IN THE SUPREME COURT OF THE STATE OF NEVADA

HIGH NOON AT ARLINGTON RANCH HOMEOWNWERS ASSOCIATION, a Nevada non-profit corporation, Petitioner, v. EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the COUNTY OF CLARK; and the HONORABLE SUSAN H. JOHNSON, District Judge, Respondents, and D.R. HORTON, INC., Real Party in Interest	Case No. 58630 Clark County District Court Case No. A542616

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

ANGIUS & TERRY LLP
Paul P. Terry, Jr., Nevada Bar No. 7192
John Stander, Nevada Bar No. 9198
Melissa Bybee, Nevada Bar No. 8390
Asmara Tarar, Nevada Bar No. 10999
1120 N. Town Center Drive, Suite 260
Las Vegas, NV 89144
(702) 990-2017
Email: jstander@angius-terry.com
Email: atarar@angius-terry.com
Attorneys for Petitioner
High Noon At Arlington Ranch Homeowners Association

TABLE OF CONTENTS

GIUS & TERRY LLP
) N. Town Center Dr.
Suite 260
s Vegas, NV 89144
(702) 990-2017

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

TABLE OF AUTHORITIES

CASES

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

STATUTES

TREATISES

OTHER AUTHORITIES

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
.as Vegas, NV 89144
(702) 990-2017

I. ARGUMENT

A. The Association Acquired A Valid Assignment From The Assignor Homeowners Which Conveyed Assignee-Based Standing To The Association To Pursue: 1) All Claims Related To The Assignors' Units; And 2) All Claims Regarding The Building Envelopes, Structural Systems, And Fire-Resistive Systems Of The Assignors' Buildings.

High Noon consists of 342 units in 114 buildings. The Association has obtained written assignments from 194 unit owners out of a total of 342 units, and these assignments expressly include all of the construction defect claims relating to those unit-owners' units and buildings. *See* Petitioner's Appendix, Vol. II, pp. 253-446. The assigned units are located in 107 of the 114 buildings. *See* Petitioner's Appendix, Vol. II, p. 456 (map of the buildings containing the assigned units.) By virtue of these assignments, and without reliance on NRS Chapter 116 standing, the Association has assignee-based standing to pursue all constructional defect claims relating to the assigned units. Moreover, the Association derives- from the assignments- standing to pursue claims for defects in the building envelope, structural systems, and fire-resistive systems of those buildings. As discussed below, D.R. Horton's arguments regarding the invalidity of the Assignments are entirely meritless.

1. The Homeowners Who Assigned Their Claims To The Association Transferred Their Entire Interest In The Lawsuit To The Association.

The unit-owners' assignments were in writing and were quite clear and unambiguous in assigning all of their constructional defect claims, for both the units and the buildings, to the Association:

> "NOW, THEREFORE, and in exchange for valuable consideration, 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

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

> townhome project and/or HOMEOWNER'S unit, for defective construction."[1]

D.R. Horton claims that the homeowners did not transfer their entire interest in the lawsuit to the Association.[2] However, D.R. Horton's claim that the Association is not acting as its own, separate entity in this litigation and has not fully stepped into the shoes of the homeowners is entirely meritless. In *Sprint Communications Co., L.P. v. APCC Services, Inc.*, 554 U.S. 269, 128 S. Ct. 2531 (U.S. 2008), assignees of payphone operators brought separate Communications Act suits against long-distance carriers, seeking to recover dial-around compensation for coinless payphone calls required by Federal Communications Commission (FCC) regulation. 554 U.S. at 272-273. The U.S. Supreme Court held that: 1) the assignees had standing to bring claims arising from the payphone operators' injuries; 2) **the assignees were asserting first-party interests, having acquired all rights, title and interest in the operators' claims**; 3) the operators' choice to proceed by assignment rather than class action did not warrant a finding of no standing; and 4) an assignee of a legal claim for money owed has standing to sue in federal court, even when the assignee has promised to remit the proceeds of the litigation to the assignor. *Id.* at 285 – 291. The Court stated that:

> "Here, the [assignees] are suing based on *injuries* originally suffered by third parties. But the [assignors] assigned to the [assignees] all "rights, title and interest" in claims based on those injuries. Thus, in the litigation before us, the [assignees] assert what are, due to that transfer, *legal rights of their own*. The [assignees], in other words, are asserting first-party, not third-party, legal rights."

---

[1] *See* Petitioner's Appendix, Vol. II, p. 254 (emphasis added).

[2] D.R. Horton states that: "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." *See* D.R. Horton's Answering Brief to Petition for Writ of Mandamus at p. 7.

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

Id. at 290. The Court noted that the Assignment provided that each payphone operator "assigns, transfers and sets over" to the [assignee] all "rights, title and interest" in the dial-around compensation claims- the Court stated that this language demonstrated that the assignors had assigned their claims over to the assignees "lock, stock, and barrel." *Id.* at 286. The Court noted that within the past decade it has expressly held that an assignee can sue based on his assignor's injuries, citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773, 120 S. Ct. 1858 (2000) ("the assignee of a claim has standing to assert the injury in fact suffered by the assignor"). *Id.* at 286. Thus, based upon this analysis, it is clear that the Association has fully stepped into the shoes of the assignee homeowners and the Association has acquired standing to assert the injuries that have been suffered by the assignor homeowners.

Next, D.R. Horton claims that the homeowners did not transfer their entire interest in the lawsuit to the Association, because "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 judgment." *See* D.R. Horton's Answering Brief at p. 7. However, pursuant to the Association's fiduciary duty, the funds recovered by the Association will be utilized to redress the injuries for which this suit has been brought. The funds will be utilized to repair the construction defects in the High Noon community. Moreover, even if the Association intended to simply disburse the recovered funds to the assignor homeowners, this would not negate the Association's standing. In *Sprint Communications Co., L.P.*, the U.S. Supreme Court soundly rejected the notion that an assignee of a legal claim lacks standing simply because the assignee has promised to remit the proceeds of the litigation to the assignor:

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

> "Petitioners next argue that the [assignees] cannot satisfy the redressability requirement of standing because, if successful in this litigation, the [assignees] will simply remit the litigation proceeds to the [assignors]. But petitioners misconstrue the nature of our redressability inquiry. That inquiry focuses, as it should, on whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation-not on what the plaintiff ultimately intends to do with the money he recovers....[Here], a legal victory would unquestionably redress the *injuries* for which the [assignees] bring suit."

554 U.S. at 286-287.[3] For all of the foregoing reasons, D.R. Horton's claims regarding the invalidity of the Assignments must be rejected.

2. There Is A Presumption That An Assignment In Writing Is Supported By Sufficient Consideration, And A Recital Of Consideration In An Assignment Is Prima Facie Evidence Of Such Consideration. The Assignments Contain A Valid Recital Of Consideration.

D.R. Horton claims that the Association "has no obligation to do anything under the language of the Assignments," and thus there is no consideration given by the Association to the homeowners which would support the proper formation of a contractual assignment of rights. *See* D.R. Horton's Answering Brief at pp. 7-8. However, the Assignments clearly state that **in exchange for valuable consideration**, the homeowner is assigning to the Association all of its claims and causes of action against D.R. Horton.[4] There is a presumption that an assignment in writing is supported by sufficient consideration; and a recital of consideration in an assignment is prima facie evidence of such consideration, in the absence of evidence to the contrary. 6 Am. Jur. 2d *Assignments* § 147 (2011); *see also Nebco &*

---

[3] *See also id.* at 284 – 285, citing 6A Wright & Miller § 1545, at 346-348 ("federal courts have held that an assignee for purposes of collection who holds legal title to the debt according to the governing substantive law **is the real party in interest even though the assignee must account to the assignor for whatever is recovered in the action**") (emphasis added).

[4] The Assignment states, in relevant part, that: "NOW, THEREFORE, and in exchange for valuable consideration, HOMEOWNER hereby assigns to THE ASSOCIATION all of the claims and causes of action that HOMEOWNER possesses against D.R. Horton, Inc....". *See* Petitioner's Appendix, Vol. II, p. 254.

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

Associates v. U.S., 23 Cl.Ct. 635, 645 (Cl.Ct. 1991) (a recital of consideration in an assignment is prima facie evidence of such consideration, in the absence of evidence to the contrary); *Massie v. Massie*, 91 Ohio App. 169, 171-172, 101 N.E.2d 222 (Ohio App. 1951) (the court noted that the assignment recited that it was "for value received;" the court stated that the assignment itself imports a valuable consideration and in the absence of evidence to the contrary, the court had a right to conclude that the assignment was given for a valuable consideration); *id.* at 173-174, citing *Roberts v. Friedman*, 96 Pa. Super. 530, 1929 WL 3799 (Pa. Super. 1929) ("The assignment of the chose states that it was for a 'valuable consideration.' Whether it was for forbearance in instituting an action or some other valuable consideration, we are not informed, and it is not important. It is difficult to get stronger evidence that there was a valuable consideration than that of an expressed acknowledgement over the assignor's signature."). Thus, the High Noon Assignments are entirely valid.

a. The Association's Board Has A Statutory Fiduciary Obligation To Act In The Best Interest Of The Homeowners.

D.R. Horton claims that there is no consideration for the Assignments because the Association "has no obligation to do anything" under the language of the Assignments. *See* D.R. Horton's Answering Brief at pp. 7-8. However, D.R. Horton's claims are entirely flawed, because the Association and its homeowner members all possess the same interest in proving the existence of the defects and otherwise seeking compensation to remedy the defective condition of the building components. Each member of the Association's board has a **fiduciary duty** to act in the best interest of the Association- NRS 116.3103(1) states that:

> "in the performance of their duties, the officers and members of the executive board are fiduciaries and shall act on an informed basis in good faith and in the honest belief that their actions are in the best interest of the association. The members of the executive board are required to exercise the ordinary and reasonable care of directors of a corporation, subject to the business judgment rule."

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

These clearly defined duties imposed on the Association's board members benefit the unit owners as they include maintenance, repair and/or replacement obligations for the triplex buildings. If the Association were to violate its statutory obligation by refusing to make repairs or by mishandling funds that may be recovered from this lawsuit, the homeowners would then be able to bring a claim against the Executive Board for violation of its fiduciary duty.[5] Thus, D.R. Horton's claims regarding the lack of consideration must be rejected.

3. Even If There Was No Consideration For The Assignments, The Lack Of Consideration Would Not Negate The Validity Of The Assignments.

An assignment of a chose in action is valid after delivery even though made without consideration. *Nebco & Associates*, 23 Cl.Ct. at 645, citing 6A C.J.S. *Assignments* § 60 (1975 & Supp 1991) and 6 Am.Jur.2d *Assignments* §90 (1963 & Supp. 1991). *See also Sprint Communications Co., L.P.*, 554 U.S. at 285, citing 6 Am.Jur.2d, Assignments § 184, pp. 262-263 (1999) (footnote omitted) ("An assignee for collection or security only is within the meaning of the real party in interest statutes and entitled to sue in his or her own name on an assigned account or chose in action, although he or she must account to the assignor for the proceeds of the action, **even when the assignment is without consideration**.") (emphasis

---

[5] *See, e.g., Sprint Communications Co., L.P.*, 554 U.S. at 288 ("Moreover, to the extent that trustees, guardians ad litem, and the like have some sort of "obligation" to the parties whose interests they vindicate through litigation...,[the] same is true in respect to the [assignees] here. The [assignees] have a [contractual] obligation to litigate [in the payphone operator's interest.]...(And if the [assignees] somehow violate that contractual obligation, say, by agreeing to settle the claims against the long-distance providers in exchange for a kickback from those providers, each payphone operator would be able to bring suit for breach of contract.").

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

added). Thus, even if there had been no consideration present, the High Noon homeowners' Assignments would still be valid.[6]

4. The Assignments Are Valid Because They Do Not Afford The Association Greater Rights Than The Homeowners Had Absent The Assignment.

D.R. Horton cites the case of *Ruiz v. City of North Las Vegas*, 127 Nev. Adv. Op. 20, 255 P.3d 216, 221 (2011) for the proposition that an assignment that has the effect of increasing the nonassigning party's obligations or risks under the contract is prohibited. *See* D.R. Horton's Answering Brief at p. 6. D.R. Horton is claiming that the fact that the homeowners have assigned their claims to the Association has modified the terms of the contract between D.R. Horton and the homeowners by allowing the homeowners to bypass NRCP 23. However, the Assignments here do not have the effect of increasing D.R. Horton's obligations or risks under its contract with the homeowners. In *Easton Bus. Opp. v. Town Executive Suites*, ___ Nev. ___, 230 P.3d 827, 831 (2010), citing *Citibank, N.A. v. Tele/Resources, Inc.*, 724 F.2d 266, 269 (2nd Cir. 1983), the Nevada Supreme Court explicitly recognized that an assignment does not modify the terms of the underlying contract:

> "[A] standard no-oral-modification clause cannot be pressed into service as an anti-assignment clause because, without more, [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."

As the Court noted in *Deal v. 999 Lakeshore Association*, 94 Nev. 301, 305, 579 P.2d 775 (1978), the owners of condominium units are real parties in interest to pursue actions for

---

[6] D.R. Horton cites the case of *Mack, Estate of Mack*, 125 Nev. ___, 206 P.3d 98, 108 (2009) for the proposition that a settlement agreement is only enforceable where there is an offer and acceptance, meeting of the minds, and consideration. *See* D.R. Horton's Answering Brief at p. 7. However, the *Mack* case involved a divorce settlement, *see id.* at 108, and is thus entirely inapplicable here. The *Mack* case did not involvement an assignment of a cause of action.

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

constructional defect claims, in that they bear the costs of replacement or repair of those defects. By virtue of the Assignments, the homeowners' standing has simply been transferred to the Association, and the Association is the real party in interest under NRCP 17(a) to assert those claims. *Easton Bus. Opp.*, 230 P.3d at 831, citing 6A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure*: Civil 2d § 1545, at 350-51 (even when the claim is not assigned until after the action has been instituted, the assignee is the real party in interest under NRCP 17(a) and can maintain the action). Thus, the Association is simply seeking to assert the same claims that the homeowners would have been entitled to assert on an individual basis if they had not assigned their claims over to the Association.

a. First *Light II* And NRCP 23 Only Apply To An Association's Statutory Standing Under NRS 116.3102(1)(d). *First Light II* And NRCP 23 Are Inapplicable When An Association Has Acquired Assignee-Based Standing As An Assignee Of The Assignor Homeowners' Rights.

D.R. Horton is entirely misguided in arguing that NRCP 23 applies to the Association's assignee-based standing. The Association's assignee-based standing pursuant to the law of Assignments is entirely different from the type of statutory standing that NRS 116.3102(1)(d) provides. *First Light II* and NRCP 23 are only implicated when discussing an Association's **statutory standing** under NRS 116.3102(1)(d). *First Light II* and NRCP 23 are not applicable where the Association has obtained **assignee-based standing** as an assignee of the assignor homeowners' rights. The fact that the assignee of the homeowners' claims happens to be the Association- who also happens to have possess a distinct type of standing in the form of NRS 116.3102(1)(d)- does not mean that the Association as an assignee is subject to an NRCP 23 analysis. For instance, hypothetically, if the homeowners had assigned their claims over to a person named X rather than to the Association, X would similarly be able to bring this Petition stating that it has standing to represent the homeowners for the defects in

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

their individual units based upon the Assignments. In that situation, D.R. Horton would not be able to claim that NRS 116.3102(1)(d) and NRCP 23/*First Light II* do not allow X to have standing, because that statute only deals with common-interest Associations, not individuals like X. Thus, if this Court accepts the Association's position that it has obtained valid standing under the law of assignments as an assignee of the assignor homeowners' claims, then it is also clear that NRS 116.3102(1)(d)/*First Light II*/NRCP 23 are inapplicable to that type of assignee-based standing. D.R. Horton claims that:

> "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 D.R. Horton's Answering Brief at p. 10. However, D.R. Horton's claim is entirely untrue. *First Light II* only held that if a homeowners association were to assert its statutory right under NRS 116.3102(1)(d) to bring a claim in a representative capacity on behalf of two or more unit owners, then an NRCP 23 analysis is required. *First Light II*, 215 P.3d at 704-705. If the homeowners themselves were to bring a claim on behalf of their units, they would not be required to obtain class certification, and they would not be required to satisfy NRCP 23. Thus, for instance, in a joinder action brought by individual homeowners for construction defects in their respective units, no NRCP 23 analysis is required. In *Sprint Communications Co., L.P.*, the Court recognized this fact, and the Court soundly rejected the petitioner's claim that the assignments represented an attempt by the assignors to circumvent the class action requirements of Rule 23:

> "[petitioners] suggest that the litigation here simply represents an effort by the [assignees] and the [assignors] to circumvent Federal Rule of Civil Procedure 23's class-action requirements. But we do not understand how "circumvention" of Rule 23 could constitute a basis for denying standing here. For one thing, class actions are permissive, not mandatory. More importantly, class actions constitute but one of several methods for bringing about aggregation of claims, i.e. they are but one of several methods by which multiple similarly situated parties get similar claims

GIUS & TERRY LLP
) N. Town Center Dr.
Suite 260
s Vegas, NV 89144
(702) 990-2017

resolved at one time and in one federal forum. See Rule 20(a) (permitting joinder of multiple plaintiffs)...".

554 U.S. at 290-291. For all of the foregoing reasons, the Association has acquired valid assignee-based standing to bring suit for construction defects in 1) the assignors' individual units; and 2) the building envelopes, structural systems, and fire-resistive systems of the assignors' buildings.

5. Under NRS 116.4114 And *Anse, Inc. v. Eighth Judicial District Court*, Subsequent Purchasers Can Pursue Claims For Constructional Defects And Breach Of The Implied Warranty Of Quality.

D.R. Horton claims that "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." *See* D.R. Horton's Answering Brief at p. 7.[7] However, Nevada's statutorily implied warranty of quality- NRS 116.4114(2)- states that:

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

D.R. Horton is the declarant. Upon D.R. Horton's sale of the High Noon units to the homeowners, D.R. Horton warranted that the buildings met the provisions of NRS 116.4114(2). Moreover, NRS 116.4114(6) provides that "**any conveyance of a unit**

---

[7] D.R. Horton's assertion that the **majority** of the assignee homeowners are not the original purchasers of the units is an entirely unsupported assertion, since D.R. Horton did not cite to any portion of the record to back up this claim. Nevertheless, as discussed herein, this information is entirely irrelevant.

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

transfers to the purchaser all of the declarant's implied warranties of quality." Thus, regardless of D.R. Horton's assertions, it is entirely irrelevant that some of the current homeowners may not be the original purchasers. Subsequent purchasers have the same rights to plead a breach of the statutory implied warranty as did the original purchasers. *See also Anse, Inc., v. Eighth Judicial District Court,* 124 Nev. 862, 872, 192 P.3d 738, 745 (2008) (holding that subsequent purchasers can pursue claims for construction defects under NRS Chapter 40).

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

D.R. Horton argues that because the exterior walls and building envelope are owned individually and are included in the definition of "unit"- they do not meet the criteria established by the Court in *First Light II* for a representative action. *See* D.R. Horton's Answering Brief at pp. 11 – 13. However, in a typical condominium or townhouse case, the Association has maintenance responsibility over the building envelope, and the Association therefore has standing in its own right to bring an action to redress defects in the envelope's construction. D.R. Horton deliberately drafted the High Noon CC&Rs in a manner designed to insulate itself from potential liability for constructional defect actions, by giving all of the maintenance and repair responsibilities to the homeowners of the buildings. The Court made clear in *First Light II* that NRS 116.3102(1)(d) provides the Association with the statutory standing to pursue claims on behalf of two or more homeowners on matters that affect the common-interest community, regardless of whether the CC&Rs state that the Association is

GIUS & TERRY LLP
) N. Town Center Dr.
Suite 260
s Vegas, NV 89144
(702) 990-2017

responsible for maintaining the building exteriors.[8] Thus, a developer's accountability for defective construction cannot be precluded simply because the CC&Rs define the term "unit" to include the exterior walls and building envelope.

For all of the foregoing reasons, Petitioner respectfully requests this Court to find that the Association has assignee-based standing to pursue claims relating to the interiors of the assignor homeowners' units, and also the building envelope, structural and fire-resistive systems in residential buildings which contain one or more units owned by assignor-homeowners.

B. The District Court Abused Its Discretion In Denying The Association Standing Pursuant To NRS 116.3102(1)(d) To Assert Claims In The Structural System And The Fire- Resistive System Because Those Defects, By Definition, Affect Two Or More Unit- Owners And Concern The Common-Interest Community.

The District Court abused its discretion in denying the Association standing pursuant to NRS 116.3102(1)(d) to assert claims relating to defects in the structural and fire-resistive systems of the buildings. This Court has recognized that an association has statutorily conferred standing, by virtue of NRS 116.3102(1)(d), to pursue claims for constructional defects on behalf of two or more unit-owners which affect the common-interest community. *First Light II,* 215 P.3d at 702. The buildings at High Noon are all triplexes. Defects in the building envelope, structural components or the fire-resistive components of the buildings, by their very nature, affect two or more unit-owners and affect the common-interest community. These defects affect every inhabitant of the building. A failure of the structural system will

---

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

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

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-owner. Repairs or maintenance of these systems would require coordination and contribution by all the unit owners in the building- a proposition that is, in reality, next to impossible. Because repairs cannot realistically be made without the coordination of the Association, the community is necessarily involved. For that reason, the Association has standing pursuant to NRS 116.3102(1)(d) to assert claims to regarding these defects.

C. The Association's Assertion Of Claims Relating To Defects In The Building Envelope, Structural Systems, And Fire-Resistive Building Components Satisfies An NRCP Rule 23 Analysis.

The Association's assertion of claims relating to defects in the building envelope, structural systems, and fire-resistive building components satisfies the class certification requirements of NRCP 23.

1. The Numerosity Requirement Is Satisfied.

The legislature has determined that a common-interest community association can proceed on behalf of just 2 of its members when the issue affects the common interest community. NRS 116.3102(1)(d). If the minimum number of homeowners required under an NRCP Rule 23 analysis is greater than two, it runs afoul of this legislative mandate. Accordingly, the numerosity requirement should be viewed in that light. Here, it is clear that more than 2 unit owners are affected by the alleged defects in the building envelope, structural systems and fire-resistive components. 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-owner. Moreover, the putative "class" of unit owners at High Noon at Arlington Ranch is sufficiently numerous to make joinder of all class members impracticable. There are 342 units in High

GIUS & TERRY LLP
) N. Town Center Dr.
Suite 260
s Vegas, NV 89144
(702) 990-2017

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.

2. The Common Questions Of Law And Fact Predominate Over Individual Questions.

Here, the predominant factual issue to be determined is whether the building envelope, structural systems and fire-resistive components are defective, and, if so, the extent of the repairs. The claims and defenses are common to every building. Plaintiff's Expert destructively tested 13 firewalls. *See* Petitioner's Appendix, Vol. I, p. 176. Defects were found in both the unit-to-unit fire walls and the garage-to-unit firewalls. *See id.* at pp. 176-190. Structural engineer Felix Martin of Marcon Forensics inspected the structural systems of the building and discovered serious structural deficiencies at each of the locations inspected. For example, they identified insufficient nailing at the shear walls, insufficient width of shear walls, nailing at foundation holdown straps missing, floor-to-floor holdown straps, and sill nailing missing rim joists at exterior walls. *See* Petitioner's Appendix, Vol. I, pp. 233-250 and Vol. II, p. 251-252. Each of the locations inspected showed structural insufficiencies and defects. *See id.* These defects, by their very definition, affect the entirety of the buildings in which they exist and, therefore, affect two or more homeowners. Thus, the common issues of law and fact predominate over any individual questions.

3. The Claims And Defenses Of The Association Are Typical Of The Class.

Here, the unit-owners who have assigned their claims to the Association have suffered injury from the same course of events as those who have not. Their claims rest on the very 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 in the

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

putative "class" would advance these same common constructional defect arguments were they to individually pursue relief for these defects. Therefore, the Association's claims and applicable defenses are typical of the entire High Noon at Arlington Ranch membership.

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

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. Thus, the Association will fairly and adequately protect the interests of the membership. Moreover, since the Association's board members are fiduciaries, they have an affirmative duty under the law to "act on an informed basis, in good faith and in the honest belief that their actions are in the best interest of the association." NRS 116.3103(1). These clearly defined duties imposed on the Association's board members benefit the unit owners as they include maintenance, repair and/or replacement obligations for the triplex buildings, and thus are adequate for these alleged constructional defect claims.

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

Here, the common issue of defects in the structural and fire-resistive components of the High Noon buildings, the sheer volume of potential class members, and the high costs in expert and legal fees easily tip the scale in favor of class-wide resolution. Allowing the present case to proceed as a class-action will minimize these burdens on the class, because investigations will be limited to a representative sample of homes, and the associated costs will be shared by all class members. Any attorney's fees and associated costs would also be shared by the class, as opposed to each individual class member's incurring his or her own attorney's fees and costs in an individual action based on the same main issues that apply to all. Thus, a representative action is the superior method of adjudication in the case at hand.

GIUS & TERRY LLP
) N. Town Center Dr.
Suite 260
s Vegas, NV 89144
(702) 990-2017

IV. CONCLUSION

For the forgoing reasons, Petitioner urges this Court to grant Petitioner's Petition for Writ of Mandamus.

Dated: September 7, 2011

ANGIUS & TERRY LLP

By: _____

Paul P. Terry, Jr., Nevada Bar No. 7192
John Stander, Nevada Bar No. 9198
Melissa Bybee, Nevada Bar No. 8390
Asmara Tarar, Nevada Bar No. 10999
1120 N. Town Center Drive, Suite 260
Las Vegas, NV 89144
Attorneys for Petitioner
High Noon At Arlington Ranch
Homeowners Association

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017

CERTIFICATE OF COMPLIANCE

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

Dated: September 7, 2011

ANGIUS & TERRY LLP

By: _____

Paul P. Terry, Jr., Nevada Bar No. 7192
1120 N. Town Center Drive, Suite 260
Las Vegas, NV 89144
Attorneys for Petitioner
High Noon At Arlington Ranch
Homeowners Association

GIUS & TERRY LLP
) N. Town Center Dr.
Suite 260
s Vegas, NV 89144
(702) 990-2017

CERTIFICATE OF SERVICE

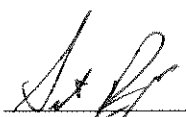
I HEREBY CERTIFY that on the 7th day of September, 2011, a copy of REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS was duly deposited in the United States mail, postage prepaid, addressed to and served upon the following parties:

ROBERT C. CARLSON, ESQ.
Nevada Bar No. 8015
MEGAN K. DORSEY, ESQ.
Nevada Bar No. 6959
IAN P. GILLIAN, ESQ.
Nevada Bar No. 9034
KOELLER, NEBEKER, CARLSON
& HALUCK, LLP
300 South Fourth Street, Suite 500
Las Vegas, NV 89101
Attorneys for D.R. Horton, Real Party in Interest

JOEL ODOU, ESQ.
Nevada Bar No. 7468
WOOD, SMITH, HENNING
& BERMAN, LLP
7670 W. Lake Mead Blvd., Suite 250
Las Vegas, NV 89128
Attorneys for D.R. Horton, Real Party in Interest

THE HONORABLE SUSAN JOHNSON
DEPARTMENT XXII
EIGHTH JUDICIAL DISTRICT COURT
OF CLARK COUNTY, NEVADA
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89101
Respondent

DATED this 7th day of September, 2011



An employee of Angius & Terry LLP

NGIUS & TERRY LLP
20 N. Town Center Dr.
Suite 260
as Vegas, NV 89144
(702) 990-2017