IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court No.:
District Case Court No. 07A542616

D.R. HORTON, INC.

Petitioner,

v.

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

Respondent,

ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada non-profit corporation,

Real Party in Interest.

PETITIONER, D.R. HORTON, INC.'S PETITION FOR WRIT OF PROHIBITION OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

D.R. Horton, Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of D.R. Horton, Inc.'s stock;

D.R. Horton, Inc. is represented in the District Court and in this Court by Joel Odou, Esq. and Victoria Hightower, Esq. of the law firm of Wood, Smith, Henning & Berman, LLP.

Dated: April 14, 2014

WOOD, SMITH, HENNING & BERMAN LLP

By: _____

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VERIFICATION AFFIDAVIT OF JOEL D. ODOU, ESQ.

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, Joel D. Odou, Esq. being first duly sworn on oath, deposes and states under penalty of perjury:

1. I am an attorney duly licensed to practice law in the State of Nevada, and I am an attorney with the law firm, WOOD, SMITH, HENNING & BERMAN authorized to represent Petitioner D.R. HORTON, INC. in relation to this PETITION FOR WRIT OF MANDAMUS, OR IN THE ALTERNATIVE, WRIT OF PROHIBITION.

2. I certify to the best of my belief, this Petition complies with the form requirements of Rule 21(d).

3. I have read this Petition for Writ of Mandamus or in the Alternative, Writ of Prohibition and the facts stated herein are true of my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Joel D. Odou, Esq.

SUBSCRIBED and SWORN to before me this 14 day of April 2014.

NOTARY PUBLIC

RAPHAELA M. TODD
Notary Public - State of Nevada
Appointment Recorded in Clark County
My Appointment Expires on April 24, 2014
98-3712-1

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I. INTRODUCTION

This litigation commenced over six years ago on June 7, 2007, when HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION ("Association") filed suit against D.R. HORTON, INC. ("Horton") for alleged constructional defects within the Arlington Ranch Development. The Association filed suit seeking to recover damages, including attorney's fees and costs, for several categories of alleged constructional defects related to structural, roofing, architectural and plumbing. The subject property consists of 114 buildings with a total of 342 units. The Complaint seeks damages for constructional defects within the common areas, the building envelopes of all 342 homes in which the Association has no ownership interest and within the interiors of 192 homes for which the Association contends it obtained valid assignments of causes of action from each individual homeowner. The Complaint is in the name of the Association on behalf of itself and all others similarly situated. The Association seeks to amend the Complaint if it is determined this action should more properly be brought in the name of each individual owner or as a class action. App., Vol. I, p. 2:17-24. To date, the Complaint has not been amended. The Complaint seeks damages for Breach of Express Warranties, Breach of Implied Warranties of Workmanlike Quality and Habitability, Breach of Contract, and Breach of Fiduciary Duty as well as common area claims. D.R. Horton was the developer of the Arlington Ranch project and first sold the majority of the individual homes in 2004 and 2005. Trial was set for August 5, 2014 pursuant to a recent stay ordered by the District Court regarding the to permit both the Association and D.R. Horton to file writs challenging separate orders App., Vol. VII, pp. 1410-1413. Should the proceedings on this Writ not be concluded on or before August 5, 2014, D.R. Horton will seek an additional stay at that time.

D.R. Horton seeks extraordinary relief from this Court by challenging the District Court's November 12, 2013 Order, as amended, certifying a class action to ensure the guidelines and mandates articulated by this Court in *D.R. Horton v. Eighth Judicial District Court*, 125 Nev. 449, 215 P.3d 697 (2009) ("*First Light II*"), *Shuette v. Beazer Homes*, 121 Nev. 837, 124 P.3d 530 (2005)("*Shuette*"), *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court.*, 291 P.3d 128 (2012)("*Beazer*") are followed and reconciled with NRCP 23 and NRS 116.3102(1)(d), to clarify the scope of NRS 116.3102(1)(d) representational standing and to ensure the law of the case established by this Supreme Court is preserved in this litigation.

II. RELIEF SOUGHT

D.R. Horton, pursuant to Nev. Const., Art. 6 §4, NRS 34.320 or NRS 34.160, and NRAP 21, requests this Court issue a Writ of Mandamus and/or Prohibition to the Honorable Susan H. Johnson ("Respondent") regarding three issues:

1. D.R. Horton requests this Court issue a Writ of Mandamus and/or Prohibition to Respondent to vacate the November 12, 2013 Order and enter a new order reinstating its previous order which denied class certification as to all 342 homes, including the 192 assigned unit owners' claims, on April 29, 2013. The District Court erred in concluding it could consider a class action format as an alternative representative action following its previous denial of class certification in its April 29, 2013 Order. The only analysis to be conducted by the District Court following its April 29, 2013 Order denying class certification was a determination by the District Court of an alternative representative action, other than a class action, consistent with the holding in *Beazer Homes Holding Corp., v. District Court* 291 P.3d 128, 128 Nev. Adv. Op 66 (2012) ("*Beazer*") and NRCP 23.

In the alternative, should this Court decline to reinstate the April 2013 Order, D.R. Horton respectfully challenges the November 2013 Order in that the District

Court erred in permitting the class actions to proceed as the Association, once again, failed to meet its burden pursuant to NRCP 23(a) and NRCP 23(b) as the District Court permitted the use of extrapolation to define the members of the class actions and failed to examine the reliability and persuasiveness of the expert evidence used to certify the class actions as required by NRCP 23 and Nevada law. The use of extrapolation to define the members of a class and the certification of a class without determining the reliability and persuasiveness of the evidence offered cannot satisfy NRCP 23(a) commonality and the more stringent NRCP 23 (b) predominance requirement. In addition, D.R. Horton contends the District Court erred when it amended its November 2013 Order to include the 150 unit owners who did not assign their claims to the Association in the class as the District Court, by its own admission, did not perform the required NRCP 23 analysis of the claims of these unit owners. The only NRCP 23 analysis to date in this action performed by the District Court regarding the 150 unassigned unit owners' claims was the analysis conducted by the District Court in relation to its April 2013 Order denying class certification.

2. D.R. Horton requests this Court issue a Writ of Mandamus and/or Prohibition to Respondent as it acted in complete disregard of the law of the case as to the 192 assigned unit owners' claims as established by this Court in the Supreme Court's January 2013 Writ Order which determined the Association failed to meet NRCP 23 requirements as to those claims.

3. D.R. Horton requests this Court issue a Writ of mandamus and/or prohibition remanding this action to clarify the standing of the Association, as assignee of the 192 claims alleged rather than as a representative of the unit owners. The Association does not have standing under NRS 116.3102(1)(d) to represent the 192 unit owners in a representative capacity as the assignment of the causes of action by the 192 homeowners to the Association obviated the Association's

representational standing. The Action must be remanded back to the District Court to determine the Association's current standing to bring the claims alleged in the Complaint.

D.R. Horton does not challenge the Representative Action (as defined herein) or the Association's right to bring common area claims granted by the November 2013 Order.

III. ISSUES PRESENT

ISSUE ONE: Did the District Court err in certifying the class actions after its previously found in April 2013 the Association did not meet its burden under NRCP 23 as to all 342 homes owners' claims and was required to determine an alternative representative action as mandated by *Beazer Homes Holding Corp., v. District Court* 291 P.3d 128, 128 Nev. Adv. Op 66 (2012)?

CONCLUSION: The District Court erred in certifying the class actions following its denial of class certification of all 342 unit owners' claims in its April 2013 Order as the District Court was required to determine an alternative representative action, other than a class action, for this case to proceed such as joinder, consolidation or in some other representative manner as set forth in *Beazer*. The District Court erred in concluding it could certify a class action as an alternative representative action.

ALTERNATIVE ISSUE ONE: In the alternative, if *Beazer* does not mandate the District Court to determine an alternative representative action, other than a class action, did the District Court err in certifying the class actions as the Association failed to meet its burden pursuant to NRCP 23(a) and 23(b)?

CONCLUSION: The District Court erred in certifying the class actions in three ways: (1) the District Court abused its discretion in amending its November 2013 Order to include the 150 unit owners who did not assign

their claims to the Association in the class action as the District Court, by its own admission, did not perform any analysis required by NRCP 23 as to the 150 unit owners' claims; (2) the Association failed to meet the requirements of NRCP 23 (a) commonality and the more stringent requirement of NRCP 23(b) predominance because the District Court permitted the Association to use extrapolation to define the members of the class action which cannot satisfy NRCP 23(a) or NRCP 23(b)(3); and (3) the Association failed to meet the requirements of NRCP 23 as the District Court failed to conduct an evidentiary hearing and examine the reliability and persuasiveness of the expert evidence used to certify the class actions.

ISSUE TWO: Did the District Court err when it certified the class action on behalf of the 192 assigned unit owners' claims in violation of the "law of the case" as established by the Supreme Court's January 2013 Writ order which denied the Association class certification for these claims?

CONCLUSION: The District Court acted in complete disregard of the "law of the case" as established by this Court in the January 2013 Writ Order, which determined the Association failed to meet NRCP 23 requirements as to the 192 unit owners' claims. Once the Supreme Court determined the Association failed to meet its burden under NRCP 23 as to the 192 unit owners' assigned claims that became the law of the case and that decision governed the issue of class action certification as to the 192 unit owners in any subsequent proceedings in this case, both in the lower court and upon subsequent appeal.

ISSUE THREE: Did the District Court err in certifying the class action on behalf of the 192 unit owners who assigned their claims to the Association as the Assignments obviated the representational standing granted to the Association pursuant to NRS 116.3102(1)(d)?

CONCLUSION: The assignments obtained by the Association assigning the 192 unit owners' causes of actions to the Association extinguished the claims of the 192 unit owners and transferred ownership of those claims to the Association. The Association no longer has standing to sue on behalf of the homeowners as this action is no longer a representative action. Should the Association wish to proceed as a class action consisting of the 192 assigned claims, the Action must be remanded to the District Court to analyze the prerequisites and requirements of NRCP 23 in this capacity. Otherwise, the action as to the 192 assigned claims is 192 separate claims brought by the Association in other than its representative capacity.

IV. RELEVANT FACTS

The Arlington Ranch Development consists of 342 homes or units. Its Association seeks to recover damages for construction defects within the common areas, within all the building envelopes on behalf of all 342 unit owners in which the Association has no ownership interest and within the interiors of 192 units for which the Association contends it received assignments of the causes of action pled in this action (the "Assignments"). The Assignments were executed in or about September 2010 after the Complaint was filed and assigned all of the claims and causes of action that the individual unit owner possessed against D.R. Horton for defective construction to the Association. App., Vol. I, p. 0013 (exemplar); Vol. IV, pp. 0687-Vol. V, pp. 0880 (all 192 assignments). The issue of representative standing pursuant to NRS 116.3102(1)(d) was the subject of numerous motions stemming primarily from recent changes in the law and the misunderstanding and misinterpretation of the representative standing conferred by NRS 116.3102(1)(d) as articulated by this Supreme Court in *Beazer*. Specifically, how this case shall proceed as a representative action is a source of great confusion and uncertainty: will it proceed as a representative joinder action or as a representative class action,

or as both. The following procedural history intends to provide the Supreme Court with only relevant procedural history regarding the Association's standing to pursue the alleged claims for construction defect.

A. The Association's September 30, 2010 Standing Motion

On September 30, 2010, the Association filed a Motion for Declaratory Relief Re: Standing Pursuant to Assignment and Pursuant to NRS 116.3102(1)(d) (the "Standing Motion") alleging it had standing to assert constructional defect claims in the 192 units for which it had procured the Assignments, all constructional defect claims within the building envelope in those buildings which contained a unit which the Association had procured an Assignment and all constructional defect claims within the remaining building envelopes.[1] App., Vol. I, p. 0014. The Association was seeking to represent the 192 assigned unit owners in its own name by virtue of the assignment of rights but without meeting the principles of NRCP 23. In addition, the Association argued it could derive its standing to assert claims for defects in all of the 107 buildings which contained an assigned unit relating to the building envelope without meeting NRCP 23. (Standing Motion at 2:11-15). The Association was not seeking representational standing pursuant to NRS 116.3102(1)(d) for these claims at that time.

The Association did seek representational standing pursuant to NRS 116.3102(1)(d) to pursue alleged constructional defect claims within all of the remaining buildings in the development for alleged constructional defects. App., Vol. I, p. 0023:1-8. The Association specifically contended it was not asserting standing with regard to the electrical and plumbing issues in the individual units for which the Association did not procure an Assignment. App., Vol. I, pp. 0021:0027-22:2. Following a hearing, the District Court issued an Order on February 11, 2011

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1 There has been confusion regarding the number of assignments obtained by the Association. However, both parties now agree the number of Assignments to be 192.

(the "February 2011 Order"). The District Court performed a NRCP 23 analysis as to the 192 assigned interior claims and concluded the Association failed to meet its burden to proceed as a class action irrespective of the Assignments. Accordingly, the District Court declined to certify the claims of the 192 unit owners as a class under NRCP 23 and concluded the Association did not have standing to pursue claims in its representative capacity App., Vol. I, p. 0069:17-18.[2] The District Court further concluded no NRCP 23 analysis was necessary for the Association to bring claims on behalf of the unit owners for the remaining alleged construction defects occurring in building envelopes App., Vol. I, p. 0070:5-9.

B. The Supreme Court of Nevada's Writs of Mandamus/Prohibition re: Standing Motion

The Association thereafter filed a Writ of Mandamus and/or Prohibition in the Supreme Court of Nevada challenging the District Court order refusing to permit the Association to assert constructional defects claims on behalf of the 192 unit owners for defects located within the individual units. D.R. Horton filed its own petition arguing the District Court erred in concluding no NRCP 23 analysis was necessary for the building envelope claims of all buildings.

After analysis on the Association's Petition, including a thorough analysis of the District Court's findings, the Supreme Court affirmed the February 2011 Order on January 25, 2013 denying the Association standing to bring claims for constructional defects in the interior of the units on behalf of the 192 assigned unit owners as a class action (hereinafter "the Association's January 2013 Writ Order"). The Supreme Court reviewed and documented the findings of the District Court and found "the district court did not err in its findings that High Noon failed to meet the commonality, typicality, predominance and superiority requirements of NRCP 23."

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2 The February 2011 Order was pre- *Beazer* and therefore the District Court denied representative standing in any capacity.

App., Vol. I, pp. 0158-0159.[3]

After analysis on D.R. Horton's Petition, the Supreme Court concluded the District Court erred in failing to perform a full and thorough NRCP 23 analysis as to the claims involving the building envelopes. App., Vol. I, p. 0165. The Supreme Court directed the District Court to conduct further proceedings in light of its Order and the holding in *Beazer. (Id.)*

C. The Association's Motion For Determination The Superior Alternative Procedure to Proceed is a Representative Action With Regard to the Building Envelopes and the Assignee's Interests With Regard to the Firewall and Structural Issues (the Association's Representative Action Motion hereinafter "ARAM").

On April 19, 2013. in response to the Supreme Court' January 2013 Writ Order on D.R. Horton's Petition, the Association filed the ARAM requesting to proceed as a representative action and acknowledged it had failed to meet class action requirements. "Here it is important to note that the Association is not moving for certification of a class." App., Vol. I, p. 0179:5-6. The Association further noted: "[Rather than a class action]... a representative action is the superior method to proceed with regard to the building envelope claims (roofs, stucco, windows, doors and decks/balconies)" App., Vol. I, p. 0181:9-12. The Association further argued a representative action of all assignees (sic) is the superior method to proceed with regard to the fire resistive and structural claims – the interior components of the buildings App., Vol. I, p. 0182:4-10. The Association argued: "Proceeding as a joinder of the assignment (sic) claims is the preferable way to proceed. App., Vol. I, p. 0193:7-10. Accordingly, the Association had abandoned class certification as to the building envelope claims and the 192 assigned claims as

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3 *Beazer* was decided on December 27,2012 after the Writs were filed but before the Supreme Court issued its rulings.

to the interior components and concluded an alternative representative action was the superior method to proceed.

During the pendency of the ARAM, the District Court rendered its Finding of Facts, Conclusions of Law and Order dated April 29, 2013. The District Court vacated the hearing on the ARAM concluding the issue of standing would be addressed after the Association complied with the April 2013 Order and submitted the requested documentation. App., Vol. II, p. 0252:20.

D. The District Court's April 29, 2013 Order Denying Class Action Certification as to The Building Envelope Claims and the 192 Assigned Interior Claims.

In accordance with the Supreme Court's mandate in D.R. Horton's January 2013 Writ Order, the District Court conducted a full and thorough NRCP 23 analysis as to the building envelopes claims. In reaching its Findings of Facts and Conclusions of Law on April 29, 2013 (the "April 2013 Order"), the District Court concluded the Association "had standing to sue for alleged constructional defects in the common and limited common elements and the Association *may* have standing to sue on behalf of two or more homeowners for the alleged deficiencies located within the individual townhouses (sic), which includes defects that may be located within the building envelopes for which homeowners are individually responsible, but it had failed to meet its burden required by NRCP 23" App., Vol. I, p. 0208:1-8. In reaching this conclusion, the District Court conducted an NRCP 23 analysis as to all 342 units, as well as an analysis of the 192 assigned claims regarding the alleged defects within the interior and the building envelopes App., Vol. I, p. 0208:10-12; fn 10). The District Court again specifically noted the Association had not demonstrated the commonality and typicality elements of NRCP 23(a) and the Association failed to satisfy the more demanding predominance prong of NRCP 23(b)(3) App., Vol. I, pp. 0208:7-12, 0209:1-10. The District Court further concluded the Association failed to meet its burden of showing a class action is the

superior method for adjudicating claims of the 192 assigned claims, the second prong of NRCP 23(b)(3). App., Vol. I, p. 0209:12-16.

In rendering its decision the Association had not met its burden under NRCP 23 to proceed as a class action on behalf of the 342 units, including the 192 assigned claims, the District Court stated: "it is evidence (sic) this Court should determine an alternative for the individual homeowners claims to proceed in some manner ***other than a class action***", citing *Beazer*, so it could "fashion an appropriate alternative case management plan to efficiently and effectively resolve the case"(emphasis added) App., Vol. I, pp. 0210:15-0211:3. The District Court thereafter ordered the Association to report to the District Court what constructional defects, if any, are located: "within the common and limited common areas" and "within the individual owners' units or those for which the homeowners are responsible, i.e. building envelopes, and whether two or more homeowners suffer damages as a result of the same constructional defects." App., Vol. I, pp. 0211:22-0212:4.

E. The November 2013 District Court Order

In response to the April 2013 Order, the Association filed its Notice of Plaintiff's Matrix Outlining the Defects Alleged and Locations of Defects Pursuant to Court Order on September 13, 2013, and Errata thereto on September 17, 2013, which contained over 1000 pages of documents . D.R. Horton filed its Opposition and objected based on numerous grounds but primarily based on the unreliability of the evidence contained therein App., Vol. II, pp. 0264-0392. Following a hearing on October 10, 2013 the Association filed a Supplement to Notice of Plaintiff's Matrix Outlining Defects Alleged and Locations of Defects (collectively the three matrixes will be referred to as "Association's Defect List") on October 23, 2013. [4]

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4 The original Matrix submitted by the Association was over 1000 pages. In the interest of brevity as required by NRAP 30(b) it is not included in D.R. Horton's Appendix as the District

App., Vol. III, pp. 434-502. A subsequent hearing was conducted on October 24, 2013 and the District Court issued an order on November 12, 2013 which was later modified on March 20, 2014, which D.R. Horton challenges in this Writ of Mandamus and/or Prohibition.

The District Court rendered its third NRCP 23 analysis as to the Association's standing to proceed in its representative capacity as a class action on behalf of the 192 assigned unit owners' (both the interior claims and the building envelope claims) and certified a class defined as the 192 unit owners. The District Court permitted the Association to extrapolate the existence of the defects found to exist in all of the limited units inspected to all 192 units. The District Court also certified a subclass(es) on behalf of unit owners where 40 or more were found to have a particular defect as set forth the Order but did not permit the Association to extrapolate the existence of those defects found in only some of the units inspected to infer the alleged deficiencies exist in a corresponding percentage of units App., Vol. III, pp. 0531-0540. The November 2013 Order expressly stated it only addressed the 192 assigned unit owners' claims and understood the Association was only proceeding on behalf of the 192 assigned unit owners' claims. "As previously noted, the community consists of 114 buildings, each containing three (3) individual homes, for a total of 342 units. The Court understands Plaintiff has obtained assignments of 192 townhome owners, and thus, is proceeding on behalf of those owners only" App., Vol. III, p. 0533:fn 2.

F. Modified November 2013 Order Following the Association's Motion for Reconsideration

At a hearing on D.R. Horton's Motions in Limine heard on December 12, 2013, the Association became aware, allegedly, for the first time the District Court was proceeding only on behalf of the 192 assigned unit owners' claims and expressed its

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Court relied on the Supplement to the Matrix in issuing its November 2013 Order, which is

shock and disagreement with the District Court's position this action was limited to the 192 assigned claims and the claims on behalf of the 150 unassigned unit owners had been abandoned by the Association. At that hearing, the Association argued to the District Court it never intended to abandon the claims of the 150 unassigned unit owners and the Assignments were only meant to protect its standing rights should the Court decline to find it had representative standing.

> MS. SATURN: Your honor, we're dealing with 342 units. That is our understanding. That is our position that in the 342 units, there are going to be issues that affect two or more units and the homeowners association would therefore have the standing to pursue those claims.
> THE COURT: On behalf of two or more that have these issues and I understand, then it gets into how those cases will proceed. But I am really having a hard time because I thought we were dealing with 194.

App., Vol. III, p. 0564:3-11.

The Association thereafter filed a Motion for Reconsideration on ordering shortening time on January 8, 2014, seeking to pursue a representative action on behalf of all 342 units where a defect affects two or more units requesting the District Court to reconsider its prior belief that the action was limited to 192 assigned unit owners' claims. App., Vol. IV, p. 0592. The Association did not request the District Court consider a class action on behalf of the 150 unassigned claims, but only that it be permitted to proceed it its representative capacity pursuant to NRS 116.3102(1)(d) App., Vol. IV, pp. 0597:17- 0598:21. D.R. Horton filed its Opposition arguing it was untimely, not based on new facts and without merit. App., Vol. VI, p. 1101:6-13.

The District Court reconsidered its November 2013 Order following oral arguments on January 16, 2014 and issued an Order on the Association's Motion for Reconsideration amending the November 2013 Order and certified a class

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included.

action and sub-class action consisting of the 342 unit owners as to their building envelope claims in addition to the previously certified class action and sub class actions on behalf of the 192 assigned unit owners claims. The November 2013 Order, as amended, provides:

1. The Association may prosecute the claims of all 342 homeowner-members for claims relating to the building envelope (roofs, stucco, windows, doors, and decks) that may exist in 100% of the homes. It may also use statistical proof to extrapolate or show the constructional defects found to exist in 100% of the homes inspected also exist in the building envelopes of all 342 homes, as identified in the November 2013 Order, and consisting of: two (2) roof defects; sixteen (16) architectural defects; one (1) electrical defect; thirteen (13) plumbing defects; two (2) mechanical defects; and five (5) structural defects (the "342 Class Action").
2. The Association may prosecute the claims of homeowners numbering more than 40 but less that the total 342, as their representative in a sub-class format, for the defects set forth in the November 2013 Order, meaning the Association may use generalized proof to demonstrate such claims. (hereinafter the "342 Sub-Class Action");
3. The Association may prosecute the claims of its 192 homeowner-members that assigned their claims to the Association with respect to constructional defects that relate to the interior of the buildings, including fire resistive, electrical, plumbing and structural claims, that may exist in 100 % of the homes as inspected and as identified in the November 2013 Order. It may also use statistical proof to extrapolate or to show such constructional defects found in 100% of the homes inspected exist within all 192 homes. (hereinafter the "192 Class Action");
4. The Association may prosecute the claims of homeowners numbering more

than 40 but less that the total 192, as their representative in a sub-class format for the defects set forth in the November 2013 Order, meaning the Association may use generalized proof to demonstrate such claims. App., Vol., VII. 1408: (hereinafter the "192 Sub-Class Action");

5. The Association may bring and maintain claims on behalf of two or more homeowners who actually suffer certain constructional defects that may not have been experienced or encountered by their neighbors on behalf of all 342 unit owners, including the 192 assigned claims, pursuant to NRS 116.3102(1)(d) (hereinafter the "Representative Action").

App., Vol. VII, pp. 1407 -1409.[5]

The 342 Class Action, the 192 Class Action, the 342 Sub-Class Action, and the 192 Sub-Class Action may be collectively referred to as the "Class Actions". D.R. Horton does not challenge the November 2013 Order as to the Representative Action or as to the Association's right to bring common area claims.

V. STANDARD OF REVIEW

This court has original jurisdiction to issue writs of prohibition and mandamus. Nev. Const. Art. 6, § 4. Nevada Courts have stated "where an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction, our consideration of a petition for extraordinary relief may be justified. "*Mineral County v. State, Dep't of Conserv.,* 117 Nev. 235, 243 (2001). "Prohibition is a proper remedy to restrain a district court judge from exercising a judicial function without or in excess of its jurisdiction." *Beazer* 291 P.3d at 133. Writ of prohibition 'serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction." *Stephens Media v. Dist. Ct.,* 125 Nev. 849, 857, 221 P.3d 1240, 1246

[5] The November 2013 Order further ordered the Association may not institute or maintain a lawsuit on behalf of those homeowners who alone suffer certain constructional defects which is not the subject of this Writ.

(2009).

The November 2013 Order being challenged is an order certifying a class action and is not independently appealable and therefore D.R. Horton lacks a plain, speedy and adequate remedy at law. *Mineral County v. State Dept of Conserv.*, 117 Nev. 235, 243, 20 P.3d 805, see also, NRS Rule 3(a). In considering a writ petition this court has given deference to a district court's factual determinations; however, questions of law are reviewed de novo. *Shuette v. Beazer Homes Holdings Corp* ("*Shuette*") 121 Nev. 837, 846, 124 P 3d 530, 537(2005). D.R. Horton's petition raises important issues of law and public policy concerning the interpretation and clarification of the Supreme Court's decision in *Beazer* and the analysis required by the district court after an association fails to meet NRCP 23 class action requirements in order to maintain representative standing as required by Nevada law. District Courts continue to struggle with the application of *Beazer* and reconciling NRS 116.3102(1)(d) with NRCP 23 and the understanding of a representative action. These issues need to be resolved in order to prevent conflicting interpretations of the law among the district courts in Nevada as a number of cases are currently pending throughout Nevada Courts with a remand order to conduct an alternative *Beazer* analysis to proceed. Neither judicial economy nor the parties' interest would be served by waiting for an appeal. *Beazer,* 291 P.3d at 128.

Extraordinary relief is further warranted to determine the standard in Nevada for the use of extrapolation evidence to certify a class action in the context of constructional defects and representational actions, and whether extrapolation satisfies the stringent requirements of NRCP 23(a) and NRCP 23(b)(3) commonality and predominance, as well as whether the District Court erred in relying on the expert evidence and testimony to certify the class actions without a determination of its reliability and persuasiveness as required by NRCP 23. In

Williams v. Eighth Judicial District Court, 262 P.3d 360, 365 (2011) this Court recognized that a district court's decision to exclude or allow expert testimony should be reviewed by writ when "an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." D.R. Horton requests this Court grant its writ review to address and clarify the narrow issue of the appropriate evidentiary standard, including the use of extrapolation to define a class action in the context of a construction defect and whether a district court is required to conduct an evidentiary hearing to determine the reliability and persuasiveness of expert testimony in certifying a class action.

Further D.R. Horton contends the Association's representational standing granted to it pursuant to NRS 116.3102(1)(d) presents a question of statutory interpretation which must be clarified following the Assignments. This Court has previously held when an issue presented in an original writ proceeding is a question of statutory interpretation, this court will review the district court's decision de novo. *First Light II,* 125 Nev. 449, 456, 215 P. 3d 697. Although Nevada courts are in the processes of defining NRS 116.3102(1)(d) in the context of common interest community association's ability to litigate claims on behalf of members in a representative capacity, the issue of whether an assignment of those claims obviates representational standing is one of first impression and must be clarified in order to define the rights of the Association to bring claims in this action as well as in future actions.

Finally, the question of whether the Supreme Court's January 2013 Writ Order affirming the District Court's denial of class certification as to the 192 assigned unit owners' claims is the law of the case and therefore prevents the Association from seeking a class action as to these claims, is a question of law that also must be reviewed de novo.

For the foregoing reasons, D.R. Horton respectfully requests this Court

exercise its discretion and consider the instant Petition for Writ of Mandamus and/or Prohibition.

VI. ARGUMENT

A. The District Court Erred in Certifying A Class Action Following Its Previous Denial In April 2013 As The District Court Was Required To Determine An Alternative Representative Action Pursuant To *Beazer*.

In *Beazer,* this Court reaffirmed that a district court upon request must conduct an NRCP 23 analysis to determine whether litigation by class action is the superior method of adjudicating homeowners' construction defect claims. *Beazer,* 291 P.3d at 135. It also clarified, however, that a failure to satisfy NRCP 23's class action prerequisites does not strip a homeowners' association of its ability to litigate on behalf of its members under NRS 116.3102(l)(d). *Id.* at 134–35. "That is, if the association satisfies the requirements of NRCP 23 it may then proceed with the litigation in a class action format. If not, the district court must determine an alternative representative action, other than as a class action, to proceed such as joinder, consolidation or in some other manner *Id.* at 136. This is the holding and mandate of *Beazer*. The District Court erred when it certified a class action as it was required to determine an alternative representative action other than a class action. *Beazer*'s statement that the failure to meet NRCP 23 class action requirements cannot strip an association of its representative standing under NRS 116.3102(1)(d) seems to have created confusion in the District Court and among the attorneys litigating representative actions and must be clarified by this Court. *Beazer* and NRS 116.3102(1)(d) do not intend to guarantee a representative *class* action with the requirement of generalized proof; they confer representative standing to bring an action, which could be other than a class action, such as a joinder or consolidated action as long as NRS 116.3102(1)(d) is satisfied. *Beazer* clarified the application

of *First Light II* when a homeowners' association seeks to litigate construction defect claims on behalf of its members under NRS 116.3102(1)(d): it may proceed either as a class action if NRCP 23 requirements are satisfied, or as an alternative representative action, such as a joinder or consolidated action, if not. *Beazer*, 291 P.3d at 136. Both are representative actions as the Association represents its members in both pursuant to NRS 116.3102(1)(d). One significant difference is a class action must be proved by generalized proof of liability and an alternative representative action, such as a joinder, requires individualized proof of liability and damages. *Beazer* 291 P 3d at 136, citing *First Light II,* 125 Nev. at 458, 215 P.3d at 704.[6] *Beazer* makes it clear that in conducting the analysis to determine how the alternative representative action will proceed "the district court must determine, among other issues, which units represented by the association have constructional defects, that the alternative method to proceed will adequately identify factual and legal similarities between claims and defenses, provide notice to members represented by the associations, and confront how claim preclusion will be addressed" *Id.*, at 136. This analysis ensures that the objectives embodied in NRCP 23, rather than the requirements, are met in order to proceed in a representative capacity *Id.*

The District Court in the present action misinterpreted the holding in *Beazer*

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6 In light of its opinion in *Beazer*, this Court has recently remanded several district court actions following a finding that a homeowners' association failed to meet NRCP 23 requirements with express instructions to analyze and document its findings to support an alternative representative action, other than a class action, for the case to proceed. All opinions are unpublished and cited only for the purpose of showing the current cases remanded to conduct an alternative *Beazer* analysis, none of which have resulted in a published opinion providing clarity and guidance to district courts on how to conduct such analysis. *First Light v. Eighth Judicial Dist. Ct.*, 2013 WL 5410990(Sept 20, 2013); *D.R. Horton Inc. v. Eighth Judicial Dist Ct.* (Paradise Court), 2013 WL 3324998) April 18, 2013); *D.R. Horton Inc. v. Eighth Judicial Dist. Ct.* (Dorrell Square), 2013 WL 1182078 (March 18, 2013); *D.R. Horton v Eighth Judicial Dist Ct.* (Court at Aliante), 2013 WL 1150875 (March 18, 2013); *Chartered Development Corp v. Eighth Judicial Dist. Ct.*, 2013 WL 1136766 (March 18, 2013)

as permitting the consideration of a class action as an *alternative* representative action once the District Court held the Association failed to satisfy the requirements of NRCP 23 in its April 2013 Order. This confusion is indicated by the conflicting paragraphs contained in the April 2013 Order. The District Court's instructions in the first paragraph 21 (there are two paragraphs numbered 21 in the April 2013 Order) is consistent with the *Beazer* alternative analysis: "[i]t is evident this Court should determine an alternative for the individual homeowner to proceed in some manner *other than a class action"*, citing *Beazer* 291 P 3d at 136 (emphasis added) App., Vol. I, p. 0210: 21-24. However the second paragraph 21 contradicts this paragraph and states: "For this Court to decide how this matter should proceed, [the Association] must report what individual defects, if any, are suffered by two or more owners. Once this question is answered the Court will then determine how or whether it is appropriate for the Association to bring such claims for constructional defects on behalf of homeowners-members *as a class or otherwise*, or alternatively whether the individual owners causes of action should be joined within the same lawsuit" App., Vol. I, p. 0211:5-12 (emphasis added). The inclusion of "*as a class action or otherwise*" in the second paragraph 21 was incorrect. This second paragraph 21 is actually the first step in the analysis of a representative action pursuant to NRS 116.3102(1)(d). In the first step of the analysis, if requested, the district court is not examining whether a representative action can proceed, it is examining what *type* of representative action can proceed and therefore how the action shall proceed: as a class action, a joinder action, a consolidated action or otherwise. *Beazer* at 135. All can be representative actions and therefore consistent with the standing conferred by NRS 116.3102(1)(d) and this Court's holding in *First Light II.*

As long as the alleged defect exists in "two or more" and affects the "common interest community" (the requirement for a representative action under

NRS 116.3102(1)(d)) the district court conducts its NRCP 23 analysis to determine if the case can proceed as a class action. If it fails to meet class action requirements, it then must determine an alternative representative action, the second step in the analysis: joinder, consolidated or otherwise (as referenced in the first paragraph 21). Accordingly, the District Court confused the steps in the analysis of determining how a representative action could proceed. Once the District Court determined the Association did not meet its burden under NRCP 23, *Beazer* mandates the procedure available to determine what type of alternative representative action can proceed so as not to strip a common interest association of its NRS 116.3102(1)(d) standing. It is D.R. Horton's suggestion this confusion on the part of the District Court in the April 2013 Order gave rise to its mistaken assumption it could consider whether the Association could still proceed as a class action in the November 2013 Order. The documents thereafter submitted by the Association after the April 2013 Order should not have been for the purpose of considering a class action but for the second step of the analysis, the determination of an alternative representative action other than a class action.

Based on the foregoing, the District Court erred in conducting a third NRCP 23 analysis as to both the 192 assigned unit owners' claims and (purportedly) as to the building envelopes of all 342 units. *Beazer* mandates the procedure available to District Courts following a denial of class action certification necessary to maintain representative standing pursuant to reconcile NRS 116.3102(1)(d): the determination of an alternative representative action other than a class action. This action must be remanded to the District Court to follow the principles and procedures outlined in *Beazer* and for this case to proceed as an alternative representative joinder action or in some other manner other than a class action. In doing so, the District Court should be instructed to analysis and document its findings to show the alternative method to proceed will adequately identify factual

and legal similarities between the claims and defenses, provide notice to members represented by the association and confront how claim preclusion issues will be addressed. The District Court should then fashion an appropriate case management plan to efficiently and effectively resolve the case. *Beazer* 291 P.3d at 136.

B. The District Court Erred In Certifying the Class Actions as the Association Failed To Meet Its Burden Under NRCP 23

In the alternative, should this Court determine the District Court did not err in considering a class action following its denial in April 2013, D.R. Horton contends the District Court erred in certifying the Class Actions as the evidentiary standards applied by the District Court cannot meet the requirements of NRCP 23 based on the following errors committed by the District Court: (1) as to the 150 unassigned unit owners' claims, the District Court never conducted any NRCP 23 analysis nor was one requested by the Association in the Motion for Reconsideration. The only NRCP 23 analysis performed by the District Court as to these 150 unassigned building envelope claims was in relation to the April 2013 Order when the District Court determined the Association did not meet the requirements NRCP 23; (2) the District Court relied on extrapolation methodology to determine the class members and to certify the Class Actions which cannot meet the NRCP 23(b)(3) requirement that common questions predominate over individual questions; and (3) the District Court failed to examine the reliability and persuasiveness of the expert evidence relied on to certify the Class Actions which also defeats NRCP 23.

1. The Certification of the Class Action as to the 150 Unassigned Unit Owners' Claims Does Not Meet NRCP 23

Following the Association's Motion for Reconsideration, the District Court amended its original November 2013 Order and certified the 342 Class Action and 342 Sub-Class Action so as to include the 150 unassigned unit owners' building envelope claims without any NRCP 23 analysis as to these additional unit owners'

claims and without any party requesting it do so. App., Vol. VII, p. 1408:6-18. In its Motion for Reconsideration, the Association argued the District Court erred in concluding it could only prosecute the 192 assigned claims; it did not request or argue a class action as to these claims. The Association stated "only the 192 assigned claims were before the Court for purposes of class certification but no party had challenged [the Association] retained its standing to pursue claims for all 342 units where NRS 116.3102(1)(d) is applicable" App., Vol. IV, p. 0597:4-7. "This Honorable Court has already resolved the manner and proof for the defects are not entitled to class treatment or generalized proof pursuant to its November 12, 2013 Order and thus resolution of this specific confusion will expediently allow the case to move forward to trial", citing the November 2013 Order permitting the Association to prosecute a representative action other than a class action. App., Vol. IV, pp. 0597:28- 0598:12. The Association concluded, "This Honorable Court correctly omitted any limitation to 194 (sic) units in that statement, and thus it is recognition of [the Association's] right to pursue claims for all 342 units where construction defects have been found to exist in two or more units –claims that are in addition to those authorized for class treatment." App., Vol. IV, p. 0598:18-21. Accordingly, the Association was not seeking reconsideration as to whether it could prosecute the 342 building envelope claims as a class action, but only whether it could prosecute those claims as a representative action without the necessity of generalized proof. It expressly stated it was not seeking a class action. Accordingly, no party requested the District Court certify a class action as to the 342 building envelope claims as required by *Beazer*. *Beazer* 291 P.3d at131.

Finally, by its own admission, the analysis performed by the District Court in November 2013 pertained only to the 192 assigned unit owners' claims. "This Court understands Plaintiff has obtained the assignments of 194 (sic) townhouse owners, and thus, is proceeding on behalf of these owners only." App., Vol. III, p.

0533:fn 2). The District Court also expressed several times at the hearing on cross-defendants Motion in Limine to Strike Plaintiff's Expert's Reports, it understood the Association was proceeding only on behalf of the 192 assigned unit owners and therefore could not have conducted a NRCP 23 analysis as to these claims. App., Vol. III, pp. 0564:3-11; 0565:12-15; 0567:3-24. Moreover, the documents submitted by the Association pertained only to the 192 units. The District Court noted: "Plaintiff's Supplemental Matrix identified all defects found within the 194 (sic) units, including their building envelopes." It grouped them into categories: Roofs, Architectural, Electrical, Plumbing and Structural." App., Vol. III, p. 0534:17-20. Most notably, and as previously recognized by the District Court and the Supreme Court, the Association was unable to obtain assignments from the other 150 unit owners. App., Vol. I, p. 0209:20-23; App., Vol. I, p. 0158. This fact strongly suggests they do not want to participate in this action and do not want be bound by a judgment in a class action. [7]

Certifying the 342 Class Actions to include the 150 unassigned unit owners' claims without the stringent NRCP 23 analysis violates all case law in Nevada regarding class actions based on NRS 116.3102(1)(d). See, *Shuette*, 121 Nev. 837, *First Light* II, 125 Nev. 449, *Beazer*, 291, P.3d 128. It also violates the law of the case set forth in D.R. Horton's Supreme Court January 2013 Writ Order wherein this Supreme Court remanded the action to the District Court to conduct a full NRCP 23 analysis as to the 342 building envelope claims. (D.R. Horton's January 2013 Writ Order pg 5). Accordingly, the only NRCP 23 analysis ever performed by the District Court as to the 342 building envelope claims was reflected in the

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7 Furthermore, the District Court previously determined the Association failed to meet its NRCP 23 burden as to the 342 building envelope in its April 2013 Order and, as argued in Section VI herein, *Beazer* mandates the District Court to determine an alternative representative action other than a class action as to the 150 unassigned unit owners' building envelope claims.

April 2013 Order following remand from this Supreme Court wherein the District Court found the Association failed to meet its NRCP 23 burden App., Vol. I, p. 0208:1-13. This action must be remanded to the District Court with instructions to reinstate the April 2013 Order denying class certification as to the 342 building envelope claims and to determine an alternative representative action for these claims to proceed as requested by the Association.

2. The Use of Extrapolation to Define the Members of a Class is Not an Accepted Methodology in Nevada

Extrapolation is defined as "[t]he process of estimating an unknown value or quantity on the basis of the known range of variables. In the context of NRS 40.645, extrapolation encompasses the statistical use by an expert witness of a valid and reliable sample to formulate an opinion that similarly situated residences and appurtenances *may* have a constructional defects." *First Light I*, 123 Nev. at 479 (emphasis added). The District Court permitted the Association to determine the members of the 342 and 192 Class Actions through the use of statistical sampling by permitting it to extrapolate to show an alleged constructional defect found to exist in all of the units inspected exists in all of the 192 assigned units and all of the building envelope claims of the 342 units. The District Court's only analysis regarding the use of such extrapolation was to conclude because this methodology is permitted in a Chapter 40 notice it is permitted to certify a class App., Vol. III, p. 0535:5-18. This conclusion was in error.

There are no reported cases in Nevada approving of the use of extrapolation to determine the members of a class in a construction defect class action case. In fact, the only reported case in Nevada regarding the use of extrapolation to certify a class action expressly prohibited it. See, *Shuette*, 121 Nev. at 859, where the subset of homes that plaintiff sampled was a representative sample and therefore could not satisfy NRCP 23(b)(3). D.R. Horton contends this is so because the use of

extrapolation to identify the members of a class in a construction defect case is inherently unreliable as it is a representative sample and cannot meet the requirements of NRCP 23. Although California courts have considered statistical and sampling evidence to evaluate damages and liability outside the construction defect arena, D.R. Horton contends no California case exists in the construction defect context permitting the use of statistical extrapolation to define the members of a class. In the California Superior Court case discussed in the CCH State Unfair Trade Practices Law Treatise, *Wallace v. Monier, LLC*, the California Superior Court reversed a jury verdict in a class action under the California Unfair Competition Law and Consumer Legal Remedies Act against a tile manufacturer that allegedly misrepresented the characteristics of tiles and knowingly failed to disclose the slurry coating eroded. Testimony from potential class members was used to establish the class size by extrapolation. The expert's opinion relying on this methodology was excluded as not accepted in the field of statistics. The Superior Court acknowledged the trend towards the use of and acceptance of statistics as a method of *proof* but determined the particular methodology was one of first impression to determine a class size and therefore was not generally accepted by recognized authorities in the field of statistics or surveys. In addition, the plaintiff failed to show correct scientific procedures were used in administrating the methodology. See, §32, 648, *Wallace et al v. Monier*, LLC, 2013 WL 6051602 (2013) CCH State Unfair Trade Practices Law. The United States Supreme Court opinion in *Wal-Mart v. Dukes*, 131 S. Ct. 2541, 2561 (2011) also addressed the extent to which statistical evidence may be used to certify a class action and whether such evidence satisfied NRCP [FRCP] 23 and reversed the Ninth Circuit's class certification as "trial by formula" severely criticizing the use of evidentiary extrapolation as a form of common proof where a sample set of class members were selected through depositions. Likewise, in the present case, the District Court did

not perform any analysis as to the methodology of extrapolation and whether it is accepted in field of statistics, whether correct scientific procedures were used and whether it compiled with NRCP 23 requirements.

The use of statistics and extrapolation to define the members of a class is wholly inconsistent with the requirement that a class be "adequately defined and clearly ascertainable before a class action may proceed." *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679–80 (S.D.Cal.1999); "A class definition should be 'precise, objective and presently ascertainable.' " *Rodriguez v. Gates*, 2002 WL 1162675 at *8 (C.D.Cal.2002), see also *Manual for Complex Litigation*, Fourth § 21.222 at 270–71 (2004). The determination of the members of a class is axiomatic to a class action, its members are self –evident. See, *Simer v. Rios,* 661 F.2d 655, 670 (7th Cir 1981). [8] "[A] class that includes those who have not been harmed is both imprecise and overbroad." *In re Autozone Inc. Wage and Hour Practices Employment Litigation*, 289 F.R.D. 526, 545 (N.D. Cal 2012), citing *Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D.Cal.2009). This is an example of what is known as a "fail-safe" class and which is palpably unfair to the defendant. In *Kamar v. Radio Shack Corp.*, 375 Fed. App. 734 (9th Cir. Cal. 2010), the Ninth Circuit explained fail-safe classes as follows:

> The fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established. When the class is so defined, once it is determined that a person, who is a possible class member, cannot prevail against the defendant, that member drops out of the class. That is palpably unfair to the defendant, and is also unmanageable -- for example, to whom should the class

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8 While extrapolation and statistics has been appropriate in certain class actions for the purpose of determining damages and, in very limited situations, liability, it rarely, if ever, is used to determine the *members* of a class. See. §32, 648, *Wallace et al v. Monier*, LLC, 2013 WL 6051602 (2013) CCH State Unfair Trade Practices Law, citing *Bell v. Farmers Ins Exchange*, 115 Cal.App.4th 715.

notice be sent?

A failsafe class is one in which the class members "either win or are not in the class." *In re Autozone Inc. Wage and Hour Practices Employment Litigation*, 289 F.R.D. at 545. The *Shuette* Court explained this concept in the context of a construction defect action as a failure to satisfy the predominance prong of NRCP 23(b)(3):

> [T]he homeowners introduced evidence of several different types of property damage, based on inspections of only some of the houses. Even among the inspected houses, however, the damages differed. Thus, no reasonable basis exists on which to extrapolate to all of the houses the property damage, and causes therefor, pertaining to the inspected houses. Such evidence does not represent property damage suffered by the individual homeowners, and its extrapolation to each house is unfair to both Beazer Homes and any homeowner who suffered additional harm. Instead, individualized proof as to the alleged defects, including the impact of the shifting soils, should have been offered as to each house. Due to the varying property damage caused by the houses' differing defects, the damages calculation would not fit into a simple equation, but rather would also require additional, separate litigation.

Shuette, 121 Nev. at 858-9. *Cf. Hicks v. Kaufman & Broad Home Corp.,* 89 Cal.App.4th 908, 916 (2001) wherein the class consisted of "owners of homes in specified developments constructed and marketed by Kaufman in which Fibermesh was utilized in the concrete foundation slabs. As such, the class was precise, objective, and could be determined from public records and Kaufman's own records."

In permitting the use of extrapolation to define the class members the District Court certified a fail safe class and failed to analyze the methodology in the context of NRCP 23. Specifically, the District Court failed to understand a basic premise of the requirement of NRCP 23(b)(3) predominance: common questions will only predominate over individual questions if their resolution can be achieved through

generalized proof. *Shuette,* 121 Nev. at 851. In certifying the Class Actions, the District Court mischaracterized the use of generalized proof as being an option for the Association rather than a requirement: "Plaintiff ***may*** establish liability and entitlement to relief through the use of generalized proof with respect to the constructional defects found in 100% of the units inspected as identified above" (emphasis added)" App., Vol. III, p. 0536:20-21. "Plaintiff may prosecute those claims as their representative in a sub-class format meaning the Association ***may*** use generalized proof to demonstrate such claims" App., Vol. VII, pp. 1408:27-1409:3. "Claims that ***may*** exist in 100% of the homes." App., Vol. VII, p. 1408:2-8. (emphasis added)[9] As the law provides, once the class members are defined there cannot be a need at trial to examine individual issues. The Association must prove liability through the use of generalized proof and therefore will submit evidence of the existence of alleged defects in the units inspected to prove the defect exists in all 342 units or all 192 units. The District Court (and the Association) made the incorrect assumption the trial process could alleviate and correct a mistake if an uninspected unit was found not to have the alleged defect. This defeats the requirement the Association must prove liability through the use of generalized proof and NRCP 23(b). In discussing how the Class Actions would proceed at trial, counsel for D.R. Horton was concerned about the use of generalized proof and the Association's ability to prove liability on that basis:

> MR. ODOU: --but on the roofing for example, yeah, is there an overexposed tile on one roof? Absolutely. I'm sure there is. Does that one tile need to get fixed? Probably. But beyond-when you start going beyond that though and you start extrapolating and then saying, okay, they can pursue, you

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9 As previously discussed, the amended November 2013 Order omits this sentence regarding generalized proof as to the 342 and 192 Class Actions but includes it in the 342 and 192 Sub-Class Actions and the original November 2013 Order. Accordingly, D.R. Horton assumes it was the Court's oversight to omit this sentence. Regardless, the District Court had a misunderstanding of the requirement of generalized proof in a class action.

know, these claims on behalf of people who will never be front of this Court it really breaks down. And I'm lost as to what issues are they being allowed to go forward on and what will be the proof requirement.
So, in your prior order you had two roofing issues, you said: "Look they've made a prima facie case that these are at a hundred percent if the Defendants show that they're less than a hundred percent then they've got a problem, they can't use generalized proof.
THE COURT: Well, they can't pursue on behalf of all owners the owners. Like if there's a hundred of the –
MR. ODOU: Then what happens-
THE COURT:--hundred fourteen buildings that have got roof defects, well, you can't – you can't pursue those on behalf of the occupancy—
MR ODOU: Sure
THE COURT: of those fourteen buildings.
MR ODOU: So far so good. So then what happens in this case? So, Mr. Valine [the Association's expert] testifies that you know roofing defect whatever is hundred percent, we find that roofing defect is not hundred percent. Okay, that comes out in deposition testimony, then-
THE COURT: Okay so he's
Mr. ODOU:--the jury-
THE COURT: --gonna say that?
MR ODOU: Yeah, the jury—he's gonna say a hundred percent, my expert is gonna say it's less than a hundred percent, the jury weighs it and decides, you know, what to do with it. They come up with – if they find it's – is there gonna be a specific question to the jury, if you find less than a hundred percent that the claims fails (sic)? I mean how are you going to wrestle with this proof problem?
MR STANDER [the Association's counsel]: Your Honor, if I might. Right now we're talking standing and counsel is talking about how we deal with it at trial, how the jury is gonna decide it, how the judge is gonna decide it based on what the jury finds. If the jury-you know, we're gonna say a hundred percent, they say fifty percent, the jury agrees a hundred, the jury agrees fifty, how is Your Honor gonna deal with that? That's a great question-that's a question for another day. Today we're talking about standing, what can pursue.

App., Vol. VI, pp. 1214:16-1215:20.

The District Court further indicated the need for individual questions in

reaching a verdict:

> THE COURT:--we're still gonna have to have that verdict form be pretty much individually by or by building or by-we'll have to couch it. It's gonna be very complicated jury form. And let's say the jury finds, given the generalized proof presented, that-there's only roofing defects-let me use a better one. Let's say that in- yeah that roofing defects exist in fifty buildings then only those folks in the fifty building collect. Does that make sense?
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> App., Vol. VI, p. 1219:10-15.

Accordingly, the District Court confirmed the Association could not prove liability through generalized proof and completely misunderstood how class actions proceed at trial. The District Court certified a class that it knows may contain members that are not in the class which, according to it, will be determined at trial. This is not permissible: it fails to adequately define a clearly ascertainable class before it proceeds and therefore defeats the requirement the Association prove liability through generalized proof and NRCP 23(b)(3).

Moreover, the District Court's reliance on NRS 40.645 was completely misplaced and ignored the requirements of NRCP 23. The provisions of NRS 40 reveal that the Legislature intended to provide contractors with an opportunity to repair constructional defects in order to avoid litigation. *First Light I,* 123 Nev. at 476. To ensure that contractors are given this opportunity to repair, NRS 40.645 requires a claimant to give the contractor notice in "reasonable detail" to allow the contractor time and opportunity to inspect and make repairs when a defect is verified. *Id.* NRS 40.645 sets forth minimum guidelines that an extrapolated notice must satisfy. However, there is no risk the extrapolation in this context would result in an unjust outcome for the developer as the extrapolation was merely used to provide notice to the homeowner that a defect "might" exist; the contractor then must verify its existence and determine the extent of the individual repair, which could be different in every home. The risk associated with the use of extrapolation

in the context of determining the members of a class is significantly greater in that a unit not inspected, but presumed to contain a defect based on extrapolation, could be awarded damages and a windfall if in fact the alleged defect does not exist or was repaired by a prior owner as the Association must prove liability through the use of generalized proof. The District Court's comparison to and reliance on the NRS 40.645 notice procedure was misplaced and ignored the stringent requirements of NRCP 23 (a) commonality which examines factual and legal similarities between claims and the more stringent requirement of NRCP 23(b)(3) predominance which questions whether common questions predominate over individualized questions. *Beazer* 291 P 3d at 135.

The District Court relied on extrapolation to determine the members of the Class Actions concluding it was permitted in a Chapter 40 notice and therefore satisfied NRCP 23(a) and NRCP 23(b). Extrapolation methodology has never been accepted in Nevada or in California to certify a class action in the context of construction defect and is severely criticized by the United States Supreme Court in any capacity in a class action in *Wal-Mart v. Dukes.* D.R. Horton requests this Court issues a Writ of Mandamus instructing the District Court its reliance on extrapolation to define the Class Actions was in error and the Association failed to meet NRCP 23(a) and NRCP 23(b) or, alternatively, that it conduct an analysis as to whether the extrapolation methodology relied upon by the Association for purposes of its NRS 40.645 notice satisfies NRCP 23(a) and NRCP 23(b)(3).

C. The District Court Failed to Determine the Reliability of the Evidence Used to Certify the Class Actions

The District Court also failed to fulfil its gatekeeper role as the District Court specifically failed to conduct any inquiry into the reliability of the evidence submitted instead accepting it as true concluding the reliability of the evidence did not negate admissibility but affected the weight the jury gives to the evidence App.,

Vol. III, pp. 0536:25-0537:2. Such conclusion was in error. The District Court certified the Class Actions based on the evidence contained in the Association's Defect List which was a matrix put together by the Association based on destructive testing performed by expert witnesses for the purpose of a NRS 40.645 notice, limited visual inspections by experts in response to the April 2013 Order and the opinions and conclusions of various expert witnesses. No statistician nor any offer of statistical validity was offered by the Association or requested by the District Court. The District Court did not conduct an evidentiary hearing or any inquiry into the reliability of the evidence contained in the Association's Defect List in certifying the Class Actions. App., Vol. III, pp. 0520:19-22-0523:11. The District Court made repeated references at the hearings certifying the class actions as a "standing" motion and refused to hear the Association's evidentiary objections despite repeated attempts by D.R. Horton App., Vol. III, pp. 0523:12-0524:6. [10] This was done in error. All courts require some type of a determination as to the reliability of the expert evidence when conducting its rigorous analysis of whether a class should be certified. A court should determine under the applicable standard of reliability whether expert evidence is sufficiently reliable to be considered and then weigh the significance of the expert evidence relevant to any class certification requirement, even if the court's determination overlaps with the merits. This approach is widely accepted throughout jurisdictions. See, *Daubert v. Merrell Dow Pharmaceuticals, Inc.("Daubert")*, 509 U.S. 579, 595, 113 S. Ct 2786 (1993). Further, the proponent of the proffered expert testimony bears the burden of proving admissibility by a preponderance of the evidence. *Lust by and Through Lust v.*

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10 Despite the fact the District Court referred to motions that gave rise to the November 2013 Order as "standing motions", they were in fact certification motions. See, *Waterfall Homeowner's Assn v. Viega, Inc.*, 283 F.R. D. 571, 577(2012), wherein the federal district court of Nevada treated a motion to strike class allegations as a motion to deny class certification as "that is what the motion requests in substance". Clearly the November 2013 Order was an order certifying a class action as "that is what it did." *Id.*

Merrell Dow Pharmaceuticals, Inc. 89 F. 3d 594, 598 (9th Cir 1996).

The *Hallmark* rule of evidence is used in Nevada to evaluate the reliability of expert evidence. *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008) ("*Hallmark*"), *Higgs v. State*, 126 Nev. Ad Op 1, 222 P.3d 648, 650 (2010). The *Hallmark* rule requires a District Court to allow expert testimony when it is relevant and a product of reliable methodology. In determining whether an expert's opinion is based upon reliable methodology, the Nevada Supreme Court has identified three requirements that must be satisfied prior to admitting evidence from an expert witness: (1) qualification, (2) assistance, and (3) limited scope requirements. *Higgs v. State*, 222 P.3d at 650. In considering whether testimony will assist the jury to understand the evidence, or to determine a fact in issue, Nevada courts have articulated five factors to judge reliability of a methodology, instructing the district court to consider whether the proffered opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. *Higgs v. State,* 222 P.3d at 660, citing *Hallmark.*

Other jurisdictions adopt the *Daubert* rule of evidence. In not adopting the *Daubert* standard, which provides limitations on judges' considerations with respect to the admission of expert testimony, Nevada trial judges are given wide discretion within the parameters of NRS 50.275, to fulfill their gatekeeping duties. *Higgs v. State*, 222 P 3d at 658. Therefore, *Daubert* is inconsistent with *Hallmark* only to the extent it limits the judges consideration of factors. *Id.* at 650. "Indeed, to the extent *Daubert* espouses a flexible approach to the admissibility of expert witness testimony, this court has held it is persuasive. *Hallmark v. Eldridge*, 124 Nev. at 498.

While some courts require a "full *Daubert* analysis" and others require an evaluation of the reliability, but less than a full *Daubert* analysis, all courts require inquiry and consideration of the reliability of the evidence offered to certify a class. The Ninth Circuit has made it clear it applies the "full *Daubert* analysis" at the class certification. *Ellis v. Costco Wholesale Corp* 657 F.3d 970, 982 (9th Cir 2011) (the Ninth Circuit recognized that the district court correctly applied the *Daubert* standard to evaluate the admissibility of expert testimony at class certification); *Messner v. Northshore University Health System,* 669 F.3d 802, 812 (7th Cir. 2012) "When an expert's report or testimony is 'critical to class certification,' we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification."; I*n re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604, 612, (8th Cir. 2011) (approving district court's evaluation "of the reliability of the expert testimony in light of the existing state of the evidence and with Rule 23's requirements in mind" and holding that the review does not need to go as far as pre-determining admissibility of expert testimony at trial); A*merican Honda Motor Co., Inc. v. Allen*, 600 F.3d 813 (7th Cir. 2010) ("[W]hen an expert's report or testimony is critical to class certification ... a district court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion. That is, the district court must perform a full *Daubert* analysis before certifying the class if the situation warrants."; U*nger v. Amedisys Inc.*, 401 F.3d 316, 323 n.6 (5th Cir. 2005), "In order to consider Plaintiffs' motion for class certification with the appropriate amount of scrutiny, the Court must first determine whether Plaintiffs' expert testimony supporting class certification is reliable."); See also, M*oore v. Napolitan*o, 926 F. Supp. 2d 8 (D.D.C. 2013*), In re AutoZone, Inc., Wage and Hour Employment Practices Litigation*, 289 F.R.D. 526 (N.D. Cal. 2012) and *In re*

Chocolate Confectionary Antitrust Litigation, 289 F.R.D. 200 (M.D. Pa. 2012) (all applying *Daubert* on class certification motion). Finally, the United Sates Supreme Court's reversal of class certification in *Wal-Mart v. Dukes* removes any doubt regarding the appropriateness of a reliability analysis at the class certification stage. The *Dukes* Court expressly stated that it "doubt[ed] the district court's determination in *Dukes* that *Daubert* determinations about the admissibility of expert testimony were not required to be made at class certification stage." *Wal Mart v. Dukes,* 131 S Ct at 2554 (2011).

In certifying the Class Actions and concluding the Association may establish liability and entitlement to relief through the use of generalized proof and may extrapolate such information with statistical proof to show the constructional defects exist in 100% of the units, the District Court expressly failed to make any evidentiary inquiry into the information relied upon. There was no expert testimony regarding the reliability of evidence or the extrapolation nor was it verified or submitted by declaration. For example, evidence offered by Association expert Thom Sanders was based on hearsay as Mr. Sanders has no personal knowledge of the defects testified to regarding alleged electrical deficiencies. Mr. Sanders merely relied on an expert report prepared by disqualified expert John Nicholas and did not conduct any independent analysis of the alleged defects. App., Vol. II, p. 0270:1-8. Moreover, there was no evidence regarding how the information in the Association's Defect List was compiled and whether it was done so in accordance with *Hallmark.* For example, much of the testing conducted for the various defects was conducted only on a small portion of the structural element alleged to be defective and a thorough inspection would require intrusive testing. App., Vol. II, p. 0274:1-15. As such, the information provided by the Association's expert is insufficient to make a determination as to the presence of the defect. An expert's opinion should be based on evidence that is testable and should not be based on

mere conjecture or assumptions. In addition, there was absolutely no evidence the sampling was random and the number of homes inspected for each defect varied significantly. The technique, equipment or calculation was not controlled by known reliable standards or any standards known to the District Court as it did not examine the process. The Association did not inspect the same number of homes for each issue alleged and, apparently did not even inspect the same homes with regard to each sample. App., Vol. II, p. 0275:4-7. Hence, it is impossible to determine the sample used is statistically valid and a representative sample. Nevada law requires a statistically valid and reliable sample. *See*, *First Light I*, 121 Nev. at 479.

The District Court relied on the representations of counsel as to what the evidence would show rather than conduct an evidentiary hearing. For example, the Association's Defect List represents defect 10.1 was found in 25 of the 25 unit garages inspected which amounts to 100% occurrence and therefore permitted to be extrapolated to exist in all units as part of the Class Action. However, the Association's expert Thom Sanders' method of achieving this number was simply adding the 14 units he inspected with the 11 units the previous, disqualified expert, inspected. App., Vol. II, pp. 0275:17-0276:1. In addition, portions of the Association's Defect List were actually prepared by counsel for the Association and not the experts. App., Vol. VI, pp. 1359:20-1360:5.

The Association merely submitted a matrix that purports to contain evidence of defects in units inspected which it then extrapolated to all 342 units without providing support for the evidence, the opinions offered, verification under the penalty of perjury, or an opportunity for D.R. Horton to cross examine or contest the evidence in any meaningful manner. All of these evidentiary objections were made by D.R. Horton in its Opposition to Plaintiff's Purported Matrix Outlining Defects and at both hearings and expressly declined to be heard or addressed by the District Court in certifying the Class Actions. App., Vol. II, pp. 0409:15-0414:15 (lengthy

exchange between counsel for D.R. Horton and the District Court where D.R. Horton raised numerous evidentiary objections and the District Court consistently responded the hearing was not an evidentiary hearing but a hearing to determine standing).

At the subsequent hearing on October 24, 2013 after the Association filed its Supplemental defect list, D.R. Horton again requested numerous times that the District Court conduct an evidentiary hearing but was instructed consistently by the Court the hearings were not evidentiary hearings but hearings to determine standing. For example,

> MR. ODOU: Now they've provided the Court with a shorter version of the same thing though. Here is, you know, a hundred defects and we want to go forward and it just doesn't work. You know, this Court—one of the things we probably need is an evidentiary hearing as to what are we gonna go forward on. We certainly need some guidance as to what the threshold is going to be that they're gonna be allowed to go forward on and that's something we've been arguing over. But even that threshold doesn't work under *Shuette* and I don't know how we get around the fact the Nevada Supreme Court has already rejected this type of argument.
>
> App., Vol. III, pp. 0516:4-9; 0523-0525.

In response to D.R. Horton's request to consider the reliability of the evidence and the extrapolation methodology, the District Court stated it agreed with the Association's counsel it was not conducting an evidentiary hearing but merely a hearing on the Association's standing.

> Mr. Terry (the Association's counsel): [T]his is a standing hearing, this is not an evidentiary hearing, this is not a trial, this is—
> The Court: I'm with you.
> Mr. Terry:--this is just do we have standing. So—and I think it's pretty clear the association does have standing.

App., Vol. III, p. 0520:19-23.

D.R Horton then attempted to raise evidentiary concerns to the Court in the context of standing:

> The Court: --talking standing.
> Mr. Odou: Then I'll just confine it to you, you know, we've made evidentiary objections on the standing issue. That was part of our evidentiary objection, other part was the issue that Mr. Terry [the Association's counsel] was just talking about which is they're trying to use double and triple hearsay on some of these things to move forward under standing and we don't think there is reliable and sufficient evidence for that. In out expert matrix attached to our last submission to this Court we actually point out many of those evidentiary issues and we went line by line through all of the issues in this case as to why the Court should not grant them standing and to pursue them.

App., Vol. III, pp. 0523:23-0524:6; 516:4-9, 21-24.

The District Court provided no response to D.R. Horton's objections.

What the District Court failed to appreciate or understand was a determination of "standing" to pursue a representative action as a class action is more than just a determination of standing to proceed in a representative capacity. The parties were not disputing the Association had representational standing under NRC 116.3102(1)(d), they were disputing how the Association could proceed with its representative standing. This required a determination on the reliability of the evidence in support of that certification which the District Court clearly failed to do.

The District Court's conclusion the motion was just to determine standing and its express refusal to conduct any analysis into the reliability of the experts' opinions and testimony contained in the Association's Defect List used to certify the Class Actions was in error. In determining the Association had "standing" to prosecute the Class Actions, the District Court was required to conduct an evidentiary hearing and examine the evidence in accordance with *Hallmark*. This action must be remanded to the District Court to conduct a proper evidentiary

hearing in accordance with Nevada and Ninth Circuit law.

D. The District Court Failed To Examine The Persuasiveness Of The Expert Evidence Used In The Class Certifications.

Should this Court somehow determine the District Court conducted an evidentiary hearing and made a determination the Association's Defect List, the expert evidence contained therein and the extrapolation were reliable under the *Hallmark* rule, the District Court was required to take one further step in analyzing the expert evidence when determining commonality under NRCP 23. As recognized by the Ninth Circuit in *Ellis*, for the purpose of evaluating the class action prerequisite of commonality, courts must take a further step beyond the determination of reliability and analyze the persuasiveness of the expert testimony. In *Ellis*, the plaintiff sought to certify a class based on Costco's alleged promotional practices discriminated based on gender. The plaintiffs introduced expert declarations to establish this gender disparity and Costco offered its own evidence to the contrary. The Ninth Circuit vacated and remanded the district court's class certification because the district court failed to conduct the required "rigorous analysis" to determine whether there were common questions of law or fact among the class members' claims required by NRCP 23(a).[11] "It is clear in determining whether an expert's testimony is reliable, the trial court must act as a gatekeeper to exclude "junk science" that does not meet the Federal Rule of Evidence 702's reliability standards by making a preliminary determination that the expert's testimony is reliable." *Id.*, at 982 (describing the *Daubert rule)*. This rule of evidence does not require a court to admit or to exclude evidence based on its persuasiveness; rather it requires a court to admit or exclude evidence based on its

[11] The Ninth Circuit relied on the *Daubert* rule of evidence while Nevada adopts the *Hallmark* rule as discussed herein. The distinction is immaterial to the argument the District Court was required to judge the persuasiveness of the evidence once it determined, if it did, its reliability.

scientific reliability and relevance. This standard should not be confused with the standard analyzing commonality for the purposes of NRCP 23. "*Ellis v. Costco*, 657 F.3d at 981. The Ninth Circuit concluded: "Instead of judging the persuasiveness of the evidence presented, the district court seemed to end its analysis of the plaintiff's evidence after determining such evidence was merely reliable. The district court stated that although Costco challenges the propriety of using such aggregate data, such arguments "attack the weight of the evidence and not the admissibility." *Id.* at 982. The district court in *Ellis* concluded: "[T]o the extent the district court limited its analysis of whether there was commonality to a determination of whether plaintiffs' evidence on that point was admissible, it did so in error." *Id.* In finding the Association may proceed with the Class Actions, the District Court concluded: "In this Court's view, presenting statistical or extrapolated proof does not negate admissibility but may affect the weight the jury gives to the evidence." App., Vol. III, p. 0537:1-2. The District Court made the same mistake as the lower court in *Ellis* and expressly failed to judge the persuasiveness of the evidence in determining commonality and instead concluded the jury will decide the weight given to the evidence. Instead of examining the merits to decide commonality, the District Court concluded because the Association's Defect List was reliable (a fact D.R. Horton disputes), a finding of commonality was appropriate. However, the District Court was required to resolve any factual disputes necessary to determine whether there were common questions that could affect the class as a whole. *Ellis v. Costco*, 657 F 3d at 983. D.R. Horton presented factual argument regarding the lack of persuasiveness of the Association's expert evidence. The evidence was not verified by an expert. D.R. Horton disputed the manner in which the homes were inspected, whether the inspections were random or purposively selected, whether the inspected units were all the same plan or elevation, whether all alleged defects manifested itself in the same manner throughout all units and whether in fact it was even

possible for the alleged defects to exist in all units. The District Court was required to resolve any factual disputes as to the existence of the alleged defects in all of the units to determine whether they were common to the class as a whole. Accordingly, under either scenario, the District Court either erred in failing to determine the reliability of the expert evidence offered by the Association or, if it did, it expressly failed to judge the persuasiveness of the evidence and utilized an impermissible legal criteria to resolve the critical factual disputes as to the existence of the alleged defects in the units. The Class Actions failed to satisfy NRCP 23(a) and 23(b)(3) commonality and must be dismissed or, in the alternative, remanded for application of the proper legal standard.

E. The Supreme Court's January 2013 Writ Order Is the Law of the Case as to the 192 Assigned Claims

The law-of-the-case doctrine provides when an appellate court decides a principle or rule of law that decision governs the same issues in subsequent proceedings in that case, both in the lower court and upon subsequent appeal. *Dictor v. Creative Management Services, LLC.*, 223 P.3d 332, 126 Nev. Adv. Op. 4 (2010); *Hsu v. County of Clark*, 123 Nev. 625, 629, 173 P.3d 724, 728 (2007); *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003). "The law of the case doctrine is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest. The law of the case doctrine, therefore, serves important policy considerations, including judicial consistency, finality, and protection of the court's integrity. *Hsu v. County of Clark, supra*, 123 Nev. at 631. In order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue explicitly or by necessary implication. *Snow–Erlin v. U.S.*, 470 F.3d 804, 807 (9th Cir. 2006). However, the doctrine does not bar a district court from hearing and adjudicating issues not

previously decided and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal. *Emeterio v. Clint Hurt and Assocs.*, 114 Nev. 1031, 1034, 967 P.2d 432, 434 (1998); *Bone v. City of Lafayette, Ind.*, 919 F.2d 64, 66 (7th Cir.1990) ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default.").

The Supreme Court heard and adjudicated whether the Association met its burden of establishing the requirements of NRCP 23 as to the 192 assigned claims. The Supreme Court noted it applied an abuse of discretion standard in its review of class certification. In doing so, the Supreme Court performed its own thorough analysis of all of the NRCP 23(a) requirements and NRCP 23(b)(3) requirements and determined the Association failed to meet the NRCP 23(a) commonality, typicality requirements and the NRCP 23(b)(3) predominance and superiority requirements. The Supreme Court documented its factual findings and analysis in its opinion. ." App., Vol. I, pp. 0154, 0155, 0157. For instance, the Supreme Court noted the Association failed to meet its burden of showing NRCP 23(a) commonality as the Association "identifies a myriad of vague complaints in paragraph 16 of the Complaint..." App., Vol. I, p. 0154. The Court further noted the Association failed to meet NRCP 23(a) typicality requirement because "given the myriad of constructional defects alleged, it is also difficult to perceive whether they are typical of those found within the 192 assigned claims' home." App., Vol. I, p. 0154. In addition, the Supreme Court's heard and adjudicated the predominance inquiry and concluded because the predominance requirement is more demanding than the NRCP 23(a) commonality and typicality requirements, the Association also failed to satisfy the more demanding prong of NRCP 23(a). App., Vol. I, p. 0157. Finally, the Supreme Court made a thorough inquiry into superiority and found the Association failed to meet its burden of showing that a class action is the superior

method of adjudication and additionally noted the inability to obtain assignments form the other 150 unit owners was an indication that additional litigation may occur if it were to certify a class. App., Vol. I, p. 0157. It is clear the Supreme Court addressed each requirement of NRCP 23 and explicitly adjudicated the Association failed to meet its burden. This is the law of the case and cannot be changed nor can a more precise presentation of evidence to a district court influence a change in the previously decided law. *See, Hall v. State,* 91 Nev. 314, 535 P.2d 797 (1975), "[T]he instant appeal merely supplies a more focused review of the issues stemming from the illumination of hindsight." As stated in *Hall,* the "doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *Id.* at 316. This is exactly what the District Court permitted: the Association was permitted to present a more organized and detailed documentation and argument at the direction of the District Court after reflection of the previous proceedings.

In Nevada, the only instance when the "law of the case doctrine" does not apply, as decided by the Supreme Court of Nevada in *Hsu v. County of Clark,* supra, 123 Nev. at 729, is where, in the interval between two appeals of a case, there has been a change in the law...by judicial ruling entitled to deference. There has been absolutely no change in the law expressed in *Shuette, First Light II,* and recently clarified in *Beazer*, from January 25, 2013 until November 12, 2013 as to the Association's burden of establishing all of the requirements of NRCP 23 necessary to proceed with a class action. The District Court's reconsideration of the ruling denying standing to the Association to bring class action claims on behalf of the 192 unit owns violates the law of the case doctrine by reconsidering the Supreme Court's order denying standing to the Association to proceed as a class action on behalf of the 192 assigned unit owners. D.R. Horton requests this Court

issue a writ of prohibition and/or mandamus instructing the District Court to vacate its November 2013 Order as to the 192 Class Action and 192 Sub Class Actions and instruct the District Court to determine an alternative representative action for the Association to proceed as mandated by *Beazer*.

F. The Assignments Obviated the Association's Representative Standing Granted to It by NRS 116.3102(1)(d)

In or about September 2010, the Association obtained written Assignments on behalf of 192 unit owners. App., Vol. I, p. 13 (exemplar); Vol. IV, pp. 0687-Vol. V, p. 880 (all 192 assignments). In its Standing Motion, filed on September 30, 2010, the Association argued, based on 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 citing *In re Silver State Helicopters, LLC*, 403 B.R. 849, 864-865 (Bkrtcy D. Nev. 2009) which provides:

> The assignability of rights generally depends on local law. Like any other valid agreement, assignments are enforceable under Nevada law. See e.g. *Woods v. Chicago Title Agency of Las Vegas*, Inc., 109 Nev. 70, 847 P 2d 738 (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 Section 317 (1981). An assignee typically "steps in the shoes" of an assignor. See *In re Boyajian*, 367 B.R. 138, 145 (9th Cir BAP 2007).

The Association argued by virtue of the Assignments of all of the claims of the 192 unit owners, the Association is the real party in interest apart of its representative standing granted to it by NRS 116.3102(1)(d) and could proceed on behalf of the 192 assigned claimants without meeting NRCP 23 class action requirements. App., Vol. I, p. 0029:16-18. In addition to "stepping into the shoes" of the assignor homeowner, the Assignments extinguished the 192 unit owners'

right to bring claims against D.R. Horton. Only the Association is the real party in interest to bring those claims now. The 192 unit owners no longer have *any* claims against D.R. Horton as all of those claims are held by the Association. Accordingly, the assignments obviated the representative standing granted to the Association by NRS 116.3102(1)(d): the Association no longer has anyone's interest to represent as the only interests in this action are the Association's. The Association has 192 separate claims for construction defects against D.R. Horton, which may be a joinder action, a consolidated action or possibly a class action if the Association can sustain its burden of showing the requirements of NRCP 23 are met, an analysis not yet performed by the district court.

1. The Nevada Federal District Court Has Determined an Association Cannot Have Standing As An Assignee and Have Representative Standing.

The Nevada Federal District Court recently addressed associational standing under federal law in *Waterfall Homeowners Ass'n v. Viega, Inc.* 283 F.R.D. 571 (2012). In *Waterfall,* the homeowner's association filed a Rule 23 class action purporting to represent 998 homeowners throughout the Las Vegas area arising out of the failure of yellow brass plumbing fittings and components. The homeowners association sought damages and standing in a representative capacity pursuant to Chapter 40. On a motion to deny class certification, the defendants argued the association had no associational standing to pursue the claims in federal court. Defendants conceded under Nevada law the homeowner association had standing to represent its members under Chapter 40, including claims affecting the individual units. *Id.*, at 579. Defendants, however, argued the relevant state statute permitting such representation, NRS 116.3102(1)(d), does not guarantee associational standing under Article III of the United States Constitution.[12]. In

12 Associational standing under federal law is analyzed by a three part test as defined in *Hunt v. Wash State Apple Adver Comm'n* 432 U.S. 333, 343 (1977)

finding the association lacked standing under federal law because the individual homeowners would have to participate in the suit which violates the third requirement under *Hunt*, the Court in *Waterfall* recognized had the homeowners *assigned* their claims to the association outright, as in the present case, representational standing would be obviated and the association would have standing in federal court on that basis. *Waterfall Homeowner's Association* 283 F.R.D. at 579. Accordingly, the Nevada Federal District Court acknowledged associational standing, and standing by virtue of an assignment, are two mutually exclusive legal principles, conferring very different rights. It further affirmed NRS 116.3102(1)(d) does not guarantee representational standing; the requirements must be met. See also, *Greystone Nevada, LLC v. Anthem Highlands Community Ass'n*, 2012 WL 7984490 at 4 (D. Nev. 2012), another case involving a homeowners association acting in a representative capacity pursuant to NRS 116.3102(1)(d), where the Nevada Federal District Court also pointed out the distinction, "..an assignee ultimately keeps the proceeds of a successful claim, whereas a statutory representative does not..." *Id.* at 5. Once the Assignments were executed, representational standing was obviated.

2. NRS 116.3102 Limits the Association's Representative Standing

NRS chapter 116 provides a statutory grant of standing to homeowners association to assert claims affecting individual units within the common interest community. *First Light II*, 125 Nev. 449, 457. However, NRS 116.3102(1)(d) standing is granted only to an association representing "two or more unit owners" on matters affecting "the common interest community", neither of which exist after the Assignments. After the Assignments, the Association has the right to bring claims for construction defects in the individual units pursuant to the Assignments, not the right to bring an action in its representative capacity without meeting the requirements of NRS 116.3102(1)(d). The Assignments did not confer title to the

Association nor did they automatically confer the representative standing the Association may have had prior to the Assignments. Following the Assignments there is no longer "two or more unit owners" for the Association to represent and there is no longer a matter affecting a "common interest community". The outcome of this litigation will have no impact on the common interest community. The Assignments expressly state in paragraph C:

> It is understood that nothing in this Assignment shall be construed to obligate THE ASSOCIATION, in any way to undertake or pay for any particular repairs to the individual unit.
>
> App., Vol. I, p. 0013.

This fundamental principle of law was also recognized in *First Light* when the Court referred to damages in a representative construction action as those "necessary to compensate individual unit owners." *First Light II* at 459. While the Association may still have representative standing to pursue common area claims, and claims on behalf of the 150 unit owners who did not assign their claims to the Association, the Assignments obviated its representational standing to pursue the 192 individual claims assigned. It cannot have both representational standing of its members (who assigned away all their rights) and standing as the real party in interest as to the individual claims previously owned by the 192 unit owners.

3. Without Representational Standing, The Association's 192 Separate Claims Are Not Suitable For Class Action

Once this Court determines the District Court erred in failing to address the representative standing of the Association as a result of the Assignments, the action must be remanded to determine how the 192 separate claims of the Association can proceed. If the Association wants to bring its 192 separate claims as a class action, it must establish the four prerequisites of NRCP 23(a) and at least one of the requirements set forth in NRCP 23(b), an analysis different than the one conducted

by the District Court as to the Association in its representative capacity.

The 192 separate claims of the Association are not amenable to class certification as the Association is the only member of the class and cannot meet the numerosity requirement. Individual litigation is preferred where it is possible to join all members' claims in a single lawsuit. The "numerosity" requirement ensures that the class action device is used only where it would be inequitable and impractical to require every member of the class to be joined individually. *Shuette* 121 Nev. 837, 846. Nor is a class action the superior method for adjudicating the claims of the class members as required by NRCP 23(b). The Association is the only party to this litigation by virtue of the Assignments and all of its 192 claims can be joined in a single joinder action. The Association, relying only on itself, can bring forth individualized proof for each claim demonstrating the peculiar damages related to each of the 192 claims both in quality and quantity.

D.R. Horton requests this Court vacate the November 2013 Order as to the 192 Class Action and 192 Sub Class Action and remand the action to the District Court to with instructions to prosecute the claims of the 192 unit owners as 192 individual claims and not as a representative action.

X. CONCLUSION

The District Court's November 2013 Order, as modified, certifying the Class Actions and the Sub Class Actions contains numerous errors and abuses of discretion on the part of the District Court warranting remand to the District Court for further proceedings and clarifications. D.R. Horton respectfully request this Court consider its challenges to the November 2013 Order and find the Class Actions and the Sub Class Actions cannot proceed as ordered. The only analysis available to the District Court following was an analysis to determine an alternative representative action pursuant to the mandate of *Beazer*. In the alternative, the District Court abused its discretion in certifying the Class Actions as the Association failed to meet its burden under NRCP

23(a) and NRCP 23(b) as the District Court improperly relied on extrapolation to define the class members and failed to properly examine the expert evidence submitted by the Association pursuant to Nevada evidentiary standards.

In addition, the certification of the 192 Class Actions violates the law of the case as established by this Supreme Court in its January 2013 Order. Moreover, the representational standing conferred by NRS 116.3102(1)(d) was obviated by the Assignments and the Association no longer has representational standing. The challenges contained herein present issues in need of clarification regarding the application of *Beazer* following a denial of class certification and the evidentiary standard in Nevada for class certification in the context of constructional defect litigation and the use of statistical sampling, extrapolation and expert evidence in the certification process. All of these issues, additionally, present questions of statutory interpretation and construction regarding NRS 116.3102(1)(d) and the applicability of the procedures contained in NRS 40.645 in the class certification of construction defect cases.

Dated this 14th day of April, 2014.

WOOD, SMITH, HENNING & BERMAN LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of April, 2014, I submitted for electronic filing and electronic service to all parties the foregoing PETITIONER'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS.

I HEREBY CERTIFY that on the 14th day of April, 2014, a copy of PETITIONER'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS was hand delivered to the following:

Honorable Judge Susan H. Johnson
Regional Justice Center, Department XXII
Eighth Judicial District Court
200 Lewis Avenue
Las Vegas, NV 89101

I HEREBY CERTIFY that on the 14th day of April, 2014, a copy of PETITIONER'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS was hand delivered to the following:

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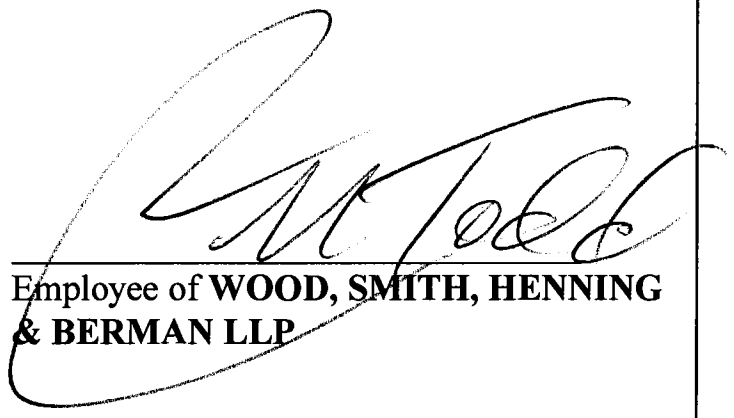

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