IN THE SUPREME COURT OF THE STATE OF NEVADA

D.R. HORTON, INC., a Delaware corporation,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the COUNTY OF CLARK; and the HONORABLE SUSAN H. JOHNSON, District Judge,

Respondent.

HIGH NOON AT ARLINGTON RANCH HOMEOWNWERS ASSOCIATION, a Nevada non-profit corporation,

Real Party in Interest.

Case No. 58533

Clark County District Court
Case No. A542616

ANSWER TO PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION

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I. INTRODUCTION

The District Court (sometimes referred to as "Respondent Court") did not abuse its discretion in ruling that an NRCP 23 analysis is not required for the Association's claims regarding the building envelopes. The District Court correctly found that since the constructional defects which are located within or upon the units' building envelopes- including the exterior of the building, the roof, stucco, balconies, decks, exterior doors, and windows - **necessarily** affect the common interest community, the Association has standing to bring suit in a representative capacity for these defects pursuant to NRS 116.3102(1)(d).[1] D.R. Horton's position that an NRCP 23 analysis is required **in all instances** when the Association seeks to bring a representative action is entirely flawed. The District Court correctly recognized that requiring a homeowner's association to meet all the prerequisites of NRCP 23 before it can litigate on behalf of its members constructional defects affecting the common-interest community- such as those upon or within exterior walls, wall openings and roofs- would nullify NRS 116.3102(1)(d). Rather, *D.R. Horton v. Eighth Judicial District Court*, 215 P.3d 697 (2009) (hereinafter "*First Light II*") only requires a Rule 23 analysis where the defects are in the interior of the units and do not affect other unit owners.

The Nevada district courts have correctly recognized that there are inherent conflicts between an association's statutorily granted standing under NRS 116.3102(1)(d) and the requirements of *First Light II* and NRCP 23.[2] *First Light II* does not require an NRCP 23

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[1] *See* Respondent Court's February 10, 2011 Order, Exhibit 12 to D.R. Horton's Petition for Writ of Mandamus, p. 18 and p. 20.

[2] Several writ petitions have been filed challenging district court decisions on the issue of an association's representational standing. *See, e.g.*, Nevada Supreme Court Case Numbers 57187, 57515, 57614, 57887, 57888, and 58029.

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analysis in those instances where conducting one would transgress the Nevada legislature's intent. For instance, NRS 116.3102(1)(d) clearly allows an Association to bring a representative action on behalf of **2 or more** units' owners. However, NRCP 23(a) states that to meet the numerosity requirement, the number of class members must be so numerous that joinder is impracticable. Thus, application of the numerosity prong of Rule 23 facially violates the legislative mandate of NRS 116.3102(1)(d) that a defect affecting "two or more" unit owners is sufficient. By ruling that no NRCP 23 analysis is required for the Association's building envelope claims, the District Court correctly reconciled NRS 116.3102(1)(d) and *First Light II* in a way that would avoid transgressing the Legislature's intent. Moreover, contrary to D.R. Horton's assertions, a developer's accountability for defective construction cannot be precluded simply because the CC&Rs place the ownership and maintenance responsibilities of the building envelope upon the unit owners. For all of the foregoing reasons, D.R. Horton's Petition for Writ must be denied.

II. FACTS

This matter concerns a planned townhome development known as High Noon at Arlington Ranch (hereafter "High Noon"). The High Noon Community consists of 342 residential units in 114 triplex buildings located in Clark County, Nevada. The development construction type is wood framed walls, with concrete tile roofing, and a one-coat stucco system. Units are housed in triplex buildings with the owners sharing common exterior walls, foundation and roof and with one of the units constructed on top of portions of the other two units. High Noon was developed, constructed and sold by D.R. Horton in or about 2005. On June 7, 2007, Association filed a Complaint against D.R. Horton alleging constructional defects in the common areas and in the residential buildings. *See* Exhibit 1 to D.R. Horton's Petition for Writ of Mandamus. On April 14, 2008, D.R. Horton brought a motion for partial

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summary judgment, based upon the argument that the Association lacked standing to pursue claims with regard to the buildings which are owned and maintained by the homeowners. *See* Exhibit 4 to D.R. Horton's Petition for Writ of Mandamus. On July 9, 2008, the District Court entered an order granting D.R. Horton's Motion for Partial Summary Judgment, stating that the Association is precluded from pursuing claims related to the individual units. *See* Exhibit 5 to D.R. Horton's Petition for Writ of Mandamus. On November 20, 2008, Association filed a Petition for Writ of Prohibition or Mandamus in the Nevada Supreme Court, challenging the District Court's order granting D.R. Horton's Motion for Partial Summary Judgment. *See* Exhibit 6 to D.R. Horton's Petition for Writ of Mandamus. On September 3, 2009, the Nevada Supreme Court issued an Order Granting Petition, stating that the District Court was to review the Association's claims in accordance with the guidelines set forth in *First Light II* to determine whether the Association may file suit in a representative capacity for constructional defects affecting the individual units. *See* Exhibit 7 to D.R. Horton's Petition for Writ of Mandamus.

On September 30, 2010, Association filed a Motion for Declaratory Relief re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d). *See* Appendix To Answer To Petition For Writ of Mandamus, Vol. I, pp. 1 – 207. On February 10, 2011, the District Court entered an Order finding that the Association lacked standing to assert defect claims alleged to exist within the individual homes at the High Noon community due to failure to satisfy the class action requirements of NRCP 23 and *First Light II*. *See* Exhibit 12 to D.R. Horton's Petition for Writ of Mandamus at pp. 15 – 17.[3] However, the Court found

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[3] On June 22, 2011, Association filed a Petition for Writ of Mandamus, arguing that the Association may assert standing for defect claims within the individual homes at the High Noon Community pursuant to the Assignment of Claims that the Association has received

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that pursuant to NRS 116.3102(1)(d), Plaintiff has standing to bring suit in a representative capacity for constructional defects that affect the 114 triplex "building envelopes," including the exterior of the building, the roof, stucco, balconies, decks, exterior doors, and windows. *See id.* at pp. 18 - 20.

III. ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Ruling That An NRCP 23 Analysis Is Not Required For The Association's Claims Regarding The Building Envelopes.

In its Petition for Writ, D.R. Horton asserts the "Respondent Court arbitrarily and capriciously abused its discretion in failing to perform an NRCP 23 analysis, as mandated in the September 3, 2009 Order Of This Court and *First Light II*." *See* D.R. Horton's Petition for Writ at p. 13. However, as discussed below, the district court correctly recognized the Association has standing under NRS 116.3102(1)(d) to assert claims in the building envelope, because the defects alleged affect two or more unit owners and necessarily concern the common-interest community.

1. The Association Has Standing Under NRS 116.3102(1)(d) To Assert Claims In The Building Envelope Because The Defects Alleged Affect Two Or More Unit Owners And Necessarily Concern The Common Interest Community.

NRS 116.3102 defines the powers of unit owners' associations, including whether they have standing to pursue litigation in their own name and/or on behalf of its members. NRS 116.3102(1)(d) states that:

> 1. Except as otherwise provided in subsection 2, and subject to the provisions of the declaration, the association may do any or all of the following:
>
> . . .

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from the homeowners. Said Petition is pending in the Nevada Supreme Court in Case No. 58630.

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> (d) Institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more units owners on matters affecting the common-interest community.

(emphasis added.) NRS 116.3102(1)(d) was modeled after Section 3-102 of the Uniform Common Interest Ownership Act ("UCIOA"). *First Light II*, 215 P.3d at 703. The purpose of UCIOA Section 3-102 was to "make clear that the association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest." UCIOA Section 3-102, Comment 3 (1982). In *First Light II*, the Nevada Supreme Court confirmed that an Association does have standing pursuant to NRS 116.3102 to file a representative action on behalf of its members for constructional defects in individual units of a common-interest community:

> "We conclude that because a common-interest community includes both common elements and units, a homeowners' association has standing under NRS 116.3102(1)(d) to assert a cause of action against a developer for constructional defects within individual units."

First Light II, 215 P.3d at 704.

Respondent Court specifically stated that since the constructional defects which are located within or upon the units' building envelopes **necessarily** affect the common interest community, the Association has standing for these defects pursuant to NRS 116.3102(1)(d):

> "By the express language set forth in NRS 116.3102(1)(d), a homeowners' association such as Plaintiff, may institute litigation on behalf of itself or 2 or more units' owners on matters affecting the common-interest community. There is no doubt constructional defects within or upon the units' "building envelopes" affect the common-interest community, and thus, this Court concludes Plaintiff has standing to sue on behalf of 2 or more of its members for constructional defects which are limited to [the] exterior of the building, the roof, the stucco, the balconies and decks, the exterior doors and the windows."

See Exhibit 12 to D.R. Horton's Petition for Writ of Mandamus, pp. 17 - 18, Paragraph 32. Defects in the building envelope by definition affect more than one unit owner, and affect the entire common interest community. The building envelope is a monolithic structure, and can

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only be repaired as a whole. For instance, if there is a defect in one unit owner's "portion" of the roof or exterior walls, that defect will affect and damage the other unit owners in the building. It would not be possible to repair one units' roof or exterior walls without also repairing the neighboring units' roof or walls. As the district court explained:

> "Here, as noted above, this Court concluded [Association] did not have standing to represent 194 units' owners with respect to the sundry of individualized claims for constructional defects within the interiors of their units. However, in this Court's view, claims relating to constructional defects located upon or within the buildings' envelopes are different, and affect every member of the common-interest community. Such is true even where, as in this case, units' owners typically are responsible for maintaining their homes' exteriors and to repair any defects. Indeed, members of the Association have a justifiable expectation that maintenance and repairs to the 114 triplex building exteriors will be consistent, and not a myriad of piecework upkeep to each structure, or portion thereof."

See Exhibit 12 to D.R. Horton's Petition for Writ of Mandamus, pp. 18 – 19, Paragraph 34.

2. *First Light II* Does Not Require An NRCP 23 Analysis In Those Instances Where Conducting One Would Transgress The Nevada Legislature's Intent.

D.R. Horton's position is that an NRCP 23 analysis is required **in all instances** when the Association seeks to bring a representative action. However, as explained below, *First Light II* does not require an NRCP 23 analysis in those instances where conducting one would transgress the Nevada legislature's intent. By ruling that no NRCP 23 analysis is required for the Association's building envelope claims, the Respondent Court correctly reconciled NRS 116.3102(1)(d) and *First Light II* in a way that would avoid transgressing the Legislature's intent.

First Light II held that when an Association asserts claims in a representative capacity with regard to the *interior of the units*, the action must fulfill the requirements of NRCP 23, and the principles expressed in *Shuette v. Beazer Homes*, 121 Nev. 837, 124 P.3d 530 (2005).

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First Light II, 215 P.3d at 699-700.[4] Thus, *First Light II* requires a Rule 23 analysis only where the defects are in the interior of the unit and do not affect other unit owners. The *First Light II* Court took the concept of applying a Rule 23 analysis from a comment to the Restatement 3d of Property, quoted as:

> "[i]n suits **where no common property is involved**, the association functions much like the plaintiff in a class-action litigation, and questions about the rights and duties between the association and the members with respect to the suit will normally be determined by the principles used in class-action litigation." *Restatement (Third) of Prop.: Servitudes* § 6.11 cmt. a (2000).

First Light II, 215 P.3d at 703 (emphasis added.) Thus, "where no common property is involved" and only individual defects are addressed, as in the *Shuette* case (*Shuette* concerned geotechnical defects that disparately affected single family homes, and were disparately affected by homeowner improvements and lack of maintenance), the *First Light II* court requires a Rule 23 analysis:

> "And we turn to both NRCP 23 and the principles expressed in *Shuette* to determine how "questions about the rights and duties between the association and the members," [citation] shall be resolved. When describing the policy behind class action lawsuits, this court has declared that "class actions promote efficiency and justice in the legal system by reducing the possibilities that courts will be asked to adjudicate many separate suits arising from a single wrong." *Shuette*, 121 Nev. at 846, 124 P.3d at 537. However, in *Shuette*, this court announced that because a fundamental tenet of property law is that land is unique, "as a practical matter, single-family residence constructional defect cases will rarely be appropriate for class action treatment." *Id.* at 854, 124 P.3d at 542. In other words, because constructional defect cases relate to multiple properties and **will**

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[4] *See also* February 10, 2011 Order, Exhibit 12 to D.R. Horton's Petition for Writ of Mandamus, at p. 18, Paragraph 33 (Respondent Court stated that: "In [*First Light II*], the Nevada Supreme Court was petitioned for extraordinary writ relief, and asked to resolve whether a homeowner's association had standing to pursue constructional defect claims on behalf of its members with respect to alleged defects *within or inside* individual units located within a common-interest community.").

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> **typically involve different types of constructional damages, issues concerning causation, defenses, and compensation are widely disparate and cannot be determined through the use of generalized proof**. Id. at 855, 124 P.3d at 543. Rather, individual parties must substantiate their own claims and class action certification is not appropriate. *Id.*"

First Light II, 215 P.3d at 703-704 (emphasis added.)

Shuette concerned single family homes, where causation, damages and defenses were widely disparate. Here, we have the opposite. Ownership of a unit in a building consisting of other like units in a common-interest community differs vastly in character and nature from ownership of a single-family home on a separate parcel of land. As recognized by the Respondent Court, Plaintiff's "building envelope" claims do not involve defects that are located within the interiors of the units. *See* Exhibit 12 to D.R. Horton's Petition for Writ of Mandamus, p. 18. Thus, Respondent Court stated that *First Light II* is distinguishable, and the class action analysis of NRCP 23 is not required. *See id.* at pp. 17 - 18, Paragraph 32 ("In so holding, this Court notes claims made by Plaintiff for constructional defects to the building exteriors, or "envelope" are different than those addressed in [*First Light II*], whereby no class action analysis under NRCP 23 need be undertaken with respect to such causes of action."). Thus, D.R. Horton's assertions that Respondent Court has ignored the mandates of *First Light II* and NRCP 23 are entirely meritless. Rather, in holding that the Association has standing for the building envelope defects, Respondent Court correctly applied the holding and rationale of *First Light II* to the facts of this case.

a. The Nevada District Courts Have Correctly Recognized That There Are Inherent Conflicts Between An Association's Statutorily Granted Standing Under NRS 116.3012(1)(d), And The Requirements Of *First Light II*, *Shuette*, And NRCP 23.

Since the *First Light II* decision, homeowners associations, developers, and contractors have set forth varying interpretations of the decision. Several writ petitions have

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been filed challenging district court decisions on the issue of an association's representational standing.[5] Thus, although D.R. Horton asserts throughout its petition that the Court set forth "clear and certain guidelines" in *First Light II*, the reality is that the *First Light II* decision did not set forth "clear and certain" guidelines. Rather, Nevada district courts have correctly recognized that there are inherent conflicts between an association's statutorily granted standing under NRS 116.3102(1)(d) and the requirements of *First Light II* and NRCP 23.

i. Strict Compliance With The Numerosity Prong Of NRCP 23 Facially Violates The Legislative Mandate Of NRS 116.3102(1)(d) That An Association May Bring An Action On Behalf Of 2 Or More Units' Owners.

NRS 116.3102(1)(d) clearly allows an Association to bring a representative action on behalf of **2 or more** units' owners. However, NRCP 23(a) states that to meet the numerosity requirement, the number of class members must be so numerous that joinder of all members is impracticable. Moreover, the Court in *Shuette* noted that: "although courts agree that numerosity prerequisites mandate no minimum number of individual members, a putative class of forty or more generally will be found "numerous." *Shuette*, 121 Nev. at 847. Thus, the Nevada district courts have correctly recognized that there is an inherent conflict between NRS 116.3102(1)(d)'s statutory grant of standing to a homeowners association, and the numerosity requirement of NRCP 23. Respondent Court has stated that:

> "**To conclude a homeowner's association must adhere and meet all the prerequisites of NRCP 23 before it may litigate on behalf of unit owners on matters affecting the common-interest community, would be contrary to the legislative intention set forth in NRS 116.3102(1)(d).** Indeed, the Nevada Legislature clearly set forth within this statute the homeowner's association may institute, defend or intervene in litigation in its own name on behalf of a minimum of *two* units' owners. "Two", however, is a number or figure that never would meet the

[5] *See, e.g.*, Nevada Supreme Court Case Numbers 57187, 57515, 57614, 57887, 57888, and 58029.

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"numerosity" requirement of NRCP 23… **T]hus, requiring a homeowner's association to meet all the prerequisites of NRCP 23 before it can litigate, on behalf of its members, constructional defects affecting the common-interest community, such as those upon or within exterior walls, wall openings and roofs, would nullify NRS 116.3102(1)(d).**"

See February 10, 2011 Order, Exhibit 12 to D.R. Horton's Petition for Writ of Mandamus, p. 19, Paragraph 35 (emphasis added). Thus, it is clear that application of the numerosity prong of NRCP 23 facially violates the legislative mandate of NRS 116.3102(1)(d) that a defect affecting "two or more" unit owners is sufficient. Strict compliance with NRCP 23 would entirely negate the statutory standing which has been granted to homeowners associations under NRS 116.3102(1)(d), and it would also negate the first part of *First Light II*, wherein the Court confirmed an association's right to act in a representative capacity on behalf of two or more unit owners.

For all of the foregoing reasons, D.R. Horton's Writ Petition must be denied.

3. The Fact That The CC&Rs Of The High Noon Community Define "Unit" To Include The Building Envelope And Place The Maintenance Responsibilities Upon The Unit Owners Does Not Defeat The Association's Standing.

D.R. Horton argues that because the building envelopes are owned individually, and are required to be maintained by the individual homeowners, they do not meet the criteria established by the Court in *First Light II* for a representative action. *See* D.R. Horton's Petition for Writ of Mandamus at pp. 11 – 12. However, in a typical condominium or townhouse case, the Association has maintenance responsibility over the building envelope, and the Association therefore has standing in its own right to bring an action to redress defects in the envelope's construction. D.R. Horton deliberately drafted the High Noon CC&Rs in a manner designed to insulate itself from potential liability for constructional defect actions, by giving all of the maintenance and repair responsibilities to the homeowners. By this tactic of

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stripping the Association of the maintenance responsibilities that it would typically have, D.R. Horton has created the impossible situation whereby all of the homeowners of a building would have to coordinate and agree to contribute to the repair, maintenance or replacement of any of the common components.

Thus, D.R. Horton's interpretation of *First Light II* would unconstitutionally create discriminatory classifications. It would treat homeowners seeking recovery for construction defects in the building envelopes of their units owned individually more restrictively than it would treat homeowners seeking recovery for construction defects in virtually identical building elements contained in the common elements that are owned jointly by causing only the former actions to be reconciled with the principles and analysis of class action lawsuits. D.R. Horton's interpretation is absurd and it must be rejected.

Moreover, D.R. Horton's contention that the CC&Rs- through the allocation of maintenance and repair responsibility- preclude an Association from bringing litigation on behalf of the owners in a representative capacity is the same issue that D.R. Horton raised in *First Light II*. However, the Court made clear in *First Light II* that NRS 116.3102(1)(d) provides the Association with the statutory standing to pursue claims on behalf of two or more homeowners on matters that affect the common-interest community, regardless of whether the CC&Rs state that the Association is responsible for maintaining the building exteriors.[6] Thus, contrary to D.R. Horton's assertions, a developer's accountability for defective construction

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[6] This argument was also soundly rejected by the Nevada Supreme Court in *Monarch Estates Homeowners Association v. Eight Judicial District* (Johnson Communities of Nevada, Inc., real party in interest), No. 51942; the Court stated that "[To] the extent that Johnson argues that the CC&Rs limit Monarch's standing, we conclude that Johnson's arguments have no merit.") *See* Slip Opinion dated September 3, 2009, No. 51942, at p. 4.

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cannot be precluded simply because the CC&Rs place the ownership and maintenance responsibilities of the building envelope upon the unit owners.

B. Even If An NRCP 23 Analysis Is Required For The Building Envelope Claims, The Defects Satisfy An NRCP Rule 23 Analysis.

Even if this Court finds that an NRCP 23 analysis is required for the building envelope claims, the Association satisfies the requirements of NRCP 23.

1. NRCP 23's Numerosity Requirement Is Satisfied.

The legislature has determined that a common-interest community association can proceed on behalf of just 2 of its members when the issue affects the common interest community. NRS 116.3102(1)(d). If the minimum number of homeowners required under an NRCP Rule 23 analysis is greater than two, it runs afoul of this legislative mandate. Accordingly, the numerosity requirement should be viewed in that light. Here, it is clear that more than 2 unit owners are affected by the alleged defects because all of the triplex homes within the community are directly affected by the defective construction of the building envelopes. The defective condition of the project affects each and every homeowner's property value. Also, because each building envelope is a monolithic structure, repairs must be made to the entirety of the building. Thus, the numerosity requirement is satisfied.

Moreover, the putative "class" of unit owners at High Noon is sufficiently numerous to make joinder of all class members impracticable. Although there is no universal minimum number required to fulfill the numerosity requirement, "a putative class of forty or more generally will be found 'numerous.'" *Shuette,* 121 Nev. at 847. Impracticability factors such as judicial economy, geographic dispersion of class members, financial resources of class members and ability of class members to bring individual suits should be taken into consideration when analyzing the numerosity requirement. *Id.* at 847. In the context of this

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analysis, "Impractical does not mean impossible." *Id.* at 847, citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2nd Cir. 1993).

There are 342 units in High Noon at Arlington Ranch. Certainly litigating over 300 of the same claims individually would not be judicially economical, especially when dealing with similar breach of warranty and negligence claims. While an individual homeowner may ultimately recover his or her reasonable expert and investigation costs under NRS 40.655, it is still financially burdensome to the homeowner given the fact that he or she would have to advance these costs before a verdict. This may in fact make homeowners hesitant to bring their action forward. Thus, even though the unit owners may be close in geographical location, the high costs associated with bringing an individual or joinder construction defect action make it impractical.

2. The Instant Action Involves Common Questions of Law and Fact.

The "commonality" prong of Rule 23 can be satisfied by a single common question of law or fact. *Shuette*, 121 Nev. at 848. "Commonality does not require that all questions of law and fact must be identical, but that an issue of law or fact exists that inheres in the complaints of all the class members." *Id.* (citation omitted). The need for an individualized determination of damages suffered by each class member generally will not defeat class certification. *Shuette*, 121 Nev. at 856. Here questions of law and fact are common throughout the development. All the unit owners have common problems in the building envelope that have resulted from D.R. Horton's conduct in the construction of the buildings. Each owner must rely on the same theories of liability, and D.R. Horton's defenses are likewise identical to each owner.

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a. There Are Several Common Issues Of Fact.

All of the High Noon unit owners have claims that will be resolved under NRS Chapter 40 and NRS Chapter 116, and the defective conditions of the building envelope are common to all of them. Thus, although each individual member might not possess each individual defect, the building envelope defects are interconnected because a defective condition in one neighbor's portion of the envelope commonly affects the abutting owner. Regardless of which unit owner owns the particular stucco, framing and roof, defects in these items affect the entire community. For instance, it is not uncommon for a defect to develop in the roof of one owner and manifest itself by leaking water into the dwelling of another. Thus, the defects in the building envelope- coupled with a joint maintenance, repair and/or replacement duty- is a fact that is common to all unit owners.

Roofs

Association's expert RH Adcock and Associates has visually and destructively inspected 54 of the 114 building roofs—which is 47.4 percent of the roofs. *See* Appendix to Answer to Petition for Writ of Mandamus, Vol. I, p. 48. Defects in tile and roof component installation were identified at 100% of the roofs inspected. *See id.* at pp. 48 – 108. While the exact configuration of defects varied somewhat from roof to roof, the same patterns of defective conditions were observed throughout the development. *See id.* Each of the roofs is defective, and the repair recommendation for each of the roofs is the same. *See id.*

Decks and Balconies

Mr. Adcock and his inspectors visually inspected 52 private balconies, and destructively tested seven. *See* Appendix to Answer to Petition for Writ of Mandamus, Vol. I, p. 109. The defects found at the privacy balconies were uniform- the same defects were identified at 100% of the decks inspected. *See id.* at pp. 110 - 120. Those defects include use

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of inappropriate sheet metal nails, incomplete and inadequate sheet metal flashing laps; lack of sealant at same; and inadequate sloping of the deck surfaces. *See id.* The repair recommendation for each balcony is the same. *See id.*

One Coat Stucco System

Mr. Adcock and his inspectors visually inspected 65 of the 114 building exteriors to date. *See* Appendix To Answer To Petition for Writ of Mandamus, Vol. I, p. 121. The same defects were observed at 100% of the buildings inspected. *See id.* at pp. 126 – 127. These defects include excessive cracking; penetrations not sealed; missing backing at horizontal surfaces; improper sheathing at such surfaces; defects in the waterproof membrane at horizontal surfaces; and foam plant-ons notched to accommodate shutters. *See id.* at pp. 122-131. Again, each of buildings did not exhibit each of these defects—but all of the buildings exhibited some or all of these defects, and the repair recommendation is the same in each building. *See id.*

Doors

R.H. Adcock visually inspected 57 sliding glass doors, and invasively tested 11 of them. *See* Appendix To Answer To Petition for Writ of Mandamus, Vol. I, p. 132. Again, R.H. Adcock found defects at each of the doors inspected, including water intrusion at the doors, defects in the door frame sealing and at head flashing. *See id.* at pp. 133-153. Not every door exhibited every defect, but each door inspected was defectively installed with regard to one or more of the defective conditions observed. *See id.* The repair recommendation is the same for each of the defective doors. *See id.*

Windows

R.H. Adcock visually inspected 719 weather exposed windows at 91 units, and invasively tested 25 windows. *See* Appendix To Answer To Petition for Writ of Mandamus,

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Vol. I, p. 180. Every window inspected was found defective. *See id.* at p. 186 and p. 194. The main defects identified include: Leaking window during spray tests, EPS not sealed at frame, missing or incomplete sealant behind nail fin, flashing improperly installed, shear panels at windows short of window fin, improper penetrations through nail fin, and alarm contacts drilled at sill of windows. *See id.* at pp. 181 - 207. Although every window did not exhibit every defect identified, every window observed was defective in one or multiple ways. *See id.* The repair recommendation is the same for each window. *See id.*

b. There Are Several Common Issues Of Law.

Common issues of law include whether D.R. Horton was negligent in constructing the building envelope and whether D.R. Horton breached any implied warranties in constructing the building envelope. Nevada's statutorily implied warranty of quality- NRS 116.4114(2)- states that:

> "a declarant and any dealer impliedly warrant that a unit and the common elements in the common-interest community are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by a declarant or dealer, or made by any person before the creation of the common-interest community, will be: (a) free from defective materials; and (b) constructed in accordance with applicable law, according to sound standards of engineering and construction, and in a workmanlike manner."

Thus, NRS 116.4114(2) simply places liability on the declarant for all of the "improvements made or contracted for by him" that are defectively constructed. D.R. Horton is the declarant. Thus, upon D.R. Horton's sale of the High Noon units to the homeowners, D.R. Horton warranted that the building envelopes met the provisions of NRS 116.4114(2). Under NRS 116.4114, the main inquiry is whether the improvements are defective. The statute does not place emphasis on why or how the improvements are defective, thus it is irrelevant how many subcontractors may have worked on the project. Moreover, NRS 116.4114(6) provides

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that "any conveyance of a unit transfers to the purchaser all of the declarant's implied warranties of quality." Thus, subsequent purchasers have the same rights to plead a breach of the statutory implied warranty as did the original purchasers. *See also Anse, Inc. v. Eighth Judicial District Court*, 124 Nev. 862, 872, 192 P.3d 738, 745 (2008) (holding that subsequent purchasers can pursue claim for construction defects under NRS Chapter 40).

3. The Claims and Defenses of the Association are Typical of the Class.

Association's claims and applicable defenses are typical of the other owners. Typicality is satisfied when "each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove the defendant's liability." *Shuette*, 121 Nev. at 848-49, (citing *Robidoux v. Celani*, 987 F.2d 931, 936 (2nd Cir. 1993)). This does not require all class member claims to be identical. *Id.* at 849. Thus, "certification will not be prevented by mere factual variations among class members' underlying individual claims." *Id.* at 849.

In *Deal v. 999 Lakeshore Association*, 94 Nev. 301, 306 (1978), the Court recognized that where the roofs leaked in every one of the buildings, and all of the unit owners were assessed for repairs to the roof area- each of the homeowners suffered damage and their claims were typical of the other homeowners. Here, similarly, each member's claim arises out of D.R. Horton's construction of the building envelopes. The claims rest on the same legal arguments of breach of express and implied warranties as well as negligence to prove D.R. Horton's liability. Each homeowner from the putative "class" would advance these same common construction defect legal arguments if they were to individually pursue relief for their construction defects. Even if various contractors were involved in High Noon's construction, in light of the clear liability that attaches to a declarant for defective improvements "made or contracted by him," it is only D.R. Horton's course of conduct that

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need be considered for purposes of typicality. NRS 116.4114. Thus, as a result of D.R. Horton's conduct, each member who currently owns a High Noon unit has been injured and the claims are typical.

4. The Association Will Fairly And Adequately Protect The Interests Of The Membership.

Here, the Association and the other homeowners have suffered the same injury in that their homes were built in the same defective manner as the rest of the unit owners. Moreover, the Association and the other homeowners all possess the same interest in proving the defects and otherwise seeking compensation to remedy the condition of the building components. Accordingly, the Association will fairly and adequately protect the interests of the unit owners. Moreover, the Association's board members have a fiduciary duty to "act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association." NRS 116.3103(1). These clearly defined duties imposed on the Association's board members benefit the unit owners as they include maintenance, repair and/or replacement obligations for the triplex buildings, and thus are adequate for these alleged constructional defect claims.

Additionally, the law firm of Angius & Terry LLP is more than qualified in representing the class. The firm has handled numerous class action lawsuits dealing with construction defects. A-V rated attorney Paul P. Terry, Jr. has several years of litigation experience in handling complex matters relating to construction defects. As such, the membership will be adequately represented by Angius & Terry LLP.

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5. Common Questions Of Law And Fact Predominate Over Individual Questions And A Class Action Is The Superior Method Of Adjudication.

In addition to satisfying the numerosity, commonality, typicality, and adequacy of representation elements of NRCP 23(a), Plaintiff must also fulfill at least one of the requirements outlined under NRCP 23(b)(3)- that common questions predominate over individual questions, and that the class action is a superior method of adjudication of the claims. Here, those prongs are met.

a. Common Questions Predominate Over Individual Questions.

The predominance prong "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623, 117 S. Ct. 2231 (1997). The rule "does not require uniformity of claims across the entire class" and "presupposes that individual issues will exist." *Payne v. Goodyear Tire & Rubber Co.*, 216 F.R.D. 21, 26 (D. Mass. 2003). "There is no rigid test of predominance; rather, it simply requires a finding that a sufficient constellation of issues binds class members together." *Id.* at 26 (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 296 (1st Cir. 2000)). "A single, central issue as to the defendants' conduct vis a vis class members can satisfy the predominance requirement even when other elements of the claim require individualized proof." *Id.* at 27.

Here, the predominant factual issue to be determined is whether the building envelope is defective, and, if so, the extent of the repairs. The claims and defenses are common to every building. The Association's claims here are similar to claims made in condominium cases where the Association maintains the building envelope, and therefore class representation is not required. This case presents no more difficulty in management than those types of condominium cases. The Association is in a better position than the individual members to

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assess all of the constructional defects throughout the property and to ensure that an effective remedy is implemented for their correction. Thus, the common issues of law and fact predominate over any individual questions.

b. A Representative Action Is The Superior Method Of Adjudication.

The purpose of a class action is to prevent the same issues from "being litigated over and over[,] thus avoid[ing] duplicative proceedings and inconsistent results." *Shuette*, 121 Nev. at 852 (citing *Ingram v. The Coca-Cola Co.*, 200 F.R.D. 685, 701 (N.D. Ga. 2001)). "It also helps class members obtain relief when they might be unable or unwilling to individually litigate an action for financial reasons or for fear of repercussion." *Id.*

Here, the common issue of the defective buildings in High Noon, the sheer volume of potential class members, and the high costs in expert and legal fees easily tip the balancing scale in favor of class-wide resolution. Having the homeowners' association act as a fiduciary on behalf of the unit owners- handling the litigation in an efficient manner and attempting to effectuate uniform and coordinated repairs of the building envelope- is far superior than individual unit owners' piece-meal attempts to accomplish the same task. A representative action will resolve all claims in a single forum and will avoid potentially conflicting adjudications. A single action will also conserve judicial resources and costs to the litigants. The expected high litigation costs would likely deter individual homeowners from bringing forward their claims. Construction investigations as well as expert testimony, can be extremely expensive and would likely be a prohibitive financial burden on a single homeowner. While NRS 40.655 allows a homeowner to ultimately recover these investigation and expert costs from the builder and/or subcontractors, the reality remains that the homeowner would need to advance all of these costs years before recovery. Allowing the instant action to proceed as a class will minimize these expenses to the class since

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investigations will be limited to a representative sample of homes and the associated costs will be shared by all class members. Any attorneys' fees and associated costs would also be shared by the class as opposed to each individual class member paying for their own attorneys' fees and costs through individual actions of the same main issue. Thus, a representative action is the superior method of adjudication.

IV. CONCLUSION

For the foregoing reasons, Association respectfully requests that this Court deny D.R. Horton's Petition for Writ of Mandamus.

Dated: September 7, 2011

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 7th day of September, 2011, a copy of ANSWER TO PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION with appendix was duly deposited in the United States mail, postage prepaid, addressed to and served upon the following parties:

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