

1 **0035**
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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 * * *

12 RICHARD and JEANNE EINSIEDEL, husband) **PLAINTIFFS' MOTION FOR**
13 and wife; KARL and MARY BRUNER, husband) **LEAVE TO AMEND COMPLAINT**
14 husband and wife; STEPHEN and LINDA MYOTT,)
15 husband and wife; STUART and HELEN)
16 O'BRIEN, husband and wife; ALAN and VIIVE) CASE NO.: A546409
17 HYMAN, husband and wife; MARY RICHARD,) DEPT. NO.: XXII
18 an individual; MICHIKO JUDICE, an individual;)
19 RAYMOND and SUSAN MCIVER, husband and)
20 wife; DONALD and SANDRA COOLEY, husband) Hearing Date: April 21, 2009
21 and wife; JOSEPH and ELLEN DEROSE, husband) Hearing Time: 8:30 a.m.
22 and wife; ROSE ANTONELLO, an individual;)
23 VERDA DUNCAN, an individual; ELLIOT and) **(ELECTRONIC FILING CASE)**
24 PHYLLIS BARON, husband and wife; RICHARD)
25 and DEANNA GARCIA, husband and wife;)
26 EDWARD and JEAN MORKEN, husband and)
27 wife; MELVIN and GLORIA WILSON, husband)
28 and wife; JEANNIE SUE PEARCE, an individual;)
and WILLIAM and ELSY PADILLA-PEGAN,)
husband and wife,)
Plaintiffs,)
vs.)
PN II, INC. dba PULTE HOMES OF NEVADA)
dba DEL WEBB aka THE COMMUNITIES OF)
DEL WEBB, a Nevada corporation; DEL WEBB)
COMMUNITIES, INC. aka DEL WEBB, a Nevada)
corporation;)
Defendants.)

1 COME NOW Plaintiffs, by and through their counsel of record, NEAL K. HYMAN, ESQ. and
2 RHONDA R. LONG, ESQ. THE LAW OFFICES OF NEAL HYMAN, and hereby move for leave to
3 amend the Complaint.

4 The Motion is made and based on the following Memorandum of Points and Authorities, the
5 exhibits attached thereto, the papers and pleadings on file herein and any evidence or oral argument
6 heard or permitted by the Court at the hearing on this matter.

7 DATED this 19th day of March, 2009.

8
9 **THE LAW OFFICES OF NEAL HYMAN**

10
11 By: /s/ Neal K. Hyman
12 NEAL K. HYMAN, ESQ.
13 Nevada Bar No. 005998
14 RHONDA R. LONG, ESQ.
15 Nevada Bar No. 010921
16 2441 W. Horizon Ridge Pkwy., Suite 120
17 Henderson, NV 89052
18 *Attorneys for Plaintiffs*

19 **NOTICE OF MOTION**

20 PLEASE TAKE NOTICE that *PLAINTIFFS' MOTION FOR LEAVE TO AMEND COMPLAINT*
21 will be heard before the above-entitled Court on the 21st day of April, 2009, at 8:30 a.m. in Department
22 XXII.

23 DATED this 19th day of March, 2009.

24 **THE LAW OFFICES OF NEAL HYMAN**

25 By: /s/ Neal K. Hyman
26 NEAL K. HYMAN, ESQ.
27 Nevada Bar No. 005998
28 RHONDA R. LONG, ESQ.
Nevada Bar No. 010921
2441 W. Horizon Ridge Pkwy., Suite 120
Henderson, NV 89052
Attorneys for Plaintiffs

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1 **1. RELIEF SOUGHT**

2 Plaintiffs move for leave to amend the Complaint: (1) to add causes of action for Fraudulent
3 Inducement and Fraudulent Concealment of Defects/Failure to Disclose Defects; Intentional/Negligent
4 Misrepresentation; and Breach of the Covenant of Good Faith and Fair Dealing; (2) to dismiss any non-
5 Kitec related claims/allegations without prejudice; (3) to include the names of Raymond and Susan
6 McIver to the Parties Section of the Complaint; (4) to substitute Catherine Marie Antonello Davis and
7 Jay York, as Co-Trustees of the Antonello Family Revocable Living Trust, in place of Rose Antonello,
8 who is deceased; (5) to remove March Richard as a Plaintiff as she has settled; and (6) to substitute the
9 names of the Trustees/Trusts in place of homeowners' individual names (the individuals named are the
10 trustees of the trusts).

11 **2. FACTS**

12 As is commonly and widely known throughout the Clark County valley, and possibly throughout
13 Nevada, the United States and other countries, a large, class action lawsuit is proceeding against
14 Defendants PN II, INC. dba PULTE HOMES OF NEVADA dba DEL WEBB aka THE
15 COMMUNITIES OF DEL WEBB and DEL WEBB COMMUNITIES, INC. aka DEL WEBB ("Pulte")
16 and its subcontractors, product suppliers and product manufacturers, including Third-Party Defendants
17 IPEX INC. and IPEX USA LLC ("IPEX") (manufacturer of Kitec) and Third-Party Defendant Cox
18 Plumbing. That large, class action lawsuit is being prosecuted by J. Randall Jones, Esq. and the law firm
19 Harrison Kemp & Jones, and it is in Department 16 along with some consolidated cases. The same
20 defense counsel as in this case, Jason Williams, Esq. and James Carraway, Esq. are in the Class Action
21 representing Pulte and IPEX, respectively. It involves potentially 35,000+ homes throughout the Clark
22 County valley and many builders (over 10) and their subcontractors ("Class Action"). More specifically,
23 the Class Action case involves Pulte and other builders (over 10 others), its manufacturer/distributor
24 of Kitec pipe fittings (IPEX) and its plumbing subcontractors (including Third Party Defendant Cox
25 Plumbing), which installed defective Kitec pipe fittings in homes designed, constructed and sold by
26 Pulte throughout Clark County, including homes owed by Plaintiffs at their senior retirement
27 community, Sun City Anthem in Henderson, Nevada. This firm represents homeowners of 19 houses
28 (31 individual homeowners). Plaintiffs are informed IPEX has entered into a 90 million dollar

1 settlement in the Class Action involving roughly 35,000 homes.¹ Plaintiffs are informed that Pulte has
2 settled in the Class Action for 44.5 million dollars.

3 The instant action has nothing to do with the Class Action. In fact, it is not consolidated, it is
4 in a different Department (per the peremptory challenge by Pulte) and each and every Plaintiff in the
5 instant action timely opted out of the Class Action, initiated their own individual Chapter 40 Notices and
6 filed the instant lawsuit as a group. While some of the issues raised in the instant lawsuit ‘may’ be
7 similar to those in the Class Action, as the Court well knows, Mr. Jones is Nevada’s premier “class
8 action” attorney and that is the type of lawsuit he is prosecuting. While it ‘may’ have construction defect
9 components, as the Court also knows single family home construction defect cases are not generally
10 suitable for class certification. See, *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d
11 530 (Nev. 2005). Further, the instant action ‘only’ alleges “construction defect” claims against Pulte
12 under NRS 40.600 et seq. There are no direct claims by Plaintiffs against IPEX or any third-party
13 defendant, as opposed to the Class Action where the class of plaintiffs have sued Pulte, IPEX and Cox
14 Plumbing directly. Also, the claims in the Class Action involve “products liability.” As the Court also
15 knows, products liability (or strict liability) claims generally cannot be asserted against a homebuilder
16 as they relate to installation construction defects that are integrated into a house. See, *Calloway v. City*
17 *of Reno*, 116 Nev. 250, 270, 993 P.2d 1259, 1272 (Nev. 2000) (overruled on separate grounds).

18 Plaintiffs are alleging various claims for relief against Pulte, which are: Breach of Implied
19 Warranties, Negligence/Negligence Per Se and Declaratory/Equitable Relief. While one allegation of
20 Plaintiffs is that Kitec pipe fittings, in and of themselves, are constructional defects under NRS 40.600
21 et seq. as they are made of inferior materials and are part of an inferior plumbing system, which can lead
22 to maintenance, repairs, water leaks, lack of water pressure and mold/damage (this is supported by the
23 nationwide product recall of Kitec in or around 2005 and its use being stopped everywhere in Clark
24 County and the Country), Plaintiffs have another theory which was developed during discovery. Upon
25 receiving the approved plans and specifications for these houses from Pulte and **3386 pages of**

27 ¹Even though Plaintiffs never sued IPEX, they entered into a settlement with IPEX in this case.
28 There is a signed agreement and IPEX filed a motion for determination of good faith settlement, which
will extinguish any implied indemnity or contribution claims against it by Pulte. It is set for hearing on
April 16, 2009.

1 documents (produced during this litigation and recently produced on March 4, 2009), Plaintiffs'
2 mechanical engineering expert, Harvey Kreitenberg, opines that the Kitec pipe fittings were not an
3 approved material on the approved plans and specifications, thus it is a design defect under NRS 40.600
4 et seq., and specifically NRS 40.615. This is the primary ground for seeking leave to amend the
5 Complaint to allege failure to disclose defects, fraudulent inducement/fraudulent concealment of defects,
6 misrepresentation and breach of the covenant of good faith and fair dealing claims due to Pulte's actual
7 knowledge that the Kitec pipe fitting was inferior and should not have been installed at these homes –
8 no disclosures of this were made to Plaintiffs). See NRS 40.640(5).² Further, Pulte has breached
9 implied warranties of habitability, fitness, quality and merchantability. Since the defects are so obvious
10 (they should be conceded based on settlements in the Class Action), this whole case is about what is the
11 proper repair (most everyone agrees that a complete re-pipe is the only adequate repair – now apparently
12 Pulte's experts do not think so), how much it will cost and Plaintiffs' Chapter 40 entitlements.³
13 Unfortunately Pulte only cares about the Class Action, not these senior citizens who are worried that
14 water leaks and/or plumbing problems will occur, and who were sold a defective plumbing system
15 without disclosure.

16 **3. PROCEDURAL POSTURE**

17 Individual Chapter 40 Claims on behalf of Plaintiffs were served between February 12-19, 2007.
18 Pulte made a statutory monetary offer per house, as it did with homes in the Class Action. Plaintiffs and
19 their experts contend that the amount of the offer was woefully insufficient to compensate them for
20

21 ²A developer, builder or seller of a new home can only disclaim a defect to avoid liability if: the
22 defect is disclosed to an owner before his purchase of the residence and the disclosure was provided in
23 language that is understandable and was written in underlined and boldfaced type with capital letters.

24 ³Unfortunately, despite three mediation sessions occurring to date, and Pulte's unwillingness to
25 stipulate to anything (not even the existence of Kitec), offer repairs or offer reasonable compensation
26 for repairs, Plaintiffs have had to conduct expensive destructive testing and a lengthy expert
27 investigation, and costs to date exceed \$85,000 for these 19 homes (now 18 with Mary Richard being
28 settled). Plaintiffs intend to seek declaratory relief that prior Chapter 40 offers of \$7,800.00 and offers
of judgment of \$6,500.00 are deficient, unconscionable and fail to comply with NRS 40.655. Chapter
40 offers made during pre-litigation were not based on any expert report, were conditioned upon signing
an improper release of liability prior to funds being paid and did not include attorney's fees and costs.
Offers of judgment made during this litigation were not based on any expert report and did not include
attorney's fees, costs and prejudgment interest. Pulte's non-compliance with Chapter 40 will entitle
Plaintiffs to damages beyond those specified in NRS 40.655. NRS 40.650.

1 repair costs and Chapter 40 entitlements (no expert reports or back-up were provided to support the
2 offers). The statutory offers were rejected after Chapter 40 mediation efforts failed. A Complaint was
3 filed on August 14, 2007. Pulte filed an Answer and Third Party Complaint on September 11, 2007.
4 For some reason, Pulte waited until March 2008, to serve IPEX and Cox Plumbing. IPEX filed an
5 Answer and Cross-Claim on March 13, 2008 (six months after Pulte answered), and Cox Plumbing filed
6 an Answer on March 20, 2008.

7 On September 5, 2007, Pulte filed a Peremptory Challenge of Judge Williams (most likely
8 because that is the Department where the Class Action is located). This case was re-assigned to Judge
9 Earl. The parties stipulated to the appointment of Floyd Hale as Special Master. He recommended and
10 the Court entered a Case Management Order (“CMO”) on November 29, 2007. After a short stay in
11 Department 19, Judge Earl disclosed a ‘potential’ conflict of interest with all cases involving Pulte, and
12 gave the defense parties the opportunity to challenge him (he did not believe there was a conflict, and
13 neither did Plaintiffs). Pulte chose to challenge Judge Earl, and on February 28, 2008, the case was
14 assigned to the only remaining construction defect court, your Honor in Department 22.

15 Pre-litigation mediation proceeded with Carl Flick before the Complaint was filed. After the
16 complaint was filed, mediation proceed on April 10, 2008, with Ross Feinberg. No offers were made
17 by Pulte. Mediation proceeded again on September 22, 2008, with James Roberts. No offer was made
18 by Pulte. Plaintiffs’ initial plumbing expert report was produced on June 20, 2008, and their cost of
19 repair estimate was produced on July 3, 2008. A report from Plaintiffs’ metallurgical expert, David
20 Coates, Ph.D was produced on February 5, 2009. Pulte’s expert reports were produced on March 10,
21 2009. Its cost of repair estimate is due March 24, 2009. Plaintiffs’ cost estimator, Jan Brussel, estimates
22 repair costs for each individual house ranging from \$15,000 to \$22,000. Third party reports (only Cox
23 Plumbing) are due April 14, 2009. Expert depositions are set to proceed and be completed June 1, 2009
24 - August 28, 2009. **No depositions have been taken.** The discovery cut-off is August 28, 2008, and
25 trial is set for September 7, 2010. Since trial is set so far out, an extension of discovery is possible.

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1 **4. ARGUMENT**

2 **A. LEAVE TO AMEND SHOULD BE FREELY GRANTED**

3 NRCP 15(a) provides:

4 . . . a party may amend his pleading only by leave of court . . . and leave shall be
5 freely given when justice so requires . . .

6 In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory
7 motive on the part of the movant – the leave to amend should be freely granted. *Stephens v. Southern*
8 *Nevada Music Co.*, 89 Nev. 104, 507 P.2d 138 (1973). The grant or denial of an opportunity to amend
9 is within the discretion of the trial court, but outright refusal to grant the leave without any justifying
10 reason appearing for the denial is not an exercise of discretion, it is merely an abuse of that discretion
11 and inconsistent with the spirit of the Nevada Rules of Civil Procedure. *Adamson v. Bowker*, 85 Nev.
12 104, 507 P.2d 138 (1973).

13 **B. THE AMENDMENT SHOULD RELATE BACK**

14 If the original pleading gives fair notice of the facts from which a new claim arises, the
15 amendment should relate back for limitations purposes. *Nelson v. City of Las Vegas*, 99 Nev. 548, 665
16 P.2d 1141 (1983). Whenever the claim or defense asserted in the amended pleading arose out of the
17 conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the
18 amendment relates back to the date of the original pleading. NRCP 15(c).

19 **C. NEVADA IS A NOTICE PLEADING STATE**

20 NRCP 8(a) requires that a pleading contain only a short and plain statement showing that the
21 pleader is entitled to relief. *Brown v. Keller*, 97 Nev. 582, 636 P.2d 874 (1981). Each averment of a
22 pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.
23 NRCP 8(e)(1).

24 A complaint must set forth sufficient facts to establish all necessary elements of a claim for relief
25 so that the adverse party has adequate notice of the nature of the claim and relief sought. *Hay v. Hay*,
26 100 Nev. 196, 678 P.2d 672 (1984). Courts liberally construe pleadings to place into issue matters
27 which are fairly noticed to the adverse party. *Id.* Pleading of conclusions, either of law or fact, is
28 sufficient so long as pleading gives fair notice of the nature and basis of the claim. *Crucil v. Carson*
City, 95 Nev. 583, 600 P.2d 216 (1979).

1 Nevada has adopted the heightened pleading requirement of Federal Rules of Civil Procedure
2 9(b) for fraud claims. Under NRCP 9(b), “all averments of fraud or mistake, the circumstances
3 constituting fraud or mistake shall be stated with particularity.” “Specifically, the circumstances that
4 must be detailed include averments to the time, the place, the identity of the parties involved, and the
5 nature of the fraud or mistake.” *Brown, supra*, at 583-584, 874. The reason Nevada requires heighten
6 pleading for fraud is "in order to afford adequate notice to the opposing part[ies]," "so that they can
7 defend against the charge and not just deny that they have done anything wrong." *Rocker v. KPMG LLP*,
8 148 P.3d 703, 707-708, 122 Nev. Adv. Rep. 101 (2006) (*overruled in part*) (quoting *Ivory Ranch v.*
9 *Quinn River Ranch*, 101 Nev. 471, 472-73, 705 P.2d 673, 675 (1985), *Neubronner v. Milken*, 6 F.3d
10 666, 671 (9th Cir. 1993).

11 The Supreme Court of Nevada applied a relaxed standard of NRCP 9(b) in *Rocker, supra*. In that
12 case, the Court found that the plaintiffs (a group of consumers) did not plead fraud with particularity
13 because a great deal of the information regarding the fraud was in the hands of the Defendant. *Id.* at
14 708.

15 The Court noted:

16 “This difficulty places the consumers in a classic catch-22—they are required to file a
17 complaint to enable them to conduct discovery to ascertain the relevant information they
18 need, but they cannot file a complaint with sufficient particularity because they do not
19 know the information contained in KPMG’s documents. Many courts have addressed
similar situations and recognize an exception to the particularized pleading
requirements.”

20 *Id.* at 708.

21 The Court further held that in this situation a relaxed application of the NRCP(9)(b) would apply
22 which would allow a plaintiff to conduct discovery and amend their complaint to meet the pleading
23 requirements. *Id.* at 709. The Court explained:

24 “This exception strikes a reasonable balance between NRCP(9)(b)’s stringent
25 requirements for pleading fraud and a plaintiffs’s inability to allege the full factual basis
26 concerning fraud because information and documents are sole in the defendant’s
27 possession and cannot be secured without formal, legal discovery. Therefore, we adopt
this relaxed standard in situations where the facts necessary for pleading with
particularity “are peculiarly within the defendant’s knowledge or are readily obtainable
by him.” *Id.* at 709 (quoting *Neubronner v. Milken*, 6 F.3d 666 at 672).

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1 In addition, the Court held as long as the Plaintiffs showed in their complaint a strong inference
2 of fraud and showed that they cannot plead with more particularity because the information is in
3 Defendant's control, Plaintiffs should be allowed to conduct discovery and amend the pleadings to
4 comply with NRCP 9(b). *Id.*

5 **D. THERE IS NO UNFAIR OR SUBSTANTIAL PREJUDICE TO DEFENDANTS**
6 **BY GRANTING LEAVE TO AMEND THE COMPLAINT**

7 Discovery in this case has revealed that Plaintiffs' homes were installed with Kitec water
8 distribution systems (confirmed in each house through costly destructive testing)⁴ and that piping
9 connections in this defective plumbing system are subject to failure (many if not all of them are
10 exhibiting signs of water leakage and damage). In fact, one home had an emergency plumbing failure
11 and had to be re-piped at the cost of \$24,000 (the Myotts have a liquidated damages claim for this
12 amount). The Kitec pipe fittings removed were severely corroded and damaged. Plaintiffs'
13 metallurgical expert, David Coates, Ph.D, based on viewing corroded and damaged Kitec fittings
14 removed from one house and reviewing photographs of corrosion on Kitec pipe fittings in all 19 homes
15 taken during destructive testing, opines that all 19 homes have evidence of failure and the potential for
16 failure in the future. Plaintiffs' general contracting expert, Jan Brussel, inspected each individual house
17 and prepared an individual cost of repair estimate for each, ranging from \$15,000 to \$22,000 based on
18 type of house, number of fixtures and other individual characteristics.

19 Plaintiffs' plumbing expert, Harvey Kreitenberg, upon reviewing the plans and plumbing
20 specifications for the Subject Properties, found that the plans did not call for Kitec piping systems. See
21 report of Harvey Kreitenberg dated May 31, 2008, attached with exhibits as **Exhibit 1**. In fact, the
22 approved plumbing plans called for Cross-Lined Polyethulene or Type-M Copper piping systems. *Id.*
23 Kitec was not listed among the suitable or approved types of piping systems that were to be installed in
24 the Subject Properties. Unlike Kitec, Cross-Lined Polyethulene and/or Type-M Copper piping systems
25 are not prone to failure like Kitec. In fact, Cross-Lined Polyethulene (PEX) could have been installed

26
27 ⁴Plaintiffs requested that Pulte stipulate to the existence of Kitec in Plaintiffs' homes which is
28 generally common knowledge (Pulte knew homes in Sun City Anthem had Kitec due to the Class Action
but chose to drive up Plaintiffs' costs). Since it refused, Plaintiffs were forced to incur significant costs
to destructively test each house. Plaintiffs simply could not take the risk that Pulte would argue
Plaintiffs failed to prove that Kitec fittings exist at each house.

1 with plastic on plastic connections (i.e., a plastic water pipe connected to a plastic fitting) which would
2 have avoided the problems now experienced by Plaintiffs with the Kitec water pipe being attached to
3 a Kitec brass pipe fitting. Pulte knowingly, deliberately and willfully violated its own approved plans
4 by installing a defective Kitec piping system in lieu of the proper and previously planned for piping
5 systems. Pulte knew that Kitec piping was being installed in Plaintiffs' homes and knew that the Kitec
6 system was inadequate for water conditions in Clark County (Pulte was on notice of the hard, high
7 sulfate in Clark County water when it designed, built and sold these homes). Although Pulte had actual
8 knowledge of the use and installation of the defective Kitec plumbing system, Pulte continued to sell
9 the homes to Plaintiffs without disclosing the intentional deviation in its approved plumbing plans.
10 Plaintiffs relied on Pulte (thinking it was a reputable, quality and 'honest' builder that stood by its
11 product) building a home with a plumbing system installed that was as specified in approved plans, and
12 not defective and prone to failure.

13 As opined by Mr. Kreitenberg (Exhibit 1), the Uniform Plumbing Code 310.1 provides that "all
14 design, construction, and workmanship shall be in conformity with accepted engineering practices
15 and shall be of such character as to secure the results sought to be obtained by this Code" Also in Mr.
16 Kreitenberg's report, he cites to Chapter 3, Part I of the UPC, under Workmanship, which provides in
17 pertinent part: "the goal is . . . plumbing installation that will function well during its expected life cycle
18 with a minimum of problems . . . there are other considerations such as reliability, resistance . . . good
19 workmanship results in the safe and satisfactory operation of a plumbing system for an expected duration
20 of time, with maximum economy and minimum maintenance." Here, Pulte failed to meet its obligation
21 to install an adequate and specified hot/cold potable water system to the standards they expressly and
22 impliedly warranted to Plaintiffs through their approved plans/specifications, their own representations
23 and their failure to disclose defects. Since Defendants' defenses do not change, nor do the witnesses and
24 evidence to prove these claims, there can be no unfair or substantial prejudice to Defendants, or any
25 undue delay. They cannot show that any 'real' prejudice to their ability to maintain defenses would
26 result by amendment of the pleadings to assert additional causes of action which are all based on facts,
27 witness testimony and evidence to date. In fact, under NRCP 15(b), Plaintiffs' are entitled to amend the
28 complaint at any time, even after judgment, to conform to the evidence. Plaintiffs are simply trying to

1 allege all viable causes of action in this lawsuit, which is their right, and the facts alleged in the initial
2 Complaint and subsequent amendments put Defendants on notice that these amendments would be
3 made. If Plaintiffs are not permitted to amend the Complaint to allege these claims, their rights will be
4 forever lost. In *Rocker*, supra, 148 P.3d at 707-708, 122 Nev. Adv. Rep. 101, the Supreme Court
5 applied a relaxed standard to the particularity pleading requirement for fraud when the documents and
6 information needed to prove fraud are in the possession of the defendants. That is the case here.
7 Depositions of Pulte's agents and broker are needed to gain more facts to support fraud and
8 misrepresentation, and Plaintiffs are entitled to conduct discovery on such issues/claims. The amendment
9 should relate back to the filing of the initial Complaint as the claims all arise out of the conduct,
10 transaction, or occurrence set forth or attempted to be set forth in the original pleading. NRC P 15(c).

11 Additionally, Plaintiffs seek to dismiss any non-Kitec related claims/allegations in the Complaint
12 without prejudice. They were generally alleged to protect the statutes of limitation/repose from running
13 and in case discovery revealed other constructional defects. This case only involves, and will only
14 involve, Kitec related defects. On September 30, 2008, parties entered a stipulation which resulted in
15 an order to dismiss "without prejudice" the non-Kitec allegations of Plaintiffs Richard and Jeannie
16 Einsiedel which are detailed in the Complaint. Plaintiffs seek to simplify the Complaint by removing
17 all non-Kitec allegations involving any Plaintiffs. Plaintiffs wish to clarify and simplify the Complaint
18 by alleging defects which are exclusively Kitec related and to conform the Complaint to the evidence.
19 NRC P 15(b). Non-Kitec defects should be dismissed without prejudice so Plaintiffs can pursue warranty
20 claims directly with Pulte or retain separate counsel to prosecute them. This firm has not been retained
21 to prosecute such non-Kitec claims, nor have they been investigated.

22 Plaintiffs inadvertently omitted Plaintiffs Raymond and Susan McIver under the Parties section
23 of the Complaint, even though they are parties to the action, are listed in the caption/preface language
24 and served a Chapter 40 Notice on Pulte. Their house has been investigated by Plaintiffs and Pulte and
25 they have always been treated as Plaintiffs. Defendants have always been on notice of them being
26 Plaintiffs, and they received an Offer of Judgment from Pulte. Plaintiffs seek to correct this omission
27 by added their names and address to the amended complaint.

28 ///

1 In or around December 2008, Plaintiff Rose Antonello passed away due to cancer. Her Trust is
2 now the record owner of the house. As such, Plaintiffs seek leave to amend the complaint to substitute
3 Catherine Marie Antonello Davis and Jay York, as Co-Trustees of the Antonello Family Revocable Trust
4 in place of her individual name, Rose Antonello, as she is deceased.

5 Recently Plaintiff Mary Richard accepted an Offer of Judgment served by Defendants. She has
6 signed a stipulation to dismiss with prejudice. Plaintiffs move for leave to remove her from the
7 Complaint.

8 When the initial Complaint was filed, the names of trusts/trustees for some of the homes were
9 not specifically identified. However, the trustees were. Plaintiffs move for leave to add the names of
10 the trustee/trusts. There is no surprise or prejudice as the same people have been in this case and they
11 have all received offers from Defendants both prior to and after litigation.

12 Accordingly, Plaintiffs should be permitted to amend their Complaint to include the
13 aforementioned claims for relief, to dismiss all non-Kitec related claims/allegations “without prejudice,”
14 to add a few facts to conform to the evidence, to add the names of Raymond and Susan McIver to the
15 Parties Section of the Complaint, to remove Mary Richard as a Plaintiff as she has settled and to add the
16 names of trustees/trusts.

17 **E. EVIDENCE SUPPORTS AMENDMENT OF THE FIRST AMENDED**
18 **COMPLAINT**

19 A builder has a non-delegable duty to ensure code compliance, safe construction and construction
20 in a workmanlike matter. *Reid v. Royal Ins. Co.*, 80 Nev. 137 (Nev. 1964). A contractor is responsible
21 for the work and actions of its subcontractors, designers and agents. NRS 40.640. NRS 40.640
22 provides:

23 *Liability of contractor.* In a claim to recover damages resulting from a constructional
24 defect, **a contractor is liable for his acts or omissions or the acts or omissions of his**
25 **agents, employees or subcontractors** and is not liable for any damages caused by:

- 26 1. The acts or omissions of a person other than the contractor or his agent, employee or
27 subcontractor;
- 28 2. The failure of a person other than the contractor or his agent, employee or
subcontractor to take reasonable action to reduce the damages or maintain the residence;
3. Normal wear, tear or deterioration;
4. Normal shrinkage, swelling, expansion or settlement; or

1 **5. Any constructional defect disclosed to an owner before his purchase of the**
2 **residence, if the disclosure was provided in language that is understandable and**
3 **was written in underlined and boldfaced type with capital letters.**

4 [Emphasis added]

5 In the case at hand, Pulte constructed and developed the residential community of homes that are
6 the subject of the Complaint. Pulte’s approved plumbing plans/specifications for the community call for
7 the installation of Cross-Lined Polyethulene (PEX) or Type-M Copper piping systems. Instead of
8 installing of plumbing system per the approved building plans, Pulte installed an inferior and defective
9 piping system, manufactured by Kitec. Neither the purchase agreement for the Subject Properties, nor
10 any related purchase or disclosure document, disclosed to Plaintiffs before they signed purchase
11 agreements, before they put money down on their homes or before they became the recorded owners that
12 the Subject Properties would have Kitec piping systems, a system which was prone to failure. As such,
13 since the type of continuing and potential damage that exists at the Properties is not the result of normal
14 wear, tear or deterioration, is not the result of normal shrinkage, swelling, expansion or settlement,
15 Defendants are liable to Plaintiffs for the continuing and significant defects at the Subject Properties.
16 NRS 40.640. Also, for Pulte to have disclaimed these defects, any constructional defect had to be
17 disclosed to Plaintiffs before their purchase of the residences with disclosures provided “in language that
18 is understandable and was written in underlined and boldfaced type with capital letters.” NRS
19 40.640(5). This simply did not occur.

20 The facts in this case clearly support a cause of action for fraudulent inducement and
21 concealment of defects, failure to disclose defects, misrepresentation and breach of the covenant of good
22 faith and fair dealing. See Proposed First Amended Complaint attached as **Exhibit 2** (removed
23 provisions are stricken and new allegations and claims are set forth in bold and italics). Since Nevada
24 is a notice pleading state, Pulte was on notice that Plaintiffs would amend to add these causes of action
25 because (1) it knew that it violated the approved plans and specifications, and (2) the initial Complaint
26 alleged that Pulte “knew” of the defects, as follows:

27 28. Defendants **knew** or should have known **of the defects, deficiencies and**
28 **property** damage at the Subject Properties, including but not limited to the defective and
 deficient Kitec pipe fittings and related systems, assemblies, parts and components, and
 failed to take appropriate steps to repair the problems, and **failed to disclose the**
 existence of the defects, deficiencies and property damage to Plaintiffs.

1 the use of Kitec instead of PEX were made to Plaintiffs. Plaintiffs will take Person Most Knowledgeable
2 and percipient witness depositions of Pulte employees to prove these claims. If the amendment is not
3 permitted, Plaintiffs cannot conduct discovery on these issues. The facts support such claims for relief
4 and Plaintiffs did not discover them until after the initial Complaint was filed and after Plaintiffs' expert
5 review of the plumbing plans which were produced by Pulte, some as recently as this month.

6 Rule 11 did not permit specifically alleging these claims in the initial Complaint on file.
7 Certainly doing so would have drawn a motion to dismiss and request for sanctions. In the initial
8 Complaint, Plaintiffs specifically reserved the right to seek amendment. See Complaint, Para. 32. This
9 is the 'first' amendment sought by Plaintiffs and it would be unfair not to permit them to amend when
10 leave to amend shall be freely given and there is plenty of time left for discovery, and when Plaintiffs
11 did not act dilatory or for improper purpose. They should be entitled to bring all of their claims against
12 Pulte in this action; and denying this motion when leave to amend shall be freely granted would unfairly
13 and substantially prejudice them as their claims will be forever lost. In *Rocker*, supra, 148 P.3d at 707-
14 708, 122 Nev. Adv. Rep. 101, the Supreme Court applied a relaxed standard to the particularity pleading
15 requirement for fraud when the documents and information needed to prove fraud are in the possession
16 of the defendants. That is the case here. Depositions of Pulte's agents and broker are needed to gain
17 facts to support fraud and misrepresentation, and Plaintiffs are entitled to conduct discovery on such
18 issues/claims. An outright refusal to grant leave to amend without any justifying reason appearing for
19 the denial is not an exercise of discretion, it is merely an abuse of that discretion and inconsistent with
20 the spirit of the Nevada Rules of Civil Procedure. *Adamson*, supra, 85 Nev. 104, 507 P.2d 138. Neither
21 the failure to disclose defects claim which is part of the fraud claim, nor the misrepresentation or breach
22 of the covenant of good faith and fair dealing claim, require any particularity. Rather, they fall under
23 general notice pleading requirements.

24 The proposed First Amended Complaint also removes irrelevant allegations/claims pertaining
25 to non-Kitec related claims. Non-Kitec claims are not being prosecuted in this action and should be
26 dismissed without prejudice. The First Amended Complaint also adds the names of Raymond and Susan
27 McIver to the Parties Section (they were named in the caption and preface and have always been treated
28 as Plaintiffs – they received an Offer of Judgment from Pulte). A few other allegations are added so that

1 the pleading conforms to the evidence to date. NRCP 15(b). All proposed amendments are set forth
2 in both and italics (the caption should also be amended to reflect changes), and allegations or claims to
3 be removed are stricken. Also, leave should be granted so the Co-Trustee of the Trust of Rose Antonello
4 (deceased) can be substituted with her name. This is just a procedural amendment. Plaintiffs also move
5 to remove Plaintiff Mary Richard as a Plaintiff as she has settled with Pulte and will be dismissed with
6 prejudice. This is just a procedural amendment. Finally, they move to add the names of trustees/trusts
7 who own the homes in place of the individuals who are the trustees. This is just a procedural
8 amendment.

9 Since this motion is timely brought and is not brought for the purpose of delay or surprise leave
10 shall be freely given [NRCP 15(a)], this motion should be granted and the amendment should relate back
11 to the date the original Complaint was filed.

12 For all of the aforementioned reasons, Plaintiffs respectfully request that leave be granted so the
13 proposed First Amended Complaint can be filed.

14 DATED this 19th day of March, 2009.

15 **THE LAW OFFICES OF NEAL HYMAN**

16
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