EXHIBIT "10"

KOELLER | NEBEKER | CARLSON | HALUCK LLP

300 South Fourth Street, Suite 500
Las Vegas, NV 89101

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CLERK OF THE COURT

RPLY
Paul P. Terry, Jr. (Nev. Bar 7192)
John Stander (Nev. Bar 9198)
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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation; for itself and for all others similarly situated, Plaintiffs v. D.R. HORTON, INC. a Delaware Corporation DOE INDIVIDUALS, 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100 inclusive Defendants.	Case No. 07A542616 Dept. XXII **PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR DECLARATORY RELIEF RE: STANDING PURSUANT TO ASSIGNMENT AND PURSUANT TO NRS 116.3102(1)(d)** **Date: November 10, 2010** **Time: 9:30 a.m.**

COMES NOW Plaintiff, HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION ("Association") by and through its attorneys, ANGIUS & TERRY LLP, respectfully submits PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR DECLARATORY RELIEF RE: STANDING PURSUANT TO ASSIGNMENT AND PURSUANT TO NRS 116.3102(1)(d).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Opposition to Plaintiff's Motion for Standing, defendant D.R. Horton Inc. ("D.R. Horton") either ignores or mischaracterizes the arguments that Association makes for standing.[1] Moreover, D.R. Horton expends pages of argument on a moot, already decided point. D.R. Horton's argument is that the CC&R's of the High Noon at Arlington Ranch Owners Association do not confer standing on the Association to pursue claims within the buildings, so the Association therefore lacks standing. This is the same argument that was made before the Supreme Court in *Monarch Estates Homeowners Association v. Johnson Communities of Nevada, Inc.*, Case Number A51942, and which the Supreme Court summarily rejected.

> Because Johnson is not seeking to enforce provisions of Monarch's CC&Rs, we do not discuss whether the CC&Rs limit Monarch's standing to assert claims affecting the CMU walls. However, to the extent Johnson argues that the CC&Rs limit Monarch's standing, we conclude that Johnson's arguments have no merit.

Monarch Estates Homeowners Association v. Johnson Communities of Nevada, Inc., Case Number 51942, Order Granting Petition filed September 3, 2009, at p. 4, fn.2, Exhibit 1 hereto. The final nail in the coffin of D.R. Horton's argument was driven in *D.R. Horton, Inc. v. Eighth Judicial District Court (First Light HOA)*, 215 P.3d 697, 699 (Nev., 2009) (hereafter "*First Light II*") in which the Court stated:

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[1] D.R. Horton also makes a material misrepresentation regarding the nature of the construction, of course without supplying any support or authority. In its Opposition, D.R. Horton claims that "each home could have been constructed as a stand alone residence," and therefore "the ownership rights provided to each homeowner evidences the uniqueness of each home and separation from the other." Opposition Brief, p. 6:11-15. This assertion is false. In fact, the units in each building are stacked as one would normally expect condominiums to be. Each unit relies on the building envelope, fire resistive system and structural system of each other unit in the building. The units are not "separate" as D.R. Horton would have this Court believe. See attached Affidavit of Thomas L. Sanders, and attachments thereto.

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> [W]e conclude that where NRS 116.3102(1)(d) confers standing on a homeowner's association to assert claims on matters affecting the common interest community, a homeowners' association has standing to assert claims that affect individual units.

First Light II, 215 P.3d at 702-703. D.R. Horton's entire argument is based upon the CCR's conferring maintenance responsibility on the homeowners, and not the Association. That fact is entirely irrelevant after *First Light II*. The pertinent questions in this matter are 1) whether the assignments obtained by the Association confer standing on the Association for all of the claims arising from those assigned units; 2) Whether by virtue of the assignments, the Association has standing to pursue the "building wide" defects which affect and damage the assigned units; and 3) whether pursuant to NRS 116.3102(1)(d), the Association has standing to pursue the "building wide" defects which, by their very nature affect two or more unit owners and the common interest community.

In its Opposition, D.R. Horton all but ignores the fact that, completely apart and aside from standing conferred by NRS 116.3102(1)(d), Association has standing pursuant to assignment to pursue all of the claims within 199 units[2] in which Association has received an assignment from the homeowners. D.R. Horton's only argument in this regard is 1) to criticize the language of the assignment form, without arguing, much less supporting with authority, how that might render the assignments ineffective; and 2) making the nonsensical argument that somehow *First Light II* precludes the use of assignments. There is absolutely nothing in the *First Light II* decision that could be interpreted as preventing an association from obtaining assignments, and obtain standing in that manner. The law of assignments is as old, well established and iron clad

[2] Five additional assignments have been received by the Association since the motion was filed. An updated chart of units assigned is attached hereto as Exhibit 2.

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as the law of contracts—the homeowners have every right to assign the claims that they possess to the Association, and 199 of the homeowners at High Noon at Arlington Ranch did so.

Moreover, D.R. Horton does not address at all the argument that the assignments also give Association standing to pursue building envelope, fire wall and structural claims in buildings for which the Association has received an assignment (again completely aside from NRS 116.3102(1)(d) conferred standing). Association possesses assignments of units in 107 of the 114 buildings. Since the assigning homeowner is damaged by, and has standing to pursue claims relating to the "building wide" defects in those buildings, so too does the Association by virtue of the assignments. See Footnote 1 and the Affidavit of Thomas L. Sanders.

D.R. Horton asserts multiple times in its brief that Association does not identify the defects, ignores the mandates of *First Light II*, and does not present a Rule 23 analysis. None of these charges are true, and frequent repetition by D.R. Horton does not make them so. Indeed, the defects, together with details of the inspections and where the defects were identified, are all present in the motion—all of Plaintiff's expert reports and matrices of defect observations are appended to the motion.

Contrary to D.R. Horton's pronouncements, Association neither ignores nor "seeks to abrogate" the holding of *First Light II*. Rather, Association seeks to apply the holding and rational of *First Light II* to the facts of this case. As Association points out in its moving papers, the *First Light II* decision requires a Rule 23 analysis only with regard to an analysis of NRS 116.3102(1)(d) standing concerning purely individual claims (i.e. claims involving the interior of the units. A careful and correct reading of the *First Light II* case reveals that the Court does not require such an analysis where, as here, the Association is only asserting NRS 116.3102(1)(d) standing with regard "building wide" defects which by their nature affect two or more unit owners, such as defects in the building envelope, the structural system and the fire

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resistive system. Notwithstanding this argument, however, in its moving brief, plaintiff goes into a detailed Rule 23 analysis. D.R. Horton's repeated assertions in its Opposition Brief that plaintiff doesn't make a Rule 23 analysis is odd, to say the least.

II. ARGUMENT

A. CLARIFICATION OF CLAIMS FOR WHICH ASSOCIATION ASSERTS STANDING

In its Opposition, D.R. Horton makes it appear that there is confusion as to the defects for which Association claims standing, and the source of that standing. D.R. Horton is feigning confusion. Nonetheless, the Association takes this opportunity to ensure that there is no confusion on the issue.

With regard to the 199 units for which Association has assignments, Association asserts standing pursuant to those assignments for all claims arising from and relating to those units.

With regard to the 107 buildings in which assigned units are located, Association asserts standing pursuant to the assignments for all defects in the building envelope (roofs, decks, windows, doors, stucco), the fire resistive system, and the structural system. These is so because the assignor units are affected by and damaged by those "building wide" defects, and therefore have standing to redress those issues. Those claims, along with their other claims against D.R. Horton, have been assigned to Association.

With regard to all buildings in the development, Association asserts standing pursuant to NRS 116.3102(1)(d) to pursue claims for all defects in the building envelope (roofs, decks, windows, doors, stucco), the fire resistive system, and the structural system. This is so because those defects by their "building wide" nature affect two or more unit owners, and affect the common interest community. See Footnote 1 and the Affidavit of Thomas L. Sanders.

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B. ASSOCIATION'S STANDING PURSUANT TO ASSIGNMENTS

1. The *First Light II* Holding Does Not Preclude The Use Of Assignments

D.R. Horton argues, without any support or analysis, that the *First Light II* holding precludes the use of assignments to obtain standing. See Opposition Brief, p. 2:16-19. This argument is entirely baseless. The *First Light II* case addresses an Association's statutory standing derived from the language of NRS 116.3102(1)(d). This statutorily based standing is entirely unrelated to the contractually based standing derived from the assignments executed by the homeowners. The *First Light II* Court did not address the use of assignments at all. There is nothing in either the language or the rational of that case to preclude the use of assignments to confer standing to the Association.

D.R. Horton's apparent position is that if the Association does not have statutory standing then the Association cannot be given standing contractually through Assignment. This argument is patently absurd. An individual's rights and claims can contractually be given via assignment, irrespective of whether the recipient has rights or claims of its own. Claims transferred through assignment have been long recognized in Nevada jurisprudence. See *Feusier v. Sneath*, 3 Nev. 120 (1867); *Sadler v. Immel*, 15 Nev. 265 (1880). There is absolutely nothing novel about assignments, and there is nothing unusual about the assignments that the High Noon at Arlington Ranch homeowners gave to their Association.

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2. There Is Nothing In The Language Of The Assignment That Renders It Invalid

D.R. Horton takes issue with certain of the language in the assignments. Particularly, D.R. Horton does not agree with the statement that it has failed to make repairs to the buildings. D.R. Horton clings to the fiction that its failure to repair the defective buildings is somehow due to a perceived failure of Plaintiff to comply with Chapter 40. The fact is that Plaintiff has complied with Chapter 40, and has made the units available D.R. Horton for inspection and or repair. Rather than repair, however, D.R. Horton has chosen to challenge, at every turn, the Association's standing to bring this action with regard to the buildings. However, this disagreement between D.R. Horton and Association as to the reason that D.R. Horton has failed to make repairs is entirely immaterial to the issues presented in this motion.

Even if D.R. Horton is right (which it is not), and the reasons stated in the assignment for D.R. Horton's failure to repair the buildings did not recite the whole picture, the assignments would not be rendered invalid. It must be noted that while D.R. Horton expends considerable energy ranting about the language in the assignments, D.R. Horton does not make the argument, much less provide authority for the proposition that the offending language in the assignments renders them invalid. That is because it is not so. The operative language in the assignments is the assignment of claims. If there is opinion in the recitations with which D.R. Horton does not agree, it does nothing to affect the legal efficacy of the assignment.

3. The Assignments Give Association Standing To Pursue Claims With Regard To The Building Envelope, Structural System and Fire Resistive System in Buildings In Which Association Has Assigned Claims

Where Association has the assignment of one homeowner in a building, Association steps into the shoes of that homeowner, and therefore has standing to assert all claims that the homeowner has with regard to the building. That includes all of the defects that exist within the

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building which affect that unit. Each homeowner in the building, and thus the Association as assignee of one or more of the homeowners, is affected by defects to the fire resistive system, the structural system and to the building envelope. This is so because defects arising from those defects will necessarily impact the rights of the assigning homeowners. See Footnote 1 and the Affidavit of Thomas L. Sanders. The assigning homeowners have standing to redress those defects which affect their units—and those rights have been assigned to Association by virtue of the assignments.

It must be noted that D.R. Horton did not produce any argument or authority contrary to the fact that one assignment in a building gives the Association standing to pursue all "building wide" defects in that building. Failure to oppose an argument may be deemed an admission that the point is meritorious. See *Ozawa v. Vision Airlines, Inc.*, 216 P.3d 788, 793 (Nev. 2009), citing *Bates v. Chronister*, 100 Nev. 675, 682.

The lack of argument by D.R. Horton against this conclusion is likely because it is an irrefutable conclusion that follows one of the most basic and well established principals of law—a defect caused on one person's property which adversely affects a second person's property, gives rise of a claim by the second person to redress the problem. If a defect, no matter where located in a shared building, proximately causes damage to a property owner within that building, that property owner has a claim to redress the defect (and thus has the ability to assign that claim.)

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C. STANDING PURSUANT TO NRS 116.3102(1)(d)

In addition to the standing conferred by the assignments, Association also has standing pursuant to NRS 116.3102(1)(d).[3]

1. **Association Does Not Seek to Either Disregard or Overturn The *First Light II* Decision**

D.R. Horton argues that Association seeks to have this Court "overrule" or disregard the *First Light II* decision. Such is not the case. It goes without saying that the *First Light II* decision is binding upon this matter, and this Court must adhere to the dictates of that decision. Association does not urge the Court to disregard the *First Light II* decision. Rather, Association urges this Court to correctly read, and apply, the holding of that decision to this case.

It must be recognized that the *First Light II* decision addressed a factual scenario where the defects were in the individual units and therefore only affected one homeowner. In that situation the *First Light II* Court held that a Rule 23 analysis must be applied. Here, on the other hand, Association is only asserting claims that are "building wide" and that by their very nature affect every homeowner in the building. See Footnote 1 and the Affidavit of Thomas L. Sanders. Therefore, and for the reasons set forth in the Moving Papers, Association urges that a correct reading of the *First Light II* decision mandates a finding that Association has standing pursuant to NRS 116.3102(1)(d). without application of a Rule 23 analysis, as this Court recognized in *View of Black Mountain Homeowners Association Inc. v. The American Black Mountain Limited Partnership, et al.* See Order, Exhibit 8 to Moving Papers at p. 5.

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[3] With regard to many of the units and buildings, there is overlapping standing. Association is asserting standing for those units and buildings pursuant to assignment, and also pursuant to statute.

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2. As Set Forth In The Moving Papers, A Rule 23 Analysis Is Satisfied

As is more fully set forth in the Moving Papers, even if a Rule 23 analysis is applied, such an analysis is satisfied in this matter.

a. **Common Issues Of Law And Fact Predominate**

D.R. Horton attempts to muddy the water by focusing on minutia within the defect groups, and focusing on certain subcategories of defects which were not universally observed. In this manner, by drawing focus away from the big picture, D.R. Horton attempts to paint a distorted picture of the High Noon at Arlington Ranch development which does not convey the true nature of the defective components in the development. The minutia and the small differences in the investigative observations that D.R. Horton points to are irrelevant. More relevant is the larger picture of the defective conditions. The fact is that with regard to each major component: roofs, decks, stucco, windows, fire resistive, and structural components; there is a combination of similar defective conditions that render all of the component systems defective. See Adcock Report, Exhibit 2 to Moving Papers, pp. 41-59 (re roofs), pp. 63-73 (re decks), pp. 74-85 (re stucco), pp. 134-160 (re windows) pp. 107-121 (re fire resistive), and Marcon Report matrix, Exhibit 4 to Moving Papers (re structural.)

While every deck, for example, may not exhibit the exact same combination of defect subcategories in the exact same locations, each deck does exhibit a combination of similar defective conditions which renders the deck defective, and requiring repair. Moreover, because of the similarity in the combination of defective conditions in each component, the components virtually all require the same comprehensive repair scope.

Here, every resident of High Noon at Arlington Ranch is affected by similar constructional defects both in their own units and in the other units in their buildings, which will

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require the same scope of repairs. Common issues include whether D.R. Horton negligently constructed the unit owners' residences and whether D.R. Horton breached any express and implied warranties in light of constructing the Plaintiffs' residences. For these reasons, the "commonality" prong of Rule 23 is satisfied. In addition, since common issues by far predominate over individual issues, Rule 23(b)(3) is satisfied.

b. Typicality

The "typicality" prong of Rule 23 is easily satisfied in this case. The Association stands in the shoes of the class representative in a more traditional class action scenario. The Association is the assignee of the claims of a majority of the homeowners. The homeowner claims which the Association has the assignment for do not differ in any material manner from the claims of the other homeowners.

c. Numerosity

The "numerosity" prong of Rule 23 is also easily satisfied. ". . .[A] putative class of forty or more generally will be found 'numerous.'" *Shuette v. Beazer Homes Holdings Corp,* 121 Nev. 837, 847, 124 P.3d 530, 537 (2005). Here there are 342 unit owners in the putative class.

d. D.R. Horton Does Not Challenge the Remaining Issues in the Rule 23 Analysis

Because D.R. Horton does not challenge the Association's analysis with respect to the remaining issues in the Association's Rule 23 analysis, the Association does not reiterate its analysis here.

III. CONCLUSION

The Association has standing to pursue claims on behalf of its homeowners for a number of reasons:

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First, the Association is the assignee of the claims of 199 homeowners. The Association therefore has standing pursuant to the assignments to pursue all of the defect claims arising from or related to those 199 units (including defects that are solely in the interior of the units).

Second, by virtue of the assignments, the Association has standing to assert claims in the buildings of the assigned units which affect the assigned units. Such "building wide" claims include defects with the building envelope, the structural system and the fire resistive system. There are 107 buildings that contain assigned units.

Finally, pursuant to NRS 116.3102(1)(d), Association has standing to pursue claims "on behalf of itself or two or more unit owners on matters affecting the common-interest community." As set forth above, consistent with the First Light II decision, Association urges that since the claims that it makes pursuant to NRS 116.3102(1)(d) are "building wide" and affect every owner of a building by their very nature, a Rule 23 analysis is not needed. However, even if a Rule 23 analysis is applied, the facts of this case pass that scrutiny.

For the forgoing reasons, Association's motion should be granted in its entirety.

Dated: November 3, 2010

ANGIUS & TERRY LLP

By: _____

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John J. Stander
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CERTIFICATE OF SERVICE

I HEARBY CERTIFY that on the 3rd day of November 2010, I electronically filed with this court and served on all parties via the WIZNET electronic court filing system, a copy of the within PLAINTIFF'S REPLY TO OPPOSITION TO MOTION FOR DECLARATORY RELIEF RE: STANDING PURSUANT TO ASSIGNMENT AND PURSUANT TO NRS 116.3102 (1) (d)

An employee of Angius & Terry, LLP.

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AFFIDAVIT OF THOMAS SANDERS

STATE OF CALIFORNIA)
) :§
COUNTY OF SAN DIEGO)

Thomas L. Sanders, NCARB, being first duly sworn on oath, deposes and says:

1. I have personal knowledge of the matters set forth below and I can testify competently thereto if called upon to do so.

2. I have been retained by the representative plaintiff High Noon at Arlington Ranch Homeowners Association to inspect the High Noon at Arlington Ranch development (hereafter "High Noon") for the existence of construction related defects in the roofs and fire resistive systems, among other components, and damage that has been caused by such defects. I am a registered architect in the State of Nevada, Registration No. 3819. A true and correct copy of my C.V. is attached hereto.

3. The buildings at High Noon are two story triplexes, and the three units in the buildings are in a stacked configuration. At locations in each of the buildings, units are on top of other units. Also, the garages for the units are in the same buildings, with units stacked on top of the garages. A copy of the building plan diagram which depicts the configuration of the buildings is attached hereto.

4. Due to this stacked configuration, the same area of roof is, at some parts of the building, over more than one unit or garage, and the exterior wall planes enclose more than one unit or garage. It would not be possible to repair one units' roof or exterior walls without also repairing the neighboring units' roof or walls.

5. Similarly, due to the stacked configuration of the units and garages, there is a complicated configuration of both horizontal and vertical interconnected fire separation walls and floor/ceiling assemblies separating unit from unit and unit from garage. The fire wall assemblies protect more than one unit. It would not be possible to repair one unit's fire separation walls without also repairing the neighbors' walls, because they share components, and the walls and construction elements are all interconnected.

6. Similarly, due to the stacked configuration of the units and garages, each of the units relies

upon the structural integrity of each of the other units in the building. If there is a defect in the structural integrity of any one unit, it must be repaired in order to protect the structural integrity of each of the other units in the building.

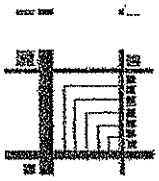
Further affiant sayeth naught.

Thomas L. Sanders

Sworn to and acknowledged before me on this 3rd day of Nov ember 2010

Notary Public, in and for San Diego County, California

OFFICIAL SEAL
F. A. HENKELS
NOTARY PUBLIC-CALIFORNIA
COMM. NO. 1858340
SAN DIEGO COUNTY
MY COMM. EXP. JULY 19, 2013.



Thom L. Sanders / Architect, NCARB

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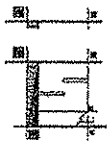
Curriculum Vitae

1 January 2010

Thomas L. Sanders

Firm:	Building Design and Analysis, Inc. 120 Island Avenue, Suite 448 San Diego, California 92101-7053	
Education:	University of Michigan Ann Arbor, Michigan College of Architecture and Urban Planning Master of Architecture	1977
	University of Michigan Ann Arbor, Michigan College of Architecture and Urban Planning Bachelor of Science	1976
Licensing:	Registered Architect No.7055, State of Texas	1979
	Licensed Architect No.15302, State of California	1984
	Registered Architect No.3819, State of Nevada	1997
	National Council of Architectural Boards Certification No.48806	1997
	Registered Architect No.32942, State of Arizona	1998
	Licensed Architect No. 305662, State of Colorado	1999
Previous Professional Experience:	Whitmore & Associates, Architects San Diego, California Associate Architect	1989-1995
	Thom L. Sanders Associates San Diego, California Principal	1983-1989
	Morris Aubry Architects Houston, Texas Project Architect	1977-1983



Thom L. Sanders / Architect

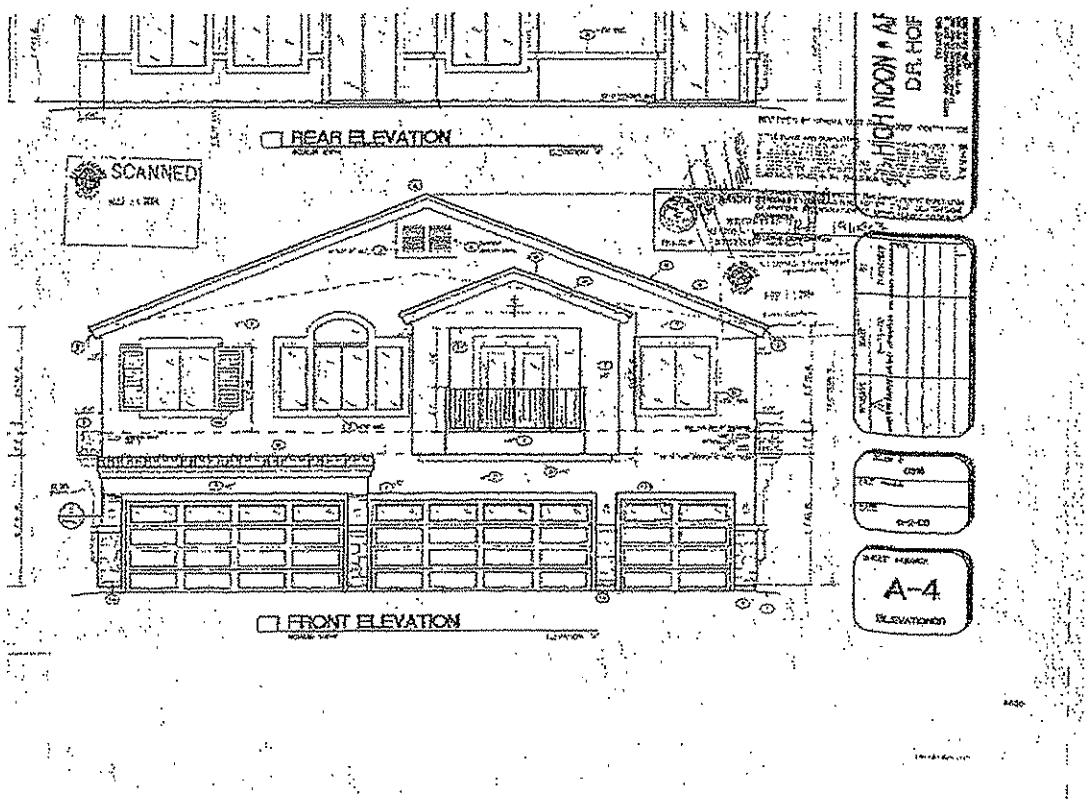
Building Design and Analysis, Inc.

Expert Testimony:	Superior Court of the State of California Superior Court of the State of Nevada	1992- present
Publication:	"Was That an Earthquake? -- The Case of a Vibrating Floor"; Wood Design Focus; September 1995	
Membership:	Western States Roofing Contractors Association	2007
Continuing Education:	Mold Remediation In Buildings Seminar	2002
	Fireplace Repair & Installation Seminar	1995
	RIEI, Modified Bitumen Roofing Systems Seminar	1995
	AIA Loss Prevention Workshop Professional Services Contracts	1993
	UCSD Extension Americans with Disabilities Act Uniform Building Code	1992
	AIA Loss Prevention Workshop Quality Control for Architects	1992
	Building Industry Association Construction Quality Workshop	1991
	RIEI, Roofing Technology Four day Seminar Workshop	1990

ARLINGTON RANCH
Preliminary Defect List &
Repair Recommendations
January 7, 2008

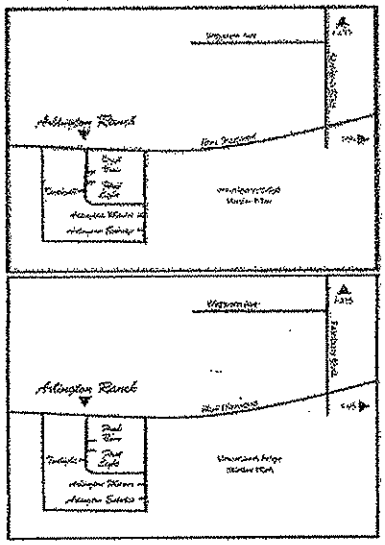
FOR MEDIATION PURPOSES ONLY.
N.R.S. 48.109 and N.R.S. 40.680

Elevation 'A'



High Noon @ Arlington Ranch

Affordable Homes Featuring Custom-Styled Amenities.



DIRECTIONS:

West on Blue Diamond from Rainbow Blvd. Arlington Ranch is approximately three miles down Blue Diamond on the left.

CONTACT:

8818 Tom Noon Ave
Las Vegas, NV 89178

Main Office
(702) 360-8839

rebuckley@drhorton.com

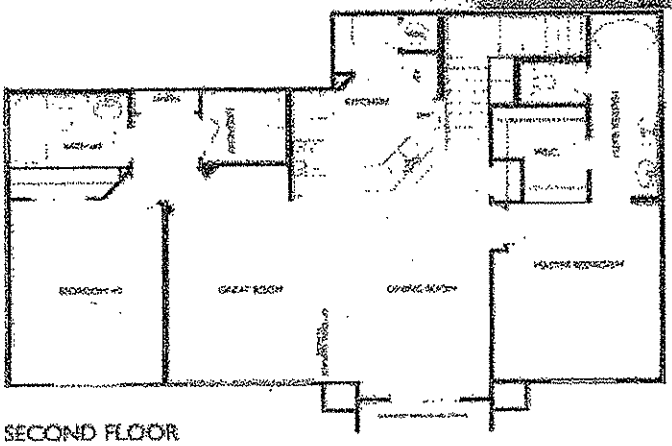
HOURS:

Open Daily 10am to 6pm, except Monday 1pm to 6pm.

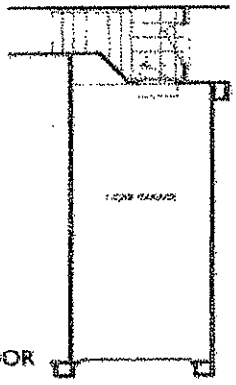
High Noon @ Arlington Ranch

Plan One

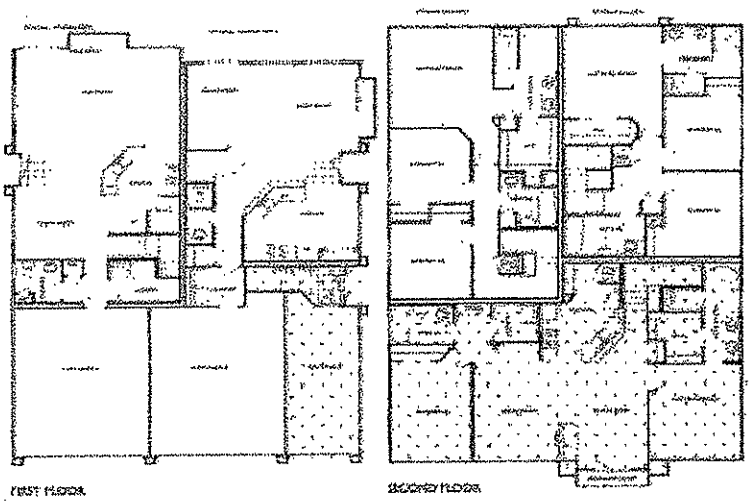
1,230 sqft 2 story
2 bdr / 2 bathar
Priced garage
from: $194,900



SECOND FLOOR



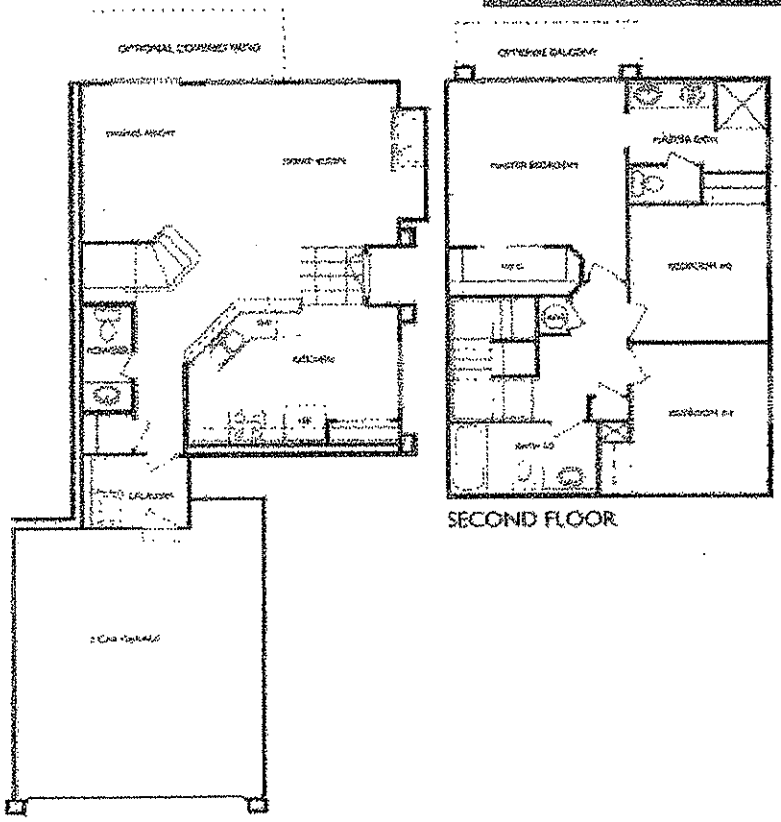
FIRST FLOOR



High Noon @ Arlington Ranch

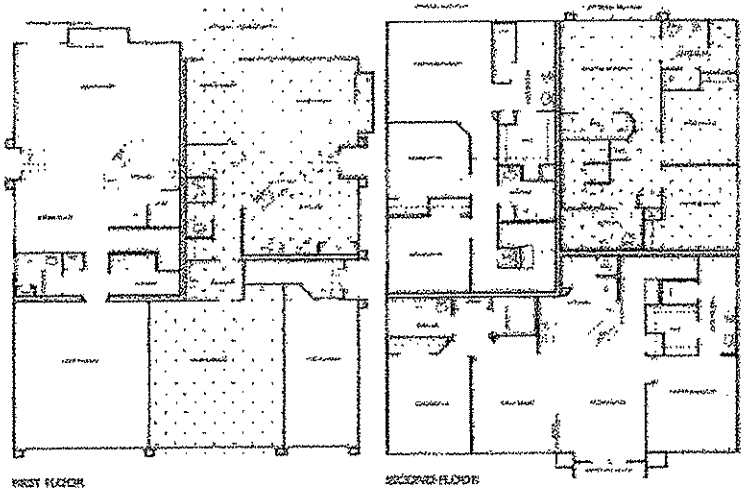
Plan Two

1,399 sqft 2 story
3 bdr / 2 2 car
1/2 bath garage
Priced from: $234,900



SECOND FLOOR

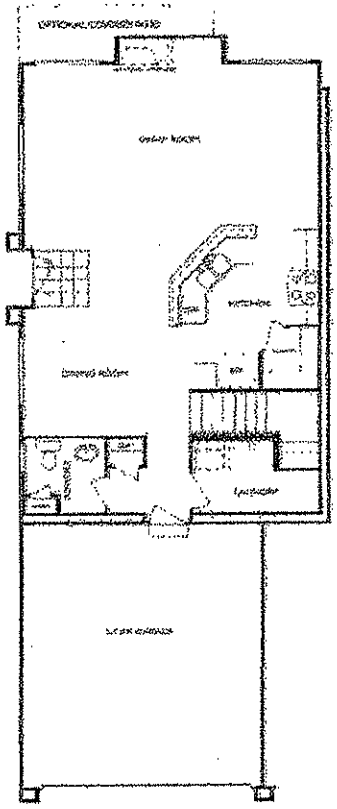
FIRST FLOOR



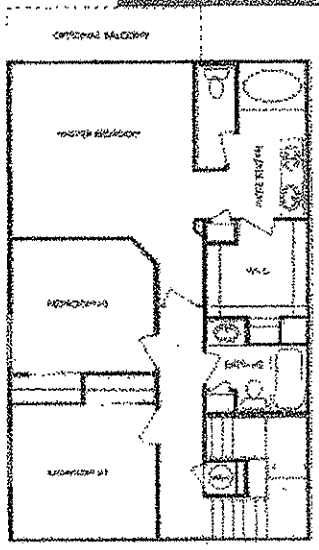
High Noon @ Arlington Ranch

Plan Three

1,617 sqft 2 story
3 bdr / 2 - 2 car
1/2 bath garage
Priced from: $257,900



FIRST FLOOR



SECOND FLOOR

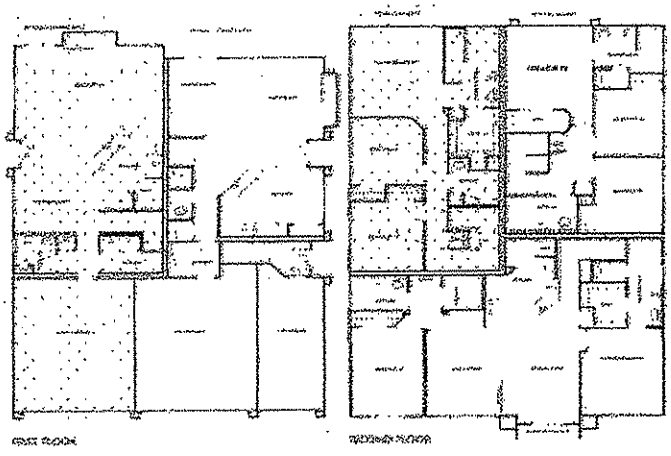


Exhibit 1

ORIGINAL

Monarch
estate

IN THE SUPREME COURT OF THE STATE OF NEVADA

MONARCH ESTATES HOMEOWNERS ASSOCIATION, A NONPROFIT CORPORATION,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE,
Respondents,
and
JOHNSON COMMUNITIES OF NEVADA, INC., A NEVADA CORPORATION; AND RICHMOND AMERICAN HOMES OF NEVADA, INC., A FOREIGN CORPORATION,
Real Parties in Interest.

No. 51942

FILED

SEP 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order granting partial summary judgment in a constructional defect action.

Petitioner Monarch Estates Homeowners Association (Monarch) governs a planned community that was developed by real party in interest, Johnson Communities of Nevada (Johnson). Monarch owns the common elements of the planned community and members of Monarch own their respective units. A concrete masonry unit wall (CMU) surrounds the community and abuts the properties of approximately 35 out of 84 units. The CMU wall is not located in the common elements, and property owners whose properties abut the CMU wall are, under

09-21421

Monarch's Declaration of Covenants, Conditions, and Restrictions and Reservation of Easements (CC&Rs), responsible for maintaining and repairing the portion of the CMU wall adjoining their property.

In July 2006, Monarch filed suit on behalf of its members against Johnson, alleging, in part, that the CMU wall was defectively constructed. Johnson filed a motion for summary judgment, contending that because Monarch does not have an ownership interest in the CMU wall and does not have the duty to maintain or repair the CMU wall, Monarch did not have standing to assert claims for damages for the defective CMU wall. The district court granted Johnson's motion for summary judgment based on the language of NRS 116.3102(1)(d). This original petition followed.

In its petition, Monarch argues that NRS 116.3102(1)(d) confers standing on a homeowners' association to assert claims affecting individual units. In opposition, Johnson contends that the statute prohibits a homeowners' association from raising claims that do not involve common areas.

We recently resolved this issue in D.R. Horton v. Dist. Ct., 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 85, September 3, 2009), and concluded that a homeowners' association has standing to institute litigation on behalf of owners for defects in individual units so long as the claims are subject to class certification. Therefore, we grant Monarch's petition. See We the People Nevada v. Secretary of State, 124 Nev. ___, ___, 192 P.3d 1166, 1170 (2008) ("A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion."); see also NRS 34.160.

Monarch has standing under NRS 116.3102(1)(d) to assert causes of action for constructional defects related to the CMU wall

In D.R. Horton v. Dist. Ct., 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, September 3, 2009), we recognized that in the absence of an express statutory grant, a homeowners' association does not have standing to sue. Therefore, we turned to NRS 116.3102(1) to determine whether NRS chapter 116 grants standing to a homeowners' association to sue on behalf of its members for constructional defects in individual units.

NRS 116.3102(1) provides, in pertinent part:

> 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:
>
> . . . .
>
> (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.

The parties in this case do not dispute that Monarch has standing under NRS 116.3102(1) to assert claims that affect the common elements[1] of the common-interest community. However, Johnson argues that any defects related to the CMU wall are not considered a part of the

---

[1]NRS 116.017 defines "[c]ommon elements" as:

> 1. . . . all portions of the common-interest community other than the units, including easements in favor of units or the common elements over other units; and
>
> 2. In a planned community, any real estate within the planned community owned or leased by the association, other than a unit."

common-interest community because the CMU wall is a part of an individual homeowner's unit. Thus, Johnson contends that individual homeowners, not Monarch, have standing to sue for defects affecting their units.[2]

Pursuant to our holding in D.R. Horton, we conclude that where NRS 116.3102(1)(d) confers standing on a homeowners' association to assert claims "on matters affecting the common-interest community," a homeowners' association has standing to assert constructional defect claims that affect individual units. 125 Nev. at ___, ___ P.3d at ___. The definitions of "common-interest community," NRS 116.021, "unit," NRS 116.093, and "common elements," NRS 116.017, demonstrate that the Legislature intended a common-interest community to include both units and common elements. D.R. Horton, 125 Nev. at ___, ___ P.3d at ___. In addition, section 6.11 of the Restatement (Third) of Property supports our interpretation of the term "common-interest community" to include individual units. Id. at ___, ___ P.3d at ___. Therefore, because alleged constructional defects affect individual units in the Monarch community, the alleged damages are "matters affecting the common-interest community" under NRS 116.3102, and Monarch has standing to sue.

Nevertheless, we also ruled in D.R. Horton that a homeowners' association filing a suit on behalf of its members will be treated much the same as a plaintiff in class action litigation. Id. at ___,

[2]Because Johnson is not seeking to enforce provisions of Monarch's CC&Rs, we do not discuss whether the CC&Rs limit Monarch's standing to assert claims affecting the CMU wall. However, to the extent that Johnson argues that the CC&Rs limit Monarch's standing, we conclude that Johnson's arguments have no merit.

___ P.3d at ___. Thus, although Monarch has standing to assert claims on behalf of its members for defects related to the CMU wall, the suit must fulfill the requirements of NRCP 23 and the principles and concerns discussed in Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005). In particular, Monarch may assert claims on behalf of its members only if the claims and various theories of liability satisfy the requirements of numerosity, commonality, typicality, adequacy, and meet one of the three conditions set forth in NRCP 23(b). See id. at 846-850, 124 P.3d at 537-539.

In this case, we conclude that constructional defect claims related to the CMU wall are subject to class certification because they satisfy the elements of numerosity, commonality, typicality, adequacy and because "common questions of law or fact predominate over individual questions." See id. at 846, 850, 124 P.3d at 537, 539; see also NRCP 23(b)(3). The claims are numerous. Specifically, 35 of the 84 single family homes within the Monarch community abut the CMU wall, and thus, the claims related to the alleged defective construction of the CMU potentially affect at least 35 of the 84 single family properties.[3] The claims are also common to and typical of the 35 properties that abut the wall. The defenses and theories of liability apply to the entire surrounding wall, regardless of which unit a portion of the wall abuts. Moreover, even if portions of the wall suffer from various stages of disrepair, Monarch may adequately assert claims on behalf of its members and protect the interests of the homeowners whose properties abut the CMU wall.

[3]Notably, the remaining 49 single family homeowners are not named as parties.

Because Monarch, by virtue of its CC&Rs, may repair or replace the portions of the wall according to their state of disrepair, there will not be overly conflicting views regarding how any damages, if warranted, will be divided. Thus, we conclude that, in this action, common questions predominate over individual ones, and individualized proof of damages is not necessary as Monarch may, in a representative capacity, properly assert claims on behalf of its members whose properties abut the wall. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to conduct further proceedings consistent with this order.

It is so ORDERED.

Hardesty, C.J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

cc: Hon. Timothy C. Williams, District Judge
Feinberg Grant Mayfield Kaneda & Litt, LLP
Lee, Hernandez, Kelsey, Brooks, Garofalo, & Blake
Marquis & Aurbach
Marquiz Law Office
Deanne M. Rymarowicz
Snell & Wilmer, LLP/Las Vegas
Eighth District Court Clerk

Exhibit 2

HOMEOWNER	PROPERTY ADDRESS	ASSIGNMENT
Abbey, Debra K	8797 Tom Noon Ave #101	YES
Akhavan, Parivash	8688 Tom Noon Ave #102	YES
Alcantara, Larcy M	8669 Horizon Wind Ave #102	YES
Amato, Alfred & Roxanne	8815 Traveling Breeze Ave #102	YES
Anderson, William & Dale	8715 Traveling Breeze Ave #101	YES
Aranda, Ezequiel	8715 Traveling Breeze Ave #103	YES
Armeni Androvandi, Paola	8654 Traveling Breeze Ave #103	YES
Aupied, Celeste F	8794 Traveling Breeze Ave #102	YES
Bailitz, Richard & Maurer, Kathryn	8628 Tom Noon Ave #103	YES
Bannerman, Paul c/o Nicklin Prop Man	8804 Traveling Breeze Ave #102	YES
Bebout, Zackary	8659 Horizon Wind Ave #102	YES
Bjornstad, Tiffany A	8750 Horizon Wind Ave #103	YES
Bocko, Barbara G	8810 Horizon Wind Ave #102	YES
Bonke, Robin A	8754 Traveling Breeze Ave #103	YES
Broock, Konrad	8789 Horizon Wind Ave #102	YES
Burroughs, Stefanie	8769 Horizon Wind Ave #103	YES
Burt, Kendrick N	8807 Tom Noon Ave #102	YES
Butler, Eric & Christine	8755 Traveling Breeze Ave #103	YES
Carannante, Sara B c/o Rebecca Molif	8799 Horizon Wind Ave #101	YES
Carney, Roger & Carmen Noriega-Carney	8689 Tom Noon Ave #101	YES
Carrara-Edwards, Janet L c/o Doris Carrara	8675 Traveling Breeze Ave #103	YES
Carrere, Marcia	8670 Horizon Wind Ave #102	YES
Carroll, Ronald J	9490 Thunder Sky St #103	YES
Caruso, Adam M	9430 Thunder Sky St #102	YES
Caruso, Joseph & Diane	8820 Horizon Wind Ave #102	YES
Cassidy, Mary Ann	8638 Tom Noon Ave #101	YES
Cloyd, John & Hsiu	8678 Tom Noon Ave #102	YES
Cohn, Dov & Sheila	8739 Horizon Wind Ave #103	YES
Corwin, Lan Thi	8720 Horizon Wind Ave #103	YES
Costia, Nicoleta	8779 Horizon Wind Ave #102	YES
Crame, Nino C	8825 Traveling Breeze Ave #101	YES
Crawford, Jared	9490 Thunder Sky St #101	YES
Dacheux III, Francois A	8618 Tom Noon Ave #102	YES
Dewees, Jacob J	8669 Horizon Wind Ave #101	YES
Dillard, Mikala L (A)	8655 Traveling Breeze Ave #101	YES
Dizar, Cem	8729 Horizon Wind Ave #101	YES
Doepper, Jennifer L	8708 Tom Noon Ave #101	YES
Donoso, Rosa	8665 Traveling Breeze Ave #102	YES

Egeland, Duane R (A/B)	8730 Horizon Wind Ave #101	YES
Eramya, Ghayda	8637 Tom Noon Ave #102	YES
Evans, Lisa	8835 Traveling Breeze Ave #101	YES
Farley, Mary	8814 Traveling Breeze Ave #103	YES
Fielding, Melissa	9470 Thunder Sky St #101	YES
Finnegan, Sean D	9440 Thunder Sky St #101	YES
Fisher, Heather & Jared	8655 Traveling Breeze Ave #102	YES
Fishman, Steven	8748 Tom Noon Ave #103	YES
Fitzgerald, Jennifer Nicole	8765 Traveling Breeze Ave #101	YES
Flores, Maria & Seitz, Greg	8757 Tom Noon Ave #103	YES
Ford, Randall	8649 Horizon Wind Ave #102	YES
Francese, Bruno & Caterina	8710 Horizon Wind Ave #102	YES
Frank, Jody L	8654 Traveling Breeze Ave #101	YES
Frank, William	8675 Traveling Breeze Ave #101	YES
Gailey, Brian S	8658 Tom Noon Ave #101	YES
Gallego, Raymund R (S)	8760 Horizon Wind Ave #101	YES
Gardner Mike, Sue Ann Moreland	8648 Tom Noon Ave #103	YES
Gardner, Amanda	8694 Traveling Breeze Ave #102	YES
Gholami, Farhad	8758 Tom Noon Ave #103	YES
Gibson, Thomas A	8777 Tom Noon Ave #103	YES
Gomez, Fredrick & Mary Beth	9450 Thunder Sky St #102	YES
Grasso, Robert J	8794 Traveling Breeze Ave #101	YES
Gustaw, James J	8775 Traveling Breeze Ave #103	YES
Hall, David J	8808 Tom Noon Ave #101	YES
Hamilton, Tamesan	8739 Horizon Wind Ave #102	YES
Hapka, Renae	8788 Tom Noon Ave #103	YES
Harrison, Roger	8820 Horizon Wind Ave #103	YES
Hartard, Wayne	8745 Traveling Breeze Ave #103	YES
Hayford, Charles A	8644 Traveling Breeze Ave #103	YES
Hetzel, Hillary B	8695 Traveling Breeze Ave #101	YES
Hoban, Amelia J	8797 Tom Noon Ave #102	YES
Hodges, Sheryl	8678 Tom Noon Ave #103	YES
Hovius, Kathleen	8759 Horizon Wind Ave #102	YES
Irving, John	8757 Tom Noon Ave #101	YES
Jackel, Julie	8808 Tom Noon Ave #103	YES
Jones, Janice M	8760 Horizon Wind Ave #103	YES
Keays, Devin T	8680 Horizon Wind Ave #102	YES
Kelli, Keri	8698 Tom Noon Ave #101	YES
Kennedy, Elizabeth	8664 Traveling Breeze Ave #103	YES
Kim, Tai Son	8638 Tom Noon Ave #102	YES
Kobes, Lucas	8798 Tom Noon Ave #101	YES
Krupinski, Michael & Martinez, Edwin	8737 Tom Noon Ave #103	YES

Kuiken, Dale & Dorothy	8768 Tom Noon Ave #102	YES
Kuk, Ms. Jennifer	8765 Traveling Breeze Ave #103	YES
Lane, Fielding & Joyce	9440 Thunder Sky St #102	YES
Langill, Karina & Jay	8698 Tom Noon Ave #103	YES
Laursen, Cara	8667 Tom Noon Ave #102	YES
Le, Louislam T	8650 Horizon Wind Ave #102	YES
Leite, Juliana	8650 Horizon Wind Ave #101	YES
Levy, Ravid	8628 Tom Noon Ave #102	YES
Liu, Yihong	8744 Traveling Breeze Ave #101	YES
Lopez, Gustavo & Elizabeth	8790 Horizon Wind Ave #103	YES
Love, Andrew & Heather	8644 Traveling Breeze Ave #102	YES
Lowe, David Earl	8674 Traveling Breeze Ave #102	YES
Lu, Joseph	8787 Tom Noon Ave #102	YES
Luby, Trisha L	8657 Tom Noon Ave #101	YES
Luna, Irwin & Grace	8757 Tom Noon Ave #102	YES
Ma, Ying Ying	8749 Horizon Wind Ave #103	YES
Maleki, Mehrad	8740 Horizon Wind Ave #103	YES
Manu, Cornel	8664 Traveling Breeze Ave #102	YES
Marconi, Elizabeth J	8824 Traveling Breeze Ave #101	YES
Markham, Steven L & Diane	8689 Horizon Wind Ave #103	YES
Martirosyan, Arman	8675 Traveling Breeze Ave #102	YES
Mauck, Michael W	8805 Traveling Breeze Ave #101	YES
Mayne, Paula M	9450 Thunder Sky St #101	YES
McCully, Roger D & Dawn D	8744 Traveling Breeze Ave #103	YES
Millman, Clyde P	8810 Horizon Wind Ave #101	YES
Miska, LLC. c/o Lisa J. Callahan	8788 Tom Noon Ave #101	YES
Mittelstadt, Patricia	8645 Taveling Breeze Ave #101	YES
Morales, Ernesto	8738 Tom Noon Ave #102	YES
Moran, John F (A)	9450 Thunder Sky St #103	YES
Moreno, Adriana	8670 Horizon Wind Ave #103	YES
Morrison, Jason	8679 Horizon Wind Ave #102	YES
Mueller, James & Lilia	8800 Horizon Wind Ave #103	YES
Murch, Rachel L	8805 Traveling Breeze Ave #102	YES
Murray, Fred	8778 Tom Noon Ave #102	YES
Nelson, Sabrina	8684 Traveling Breeze Ave #102	YES
Nikolic, Zikolic	8735 Traveling Breeze Ave #103	YES
Ning, Jia Qing	8759 Horizon Wind Ave #103	YES
Nolfi, Deborah A	9470 Thunder Sky St # 102	YES
Norris, Patrick	8689 Tom Noon Ave #102	YES
Nuzzo, Frank & Marlene	8684 Traveling Breeze Ave #101	YES
O'Steen, Ginger	8825 Traveling Breeze #102	YES

Pace-Henning, Stephanie	8724 Traveling Breeze Ave #101	YES
Palladinetti, Gloria	9460 Thunder Sky St #103	YES
Pascu, Gabriela	8828 Tom Noon Ave #102	YES
Payette, Margaret A	9430 Thunder Sky St #103	YES
Pecora, Martin C	8749 Horizon Wind Ave #101	YES
Perillo, Bruno & Gail	8644 Traveling Breeze Ave #101	YES
Prestipino, Chris	8710 Horizon Wind Ave #101	YES
Ragland, Norman	8809 Horizon Wind Ave #102	YES
Rechsteiner, Paul E	8785 Traveling Breeze Ave #101	YES
Ridilla, Linda M	8685 Traveling Breeze Ave #102	YES
Rodgers, Marie K	8654 Traveling Breeze Ave #102	YES
Rogers, Michael & Darlene	8804 Traveling Breeze Ave #103	YES
Ross, Ellen J	8815 Traveling Breeze Ave #101	YES
Roth, Lisa F	9470 Thunder Sky St #103	YES
Royfe, Eugene	8764 Traveling Breeze Ave #101	YES
Sadruddin, Azmath Q	8738 Tom Noon Ave #103	YES
Sandler, Ami S	8650 Horizon Wind Ave #103	YES
Sanitate, Vito	8750 Horizon Wind Ave #102	YES
Sarkissian, Kogarik	8718 Tom Noon Ave #101	YES
Schafferman, Leslie	8814 Traveling Breeze Ave #102	YES
Schmitt, Priscilla & Michael	8829 Horizon Wind Ave #102	YES
Schneider, Benjamin M	8717 Tom Noon Ave #102	YES
Sehnem, David & Yvette	8777 Tom Noon Ave #102	YES
Selby, Dennis	8754 Traveling Breeze Ave #102	YES
Seznec, Alain & Janet	8735 Traveling Breeze Ave #102	YES
Shaw, Robert J & Rosemary D	8725 Traveling Breeze Ave #102	YES
Sheets, Thomas and Sandra	8659 Horizon Wind Ave #101	YES
Silveira, Gary	8804 Traveling Breeze Ave #101	YES
Smith, Martha	8778 Tom Noon Ave #103	YES
Standley, Christopher & Iryna	8639 Horizon Wind Ave #101	YES
Steele, Gayle L & Thomas N	8818 Tom Noon Ave #103	YES
Stephen, Kimberly L & Daniel C	8788 Tom Noon Ave #102	YES
Sterbens, Barry & Tina	8819 Horizon Wind Ave #102	YES
Stinson, Stephanie Jean	8764 Traveling Breeze Ave #102	YES
Stirling, Anthony & Whitney	8785 Traveling Breeze Ave #103	YES
Strobehn, Patricia A	8665 Traveling Breeze Ave #101	YES
Swallow, Mark & Dawn	8754 Traveling Breeze Ave #101	YES
Tabaee, Mike & Susan	8658 Tom Noon Ave #103	YES

Tajik, Yasmin	8718 Tom Noon Ave #102	YES
Takahashi, Masai & Ayumi	8668 Tom Noon Ave #101	YES
Tau, Kenneth W O	8737 Tom Noon Ave #102	YES
Thetford, Bruce	8640 Horizon Wind Ave #103	YES
Tiso, Carmine	8740 Horizon Wind Ave #102	YES
Trask, Amber	8817 Tom Noon Ave #103	YES
Tromello, Salvatore	8665 Traveling Breeze Ave #103	YES
Tung, Henry Kuohen	8808 Tom Noon Ave #102	YES
Tung, Katherine	8747 Tom Noon Ave #101	YES
Turner, Kathryn & John Ashoori	8758 Tom Noon Ave #102	YES
Valdez, Jesse & Beatriz	8768 Tom Noon Ave #103	YES
Van Cleve, Zachary	8807 Tom Noon Ave #103	YES
Varela, Ralph & Kathleen Wood Varela	8729 Horizon Wind Ave #102	YES
Vere De Rosa, Ninon De c/o NDD Properties LLC	9480 Thunder Sky St #101	YES
Vinciguerra, Christian	8694 Traveling Breeze Ave #103	YES
Vogel, Cheryl & Patricia	8835 Traveling Breeze Ave #103	YES
Warren, Galinda	8649 Horizon Wind Ave #103	YES
Webber, Roberta	8685 Traveling Breeze Ave #101	YES
Webster, James & Oksana	8664 Traveling Breeze Ave #101	YES
Weintraub, Fred & Mary	8720 Horizon Wind Ave #102	YES
Wells Clark & Shirley	8717 Tom Noon Ave #103	YES
Wesolek, William E & Patti (A)	8795 Traveling Breeze Ave #103	YES
Wilcox, Todd	8778 Tom Noon Ave #101	YES
Williams, Deborah	8739 Horizon Wind Ave #101	YES
Wilson, Mary	8679 Tom Noon Ave #103	YES
Wise, Stacia A	8720 Horizon Wind Ave #101	YES
Wiviott Investments LLC	9440 Thunder Sky St #103	YES
Wolf, Larry & Janet	8730 Horizon Wind Ave #103	YES
Wong, David & Karen	8747 Tom Noon Ave #101	YES
Wong, Nelson	8750 Horizon Wind Ave #101	YES
Wong, Willy F	8797 Tom Noon Ave #103	YES
Wong, Wilson	8779 Horizon Wind Ave #103	YES
Woodhouse-Marriah, Melissa R	8724 Traveling Breeze Ave #102	YES
Wright, Paul	8764 Traveling Breeze Ave #103	YES
Yamano, Hiroyoshi & Mayuka	8648 Tom Noon Ave #101	YES
Yeatts, James W	8828 Tom Noon Ave #103	YES
Younge, Michael & Paula	8734 Traveling Breeze Ave #103	YES
Zerpa, Matias & Olga	8680 Horizon Wind Ave #103	YES
ZG Sport, Inc.	8639 Horizon Wind Ave #103	YES
Allen, Jerod J & Skeeter	8658 Tom Noon Ave #102	
Antonio III, Carlos C	8740 Horizon Wind Ave #101	
Argueta, Brenda	8670 Horizon Wind Ave #101	
Armstrong, Eleanor	8645 Traveling Breeze Ave #102	

Arnold, James & Anne	8734 Traveling Breeze Ave #102	
Atkinson, Steven	8795 Traveling Breeze Ave #102	
Avecilla, Denise	8809 Horizon Wind Ave #101	
Bank HSBC USA NATL ASSN TRS	8689 Horizon Wind Ave #101	
Banks, Hayley	8818 Tom Noon Ave #102	
Berger, Richard & Jody	8835 Traveling Breeze Ave #102	
Bettencourt, Angela M	8684 Traveling Breeze Ave #103	
Block, Kim (A)	8798 Tom Noon Ave #102	
Bowles, Jason	8805 Traveling Breeze Ave #103	
Bowman, Michael H	8768 Tom Noon Ave #101	
Brand, Marcelle S	8717 Tom Noon Ave #101	
Budde, Jacqueline P	8640 Horizon Wind Ave #101	
Bumbasi, Emiterio	8668 Tom Noon Ave #102	
Calarco, Michael D & Sarah J Weber	8747 Tom Noon Ave #102	
Cao, Jie	8657 Tom Noon Ave #102	
Chandler, Melissa	8817 Tom Noon Ave #102	
Chase Home Finance (A)	8729 Horizon Wind Ave #103	
Chen, Jeong Shen	8780 Horizon Wind Ave #103	
Chervinsky, Sandra	8829 Horizon Wind Ave #101	
Chivers, Victoria	8688 Tom Noon Ave #103	
Chow, Ivy	8640 Horizon Wind Ave #102	
Cohn, Eric, Darren & Evan	8755 Traveling Breeze Ave #101	
Contreras, Lucy T	8649 Horizon Wind Ave #101	
Contreras, Patrick B	8738 Tom Noon Ave #101	
Crain, Brett	8688 Tom Noon Ave #101	
Crite-McClure, Phyllis C	8674 Traveling Breeze Ave #101	
Cruz, Zaira M	8708 Tom Noon Ave #102	
De Los Santos, Leandro & Nely (S)	8689 Tom Noon Ave #103	YES
Dekok, Cornelius A	8690 Horizon Wind Ave #102	
Deutshe National Bank C/O American Home Mortgage	8657 Tom Noon Ave #103	
Deutshe National Bank C/O One West Bank	9480 Thunder Sky St #103	
Digiacomo, Mike	8807 Tom Noon Ave #101	
Doerr, Delmar	8728 Tom Noon Ave #102	
Duque, David A	8780 Horizon Wind Ave #101	
Felton, Belinda	8727 Tom Noon Ave #103	
Fiorucci, Michael	8638 Tom Noon Ave #103	
Fishman, Lisa	8787 Tom Noon Ave #103	
Fitzgerald, Erin M	8789 Horizon Wind Ave #103	
FNMA c/o Everhome Mortgage Co.	8679 Horizon Wind Ave #101	
Fox, Greg & Patricia	8799 Horizon Wind Ave #103	
Galen, Flint	9480 Thunder Sky St #102	
Gambina, Frank & Cynthia	8648 Tom Noon Ave #102	
Garden, Cody (A)	8777 Tom Noon Ave #101	
Geene, David A	8645 Traveling Breeze Ave #103	
Giarraputo, Gray & Patricia	8769 Horizon Wind Ave #102	

Gill, Kevin L	8660 Horizon Wind Ave #101	
Godfrey, Thomas	8755 Traveling Breeze Ave #102	
Gordon, Jason E	8829 Horizon Wind Ave #103	
Harvey, Jennifer M	8710 Horizon Wind Ave #103	
Henson, Rachel Lynn	8794 Traveling Breeze Ave #103	
Hernandez, Dino & Rowena	8748 Tom Noon Ave #102	
Hershey, Melissa L	8819 Horizon Wind Ave #101	
HSBC BANK c/o Everhome Mortgage Co.	8669 Horizon Wind Ave #103	
Huang, Yun Shan	8659 Horizon Wind Ave #103	
Jacob , Kenneth Bradley	8715 Traveling Breeze Ave #102	
Jelic, Igor	8800 Horizon Wind Ave #101	
Jennings, Joseph A	8795 Traveling Breeze Ave #101	
Jolas, Tasia	8824 Traveling Breeze Ave #103	
Jordan, Daniel	8694 Traveling Breeze Ave #101	
Kaviani, Javad	8800 Horizon Wind Ave #102	
Krause, Kara L	8775 Traveling Breeze Ave #101	
Lachica, Heather (A)	8810 Horizon Wind Ave #103	
Lee, Rosa (A)	8769 Horizon Wind Ave #101	
Letterman, Clifford O & Rhonda K	8655 Traveling Breeze Ave #103	
Lindberg, Ernest	8695 Traveling Breeze Ave #103	
Linton, Michael	8647 Tom Noon Ave #103	
Loker, Zachary	8780 Horizon Wind Ave #102	
Lucero, Bryan	8759 Horizon Wind Ave #101	
LV Properties & Investments, Horizon Wind Series	8779 Horizon Wind Ave #101	
Maddy, Jin-joo L	8637 Tom Noon Ave #101	
Mattson, Heather	8695 Traveling Breeze Ave #102	
McKenzie, Denise L	8628 Tom Noon Ave #101	
McNally, Mitra	8690 Horizon Wind Ave #103	
Mcnutt, Jamie L & James	8618 Tom Noon Ave #101	
Meadows, Monty	8728 Tom Noon Ave #103	
Miller, Constance L	8725 Taveling Breeze Ave #101	
Mirzoyan, Shamir	8679 Horizon Wind Ave #103	
Mitchell, Ronald (A)	8679 Tom Noon Ave #101	
Morganti, Daniel (A/B)	8828 Tom Noon Ave #101	
Morris, Jeremy & Taren	8758 Tom Noon Ave #101	
Nilsson, Kris	8745 Traveling Breeze Ave #101	
Nunn, Gregory	8725 Traveling Breeze Ave #103	
O'Connor, Madeline	8825 Traveling Breeze Ave #103	
O'neil, Daniel M	8737 Tom Noon Ave #101	
Onstott, Charles & Barbara	8708 Tom Noon Ave #103	

O'Shea, John	8637 Tom Noon Ave #103	
Otto, Margo	8727 Tom Noon Ave #102	
Palladinetti, April	8667 Tom Noon Ave #103	
Palsha, Tara	8824 Traveling Breeze Ave #102	
Pappas, Anthony J & Bridget A	8745 Traveling Breeze Ave #102	
Patterson, William J (A)	8618 Tom Noon Ave #103	
Pentony, Shannon M	8724 Traveling Breeze Ave #103	
Pettel III, John D	8790 Horizon Wind Ave #102	
Placzkibwicz, Dariusz	8680 Horizon Wind Ave #101	
Price, Kathleen (A)	8679 Tom Noon Ave #102	
Quant, Marjorie V	8690 Horizon Wind Ave #101	
Riccardo, Steve	8784 Traveling Breeze Ave #102	
Rivas, Sabian	8799 Horizon Wind Ave #102	
Rogers, Michael & Darlene	8815 Traveling Breeze Ave #103	
Ross, Tyler H	9460 Thunder Sky St #101	
Russo, Julie G	8718 Tom Noon Ave #103	
Saludares, Ranette C (A)	9430 Thunder Sky St #101	
Satornino, Robert James (A)	8744 Traveling Breeze Ave #102	
Schneider, Katherine	8817 Tom Noon Ave #101	
Schorgl, William G	8674 Traveling Breeze Ave #103	
Schultz, Josh R	8727 Tom Noon Ave #101	
Shimizu, Anthony	8689 Horizon Wind Ave #102	
Smith, Catherine L	8818 Tom Noon Ave #101	
Smith, Colette D (A)	8734 Traveling Breeze Ave #101	
Solis, Ricardo	8660 Horizon Wind Ave #102	
Southlands Real Estate	8668 Tom Noon Ave #103	
Stanley, Grant/Richard/Janice	8647 Tom Noon Ave #101	
Strickland Properties, LLC	8784 Traveling Breeze Ave #101	
Stuhmer, Meghan (B)	8749 Horizon Wind Ave #102	
Sulliban, Ms Megan R	8787 Tom Noon Ave #101	
Tacker, John & Cherie	8798 Tom Noon Ave #103	
Taikaldiranian, Vartan	8789 Horizon Wind Ave #101	
Tartt, Trena	8765 Traveling Breeze Ave #102	
Taylor, Les P (A)	9460 Thunder Sky St #102	
Thompson, Danielle D	8785 Traveling Breeze Ave #102	
Tolentino, Pressie A	8678 Tom Noon Ave #101	
Traylor, Jeremy D, Jerry & Onice Traylor	8728 Tom Noon Ave #101	
Trent, Justin (A)	8775 Traveling Breeze Ave #102	
Turla, Romaulda & Annabelle (A)	8698 Tom Noon Ave #102	
US Bank National	8667 Tom Noon Ave #101	
US Bank National	8809 Horizon Wind Ave #103	

US Bank National c/o One West Bank	8685 Traveling Breeze Ave #103	
Van Alstyne, Benjamin & Conkey, Wendi	8784 Traveling Breeze Ave #103	
Vasilyev, Sergei	8814 Traveling Breeze Ave #101	
Veit, Ronald A (A)	8660 Horizon Wind Ave #103	
Vickers, Natalie H	8735 Traveling Breeze Ave #101	
Vong, Vanu	8819 Horizon Wind Ave #103	
Ward, Kathleen, Nancy, & Herbert	8790 Horizon Wind Ave #101	
Watson, Edward & Pearl	8820 Horizon Wind Ave #101	
Wells Fargo Bank (A)	8748 Tom Noon Ave #101	
Winter, Ronald & Traci	9490 Thunder Sky St #102	
Yamenfeld, Joyce & Jeremy	8647 Tom Noon Ave #102	
Zamora, Manuel	8760 Horizon Wind Ave #102	
Zerpa, Adriana	8730 Horizon Wind Ave #102	
Zhao, Shan	8639 Horizon Wind Ave #102	
TOTAL BLDGS	**114**	TOTAL
TOTAL UNITS	**342**	
Units w/assignents	**199**	
Units w/o assignments	**143**	
Bldgs w/one or more assignments	**107**	

EXHIBIT "8"

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Plaintiffs v. D.R. HORTON, INC. a Delaware Corporation DOE INDIVIDUALS, 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100 inclusive Defendants.	Case No. 07A542616 Dept. XXII **PLAINTIFF'S MOTION FOR DECLARATORY RELIEF RE: STANDING PURSUANT TO ASSIGNMENT AND PURSUANT TO NRS 116.3102(1)(d)** Date: Time: Dept:

COMES NOW Plaintiff, HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION ("ASSOCIATION") by and through its attorneys, ANGIUS & TERRY LLP, and respectfully submits PLAINTIFF'S MOTION FOR DECLARATORY RELIEF RE: STANDING PURSUANT TO ASSIGNMENT AND PURSUANT TO NRS 116.3102(1)(d). Association moves the Court for a determination of its standing to assert a claim for

constructional defects which exist in the residential buildings of the townhome development. By this motion, Association seeks a declaration of the Court that:

(1) With regard to units for which Association has procured an assignment of rights from the unit owners, Association has standing to assert all constructional defect claims;

(2) In all buildings which contain a unit for which Association has procured an assignment of rights from the unit owner, Association has standing to assert all constructional defect claims which affect common property and therefore the assigned unit owner. In this case, Association has standing to assert construction defect claims in the building envelope, building structural systems and building fire resistive systems,; and

(3) In all buildings, Association has standing pursuant to NRS 116.3102(1)(d) to assert all constructional defect claims which affect common property. In this case, Association has standing to assert construction defect claims in the building envelope, building structural systems and building fire resistive systems.

This Motion is made and based upon the attached Memorandum of Points and Authorities, together with all papers and pleadings on file herein, which are hereby

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/ / /

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incorporated by this reference, as well as any oral arguments that may be heard at the time of the hearing of this matter.

Dated: September 30, 2010

ANGIUS & TERRY LLP

By: _____

Paul P. Terry, Jr., SBN 7192
John J. Stander, SBN 9198
Melissa Bybee, SBN 8390
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Las Vegas, Nevada 89144
Attorneys for Plaintiff

NOTICE OF MOTION

TO: All Interested Parties and,

TO: Their Respective Attorneys of Record

PLEASE TAKE NOTICE that PLAINTIFF'S MOTION FOR DECLARATORY RELIEF RE: STANDING PURSUANT TO ASSIGNMENT AND PURUSANT TO NRS 116.3102(1)(d) will be heard in Department XXII of the above entitled Court on the ____ day of _____ at _____a.m./p.m. or soon thereafter as counsel may be heard.

Dated: September 30, 2010

ANGIUS & TERRY LLP

By: _____

Paul P. Terry, Jr., SBN 7192
John J. Stander, SBN 9198
Melissa Bybee, SBN 8390
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Table of Contents

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TABLE OF AUTHORITIES

Cases

Statutes

Treatises

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Nevada Supreme Court has remanded this matter back to the District Court, pursuant to its holding in *D.R. Horton, Inc. v. Eighth Judicial District Court (First Light HOA)*, 215 P.3d 697, 699 (Nev., 2009) (hereafter "*First Light II*"), for a determination of plaintiff High Noon at Arlington Ranch Homeowners Association's (hereafter "ASSOCIATION") standing to assert a claim for constructional defects which exist in the residential buildings of the townhome development.

There are different types of defects involved, and the ASSOCIATION'S claim for standing is not the same for each of them. For clarity in this brief, ASSOCIATION has grouped the defects into four classifications:

1) The Building Envelope—The building envelope encompasses the exterior of the building, the roof, the stucco, the balconies and decks, the exterior doors and the windows. Defects in these components affect every unit owner in the building.

2) Structural and Fire Resistive Systems—The structural and fire resistive systems are conceptually grouped together because, although they are located in the interior of the buildings, they are not located in the interior of the units and by their nature they affect every unit in the building.

3) Electrical and Plumbing defects which endanger the life and safety of the buildings inhabitants—ASSOCIATION can envision defects with the electrical and plumbing systems that so severely endanger the life and safety of the inhabitants of the entire building, that they would by their very nature affect more than two unit owners, and would concern the common interest community. However, at this time, ASSOCIATION is not asserting standing with

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regard to electrical or plumbing issues in units for which Association does not hold an assignment.

4) Defects In The Interior Of The Units—These are defects that exist within the interior of the units, and only affect the individual unit owner. ASSOCIATION is only asserting standing for these claims in the units for which ASSOCIATION has assignments.

High Noon at Arlington Ranch is a townhome development of 342 units in 114 buildings. To date, ASSOCIATION has obtained the assignments of 194 of the homeowners, with assigned units located in 107 of the buildings. By virtue of those assignments, and without reliance on Chapter 116, the ASSOCIATION has assigned standing to pursue all constructional defect claims arising from the assigned units. Moreover, since the assigned homeowners have a shared maintenance obligation and rely on the integrity of the common property, ASSOCIATION derives from the assignments standing to pursue claims for defects in the building envelope, structural and fire resistive systems of those buildings.

With regard to the other buildings in the development, ASSOCIATION has standing pursuant to NRS 116.3102(1)(d) to assert claims on behalf of its members with regard to matters that affect the common interest community. With regard to these buildings, and for all of the units to which ASSOCIATION does not have an assignment, ASSOCIATION is only asserting claims for defects that affect the entirety of the buildings, and therefore by their nature affect two or more owners, and concern the common interest community. This includes defects in the building envelope, structural elements, and fire resistive elements.

By this motion, Association seeks a declaration of the Court that:

(1) Association has standing to assert all constructional defect claims in units for which Association has procured an assignment of rights from the unit owners;

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(2) Association has standing to assert constructional defect claims in the building envelope, building structural systems, and building fire resistive systems, in all buildings which contain a unit for which Association has procured an assignment of rights from the unit owner; and

(3) Association has standing to assert constructional defect claims in the building envelope, building structural systems, and building fire resistive systems in all buildings pursuant to NRS 116.3102(1)(d).

II. STATEMENT OF FACTS

A. GENERAL FACTS

This matter concerns a planned townhome development[1] known as High Noon at Arlington Ranch (hereafter "HIGH NOON"). Plaintiff HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION ("ASSOCIATION") is a non-profit elected governing body of the HIGH NOON development.

HIGH NOON is comprised of 114 buildings with three units per building, for a total of 342 units. The development construction type is wood framed walls, with concrete tile roofing, and a one-coat stucco system. HIGH NOON was developed, constructed and sold by D.R. HORTON in or about 2005.

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[1] ASSOCIATION refers to the development as a "townhome development." However, with the stacked configuration of the multiple residences within the buildings, one would expect the units at High Noon at Arlington to be condominiums. They are not classic "condominiums" because D.R. Horton drafted the CC&Rs in such a way as to virtually strip the Association of all of the maintenance and ownership responsibilities over the common areas of the buildings that a condominium association would normally have. Where a condominium association would have maintenance responsibilities over, for example, the building envelope—here D.R. Horton has assigned that responsibility to the unit owners. This was done solely in an effort to strip the ASSOCIATION of standing to pursue such issues should constructional defects arise.

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B. INSPECTION AND TESTING

ASSOCIATION, through its retained experts, has conducted extensive testing and investigation of the buildings. The building envelopes and firewall systems were inspected by RH Adcock & Associates. The CV of the architectural expert is attached hereto as Exhibit 1. Their report is attached hereto as Exhibit 2.

The structural elements were inspected by Marcon Forensics, Inc. The CV of the structural engineer is attached hereto as Exhibit 3. Their report and matrix of locations is attached here as Exhibit 4.

1. Building Envelope

a. Roofs

To date, ASSOCIATION's architectural expert, R.H. Adcock and Associates, has visually and destructively inspected 51 of the 114 building roofs. Defects in tile and roof component installation were identified at 100% of the roofs inspected. See Adcock Report, Exhibit 2, pp. 8-62. While the exact configuration of defects varied somewhat from roof to roof, the same pattern of defective conditions was observed throughout the development. Each of the roofs is defective, and the repair recommendation for each of the roofs is the same. *Ibid.*

b. Decks and Balconies

To date, R.H. Adcock has visually inspected 52 private balconies, and destructively tested seven. The defects found at the privacy balconies were uniform—the same defects were identified at 100% of the decks inspected. See Adcock Report, Exhibit 2, pp. 63-73. Those defects include use of inappropriate sheet metal nails, incomplete and inadequate sheet metal flashing laps; lack of sealant at same; and inadequate sloping of the deck surfaces. *Ibid.* The repair recommendation for each balcony is the same. *Ibid.*

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c. One Coat Stucco System

To date, R.H. Adcock has visually inspected 65 of the 114 building exteriors. The same defects were observed at 100% of the buildings inspected. 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. While the exact configuration of defects varied somewhat from building to building, the same pattern of defective conditions was observed throughout the development. The repair recommendation for each of the buildings is the same. See Adcock Report, Exhibit 2, pp. 74-85.

d. Doors

To date, R.H. Adcock has visually inspected 57 sliding glass doors, and invasively tested 11 of them.[2] They visually inspected 32 main entry doors, and destructively tested nine. They visually inspected 28 French doors, and destructively tested five. 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. While the exact configuration of defects varied somewhat from door to door, the same pattern of defective conditions was observed throughout the development. See Adcock Report, pp. 86-96. The repair recommendation is the same for each of the defective doors. *Ibid.*

e. Windows

To date, R.H. Adcock has visually inspected 719 weather exposed windows at 91 units, and invasively tested 25 windows. Every window inspected was found defective. The main defects identified include: Leaking window during spray tests. EPS not sealed at frame,

[2] Sliding glass doors only exist in unit types 102 and 103. French Doors exist in unit types 101 and at some unit types 102 and 103.

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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 Adcock Report, Exhibit 2, pp. 134-160. While the exact configuration of defects varied somewhat from window to window, the same pattern of defective conditions was observed throughout the development. The repair recommendation is the same for each window. *Ibid.*

2. Fire Resistive Construction

To date, R.H. Adcock has destructively tested 13 firewalls. Defects were found in both the unit to unit fire separation walls, and the garage to unit fire separation walls. Defects in the firewalls were identified at 100% of the locations inspected. Some firewalls were actually missing. See Adcock Report, Exhibit 2, pp. 107-121.

3. Structural

To date, the Association's structural expert, Marcon Forensics, has inspected the structural systems at numerous locations within the buildings, and discovered serious structural deficiencies at each of the locations inspected. For example, they identified insufficient nailing at the shear wall, insufficient width of shear wall, nailing at foundation holdown strap missing, floor to floor holdown strap and sill nailing misses rim joist at exterior walls. See Marcon Forensics Report and Matrix, attached as Exhibit 4. Each of the locations inspected revealed structural insufficiencies and defects.

C. ASSIGNMENTS

To date, ASSOCIATION is the assignee pursuant to executed Assignment of Claims, of the claims of 194 unit owners (out of a total of the 342 units.) The assignments are attached hereto as Exhibit 5. A spreadsheet of assigned units is attached hereto as Exhibit 6.

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The assigned units are located in 107 of the 114 buildings. A map of the buildings containing assigned units is attached as Exhibit 7.

D. PROCEDURAL HISTORY

On June 7, 2007, ASSOCIATION filed a Complaint against D.R. HORTON alleging constructional defects in the common areas and in the residential buildings. At the same time, ASSOCIATION sought, and this Court issued, a stay of the action pending completion of the Chapter 40 pre-litigation process. That stay remains in effect.

Despite the stay, D.R. HORTON brought a motion for partial 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. On July 9, 2008, the 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. On November 20, 2008, ASSOCIATION filed a Petition for Writ of Prohibition or Mandamus in the Nevada Supreme Court.

On September 3, 2009, the Nevada Supreme Court issued an Order Granting Petition, stating that in accordance with the analysis set forth in the companion case *First Light II*, the District Court was to review the claims asserted by the ASSOCIATION to determine, based upon the guidelines set forth in that opinion, whether ASSOCIATION may file suit in a representative capacity for constructional defects affecting the individual units. On September 29, 2009, the Nevada Supreme Court filed a Notice in Lieu of Remittitur, stating that since no petition for rehearing has been filed, notice is hereby given that the Order and decision entered on September 3, 2009, has become effective.

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III. ARGUMENT

A. ASSOCIATION HAS STANDING TO PURSUE CLAIMS IN BUILDINGS WITH UNITS THAT HAVE BEEN ASSIGNED TO THE ASSOCIATION

1. Association Has Assignments From 194 Of The Homeowners, And Has Standing Pursuant To The Assignments To Pursue All Claims Relating To Those Assigned Units

To date, the Association has received the assignments of claims from 194 of the homeowners in High Noon. The assignments state:

> HOMEOWNER hereby assigns to THE ASSOCIATION all of the claims and causes of action that HOMEOWNER possesses against D.R. Horton, Inc., and any and all of the designers, contractors, subcontractors and material suppliers that participated in any way in the design, construction or supply of materials for construction of the townhome project and/or HOMEOWNER'S unit, for defective construction. Such assigned claims and causes of action expressly include, but are not limited to, all claims and causes of action that arise out of (1) The contract for sale of the subject property from D.R. Horton, Inc., (2) Any express or implied warranties; (3) Any and all common law claims, including but not limited to claims in negligence, fraud and equitable claims; (4) Any and all claims relating to or arising out of NRS Chapter 40, et seq.; and (5) Any and all claims relating to or arising out of Chapter 116, et seq.

The Assignments are attached as Exhibit 5.

By virtue of the assignments, the Association "steps into the shoes" of the assignor homeowners, and is able to pursue any claim that the homeowner would have been able to pursue. *In re Silver State Helicopters, LLC*, 403 B.R. 849, 864 -865 (Bkrtcy.D.Nev., 2009).

> "The assignability of rights generally depends on local law. *See, e.g. Danning v. Mintz*, 367 F.2d 304, 308 (9th Cir.1966). Like any other valid agreements, assignments are enforceable under Nevada law. *See, e.g. Wood v. Chicago Title Agency of Las Vegas, Inc.*, 109 Nev. 70, 847 P.2d 738 (Nev.1993). An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance. *See* Restatement (Second) of Contracts, § 317 (1981). An assignee

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> typically "steps into the shoes" of an assignor. *See In re Boyajian*, 367 B.R. 138, 145 (9th Cir. BAP 2007)."

In re Silver State Helicopters, LLC 403 B.R. 849, 864 -865 (Bkrtcy.D.Nev., 2009).

The validity of assignments under Nevada law, was recently reconfirmed in *Easton Bus. Opp. v. Town Executive Suites* 230 P.3d 827, 830 (Nev., 2010) wherein the Court stated:

> "Based on the agreement as written and the facts the district court found to be undisputed, we conclude that the commission was assignable and that Century 21 validly assigned it to Easton. From this it follows that, as Century 21's assignee, Easton has real party in interest status under NRCP 17(a)."

ASSOCIATION has procured the assignment of all of the claims that 194 unit owners have against D.R. HORTON and its subcontractors. ASSOCIATION therefore, by virtue of those assignments, is the real party in interest under NRCP 17(a) to assert those claims. As the Court noted in *Deal v. 999 Lakeshore Association*, 94 Nev. 301 (1978), the owners of condominium units are real parties in interest to pursue actions for constructional defect claims, in that they bear the costs of replacement or repair of those defects. Id. at 304. That homeowner standing has been assigned to ASSOCIATION. ASSOCIATION therefore has standing as a result of these assignments, completely apart from, and without reference to either NRS 116.3102(1)(d) or the *First Light II* decision.

2. Association Has Standing To Assert Claims For Issues In The Building That Affect Its Assignors' Units

To date, 107 buildings at High Noon (out of the 114 buildings in the development) contain units for which the claims have been assigned by the homeowner to ASSOCIATION. By virtue of the assignments, ASSOCIATION has standing to pursue all of the claims arising from the "building wide" components in those 107 buildings. That is to say, that pursuant to the assignment of one homeowner in the building, the ASSOCIATION has standing to pursue claims arising in the building envelope, the structural system and the fire resistive system in that building. This is so because defects in those "building wide" components impact the

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rights of the assigning homeowners. The assigning homeowners are damaged by those defects, and have standing to redress those defects which affect their units. Those rights have been assigned to ASSOCIATION by virtue of the assignments.

It is an elemental principal of law that a problem caused on one person's property which adversely affects a second person's property, gives rise of a claim by the second person to redress the problem. For example, if a negligently started fire in Mr. Smith's home spreads and proximately causes damage to Mr. Jones' home; Mr. Jones would have redress against the negligent actor for the fire damage caused. This is the basic legal principle of proximate causation. See e.g., *Bower v. Harrah's Laughlin, Inc.* 215 P.3d 709, 724 (Nev. 2009) (A negligence claim will stand if the negligence was both foreseeable and the actual cause of plaintiff's harm).

Negligent construction within the portion of a common component owned by one homeowner (whether it is in the building envelope, firewalls, or structural elements) will both foreseeably and necessarily adversely affect the rights of each homeowner in that building. Each of the homeowners in that building are damaged, and each homeowner in the building is the real party in interest to make a claim for that defect. Each homeowner therefore has standing to redress constructional defects throughout his or her building which affect the entire building. Thus where a homeowner assigned his or her claims to ASSOCIATION, ASSOCIATION is the real party in interest, and has standing to assert claims for such defects throughout the entire building.

In *Lyon v. Walker Boudwin Const. Co.*, 88 Nev. 646, 649 (1972), the Nevada Supreme Court recognized that a contractor is liable to a neighboring property owner if his negligence in working on one property damages the neighbor. In *Lyon, supra*, an excavator working on one property negligently removed lateral support from a neighboring property causing

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damage to that property. The court found the contractor liable in negligence to the neighbor. *Id.* Similarly, if there is a defect in one unit owners "portion" of the sheer wall or the roof, that defect will affect and damage the other unit owners in the building, and those unit owners have a claim against the developer for those defects. Thus the ASSOCIATION, having all of the assigned rights of the assigning unit owner, has standing to pursue those claims.

This result is also supported by the language in the Association's CC&Rs. In its attempt to avoid liability, D.R. Horton divested the ASSOCIATION of the ownership and maintenance responsibilities that a condominium association would normally have for the common property. D.R. Horton drafted the CC&Rs so that the unit owners own and maintain the building's common area components. However, recognizing that, in reality, owners may be unable or unwilling to perform the required maintenance or repairs on their "portion" of the common area components, the CC&Rs give express authority to the Association to perform those repairs. See CC&Rs, ¶ 9.3, attached as Exhibit 9 ["In addition, the Board shall have the right . . . to enter upon such Unit and/or Exclusive Use Area to make such repairs or to perform such maintenance . . ."]. See also, CC&Rs, ¶ 9.6 [". . . the Board shall have the right . . . to correct such condition, and to enter upon such Owner's Unit, [sic] for the purpose of so doing . . ."] Moreover, each owner has an express obligation to report items in the "Triplex Building" that require repair to the Board. CC&Rs. ¶ 9.5. Finally, with respect to "wood destroying pests and organisms" such as mold, the Association has authority to adopt and implement a "pest control program" and the cost of repairing both the Common Elements and individual units "shall be a common expense." CC&Rs, ¶ 9.8. Thus, while maintaining the artifice of individual owner responsibility, the CC&Rs implicitly recognize that the common area components affect every owner in the building and thus every owner has the legal standing to bring a claim for defects.

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B. ASSOCIATION HAS STANDING PURSUANT TO NRS 116.3102(1)(d) TO PURSUE CLAIMS IN UNASSIGNED BUILDINGS THAT AFFECT TWO OR MORE UNIT OWNERS

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. That statute states in pertinent part:

> 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:
>
> . . .
>
> (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.

NRS 116.3102 (Emphasis added.)

The Nevada Supreme Court in *First Light II* confirmed that an HOA 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. As the Court stated:

> "[W]e conclude that under NRS 116.3102(1)(d), a homeowners' association has standing to file a representative action on behalf of its members for constructional defects in individual units of a common-interest community."

First Light II, *supra*, 215 P.3d at 702.

1. Conflicts Between *Shuette*, Its Rule 23 Analysis And Chapter 116

The *First Light II* court went on to hold, at least with regard to the interior of the units, that when an association asserts claims in a representative capacity, the action must fulfill the requirements of NRCP 23, and the principles expressed in *Shuette v. Beazer Homes*, 124 P.3d 530 (2005). *First Light II*, *supra*, at 703.

> "In sum, a homeowners' association filing a suit on behalf of its members will be treated much the same as a plaintiff in class action

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> litigation. Although an association has standing to assert claims on behalf of its members, the suit must fulfill the requirements of NRCP 23 and the principles and concerns discussed in *Shuette*."

First Light II, supra, 215 P.3d at 704. The *First Light II* Court based its determination that a Rule 23 analysis was required, at least in part, on commentary to the Restatement (Third) of Property: Servitudes §6.11 (2000). The Court stated:

> "Indeed, the commentary to Restatement (Third) of Property: Servitudes §6.11, that reaffirms that a homeowners' association has standing to assert claims affecting individual units, also provides, '[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, supra, 215 P.3d at 703 (emphasis added.)

However, the commentators to the cited Restatement comment suggested that class action analysis be used with regard to the relationship between the association and the membership, not with regard to analysis of the Association's standing. In other words, the members would have the rights of a potential class member to receive notice, to opt out, withdraw from the "class", or to object to a potential settlement because each of their individual rights would be impacted without any corresponding impact on the rights of the other owners. The fact that the Restatement authors were referring to the relationship of the members to the association is reflected in Illustration 3 to §6.11 which provides:

> Association sues Insurance Company for claims arising out of an earthquake that did substantial damage to common areas and individual units. The association includes claims for damage to the individual units as well as for damage to the common areas. The association has standing to do so. The rights of individual unit owners to participate in the proceedings including settlement, or to withdraw from the proceedings, and the preclusive effect of any judgment or settlement on the individual owners are determined under generally applicable procedural principles."

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Restatement (Third) of Property: Servitudes §6.11, Illustration 3 (Emphasis added.)

Thus the restatement authors give an illustration of the application of "class action" principals to association standing: 1) The association does have standing, and 2) The association members have the same rights as a putative class member to participate, or withdraw, and the preclusive effect of the proceedings follows class action rules.

As it quickly becomes apparent when one attempts to apply the NRCP Rule 23 prongs, and *Shuette* analysis to the circumstances of multi-unit association representational standing, the analysis simply doesn't fit in a number of significant ways, and, in fact, the prongs are in some ways contradictory.

For example, NRS 116.3102(1)(d) specifically sets the lower limit of unit owners affected at two, providing that an association may ". . . [i]nstitute . . . litigation or administrative proceedings in its own name on behalf of itself or for two or more unit owners on matters affecting the common interest community." (Emphasis added.) This conflicts with an NRCP 23(a) "numerosity" analysis, which requires plaintiff to prove the number of class members so numerous that joinder is impractical. Indeed, application of the numerosity prong of Rule 23 would facially violate the legislative mandate that a defect affecting "two or more" is sufficient.

Similarly, the Legislature determined, in enacting NRS 116.3102(1)(d), that the association has standing for matters "affecting the common interest community." This provision can be harmonized with the Rule 23 analysis, by an understanding that if the defect affects the common interest community, it satisfies the "commonality" prong of the

Also, NRCP Rule 23(3) requires that " . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class." This requirement simply does not

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make sense when applied to an HOA, who represents the "class" as a whole, and therefore doesn't have "typical" claims of any particular class member. It can be said, however that as a representative of the entire community, the HOA stands in the shoes of the homeowners, and its claims are, by definition, "typical" of the homeowners claims.

Finally, the *Shuette* analysis regarding application of the NRCP Rule 23 prongs does not fit with regard to the representative standing of a townhome association. *Shuette* was an expansive soils case, which involved single family homes. The Court noted ". . . as a practical matter, single family residence constructional defect cases will rarely be appropriate for class treatment . . . As pointed out by the California Supreme Court, class actions involving real property are often incompatible with the fundamental maxim that each parcel of land is unique." *Shuette*, *supra*, at 854. This is not true in a case such as this—High Noon at Arlington Ranch is a 342 unit, 114 common interest ownership community. Each two-story building shares common walls, common roofing, common exterior stucco, common structural elements and common fire resistive systems between the units within the building. Ownership of a unit in a building consisting of other like units, in a common-interest community, differs significantly in character and nature from ownership of a single family home on a separate parcel of land.

First Light II, *Shuette*, the Restatement 3d of Property and Rule 23 are easily harmonized by recognition of the fact that *Shuette* addressed a situation where only defects in the unit that did not affect other unit owners were at issue, and *First Light II* only requires a Rule 23 analysis in such an instance. 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

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> 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, at 703-704 (emphasis added.) Thus, "where no common property is involved", and only individual defects are addressed, as in the *Shuette* case, 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," Restatement (Third) of Prop.: Servitudes § 6.11 cmt. a, 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 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, at 703-704 (emphasis added.) In a detached single family housing development, any defects in the house or even in the soil under the house will rarely affect the neighboring houses and the damages can be wildly disparate depending upon a variety of factors. Similarly, defects on the interior of an attached unit will rarely affect the neighboring units. Thus, as this Court recognized in *Dorrell Square HOA v. D.R. Horton*, Action No. A527688, and *Court at Aliante HOA v. D.R. Horton*, Action No. A527641, and as our Supreme Court recognized in *Shuette*, the Association will generally not have standing pursuant to NRS 116.3102(1)(d) to pursue these individual claims. Here, we have the opposite. Where only common areas are concerned----areas which necessarily concern and

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affect two or more unit owners, and concern the common interest community, application of a Rule 23 and *Shuette* analysis are not necessary.

2. The *First Light II* Decision Is Distinguishable In That It Concerned Interior Issues That Did Not Affect Two Or More Unit Owners

Because of these conflicts and differences, the *First Light II* decision is distinguishable from this action in that the *First Light II* decision focused upon defects within the units which affected only that unit. In such a case, the *First Light II* Court held, a NRCP Rule 23 analysis is necessary. Here, on the other hand, ASSOCIATION is only asserting claims that by their very nature affect every homeowner in the building.

This distinction was recognized by this Court in its Order in the case *View of Black Mountain Homeowners Association Inc. v. The American Black Mountain Limited Partnership, et al.* Clark County Dist. Court, Dept. XXII, Case No. A-09-590266-D, wherein the Court stated:

> In this case, Plaintiff does not seek to litigate, on behalf of its members or homeowners, issues relating to constructional defects located within the interiors of any of the 262 individual units. To the contrary, it specifically seeks to represent its members in an action dealing with defects located on or in the exterior walls, wall openings and the roofs of the structures for which the unit owners typically would be held responsible. [footnote omitted] to wit, the facts and issues of this case are distinguishable from those raised in [*First Light II*] where the homeowners' association sought to represent its owners or members for a sundry of constructional defects located within the interiors of each of the developments' units.

View of Black Mountain Order, *supra*, at p. 6-7.

In this case also, ASSOCIATION seeks only to litigate issues that by their very nature affect every owner within the building. ASSOCIATION is not asserting claims for defects within the interior of the units which only affect the one unit owner. The *First Light II* decision is therefore, for the reasons set forth above, distinguishable.

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3. 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 Concern The Common Interest Community

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. However, D.R. HORTON drafted the CC&Rs at High Noon at Arlington Ranch in a manner designed to insulate itself from potential liability for constructional defect actions. D.R. HORTON gave the primary maintenance and repair responsibilities to the homeowners of the buildings. By this tactic of stripping the ASSOCIATION of the primary maintenance responsibilities that it would typically have, D.R. HORTON has attempted to create 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.[3]

---

[3] Recognizing that such a scheme would never work in the real world, D.R. Horton still bestowed secondary responsibility on the ASSOCIATION for these common components. The CC&Rs at Paragraph 9.3, "Maintenance and Repair Obligations of Owners," provides:

> "If any owner shall permit any improvement, the maintenance of which is the responsibility of such Owner, to fall into disrepair or to become unsafe, or unsightly, or otherwise violate this Declaration, the Board shall have the right to seek any remedies at law or in equity which the Association may have. In addition, the Board shall have the right, but not the duty . . . to enter upon such Unit and/or exclusive Use Area to make such repairs or to perform such maintenance and to charge the cost thereof to the Owner." (emphasis added)

CC&Rs, Paragraph 9.3 attached as Exhibit 9. Similarly, Paragraphs 9.5 and 9.6 provide:

> "9.5 Reporting Responsibilities of Owners
> "Each Owner shall promptly report in writing to the Board any and all visually discernible items or other conditions, with respect to his Unit (including Garage), Triplex Building and areas adjacent to his Unit, which reasonably appear to require repair. Delay or failure to fulfill such reporting duty may result in further damage to Improvement, requiring costly repair or replacement.

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The building envelope is a monolithic structure, and can only be repaired as a whole. It would be absolutely ridiculous for one homeowner on his or her own to undertake a repair of their one third of the roof, or their one third of the stucco or envelope openings. Water intrusion into the envelope anywhere on the building affects all of the homeowners of the building.

NRS 116.3102 provides that an association may ". . . [i]nstitute . . . litigation or administrative proceedings in its own name on behalf of itself or for two or more unit owners on matters affecting the common interest community." (Emphasis Added.) As this Court recognized in its Order in the case *View of Black Mountain Homeowners Association Inc. v. The American Black Mountain Limited Partnership, et al, supra*:

> 9.6 Disrepair; Damage to Owners
> If any Owner shall permit any Improvement, which is the responsibility of such Owner to maintain, to fall into disrepair so as to create a dangerous, unsafe, unsightly or unattractive condition, the Board, and after affording such Owner reasonable notice, shall have the right but not the obligation to correct such condition, and to enter upon such Owner's Unit, for the purpose of so doing . . ."

CC&Rs, Paragraphs 9.5-9.6, attached as Exhibit 9. Finally, where there is evidence of pest infestation, including mold, the ASSOCIATION has the affirmative responsibility to repair:

> "9.8 Pest Control Program
> If the Board adopts an inspection, prevention and/or eradication program ("pest control program") for the prevention and eradication of infestation by wood destroying pests and organisms, the Association . . . may require each such Owner and Residents [sic] to temporarily relocate to from the Unit in order to accommodate the pest control program. . . . All costs involved in maintaining the pest control program, as well as in repairing any Unit or Common Elements shall be a Common Expense, subject to a Special Assessment therefore, and the Association shall have an easement over the Units for the purpose of affecting the foregoing pest control program."

CC&Rs, Paragraphs 9.5-9.6, attached as Exhibit 9.

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> Clearly, 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 two 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, without conducting any further analysis, plaintiff View of Black Mountain Homeowners Association, Inc. has standing to sue on behalf of two or more of its members for constructional defects to the structures exteriors.

Order in *View of Black Mountain Homeowners Association Inc. v. The American Black Mountain Limited Partnership, et al.*, Exhibit 8 at p. 5. (Emphasis added.)

Here, as the Court determined in the *View of Black Mountain HOA* case, the defects in the building envelope by definition affect more than one unit owner, and affect the common interest community.

4. Association Has Standing Under Nrs 116.3102(1)(D) To Assert Claims In The Structural System And The Fire Resistive System In That Those Defects, By Definition Affect Two Or More Unit Owners And Concern The Common Interest Community

Plaintiff's experts have identified serious and alarming defects both with the structural integrity of the buildings, and with the fire resistive systems within the buildings. See Marcon Report, attached as Exhibit 4 regarding structural defects and Adcock Report, pp. 107-121, attached as Exhibit 2 regarding fire resistive defects. For example, entire sections of the two hour fire wall between the units and between the units and the garages are missing.

ASSOCIATION has standing pursuant to NRS 116.3102(1)(d) to redress these claims on behalf of its members. These defects, like defects in the building envelope, by their very nature affect every inhabitant of the building. A failure of the structural system will certainly affect every unit in the building. Similarly a failure of the fire resistive system would allow fire to spread more rapidly between the units, and endanger the lives of more than one unit

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owner. Repairs or maintenance of these systems would require coordination and contribution of all of the unit owners in the building—a proposition that is in reality next to impossible.

By its very nature, a defect in the structural integrity of the building affects more than two unit owners, and concerns the common interest community. The same is true of a defect in the fire resistive system. Since repairs cannot realistically be made without the coordination of the ASSOCIATION, the community is necessarily involved. For that reason, ASSOCIATION has standing pursuant to NRS 116.3102(1)(d) to assert claims to redress these defects.

With regard to these defects, as with defects in the building envelope, the *First Light II* decision is distinguishable. As noted above, and as noted in this Court's decision in *View of Black Mountain HOA, supra*, the *First Light II* decision was concerned with defects within the units themselves. The structural and fire resistive defects at High Noon at Arlington Ranch are located within the interior of the building, but not the units. More importantly, by their nature they concern the multiple unit owners, not just one single unit. Therefore, for the same reasons that *First Light II* is distinguishable from building envelope issues, it is distinguishable from the issues here concerning the fire resistive and structural systems of the buildings.

5. Even If A Rule 23 Analysis Is Required, The Defects Satisfy Such An Analysis

To the extent that a Rule 23 analysis must be made with application to an Association representative action (see *supra*), ASSOCIATION satisfies the class certification requirements of NRCP 23.

Pursuant to NRCP 23(a), a class (here representative action) is appropriate when:

> (1) the class is so numerous that joinder of all members is impractical;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

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> (4) the representative parties will fairly and adequately protect the interests of the class.

NRCP 23(a).

In addition to these four requirements, a litigant must also satisfy at least one of the categories of NRCP 23(b) which generally evaluates "whether maintaining a class action is logistically possible and superior to other actions." *Meyer v. District Court*, 110 Nev. 1357, 1363, 885 P.2d 622, 626 (1994). Specifically, NRCP 23(b) provides:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

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NRCP 23(b).

For purposes of this motion, Plaintiffs will focus on the third requirement of NRCP 23(b) by showing that common questions predominate over individual questions and that therefore a representative action is the superior method of adjudication.

a. The Class is so Numerous that Joinder is Impracticable.

The putative "class" of unit owners at High Noon at Arlington Ranch 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 v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 847, 124 P.3d 530, 537 (2005). Moreover, 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.* Indeed, in the context of this analysis, "Impractical does not mean impossible." *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 alone may make homeowners hesitant to bring their action forward.

Even though some of the unit owners may be close in geographical location, many of the owners are not. Thus, the high costs associated with bringing an individual or joinder construction defect action make it impractical.

Moreover, it is impractical, if not impossible to contact all of the unit owners to give them a meaningful opportunity to bring an action. ASSOCIATION has in fact attempted to contact all homeowners to inquire whether they wished to have the ASSOCIATION represent their interests. Despite exhaustive efforts, ASSOCIATION has been unable to reach a large

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percentage of the homeowners to speak to them about the issue.[4] Of the homeowners that ASSOCIATION did reach, virtually all of them agreed to assign their rights to the Association.

Therefore, any sort of "joinder" action would deprive a large percentage of unit owners from recovery—not by any choice of theirs, but simply because those people could not reasonably be reached. Clearly a representational action is the superior alternative in this case.

b. 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, supra*, 121 Nev. at 848; *Meyer v. District Court*, 110 Nev. 1357, 1363, 885 P.2d 622, 626 (1994). "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." Here questions of law and fact are common throughout the development.

Here, every resident of High Noon at Arlington Ranch is affected by the constructional defects both in their own units and in the other units in their buildings. Common issues include whether D.R. HORTON negligently constructed the unit owners' residences and whether D.R. HORTON breached any express and implied warranties in light of constructing the Plaintiffs' residences. As such, ASSOCIATION has satisfied the commonality element.

c. The Claims and Defenses of the ASSOCIATION are Typical of the Class

As noted above, the analysis of Association representation does not fit easily into the "typicality" analysis. However, in this matter ASSOCIATION is the assignee of over one half of the unit owners at the development. Therefore, its claims are literally the same as the

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[4] It is unclear exactly why so many homeowners are unreachable. It is likely a combination of absentee owner of an investment or rental unit, or units in foreclosure or bank owned. It is precisely for this reason -the impracticability of even reaching all of the unit owners in such a large development to give them a meaningful choice in pursuing their claims, that Associational standing is so important.

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homeowners. Also, with regard to the units and buildings for which the ASSOCIATION does not have an assignment, the claims of its assignors (which the ASSOCIATION is exercising) are similar to and very typical of the claims of the other unit owners.

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 (2d 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.*

The Court in *Deal v. 999 Lakeshore Association*, *supra*, 94 Nev. 301, recognized that where the roofs leaked in every one of the buildings, and that that 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. See *Deal v. 999 Lakeshore Association*, *supra*, at 306.

Here, the owners who have assigned their claims to the ASSOCIAITON have suffered injury from the same course of events as those who have not. Their 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 High Noon at Arlington Ranch 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. Therefore, the claims and defenses of the ASSOCIATION are typical of the entire High Noon at Arlington Ranch membership.

d. The ASSOCIATION Will Fairly and Adequately Protect the Interests of the Membership

The ASSOCIATION will fairly and adequately protect the interests of the membership. To satisfy this prong, generally the class representatives (here the ASSOCIATION) and members must "possess the same interest and suffer the same injury" as

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the other class members in order to avoid any potential conflicts of interest. *Shuette*, *supra*, 121 Nev. at 849.

Here, the ASSOCIATION and its assignors 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, its assignors 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 of High Noon at Arlington Ranch.

Additionally, the quality of the ASSOCIATION counsel must be taken into consideration. *In re Dalkon Shield IUD Products Liability Litig.*, 693 F.2d 847 (9th Cir. 1982). 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 over twenty years of litigation experience in handling complex matters relating to construction defects. As such, the membership will be adequately represented by Angius & Terry LLP.

e. 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, both prongs are met.

1. 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, 625 (1997). The rule "does not require uniformity of claims across the entire class" and

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"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.* (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.*

Here, adequate notice under Chapter 40 was given as to the condition of the entire project to the entire prospective "class". The claims and defenses are common to every building. Moreover, the ASSOCIATION'S claims are similar to claims made in condominium cases where the Association maintains the envelope, and therefore class representation is not required.

Although ASSOCIATION does not believe it is necessary in this case, if during discovery it is determined that cost of repair or replacement damages greatly vary, the "class" can easily be broken down into "subclasses" according to plan type, phases or other variables contributing to the variance in damages. Of course, the same subclass breakdown could be used in case any variance in causation issues arises during discovery. Therefore, individual questions can be minimized through the use of subclasses, thereby making the common questions predominant.

This approach was endorsed by the Court in *First Light II*. As the Court stated:

> And if necessary, NRCP 23(c)(4) allows the district court to certify a class action with respect to certain issues or subclasses. To that end, the district court may classify and distinguish claims that are suitable for class action certification from those requiring individualized proof.

First Light II, supra at p. 704.

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2. A Representative Action is the Superior Method of Adjudication

Plaintiffs also satisfy the superiority element of NRCP 23(b)(3). 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*, *supra*, 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.* In general, "class action is only superior when management difficulties and any negative impacts on all parties' interests 'are outweighed by the benefits of class wide resolution of common of common issues.'" *Id.* (quoting *Peltier Enterprises, Inc. v. Hilton*, 51 S.W.3d 616, 624 (Tex.App.2000)). Here, the common issue of the defective buildings in High Noon at Arlington Ranch, 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.

The decisions in *Blumenthal v. Medina Supply Company*, 139 Ohio App.3d 283, 743 N.E.2d 923 and *Payne v. Goodyear Tire and Rubber Co.*, 216 F.R.D. 21 (D. Mass. 2003) offer some insight on the superiority of the class action in the instant case. In Blumenthal, a group of Ohio homeowners sued the concrete manufacturer of their concrete driveways because there was too much water in the design mix thereby causing the concrete to become weak and crack and crumble. *Blumenthal*, *supra*, 139 Ohio App.3d 283, 743 N.E.2d 923. The trial court initially certified a class that included thousands of Ohio homeowners, but then decertified the class on the predominance and superiority prongs because of a high concentration of individual issues that could have contributed to the concrete's failure: specifically, curing procedures, concrete placement, the handling by various contractors and actions by the homeowners post installation. *Id.* However, the Ohio appellate court deemed the decertification improper and ruled, in relevant part:

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> The difficulties and complexities affecting the claims of individual class members do not outweigh the efficiency and economy of a common adjudication in this case. It must be remembered that the class affects approximately one thousand property owners throughout northern Ohio who were supplied concrete by Medina. The individual financial claims of these property owners in the class are, given the size and cost of a typical residential driveway, relatively small in dollar terms, less than $10,000 each. The individual claim, when viewed against the typical legal and expert witness fees customarily employed to litigate such a claim, necessarily militates against the bringing of individual small damage claims in favor of resolving these claims in a more efficient and economical legal vehicle for all parties, namely, a class action, wherein the claims can be aggregated and the common theories advanced for recovery. . . . [to avoid] the geometric explosion of expenses and costs that these multiple cases would necessarily generate...

Id. at 296-97

Thus, the court emphasized the high class volume and the high litigation costs as major factors in evaluating the superiority prong and holding that certification was proper. *Id.*

The *Payne v. Goodyear* court noted the same factors in holding that a class action was the superior method of adjudicating the issue of an alleged defective rubber hose used in radiant floor heating systems affecting around 2,000 homes. See *Payne*, *supra*, 216 F.R.D. 21 (D. Mass. 2003). Specifically, the court ruled, in pertinent part:

> [A] class action would best serve the underlying purposes of Rule 23(b) by assuring aggrieved consumers their day in court. "The core purpose of Rule 23(b)(3) is to vindicate the claims of consumers and other groups of people whose individual claims would be too small to warrant litigation." While the claims of many class members are not insubstantial – perhaps tens or even hundreds of thousands of dollars – the litigation costs, including extensive scientific expert analysis, of pursuing individual claims against Goodyear would be likely, in many cases, to be prohibitive."

Id. at 29.

Like *Blumenthal* and *Payne*, and perhaps even more so, the putative class in the instant case is far too numerous to efficiently proceed any other way than a class action. Again, the putative class encompasses at least 340 homes. It simply would create an undue burden on

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the court system to hear over 340 individual claims regarding the same issues of whether or not the same building components are defective.

Also like *Blumenthal* and *Payne*, and perhaps even more so, 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 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.

Accordingly, the common issues of the defective of the envelope and other issues at over 340 homes, and the anticipated high litigation costs associated with the claims, makes a representative action the superior method of adjudication in the case at hand.

In the end, practical reality should prevail over artificial technicalities. Nevada Courts have been successfully adjudicating defects in the common components of associations since at least *Deal* in 1978. No significant issue was encountered until D.R. Horton attempted to avoid legal responsibility for its defective construction by abusing its control of the drafting of the CC&Rs to advance its divide and conquer scheme.

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IV. CONCLUSION

ASSOCIATION has received assignments to assert the claims of 194 of the unit owners at the development to date. These units are in 107 of the buildings. Through these assignments, ASSOCIATION has standing to assert all claims that arise out of the assigned units, and all claims that affect the entirety of the buildings in the 107 buildings that contain assigned units.

Moreover, ASSOCIATION has standing pursuant to NRS 116.3102(1)(d) to assert claims on behalf of two or more unit owners that affect the common interest community. Defects in the building envelope, structural systems and fire resistive systems are monolithic within the building. Defects of those components, by their very nature affect every unit within the building. It would be impossible for one homeowner to attempt a repair of any of those monolithic components without the cooperation of all of the building unit owners. Clearly defects in those components affect the common interest community.

For the foregoing reasons, Plaintiff respectfully requests that this Court declare that:

(1) Association has standing to assert all constructional defect claims with regard to units for which Association has procured an assignment of rights from the unit owners;

(2) Association has standing to assert constructional defect claims for the building envelope (roof, exterior walls, and wall openings), building structural systems, and building fire resistive systems, in all buildings which contain a unit for which Association has procured an assignment of rights from the unit owner; and

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(3) Association has standing pursuant to NRS 116.3102(1)(d) to assert constructional defect claims in the building envelope (roof, exterior walls, and wall openings), building structural systems, and building fire resistive systems.

Dated: September 30, 2010

ANGIUS & TERRY LLP

By: _____

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EXHIBIT "9"

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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Plaintiff, v. D.R. Horton, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendants.	CASE NO.: A542616 DEPT NO.: XXII (ELECTRONIC FILING CASE) **D.R. HORTON, INC.'S OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY RELIEF RE: STANDING PURSUANT TO ASSIGNMENT AND PURSUANT TO NRS 116.3102(1)(d)** Date: November 10, 2010 Time: 9:30 a.m.

COMES NOW, Defendant D.R. HORTON, INC. ("D.R. Horton"), by and through its attorneys Wood, Smith, Henning, & Berman LLP, and hereby files its Opposition to Plaintiff HOA's Motion for Declaratory Relief re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d).

This Opposition is based upon the pleadings and papers on file with the Court, the Memorandum of Points and Authorities, and any argument the Court may entertain at the time of the hearing of this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

CASE SUMMARY

Plaintiff High Noon at Arlington Ranch Homeowner's Association (the "HOA") filed its Motion seeking a declaration from this Court that the HOA has satisfied the newly espoused requirements of *D.R. Horton, Inc. v. 8th Judicial District Court*, _____ Nev. _____, 215 P.3d 697 (2009)(the "*First Light*" decision) in seeking standing to assert claims for alleged construction defects affecting the individual home units at the Subject Project. The Subject Project is a common-interest community comprised of 342 triplex homes within the 114-building development. Through its Motion, the HOA claims that by virtue of the assignment of claims by the homeowners, the HOA has standing to make claims for alleged defects within the individual homes. The HOA also claims that it has standing to assert claims for issues in buildings in which there has been no assignment based on its use of the invented term "building envelope."

Of course, there is no doubt that pursuant to the Nevada Supreme Court's *First Light* analysis, the HOA is not permitted to rely upon assignments of a wide-ranging variety of a plethora of defects to obtain standing in a representative capacity. Instead, as mandated by the *First Light* Court, the HOA must come forward with evidence that conforms with the requirements of Rule 23 and the concerns regarding construction defect class actions addressed in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005).

It must be noted that the HOA is seeking to bring a representative action on behalf of all the homeowners. Other than cursory references to the newly coined term "building envelope" from the Plaintiff's bar, the HOA submits no analysis in support of its Motion that specifically identifies the location of any defects alleged to exist at the homes (as apparently it believes that ***NRS*** 40.645 (2)(b) and (c) are optional), the nature of any such alleged defects, or make a showing that the

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alleged defects are so numerous, common, and typical of each other such that a representative lawsuit is the appropriate vehicle for legal redress. A quick review of the defect materials attached to the HOA's Motion confirms why it proffers no such showing – the alleged defects, and their nature and extent, do not satisfy the Court's *First Light* Rule 23 analysis let alone ***NRS*** 40.645.

Perhaps recognizing this fatal shortcoming, in response to the Nevada Supreme Court's Remand Order, the HOA instead attempts to reargue that *Shuette* and the Rule 23 class action analysis is not required. The HOA is absolutely precluded from attempting to argue the inapplicability of *Shuette* at this juncture. This Court granted D.R. Horton's Motion for Summary Judgment, ruling the HOA did not have standing to assert claims for defects alleged to exist in the individual homes. In appealing this Court's determination, the HOA had the obligation to come forward with any and all arguments why the Court's ruling was erroneous. Accordingly, any arguments regarding the applicability of *Shuette* to the instant matter in determining whether the HOA has standing are now precluded by virtue of the Nevada Supreme Court's Remand of the District Court's order and direction to comply with its *First Light* decision. *Shuette* is directly applicable to this matter and had the HOA wanted to argue that it was not, it had every opportunity to brief that issue with the Nevada Supreme Court. Having failed to make the showing required by the Nevada Supreme Court, including the requisite *Shuette* analysis, the HOA's Motion fails as a matter of law and is just a further flagrant attempt to ignore the rulings of this Court and the Supreme Court.

By failing to demonstrate that the alleged defects at the individual homes satisfy the class action requirements of NRCP 23, the Court is without the ability to analyze the nature and extent of the defects alleged to make an appropriate determination as to "whether the claims and various theories of liability satisfy the requirements of numerosity, commonality, typicality, adequacy." The Court must also be presented with specific information as to the alleged defects in order to

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address whether, as in *Shuette*, "common questions of law or fact predominate over individual questions." *First Light*, 215 P.3d 697, 704 (quoting *Shuette*, 121 Nev. at 850, 124 P.3d at 539); see also NRCP 23. As the HOA failed to undertake the requisite showing, the class-action requirements of NRCP 23 are not satisfied.

The HOA's Motion fails to make any showing whatsoever that the class action requirements of NRCP 23 are satisfied. Recitation to case law that does not supersede the requirements set forth in *First Light* does not obviate the HOA's obligation to come forward with actual proof of the alleged defects together with the requisite class-action analysis to demonstrate that the HOA is an appropriate representative for the claims asserted, whether located in the individual homes or the newly coined Plaintiff's bar term: "building envelope." The failure to come forward with any information that first identifies the alleged defects within the individual units, followed by a class-action analysis of any identified defects under NRCP 23 and *First Light*, confirms that no standing declaration can be made.

II.

STATEMENT OF FACTS

1. High Noon at Arlington Ranch consists of 342 triplex homes within a 114-building development in Las Vegas, Nevada. Each home is a separate, freehold estate within the common-interest community called High Noon at Arlington Ranch.[1]

2. The HOA is a Nevada nonprofit corporation that manages the High Noon at Arlington Ranch condominium community.

3. OVER THREE YEARS AGO, on June 7, 2007, the HOA filed suit against D.R. Horton alleging breach of warranty, breach of contract and breach of

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[1] A copy of the High Noon at Arlington Ranch Homeowners CC&R's Supplemental Declaration is attached hereto as Exhibit "A" and incorporated herein by this reference.

fiduciary duty for alleged construction defects. The Complaint also alleges that the suit is brought on behalf of the Association and "all of the High Noon at Arlington Ranch Homeowners Association unit owners." See, the HOA's Complaint on file herein at page 2, lines 18-19.

4. The HOA is seeking to recover damages in this action pursuant to NRS Chapter 116.

5. On January 21, 2008, **six months after commencing suit**, the HOA sent its first deficient NRS 40.645 Notice to D.R. Horton alleging constructional defects in both the common areas and each of the 342 individual homes at the Subject Project (hereinafter the "Chapter 40 Notice" or "Notice").[2]

5. Pursuant to NRS Chapter 116, a homeowners' HOA may only bring suit in its own name on matters affecting the "common interest community. NRS 116.3102(1)(d).

6. To date, the HOA has failed and refused to allow D.R. Horton to inspect the homes at issue and has failed to provide an NRS 40.645 Notice that specifies the purported defects within the various homes at this project. This was the subject of two separate Motions by D.R. Horton.

7. Because of the HOA's refusal to follow the law, D.R. Horton brought a Motion to Compel on April 15, 2008. Because D.R. Horton's Motion for Partial Summary Judgment was heard before the hearing on this Motion to Compel Compliance with NRS Chapter 40, this motion was held in abeyance, but the issues contained therein have never been resolved.

8. Because the HOA has never complied with NRS 40.645 and chose instead to file suit, D.R. Horton has been irreparably prejudiced in this matter.

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[2] A copy of the Notice is attached hereto as Exhibit "B" and incorporated herein by this reference.

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III.

LEGAL ARGUMENT

A. The High Noon at Arlington Ranch Project.

As previously noted, the Subject Project consists of 342 triplex homes within a 114-building development in Las Vegas, Nevada. Each home is a separate, freehold estate. In constructing the homes, approximately 32 subcontractors performed work on the homes, with different trade professionals beginning and/or completing the work. Multiple subcontractors were used for various trades, including interior and exterior painting, flooring and windows.

The homes are constructed with three residences per building. There are a variety of floor plans available to each purchaser, such that each home could have been constructed as a stand-alone residence. Because the homes are not "condominiums" or traditional attached homes, the ownership rights provided to each homeowner evidences the uniqueness of each home and separation from each other.

The CC&Rs were drafted with this in mind so that each individual homeowner would be responsible only for the maintenance of his/her individual home. The residential units are described in the CC&Rs as follows:

> Section 1.77 "Unit" or "Residential Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plat), and shall include all Improvements thereon. As set forth in the Plat, a Unit shall mean a 3-dimensional figure: (a) the horizontal boundaries of which are delineated on the Plat and are intended to terminate at the extreme outer limits of the Triplex Building envelope and include all roof areas, eaves and overhangs; and (b) the vertical boundaries of which are delineated on the Plat and are intended to extend from an indefinite distance below the ground floor finished flooring elevation to 50.00 feet above said ground floor finished flooring, except in those areas designated as Garage Components, which are detailed on the Plat. Each Residential Unit shall be a separate freehold estate (not owned in common with the other Owners of Units

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> in the Module or Properties), as separately shown, numbered and designated in the Plat. Units shall include appurtenant Garage Components, and certain (presently, Units 2 and 3 in each Module), but not all Units shall include Yard Components. Declarant discloses that Declarant has no present intention for any Unit 1 in a Module to have any Yard Component. The boundaries of each Unit are set forth in the Plat, and include the above-described area and all applicable Improvements within such area, which may include, without limitation, bearing walls, columns, floors, roofs, foundations, footings, windows, central heating and other central services, pipes, ducts, flues, conduits, wires and other utility installations.

Id. at § 1.77.

Unit Owners are responsible for the maintenance of the Units pursuant to Section 9.3 of the CC&Rs. See, Exhibit "A" at § 9.3. The HOA's maintenance responsibility, meanwhile, is limited to the common elements. Id. at § 5.1. The only time the HOA may correct an item for which the Unit Owner is responsible is when a Unit Owner allows the item to fall into disrepair, creating, "a dangerous, unsafe, unsightly or unattractive condition." Id. at § 9.6. In such a case, the HOA has the right, but not the responsibility, to make the repair at the owner's cost. Id. at § 9.6. Nothing in the CC&Rs gives the HOA the right or the responsibility to maintain the individual units, other than in these extreme cases.

B. **The HOA's Defect Allegations.**

In this action, the HOA seeks standing to assert claims for defects which are alleged to exist within the private triplex homes. Despite the clear and unequivocal language of the CC&Rs defining with precision the borders and boundaries of each home, the HOA seeks to entirely evade the application of the CC&Rs. Despite the unambiguous language of the CC&Rs, the HOA claims that there are three (3) categories of defects for which it has standing: 1) standing to assert claims for all homes involving an assignment of claims; 2) standing to assert claims in all buildings where at least one homeowner made an assignment of claims; and 3) standing to assert claims related to the newly invented term

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"building envelope" for all buildings.

By attempting to characterize defects alleged to exist in the individual homes as affecting the "building envelope," the HOA is doing nothing more than attempting to circumvent the CC&Rs and *First Light*. The CC&Rs are the documents governing the ownership of the individual homes. Each individual home is defined therein, with no reference to "building envelope." Indeed, the HOA uses the term "building envelope" in so many different situations and scenarios that the "envelope" apparently includes and encompasses the structural system of each building, the fire resistive systems of each system, in addition to roofs, decks and balconies, stucco system, doors and windows.

It is clear why the HOA employed this terminology – there are so many defect categories the HOA seeks to include in its catch-all definition of "building envelope" that consideration of each defect category pursuant to *First Light*'s class action analysis would be instantly defeated. Instead, by using a catch-all term like "building envelope" the HOA can make broad, sweeping generalizations without having to get into the specifics. *First Light*, *Shuette*, and Rule 23 are not satisfied by word play.

As noted below within each category, the defect materials submitted by the HOA confirm that the alleged defects are interspersed throughout the Subject Project. Moreover, the HOA's defect materials also establish that the alleged defects do not occur at every home and building as alleged by the HOA.

1. Alleged Roof Defects.

The HOA's architectural expert report is attached to the HOA's Motion as Exhibit 2. With regard to the alleged roofing defects, the HOA's expert admits that it conducted roof inspections on a total of 54 of the 114 buildings. The HOA further admits that of the buildings inspected, 31 are Elevation "A" and 23 are

Elevation "B."[3] The HOA also admits through these materials that it is alleging eight broad categories of defects which are alleged to be common and typical to the entire community.

But, within the 8 broad categories, there are subcategories and subsets of additional defects. For example, defect 1.01 contains 8 sub-defect categories. Defect 1.03 has 8 sub-defect categories.[4] Thus, not only does each roofing defect consist of subcategories, but these subcategories are interspersed throughout the Subject Project. The HOA has not demonstrated that the roofing defects, and the subcategories, are exclusive to a certain building type, plan, elevation, or roof model. Without such a showing, relying on the term "building envelope" fails to comply with the requirements of *First Light*.

2. Alleged Decks and Balconies Defects.

The analysis undertaken above with regard to the alleged roof defects holds true for decks and balconies, and the remaining categories of defects. The HOA's expert inspected 52 balconies, and acknowledges that there are at least 3 types of balconies at the Project. For the great number of the deck defect allegations, the expert notes that at most, 7 decks were inspected as to each defect category.[5] The HOA's own architectural report shows the complexity and varying nature of each of these alleged construction defect allegations.

3. Alleged Stucco Defects.

The HOA alleges 8 broad categories of alleged stucco defects. These allegations are based on the HOA's expert alleging stucco defects at 17 out of 64

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[3] See, Exhibit "2" attached to the HOA's Motion, page 1.

[4] See, Exhibit "2" attached to the HOA's Motion, pages 8, 21.

[5] See, Exhibit "2" attached to the HOA's Motion, pages 63, 66, 68, and 70.

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buildings inspected.[6] Again, not every stucco defect alleged is found at every building. Moreover, there has been no showing by the HOA that its stucco allegations satisfy the requirements of Rule 23 and *Shuette*.

4. Alleged Door Defects.

Per the HOA's Motion, it sets forth that multiple doors (i.e. sliding glass doors, french doors, exterior doors) are alleged to be defective. Within each category of door, the HOA's expert alleges a whole host of defect issues affect each category. For example, 5 defect subcategories are alleged with regard to exterior doors (of course, not every door is affected by all 5 alleged defects).[7] The same holds true as to the HOA's sliding glass door allegations. 3 defect issues are alleged as to the sliding glass doors, all at different locations and different floor plans.[8]

5. Windows.

Perhaps the most wide-ranging of all defect categories, the HOA alleges 11 categories of window defects. The HOA, through inspecting 71 buildings, have submitted materials that confirm that the 11 categories of defects do not exist at every building. The HOA has likewise made no showing that the 11 window defect categories satisfy the Rule 23 and *Shuette* analysis required by *First Light*.

There is nothing before this Court as to any of the foregoing defect categories showing that these defect allegations satisfy Rule 23, *Shuette* and *First Light*. The attempt to abrogate these requirements by using a term such as "building envelope" is wholly disingenuous to what type of analysis the Nevada Supreme Court has mandated must occur in order to determine whether an HOA, under Rule 23 and *Shuette*, is the best representative for a class action. Given the

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[6] See, Exhibit "2" attached to the HOA's Motion, pages 76 and 78.

[7] See, Exhibit "2" attached to the HOA's Motion, pages 97 - 106

[8] See, Exhibit "2" attached to the HOA's Motion, page 89 – 96.

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complexity and varying nature, location and extent of all these defects, and absent any showing by the HOA, the requirements of *First Light* have not been met. Denial of the HOA's Motion is proper.

C. The Assignments Cannot Be Relied Upon In Seeking Standing As A Class Representative.

To begin with, the HOA has obtained only 193 assignments.[9] Beyond the inability to properly count the number of assignments received, the HOA obviously prepared each Assignment and potentially went door to door, in an effort to solicit and induce the homeowners to nominate the HOA as class representative. This is confirmed by the inflammatory language therein flagrantly misrepresenting the facts of this matter. Section "B" of the Assignment sets forth that D.R. Horton has refused to repair defects – a blatant misrepresentation.

This Court is well-versed in the outright refusal of the HOA to afford D.R. Horton its Chapter 40 rights, especially in refusing access to the individual homes for Chapter 40 inspections[10]. As the HOA refused to comply with ***NRS*** 40.645 (2)(b) and (c), then refused to grant access to more than half the homes purportedly at issue, D.R. Horton was left with no other choice but to seek this Court's intervention. Further, the record is very clear that D.R. Horton has in fact had its subcontractors perform warranty repairs when they have been allowed to do so.

Even more troubling is that the Assignments dictate that "***only*** those HOMEOWNERS who have assigned their Claims to THE ASSOCIATION ***will be able to share in the recovery***"(emphasis added). Setting aside the issue as to whether or not this is unethically promising money to these homeowners for their

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[9] See, spreadsheet properly tabulating 193 alleged assignments, attached hereto as Exhibit "C" and incorporated herein by this reference.

[10] D.R. Horton specifically brought a Motion to Compel on April 15, 2008 as to this very issue.

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Assignment, the Assignments by their very terms set up a conflict of interest by the HOA. While the HOA claims to this Court that it can represent all of the homeowners in a "representative capacity," it has told a large number of homeowners that they are out this case.

Thus, by the very Assignment that the HOA relies upon for class certification, the HOA's Motion is undone. Whether the HOA realizes it, the Assignments creates two separate and distinct classes of homeowners. One group consists of those who executed an Assignment and are entitled to "share in the recovery," and those who did not execute the Assignment and precluded from any recovery yet still are alleged to have defects in their home for which the HOA is seeking to recover for from D.R. Horton.

By soliciting homeowners and implying that they will receive money for their Assignment, the HOA has created an irreparable situation by its own hand which cannot be rectified by rescinding the Assignments. The Assignments create two groups of homeowners, each with separate and distinct defect claims, which situation does not comply whatsoever with the requirements of *First Light.*

D. *First Light* Sets Forth the Requirements an HOA Must Satisfy to Act as Class Representative for Alleged Construction Defects Within Individual Units.

Pursuant to *First Light*, a homeowner's association may bring suit on behalf of individual homeowners for construction defects within their individual units so long as the claims are subject to class certification under NRCP 23 such that the homeowner's association satisfies the elements of numerosity, commonality, typicality, and adequacy. *First Light*, ____ Nev. ____, 215 P.3d 697, 704 (2009). NRCP 23(a) states that, "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are

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typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." These elements are best summarized as the elements of numerosity, commonality, typicality, and adequacy.

The *First Light* Court also set forth that in undertaking this class-action analysis, the Court's prior decision in *Shuette v. Beazer*, 121 Nev. 837, 124 P.3d 530 (Nev. 2005) as to whether "common questions of law or fact predominate over individual questions," or whether the action satisfies one of the other two options set forth in NRCP 23(b), would also have to be met. *First Light*, 215 P.3d 704. This requires a determination, amongst other issues, as to which units have experienced constructional defects, the types of alleged defects, the various theories of liability, and the damages necessary to compensate individual unit owners. *Id.*

NRCP 23(b)(1) and (b)(2) provide in pertinent part as follows:

> [a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . .

In addition to meeting the NRCP 23(a) prerequisites, the HOA must also meet one of three requirements under NRCP 23(b). In *Shuette*, the parties focused only on NRCP 23(b)(3), which has two elements, that of predominance and superiority. *Shuette*, 121 Nev. at 850, 124 P.3d at 540. Specifically, the Court

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stated that, "the questions that class members have in common must be significant to the substantive legal analysis of the members' claims." *Id.* For example, "common questions predominate over individual questions if they significantly and directly impact each class member's efforts to establish liability and entitlement to relief, and their resolution can be achieved through generalized proof." *Id.* at 851, 540. Thus, the alleged construction defect must directly impact each member in the class in order to predominate.

Moreover, a class action is the superior method of adjudicating claims when it promotes "the interests of efficiency, consistency, and ensuring that class members actually obtain relief." *Id.*, 121 Nev. at 541, 124 P.3d at 852. Furthermore, a proper class action prevents identical issues from being litigated multiple times, thereby avoiding duplicative proceedings with inconsistent results. Id. Thus, a class action must be superior such that it avoids duplicative litigation in the future.

Therefore, in addition to meeting the NRCP 23(a) requirements of numerosity, commonality, typicality, and adequacy, the HOA must also meet one of the three conditions of NRCP 23(b). As previously demonstrated, there has been no showing whatsoever by the HOA as to the identification, specificity, extent or location of the alleged defects. Without this, there can be no determination what alleged defects satisfy the requirements of NRCP 23. Having failed to come forward with the requisite information to allow such a determination, the Motion should be denied.

E. The HOA Cannot Abrogate the Requirements of *Shuette*.

The HOA attempts to eviscerate its duty to make the required showing by arguing that the *First Light* Court improperly relied upon the *Shuette v. Beazer Homes*, 121 Nev. 837, 124 P.3d 530 (2005). However, the HOA's ability to "reargue" the merits of the Court's ruling in the *First Light* matter, let alone reargue the merits of the Nevada Supreme Court's remand of this Court's grant of

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summary judgment, has lapsed. The HOA is estopped, and has waived any right, to seek to overturn or otherwise modify the *First Light* Court's reliance on *Shuette*. Indeed, the HOA has already had its bite at the apple on this issue as it submitted appellate briefs in support of its writ attacking this Court's grant of summary judgment. The HOA had the obligation to raise any argument about the inapplicability of *Shuette* at that time. As the HOA cannot overturn the Supreme Court's use of *Shuette* as set forth in the *First Light* decision through its Motion filed in District Court, the HOA is precluded from arguing that the Court misinterpreted *Shuette*.

F. **The HOA Has Failed to Satisfy the Class Action Requirements of *First Light* and NRCP 23.**

As noted throughout, the HOA has failed and refused to conduct any proper analysis of the requirements set forth by *First Light* in seeking a determination that it is an appropriate class-representative regarding defects alleged within the individual homes. The failure to provide a competent assessment of what the HOA has alleged in connection with the appropriate Rule 23 analysis supports a determination that the HOA has not met its legal burden in seeking standing to act as class representative for the individual defects.

As noted hereinabove, the defects alleged within the individual homes are alleged to be so complex, varied and different that even had the HOA attempted in its Motion to make the requisite showing to satisfy the class requirements of Rule 23, it could not. The HOA's defect materials also contain summaries of which locations were inspected, and of these, at which location any defect was alleged to have been observed, further demonstrating that Rule 23 and *Shuette* are not satisfied. Indeed, the HOA must be taken at its word as D.R. Horton has never been afforded the opportunity to inspect the individual homes as to the individual defect claims.

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1. The HOA Has Made No Showing As To The "Numerosity" Of The Alleged Defects.

As previously noted, other than overbroad generalizations, the HOA fails to provide this Court with any competent analysis or information identifying the nature, extent, location and specificity of the defects it contends it has standing to pursue. Instead of providing this Court with an analysis of the defects identified in its Chapter 40 materials in connection with the requirements of *First Light*, the HOA relies on the term-of-art "building envelope" as a catch-all for what appears to be any and all defects alleged. Clearly, the mere use of the term "building envelope" as defined merely by counsel for the HOA, without any other support at all, is woefully inadequate to demonstrate "numerosity" as required by *First Light*.

The HOA also engages in wild speculation when it claims that an alleged defect will have an adverse affect on all homeowners within a building. The Motion is replete with such references, all of which are unsupported by any information identifying, for example, which of the alleged defects give rise to such a condition (if any at all), the nature of any such alleged defect, the location of any alleged defect, and the extent of any such alleged defect.

Additionally, a number of the homes are owned by persons who are not the original purchasers. As subsequent purchasers, these homeowners have no direct relationship with D.R. Horton so as to support claims for breach of warranties and contracts. The subsequent purchasers purchased their units from prior owners, and in all likelihood had no interaction with D.R. Horton whatsoever. The different and unique ownership issues also confirm that numerosity, typicality, commonality and adequacy cannot be met.

In the absence of any showing as to which units have experienced the alleged constructional defects (roof leaks, etc.), the types of alleged defects, the various theories of liability, and the damages necessary to compensate individual unit owners, the HOA has not shown the requisite "numerosity" and is not entitled

to the relief sought.

2. The HOA Has Made No Showing As To The "Commonality" Of The Alleged Defects.

The same analysis holds true as to "commonality." Instead of coming forward with specific information identifying the location(s) where a defect is alleged to exist to demonstrate "commonality," the HOA would have this Court believe that *Shuette* is inapplicable and thus the HOA need not undertake such an analysis. Of course, this is exactly what is required under *First Light*. There is no dispute that the HOA has failed to demonstrate that due to the location and nature of any alleged defect the requirements of NRCP 23's "commonality" element has been satisfied. Having failed to meets its burden, the HOA is not entitled to the relief sought.

3. The HOA Has Made No Showing As To The "Typicality" Of The Alleged Defects.

Again, the foregoing applies to the "typicality" analysis. The HOA offers up its standard request that the Court forego the analysis required of *First Light* based on its "building envelope" term of act, and also its refusal to abide by *Shuette*. It is curious to note that despite the repeated representations from the HOA that the alleged defects are not complex, are typical, numerous, common, occur within home and at every building, etc. it provided no analysis to these assertions. There is no doubt that the HOA has failed to establish "typicality" of any defect by establishing which units have experienced the alleged constructional defect, the type of alleged defect, the various theories of liability, and the damages necessary to compensate individual unit owners. Having failed to meets its burden, the HOA is not entitled to the relief sought.

4. The HOA Has Made No Showing As To The "Adequacy" Of The Alleged Defects.

As before, so again. The HOA provides this Court with no competent evaluation of the alleged defects, their location, the extent and nature of any

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alleged defect, etc. to satisfy the "adequacy" component of the NRCP 23 analysis.

5. The HOA Has Made No Showing That The Alleged Defects Satisfy The Requirements of NRCP 23(b).

The HOA's failure to identify the specific defects alleged, their extent, nature and location, all in connection with the requirements of NRCP 23(a), is equally fatal as to whether it has satisfied NRCP 23(b). As with every other element of the Court's *First Light* analysis, the HOA again chooses to ignore its failure to correlate specific defect information with the requirements of NRCP 23. Here, the HOA relies solely on the generalization that the claims and defenses are common to every building. The HOA would have this Court believe that such overgeneralizations serve as the best analysis of the nature and extent of the alleged defects. Nothing could be further from the truth.

The HOA was required to identify the defects at issue and demonstrate how the alleged defects satisfy the class action requirements of NRCP 23. Having failed to come forward with even a scintilla of analysis in support for its claims, the Court is constrained in its ability to determine whether the policy considerations of NRCP 23(b) have been satisfied. There being no information identifying any defect, there can be no determination whether the claims can be prosecuted separately, whether existing litigation would cover these same issues, whether it is desirable to concentrate unknown defect claims in a single forum, and whether any difficulties will be encountered in prosecuting these unknown and unspecified claims. Simply put, the HOA's Motion fails to be properly supported with the required analysis, and is therefore without merit and cannot be granted.

IV.

CONCLUSION

For all the foregoing reasons, D.R. Horton respectfully requests that the HOA's Motion be denied as the HOA has wholly failed to comply with *First Light, Shuette*, and Rule 23. Three years after filing suit, the HOA still has not come

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forward with any analysis at all identifying what defects it contends it has standing to pursue under the parameters espoused in *First Light*.

The requirements of *First Light* are unequivocal: in order for an HOA to assert claims for defects at individual units, the Court must consider "whether the claims and various theories of liability satisfy the requirements of numerosity, commonality, typicality, adequacy, and as in *Shuette*, whether 'common questions of law or fact predominate over individual questions,' or whether the action satisfies one of the other two options set forth in NRCP 23(b)." The HOA having failed to undertake this evaluation, in addition to D.R. Horton's demonstrating the HOA's own expert materials and assignments show that class certification cannot be had, there is nothing before supporting the HOA's contention that it has satisfied the requirements of *First Light*. The HOA's Motion should be denied.

Finally, D.R. Horton notes that this case has proceeded over its objection for the HOA's failure to comply with ***NRS*** 40.645, 40.6462, and 40.680 for over three years now and is set for Trial on July 5, 2011. This has irreparably prejudiced D.R. Horton, in that it has had no way to formulate its defenses, file an Answer to the prematurely filed Complaint, or file a Third-Party Complaint for indemnity as it is still unclear what claims, if any, are being pursued as to the homes. This is a situation solely of the HOA's making in their refusal to follow statutes and case law, or even their own promise made to this Court over three years ago:

> "The Association will immediately serve the Defendants with the Notice. The Notice will provide expert reports setting forth the nature, cause and extent of the defects based upon an extensive investigation undertaken by construction experts. Much better than a typical complaint, the Notice will clearly advise Defendants of the basis for which the Association claims damages. From the Notice, the Defendants will be in a much better position to locate and preserve witnesses, documents, and other evidence that may be useful in supporting their defense and/or prosecuting third party defendants. As this enhanced Notice will be

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served within the 120 day service period for the complaint, Defendants can show no prejudice from the delayed service of the complaint."[11]

Three years and several Motions later, D.R. Horton and the subcontractors are still waiting for this "*enhanced notice*" that will "clearly advise the Defendants for the basis for which the Association claims damages."

Based upon the forgoing, in addition to denying the instant Motion, D.R. Horton respectfully requests that the trial date be vacated in this mater and the HOA Ordered to finally comply with NRS 40.600 et seq.

DATED: October 11, 2010

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By:

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[11] A copy of the HOA's Ex Parte Motion to Stay Complaint and Enlarge Time for Service, filed August 13, 2007, page 5, lines 5 through 13, is attached hereto as Exhibit "D" and incorporated herein by this reference.

EXHIBIT "5"

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DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Plaintiff, v. D.R. Horton, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendant.	CASE NO.: A542616 DEPT NO.: XXII **ORDER GRANTING D.R. HORTON'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

D.R. Horton Inc.'s Motion for Partial Summary Judgment came on for hearing on May, 27, 2008, before the Honorable Judge Susan Johnson in Department XXII.

Jason Bruce, Esq., of the Quon Bruce Christensen Law Firm, appeared on behalf of Plaintiff, the High Noon at Arlington Ranch Homeowners' Association, Joel D. Odou, Esq. and Stephen N. Rosen, Esq., of the law firm of Wood, Smith, Henning & Berman LLP appeared on behalf of Defendant D.R. Horton, Inc.

The Court, having considered the pleadings, supporting papers and

arguments from counsel, hereby makes the following findings of material and undisputed facts and legal determinations pursuant to NRCP 56(c):

undisputed facts and legal determinations pursuant to NRCP 56(c):

I.

FINDINGS OF MATERIAL AND UNDISPUTED FACTS

1. The High Noon at Arlington Ranch consists of 342 townhomes in a 114-building development in Las Vegas, Nevada. Each town-home is a triplex separate, freehold estate within the greater common-interest community called High Noon at Arlington Ranch (the "Subject Property").

2. The High Noon at Arlington Ranch Homeowners Association (the "HOA") is a Nevada nonprofit corporation, which manages the High Noon at Arlington Ranch condominium community.

3. As with any corporation, the HOA must follow the rules of its governing documents. In this case those governing documents are the High Noon at Arlington Ranch Covenants, Conditions and Restrictions (the "CC&Rs"), attached as Exhibit "A" to the Moving Papers, and referenced by both parties.

4. On June 7, 2007, the HOA filed suit against D.R. Horton, Inc., on behalf of itself alleging causes of action entitled breach of warranty, breach of contract and breach of fiduciary duty for alleged construction defects.

5. The HOA is seeking to recover damages in this action pursuant to ***NRS*** Chapter 116.

6. Both parties to this motion agree that there are no material facts in dispute (Opposition page 4, lines 8-10, Reply page 12, lines 8-9).

7. Pursuant to ***NRS*** Chapter 116, a homeowners association may only bring suit in its own name on matters affecting the "common interest community." ***NRS*** 116.3102(1)(d).

8. Six months after commencing suit, on January 21, 2008, the HOA sent a ***NRS*** 40.645 Notice to D.R. Horton alleging defects in both the common areas and each of the 342 individual units at the Subject Property (hereinafter the

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"Chapter 40 Notice").

9. The boundaries of each individually owned unit, within the Subject Property, is defined by Section 1.77 of the CC&Rs, which provides the following:

> "Unit" or "Residential Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plat), and shall include all Improvements thereon. As set forth in the Plat, a Unit shall mean a 3-dimensional figure: (a) the horizontal boundaries of which are delineated on the Plat and are intended to terminate at the extreme outer limits of the Triplex Building envelope and include all roof areas, eaves and overhangs; and (b) the vertical boundaries of which are delineated on the Plat and are intended to extend from an indefinite distance below the ground floor finished flooring elevation to 50.00 feet above said ground floor finished flooring, except in those areas designated as Garage Components, which are detailed on the Plat. Each Residential Unit shall be a separate freehold estate (not owned in common with the other Owners of Units in the Module or Properties), as separately shown, numbered and designated in the Plat. Units shall include appurtenant Garage Components, and certain (presently, Units 2 and 3 in each Module), but not all Units shall include Yard Components. Declarant discloses that Declarant has no present intention for any Unit 1 in a Module to have any Yard Component. The boundaries of each Unit are set forth in the Plat, and include the above-described area and all applicable Improvements within such area, which may include, without limitation, bearing walls, columns, floors, roofs, foundations, footings, windows, central heating and other central services, pipes, ducts, flues, conduits, wires and other utility installations.

10. Pursuant to the CC&Rs Section 9.3, the individual unit owners are solely responsible for the maintenance and repair of items within their individual units.

11. Section 9.3 of the CC&Rs provides in pertinent part as follows:

> **Section 9.3 Maintenance and Repair Obligations of Owners:** It shall be the duty of each Owner, at his or her sole cost and expense, subject to the provisions of this Declaration requiring ARC approval, to maintain, repair, replace and restore all Improvements located on his or her Unit, the Unit itself, and any Exclusive Use Area pertaining to his or her Unit, in a neat, sanitary and attractive condition, except

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for any areas expressly required to be maintained by the Association under this Declaration... Without limiting the foregoing, **each Owner shall be responsible for the following**:

(a) **maintenance, repair, and/or replacement of all exterior walls, and all roof area of the Triplex Building** (including the exteriors of exterior walls of Yard Components) in which the Owner's Unit is located, respectively appurtenant to said Unit, ...in conformity with the original construction thereof; without limiting the foregoing, exterior painting of Triplex Buildings shall be the responsibility of the Owners of the Units in each Triplex Building, and if two (2) of the three (3) such Owners agree that such exterior painting is required, they shall have the right, following reasonable notice to the third such Owners, to proceed with such painting and to require such third Owner to equally or equitably share the cost of such painting.

(b) periodic painting, maintenance, repair, and/or replacement of the front doors to the Owner's Units, and Garage sectional roll-up doors;

(c) annual inspection and repair or replacement of heat sensors, as originally installed in certain (but not necessarily all) of the Owner's Unit;

(d) **cleaning, maintenance, repair, and/or replacement of any and all plumbing fixtures, electrical fixtures, and/or appliances** (whether "built-in" or free-standing, including, **by way of example and not of limitation: water heaters (and associated pans), furnaces, plumbing fixtures, lighting fixtures**, refrigerators, dishwashers, garbage disposals, microwave ovens, washers, dryers, and ranges), **within the Owner's Unit**;

(e) cleaning, maintenance, painting and repair of the interior of the front door of the Owner's Unit; cleaning and maintenance of the exterior of said front door, subject to the requirement that the exterior appearance of such door shall not deviate from its external appearance as originally installed by Declarant;

(f) **cleaning, maintenance, repair, and/or replacement of all windows and window glass within or exclusively associated with, the Owner's Unit, including the metal frames, tracks, and exterior screens thereof**, subject to the requirement that the exterior appearance of such items shall not deviate from its external appearance as originally installed by Declarant;

(g) cleaning, and immediate, like-kind replacement of burned-out light bulbs, and broken light fixtures, with respect to the "coach lights" at or near the front door of the Owner's Unit; in the event that the Owner does not immediately accomplish his or her duties under

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this subsection (g), the Association shall have the rights set forth in Section 9.1 (h), above.

Section 9.1 (h), above.

(h) cleaning, maintenance, repair, and replacement of the HVAC, located on an easement within the Common Elements, serving such Owner's Unit exclusively (but not the concrete pad underneath such HVAC), subject to the requirement that the appearance of such items shall not deviate from their appearance as originally installed by Declarant:

(i) maintenance, repair, and replacement of Garage remote openers, subject to the requirement that any replacement therefor be purchased by the Owner from the Association; and

(j) without limiting any of the foregoing: cleaning, maintenance, repair, and replacement of the door opener and opening mechanism located in the Owner's Garage (provided that any replacement door opener shall be a "quiet drive" unit, at least as quiet as the unit originally installed by Declarant), so as to reasonably minimize noise related to or caused by an unserviced or improperly functioning Garage door opener and/or opening mechanism.

(Emphasis added).

12. In this action, the HOA has made claims for the following defects, among other claims, in its Chapter 40 Notice:

Structural:

11.01 Wallboard system failure; cracking

11.02 Wallboard ceiling and wall stains

14.01 Floor sheathing is improperly fastened.

15.01 Shower enclosure system failure; stained framing.

Electrical:

E.1 At the termination points of aluminum wires in the panels, lack of wire preparation and insufficient torque tightness of conductors.

E.2 The load center is recessed and over cut into the wall space beyond the code allowance.

E.3 The general quality of workmanship in the Electrical system does not meet the code.

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E.3.1 Debris in panel.

E.3.2 Vaque directorv.

E.3.2 Vague directory.

E.3.3 Open knockouts.

E.3.4 Lower/upper hallway switches reversed (9460 Thunder Sky 103).

E.3.5 Zero Torque on neutral (8810 Horizon Wind 103).

E.3.6 Exhaust fan not flush.

E.3.7 Wall switch cover bent (8785 Traveling breeze 101).

E.3.8 Fittings are not fire-sealed at main panel.

E.3.9 The outlet boxes in the fire-rated wall spaces are not installed in a Code-approved assembly to assure fire-resistant integrity of the wall space.

E.3.10 The Ground Fault Circuit Interrupter outlet failed to trip within the established thresholds.

E.4 The groundling electrode system is not effectively bonded together.

E.5 The cables were inadequately supported or not supported at all.

E.6 NM cables are well within 6 ft. radius of attic access.

E.7 At the fire rated wall spaces or floor assemblies and the attic access areas, the cables are running through fire rated walls or framing members, in openings much greater than the conductor diameter.

E.8 The non-metallic cables in bored holes thru studs and framing plates, and are within the restricted area specified by Code without the use of required steel protection plates.

E.9 The boxes for wiring, devices and splices are required to be flush to the finished surface.

E.10 The outlet for the dishwasher and disposal cords has been

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placed in an area where it is now blocked by the finish installation of the cabinets and plumbing.

2 cabinets and plumbing.

E.11 The required outlet along floor line is not present at wall spaces.

E.13 The recessed lighting fixtures contain paint overspray.

E.14 The class 2 thermostat wires are a type PJ2, a non rated wire for exposed use.

E.15 A/C disconnect is not sealed against the entry of washer where the disconnect is attached to the structure.

Plumbing:

P.1 3-wall fiberglass shower or combination bath/shower modules have "in-wall" valves, spouts and shower arms, are not properly aligned or adequately secured to the wall structure, the spout nipple and valve penetrations are not properly sealed.

P.2a The master tubs and Plan 102 shower pans lack support bedding materials; fixtures creak and pop when stepped upon.

P.2b The wainscot panel surrounds are not properly sealed.

P.3 Toilets (a) are not securely mounted to the wood framed floors and/or (b) closet bend grade slab penetrations are not sealed and/or the closet ring is not secured to the floor.

P.4 Water heaters are inadequately sized, lack sufficient capacity and recovery rates to satisfy the hot water demands of the residence.

P.5 Water heater drip collection pans discharge into a 2" pipe nipple which is not integrated into the floor materials, the 2" line improperly reduces down to 1" and pans' tailpiece is not solidly connected to the discharge pipe; and are undersized.

P.6 Water heater temperature and pressure relief valve discharge lines contain corrugated connectors which fail to meet the valve's surface

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temperature minimums and creates a reduction in the discharge pipe's size.

P.7 Water heater seismic restraint devices are either lacking 'vee'

P.7 Water heater seismic restraint devices are either lacking 'vee'

blocks or the devices are not installed.

P.8 Water heater shutoff valves and/or heater connections are prematurely corroding/failing.

P.9 Water heater flues ("B" vent stack) lack appropriate materials and fittings.

P.10 Washing machine utility box have hose bib water connections, piped with plastic tubing, lack sufficient rotating resistive stability to permit proper operation; and/or the support arms are backwards and the box is set-back from the drywall's face; and/or are improperly located in the party walls.

P.11 Washing machine drain pans are equipped with 1" undersized outlets, do not provide complete drainage, laundry area wall/floor joints are not sealed and are not curbed/dammed to control/direct surface water flow and piping does not discharge to the sanitary sewer.

P.12 Free-standing gas ranges are either lacking or have improperly installed "anti-tip" bracket.

P.13 Dishwasher drain hoses from the air gap to the disposer are either kinked or trapped, thus lacking positive slope.

P.14 Pedestal lavs located in the 103 Guest Bathroom have interior cleanouts that are inaccessible due to the lav's pedestal.

P.15 Individual unit water service laterals lack individual shut off valves.

P.17 Pressure reducing valves installed on the interior surface of the garage walls are vulnerable and exposed to mechanical injury.

Mechanical:

M.1 The refrigerant lines are not properly weatherproofed at the

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building line. Condensers are not secured to the pad.

M.2 FAUs sleeping on suspended angle iron hangers lack

M.2 FAUs sleeping on suspended angle iron hangers lack

"securement" and anti-sway stabilizers.

13. It was not contested that each of the above defects is contained within the private units owned by the individual, non-party homeowners.

II.

CONCLUSIONS OF LAW

1. Actions must be prosecuted in the name of the real party in interest. ***NRCP*** 17(a).

2. The only express power by an HOA to bring suit on behalf of unit owners is set forth in ***NRS*** 116.3102(1)(d), entitled "Powers of the HOA", which provides that an HOA may "[i]nstitute, 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."

3. The definition of "common-interest community" pursuant to ***NRS*** 116.021 is as follows: "Common-interest community" means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit. "Ownership of a unit" does not include holding a leasehold interest of less than 20 years in a unit, including options to renew."

4. The definition of "common-interest community" as set forth in ***NRS*** 116.021 is different than the definition in the Colorado Statute, ***CRS*** 38-33.3-103(8), as cited by the HOA in its Opposition to the present motion. Specifically, ***CRS*** 38-33.3-103(8) does not include the phrase "other than that unit." Because ***NRS*** 116.021 is different than CSR 38-33 3-103(8), the Colorado cases cited in the opposition purporting to define the Nevada statute are distinguishable.

5. As the Nevada Supreme Court held in *Albios v. Horizon Communities.*, Inc., 132 P.3d 1022 (2006), the Court will interpret a rule or statute

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in harmony with other rules or statutes, but will construe statutes such that no part of the statute is rendered nugatory or turned to mere surplusage. *Id.* at 1028. As such, this Court finds that the legislature intended to have the words "other than the unit" considered in any interpretation of ***NRS*** 116.021 and that the Nevada's legislature intended to limit the definition to exclude claims within the Unit.

6. As ***NRS*** 116.2102 defines unit boundaries, which includes the phrase "[e]xcept as otherwise provided by the declaration," the definition of the Unit Boundaries as found in Section 1.77 of the High Noon at Arlington Ranch Homeowner's Association CC&Rs control.

7. Section 1.77 of the CC&Rs provides in pertinent part that each Unit at Arlington Ranch includes a 3-dimensional figure: (a) the horizontal boundaries of which are delineated on the Plat and are intended to terminate at the extreme outer limits of the Triplex Building envelope and include all roof areas, eaves and overhangs; and (b) the vertical boundaries of which are delineated on the Plat and are intended to extend from an indefinite distance below the ground floor finished flooring elevation to 50.00 feet above said ground floor finished flooring, except in those areas designated as Garage Components, which are detailed on the Plat.

8. As the claims cited are the property of the individual unit owner, the CC&Rs do not confer the right or the duty upon the HOA to take these claims from the unit owners and pursue them in the name of the HOA. The right to pursue defect claims related to the units remains with the individual homeowners and these rights can not be taken away.

9. As the HOA is not empowered by either statute or the CC&Rs to pursue the Defects at Issue, the HOA cannot pursue construction defect claims for any item contained within the individual units, for which ownership rights belong solely to an individual homeowner.

10. This court finds that the HOA only has standing to sue for defects that are within the common interest community that are defined within the CC&R's.

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III.

ORDER AND JUDGMENT

ORDER AND JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

That Partial Summary Judgment is entered in favor of Defendant D.R. Horton, Inc, and against the HOA, such that the HOA is precluded from pursuing claims related to the individual units and/or owned by the individual unit owners.

DATED this 2nd day of ~~June~~, 2008.

DISTRICT COURT JUDGE

Prepared and submitted by:

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By: _____

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EXHIBIT "6"

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ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT in and for Clark County; and THE HONORABLE SUSAN H. JOHNSON, in her capacity as District Judge in and for Clark County,

Respondents.

D.R. HORTON, INC.,

Real-Party-In-Interest.

Case No. 52798
Clark County District
Court No. A542616

FILED

NOV 20 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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52-2978

IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT in and for Clark County; and THE HONORABLE SUSAN H. JOHNSON, in her capacity as District Judge in and for Clark County, Respondents. D.R. HORTON, INC., Real-Party-In-Interest.	Case No. Clark County District Court No. A542616

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER

Petitioner, High Noon at Arlington Ranch Homeowners Association ("Association"), pursuant to Nev. Const., Art. 6, § 4, NRS 34.320 or NRS 34.160, and NRAP 21, requests this Court to issue a writ of prohibition or mandamus. The Association respectfully submits its Petition requesting this Court order Respondents, the Eighth Judicial District of the State of Nevada and the Honorable Susan H. Johnson, to rule that the Association has standing to bring claims for construction defects located in individual condominium units. The present controversy raises urgent matters of public interest. Principles of sound judicial economy and administration favor the granting of the instant petition.

I. SUMMARY OF THE ISSUE & CONCLUSION

A. **ISSUE: Whether Nevada should be the only Uniform Common Interest Ownership Act ("UCIOA") jurisdiction to deny homeowner associations standing to bring claims for construction defects located in individual units and thereby defy the plain language of the UCIOA, the express intent of its drafters, Nevada and nationwide case law, and the Restatement (Third) of Property?**

B. **CONCLUSION: No. This Court should overturn the lower court's decision and allow the Association standing to bring claims for construction defects located within the individual units.**

II. INTRODUCTION

The Arlington Ranch Community consists of 342 attached residential units and common areas located in Clark County, Nevada. The operative declaration for the community created a common interest community governed by the Uniform Common-Interest Ownership Act ("UCIOA").

High Noon at Arlington Ranch Homeowners Association ("Association") on behalf of itself and its members, served its NRS 40.645 Notice of Construction Defects on Real Party in Interest, D.R. Horton, Inc. ("D.R. Horton") on January 19, 2008. The Association sent the Notice as the result of severe and pervasive community-wide construction defects. (*See*, Petitioner's Appendix ["PA"], **Vol. I, Exh. 5, pp. 157-161; Vol. I-III, Exh. 5, pp. 246-738**). The Association also filed a Complaint against D.R. Horton on June 7, 2007, bringing causes of actions primarily based on construction defects. (*See*, **PA, Vol. I, Exh. 4, pp. 13-24**). The Association brings the lawsuit on behalf of the Association and its members. (*See, id.*) Certain

construction defects for which Association seeks recovery are located inside the individual "units" within the Arlington Ranch community.

The UCIOA expressly and unambiguously provides standing to the HOA to bring or defend claims affecting the High Noon at Arlington Ranch "common-interest community," both for the shared amenities and the residential buildings that together make up the "common-interest community." Contrary to the express language of the UCIOA, the District Court ruled that an HOA may not maintain claims to remedy the construction defects of individual units. Such drastic limitation on the authority of HOAs contravenes the plain language of the UCIOA and eviscerates its broad purpose to empower HOAs to protect the entire community – including the most important part of that community – the buildings where owners live.

The lower court's ruling also contradicts the express intent of the drafters of the Uniform Act, stating: "This Act makes 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." Consistent with the plain language of the statute and the intent of its drafters, several Nevada District Courts have ruled that HOAs have standing under NRS 116.3102(1)(d) to pursue construction defect claims affecting the individual units of a common-interest community. In addition, every court in the nation with a similar statute considering the question of HOA standing found that HOAs have the power to bring claims affecting the entire common-interest community, including individual units. Consistent with the broad scope of NRS 116.3102(1)(d), the Declaration of Covenants, Conditions & Restrictions and Reservation of Easements for High Noon at Arlington Ranch ("CC&Rs") **(PA, Vol. IV, Exh. 6, pp. 755-848)**, drafted by D.R. Horton, contain no limitation on the HOA's authority to bring construction defect claims affecting the individual units.

In contravention of the foregoing, D.R. Horton filed a motion for partial summary judgment claiming that the Association does not have standing to bring claims for construction defects located within the community's "units." (*See*, **PA, Vol. I-III, Exh. 5, pp. 25-738**). The Association opposed the motion **(PA, Vol. III-V, Exh. 6, pp. 739-1081)** and D.R. Horton filed

its reply **(PA, Vol. V, Exh. 7, pp. 1082-1098)**.

Despite the clear language of the UCIOA, the official commentary thereto, and the holdings of every court considering the issue, the District Court manifestly abused its discretion and found that the Association could not bring claims for constructional defects located within the community's units **(PA, Vol. V, Exh. 8, pp. 1099-1113)**.

III. STATEMENT OF RELIEF SOUGHT

The Association seeks a writ of prohibition or mandamus directing Respondent District Court to vacate its order denying homeowner associations standing to bring claims for construction defects located in individual condominium units.

IV. REASONS WHY THE WRIT SHOULD ISSUE

A. The Importance of the Issues, the Need for Immediate Relief, and Association's Lack of Any Other Adequate Remedy Warrant this Court's Exercise of its Original Jurisdiction

1. Prohibition/Mandamus review is appropriate to consider the District Court's Order

Writs of mandamus have been issued by this Court to control the arbitrary or capricious abuses of discretion by the district courts. *See, Marshall v. District Court*, 836 P.2d 47, 52 (Nev. 1992). A writ of mandamus compels a government body or official to perform a legally mandated act. NRS 34.160; *Digesti v. Third Judicial Dist. Court*, 853 P.2d 118 (Nev. 1993). A writ of prohibition, on the other hand, compels a government body or government official to cease performing an act beyond its legal authority. NRS 34.320; *State ex. rel. Tidval v. Eighth Judicial Dist. Court*, 539 P.2d 456 (Nev. 1975). Such extraordinary relief has been issued to resolve issues of standing in favor of a party seeking relief. *See, e.g., State ex. rel. List v. Douglas County*, 524 P.2d 1271 (Nev. 1974).

In this matter, extraordinary relief is warranted. The Association and its members have been denied their statutory right to have their collective interests represented in a single constructional defect action. If the District Court's order stands, the Association and each of its members will be forced to bring individual actions for the same reoccurring defects throughout their community. The costs of the litigation will be enormous. The strain on judicial resources

will be extraordinary. Many homeowners may not be able to afford representation or the associated costs. Inconsistent resolutions throughout the homeowners' claims are likely due to the length and complexity of the competing efforts. Finally, many of the defects may never be addressed due to units being abandoned as a result of economic hardship. In such cases, the adjacent homeowners will suffer as defects causing water intrusion, mold, fire hazards and community depreciation will go unaddressed even though they significantly impair their own safety, value and home enjoyment.

The substantial prejudice may only be avoided by this Court issuing a writ compelling the District Court to follow the plain language of NRS 116.3102(1)(d), the holdings of every other jurisdiction addressing this standing issue, the Restatement (Third) of Property, and the official commentary of the Uniform Common Interest Ownership Act. Relief from an appeal will not rectify the substantial prejudice that the Association must first endure under the District Court's order.

2. Nevada District Courts have held that NRS 116.3012(1)(d) grants standing to an HOA to pursue claims arising from individual residences

Several Nevada District Courts have ruled that HOAs have standing under NRS 116.3102(1)(d) to pursue construction defect claims affecting the individual units and common elements of a common-interest community. (*See, e.g.*, **PA, Vol. I, Exh. 2, pp. 5-8; PA, Vol. I, Exh. 3, pp. 9-12; PA, Vol. I, Exh. 1, pp. 1-4**; and **PA, Vol. V, Exh. 9, pp. 1114-1118**). It is respectfully submitted that this Court exercise its discretion and accept the petition to resolve the contrasting decisions of the lower courts.

B. The District Court Abused its Discretion in Denying the Association's Standing

As set forth below, the District Court has abused its discretion. It strayed from the plain language of NRS 116.3102(1)(d). It dismissed the well-reasoned, thorough and consistent analysis of other jurisdictions confronting the same standing issue. The District Court placed its arbitrary interpretation of NRS 116 ahead of that reached by the Restatement (Third) of Property. Finally, this Court has compelled Nevada courts to look to the official commentary of

a model act when interpreting a statute's meaning. The District Court, however, arbitrarily and capriciously ignored the official commentary of the Uniform Common Interest Ownership Act. This Court should issue the extraordinary relief requested.

V. ARGUMENT

A. The UCIOA Expressly Authorizes an HOA to Bring or Defend All Claims Affecting the Common-Interest Community, Including Those Impacting Individual Units

The Nevada Supreme Court "has consistently held that when there is no ambiguity in a statute, there is no opportunity for judicial construction, and the law must be followed unless it yields an absurd result." *Diamond v. Swick*, 28 P.3d 1087, 1089 (Nev. 2001). "When 'the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended.'" *Harris Assocs. v. Clark Cty. Sch. Dist.*, 81 P.3d 532, 534 (Nev. 2003).

The Nevada Legislature has expressly and unambiguously granted homeowner associations standing to bring or defend claims on behalf of its homeowners for any and all matters impacting the common-interest community. Specifically, NRS 116.3102(1)(d) states:

> . . . an association may . . . [i]nstitute, 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.

The UCIOA explicitly includes individual "units" as part of the "common-interest community," stating: "'Unit' means **a physical portion of the common-interest community** designated for separate ownership or occupancy . . . ." NRS 116.093 (emphasis added).

Were there any doubt that a "common-interest community" means precisely what the statute states, *i.e.*, the entire residential "community" including the "units," the UCIOA defines "common-interest community" as:

> real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit.

NRS 116.021. Thus, to constitute a "common-interest community," the owners of the individual residences must simply have an obligation to pay dues to the association for "real

estate other than" his or her individual residence. Such other "real estate" may include a pool, common grounds, streets, clubhouse, parking lots, sidewalks and all other real estate owned by the association.

Nevada's statutory provisions thus explicitly and unambiguously empower associations to bring or defend claims affecting the buildings and individual units occupied by owners. Even if the statutory language were not so clear and explicit, the drafters of the Uniform Act have clearly stated their intent that associations have such authority.

This Act makes 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. *Comment 3* to UCIOA § 3-102(a)(4), 7 ULA 96 (1982). A court must accept the intent of the drafters of a uniform act as the Legislature's intent when it adopts a uniform act. *See, Beazer Homes Nevada, Inc. v. Eighth Judicial District Court*, 97 P.3d 1132, 1137 (Nev. 2004); *Harris Assocs. v. Clark Cty. Sch. Dist.*, 81 P.3d 532, 534 (Nev. 2003) ("if a statute 'is ambiguous . . . the drafter's intent 'becomes the controlling factor in statutory construction'"); *see also, Hill v. DeWitt*, 54 P.3d 849, 860 (Colo. 2002) (a court should "accept the intent of the drafters of a uniform law as that of the general assembly").

The analysis thus should go no further. Not only is the UCIOA's language explicit, but the express intent of the Uniform Act's drafters puts to rest any question regarding the intended scope of an association's authority to bring construction defect claims. This Court should overturn the lower court's ruling and grant full standing to the Association in accordance with the UCIOA.

B. Fundamental Rules of Statutory Construction Demonstrate the Association's Standing Over Those Claims Excluded by the District Court

"[N]o part of a statute [may] be rendered meaningless and its language 'should not be read to produce absurd or unreasonable results.'" *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 168 P.3d 731, 738 (Nev. 2007). "[W]e 'construe statutes to give meaning to all of their parts and language, and this court will read each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation.'" *Harris Assocs.*, 81 P.3d at 534.

A court may not imply a limitation that does not exist in the plain language of a statute. *See, Glenbrook Homeowners Assoc. Inc. v. Pettitt*, 919 P.2d 1061, 1063 (Nev. 1996). In *Glenbrook*, the trial court granted summary judgment against an HOA finding that a statute did not authorize it to exercise eminent domain. The Nevada Supreme Court reversed and stated: "If the legislature had intended to limit the power of eminent domain with respect to the construction of byroads, it would have expressly done so." *Id.* at 1063.

Disregarding the plain language of the UCIOA and the explicit intent of its drafters, D.R. Horton argued that the term "common-interest community" as used in NRS 116.3102(1)(d) severely restricts the authority of associations to bring or defend claims to solely the "common elements" of a common-interest community. There is nothing in the plain language of NRS 116.3102(1)(d) to support the conclusion that the term "common-interest community" means solely "common elements" to the exclusion of residential "Units." On the contrary, the Legislature expressly included individual "units" as a "portion of the common-interest community . . . ." NRS 116.095.

In asserting that an association may only bring or defend claims affecting the limited, "common elements" of a common-interest community, D.R. Horton thus argued that "common-interest community" means exactly the same thing as "common elements." "Common elements," however, is a defined term in the UCIOA meaning "all portions of the common-interest community other than the units . . . ." NRS 116.017. Thus, "common elements," like "units," is specifically defined as a portion of the greater "common-interest community" thus negating D.R. Horton's effort to read it to comprise the entire common-interest community.

D.R. Horton also cited to the definition of unit boundaries, but regardless of the boundary line, the components remain conclusively within the common interest community.

Were it the Legislature's intention to limit an association's right to institute litigation on matters affecting only the common elements of a common-interest community, it would have used the term "common elements" instead of "common-interest community" in NRS 116.3102(1)(d). It did not and the Court may not rewrite the statutory language to create such a

drastic limitation. *See*, *Glenbrook Homeowners Assoc.*, 919 P.2d at 1063.

In addition, D.R. Horton's view that the term "common-interest community" as used in NRS 116.3102(1)(d) actually means "common elements," disregards that "common-interest community" is used repeatedly in the UCIOA to mean the community at large, including the individual units. *See*, *Diamond*, 28 P.3d at 1090 ("Other words or phrases used in the statute or separate subsections of the statute can be reviewed to determine the meaning and purpose of the statute."). For example:

- "Developmental rights" means the right to "[c]reate units, common elements or limited common elements within a common-interest community." NRS 116.039.
- For "Leasehold common-interest communities," the "number of units in a common-interest community" must be disclosed. NRS 116.2106.
- The declaration must state formulas if "units may be added to or withdrawn from the common-interest community . . . ." NRS 116.2107.
- A "Public offering statement" must include "The estimated number of units in the common-interest community . . . ." NRS 116.4103(c).
- A "Public offering statement" has different disclosure requirements "[i]f a common-interest community [is] composed of not more than 12 units . . . ." NRS 116.41035.
- The "Contents of declaration" must include the "name of every county in which any part of the common-interest community is situated . . . ." NRS 116.2105(b).
- The declaration "must be recorded in every county in which any portion of the common-interest community is located . . . ." NRS 116.2101.
- The "information statement" to purchasers must include the language: "When you enter into a purchaser agreement to buy a home or unit in a common-interest community . . . ." NRS 116.41095.

The defined term "common-interest community" cannot mean fundamentally different things depending on where it shows up in the UCIOA. Rather, it has one, and only one, meaning – the "common-interest community" includes all the real estate within it, including the individual units.

Recognizing that its interpretation is contrary to the plain language of NRS 116.3102(1)(d), D.R. Horton patently misconstrued the unambiguous definition of "common-interest community." As noted above, "common-interest community" means "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate

other than that unit." NRS 116.021.

D.R. Horton asserted that the Legislature's use of the language "obligated to pay for real estate other than the unit" somehow limits the term "common-interest community" to the few common elements owned by the Association. D.R. Horton's argument is nonsensical where the words "obligated to pay for real estate other than the unit" are plainly and simply meant to describe a community where individual owners pay for the maintenance and use of commonly owned real estate, *i.e.*, a community pool, in addition to their individual unit. D.R. Horton also ignored that the UCIOA explicitly includes individual "units" as part of the "common-interest community," stating: "'Unit' means a physical portion of the common-interest community designated for separate ownership or occupancy . . . ." NRS 116.093.

Notably absent from D.R. Horton's unfounded interpretation was any explanation how its view squares with the drafters' explicit statement that an "association can sue or defend suits even though the suit may involve only units as to which the association itself has no ownership interest." *Comment 3* to UCIOA § 3-102(a)(4), 7 ULA 96 (1982). Even if NRS 116.3102(1)(d) could be viewed as ambiguous, which it plainly is not, the rule that a legislative body adopts the interpretation given the uniform law by its drafters negates D.R. Horton's interpretation. *See, Harris Assocs.*, 81 P.3d at 534 ("if a statute 'is ambiguous . . . the drafter's intent 'becomes the controlling factor in statutory construction'").

D.R. Horton's interpretation contradicts the express provisions of the UCIOA and eviscerates an association's ability to protect the most important part of a "common-interest community" – the buildings where owners reside. As the Legislature made absolutely clear, as long as a matter affects the "common-interest community," an association has the power to "[i]nstitute, defend or intervene in litigation or administrative proceedings" – including those matters impacting individual units. NRS 116.3102(1)(d). The District Court's Order should not stand.

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C. Every Jurisdiction Adopting the UCIOA Holds that HOAs Have Standing to Bring Claims Affecting to Individual Residences

Nevada's Chapter 116 is an implementation of the Uniform Common Interest Ownership Act. Nevada courts are under a legislative mandate to apply and construe the provisions of NRS Chapter 116 "so as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2). The same UCIOA has been adopted in multiple other jurisdictions and all other jurisdictions recognize that the express language of the UCIOA authorizes HOAs to bring construction defect claims for entire common-interest community – including individual residences.[1]

1. Colorado's UCIOA is materially identical to Nevada's UCIOA and its decisions are instructive

Colorado's UCIOA includes language identical to Nevada's 116.3102(1)(d) and states that an association may: "[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community." CRS § 38-33.3-101. Likewise, Colorado and Nevada's definition of "common-interest community" are materially indistinguishable. Colorado defines "common interest community" as: "real estate described in a declaration with respect to which a person, by virtue or such person's ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration." *Id.* at § 38-33.3-103. Both definitions simply require that to be a "common interest community" the owner of a unit must also pay for common property other than his unit.

Yacht Club II Homeowners Ass'n, Inc. v. A.C. is highly instructive here because it involves virtually identical language found in Colorado's version of the Uniform Common Interest Ownership Act. *Yacht Club II Homeowners Ass'n, Inc. v. A.C.*, 94.P.3d 1177 (Colo.

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[1] Besides Nevada, five other jurisdictions have adopted the Uniform Common Interest Ownership Act. These jurisdictions are: Alaska (Alaska Stat. §§ 34.08.010 to 34.08.995); Colorado (CRS §§ 38-33.3-101 to 38-33.3-319); Connecticut (Conn. Gen. Stat. §§ 47-200 et seq.); Minnesota (Minn. Stat. Ann. §§ 515B.1-101 to 515B.4-118); and West Virginia (W. Va. Code §§ 36B-1-101 to 36B-4-120).

App. 2003). In *Yacht Club II*, the defendant builder asserted that "the CCIOA does not confer standing upon the HOA to raise damage claims related to individual units." *Id.* at 1179. The builder, like D.R. Horton here, argued that "[c]laims of that nature are not . . . 'matters affecting the common interest community.'" *Id.* The Court rejected the builder's arguments and held "the trial court erred in ruling that the HOA lacked standing to assert damage claims for construction defects to numerous individual townhome units." *Id.*

To reach its holding, the *Yacht Club II* court engaged in a comprehensive statutory analysis. It began by finding that "[u]nder the CCIOA, individual units are a part of the 'common interest community.'" *Id.* (defining "unit" as "a physical portion of the common interest community which is designated for separate ownership or occupancy and the boundaries of which are described in or determined from the declaration"). Nevada's UCIOA has the identical definition of "Unit." NRS 116.095. Based on language identical to that found in Nevada's UCIOA, the Colorado Court ruled:

> Recognizing the underlying purpose of [the Act], giving the phrase "common interest community" the meaning ascribed to it by [the Act] and realizing that an exception should not be read into a statute that its plain language does not suggest, warrant, or mandate, we conclude that [the Act] confers standing upon associations to pursue damage claims on behalf of two or more unit owners with respect to matters affecting their individual units.

Yacht Club II, 94 P.3d at 1180.

In reaching its conclusion, the Colorado Court also relied on the Uniform Act's drafters "whose stated purpose 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.'" *Id.*, *citing*, UCIOA § 3-102, cmt. 3.

Another division of the Colorado Court of Appeals reached the same conclusion and held that "the CCIOA's plain language including individual units in the common interest community and *Yacht Club II* make clear that the Association has standing to assert claims of individual unit owners." *Heritage Village Owners Ass'n Inc. v. Golden Heritage Investors, Ltd.*, 89 P.3d 513, 515 (Colo. App. 2004). The *Heritage* court also rejected the builder's

reliance on its CC&Rs that imposed maintenance duties on the individual owners for items within their units, holding that such provisions "have no bearing on the Association's standing under the CCIOA." *Id.*

The standing provision of Connecticut's Common Interest Ownership Act also is identical to Nevada's NRS 116.3102(1)(d). It likewise states than an HOA has the right to institute litigation "on behalf of itself or two or more unit owners on matters affecting the common interest community." *Winthrop House Association, Inc. v. Brookside Elm, Ltd.*, 451 F. Supp. 2d 336, 340 (D. Conn. 2005) (quoting Conn. Gen. Stat. § 47-244(a)(4)). The federal district court in *Winthrop* held that an HOA enjoyed broad standing to sue a developer for construction defects in the common elements and the units. *Id.* at 341. The *Winthrop* court noted that any other conclusion regarding the construction of the broad standing conferred by the Connecticut statute would amount to "judicial legislation" by adding an exception to the statute that was not intended by the Connecticut legislature when it adopted the Uniform Common Interest Ownership Act. *Id.*

Consistent with all case law on the subject, the Restatement (Third) of Property likewise recognizes that an HOA has standing to sue for defects to property for which it has no ownership interest, including individually owned units. Section 6.11 states:

> Except as limited by statute or the governing documents, the association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common-interest community on matters affecting the community.

Comment "a." to Section 6.11 explains that "[t]he rule stated in this section . . . makes clear that an association may sue or defend suits even though the suit involves only property in which the association has no ownership interest." Restatement § 6.11 includes the following illustration:

> Association sues developer over damage to common areas and individually owned units resulting from construction defects. . . . The association includes claims for damage to individual units as well as for damage to the common areas. The association has standing to do so.

Id. (emphasis added). Like NRS 116.3102(1)(d), Section 6.11 is modeled on UCIOA

§ 3-102(a)(4). *See*, Restatement (Third) of Property § 6.11, cmt. a.

This Court should not stray from the well-established common law established by other jurisdictions adopting the UCIOA. The District Court below should have followed suit.

2. All other states to consider HOA standing have concluded that an HOA has authority to bring claims affecting individual residences

The following states have adopted the Uniform Condominium Act whose standing provisions are materially indistinguishable from the UCIOA. All conclude that HOAs have the authority to bring claims on behalf of individual residences.

In *Milton v. Council of Unit Owners of Bentley Place*, 729 A.2d 981 (Md. App. 1999), the homeowners association sought damages from the developer for construction defects in the common areas and in the plumbing and HVAC systems in many of the individual residences. There, as here, the developer disputed the standing of the association to recover for defects in the individual units. The language before the court of appeals was virtually identical to NRS 116.3102(1)(d). It stated that the association has the power "[t]o sue and be sued, complain and defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the condominium." *Id.* at 989. The court held that the association "could sue on behalf of the unit owners for claims based on the plumbing and HVAC defects that were common to many individual units at Bentley Place." *Id.* at 990.

The Utah Supreme Court analyzed statutory provisions indistinguishable from Nevada's. The Court likewise concluded that the HOA had statutory authority "to sue with respect to any cause of action relating to the common areas and facilities or more than one unit." *Brickyard Homeowners' Assoc. Management Committee v. Gibbons Realty Co.*, 668 P.2d 535, 542 (Utah 1983). As here, the homeowners association in *Brickyard* sued for construction defects occurring in the common areas and the individually owned units. *Id.*

All other jurisdictions to consider the question of Association's standing to bring claims for defects in individual units have answered the question in the affirmative. *See, e.g., Ass'n of Unit Owners of Bridgeview Condos. v. Dunning*, 69 P.3d 788, 798 (Or. App. 2003) (finding

association had standing to bring claims for construction defects in individual units); *Sandy Creek Condo. Assoc. v. Stolt and Egner, Inc.*, 642 N.E.2d 171, 176 (Ill. App. 1994) (finding that association enjoys standing to sue on behalf of individual unit owners for fraudulent misrepresentation by builder and developer that buildings were constructed in compliance with building codes and in a good and workmanlike manner). This Court should remain consistent with every other jurisdiction examining similar statutes to NRS Chapter 116.

D. The CC&Rs Drafted by D.R. Horton Likewise Establish that the HOA Has Authority to Bring Claims for Construction Defects Beyond the "Common Elements"

1. The CC&Rs define the common-interest community as the entirety of High Noon at Arlington Ranch

The developers of "common-interest communities," such as D.R. Horton, draft the CC&Rs. They define the rights and responsibilities of the homeowners association and the future owners of residences. Future homeowners have no say in the content of the CC&Rs.

The CC&Rs here charge the Association with the duty and responsibility of preserving the community's beauty, desirability and property values. (*See*, **PA, Vol. IV, Exh. 6, pp. 755-848** at ¶ L.) The CC&Rs recognize that the Association generally has the power "to do any and all things . . . which are necessary or proper, in operating for the peace, health, comfort, safety and general welfare of its Members, including any applicable powers set forth in NRS § 116.3012, subject only to the limitations upon the exercise of such powers as are expressly set forth in the Governing Documents, or in any applicable provision of NRS Chapter 116." (*Id.* at § 3.2).

Contrary to its litigation position that "common-interest community" actually means only "common elements," D.R. Horton's CC&Rs leave no doubt that the "common-interest community" means the entirety of High Noon at Arlington Ranch. In the CC&Rs, a "Unit" means "that residential portion of this Community to be separately owned by each Owner . . . ." (*Id.* at § 1.73) Thus, the term "common-interest community" in both NRS 116 and the CC&Rs mean precisely the same thing – the entire High Noon at Arlington Ranch "Community" – the individual "Units," the "Exclusive Use Areas," and the "Common Elements."

There is nothing in the CC&Rs limiting the High Noon at Arlington Ranch "common-interest community" to only the "common elements," or excluding the residential units from the "community." There likewise is no statement anywhere in the CC&Rs that remotely divests the Association of authority to bring claims to remedy construction defects in individual units. This Court should prevent the lower court from inserting such drastic limitation from the CC&Rs – particularly where such limitation directly conflicts with the Legislature's express authorization for HOAs to have the power to bring or defend claims affecting the entire community-interest community.

2. The CC&Rs grant the Association the right to repair individual units

D.R. Horton has argued that because owners have certain obligations to maintain their units, the Association is somehow divested of its right to bring claims to remedy construction defects in (or outside) of the Units. Such argument has been squarely rejected by the Colorado Court of Appeals when considering identical provisions of its Uniform Act, stating that such maintenance duties "have no bearing on the Association's standing under the CCIOA." *Heritage Village Owners Ass'n Inc. v. Golden Heritage Investors, Ltd.*, 89 P.3d 513, 515 (Colo. App. 2004). Moreover, the *Heritage Village* court recognized that even if a conflict existed, "the CCIOA prevails over any inconsistent provision in the Declaration." *Id.*

Nevada's UCIOA contains the identical conflict resolution language, stating: "In the event of a conflict between the provisions of the declaration and the bylaws, the declaration prevails except to the extent the declaration is inconsistent with this chapter." NRS 116.2103(3). Thus, even if the maintenance duties of the CC&Rs created a conflict with the standing provision of the UCIOA (which they do not), the UCIOA prevails.

D.R. Horton's reliance on the maintenance obligations of owners to limit the powers of the HOA also is misplaced because the CC&Rs expressly grant the Association the right to enter individual Units to correct "unsafe," "unsightly," "unattractive," or "dangerous" conditions:

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> 9. If any Owner shall permit any Improvement . . . to fall into disrepair or to become unsafe, or unsightly, or otherwise to violate this Declaration, the Board shall have the right to seek any remedies at law or in equity the Association may have. In addition, the Board shall have the right, but not the duty, . . . to enter upon such Unit and/or Limited Common Element to make such repairs or to perform such maintenance . . . .

(PA, Vol. Vol. IV, Exh. 6, pp. 755-848 at § 9.3).

D.R. Horton's own CC&Rs thus are entirely consistent with the UCIOA's grant of authority for the HOA to bring or defend claims involving the residential buildings and individual units. The fact that the residences have zero lot lines fabricated into the CC&Rs does not shield the defects from affecting the common interest community.

The need for homeowners associations to be able to bring or defend claims impacting residential units is also evident in the present housing market. This has resulted in some residential units being abandoned by owners or foreclosed on by lending institutions. If there is no viable owner of a unit due to abandonment or foreclosure, or if an owner refuses to seek a remedy, the Association must be able to take action to ensure that the individual residence does not negatively impact the community. This is particularly true where, as here, there are multiple units in a single building sharing walls, floors, roofs, foundations, plumbing, and electrical systems. If plumbing in an upper unit is defective and causes leaks to the unit below, the homeowners association must have the right to bring claims against the developer to fix the problem for the benefit of all owners in the building and the community. Or, if a firewall shared between two units is defective, the homeowners association must have the right to bring claims to repair both sides of the firewall.

One of the fundamental reasons individuals choose to live in a "common-interest community" is precisely because an HOA has the duty to maintain the integrity and value of the community. Should one or more units face serious construction defects that harm its value, the HOA must be able to act to correct the defects to protect the value of the surrounding residences and the community. To eliminate the HOA's ability to protect the most essential part of the community – the residences where people live – would eviscerate the fundamental purpose of an HOA in a "common-interest community."

The experts in this matter have identified pervasive defects that plague High Noon at Arlington Ranch. These defects not only affect the unit in which the defect is situated, but they also threaten the life, safety and property values of adjacent and nearby unit owners with water intrusion, electrocution, fire and a less desirable place to live. (*See*, **PA, Vol. I, Exh. 5, pp. 157-161; Vol. I-III, Exh. 5, pp. 246-738**). Construction defects, wherever they may occur within the common-interest community, negatively affect the property values, safety, attractiveness and desirability of High Noon at Arlington Ranch. D.R. Horton's interpretation of the UCIOA, and its CC&Rs, eliminates the ability of the Association to carry out its fundamental purpose. This is yet another reason the lower court must be overturned.

3. A developer does not have the power to dictate the scope of NRS 116.3102(1)(d)

D.R. Horton drafted the CC&Rs for High Noon at Arlington Ranch to drastically minimize the "common elements" of the community. Under its interpretation of NRS 116.3102(1)(d), the rights of the Association to bring or defend claims has been extraordinarily diminished.

Under D.R. Horton's view, because it has shifted to each individual owner, the duty to maintain and repair the foundation, footings and roof of a building it shares with other owners, it has divested the Association of authority to bring claims for building defects. As a practical matter, must all owners collectively bring claims if the foundation of their building cracks and sinks, or if the roof leaks? Or, may one owner bring claims for all owners? Even if a single owner could bring a claim for other owners, it would be extremely difficult for a single owner to foot the cost of such litigation over shared defects impacting a building as a whole. Moreover, the manner in which any recovery is spent creates a multitude of issues amongst the homeowners. Such burden is likely insurmountable for an individual owner and D.R. Horton's interpretation thus insulates it from the most serious defect claims.

D.R. Horton's interpretation of NRS 116.3102(1)(d) to limit an HOA's standing to "common elements" thus results in granting a developer with authority to dictate the scope of the UCIOA by how it defines "common elements" in CC&Rs that it drafts. The Legislature

does not intend to give a party, to whom its legislation regulates, the unfettered ability to define the scope of the regulation. This Court should reject D.R. Horton's attempt to usurp the authority of Legislature and to grant itself the power to define those claims that the HOA may bring against it.

E. D.R. Horton May Not Challenge the Association's Standing

The lower court should not even have considered D.R. Horton's Motion for partial summary judgment because D.R. Horton lacks standing to raise the issue of Association's standing. Although most often applied to claims, the standing requirement applies equally to defenses and precludes a defendant from invoking a defense meant for the protection of another. *See, e.g., In re Noblit*, 72 F.3d 757, 759 (9th Cir. 1995) (transferees lacked standing to raise debtor's homestead exemption as defense to bankruptcy trustee's proceeding to recover preferential transfer of proceeds from homestead's sale); *In re Estate of D'Agosto*, 139 P.3d 1125, 1130-31 (Wash. 2006) (in probate proceedings, deceased insured's estate lacked standing to challenge beneficiaries' insurable interest under insured's life insurance policy, only insurer could raise defense of lack of insurable interest). Below, D.R. Horton attempted to raise the standing defense for the supposed protection of the homeowners. Only High Noon at Arlington Ranch owners have standing to raise this issue.

"Condominium unit owners comprise a little democratic sub society[.]" *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. App. 1975). This democracy is evident in NRS Chapter 116 which provides, in effect, for voter referendums on a variety of topics. Among these is litigation: an owners' association may not commence, or in certain instances maintain, a civil suit without a vote of unit owners.

NRS Chapter 116 thus makes it the unit owners' decision whether their association has authority to maintain suit on their behalf. The statute makes it solely the decision of the owners and their Board. their decision. NRS 116.31088(3) declares that "[n]o person other than a unit's owner may request the dismissal of a civil action commenced by the association on the ground that the association failed to comply with any provision of this section" (emphasis added).

Whether an owners' association is authorized to represent individual owners is a question whose answer has no effect on the rights of non-owners. In particular, non-owners lack standing to challenge an owners' association's authority under NRS 116.3102(1)(d). This conclusion is directly supported by the Restatement (Third) of Property (Servitudes) § 6.11 (2000), which states as follows:

> Except as limited by statute or the governing documents, the association has the power to institute, defend, or intervene in litigation or administrative proceedings in its own name, on behalf of itself, or on behalf of member property owners in a common interest community on matters affecting the community.

And comment "a." to Section 6.11 is directly on point here: "If either the members on behalf of whom the association sues or the association meets normal standing requirements, the question whether the association has the right to bring a suit on behalf of the members is an internal question, which can be raised only by a member of the association." It gives the following example:

> Association sues developer over damage to common areas and individually owned units resulting from construction defects. Common areas are owned by unit owners as tenants in common. Association does not hold title to common property. Developer moves to dismiss the complaint on the ground that Association lacks standing. Developer is not a member of the association. Developer's motion should be denied because Association has standing to sue on behalf of its members.

Restatement (Third) of Property § 6.11, Illus. 1. The lower court should not have even considered D.R. Horton's Motion.

F. The District Court Should Have Rejected D.R. Horton's Other Arguments

1. D.R. Horton's purported concern for individual owners was misplaced

Under NRS Chapter 116, "the officers and members of the executive board are fiduciaries" who must act on behalf of all owners. NRS 116.3103(1). Each owner has the right to seek appropriate action against any person, including officers and members of the executive board, who violate the provisions of NRS Chapter 116. *See*, NRS 116.745 to NRS 116.795. Further, NRS 116.31088 provides, in pertinent part, that: "Except as otherwise provided in this

subsection, the association may commence a civil action only upon a vote or written agreement of the owners of units to which at least a majority of the votes of the members of the association are allocated."

Thus, a homeowners association must not only act as a fiduciary to its members, but its members also have authority to decide if a lawsuit is warranted.

2. Res judicata protects a defendant builder from multiple claims for the same defects

Developers routinely argue against an association's standing to bring construction defect claims for individual residences because of purported concerns of multiple or inconsistent judgments. This argument disregards the many instances in the law where there can be two or more parties with standing to raise a claim for relief and that res judicata protects a defendant from multiple judgments for the same injury.

In *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998), the Court laid out the three pertinent elements for res judicata to apply: "1) the issue decided in the prior litigation must be identical to the issue presented in the current action; 2) the initial ruling must have been on the merits and have become final; and 3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation." *Id.* at 835. Applying the three elements here, if an association or an owner obtains a judgment on a construction defect claim, the principles of res judicata would preclude the other from litigating an identical claim because the association and owner are in privity with each other.

In addition, D.R. Horton's precise argument regarding the risk of multiple judgments was considered and rejected by the Utah Supreme Court:

> If any unit owner represented here . . . subsequently seeks to raise the same issues which are now advanced by the management committee, res judicata would protect these defendants from that subsequent litigation. Where the management acts as the legal representative with respect to the claims here litigated, present and successive owners asserting identical claims would be barred from subjecting the defendants to multiple suits.

Brickyard Homeowners' Assoc., 668 P.2d 535 at 541. The *Brickyard* court observed that "[i]n

many cases the unit owners are best represented by the management committee since the amount of damage suffered to each individual owner may not warrant the legal expense each would incur in seeking redress." *Id.* at 542. "In a nutshell, inasmuch as res judicata could be relied upon in any subsequent action by the defendants, we see no basis for concern that they will be exposed to multiple and inconsistent judgments." *Id.*

VI. CONCLUSION

The Legislature made absolutely clear, as long as a matter affects the "common-interest community," a homeowners association has the power to "[i]nstitute, defend or intervene in litigation or administrative proceedings" – including those matters impacting individual Units. NRS 116.3102(1)(d). The Court should not read into NRS 116.3102(1)(d) a drastic limitation that is not present in the statute and that is contrary to the explicit intent of its drafters. The Association respectfully requests that this Court overturn the District Court and find that the Association has standing to bring claims for all of the construction defects alleged in the action below.

Dated this 19th day of November, 2008.

Respectfully submitted,

QUON BRUCE CHRISTENSEN

By: _____

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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 NRAP 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 Nevada Rules of Appellate Procedure.

DATED this 19th day of November, 2008.

James R. Christensen
Nevada Bar No. 3861
Attorneys for Petitioner
High Noon at Arlington Ranch Homeowners Association

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I hereby certify that I am an employee of QUON BRUCE CHRISTENSEN, and that on the 19th day of November, 2008, I caused the attached **HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR PROHIBITION OR MANDAMUS** to be served by placing a true and correct copy of the same in the U.S. Mail at Las Vegas, Nevada, first class postage was fully prepaid to the addresses listed below:

Honorable Judge Susan H. Johnson
Regional Justice Center
District Court, Dept. 22
200 Lewis Avenue
Las Vegas, NV 89101

Respondent

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Las Vegas, NV 89128

Attorneys for Real-Party-In-Interest

S. Matthews

An employee of QUON BRUCE CHRISTENSEN

SUPREME COURT OF THE STATE OF NEVADA
OFFICE OF THE CLERK

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, FOR ITSELF AND FOR ALL OTHERS SIMILARLY SITUATED,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND, THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
D.R. HORTON, INC.,
Real Party in Interest.

Supreme Court No. 52798
District Court Case No. A542616

RECEIPT FOR DOCUMENTS

TO: Susan Johnson , District Judge
Quon Bruce Christensen Law Firm and Jason W. Bruce and James R. Christensen and Nancy E. Quon
Wood, Smith, Henning & Berman, LLP and Joel D. Odou and Stephen N. Rosen

You are hereby notified that the Clerk of the Supreme Court has received and/or filed the following:

11/20/08	Received Filing Fee. $250.00 from Quon Bruce Christensen check no. 5382.
11/20/08	Filed Petition for Writ. High Noon at Arlington Ranch Homeowners Association's Petition for Writ of Prohibition or Mandamus.
11/20/08	Filed Appendix to Petition for Writ. Volume 1.
11/20/08	Filed Appendix to Petition for Writ. Volume 2.
11/20/08	Filed Appendix to Petition for Writ. Volume 3.
11/20/08	Filed Appendix to Petition for Writ. Volume 4.
11/20/08	Filed Appendix to Petition for Writ. Volume 5.

DATE: November 20, 2008

Tracie Lindeman, Clerk of Court

EXHIBIT "7"

KOELLER | NEBEKER | CARLSON | HALUCK LLP

300 South Fourth Street, Suite 500
Las Vegas, NV 89101

IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, A NEVADA NON-PROFIT CORPORATION, FOR ITSELF AND FOR ALL OTHERS SIMILARLY SITUATED,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND, THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
D.R. HORTON, INC.,
Real Party in Interest.

No. 52798

FILED

SEP 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION

This is an original petition for a writ of mandamus or prohibition challenging a district court order granting partial summary judgment in a constructional defect action.

FACTS AND PROCEDURAL HISTORY

Petitioner High Noon At Arlington Ranch Homeowners Association (High Noon) manages a Las Vegas, Nevada, planned community that consists of 342 townhomes. High Noon brought suit against real party in interest D.R. Horton, Inc, the developer of the community. High Noon brought the suit "in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowners Association unit owners." In the complaint, High Noon alleged various

constructional defects that affected both the common elements and the individual units located within the community.

D.R. Horton filed a motion for partial summary judgment in which it challenged High Noon's ability to pursue the constructional defect claims that concerned the individual units. D.R. Horton argued that High Noon, as a homeowners' association, lacked standing to bring suit for defects affecting individual units, asserting that an association's standing to commence an action under NRS 116.3102(1)(d) is limited to defects affecting the "common-interest community." D.R. Horton claimed that individual units were not part of the "common-interest community" with respect to which NRS 116.3102(1)(d) granted associations standing. In support of its interpretation of NRS 116.3102(1)(d), D.R. Horton argued that a contrary reading would permit homeowners' associations to bring representational actions without abiding by Nevada Rule of Civil Procedure 23's requirements governing class actions.

High Noon opposed the motion, maintaining that, under NRS 116.31088(3), D.R. Horton, as a nonmember developer, lacked standing to challenge an association's ability to raise claims on behalf of its members, and that NRS 116.3102(1)(d) expressly granted High Noon standing to bring suit for defects involving individual units, reasoning that the units are considered a part of the common-interest community.

The district court did not address Dorrell's argument regarding D.R. Horton's ability to challenge its standing, but agreed with D.R. Horton and concluded that High Noon, as a homeowners' association, lacked standing to bring a constructional defect suit on behalf of owners for defects affecting individual units. In its conclusions of law, the court explained that NRS 116.3102(10(d) is the sole provision granting

associations the power to bring suit on behalf of unit owners. NRS 116.3102(1)(d) grants associations power to "[i]nstitute . . . litigation . . . on behalf of itself or two or more units' owners on matters affecting the common-interest community." The court then construed NRS 116.021's definition of "common-interest community" and its use of the term "other than that unit" to evidence the Legislature's intent to limit the definition to exclude individual units. The court also concluded that because Arlington Ranch's CC&Rs provided that the claims affecting the units were the property of the individual unit owners, and that the CC&Rs did not confer any right or duty upon High Noon to "pursue defect claims related to the units," such right "remains with the individual homeowners and . . . can not be taken away." Accordingly, the court held that High Noon lacked standing to pursue such claims. As a result, High Noon filed a petition for extraordinary relief.

In its petition, High Noon asserts that the district court erred by considering D.R. Horton's challenge and that the district court misread NRS 116.3102(1)(d) because a plain reading of that statute demonstrates that a homeowners' association has standing to institute constructional defect litigation on behalf of owners for defects affecting individual units since the units are part of the common-interest community.

DISCUSSION

Propriety of writ relief

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion." We the People Nevada v. Secretary of State, 124 Nev. ___, ___, 192 P.3d 1166, 1170 (2008); see also NRS 34.160.

Having recently resolved these precise issues in D.R. Horton v. Dist. Ct., 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, September 3, 2009), and concluded that: (1) a nonmember developer may challenge whether an association can properly assert claims in a representative capacity on behalf of its members; and (2) homeowners' associations have standing to institute litigation on behalf of it members for defects affecting individual units, subject to class action principles, we conclude that the district court abused its discretion by granting D.R. Horton's motion for partial summary judgment. As a result, we grant High Noon's petition.

A nonmember developer has standing to challenge whether a homeowners' association can properly assert claims in a representative capacity on behalf of its members

High Noon challenges the district court's consideration of D.R. Horton's motion for partial summary judgment, arguing that a developer lacks standing to challenge a homeowners' association's ability to raise claims on behalf of its members for defects affecting individual units under NRS 116.31088(3). As determined in D.R. Horton v. Dist. Ct., 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, September 3, 2009), while we agree with High Noon that NRS 116.31088(3) prohibits a nonmember from challenging the adequacy of the procedure underlying the commencement of a civil action, we conclude that nothing in NRS 116.31088(3) prohibits a developer from challenging whether the homeowners' association meets the requirements for bringing a suit in its representative capacity.

NRS 116.31088 sets forth the statutorily required practices of a homeowners' association regarding civil actions. Included in the statute are the procedures and timing by which the association must notify each unit owner of the commencement of a civil action, and a provision that specifies that nonmembers cannot challenge the adequacy of the

procedures underlying the commencement of a civil action. As we concluded in D.R. Horton v. Dist. Ct., nothing in NRS 116.31088 precludes a developer from challenging the nature of the asserted claims and the damages sought against the developer in a constructional defect action; therefore, NRS 116.31088 is inapposite. 125 Nev. ___, ___, ___ P.3d ___, ___ (Adv. Op. No. 35, September 3, 2009). Accordingly, we conclude that the district court did not err by considering D.R. Horton's motion for partial summary judgment.

A homeowners' association has standing under NRS 116.3102(1)(d) to assert causes of action for constructional defects on behalf of its members

High Noon argues that the district court erred by concluding that High Noon does not have standing to assert constructional defect claims on behalf of its members for defects affecting individual units under NRS 116.3102(1)(d). In line with our holding in D.R. Horton, 125 Nev. ___, ___ P.3d ___ (Adv. Op. No. 35, September 3, 2009), we agree.

NRS Chapter 116, also known as the Uniform Common-Interest Ownership Act, NRS 116.001, applies to all common-interest, planned communities. NRS 116.1201. NRS 116.3102(1) provides, in pertinent part:

> 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:
>
> . . . .
>
> (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.)

In D.R. Horton, because the meaning of "common-interest community," as used in NRS 116.3102(1), was ambiguous, we looked to the meaning of that term in light of other provisions of NRS Chapter 116, including "common-interest community," NRS 116.021, "unit," NRS 116.093, and "common elements," NRS 116.017, and concluded that units are part of the common-interest community. 125 Nev. at ___, ___ P.3d at ___. In coming to this conclusion, we analyzed the definition of a "common-interest community," under NRS 116.021—meaning, "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit"—and, contrary to D.R. Horton's argument, we concluded that the phrase "other than that unit" does not exclude a unit. D.R. Horton, 125 Nev. at ___, ___ P.3d at ___. Rather, NRS 116.021 merely expands the definition of "common-interest community" to require an owner to pay for realty other than that unit that he or she owns. Id. at ___, ___ P.3d at ___. Because we concluded that a unit is a part of the "common-interest community" as defined by NRS 116.021, we concluded that NRS 116.3102(1)(d) confers standing on a homeowners' association to assert claims "on matters affecting the common-interest community," including matters affecting individual units. Id. at ___, ___ P.3d at ___. We also noted that section 6.11 of the Restatement (Third) of Property and its comments support this court's interpretation of the term "common-interest community." D.R. Horton, 125 Nev. at ___, ___ P.3d at ___.

Applying this interpretation of NRS 116.3102(1)(d) to the facts of this case, we conclude that High Noon has standing to assert claims on behalf of its members for defects affecting individual units.[1]

We note, however, as we did in D.R. Horton, that although homeowners' associations have standing to bring constructional defect suits on behalf of individual unit owners for matters affecting individual units under NRS 116.3102(1)(d), that statute must be reconciled with the principles of class action lawsuits under NRCP 23 and the concerns related to constructional defect class actions, which this court examined in Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530 (2005). D.R. Horton, 125 Nev. at ___, ___ P.3d at ___.

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[1]NRS 116.3102(1) also requires this court to determine whether the community's declaration limit the homeowners' association's standing to assert constructional defect claims for defects that affect individual units. The Supplemental Declaration of Covenants, Conditions & Restrictions and Reservation of Easements (CC&Rs) at issue in this case provide that the "[d]uties, powers, and rights" of the association "includ[e] any applicable powers . . . as are expressly set forth in the Governing Documents, or in any applicable provision of NRS Chapter 116" and further defines "Community" as "a Common-Interest Community, as defined in [NRS Chapter 116]." Nothing in the CC&Rs prohibits High Noon from bringing constructional defect suits against third parties on behalf of individual owners. Therefore, because the CC&Rs grant High Noon the powers set forth in NRS Chapter 116 and define the "common-interest community" identically to Chapter 116, and they do not otherwise limit High Noon's standing, we determine that it is not necessary to separately address whether the CC&Rs exclude individual units from the community.

In Shuette, this court explained 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." 121 Nev. at 854, 124 P.3d at 542. In other words, because constructional defect cases generally relate to multiple properties and often involve different types of damages, issues pertaining to 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. Instead, individual parties must substantiate their own claims, which typically renders class action certification inappropriate. Id.

In sum, under the principles set forth in Shuette, if the claims asserted by a homeowners' association on behalf of its members involve multiple defects that disparately affect individual units and the developer objects to the association's action, the district court must analyze whether the association may, in a representative capacity, properly bring the action under NRCP 23. See Shuette, 121 Nev. at 856-57, 124 P.3d at 543-44. In doing so, the district court must consider "whether the claims and various theories of liability satisfy the requirements of numerosity, commonality, typicality, adequacy, and, as in Shuette, whether 'common questions of law or fact predominate over individual questions,' or whether the action satisfies one of the other two options set forth in NRCP 23(b)."[2] D.R.

---

[2]As noted in D.R. Horton, "in addition to considering whether common questions of law or fact predominate over claims concerning individual units, the district court, upon determining that the prerequisites enumerated in NRCP 23(a) are satisfied, could also consider whether the class action satisfies NRCP 23(b)(1) or (2)." 125 Nev. at ___ n.4, ___ P.3d at ___ n.4.

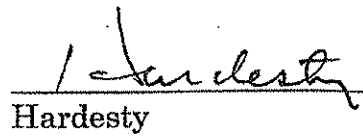
Horton, 125 Nev. at ___, ___ P.3d at ___ (quoting Shuette, 121 Nev. at 850, 124 P.3d at 539); see also NRCP 23. If necessary, the district court may grant conditional certification and reevaluate the action in light of any problems that arise during or after discovery. See Shuette, 121 Nev. at 857-58, 124 P.3d at 544.

Here, High Noon alleged several causes of action against D.R. Horton,[3] claiming, in part, that both the individual units and the common areas of the community have various defects and deficiencies pertaining to, for example, structure, electrical, plumbing, and roofing. Therefore, in accordance with the analysis set forth in D.R. Horton, we direct the district court to review the claims asserted by High Noon to determine whether the claims conform to class action principles, and thus, whether High Noon may file suit in a representative capacity for constructional

[3]In particular, High Noon alleged causes of action for breach of implied and express warranties, breach of contract, and breach of fiduciary duty.

defects affecting individual units. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to conduct further proceedings consistent with this order.

It is so ORDERED.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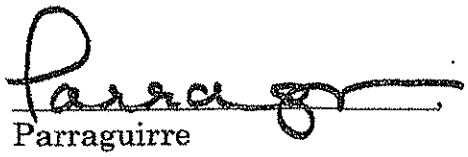
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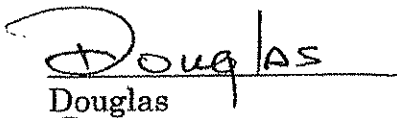
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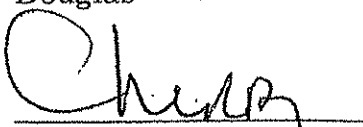
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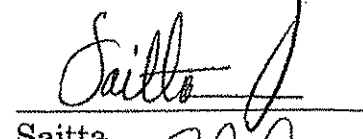
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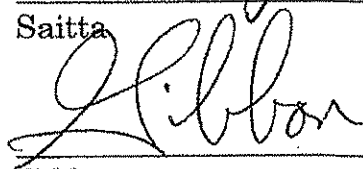
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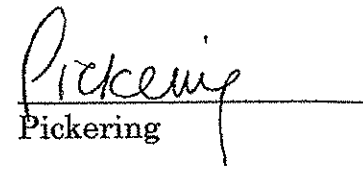
Gibbons


, J.
Pickering

cc: Hon. Susan Johnson, District Judge
Quon Bruce Christensen Law Firm
Wood, Smith, Henning & Berman, LLP
Eighth District Court Clerk

EXHIBIT "1"

KOELLER | NEBEKER | CARLSON | HALUCK LLP

300 South Fourth Street, Suite 500
Las Vegas, NV 89101

ORIGINAL

FILED
JUN 7 4 50 PM '07
CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated,

Plaintiff,

v.

D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive,

Defendants.

CASE NO.: A542616
DEPT. NO.: XXII

COMPLAINT

RECEIVED
JUN 07 2007
CLERK OF THE COURT

COMES NOW Plaintiff, HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, by and through its counsel, Quon Bruce Christensen, and upon information and belief, hereby complains, alleges, and states as follows:

I. PARTIES

1. Plaintiff. High Noon at Arlington Ranch Homeowners Association ("Plaintiff"). is a

1. Plaintiff, High Noon at Arlington Ranch Homeowners Association ("Plaintiff"), is a

non-profit corporation organized and existing under and by virtue of the laws of the State of Nevada, and has its principal place of business within the County of Clark, State of Nevada.

2. The Association's members are collectively the owners, in fee simple, of the Common Areas of the Subject Property commonly known as High Noon at Arlington Ranch. The Common Areas of the Subject Property include the entire property, except the separate interests therein, as well as all facilities, improvements, and landscaping located within the Common Areas.

3. The Association has the responsibility to maintain the Common Areas of the Subject Property. Additionally its members have the duty, responsibility and obligation to paint, maintain, repair and replace all structures and appurtenances, including but not limited to, buildings, outbuildings, roads, driveways, parking areas, fences, screening walls, retaining walls, landscaping, exterior air-conditioning components, including, but not limited to, paint, repair, replacement, and care of roofs, exterior building surfaces, building framing, and other exterior improvements within the Subject Property.

4. Plaintiff's members are the individual owners of units within the Subject Property. Plaintiff brings this suit in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowners Association unit owners. The constructional deficiencies and damages resulting therefrom are matters affecting the High Noon at Arlington Ranch Common Interest Community. If it is subsequently determined that this action, and/or any claims within the scope of this action, should more properly have been brought in the name of each individual unit owner or as a class action, Plaintiff will seek leave to amend this Complaint to include unit owners and/or Class Representatives.

5. At all times relevant hereto, Defendant, D.R. HORTON, INC., was and remains a business entity doing business in the County of Clark, State of Nevada.

6. At all times relevant hereto, Defendant D.R. HORTON, INC., a Delaware Corporation ("Defendant"), was engaged in the business of planning, developing, designing, mass producing,

building, constructing, and selling residential real property in the County of Clark, State of Nevada, and was the owner, developer, general contractor, and seller of the Subject Property.

Nevada, and was the owner, developer, general contractor, and seller of the Subject Property.

7. As the owner, developer, general contractor, and seller of the Subject Property, Defendant was directly responsible for the planning, design, mass production, construction, and/or supervision of construction of the Subject Property and, therefore, is responsible in some manner for the defects and deficiencies in the planning, development, design, and/or construction of the Subject Property, as alleged herein, and Plaintiff's damages related to such defects and deficiencies.

8. The true names and capacities of Defendants sued herein as DOE INDIVIDUALS 1-100, ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive, and each of them, are presently unknown to the Plaintiff and therefore are sued under fictitious names.

9. The DOE INDIVIDUALS 1- 100, and ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive, and each of them, are responsible for the planning, development, design, mass production, construction, supervision of construction, and/or sale of the Subject Property and, therefore, they are responsible in some manner for the defects and deficiencies in the planning, development, design, and/or construction, inspection and/or approval of the Subject Property as alleged herein, and Plaintiff's damages related to such defects and deficiencies.

II. GENERAL ALLEGATIONS

10. The Subject Property is located in the County of Clark, State of Nevada. A site map of the Subject Property is attached hereto as Exhibit 1. The Community is composed of 342 residences contained in 114 buildings. Sales of residences began in 2004 and continued through 2006.

11. At all times relevant herein, Defendants, including DOE and ROE INDIVIDUALS 1-100 or ROE BUSINESS ENTITIES 1-100, were the officers, agents, employees and/or representatives of each other in doing the things alleged herein and in so doing were acting in the scope of their respective authority and agency.

12. Defendants, and each of them, (excluding, however, ROE GOVERNMENTAL ENTITIES 1-100 unless hereinafter specifically included), undertook certain works of

improvement upon the undeveloped Subject Property, including all works of development, design, construction and sale of the Subject Property, products, and individual units therein to the
design, construction and sale of the Subject Property, products, and individual units therein to the
general public, including the Plaintiff, its members and/or their predecessors in interest.

13. Defendants were merchants and sellers with respect to the Subject Property, non-integrated products, and all individual units therein, which are the subject of this action as described above.

14. By reason of the sale, transfer, grant and conveyance to Plaintiff and its members, Defendants impliedly warranted that the Subject Property and all individual units therein, were of merchantable quality.

15. Defendants failed to properly and adequately investigate, design, inspect, plan, engineer, supervise, construct, produce, manufacture, develop, prepare, market, distribute, supply and/or sell the Subject Property, non-integrated products and all individual units therein, in that said Subject Property, non-integrated products and individual units therein have experienced, and continue to experience, defects and deficiencies, and damages resulting therefrom, as more specifically described below.

16. The defects and deficiencies include, but are not necessarily limited to, structural defects, fire-safety defects, waterproofing defects, civil engineering/landscaping, roofing, stucco and drainage defects, architectural defects, mechanical defects, plumbing and HVAC defects, sulfate contamination, acoustical defects, defects relating to the operation of windows and sliding glass doors, and electrical defects.

17. The Subject Property may be defective or deficient in other ways and to other extent not presently known to Plaintiff, and not specified above. Plaintiff reserves the right to amend this Complaint upon discovery of any additional defects or deficiencies not referenced herein, and/or to present evidence of the same at the time of trial of this action.

18. Due to the failures of Defendants and the defects, deficiencies, and resulting damage, the Subject Property has been adversely impacted so as to diminish the function of the Subject Property and individual units thereon, thereby affecting and interfering with the health, safety and welfare of the Plaintiff and its members, and their use, habitation and peaceful and

quiet enjoyment of the Subject Property.

19. Plaintiff alleges generally that the defects and deficiencies as described above are,

19. Plaintiff alleges generally that the defects and deficiencies as described above are,

among other things, violations or breaches of local building and construction practices, industry standards, governmental codes and restrictions, manufacturer requirements, product specifications, the applicable Building Department Requirements, Chapter 523 of the Nevada Administrative Code, and the Uniform Building Code, National Electrical Code, Uniform Plumbing Code, and Uniform Mechanical Code, as adopted by Clark County and the City of Las Vegas at the time the Subject Property was planned, designed, constructed and sold.

20. The deficiencies in the construction, design, planning and/or construction of the Subject Property described in this Complaint were known or should have been known by the Defendants, including the ROE GOVERNMENTAL ENTITIES at all times relevant hereto.

21. All of the claims contained in this Complaint have been brought within the applicable Statutes of Repose and/or Limitations.

22. Plaintiff alleges generally that the conduct of Defendants, including the ROE GOVERNMENTAL ENTITIES, was and remains the actual, legal and proximate cause of general and special damages to Plaintiff.

III. FIRST CLAIM FOR RELIEF
(Breach of Implied Warranties of Workmanlike Quality and Habitability)

23. Plaintiff hereby incorporates and realleges Paragraphs 1 through 22 of the Complaint as though fully set forth herein.

24. Defendants expressly and impliedly warranted that the Subject Property, components and associated improvements, were of workmanlike quality, were safely and properly constructed and were fit for the normal residential purpose intended.

25. Further implied warranties arose by virtue of the offering for sale by Defendants of the Subject Property to Plaintiff and its members, without disclosing that there were defects associated with said property, thereby leading all prospective purchasers, including Plaintiff and its members, to believe that there were no such defects.

26. Defendants gave similar implied warranties to any and all regulatory bodies who had

to issue permits and/or provide approvals of any nature as to the Subject Property, which were at all relevant times defective and known by Defendants to be so defective.

all relevant times defective and known by Defendants to be so defective.

27. Defendants breached their implied warranties in that the Subject Property was not, and is not, of workmanlike quality, nor fit for the purpose intended, in that the Subject Property was not, and is not, safely, properly and adequately constructed.

28. Defendants have been notified and have full knowledge of the alleged breaches of warranties and Defendants have failed and refused to take adequate steps to rectify and/or repair said breaches.

29. As a proximate legal result of the breaches of said implied warranties by Defendants and the defective conditions affecting the Subject Property, Plaintiff and its members have been, and will continue to be, caused damage, as more fully describe herein.

30. As a further proximate and legal result of the breaches of the implied warranties by Defendants and the defective conditions affecting said Subject Property, Plaintiff and its members have been, and will continue to be, caused further damage in that the defects and deficiencies have resulted in conditions which breach the implied warranty of habitability.

31. Plaintiff incorporates by reference, as if set forth herein, the particular statement of damages described in the prayer for relief.

32. Plaintiff is entitled to recover damages pursuant to NRS 116.4114.

33. Plaintiff has been required to retain the services of Quon Bruce Christensen to prosecute this matter and is entitled to an award of attorney's fees based thereon.

34. Plaintiff is entitled to recover its attorney's fees, costs and expenses pursuant to NRS 116.4114.

35. The monies recoverable for attorney's fees, costs and expenses under NRS 40.600 *et seq.* and NRS 116 *et seq.*, include, but are not limited to, all efforts by Quon Bruce Christensen on behalf of Plaintiff prior to the filing of this Complaint.

IV. SECOND CLAIM FOR RELIEF
(Breach of Contract)

36. Plaintiff realleges and incorporates by reference Paragraphs 1 through 35 of the Complaint as though fully set forth herein.

37. On various dates, each of the Plaintiff's members and Defendants entered into a written contract pursuant to which Plaintiff's members would purchase a unit in the Subject Property and Defendants would sell a code-compliant and habitable unit to purchasers.

38. Plaintiff and its members have at all times performed the terms of the contract in the manner specified by the contract, except those terms which could not be fulfilled without fault attributable to Plaintiff or its members.

39. Defendants have failed and refused, and continue to refuse to tender its performance as required by the contract in that said units were not and are not in a habitable and code-compliant condition.

40. Said contracts contain a provision that if the subject of the contract should go to litigation, the prevailing party is entitled to attorneys' fees and costs.

V. THIRD CLAIM FOR RELIEF
(Breach of Express Warranties)

41. Plaintiff incorporates and realleges paragraphs 1-41 hereof by reference as though fully set forth herein.

42. When marketing and selling the residences and improvements and appurtenances thereto to the general public and to Plaintiff and its members, Defendants, with the exception of ROE GOVERNMENTAL ENTITIES 1-100, by and through their agents or employees, expressly warranted by verbal, written and demonstrative means, that the design and construction of said residences and improvements and appurtenances thereto, were designed and constructed free from defect or deficiency in materials or workmanship in compliance with applicable building and construction codes, ordinances and industry standards, and are fit for human habitation.

43. By designing and constructing the residences, improvements and appurtenances incident thereto in a defective and deficient manner violating building and construction codes, ordinances and industry standards then in force as described herein above, Defendants breached

said express warranties made to Plaintiff and its members. As a proximate cause of Defendants' conduct, Plaintiff and its members have and continue to suffer damages which include, without
conduct, Plaintiff and its members have and continue to suffer damages which include, without
limitation, the cost to repair the defects and deficiencies in the design and construction of the residences and improvements and appurtenances thereto, which are now and will continue to pose a threat to the health, safety and welfare of Plaintiff, its members, their guests and the general public until such repairs are effected. Said damages are in excess of $40,000.00 (Forty Thousand Dollars) and continuing.

44. Plaintiff is entitled to damages pursuant to NRS 116.4113.

45. As a result of Defendants' breaches of express warranties, Plaintiff has been compelled to retain the services of the Quon Bruce Christensen Law Firm in order to comply with statutory requirements prior to litigation and to institute and prosecute these proceedings, and to retain expert consultants and witnesses as reasonably necessary to prove their case, thus entitling Plaintiff to an award of attorneys fees and costs in amounts to be established at the time of trial.

VI. FOURTH CLAIM FOR RELIEF
(Breach of Fiduciary Duty)

46. Plaintiff incorporates and realleges paragraphs 1-45 hereof by reference as though fully set forth herein.

47. Plaintiff is informed and believes and thereupon alleges that Defendants, with the exception of ROE GOVERNMENTAL ENTITIES, inclusive, were the promoters, developers and creators of the Association. In said capacities, Defendants served as directors and officers of the Association, exercising direct and indirect control over the administration, management and maintenance of the Association and its property, including but not limited to the Common Areas of the Subject Property. As such, Defendants were obligated to maintain and repair said Common Areas and the improvements and appurtenances incident thereto as the fiduciaries of all Association members.

48. Plaintiff is informed and believes and thereupon alleges that, as regards the sale of the units and accompanying interests in the Common Areas of the Subject Property, Defendants

owed a fiduciary duty to disclose material facts pertinent to the condition and desirability of said property which were neither known to nor reasonably discoverable by Plaintiff or its members at the
property which were neither known to nor reasonably discoverable by Plaintiff or its members at the
time of purchase, including the costs of maintaining and repairing same. Said fiduciary duties were continuing in nature, including the duty to disclose to Plaintiff's members the nature and existence of any defects of deficiencies in the design or construction of the Subject Property, the Common Areas thereof and the improvements and appurtenances incident thereto.

49. Defendants breached their fiduciary duties by failing and refusing to disclose the existence and nature of such defects to Plaintiff's members, by failing and refusing to repair said defects, and by failing and refusing to take necessary action to have those responsible for the defects and deficiencies in design and construction repair, or pay to repair, said defects and deficiencies. Because Defendants and each of them were in some manner directly responsible for the development, design and construction of the Subject Property, the Common Areas thereof and improvements and appurtenances incident thereto, Defendants knew or should have known of said defects and deficiencies therein at or before the commencement of sales to the public, and their failure to disclose, repair or pay to repair said defects and deficiencies constitutes an act of self-dealing in reckless disregard for the health, safety and well-being of Plaintiff and its members.

50. Plaintiff is informed and believes and thereupon alleges that Defendants have further breached their fiduciary duties by (1) entering into agreements, contracts and financial arrangements contrary to the best interests of the Association, (2) entering into unauthorized transactions resulting in losses to the Association, (3) maintaining conflicts of interest with the Association and failing to disclose said conflicts, (4) negligently and recklessly handling of Association revenues, income and accounts to the detriment of the Association, (5) promoting a marketing scheme that directly benefitted Defendants to the detriment of the Association, and (6) failing to collect adequate assessment income and prepare adequate operating budgets to meet the reasonable repair and maintenance needs and related Association needs.

51. As a proximate cause of Defendants' conduct, Plaintiff and its members have suffered and continue to suffer damages, including without limitation, the cost to repair the defects

and deficiencies in the design and construction of the Subject Property, the Common Areas thereof and the improvements and appurtenances incident thereto, which are now and will continue to pose
and the improvements and appurtenances incident thereto, which are now and will continue to pose
a threat to the health, safety and welfare of Plaintiff, its members, and their guests and the general public until such repairs are effected. Plaintiff is informed and believes and thereupon alleges that said damages are in excess of $40,000.00 (Forty Thousand Dollars) and continuing.

52. Defendants' breaches of the fiduciary duties owed to Plaintiff and its members were was at all times malicious and undertaken with the intent to defraud and oppress Plaintiff and its members for Defendants' own enrichment, thus warranting the imposition of punitive damages sufficient to punish and embarrass Defendants, and to deter such conduct by them in the future.

53. As a result of Defendants' conduct, Plaintiff has been compelled to retain the services of the law firm of Quon Bruce Christensen in order to comply with statutory requirements prior to litigation and to institute and prosecute these proceedings, and to retain expert consultants and witnesses as reasonably necessary to prove their case, thus entitling Plaintiff to an award of attorneys' fees and costs in amounts to be established at the time of trial.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For general and special damages all in an amount in excess of $10,000.00;
2. For such other relief that the Court deems just and proper, including, but not limited to equitable relief.

Dated this 7th day of June, 2007.

QUON BRUCE CHRISTENSEN

By: _____
NANCY QUON, ESQ.
Nevada Bar No. 6099
JASON W. BRUCE, ESQ.
Nevada Bar No. 6916
JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 3861
2330 Paseo Del Prado, Suite C-101
Las Vegas, Nevada 89102
(702) 942-1600
Attorneys for Plaintiff

NOTES

This map is for assessment use only and does NOT represent a survey.

No liability is assumed for the accuracy of the data delineated herein, information on roads and other non-assessed parcels may be obtained from the Road Document Listing in the Assessor's Office.

This map is compiled from official records, including surveys and deeds, but only contains the information required for assessment. See the recorded documents for more detailed legal information.

USE THIS SCALE(FEET) WHEN MAP REDUCED FROM ORIGINAL

0 50 100 200 400 600

MAP LEGEND

PARCEL BOUNDARY	001 1.00	PARCEL NUMBER ACREAGE
SUBD BOUNDARY	202	PARCEL SUB/SCD NUMBER
ROAD EASEMENT	PB 25-45	PLAT RECORDING NUMBER
PW/LD BOUNDARY	5	BLOCK NUMBER
NON-PARCEL LOT LINE	5	LOT NUMBER
MATCH LINE / LEADER LINE	CL5	BDY. LOT NUMBER
50% ROAD ID NUMBER		

AVERAGE DU VALUE 22

ASSESSOR'S PARCELS - CLARK CO., NV.

M. W. Schofield, Assessor

T22S R60E | 20 | N 2 SE 4 | 4 | 176-20-7

DETAIL B PG 1 OF 1

Scale:1"=100' Rev:05/20/04

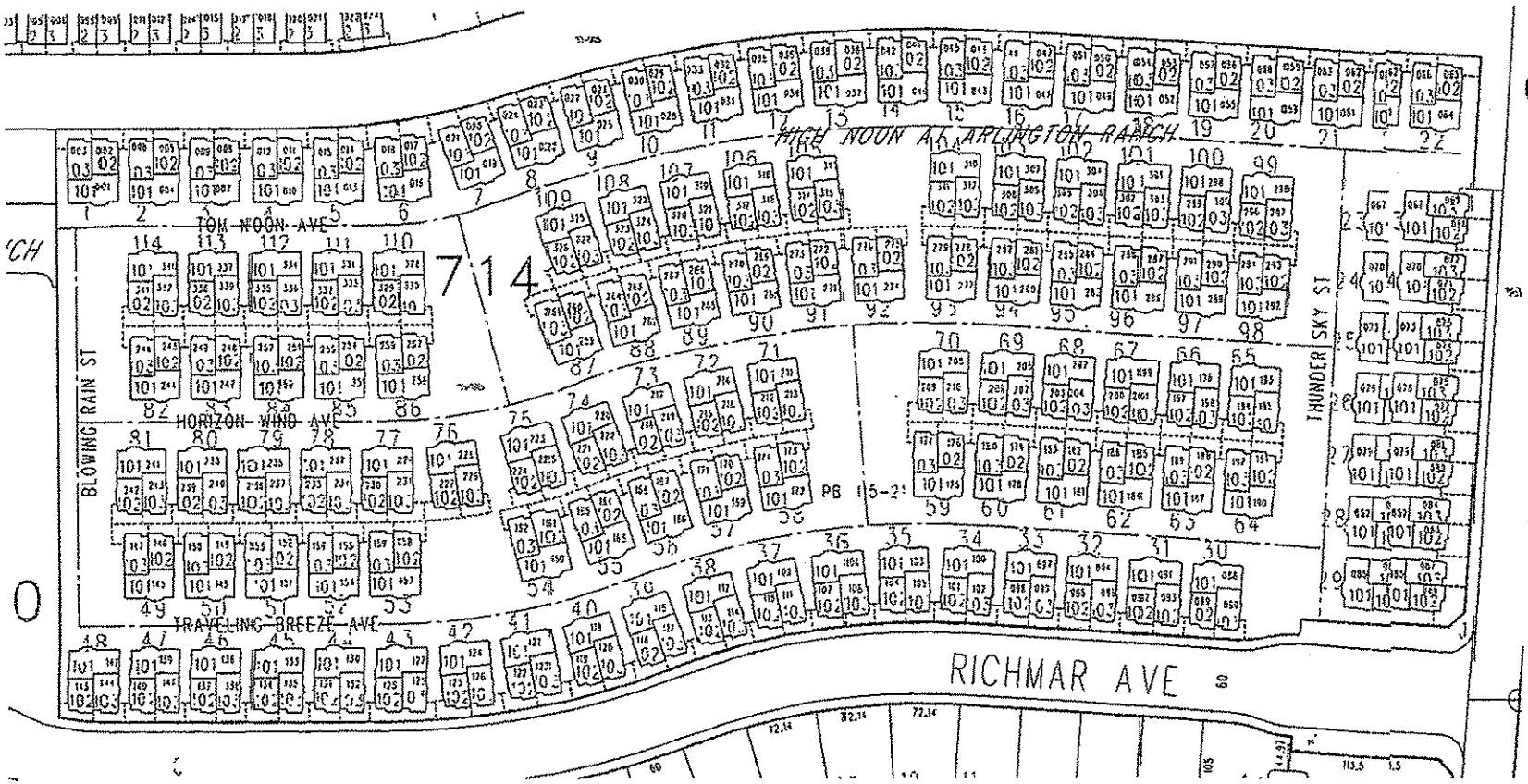

EXHIBIT "2"

KOELLER | NEBEKER | CARLSON | HALUCK LLP

300 South Fourth Street, Suite 500
Las Vegas, NV 89101

18

ORIGINAL

FILED

Aug 13 11 43 AM '07

CLERK OF THE COURT

ORD
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Nevada Bar No. 6099
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Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated,

Plaintiff,

v.

D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive,

Defendants.

CASE NO.: A542616
DEPT. NO.: XXII

ORDER GRANTING PLAINTIFF'S EX PARTE MOTION TO STAY COMPLAINT AND ENLARGE TIME FOR SERVICE

RECEIVED
AUG 13 2007
CLERK OF THE COURT

The above referenced matter having been considered by this Honorable Court, pursuant to Plaintiff's Ex Parte Motion to Stay Complaint and Enlarge Time For Service, Plaintiff being represented by the Quon Bruce Christensen law firm and the Court having considered all pleadings and papers on file herein, and determining that there was good cause for proceeding

and no just reason for delay.

IT IS HEREBY ORDERED. ADJUDICATED AND DECREED as follows:

IT IS HEREBY ORDERED, ADJUDICATED AND DECREED as follows:

1. That Plaintiff's Ex Parte Motion to Stay Complaint and Enlarge Time for Service is granted.

2. That Plaintiff's Complaint is hereby stayed until the completion of the NRS 40.600 *et seq.* pre-litigation process.

3. That based upon good cause shown, Plaintiff's time to serve its summons and complaint on each Defendant is enlarged, pursuant to NRCP 4(i), until 30 days after the completion of the pre-litigation process.

ORDERED THIS 10th day of August, 2007.

Leonard J. Johnson
DISTRICT COURT JUDGE

Submitted by:

NANCY QUON, ESQ.
Nevada Bar No. 6099
JASON W. BRUCE, ESQ.
Nevada Bar No. 6916
JAMES R. CHRISTENSEN, ESQ.
Nevada Bar No. 3861
QUON BRUCE CHRISTENSEN LAW FIRM
2330 Paseo Del Prado, Suite C-101
Las Vegas, NV 89102

EXHIBIT "3"

KOELLER | NEBEKER | CARLSON | HALUCK LLP
300 South Fourth Street, Suite 500
Las Vegas, NV 89101

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NOTC
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(702) 942-1600
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, Claimant, v. D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESS or GOVERNMENTAL ENTITIES 1-100, inclusive, Contractor.	**NOTICE OF COMPLIANCE WITH NEVADA REVISED STATUTE 40.645**

TO D.R. HORTON, INC.:

PLEASE TAKE NOTICE that this firm has been retained by HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, for itself on behalf of its members to notify you of a construction defect claim pursuant to N.R.S. 40.600 *et seq.*. and to begin possible settlement negotiations.

I.

NOTICE

This notice is made via certified mail, return receipt requested, to:

A. Declarant, D.R. HORTON , INC., a Delaware Corporation, at its last known business address, 330 Carousel Parkway, Henderosn, Nevada 89014;

B. Declarant's Resident Agent, CORPORATION TRUST COMPANY OF NEVADA, 6100 Neil Road, Suite 500, Reno, Nevada 89511; and

C. Declarant's President, Donald Tomnitz, at 301 Commerce, Suite 500, Fort Worth, TX, 76102.

II.

THE COMMUNITY

The community of residences and appurtenances is comprised of approximately 375 units located in Clark County, Nevada. The location of the community commonly known as High Noon at Arlington Ranch is more particularly described in Exhibit 1.

III.

TOLLING OF ALL RELEVANT STATUTES OF LIMITATION/REPOSE

This notice shall also commence the tolling provisions contained in NRS 40.695; thus, all statutory and contractual limitations as they apply to Claimants, will be tolled during the entire NRS 40.600 *et seq.* process.

IV.

THE DEFECTS

Pursuant to and in compliance with NRS 40.645, and more particularly NRS 40.645(5), this Notice contains a list of constructional defects identified by construction experts. The Expert Reports served as part of this Notice specify in reasonable detail the defects, known damages, and known injuries to the residences and appurtenances at the High Noon at Arlington Ranch Community. To the extent known, said reports provide expert opinions as to the causes of the defects, the nature and extent of the damages and injuries caused thereby, and the location of each defect within each residence or appurtenance.

V.

REQUESTED DOCUMENTS

Request is hereby made for all relevant reports, photos, correspondence, plans, specifications, warranties, contracts, subcontracts, work orders for repair, videotapes and soil and other engineering reports that are not privileged.

VI.

PROTECTED CORRESPONDENCE

All documents and writings, including this Notice, are protected by the settlement/mediation privilege set forth in NRS 48.109. The legislative purpose of NRS 40.600 *et seq.* is to settle construction defect claims without litigation. As such, all documents, including this notice, are protected and privileged.

Dated this 19th day of January, 2008.

QUON BRUCE CHRISTENSEN

By: _____

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Nevada Bar No. 6099
JASON W. BRUCE, ESQ.
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Attorneys for Claimants

EXHIBIT "4"

KOELLER | NEBEKER | CARLSON | HALUCK LLP

300 South Fourth Street, Suite 500
Las Vegas, NV 89101

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FILED

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CLERK OF THE COURT

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MOT
Joel D. Odou, Esq.
Nevada Bar No. 7468
Joel D. Odou, Esq.
Nevada Bar No. 7468
Thomas E. Trojan, Esq.
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7670 West Lake Mead Boulevard, Suite 250
Las Vegas, Nevada 89128-6652

Attorneys for Defendant D.R. HORTON, INC.

DISTRICT COURT

CLARK COUNTY, NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation, for itself and for all others similarly situated, HOA, v. D.R. HORTON, INC., a Delaware Corporation DOE INDIVIDUALS 1-100, ROE BUSINESSES or GOVERNMENTAL ENTITIES 1-100, inclusive, Defendant.	CASE NO.: A542616 DEPT NO.: XXII **D.R. HORTON, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT** **DATE:** **TIME:**

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Attorneys at Law
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LAS VEGAS, NEVADA 89128-6652
TELEPHONE 702.222.0625 • FAX 702.253.6225

RECEIVED
APR 14 2008
CLERK OF THE COURT

COMES NOW, Defendant D.R. HORTON, INC. ("D.R. Horton"), by and through its attorneys Wood, Smith, Henning, & Berman LLP, and hereby moves for Partial Summary Judgment against the High Noon at Arlington Ranch Homeowners Association (the "HOA") on the ground that the HOA lacks standing to bring construction defect claims outside the "common interest community" as defined under the Uniform Common Interest Ownership Act, ***NRS*** Chapter 116.

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This Motion is based upon the pleadings and papers on file with the Court,

This Motion is based upon the pleadings and papers on file with the Court,

the Memorandum of Points and Authorities, and any argument the Court may entertain at the time of the hearing of this matter.

DATED: April 11, 2008

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendant will bring the foregoing MOTION FOR PARTIAL SUMMARY JUDGMENT on for hearing on the 27 day of May, at the hour of 8:30 a.m., or as soon thereafter as counsel can be heard.

DATED: April ___, 2008

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. CASE SUMMARY

The subject of this litigation is a 342 unit condominium planned community known as High Noon at Arlington Ranch, located on Arlington Ranch Blvd and Blue Diamond Rd in Las Vegas. The instant matter involves a claim brought pursuant to ***NRS*** 40.645, by the HOA. D.R. Horton is the developer of community.

Without even serving a NRS 40.465 Notice, the HOA filed a construction defect complaint against D.R. Horton on June 7, 2007, asserting causes of action for Breach of Implied and Express Warranties (first and third causes of action), Breach of Contract (second cause of action) and Breach of Fiduciary Duty (fourth cause of action). The HOA then filed an ex parte motion to stay service of the Complaint, stating that the HOA "will immediately serve Defendants with Notice of Construction Defects pursuant to ***NRS*** 40.645." As Plaintiff's have not properly complied with ***NRS*** 40.6462, Defendants have filed concurrently with this motion, an Ex Parte Application for an Order Shortening time for an Order to Compel

compliance with the same. Unfortunately, even if granted, this will only provide Defendants partial relief, as significant issues exist over what claims the Association has standing to assert, and therefore what claims should be inspected. Accordingly, resolving both issues is critical for the Developer and the Subcontractors, so that they can make meaningful responses under ***NRS*** 40.6472 to the Association.

The HOA's Complaint states that it has brought the suit "in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowners HOA unit owners." Complaint at page 2, lines 18-19. Further, the HOA alleges that D.R. Horton breached the express warranties made by D.R. Horton to the purchaser(s) of each individual unit pursuant to ***NRS*** 116.4113. Complaint at page 8, line 8.

According to Nevada Revised Statutes, Chapter 116 of the Common Interest Ownership Act, a homeowners' association has the power to bring suit in its own name only "on matters affecting the 'common interest community.'" ***NRS*** 116.3102(1)(d). In this case, the HOA has brought defect claims which are not limited to the common interest community. Instead, the HOA alleges defects which are exclusively related to individual units for which **only** the unit owner would having standing to pursue at trial or release in a settlement. For example, the HOA is actually suing D.R. Horton to recover damages for unit owners' shower enclosures, thermostat wiring, dishwasher outlets, toilets and tubs among other things.

On January 21, 2008 (six months after filing suit), the HOA served a ***NRS*** Chapter 40 Notice on D.R. Horton asserting a construction defect claims. After receiving the Chapter 40 Notice, D.R. Horton requested access to inspect each individual unit where these claims purported exist, to determine the nature and extent of them and formulate a response under ***NRS*** 40.6472 as required by April 21, 2008. Unfortunately, counsel for the HOA has attempted to delay and make this inspection process as expensive and time consuming as possible. As set

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forth in D.R. Horton's Motion to Compel filed herewith, after seven weeks since D.R. Horton's request for compliance with ***NRS*** 40.6462, only about 153 out of 342 of the homes have been made available for inspection[1].

The overreaching by the HOA in its Notice by making claims for items for which it has no standing is improper because repairs cannot occur without the consent of the real parties in interest (i.e., the unit owners who obviously do not consent as they will not make their homes available for viewing), and more importantly, repair offers under ***NRS*** 40.6272 and mediations and settlements under ***NRS*** 40.680 can not be effective where the HOA does not own the rights to the unit specific claims. Adding to this train wreck is the fact that it appears that Plaintiff's counsel has never even bothered to obtain Association members' permission to pursue these private defect claims[2].

This Motion is to narrow this case to those defects that the HOA has a right to bring, and to strike those defects which the HOA has no authority to assert under ***NRS*** Chapter 116. D.R. Horton respectfully requests that this Court rule on this Motion as soon as possible, so that it can determine which units to continue to try to inspect, and also confirm whether the HOA has the legal right to force ***NRS*** Chapter 40 procedures on the homeowners.

Further, this relief is critical before the commencement of repairs as D.R. Horton can not enter property that the HOA does not own or control. As this relief is also a logical pre-condition to any trial on the merits, resolving the issue now, even if this case does not resolve, will save the Court and the parties time should this case proceed to trial.

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[1] These inspections have been scheduled to make it as inconvenient and as expensive as possible to the Developer and Subcontractors, with significant gaps of hours in between access to units.

[2] The CC & R's require, in section 5.3, a 2/3's Vote of the HOA of the Board to commence a lawsuit such as the present one. Assuming that they did do so in this case, the Board then has to seek approval from the membership at large, and 75% affirmative vote of the same is required to proceed. Since the HOA sued before even providing D.R. Horton with a NRS 40.645 Notice, this provision could not have been complied with and D.R. Horton is informed and believes that it still has not been complied with as of today's date. Obviously, the Association and/or its counsel feel free to disregard the CC & R's when it suits them.

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For all these reasons, D.R. Horton requests that the Court limit the scope of

For all these reasons, D.R. Horton requests that the Court limit the scope of

defects that can be sought in this action by eliminating those defects outside the standing of the HOA.

II. STATEMENT OF FACTS

1. High Noon at Arlington Ranch consists of 342 condominiums in a 114-building development in Las Vegas, Nevada. Each condominium is a separate, freehold estate within the common-interest community called High Noon at Arlington Ranch. A copy of the High Noon at Arlington Ranch Homeowners CC&R's Supplemental Declaration attached hereto as Exhibit "A" and incorporated herein by this reference.

2. The HOA is a Nevada nonprofit corporation that manages the High Noon at Arlington Ranch condominium community.

3. The HOA filed suit against D.R. Horton on June 7, 2007, alleging breach of warranty, breach of contract and breach of fiduciary duty for alleged construction defects. A copy of the Complaint is attached hereto as Exhibit "B" and incorporated herein by this reference.

4. As established in Exhibit "B" the HOA is seeking to recover damages in this action pursuant to ***NRS*** Chapter 116.

5. Pursuant to ***NRS*** Chapter 116, a homeowners association may only bring suit in its own name on matters affecting the "common interest community," ***NRS*** 116.3102(1)(d).

6. Six months after commencing suit, on January 21, 2008, the HOA sent a NRS 40.645 Notice to D.R. Horton alleging defects in both the common areas and each of the 342 individual units at the Subject Property (hereinafter the "Chapter 40 Notice"). Throughout the Chapter 40 Notice, counsel for the HOA asserts representation of all of the homeowners of the 342 individual homes. A copy of the Notice is attached hereto as Exhibit "C" and incorporated herein by this reference.

7. As set forth in Exhibit "D" attached hereto, on February 20, 2008, counsel for D.R. Horton requested, pursuant to ***NRS*** 40.6462, access to each individual unit to determine the nature and extent of the constructional defects alleged and the nature and extent of repairs that may be necessary.

8. For nearly two (2) weeks, the HOA continued to deny D.R. Horton's request to inspect all units where defects are alleged. Instead, the HOA made multiple excuses stating that the inspections were impractical and too costly.

9. On March 4, 2008, the HOA finally agreed to afford D.R. Horton their statutory right to inspect, and stated that it would "supply **as many residents** (sic.) **as possible** for visual inspection beginning March 12, 2008." (Emphasis added) (attached as Exhibit "E").

10. D.R. Horton finally received a schedule from the HOA after 4:00 PM on March 11, 2008. Out of a total of 12 units per day requested by D.R. Horton only the first day, March 12, 2008, had more than six (6) units scheduled. Only five (5) units were scheduled for the entire second week (Exhibit "F" attached hereto).

11. Throughout the first two weeks of inspections, the HOA did not provide D.R. Horton with an updated schedule. All interested parties were expected to show up each day at 8:00 AM and a "final" schedule was given to each of the attendees. D.R. Horton was advised that this lack of prior notice was due to scheduling difficulties **caused mainly by homeowners continuing to refuse access** to the HOA. D.R. Horton has made a request for a list of these homeowners in a letter attached hereto as Exhibit "G," and for reasons known only to the HOA's counsel, this request has been ignored.

12. On March 21, 2008, D.R. Horton received a revised schedule from the HOA for upcoming inspections, which also showed the numerous cancellations and gaps in the schedule that had occurred to date (Exhibit "H" hereto).

13. By Monday, March 24, 2008, gaps in the scheduled inspections became quite prevalent, burdening D.R Horton and its subcontractors with paying

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for its consultants to wait for long periods of time in between units. Consultants were expected to show up each day at 8:00 AM, whether or not an inspection was scheduled at that time, and gaps of more than four (4) hours in between units became the norm.

14. On March 26, 2008, D.R. Horton's consultants, and not the HOA, advised D.R. Horton that the HOA revised the inspection schedule yet again. The HOA unilaterally scheduled only four (4) or less inspections for each day for March 26, 2008 through March 28, 2008. D.R. Horton immediately objected to the HOA's unannounced derivation from the revised schedule (Exhibit "G").

15. As set forth in D.R. Horton's Motion to Compel Compliance with NRS 40.6462, filed concurrently herewith, from March 31, 2008, through April 10, 2008, D. R. Horton received numerous revised schedules, with a minimal number of units made available for inspection. Only 31 units were inspected in this interval, with gaps of up to seven (7) hours in between inspections, for an average of 3 homes per day. It is evident that homeowners have little knowledge of the claims being made on their behalf, let alone a willingness to let strangers come into their home and inspect.

16. To date, only 153 of the total of 314 units at the project have been inspected. The HOA's practices of going door to door at the last second, and making last minute phone calls to schedule inspections has led to less than half of the units being provided. The tapering off of access to these units only verifies D.R. Horton's concern that the chance of the HOA gaining access to all units is becoming less likely each week.

17. For more than have of the alleged affected units, the HOA has failed to provide D.R. Horton its statutory right to inspect, frustrating D.R. Horton and its subcontractors abilities to effectuate repairs, if warranted.

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18. Instead, Plaintiff's counsel continues to only obtain access to approximately two to three units per day, while attempting to discourage D.R. Horton from exercising its rights under ***NRS*** 40.6462.

III. DEFECTS ALLEGED WITHIN THE PRIVATE UNITS

In this action, the HOA seeks to recover for the following alleged defects which are contained within the private units and are the subject of this Motion:

Structural:

11.01 Wallboard system failure; cracking

11.02 Wallboard ceiling and wall stains

14.01 Floor sheathing is improperly fastened.

15.01 Shower enclosure system failure; stained framing.

Electrical:

E.1 At the termination points of aluminum wires in the panels, lack of wire preparation and insufficient torque tightness of conductors.

E.2 The load center is recessed and over cut into the wall space beyond the code allowance.

E.3 The general quality of workmanship in the Electrical system does not meet the code.

E.3.1 Debris in panel.

E.3.2 Vague directory.

E.3.3 Open knockouts.

E.3.4 Lower/upper hallway switches reversed (9460 Thunder Sky 103).

E.3.5 Zero Torque on neutral (8810 Horizon Wind 103).

E.3.6 Exhaust fan not flush.

E.3.7 Wall switch cover bent (8785 Traveling breeze 101).

E.3.8 Fittings are not fire-sealed at main panel.

E.3.9 The outlet boxes in the fire-rated wall spaces are not installed in a Code-approved assembly to assure fire-resistant integrity of the wall space.

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E.3.10 The Ground Fault Circuit Interrupter outlet failed to trip within the established thresholds.

E.4 The groundling electrode system is not effectively bonded together.

E.5 The cables were inadequately supported or not supported at all.

E.6 NM cables are well within 6 ft. radius of attic access.

E.7 At the fire rated wall spaces or floor assemblies and the attic access areas, the cables are running through fire rated walls or framing members, in openings much greater than the conductor diameter.

E.8 The non-metallic cables in bored holes thru studs and framing plates, and are within the restricted area specified by Code without the use of required steel protection plates.

E.9 The boxes for wiring, devices and splices are required to be flush to the finished surface.

E.10 The outlet for the dishwasher and disposal cords has been placed in an area where it is now blocked by the finish installation of the cabinets and plumbing.

E.11 The required outlet along floor line is not present at wall spaces.

E.13 The recessed lighting fixtures contain paint overspray.

E.14 The class 2 thermostat wires are a type PJ2, a non rated wire for exposed use.

E.15 A/C disconnect is not sealed against the entry of washer where the disconnect is attached to the structure.

Plumbing:

P.1 3-wall fiberglass shower or combination bath/shower modules have "in-wall" valves, spouts and shower arms, are not properly aligned or adequately secured to the wall structure, the spout nipple and valve penetrations are not properly sealed.

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P.2a The master tubs and Plan 102 shower pans lack support bedding materials; fixtures creak and pop when stepped upon.

P.2b The wainscot panel surrounds are not properly sealed.

P.3 Toilets (a) are not securely mounted to the wood framed floors and/or (b) closet bend grade slab penetrations are not sealed and/or the closet ring is not secured to the floor.

P.4 Water heaters are inadequately sized, lack sufficient capacity and recovery rates to satisfy the hot water demands of the residence.

P.5 Water heater drip collection pans discharge into a 2" pipe nipple which is not integrated into the floor materials, the 2" line improperly reduces down to 1" and pans' tailpiece is not solidly connected to the discharge pipe; and are undersized.

P.6 Water heater temperature and pressure relief valve discharge lines contain corrugated connectors which fail to meet the valve's surface temperature minimums and creates a reduction in the discharge pipe's size.

P.7 Water heater seismic restraint devices are either lacking 'vee' blocks or the devices are not installed.

P.8 Water heater shutoff valves and/or heater connections are prematurely corroding/failing.

P.9 Water heater flues ("B" vent stack) lack appropriate materials and fittings.

P.10 Washing machine utility box have hose bib water connections, piped with plastic tubing, lack sufficient rotating resistive stability to permit proper operation; and/or the support arms are backwards and the box is set-back from the drywall's face; and/or are improperly located in the party walls.

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P.11 Washing machine drain pans are equipped with 1" undersized outlets, do not provide complete drainage, laundry area wall/floor joints are not sealed and are not curbed/dammed to control/direct surface water flow and piping does not discharge to the sanitary sewer.

P.12 Free-standing gas ranges are either lacking or have improperly installed "anti-tip" bracket.

P.13 Dishwasher drain hoses from the air gap to the disposer are either kinked or trapped, thus lacking positive slope.

P.14 Pedestal lavs located in the 103 Guest Bathroom have interior cleanouts that are inaccessible due to the lav's pedestal.

P.15 Individual unit water service laterals lack individual shut off valves.

P.17 Pressure reducing valves installed on the interior surface of the garage walls are vulnerable and exposed to mechanical injury.

Mechanical:

M.1 The refrigerant lines are not properly weatherproofed at the building line. Condensers are not secured to the pad.

M.2 FAUs sleeping on suspended angle iron hangers lack "securement" and anti-sway stabilizers.

Please see the defect reports prepared by consultants to the HOA and enclosed with the Chapter 40 Notice. A copy of the reports is attached hereto as Exhibit "I" and incorporated herein by this reference.

IV. LEGAL ARGUMENT

In Nevada, a homeowners' association has the right to bring suit in its own name only "on matters affecting the common-interest community." ***NRS*** 116.3012(1)(d). In this case, however, the HOA has brought defect claims which are not limited to the common-interest community. Instead, the HOA has placed at issue alleged defects which are exclusively related to individual units for which only the legal owner has standing to pursue at trial or release in a settlement.

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Because the HOA is not entitled to pursue claims for defects exclusively related to individual units, and which do not affect the common-interest community, partial summary judgment in favor of D.R. Horton on these particular defects is proper as a matter of law.

A. **STANDARD OF REVIEW.**

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. Adv. Op. No. 73, 121 P.3d 1026, 1030-31 (Oct. 20, 2005).

While the pleadings and other proof must be construed in a light most favorable to the non-moving party, that non-moving party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. *Id.*, 121 P.3d at 1030-31. The non-moving party "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against him." *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

In this case, there can be no dispute that the above-listed defects are exclusively related to individual units and do not affect the common-interest community. There are no genuine issues of material fact regarding these defects. Therefore, as a matter of law, D.R. Horton is entitled to partial summary judgment on the defects listed above.

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B. **PARTIAL SUMMARY JUDGMENT IS PROPER BECAUSE THE ASSOCIATION LACKS STANDING TO PURSUE CLAIMS FOR ASSOCIATION LACKS STANDING TO PURSUE CLAIMS FOR DEFECTS EXCLUSIVELY RELATED TO INDIVIDUAL UNITS, OUTSIDE THE COMMON INTEREST COMMUNITY, TO WHICH IT IS NOT THE REAL PARTY IN INTEREST.**

The Supreme Court, the Legislature, and the HOA's own governing documents make it abundantly clear that if the HOA wishes to pursue a claim on behalf of unit owners, the claim must affect the common-interest community. The HOA does not have the right nor the standing to serve an ***NRS*** 40.645 Notice or to bring suit on behalf of unit owners where the alleged defects are exclusively related to individual units. Moreover, allowing the HOA to proceed on these claims could later preclude unit owners from individual recovery or allow double recovery. Finally, the HOA's suit in its own name is improper under Nevada law and the Nevada Rules of Civil Procedure because it skirts well-established class action requirements. Because each of the defects listed in this Motion is unquestionably related exclusively to the individual units, there is no genuine issue of material fact precluding summary judgment.

1. The Nevada Supreme Court Has Not Conferred Standing On The HOA To Pursue Claims For Defects Exclusively Related To Individual Units That Do Not Affect the Common-Interest Community.

In *Deal v. 999 Lakeshore HOA*, 94 Nev. 301 (1978), the Nevada Supreme Court addressed whether a condominium homeowners' HOA may sue for construction defects and held as follows:

> "NRCP 17(a) provides: 'Every action shall be prosecuted in the name of the real party in interest.' In the absence of any express statutory grant to bring suit on behalf of the owners, or a direct ownership interest by the association in a condominium within the development, a condominium management HOA does not have standing to sue as a real party in interest. (citations). Only the owners of condominiums have standing to sue for construction or design defects to the common areas, since they must eventually bear the costs of assessments made by the HOA."

Deal, at 94 Nev. at page 304; See also *Colfer v. Harmon*, 108 Nev. 363, 367 ("[O]nly condominium owners have standing to sue for construction or design

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defects.").

Since the decision in *Deal*, the Nevada Legislature in 1992 passed the Uniform Common Interest Ownership Act, ***NRS*** Chapter 116. The only express power to bring suit on behalf of unit owners was set forth in ***NRS*** 116.3102(1)(d), entitled "Powers of the HOA", which provides that an HOA may "[i]nstitute, 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."

Although ***NRS*** Chapter 116 does provide broader express powers for associations than what was allowed in *Deal*, the statute falls short of allowing an association to bring a claim on behalf of individual unit owners for defects which are exclusively related to individual units and do not affect the common-interest community.

To date, no Nevada decision has addressed what construction defects come within the "common interest community" pursuant to ***NRS*** 116.3102(1)(d), nor does the legislative history illuminate the matter. States which have addressed the issue have ruled that a condominium HOA may only pursue damages claims within the common interest community for those defects for damages that "results from injury to property in which all of the unit owners have a common interest." See *Villa Sierra Condominium HOA v. Field Corporation*, 787 P.2d 661, 667 (1990) ("[W]hile an HOA may generally obtain declaratory or injunctive relief without joining its members, any litigation designed to obtain damages on their behalf would normally require the members' presence"); see also *Equitable Life Assurance v. Tinsley Mill*, 249 Ga. 769, 772 (1982)(Court granted summary judgment against homeowners' HOA for lack of standing ruling "[a] party may have capacity to sue without being the real party in interest. Here the rights sought to be enforced are the right to recover for damages to property and the right to have that property protected against continuance of a nuisance.

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Those rights belong to the owners of the property damaged- the condominium owners here.")

In this case, the HOA has not joined any unit owners to the lawsuit, and is suing solely on its behalf for damages on behalf of the unit owners. While this is appropriate for common area defects pursuant to ***NRS*** 116.3102(1)(d), under the holding of *Deal*, the HOA is prohibited from bringing damage claims belonging to an individual unit owner because there is no express legislative grant allowing such a claim by the HOA.

2. Neither ***NRS*** Chapter 116 Nor ***NRS*** 40.600 et seq. Confer Standing on the HOA to Pursue Claims For Defects Exclusively Related To Individual Units That Do Not Affect the Common-Interest Community.

In enacting ***NRS*** Chapter 116 and ***NRS*** 40.600 et seq., the Nevada Legislature explicitly did not confer standing on homeowners' associations to bring claims that do not affect the common-interest community. "Common-interest community" is defined as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate other than that unit." ***NRS*** 116.021. "Unit" means the boundary of the unit by the walls and floor per ***NRS*** 116.2102.

NRS Chapter 116 permits an association to bring litigation "on behalf of itself or two or more units' owners on matters affecting the common-interest community." ***NRS*** 116.3102(1)(d). ***NRS*** 40.615 defines a construction defect as "a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance...." A "residence" is further defined at ***NRS*** 40.630 as "any dwelling in which title to individual units is transferred to the owners." ***NRS*** 40.630 An "appurtenance" is a "structure, installation, facility, amenity or other improvement that is appurtenant to or benefits one or more residences, but is not a part of the dwelling unit." ***NRS*** 40.605.

While it is permissible under ***NRS*** 40.610 for a "Claimant" under the pre-

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litigation provisions of ***NRS*** Chapter 40 to be "[a] representative of a homeowners association that is responsible for a residence or appurtenance and is acting within the scope of his duties pursuant to Chapter 116 or 117 of ***NRS***," the statute explicitly states that the homeowners association must be "**responsible** for [the] residence or appurtenance." ***NRS*** 40.610(2) (emphasis added). Moreover, the homeowners association must be "acting **within the scope of his duties pursuant to Chapter 116 or 117**." *Id.* (emphasis added).

Thus, while ***NRS*** 40.610 permits a homeowners association to bring a construction defect claim, ***NRS*** 40.600, ***et seq.*** does not confer any greater standing than what is provided in ***NRS*** Chapters 116 and 117 and in the association's governing documents. By failing to extend the powers of associations in any of these statutes, the Legislature made it abundantly clear that if an association such as the HOA wished to assert an ***NRS*** 40.600, ***et seq.*** construction defect claim on behalf of individual unit owners, the HOA must be responsible for the residence or the claim must affect the common-interest community. ***NRS*** 116.3102(1)(d). The defects that are the subject of this Motion do not meet either of these standards.

3. <u>The Governing Documents of the HOA Do Not Confer Standing On The HOA To Pursue Claims For Defects Exclusively Related To Individual Units That Do Not Affect the Common-Interest Community.</u>

The HOA is not responsible for individual units in the High Noon at Arlington Ranch development. According to the governing documents of the HOA, the HOA owns the common elements and is responsible for their maintenance, but it does not have the duty, nor does it have the right, to maintain non-common area elements exclusively related to individual units which do not affect the common-interest community.

The High Noon at Arlington Ranch Declaration of Covenants, Conditions & Restrictions (the "CC&Rs") clearly distinguishes between common elements and units, and limits the HOA's responsibility to common elements. The CC&Rs

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Section 1.20 defines "Common Elements:"

Section 1.20 defines "Common Elements:"

> Section 1.20 "Common Elements" shall mean all portions of the Properties conveyed to and owned by the HOA, and all Improvements thereon. Subject to the foregoing, Common Elements may include, without limitation: private main entryway gates for Properties; private entryway monumentation and entry landscaping areas for the Properties; Private Streets; sidewalks; perimeter walls, fences; common landscape and greenbelt areas; hardscape and parking areas (other than Garages); all water and sewer systems, lines and connections, from the boundaries of the Properties, to the boundaries of Units (but not including such internal lines and connections located inside Units); pipes, ducts, flues, chutes, conduits, wires, and other utility systems and installations (other than those located within a Unit, which outlets shall be a part of the Unit), and heating, ventilation and air conditioning, as installed by Declarant or the HOA for common use (but not including HVAC which serves a single Unit exclusively). Common Elements shall constitute "Common Elements" with respect to this Community, as set forth in ***NRS*** § 116.017.

See, HOA CC&Rs §1.20 attached hereto as Exhibit "A".

Section 2.12 of the CC&Rs states, "The HOA shall own the Common Elements." Then, under the Heading "Functions of HOA," and the subheading, "Section 5.1 Powers and Duties," subsection (b) describes the HOA's responsibilities to maintain the common elements:

> Section 5.1 Powers and Duties:
>
> (b) Maintenance and Repair of Common Elements. The power and duty to cause the Common Elements to be maintained in a neat and attractive condition and kept in good repair (which shall include the power to enter into one or more maintenance and/or repair contract(s), including contract(s) for materials and/or services, with any Person(s) for the maintenance and/or repair of the Common Elements), pursuant to this Declaration and in accordance with standards adopted by the ARC, and to pay for utilities, gardening, landscaping, and other necessary services for the Common Elements. Notwithstanding the foregoing, the HOA shall have no responsibility to provide any of the services referred to in this subsection 5.1(b) with respect to any Improvement which is accepted for maintenance by any state, local or municipal governmental agency or public entity. Such responsibility shall be that of the applicable agency or public entity. Exhibit "A" at § 5.1(b).

The Section goes on to enumerate other powers and duties of the HOA, such as paying taxes on common elements, hiring a manager and keeping

records. See, Exhibit "A" at § 5.1(e), (h) & (n). The CC&Rs do provide a section on "Maintenance of Other Areas," but the section is limited to slopes, parkways, entry structures and community signs. See, Exhibit "A" at § 5.1(o).

Nowhere do the CC&Rs confer either the responsibility or the right to maintain the individual units. Units are described in the CC&Rs as follows:

> Section 1.77 "Unit" or "Residential Unit" shall mean that residential portion of this Community to be separately owned by each Owner (as shown and separately identified as such on the Plat), and shall include all Improvements thereon. As set forth in the Plat, a Unit shall mean a 3-dimensional figure: (a) the horizontal boundaries of which are delineated on the Plat and are intended to terminate at the extreme outer limits of the Triplex Building envelope and include all roof areas, eaves and overhangs; and (b) the vertical boundaries of which are delineated on the Plat and are intended to extend from an indefinite distance below the ground floor finished flooring elevation to 50.00 feet above said ground floor finished flooring, except in those areas designated as Garage Components, which are detailed on the Plat. Each Residential Unit shall be a separate freehold estate (not owned in common with the other Owners of Units in the Module or Properties), as separately shown, numbered and designated in the Plat. Units shall include appurtenant Garage Components, and certain (presently, Units 2 and 3 in each Module), but not all Units shall include Yard Components. Declarant discloses that Declarant has no present intention for any Unit 1 in a Module to have any Yard Component. The boundaries of each Unit are set forth in the Plat, and include the above-described area and all applicable Improvements within such area, which may include, without limitation, bearing walls, columns, floors, roofs, foundations, footings, windows, central heating and other central services, pipes, ducts, flues, conduits, wires and other utility installations.

Exhibit "A" at § 1.77.

Unit Owners are responsible for the maintenance of the Units pursuant to Section 9.3 of the CC&Rs. Exhibit "A" at § 9.3. The HOA's maintenance responsibility, meanwhile, is limited to the common elements. Exhibit "A" at § 5.1. The only time an HOA may correct an item for which the Unit Owner is responsible is when a Unit Owner allows the item to fall into disrepair, creating, "a dangerous, unsafe, unsightly or unattractive condition." Exhibit "A" at § 9.6. In such a case, the HOA has the right, but not the responsibility, to make the repair at the owner's cost. Exhibit "A" at § 9.6. Nothing in the CC&Rs gives the HOA the right or the

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responsibility to maintain the individual units, other than in these extreme cases of lack of maintenance by a unit own.

The defects enumerated in this Motion do not present the "disrepair" envisioned in the CC&Rs. Nor are these defects common elements for which the HOA is responsible. Furthermore, the HOA's governing documents do not expand the Associations' standing to bring construction defect claims beyond that which is conferred in ***NRS*** Chapters 40 and 116. Because the defects enumerated in this Motion are exclusively related to the individual units, and are solely within the Unit Owners' responsibility to maintain, these particular defects do not, and in fact, cannot affect the common-interest community. Therefore, the HOA is precluded, by statute and by its own governing documents, from serving an ***NRS*** Chapter 40 Notice of Defect, asserting a claim or recovering damages for these defects.

C. ONLY UNIT OWNERS HAVE THE RIGHT TO BRING CLAIMS FOR DEFECTS EXCLUSIVELY RELATED TO INDIVIDUAL UNITS WHICH DO NOT AFFECT THE COMMON-INTEREST COMMUNITY.

Alleged defects within the interior of the units involve property claims belonging to the individual unit owners, and cannot be deemed "common interest community" under the Uniform Common Interest Ownership Act, ***NRS*** Chapter 116. There has to be a dividing line between defects in which all unit owners have a collective property interest (such as common areas) and those defects for which only a particular unit owner could logically recover damages. Without this defining line, the limitation of "common interest community" becomes meaningless, and the HOA is permitted to enter a blurred area of property ownership that makes mediation and trial impossible to resolve or adjudicate.

Further, none of these statutes or the CC&Rs allow the homeowners association to preempt what is lawfully the right of the unit owners to bring a claim for defects exclusively related to their individual residences.

Allowing such a distortion of the statute would permit the HOA to sue and

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collect damages for defects exclusively related to individual units which rightfully belong to the individual unit owner, for which the Association could not legally enter the unit and coerce repairs. Further, the HOA's recovery of these damages could lead to two undesirable results. One result is that the individual unit owner would be precluded from individual recovery in a later suit because the HOA had already recovered for defects exclusively related to individual's home. The other possible result is a double recovery if the individual unit owner later brought suit for the same defects, because the homeowner would have a persuasive argument that it is he, not the HOA, who is the proper party to recover damages for defects exclusively related to homeowner's individual's unit.

D. THE ASSOCIATION CANNOT BE PERMITTED TO CIRCUMVENT NRCP 23 BY BRINGING A CLASS ACTION LAWSUIT AS AN HOA LAWSUIT.

There are 342 individual units at High Noon at Arlington Ranch and the HOA's lawsuit alleges defects exclusively related to most, if not all, of those individual units. However, not one single homeowner is a party to the lawsuit. By maintaining an action for individual unit defects on behalf of the unit owners, the HOA is basically maintaining a class action without undergoing the analysis and scrutiny of NRCP 23.

The Association is stretching and straining ***NRS*** 116.3102(d) so far beyond its limits that it renders the Nevada Supreme Court's decision in *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (Nev. 2005) irrelevant. In *Shuette*, the Nevada Supreme Court went through a painstaking and detailed analysis to demonstrate what is necessary for class certification in a construction defect action. *Id.* at 846-853, 124 P.3d at 537-542. In spite of this, the HOA has brought what is basically a class action lawsuit on behalf of all homeowners in the development, with the HOA as the class representative. Allowing the HOA's counsel to move forward would enable the HOA to skirt NRCP 23 and the Court's decision in *Shuette*. Under this interpretation of ***NRS*** Chapter 40, any construction

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defect litigation involving community associations could become basically a class action by acquiring only the support of the homeowners association's board of directors and without a homeowner vote.

V. CONCLUSION

For all the foregoing reasons, D.R. Horton respectfully requests that its Motion for partial summary judgment be granted and that aforementioned listed defects be stricken from the claims that may be made at trial by the HOA.

DATED: April 11, 2008

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IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CLARK COUNTY, AND THE HONORABLE SUSAN B. JOHNSON, DISTRICT COURT JUDGE, **Respondents,** and D.R. HORTON, INC., Real Party in Interest.	CASE NO.: 58630 Eighth Judicial District Court Clark County, Nevada Case No.: 07-A542616 Dept No. XXII **ANSWERING BRIEF TO PETITION FOR WRIT OF MANDAMUS**

ANSWERING BRIEF TO PETITION FOR WRIT OF MANDAMUS

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ANSWERING BRIEF TO PETITION FOR WRIT OF MANDAMUS

COMES NOW, Real Party in Interest, D.R. HORTON, INC., by and through its counsel, KOELLER NEBEKER CARLSON & HALUCK, LLP, and hereby submits this ANSWERING BRIEF IN RESPONSE TO PETITIONER HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATIONS' PETITION FOR WRIT OF MANDAMUS.

Real Party in Interest asserts that extraordinary relief is not warranted in this instance and respectfully requests that Petitioner's Writ of Mandamus be denied in its entirety.

DATED this 15th day of August, 2011.

KOELLER NEBEKER CARLSON
& HALUCK, LLP

BY: _____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

TREATISES

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On February 10, 2011, the District Court entered an Order declaring that, regardless of how the High Noon Homeowner's Association [the "Association"] acquired "standing" to pursue claims in a representative capacity on behalf of its homeowners, the Association was not permitted to bypass or circumvent an NRCP 23 analysis as to alleged defect to the interior of each unit pursuant to this Court's holding in *First Light II*. Despite the Association's attempts to argue to the contrary, the District Court's Order was entirely correct in this regard.[1] No matter how "standing" was conferred upon the Association, the Association is still required to make a showing that the alleged claims it wishes to bring in a representative capacity pass an NRCP 23 analysis under this Court's binding precedent. The Association, however, incorrectly argues that it is not required to make such a showing under NRCP 23, as it acquired "standing" to sue by way of assignment from the homeowners. Ultimately, however, the assignments are nothing more than a failed attempt at an "end-run" around this Court's holding in *First Light II*.

Further, the Association incorrectly contends that it would pass an NRCP 23 analysis in regards to the "structural systems" and "fire resistant systems" located within the units. It must be noted that the Association has only contacted 194 of the more than 300 owners of the units at issue. This fact – in conjunction with the fact that several homeowners have not executed the invalid assignments at issue – demonstrates the severe deficiencies in the Association's attempt and/or potential to satisfy NRCP 23. Ultimately, despite the Association's myriad attempts at arguing to the contrary, this matter is simply not appropriate for representational treatment and the Association's Petition must be denied.

[1] Real Party In Interest asserts the District Court was incorrect in regards to its handling of the "building envelope" issues dealt with in the same February 10, 2011 Order. Those issues were discussed within Real Party In Interest's Petition for Writ of Mandamus filed with this Court on June 9, 2011, Supreme Court Case No. 58533. Real Party In Interest reserves any and all rights and arguments in this regard.

STATEMENT OF THE CASE

High Noon at Arlington Ranch [hereinafter referred to as the "Development"] consists of 342 individual units in a development of 114 buildings in Las Vegas. Each unit is a separate, freehold estate within the common-interest community at the Development.

On June 7, 2007 the Association improperly and prematurely filed a Complaint against Petitioner. (*See*, Association's Complaint, attached hereto as Exhibit "1"). The Complaint alleged a myriad of construction defects in common areas and residential buildings at the Development. (*Id.*). The Association sought and was granted a stay in order to comply with the NRS Chapter 40 pre-litigation process. (*See*, Order of the District Court, dated August 13, 2007, attached hereto as Exhibit "2"). On January 21, 2008, six months after the filing of the Complaint, the Association sent an inadequate notice pursuant to NRS 40.645 (hereinafter "Chapter 40 Notice"). The Chapter 40 Notice also alleged a myriad of defects in both the common areas and residential buildings. On that same day, the Association sent a supplemental Chapter 40 Notice. (*See*, the Association's Notice Pursuant to Chapter 40, dated January 21, 2008, attached hereto as Exhibit "3"). To date, the Chapter 40 process is still at issue and Real Party In Interest asserts the Association's compliance continues to be deficient.

On April 14, 2008, D.R. Horton brought a Motion for Partial Summary Judgment, which argued that the Association lacked standing to bring suit for claims regarding buildings that were owned and maintained by individual homeowners. (*See*, D.R. Horton's Motion for Partial Summary Judgment, dated April 14, 2008, attached hereto as Exhibit "4") (Attachments to Original omitted).

On July 9, 2008, the District Court granted the Motion for Partial Summary Judgment in D.R. Horton's favor, finding that the Association lacked standing to bring claims related to the individual units at the Development. That finding was based in part on the Development's Conditions, Covenants and Restrictions (hereinafter "CC&Rs"). (*See*, District Court Order Granting D.R. Horton's Motion for Partial Summary Judgment, dated July 9, 2008, attached hereto as Exhibit "5").

In response to the District Court's Order Granting Motion for Partial Summary Judgment, on November 28, 2008, the Association filed a Petition for Writ of Prohibition or Mandamus with this Court. (*See*, the Association's Petition for Writ of Prohibition or Mandamus, dated November 20, 2008, attached hereto as Exhibit "6") (Attachments to Original omitted). This Court granted the Petition on September 3, 2009, concluding that Respondent Court needed to conduct an analysis pursuant to this Court's holding in *First Light II*. (*See*, Nevada Supreme Court Order Granting Petition, dated September 3, 2009, attached hereto as Exhibit "7"). The Association then filed a Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d) on September 30, 2010. In that Motion, the Association argued that it had "standing" to sue for defects in the individual units on behalf of 194 homeowners, as the homeowners' "standing" was transferred to the Association via assignment. (*See*, the Association's Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d), dated September 30, 2010, attached hereto as Exhibit "8") (Attachments to Original omitted).

D.R. Horton filed an Opposition to the Motion, arguing, *inter alia*, that the CC&Rs clearly designate exterior walls, windows and roofs of each home as belonging to the individual unit owner. (*See*, D.R. Horton's Opposition to the Association's Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d), dated October 19, 2010, attached hereto as Exhibit "9"). D.R. Horton further argued that the assignment of the claims to the Association could not be relied upon to grant "standing" to the Association because the assignment had conditioned recovery by any homeowner on assigning their right to sue to the Association. (*Id.*). D.R. Horton finally contended that the Association had yet to make a showing as to the alleged defects and, under *First Light II*, the alleged defects could not satisfy the requirements of NRCP 23. (*Id.*).

The Association filed a reply to Petitioner's Opposition and argued the homeowners' assignments of rights would afford it standing to sue because a person is permitted to contractually assign their legal rights to others. (*See*, the Association's Reply to D.R. Horton's

Opposition to the Association's Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d), dated November 3, 2010, attached hereto as Exhibit "10").

This Motion was heard on November 10, 2010. The Court entered its Order on February 10, 2011. (*See*, Transcript of District Court Hearing of November 10, 2010, attached hereto as Exhibit "11"). The District Court found that it did not matter how the Association came to be in a representative capacity for the individual homeowners; the assignments by the Development's homeowners did not allow the Association to circumvent an NRCP 23 analysis under *First Light II* as to the interior of each unit. (*See*, District Court Order, dated February 2, 2011, attached hereto as Exhibit "12").

In spite of this finding, and contrary to its Original Order from July 9, 2008, the District Court also conducted no NRCP 23 analysis for alleged defects to the "building envelope." In fact, the Court stated that the NRCP 23 analysis was unnecessary in that regard; yet, it went on to define the "building envelope" as exterior walls, wall openings (such as windows and doors) and roofs. (*Id.*). The Court then granted the Association the right to sue on behalf of individual homeowners for alleged defects to the "building envelope." (*Id.*).

The Association incorrectly contends the February 10, 2011 Order was in error and seeks a Writ of Mandamus directing the District Court to vacate its order, in part, and order the Association has "standing" by way of the assignments to pursue all constructional defect claims relating to the individual units, including the structural and fire-resistive systems in residential buildings containing more than one unit, and standing pursuant to N.R.S. 116.3102(1)(d) to maintain constructional defect claims relating to the same systems in all 114 of the residential buildings.

D.R. Horton filed a Motion for Reconsideration of the February 10, 2011 Order on March 1, 2011, based on Respondent Court's inconsistent analysis and incorrect application of *First Light II*. (*See*, D.R. Horton's Motion for Reconsideration, dated March 1, 2011, attached hereto as Exhibit "13"). Respondent Court denied D.R. Horton's Motion for Reconsideration

following a hearing on the Motion on March 29, 2011.

D.R. Horton filed a Petition for Writ of Mandamus, or in the Alternative, Writ of Prohibition, regarding Respondent Court's February 10, 2011 Order on June 9, 2011. (*See*, D.R. Horton's Writ Petition, Supreme Court Case No. 58533, dated June 9, 2011, attached hereto as Exhibit "14") (Attachments to Original omitted). This Court directed the Association to Answer D.R. Horton's Writ Petition on August 10, 2011. (*See*, Nevada Supreme Court Order, Nevada Supreme Court Document No. 11-24296, dated August 10, 2011, attached hereto as Exhibit "15").

The Association filed the instant Petition for Writ of Mandamus on June 22, 2011. (*See*, the Association's Petition for Writ of Mandamus, dated June 22, 2011, on file herein). This Court directed D.R. Horton to file an Answering Brief in response to the Association's Writ Petition on July 5, 2011. (*See*, Nevada Supreme Court Order, Nevada Supreme Court Document No. 11-19795, dated July 5, 2011, attached hereto as Exhibit "16").

ARGUMENT

I. THE ASSOCIATION CANNOT BYPASS THE REQUIRED NRCP 23 ANALYSIS AND PURSUE ALL ALLEGED CONSTRUCTIONAL DEFECT CLAIMS SIMPLY BECAUSE CERTAIN HOMEOWNERS ALLEGEDLY ASSIGNED THE ASSOCIATION THE RIGHT TO SUE ON BEHALF OF INDIVIDUAL UNITOWNERS.

The Association argues that, because the homeowners assigned the Association the right to sue for damages arising from alleged defects within their units, it has "standing" to pursue all alleged claims on behalf of approximately 194 unit owners[2]. The Association points to case law from both Nevada and other jurisdictions, which purportedly stand for the general proposition that assignments are legally-recognized instruments for assigning one's right to sue to another. The Association fails to recognize, however, that pursuant to the mandates of *Shuette* and *First Light II,* Respondent Court would still be required to conduct a thorough and documented NRCP 23 examination, regardless of the how "standing" was acquired.

[2] It is unclear at this point how many of the homeowners that executed these assignments are still owners of the homes at issue. It is likely that several no longer own the homes given the volatile nature of the housing market in Southern Nevada.

Additionally, the law of assignments dictates that the Association is not entitled to broader rights than that which the homeowners possessed prior to the assignment, and, in this instance, the Association therefore cannot bypass an analysis of the requirements set forth in NRCP 23. As such, the Association cannot utilize the purported assignments as a mechanism for evading the analysis under NRCP 23 as to the units at issue, the building envelopes, or on behalf of the individual homeowners.

A. The Association did not acquire a valid, legal assignment from the homeowners.

The Association did not acquire a valid, legal assignment from the homeowners, as, *inter alia*, the homeowners did not transfer their entire interest in the lawsuit to the Association. The Restatement (Second) of Contracts provides that "[a]n assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance." Restatement (Second) of Contracts § 317(1). Generally, the elements of an effective assignment include a sufficient description of the subject matter to render it capable of identification, and delivery of the subject matter, with the intent to make an immediate and **complete transfer of all right, title, and interest in and to the subject matter to the assignee.** 29 Williston on Contracts § Section 74:3 (4th ed.) [emphasis added].

Further, this Court recently held in *Ruiz v. City of North Las Vegas*, released May 19, 2011, that "[w]hile we recognize the general rule that [rights] are freely assignable in the absence of language to the contrary, an assignment that has the effect of increasing the nonassigning party's obligations or risks under the contract is prohibited." 127 Nev. Adv. Op. 20, 255 P.3d 216, 221 (2011). This Court also recently reiterated that "'an assignment does not modify the terms of the underlying contract. It is a separate agreement between the assignor and assignee which merely transfers the assignor's contract rights, leaving them in full force and effect as to the party charged.'" *Easton Bus. Opp. v. Town Executive Suites*, 126 Nev. Adv. Op. 13, 230 P.3d 827, 831 (2010) (quoting, *Citibank, N.A. v. Tele/Resources, Inc.*, 724 F.2d 266, 269 (2d Cir.1983)). As such, the separate agreement constituting an assignment must

comport with the elements of the formation of a contract, including the giving of consideration by the assignee. *See*, *Mack v. Estate of Mack*, 125 Nev. ___, ___, 206 P.3d 98, 108 (2009) (stating generally that a settlement agreement, like any contract, is only enforceable where there is "an offer and acceptance, meeting of the minds, and **consideration**." (emphasis added)).

First, it is not entirely clear that the current homeowners were even able to assign an interest in the current litigation to the Association, as the majority of the homeowners who assigned their interests are not the original purchasers of the units and therefore do not have a contractual relationship with D.R. Horton. Additionally, the homeowners did not transfer their entire interest in the lawsuit to the Association and therefore did not create a valid assignment.

To illustrate, pursuant to the language of the assignments, it is the homeowners – and not the Association – that would allegedly share in the "recovery" from the litigation in the event of a settlement or in the event of a judgment. (*See*, Assignment of Ellen J. Ross, dated June 12, 2010, attached hereto as Exhibit "17") (*see also*, Appendix II attached to the Association's Petition, pages 6-198, on file herein). In fact, the homeowners will have to remain active in the underlying litigation, in that they are subject to depositions, to being called to testify at trial, etc. The Association is not acting as its own, separate entity in this litigation and has not fully "stepped into the shoes" of the homeowners. For these reasons, the homeowners maintain an interest in the litigation and therefore did not properly assign their interests in the litigation in its entirety to the Association. Therefore, the Association did not acquire valid legal assignments from the homeowners and the Association's argument that these legally invalid assignments somehow take precedence over statutory "standing" is without merit.

Additionally, pursuant to the language of the assignments, "[i]t is understood that nothing in [the] Assignment should be construed to obligate THE ASSOCIATION, in any way to undertake or pay for any particular repairs to any individual unit." (*Id.*). No other language in the Assignment provides for the consideration given by the Association to the Homeowners which would support the proper formation of a contractual assignment of rights from the

Homeowners to the association. The Association has no obligation to do anything under the language of the assignments. (*Id.*). The assignments relied upon by the Association to demonstrate that it has standing to bring suit on behalf of the Homeowner's at the Development, therefore, are not legally valid and thus cannot be enforced or confer some fictional extra-statutory based standing upon the Association. As such, the Association's Petition for Writ of Mandamus must be denied.

B. Regardless of whether the homeowners assigned their right to sue, standing to sue on behalf of the homeowners is conferred by N.R.S. 116.3102(1)(d) and the Association is subject to the mandates of *Shuette* and *First Light II.*

Notwithstanding that certain homeowners allegedly assigned the Association the right to sue, the dictates of both *Shuette*[3] and *First Light II* cannot be bypassed.

NRS 116.3102(1)(d) states as follows:

> **NRS 116.3102 Powers of unit-owners' association; limitations.**
> 1. Except as otherwise provided in this section, and subject to the provisions of the declaration, the association may do any or all of the following:
> . . .
>
> **(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)**

This Court has interpreted NRS 116.000 *et seq.* as providing an express statutory grant of standing on homeowners associations to assert claims affecting the common-interest community. *First Light II,* 215 P.3d 697, 701. However, the Court declared that this statutory grant must be reconciled with the principles and analysis of class action lawsuits and the concerns related to constructional defect cases. Id. at 703.

Here, the Association asserts that it has standing based on the homeowners' assignments and not on NRS 116.000, *et. seq.* It requests this Court issue a Writ of Mandamus ordering the District Court to confer upon it "standing" to assert claims as to individual units,

[3] *Shuette v. Beazer Homes Holding Corp.*, 121 Nev. 837, 854-57, 124 P.3d 530, 542-44 (2005).

as well as to the "building envelopes" because it obtained assignments from the homeowners. This argument is a blatant attempt to somehow circumvent the requirements of *Shuette* and therefore elude the class certification requirements of NRCP 23. The Association puts forth no statutes, case law, or any other relative authority that stands for the proposition that somehow an assignment would bypass or takes precedence over "standing" that is conferred by way of statute or allow it to move forward without being subject to NRCP 23. This is a blatant attempt to circumvent the laws of this State and the prior holdings of this Court, which has made it clear that class action certification is rarely appropriate in constructional defect matters and that any claims brought in a representative capacity must withstand NRCP 23 scrutiny. The Associations' Petition must therefore be denied.

Further, the Association is clearly attempting to represent the interests of the Homeowners and argues it has stepped into the Homeowners' shoes. Under this faulty view, if the Association had truly stepped into the shows of the Homeowners, each Homeowner would be entitled to recovery obtained by the Association in his and/or her name. Based on the language of the assignments, however, "[i]f THE ASSOCIATION is determined by the Court not to be allowed to sue the builder for some defects, only those HOMEOWNERS who have assigned their claims to THE ASSOCIATION will be able to share in the recovery." (*See*, Exhibit "17") (*see also*, Appendix II attached to the Association's Petition, pages 6-198, on file herein).

The above-quoted clause included in the assignments appears to provide that any obtained recovery in this matter will be "shared" by Homeowners who assigned their right to sue to the Association. This demonstrates the Association's intent to bring these claims in a representational capacity, subject to *First Light II* and *Shuette*, which requires a showing that the alleged claims withstand an NRCP 23 analysis. The type of recovery that would result from allowing the Association to pool money recovered and have all assignor Homeowners "share" in such recovery is the exact sort of recovery which NRCP 23 seeks to prevent. The proper method here is to have each Homeowner bring an individual suit, not allow the Association to

bypass NRCP 23 – by way of a legally invalid assignment – so that assignor Homeowners can "share" in a recovery. Evidence of each alleged defect must be proven for each Homeowner in this instance and it is clear the association is trying to bypass this requirement.[4] As such, under the language of the assignments entered into between the Association and the Homeowners, if seen as valid – a point which Real Party In Interest in no way concedes – the Association's Petition must be denied.

C. The Association is not afforded greater rights under an assignment than the homeowners had absent the assignment, and the Association is still subject to an NRCP 23 analysis.

Even assuming *arguendo* that the Association has valid assignments, it still could not bring an action on behalf of these homeowners without undergoing the proper NRCP 23 analysis, as it did not acquire greater rights than those afforded the homeowners absent the assignment. The case cited by the Association as summing up the alleged "nationwide trend" in assignment law, *ACLI Intern. Commodity Services, Inc. v. Banquet Populaire Suisse*, states that "[t]he parties to an assignment are now free to agree by contract to virtually any form of assignment, **subject to such general limitations as the principle that an assignee can receive no greater rights than the assignor possessed.**" (609 F. Supp. 434, 441-442 (S.D.N.Y. 1984) [emphasis added].

Although the Association may have acquired "standing" based on NRS 116.3102(1)(D), it argues it has some different form of "standing" based on the homeowner's assignments. The Association further argues that it may somehow bypass a NRCP 23 analysis because it has "standing" based on the assignments and not the statute. Absent the assignments however, the homeowners themselves would still be required to obtain class certification pursuant to the mandates of *Shuette*, if the case were not brought by the Association pursuant to NRS 116.3102(1)(D). *See*, *Shuette,* 124 P.3d at 545. The Association, by arguing it is not subject to an NRCP 23 analysis simply because it acquired "standing" based on the assignments is therefore attempting to confer upon itself greater rights that those which were afforded the

[4] As will be discussed in detail in the following Section, the claims which the Association seeks to bring in a

homeowners absent the assignments. Assuming the Association "steps into the shoes" of the individual homeowners, as argued by the Association, then allowing the Association to bypass NRCP 23 when the assignor homeowners would not be entitled to this right [if the suit were brought in a representational capacity] would be giving the Association – the assignee – rights greater than the homeowners – the assignors.

This claim, that an assignment of a right to sue allows the Association to bypass the requirements of NRCP 23, cannot be tolerated. This Court's mandates in *Shuette* are applicable to the situation at hand regardless of what vehicle is employed to confer "standing" upon the Association. The Association, therefore, must still demonstrate that the claims it is seeking to bring as assignee and on behalf of its individual homeowner members passes an analysis under NRCP 23 prior to being permitted to bring these claims in a representative capacity.

The Association has simply fabricated a method by which it is attempting to bypass statutory standing because, under *Shuette* and *First Light II*, it still has to withstand a NRCP 23 analysis, which it is unable to do. The Association has attempted to create a "catch-all" mechanism by which it can bring all claims by all homeowners without the required showing, which is in direct contravention to the laws of this State. Further, even if the assignments properly granted the Association "standing" to sue on behalf of the homeowners, the assignments do not eradicate statutory standing and do not allow the Association to bypass the requirements of *Shuette*. Either way, the Association must withstand a thorough examination of the factors of NRCP 23 prior to bringing claims in a representative capacity.

Additionally, the Association's contention that it can assert representative claims on behalf of its Homeowners for all exterior alleged defects, pursuant to the assignments, as each set of three Homeowners in a triplex would be able to, is in direct contradiction of the CC&Rs of the Development. The CC&Rs at the Development clearly define the boundaries of each individually owned Unit as:

> "Unit" or "Residential Unit" shall mean that residential portion of this community to be separately owned by each owner . . . . As set forth in the Plat, a Unit shall mean a 3-dimentional figure: (a) the horizontal boundaries of which

representative capacity do not pass an NRCP 23 analysis.

> are delineated on the Plat and are intended to terminate at the extreme outer limits of the Triplex Building envelope and include all roof areas, eaves and overhangs. . . . Each residential Unit shall be a separate freehold estate (not owned in common with the other Owners of Units in the Module or Properties), as separately shown, numbered and designated in the Plat. . . . The boundaries of each Unit are set forth in the Plat, and include the above described area and all applicable improvements within such areas, which may include, without limitation, bearing walls, columns, floors, roofs, foundations, footings, windows, central heating and other central services, pipes, ducts, flues, conduits, wires and other utility installations."

(*See*, The High Noon at Arlington Ranch CC&Rs, at Section 1.77, attached hereto as Exhibit "17").

The CC&Rs' definition of a Unit at the Development includes the roof and exterior walls. As such, the Association's argument that it may assert claims for alleged defects to the entirety of exterior structures in each triplex by simply obtaining the assignment of one of the three unit owners of that triplex is wholly without merit. Accepting this view would greatly increase the rights of the Association when considered against that of each individual Homeowner, as a single unit owner in a triplex does not own the exterior walls and roof of the other two units housed within the same triplex building. Further, the Association's attempt to bring claims for an entire triplex building based on the assignment of a single unit owner in that triplex clearly shows the Association's intent to bring these claims in a representational capacity. The Association's intent puts it squarely within this Court's jurisprudence regarding representational claims by Homeowners' Associations, and subject the Association here to an NRCP 23 analysis.

Therefore, based on the language of the CC&Rs, the Association must still pass an NRCP 23 analysis prior to being allowed to bring representative claims on behalf of Homeowners, pursuant to this Court's holding in *Shuette*, regardless of whether the Association is granted standing from the assignments themselves. The definition of Units at the Development necessarily require that an NRCP 23 analysis be conduct by the District Court to determine if the alleged defects claimed by the Association and sought to be brought in a representative capacity are proper for such a representative-type suit. As each Homeowner is individually responsible for their own roof and exterior walls, alleged defects

to the exterior of each unit should be required to be brought individually as they are not proper for a representative suit.

As such, Real Party in Interest respectfully requests that this Court deny the Association's Petition for Writ of Mandamus as the assignments obtained by the Association, if seen as valid – a point not conceded by Real Party in Interest – does not allow the Association to bypass this Court's holdings in *First Light II* or *Shuette* prior to bringing a representative action.

II. THE ASSOCIATION CANNOT SATISFY THE REQUIREMENTS OF NRCP 23 AND THEREFORE CANNOT PURSUE CLAIMS IN A REPRESENTATIVE CAPACITY ON BEHALF OF INDIVIDUAL HOMEOWNERS.

As concluded by the District Court in its February 10, 2011 Order, the Association fails to meet the requirements of NRCP 23 (a) and (b) and relies upon generic terms and vague causes of action in an attempt to demonstrate that a representational action is appropriate. First, the Association fails on all four elements of NRCP 23 (a), as it cannot meet the requirements of numerosity, commonality, typicality, and adequacy. Second, the Association cannot meet the requirements of NRCP 23 (b), as a representative action is not the superior method of adjudication of these claims, because common questions of law and fact do not prevail over those of each individual homeowner.[5]

A. The Association does not meet the requirements contained in NRCP 23 (a) and cannot bring this action in a representational capacity.

Before a class action can be certified, it must be shown that the putative class has so many members that "joinder of all members is impracticable." *See* NRCP 23 (a)(1). *See also*, *Shuette*, 124 P.3d at 537. Further, impracticability of joinder "cannot be speculatively based on merely the number of class members, but must be positively demonstrated in an 'examination of the specific facts of each case.'" *Shuette*, at 537.

[5] It must be noted that the Association's Petition did not contest the District Court's ruling in regards to any of the interior defect claims with the exception of "structural" and "fire-resistive" systems. As such, any and all arguments regarding satisfaction of NRCP 23 is waived.

The Association argues it meets the numerosity element because "litigating over 300 claims individually would not be judicially economical, especially when dealing with similar breach of warranty and negligence claims." The Association's argument contains no information regarding the specific facts of each case and how the alleged breach of warranty or negligence claims are similar. Rather, the Complaint simply states there are alleged defects relating to structural, fire safety, waterproofing defects, deficiencies in the civil engineering/landscaping, roofing, stucco and drainage, architectural, mechanical, plumbing, HVAC, acoustical, electrical, and those related to the operation of windows and sliding glass doors. The Association has failed, however, to show that these alleged defects are similar amongst homeowners, or that the number of homeowners with these claims is so numerous that joinder is impracticable. An Association cannot make wildly blanketed statements and assertions to demonstrate compliance with NRCP 23. Rather it is required to show that the represented body is too numerous to be joined in one action, which it cannot.

Here, joinder of the parties is not impossible. The Association has purported assignments from only 194 of the 300 unit owners, and the Association itself admits that it could not contact a great deal of the homeowners. (*See*, the Association's Petition for Writ of Mandamus, at Page 17, Lines 21-25). That homeowners cannot be reached, however, does not make the matter appropriate for representational treatment when the weight of Nevada case law is adamantly opposed to the same. *See*, *Shuette,* 124 P.3d at 543. For these reasons, the Association has not demonstrated that it satisfies the "numerosity" requirement set forth in NRCP 23(a).

The Association also cannot demonstrate the "commonality" of the alleged defects. Under *Shuette*, commonality does not require that all questions of law and fact be identical among homeowners; however, an issue of law or fact must be present in the complaints of all members of the represented body. Id. at 538. Again, the Association provides no information identifying the location of the alleged defects, which areas in the units are allegedly affected, or even which buildings structures are allegedly affected. The Association merely states that the

"common issue is whether D. R. Horton negligently construed and breached any express or implied warranties in constructing the buildings or units." (*See, id.*, at Page 18; Lines 17-21).

What the Association is required to demonstrate is that the **alleged defects** are common to all homeowners, not simply the cause of action upon which it bases its lawsuit. It is painfully clear that the Association cannot demonstrate that alleged defects are in fact common to all of the Homeowners. Again, the Complaint alleges defects relating to structural, fire safety, waterproofing defects, deficiencies in the civil engineering/landscaping, roofing, stucco and drainage, architectural, mechanical, plumbing, HVAC, acoustical, electrical, and those related to the operation of windows and sliding glass doors. (*See*, Exhibit "1"). The Complaint fails to demonstrate that these alleged defects are common amongst homeowners, or are even typical amongst the 194 homeowners on behalf of which the Association argues it has "standing" by assignment. For these reasons, the Association has not demonstrated that it satisfies the "commonality" requirement set forth in NRCP 23(a).

The third prong of a class certification analysis focuses on "typicality." *See*, NRCP 23(a)(3). Typicality demands that the claims or defenses of the representative parties be typical of those of the class. *See, Shuette* at 538. Generally, the typicality prerequisite concentrates on the defendant's actions, not the plaintiff's conduct. *Id.* Here, the Association has made no showing as to the "typicality" of the alleged defects, as it has failed to establish which units suffer from alleged defects, the types of alleged defects within each building, various theories of liability for the alleged defects, and damages required to compensate homeowners. Thus, claims and defenses are not typical of the entire representational body of homeowners. A homeowner who has alleged structural problems is not in the same position as a homeowner who has alleged problems in the fire-resistant system contained within the building. Not only can these not be classified as the same alleged claims, the defenses to these alleged claims are entirely different and require entirely different analyses of causation. The Association therefore cannot demonstrate the claims amongst homeowners are "typical," and thus also fails this portion of the NRCP 23 analysis.

Finally, and true to form, the Association has failed to demonstrate that it can satisfy the "adequacy" requirement of NRCP 23(a)(4). The Association cannot fairly and adequately represent the interests of all homeowners when the alleged defects differ among homeowners, thereby making their claims, defenses, causation and liability different amongst all homeowners. Further, the Association cannot fairly and adequately protect the claims of all homeowners, as a large percentage of the homeowners – more than 100, or 1/3 of the Homeowners at the Development – have not assigned their rights to the Association. As the District Court properly noted, it is likewise unclear how representational litigation would be judicially efficient, as the possibility exists that the approximately 148 unit owners who did not assign their claim may choose to bring litigation at another time. (*See*, Exhibit "12"). There is also a strong argument for the fact the Association cannot represent the interests of the homeowners in this case, as it has created an affirmative conflict through its use of assignments. Regardless, the Association has failed to demonstrate that it can adequately represent the interests of all homeowners involved. For these reasons, the Association has not demonstrated that it satisfies the "adequacy" requirement set forth in NRCP 23(a)(4).

The Association does not withstand an NRCP 23(a) analysis, and therefore representational treatment is not appropriate in this matter. Real Party in Interest thus respectfully requests that this Court deny the Association's Petition for Mandamus.

B. The Association does not meet the requirements contained within NRCP 23 (b) and cannot represent the interests of the homeowners involved.

Because the Association does not withstand analysis under NRCP 23(a), it is not necessary to analyze whether the Association meets the requirements presented in NRCP 23(b). Nevertheless, the Association would not pass muster under a NRCP 23(b) analysis, as common questions do not predominate over individual questions and representational treatment is therefore not the best method of adjudication.[6] As most of the Association's failed analysis

[6] The Association must meet one of the three requirements contained in NRCP 23(b). In its Petition for a Writ of Mandamus, the Association only focuses on NRCP 23(b)(3). Likewise, this Answering Brief focuses solely on the Association's inability to satisfy the requirement contained within NRCP 23(b)(3).

was based largely upon the fact that it did not put forth alleged defects within individualized units which are common to, or typical of, all homeowners, the Association likewise misstates that claims and common questions prevail over that of each individual homeowner.

The Association points to case law from other jurisdictions, but glosses over the leading authority of its own state. In any constructional defect case in Nevada, representational actions are only superior when management difficulties and any negative impacts on all parties' interests "are outweighed by the benefits of class wide resolution of all issues." *Shuette*, 124 P.3d at 549. Further, the "predominance" inquiry is more demanding than the commonality or typicality requirements of NRCP 23(a), and the importance of common questions must predominate over the importance of questions peculiar to individual members. *Id.* at 540.

The Association has blatantly failed to state what question or issue is common to all homeowners. It states, rather, that several of the buildings suffer from alleged problems with the "structural systems," or the "fire-resistant systems." This does not demonstrate that one common defect [which is caused by the same source; can be repaired in exactly the same manner; is located in the same location in each Unit; and will cost the same to repair] affects each homeowner. Further, the only benefit of class wide resolution is that the Association allegedly advances all costs related to the litigation.

The Association's arguments fall far short of outweighing the negative impacts on the interests of all parties because the Association has not stated what the common issue is. For instance, should the homeowners receive money as a result of this lawsuit, it is likely to be dispersed in a disproportionate manner among all homeowners and homeowners with minor alleged defects could stand to benefit at the expense of those who are proven to have experienced more significant alleged defects. Ultimately, however, because there is no question that is common to all homeowners, it is not possible for one question to predominate over individual issues. Again, and at the heart of this issue, not all homeowners have been shown to have the same alleged claims and/or the same alleged defects. That individual claims

are sacrificed and cannot be resolved is the precise reason why class actions are not the appropriate method of adjudication of most constructional defects matters.

For these reasons the Association cannot satisfy the requirements of NRCP 23(b)(3). Real Party in Interest, therefore, respectfully requests that this Court deny the Association's Petition for Writ of Mandamus.

C. *First Light II* does not distinguish between alleged defects amongst the interior and the exterior of an individual unit, and any type of alleged defect must withstand an NRCP 23 analysis.

The Association, in its Petition for a Writ of Mandamus, acknowledges that, under the mandates of *First Light II*, any alleged defects related to the structural systems or fire-resistant systems must meet the requirements of NRCP 23. Likewise, the District Court recognized in its February 10, 2011 Order that, because the fire-resistive, plumbing, and electrical systems are considered "within" each individualized unit, they are subject to an NRCP 23 analysis. However, the District Court erred in finding that the "building envelopes" – because they contain alleged defects relating to the exterior of each home – are part of the common-interest community and are therefore not subject to NRCP 23 scrutiny.[7] Contrary to the District Court's Order, *First Light II* did not distinguish between alleged defects in the interior of the home and alleged defects affecting the exterior of the home. Under *First Light II,* all alleged defects within each individualized Unit must withstand NRCP 23 scrutiny before a homeowners association can bring suit on behalf of its homeowners in a representative capacity. *First Light II*, 215 P.3d at 700.

Ultimately, common sense dictates that, simply because an alleged defect might allegedly affect the exterior of a home does not, in essence, mean it affects the entire common-interest community. It is contrary to this Court's precedent to distinguish between interior and exterior defects, and to conclude the latter must withstand NRCP 23 scrutiny while the former does not. There is no indication whatsoever that the *First Light II* Court intended there to be

[7] The issues surrounding the District Court's ruling regarding the "building envelope" is the subject of D.R. Horton's Petition for a Writ of Mandamus, filed with the Court on June 9, 2011. (*See*, Exhibit "14").

such a distinction. Therefore, the "building envelopes", as well as the structural systems, must still undergo a thorough NRCP 23 analysis.

Furthermore, should the "building envelopes" and/or structural systems undergo such an analysis – for the reasons outlined in detail above – the analysis would fail. Specifically, if the alleged structural systems of some of the buildings were in fact found to be defective, this would result in damages awarded to the entire community and to homeowners not affected by this issue. It would be impossible to determine the amount, or appropriation dispersion of, alleged damages to each individual homeowner for that homeowner's claimed alleged defects. This is the exact scenario *First Light II* aims to prevent.

The Association therefore fails to satisfy the requirements of NRCP 23(a) and NRCP 23(b). Additionally, bypassing an NRCP 23 analysis because the alleged defects at issue affect the exterior of the building, and not the interior, is contrary to this Court's prior holdings. All defects, then, must undergo scrutiny under NRCP 23, and those sought by the Association here are not proper for a representational claim as they do not pass an NRCP 23 analysis.

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CONCLUSION

For the foregoing reasons, Real Party In Interest respectfully requests that the Association's Petition for Writ of Mandamus be denied in its entirety.

DATED this 15th day of August, 2011.

KOELLER NEBEKER CARLSON
& HALUCK, LLP

BY: _____

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AFFIDAVIT OF IAN P. GILLAN, ESQ.
IN SUPPORT OF D.R. HORTON, INC.'S ANSWERING BRIEF IN RESPONSE TO HIGH NOON AT ARLINGTON RANCH HOMEOWNERS' ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, IAN P. GILLAN, ESQ., being first duly sworn on oath, deposes and states under penalty of perjury that the following assertions are true and correct, and of my own personal knowledge:

1. I am an attorney duly licensed to practice law in the State of Nevada, and I am a Partner of the law firm KOELLER NEBEKER CARLSON & HALUCK, LLP, attorneys for Real Party in Interest, D.R. HORTON, INC.'S ANSWERING BRIEF in response to Petitioner HIGH NOON AT ARLINGTON RANCH HOMEOWNERS' ASSOCIATION'S PETITION FOR WRIT OF MANDAMUS.

2. I hereby certify that I have read this Answering 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 matter in the record to be supported by a referenced to 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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3. I have discussed this ANSWERING BRIEF with the Real Party in Interest and have obtained authorization to file the same.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

IAN P. GILLAN, ESQ.

SUBSCRIBED and SWORN to before me this 15th day of August, 2011.

NOTARY PUBLIC

NOTARY PUBLIC
AUNDREA P. KEE
STATE OF NEVADA - COUNTY OF CLARK
MY APPOINTMENT EXP. JUN. 30, 2012
No: 08-7356-1

PROOF OF SERVICE

I HEREBY CERTIFY that on the 15th day of August, 2011, a copy of Real Party in Interest, Dr. Horton, Inc's ANSWERING BRIEF TO PETITION FOR WRIT OF MANDUS was served via E-filing with the Supreme Court of the State of Nevada and upon the following addresses by depositing a copy in the United States Mail at Las Vegas, Nevada postage fully prepaid:

Paul Terry, Esq.
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Honorable Judge Susan H. Johnson
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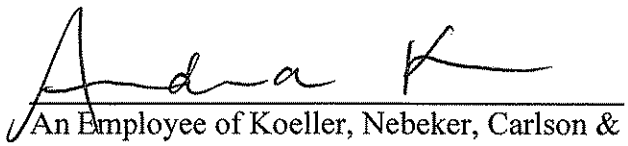

An Employee of Koeller, Nebeker, Carlson & Haluck, LLP