguous and its meaning clear and unmistakable, courts are not permitted to go outside of the statute. *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007). However, if the statute is ambiguous and susceptible to two or more reasonable interpretations, the Court may look at legislative history to ascertain context and the spirit of the law or the

causes that induced the enactment. *Torres v. Nev. Direct Ins. Co.*, 131 Nev., Adv. Op. 54, 353 P.3d 1203, 1206-07 (2015). Because this Petition presents only questions of law, the Court should, respectfully, engage in de novo review.

C. There Are Ample Grounds for the Court to Issue a Writ of Mandamus or Prohibition Regarding the Statue of Repose.

1. CNLV's Complaint Was Void Ab initio when filed on July 11, 2019, therefore the Underlying Action Never Commenced.

On July 11, 2019, when the Complaint was filed, the applicable law expressly stated:

> **[n]o action may be commenced against** … **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***.

See, NRS 11.202 (circa July 2019) (emphasis added). Thus, under the plain language of NRS 11.202, CNLV's Complaint, filed on July 11, 2019, had: (1) no legal basis (pleading was void); and (2) the underlying matter never lawful commenced as NRS 11.202 prohibited commencing any action more than six years after substantial completion. *Id.*

Courts analyzing this issue have held that these repose statutes set an "outside limit" for claims that run from the date of substantial completion, with no regard for the date of the injury and after which, causes of action for injury or

property damage are precluded from being asserted. *G&H Assoc. v. Earnest W. Hahn, Inc.*, 113 Nev. 265, 271, 934 P.2d 229, 233 (1997). These statutes were enacted to protect entities involved in "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). 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). Put simply, legislatures enact statute of repose to protect defendants from stale claims. *Nortley v. Hurst*, 980 N.W.2d 919, 922 (Mich. App. 2017).

Here, the undisputed date of substantial completion was July 13, 2009. (V1 PA6 (¶45); 132-133). CNLV's Complaint filed on July 11, 2019 violated existing law precluding the commencement of this matter. Thus, the Complaint was void ab initio – it never "legally exist[ed] and thus it cannot be amended." *See*, *Washoe Med. Ctr*., 122 Nev. at 1304, 148 P.3d at 794. As the Complaint never legally existed, "the **action was never 'commenced'** as defined by NRCP 3." *Wheble v. Eighth Judicial Dist. Court* 128 Nev. 119, 123, 272 P.3d 134, 137 (2012) (emphasis added). Thus, this matter was "dead on arrival."

When the District Court issued its initial (and correct) decision dismissing this matter (V15 PA2399-2406), said ruling formally established that CNLV's Complaint was void, not legally viable and the underlying matter never commenced. (*Id.* at Items 3, 5 and 6). These core defects in CNLV's Complaint cannot be cured by a later change in the law. Accordingly, the District Court wrongfully exercised its jurisdiction by granting the Motion to Alter Judgment, thus giving legitimacy to a void Complaint in a matter that never legally existed or commenced. (V18 PA3064-3073).[3] Because the District Court lacked the jurisdiction to revive the void Complaint, Petitioners respectfully submit this Court should issue a writ of mandamus (or prohibition) reinstating the prior order for dismissal or a writ of prohibition finding the District Court lacked jurisdiction to consider the Motion to Alter Judgment.

2. The Court's Ruling Altering its Dismissal of the Complaint with Prejudice Violated AB 421.

Retroactive application of AB 421's 10-year repose period violated the very period it instituted. AB 421, §7 amended NRS 11.202 to state in part:

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[3] In fact, in a subsequent ruling, the District Court even conceded CNLV lacked "**any legal right"** to pursue its claims on July 11, 2019. (V21 PA3596: Lines 3-5) (emphasis added). This has created significant confusion in the legal and design professional communities because of other rulings from District Courts that wholly differ from the decisions made in this matter on the same or similar issues. *See e.g.,* (V20 PA3319-3325).

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 10 years** after the substantial completion of such an improvement…

See, AB 421, Sect. 7.

As stated, AB 421's Effective Date was October 1, 2019. Only on (and after) that date, did any claimant secure the new right to bring actions with substantial completion dates up to ten years prior to October 1, 2019. Pursuant to AB 421, the 10-year repose period retroactively applied ***to commencing actions.*** However, CNLV could not commence this matter ***after*** the effective date of AB 421 as its claims would violate the new 10-year repose period. Although AB 421 did not concern pre-existing matters previously terminated and barred before October 1, 2019, CNLV decided to violate the existing six-year statute of repose by filing on July 11, 2019 and claiming a non-existing right to the new 10-year repose. No amount of legal gymnastics will change the fact that CNLV is, and always was, statutorily barred from commencing and maintaining this matter.

Only ***after*** AB 421 became law on October 1, 2019, did claimants with projects with substantial completion dates on or after October 1, 2009 (previously precluded by the prior NRS 11.202), secure a right to commence an action under the new 10-year repose. However, CNLV's substantial completion date occurred more than ten years before AB 421's 10-year repose period went into effect.

Therefore, CNLV had no legal right to even rely on AB 421 for a claim that could never be resurrected.

The District Court exceeded its jurisdiction when it concluded a change in the law about commencing actions applied to the void Complaint filed before the law took effect. The District Court's ruling essentially acted as a legislative action, providing CNLV with ten years and three months to commence this Action. *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014) (statute of repose bars a cause of action after a specified time period and there is no tolling). The District Court's decision and its legal effect on pre-AB 421 matters created a legal right that never existed and resurrected ***all projects*** with substantial completion dates prior to October 1, 2019, including ***any project*** that was more than ten years past substantial completion.[4] For these reasons, the District Court exceeded its jurisdiction by altering its judgment following AB 421's effective date, providing CNLV with more than ten years to bring its claims.

[4] When the Legislature passed AB 421, one of the major considerations was that the 6-year statue of repose often did not allow enough time for soils issues to manifest, thereby injuring homeowners. (V16 PA2482). AB 421's legislative history discussed the fact that statute of repose is an "absolute outlying date a homeowner can bring a claim" and runs from the substantial completion date with no relationship to discovery. (*Id*). The Legislature then noted that soil related matters generally begin to manifest around 8-10 years. (*Id*). No one discussed any period ***beyond 10-years*** to allow claimants to bring claims and no one discussed an open-ended retroactive application of AB 421. (*Id*).

3. AB 421's Retroactive Application Would Violate Petitioners' Vested Constitutional Rights.

Nevada's Constitution states "[n]o person shall be deprived of life, liberty, or property, without due process of law." *See*, Nev. Const. Art. I § 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-Haroon*, 128 Nev. 580, 587, 287 P.3d 305, 310 (2012). This allows the Court to rely on federal precedence for guidance. *Id*.

Importantly, "[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 (1994). In evaluating AB 421, §11(4), the Court should 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 Judicial Dist. Court*, 129 Nev. 813, 820, 313 P.3d 848 (2013). In its ruling, the District Court applied AB 421 §11(4) in such an improper manner as to substantively and unconstitutionally remove vested rights and expectations held by the Petitioners. (V18 PA3064-3073).

A statute of repose bars causes of action after the expiration of a certain time period. *Davenport v. Comstock Hills-Reno*, 118 Nev. 389, 46 P.3d 62 (2002) and

G&H Assoc., supra. 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); *Chumley v. Magee*, 33 So.3d 345, 351 (La. App. 2 Cir. 2010); *Sepmeyer v. Holman*, 642 N.E.2d 1242, 1244 (Ill. 1994); *Police & Fire Ret. System of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 106 (2d Cir. 2013).

The power of the government is limited by the Constitution and when statutory enactments conflict with constitutional principles, those principles must prevail. *Commonwealth v. Owens-Corning Fiberglas Corp.*, 385 S.E.2d 865, 868 (Va. 1989). The Constitution's guarantee of due process states "the right to commence an action and the defensive right of repose both become vested when an event occurs that triggers either the right to sue for damages, or the immunity from liability, and these rights may not be defeated by later legislation." *Williams v. American Optical Corp.*, 985 So.2d 23, 31 (Fla. 4th DCA 2008).

At times, retroactive application can collide with constitutional rights and if so, it becomes constitutionally improper when it impairs vested rights under existing laws. *Landgraf*, 511 U.S. at 280; *Varlas v. Holder*, 566 U.S. 257, 265 (2012); *Tillison v. Gregoire*, 424 F.3d 1093, 1098 n.4 (9th Cir. 2005); *American Optical Corp. v. Spiewak*, 73 So.3d 120, 131 (Fla. 2011); and *Nevada Power Co. v.*

Metro Dev. Co., 104 Nev. 684, 765 P.2d 1162 (1988). Particularly, once a statute of repose has run on claims, all causes of action are extinguished and a substantive right of repose is created which cannot be abridged by the legislature. *Commonwealth,* 385 S.E.2d at 868; *see also, U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1214 (9th Cir. 1996) ("[S]tatutes of limitations [or repose] should generally be applied retrospectively as long as the application **would not revive a stale claim**"). The reviving of a claim barred by statute of repose would constitute the unlawful taking of property without due process. *Swartz v. Swartz*, 894 P.2d 209, 212 (Kan. 1995).

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), as stated:

> 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 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 the new 90-day rule applied even though the initial 30 days had expired before the rule change. *Id*. The Ninth Circuit disagreed holding 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*, *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 a time-barred claim***).

The District Court, incorrectly relied on *Gray v. First Wintrop Corp.*, 989 F.2d 1564, 1570 (9th Cir. 1993) for the premise that a legislature can generally apply a retroactive change to time-barring statutes. (*See*, V18 PA3071). This reliance is flawed because *Gray* dealt with retroactivity generally to ***extend*** an active period of time, but not in the context of ***reviving*** an expired period of time. Further to the extent *Gray* could have allowed retroactive revival of an expired repose period, it was superseded by *Chenault* which explicitly held "newly enacted statute[s] that lengthen[] 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." *See*, 37 F.3d at 539 (emphasis added).

The principle that a previously extinguished claim cannot be revived by legislative action is shared across the nation. *See, e.g. Wood v. Eli Lilly & Co.*, 701 So. 2d 344, 346 (Fla. 1997); *Penthouse North Ass'n, Inc. v. Lombardi*, 461 So.2d 1350, 1351-52 (Fla. 1984); *Jolly v. Eli Lilly & Co*., 751 P.2d 923, 931 (Cal. 1988);

Skolak v. Skolak, 895 N.E.2d 1241, 1243 (Ind. Ct. App. 2008); *Doe v. Crooks*, 613 S.E.2d 536, 538 (S.C. 2005); *Hall v. Summit Contractors, Inc.*, 158 S.W.3d 185, 188 (Ark. 2004); *State of Minn. ex rel. Hove v. Doese*, 501 N.W.2d 366, 370 (S.D.1993); *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); and *Matter of Estate of Weidman*, 476 N.W.2d 357, 364 (Iowa 1991).

In addition to this generally accepted principle nationwide, this Court evaluated constitutional restrictions on the impairment of vested rights when evaluating the retroactive application of Senate Bill ("SB") 105 (1991). *See, Alsenz*, 108 Nev. 1122, 843 P.2d at 837. In *Alsenz*, this Court held "there are constitutional restrictions on the impairment of vested rights which can limit retroactive application of a statute of limitation" and it was "inequitable and prejudicial to apply a new, shortened statute of limitation to a claim filed prior to the announcement of the new rule…if the application of that rule would serve to cut off his rights before he was informed of the new rule and had a reasonable time to file under it." *Id*. (internal citations omitted).

Here, Petitioners secured a protected, vested statute of repose defense on or about July 13, 2015, when the six-year period expired and Petitioners' defense ripened against CNLV's claims. Even if the six-year repose was abolished or modified by AB 421, CNLV's claims remain time barred under the repose period that ran prior to CNLV commencing this matter. *See e.g., Galloway v. Dioceses of Springfield in Ill*., 857 N.E.2d 737, 740 (Ill. 2006). In fact, the District Court already found this to be the case in its initial decision to dismiss. (V15 PA2399-2406).

Petitioners are entitled to finality. By finding in *Alsenz* that claimants have constitutionally protected rights to bring a claim, the same should, and does, hold true for defendants' rights to be free from stale claims. Therefore AB 421 cannot be read to artificially ***revive*** (not ***extend***) the stale repose period. A plethora of cases cited herein have found vested substantial rights accrue once an existing period expires. The District Court disregarded this abundance of authority in favor of a single, inapplicable case. The District Court's ruling violates fundamental notions of fairness and finality. Accordingly, Petitioners respectfully request this Court issue a Writ of Mandamus directing the District Court to vacate its Order granting the Motion to Alter and to reinstate its initial ruling dismissing this case with prejudice.

D. There Are Ample Grounds for the Court to Issue a Writ of Mandamus or Prohibition Regarding NRS 11.258.

NRS 11.258 is designed to safeguard design professionals against frivolous lawsuits in nonresidential construction. *In re CityCenter Constr. & Lien Master Litig.*, 129 Nev. 669, 678, 310 P.3d 574, 581 (2013). The Legislature recognized the great disparity between the nominal fees charged by design professionals on a construction project versus the exposure incurred. The statute requires the attorney filing a complaint to attach an affidavit of merit along with an expert report by a qualified expert, setting forth opinions and conclusions as to how a design professional's performance fell below the standard of care, including causation and direct evidence that there is merit to the action. Petitioners contend both the affidavit and the expert report are non-compliant with NRS 11.258 as follows:

1. The District Court Erred In Ruling CNLV's Affidavit Of Merit Was Compliant with 11.258(1)(c) and (1)(d).

CNLV's Affidavit of Merit is legally defective because CNLV failed to consult with an expert in each relevant design discipline implicated in its Complaint to ensure proper support its claims against each design professional. Without such a consultation, it is impossible for CNLV's counsel, to obtain the requisite good faith required by statute, to conclude the action had *a reasonable basis in law and fact* in compliance with NRS 11.258(1)(d). The District Court

failed to apply this requirement when it found that CNLV fully complied with NRS 11.258(1). (V20 PA3472-3479).

Failure to comply with NRS 11.258, renders the Complaint *void ab initio*, requiring dismissal. NRS 11.259; *see also*, *Otak, supra*. NRS 11.258(1) requires an affidavit from the complainant's attorney stating they consulted with an expert knowledgeable in the relevant discipline involved in the action 11.258(1)(c). The attorney then swears by affidavit that they ***reasonably*** believe the expert consulted is ***knowledgeable in the relevant discipline involved in the action*** and has concluded on the basis of his review and consultation that ***the action has a reasonable basis in law and fact***. NRS 11.258(1)(d)(emphasis added).

CNLV failed to comply with Subsection 1. Based on its investigation, AGI provided a report on December 11, 2017, which concluded the site and surrounding appurtenances were distressed due to "excessive differential settlement and expansive soil activity." (V2 PA143). CNLV did not consult with any other specialist regarding the other design disciplines named in its Complaint. (V1 PA16-17; V20 PA3476). This failure makes it impossible for CNLV and its attorney to secure the requisite basis to conclude that the underlying matter has any ***reasonable basis in law and fact*** with respect to those design disciplines unrelated to geotechnical engineering. More telling is CNLV's admission during argument that it needed to hire experts in the other relevant disciplines to maintain this

matter against the Petitioners. (V21 PA3563). Discovery cannot be used to cure statutory deficiencies.

Moreover, CNLV's Affidavit is deficient because AGI's Report establishes N&M actually warned City the site had highly expansive soils and the underlying moving papers contain the recommendations of how to address the issues, all prior to the commencement of any construction.

> ... it is our opinion that the existing fill soils and underlying near surface alluvial (native) soils, which are moderately porous, highly pestiferous, and ***have a high expansion potential,*** are not suitable for support of the proposed structures and improvements in their present condition. ***These soils will need to be removed from structure and improvement areas and replaced with adequately compacted structural fill.*** (V1 PA72).

In violation of NRS 11.258, CNLV's expert offered no conclusions or criticisms of N&M's[5] (or any of the Petitioners') recommendations, design or services provided and merely documented (with extensive warnings and limitations) the perceived as-built site conditions that differed from N&M's recommendations. Thus, the conclusions in AGI's Report were actually positive as

[5] N&M only prepared the initial geotechnical investigation report. CNLV performed all the remaining design professional services in-house through the Building Department, presumably to save on money, including soils testing and quality assurance throughout the construction.

to N&M's services and CNLV could not have relied on same to form any good faith reasonable basis in law and fact to proceed against any of the Petitioners.

CNLV's attorney downplayed the AGI report and its earlier professed statutory compliance during the March 10, 2020 hearing on dismissal based on Laches. At the hearing, CNLV admitted that its original examination of AGI's report did not reveal the existence of any claim. (V20 PA3447). Given this admission, CNLV cannot claim good faith compliance with all requirements from NRS 11.258(1), years later.

The District Court's errant decision lay with its determination that because NRS 11.258(1) uses "strictly singular language," only one expert qualified in one identified discipline was required. (V20 PA3467). The District Court noted in its order that the statute required CNLV's attorney "consult with 'an expert' that the attorney reasonably believes is knowledgeable in 'the relevant discipline' – not disciplines." (*Id)*. The District Court believed the use of singular language did not mean that CNLV's attorney needed to consult with *an expert* for <u>each design professional discipline</u> involved in the matter. (*Id*). However, the District Court's ruling ignored the fact that in order to meaningfully comply with NRS 11.258(1)(d)'s reasonable basis requirement, CNLV was required to consult with experts in each relevant design discipline at issue, as CNLV even admitted. (V21 PA3570–3572).

Further, the Court's conclusion that NRS 11.258 must be interpreted in the singular instead of plural does not withstand logical scrutiny. If the Legislature used plural language such as "consult with experts" in the "relevant disciplines," then it would open the door to the argument that even when only one design professional is being sued, a complainant would have to consult multiple experts. Thus, the statute was framed in singular terms. By doing so, the statute can then be interpreted to as intended, separately applying the statute to each design professional sued. This interpretation also fulfills the intended purpose of the statute, namely, to ensure there is merit to the claim against the design professional named therein.

2. CNLV's Attorney Cannot Possess a Reasonable Basis in Law and Fact Without Consultations and Conclusions from Qualified Experts in Each Petitioners' Professional Field of Practice.

NRS 11.258 requires a claimant perform a proper analysis prior to filing litigation when involving services provided by design professionals and causation analysis as to how those services fell below the standard of care and are relevant to the claims. Claimants' attorney must consult with and possess a "reasonable belief" that the expert consulted, was "knowledgeable in the relevant discipline involved in the action" and has to "conclude on the basis of the review and the consultation with the expert that the action has a reasonable basis in law and fact." NRS 11.258(1)(b), (c) and (d). "Reasonably believes" means that the actor

"believes a given fact or combination of facts exist and the circumstances which he knows or should know are such as to cause a reasonable man to so believe." *Black's Law Dictionary*, 1265 (6th Ed. 1990).

This Court has held NRS 11.258 is a precise statute requiring a party to state how a potential design professional defendant fell below the standard of care, causing damage in order to bring a claim. In *Otak*, the District Court allowed several parties to rely on the expert report authored for one other party. 127 Nev. at 599-600, 260 P.3d at 412. This Court rejected the district court's ruling, instead holding each party must file its own expert report and affidavit, "as each party must justify its claims of nonresidential malpractice **based on that party's relationship with the defendant**." *Id.* (emphasis added). The holding in *Otak* makes it clear that not only must each claimant file its own affidavit and report, each claimant must also file reports and compliance statements for each design professional to the extent there are different professional services at issue in the complaint. This is necessary so claimants can justify their claims of professional malpractice "based on that party's relationship with the defendant." *Id.*

The legislative history establishes that the aforementioned interpretation is the intent of NRS 11.258. The District Court herein concluded a legislative history inquiry was not necessary because there was no ambiguity in the statute. (V20 PA3477:20–3488:4). While the statute is clear in various areas, there are

ambiguities regarding whether the statute, in a situation involving multiple design professionals, required one expert or several. Further, the clause "the relevant discipline" is ambiguous in cases involving more than one design professional or design discipline. The ultimate goal in interpretation is to effectuate the Legislature's intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

The following legislative statement was made during discussions on the enactment of 11.258:

> 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.**

(V19 PA3121) (emphasis added).

The Legislature was keen on the claimant retaining independent experts, qualified in the applicable design discipline, to provide opinions as to the standard of care and any failures in same. In fact, this Court, in interpreting the legislative history, found the intent of NRS 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*, 129 Nev. at 678, 310 P.3d at 581. The affidavit here, has the engineer only evaluating existing geotechnical issues and providing repair recommendations. Therefore, CNLV's consulting engineer failed to satisfy his obligations under NRS 11.258.

3. The District Court Erred In Ruling CNLV's Expert Report Complied With NRS 11.258(3).

The District Court determined CNLV's attached engineer's report met 11.258(3)'s requirements. (V20 PA3479). The District Court's order ignored two major elements missing from the expert report and affidavit. First, NRS 11.258(3)(d) requires the expert to provide "[a] copy of each non-privileged 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." NRS 11.258 (3)(c). Second, CNLV's engineer's report and Affidavit of Merit is devoid of any "conclusions of the expert and the basis for the conclusions." NRS 11.258(3)(d). As evidence of these missing requirements, AGI's report in a section titled, "Scope of Work", does not task AGI to evaluate the work done by the Petitioners. (V2 PA137). In spite of these deficiencies, District Court found CNLV's report was "sufficiently detailed." (V20 PA3479).

The Legislative history again helps by explaining what the report must contain. The Legislature was clear that an expert must review the case early on "to

show merit to a claim and a reasonable basis to proceed with a suit." (V19 PA3121). The Legislature envisioned the attorney would utilize the expert's report to craft the complaint against the design professional based on the errors alleged therein, rather than submitting a boilerplate complaint with generic allegations as CNLV did in this matter.

The legislative minutes establish the drafters intended the report to identify a party's wrong-doing. The Senate Committee on Judiciary met on March 23, 2007, to discuss S.B. 243, which became NRS 11.258. At that meeting, a supporter of the bill stated:

> To prove a professional negligence claim, you have to show the design professional failed to meet a standard of care. There is only one way to prove that. You have to bring an expert to the hearing to show that the standard of care and the design professional fell below that standard of care."

(V19 PA3118).

These statements establish the original intent was for the expert report to identify how a design professional failed to meet the standard of care applicable to their scope of service. The District Court ignored this history and instead ended its analysis, deciding there was no ambiguity in the statute: "Here the Legislature won't be my friend because I don't like necessarily the way they boxed us … with this statute." (V21 PA3576:8-13). For these reasons, the District Court's decision

on NRS 11.258 compliance is reversible error and extraordinary intervention is necessary and appropriate.

V. CONCLUSION

For the reasons herein, and those in the referenced documents and records, Petitioners respectfully request this Court grant their Petition for a Writ of Mandamus, or, Alternatively, Prohibition with the relief requested by Petitioners provided.

DATED: August 18, 2020.
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NRAP 32(a)(9) CERTIFICATE OF COMPLIANCE

We hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman typeface.

We further state that this Petition complies with the type-volume limitation under Amended NRAP Rule 21(d) as it contains **6,995** words, by following NRAP 32(a)(7)(C) Computing Page- and Type-Volume Limitation, **no more than 7,000 words**, not counting "The disclosure statement, table of contents, table of authorities, [and] required certificate of service and compliance with these Rules, and any addendum containing statutes, rules, or regulations do not count toward a brief's page- or type-volume limitation."

Finally, we hereby certify that we have read this **Petition for Writ of Mandamus or, Alternatively, Prohibition**, and to the best of our knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. We further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

///

DATED: August 18, 2020.
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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 18th day of August, 2020, the foregoing **JOINT PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION** and **APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS OR, ALTERNATIVELY, PROHIBITION, VOLS. I THROUGH XXI**, were e-submitted to the Clerk of the Supreme Court of the State of Nevada and services were executed to the addresses shown below in the manner indicated:

VIA E-MAIL, FEDEX AND THE COURT'S ELECTRONIC FILING SYSTEM:

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Trial Court Judge

/s/ *Joanna Medina*

_____
Joanna Medina, an Employee of
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From: Jeremy Kilber <jkilber@weildrage.com>
Sent: Monday, August 17, 2020 5:06 PM
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Subject: RE: NLV/Revised Writ
Sensitivity: Confidential

Yes.

Jeremy R. Kilber, Esq.

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Cc: Joanna Medina <jmedina@weildrage.com>; Ana Maldonado <amaldonado@weildrage.com>
Subject: RE: NLV/Revised Writ
Importance: High
Sensitivity: Confidential

Lee, Jorge and Jeremy,

Do we have permission to e-sign the Writ Petition on your behalves?

Please advise,

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Sensitivity: Confidential

Yes. Sorry that wasn't explicit before. Please sign for me!

Thanks, everyone!

Lee H. Gorlin

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Yes for me. Good job all!

Jorge A. Ramirez

On Aug 17, 2020, at 4:56 PM, John T. Wendland <jwendland@weildrage.com> wrote:

[EXTERNAL EMAIL]

Lee, Jorge and Jeremy,

Do we have permission to e-sign the Writ Petition on your behalves?

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