**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Petitioner,

vs.

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

Respondent.

D.R. HORTON, INC.,

Real-Party-In-Interest.

**SUPREME COURT CASE NO: 65456**

Eighth Judicial District Court
Clark County, Nevada
Case No.: 07A542616



**REAL-PARTY-IN-INTEREST, D.R. HORTON, INC.'S ANSWER TO PETITIONER'S WRIT OF PROHIBITION OR MANDAMUS**

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## VERIFICATION AFFIDAVIT OF JOEL D. ODOU, ESQ.

STATE OF NEVADA )
)
COUNTY OF CLARK )

I, JOEL D. ODOU, 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 ANSWER TO PETITIONER'S WRIT OF PROHIBITION OR MANDAMUS.

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

3. I have read this Answer to Petition for Writ of Prohibition or Mandamus 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**

SUBSCRIBED and SWORN to before me this 11th day of June 2014.

**NOTARY PUBLIC**

RAPHAELA M. TODD
Notary Public, State of Nevada
Appointment No. 98-3712-1
My Appt. Expires Apr 24, 2018

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES:**

**STATUTES AND RULES**



**OTHER**

# ANSWERING BRIEF TO PETITION FOR WRIT OF PROHIBITION OR MANDAMUS

**COMES NOW**, Real-Party-in-Interest, D.R. Horton, Inc., ("D.R. Horton") by and through its counsel WOOD, SMITH, HENNING & BERMAN LLP, and hereby submits this ANSWERING BRIEF IN RESPONSE TO PETITIONER HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION'S PETITION FOR WRIT OF PROHIBITION OR MANDAMUS.

Real-Party-in-Interest asserts extraordinary relief is not warranted in this instance except with regard to the District Court's Order allowing Petitioner High Noon At Arlington Ranch Homeowners Association ("the Association") to litigate, in its representative capacity, the claims of former owners for damages suffered and specified under NRS 40.655, such as loss of use and market value, repair and temporary housing expenses, attorneys' fees and the like, and respectfully requests Petitioner's Writ of Mandamus or Prohibition with respect to all other issues, is denied.

DATED this 11th day of June, 2014.

**WOOD, SMITH, HENNING & BERMAN LLP**

By: _____

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

On March 18, 2014, the District Court entered an Order granting D.R. HORTON INC.'s Motion for Partial Summary Judgment. The District Court ordered the following:

(1) Plaintiff HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION ("Association") "may litigate, in its representative capacity, the claims of the 112 'original' homeowners relating to continuing or existing constructional defects within the building envelopes," but it, "cannot represent such claims on behalf of the now 230 former-owners as the latter are no longer real parties in interest as required under NRCP 17."

(2) The Association, "may litigate, in its representative capacity, the claims of the 62 or 64 'original' unit-owners with respect to continuing or existing construction defects within the homes' interiors," and it, "cannot represent such claims on behalf of the now 130 former-owners as the latter are no longer the real parties in interest as required by NRCP 17."

(3) The Association "may litigate, in its representative capacity, the claims of former owners for other damages suffered as specified under NRS 40.655, such as loss of use and market value, repair and temporary housing expenses, attorneys' fees and the like."

(4) "[I]n the event of an assignment of claims for existing or continuing constructional defects by the seller or soon-to-be former owner to the purchaser in conjunction with the property's transfer"...the Association, "may litigate, in its representative capacity, the claims of the subsequent owners with respect to the assigned claims." (*Petitioner's Appendix*, Vol. VI, Tab 19, pp. 0985-0995.)

The Association asserts the District Court abused its discretion in granting D.R. Horton's Motion for Partial Summary Judgment by accepting the "legally

untenable claim" that subsequent changes in ownership of units reduces and limits Petitioner's NRS 116.3102 standing and/or claims under NRS 40.600 et seq. The Association contends the District Court failed to recognize in a representative actions pursuant to NRS 116.3102(1)(d), it is the Association that is the "claimant" and the "real party in interest" by express statutory authority. The Association contends "[T]hat express statutory authority does not depend upon the identity of the homeowner that owns the unit in the Association. Contrary to the ruling of the District Court, that express statutory is not divested from the Association when a homeowner sells his or her unit to another." (*Petitioner's Brief*, pg. 2, lines 8-24). The Association requests this Court to enter a writ of mandamus directing the District Court to amend its Order and find the Association has standing pursuant to NRS 116.3102(1)(d) and NRCP 17 to assert in its own name all claims of two or more unit owners that affect the common interest community, regardless of whether the homes have been sold to subsequent purchasers.

D.R. Horton contends the District Court Order did not obliterate NRS 116.3102(1)(d) and the Association's representational standing. NRS 116.3102(1)(d), read in conjunction with NRCP 17, does not give homeowners' associations the right to assert causes of action on behalf of unit owners the unit owners themselves do not own. NRS 116.3102(1)(d) does not expand the rights of unit owners; it authorizes the Association to act on their behalf. The District Court correctly found while changes in ownership do not strip the Association of its representational standing to pursue claims on behalf of two or more unit owners on matters affecting the common interest community, transfers of real property can change or adjust those particular claims or damages sought. (*Petitioner's Appendix*, Vol. IV, Tab 19, p.0992 [8:8-10]). Accordingly, the Association maintains its representational standing to act on behalf of the subsequent purchaser as to those claims owned by each subsequent purchaser, whether by assignment or

accrual. NRS 116.3102(1)(d) does not create a cause of action where none exists. The Association ignores fundamental property law requiring subsequent purchasers to obtain a valid assignment of rights from former property owners in order to maintain a cause of action that stems from damage to the property while owned by the original property owner. An owner of property becomes legally damaged for which compensation can be sought at the moment a defect causes economic damage to the property. At that moment the cause of action for such damage accrues to the owner and becomes the owner's personal property right. The owner of the claim is the real party in interest, not the property. *Vaughn* v. *Dame Const. Co.*, 223 Cal. App. 3d 144, 148-149 (1990), *Krusi v. S.J. Amoroso Construction Co.,* 81 Cal. App.4th 995, 1005 (97 Cal. Rptr. 2d 294 (2000), *Keru Investments, Inc. v. Cube Co.,* 63 Cal. App. 4th 1412, 1423-1425, 74 Cal. App. 2nd 744 (1998). Without a valid assignment from the prior owner to the current owner, the current owner does not acquire the rights of the prior owner. Therefore, any representative of the current owner similarly does not acquire the rights of the prior owner. As a representative, the Association does not have representational standing to assert any claims on behalf of subsequent purchasers for defects or damage alleged in the Complaint. However, should a subsequent purchaser discover defects or sustain damages that are *wholly different* from those the former owner possesses, the subsequent purchaser must engage in the Chapter 40 process, assert those *new* claims and the Association could represent its interests provided the NRS 116.3102 requirements for representational standing are met, i.e. two or more units affecting the common interest community. See, *Anse, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 109 P. 3d 738 (2008). Accordingly, the District Court did not err or abuse its discretion when it correctly applied Nevada law in accordance with the correct statutory interpretation of NRS 116.3102(1)(d).

D.R. Horton does, however, contend the District Court erred with regard to

number 3, supra, when it ordered the Association could prosecute the claims of the former owners for damages suffered as specified under NRS 40.655, such as loss of use and market value, repair and temporary housing expenses, attorney's fees and the like. (*Petitioner's Appendix*, Vol. IV, Tab 19, p. 0094 [10: 19 - 24]). An Association may not represent the interests of former unit owners, ever. NRS 116.3102(1)(d) allows a homeowner associations to "institute, defend or intervene in litigation…in its own name on behalf of itself or on behalf of two or more unit owners on matters affecting the common-interest community." NRS 116.095 defines unit owner as a claimant who owns a unit. Accordingly, those who sold their unit no longer own a unit and, by statutory definition, the Association cannot represent its interests for any claims. The prior owner must join the suit independently to prosecute those claims or file a separate action on its own behalf. Therefore, the District Court erred when it ordered the Association has standing to prosecute the claims still owned by former owners as to damages specified in NRS 40.655. D.R. Horton requests this Court issue a writ of mandamus directing the District Court to amend its Order of March 18, 2014 to omit this reference entirely.

## II. STATEMENT OF THE CASE

The instant matter involves Plaintiff, High Noon at Arlington Ranch Homeowners Association's ("Association") claims for purported construction defects on behalf of itself and the owners of the 342 units at the High Noon at Arlington Ranch project, a 114-building development in Las Vegas, Nevada (the "Subject Property"). The Association commenced the instant matter by filing a Complaint against D.R. Horton on June 7, 2007, prior to serving Notice as required by NRS §40.645. (*See, Petitioner's Appendix*, Vol. 1, Tab 1, pp. 0001-0012) The Association asserted a myriad of claims regarding the Subject Property, including claims involving the common interest community, as well as claims within the interiors of the individual units owned by individual homeowners.

Plaintiff specifically alleged:

> "The Association's members are collectively ***the owners***, in fee simple, of the Common Areas of the Subject Property commonly known as High Noon at Arlington Ranch."
> (*Petitioner's Appendix*, Vol. I, Tab 1, p. 0002 [2: 5 – 9])(Emphasis Added).

AND

> "Plaintiff's members ***are the individual owners*** of the units within the Subject Property. Plaintiff brings this suit in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowner's Association ***unit owners***."
> (*Petitioner's Appendix*, Vol. I, Tab 1, p. 0002 [2: 17 – 19])(Emphasis Added).

Since the Associations' filing of the Complaint, 230 of the original 342 unit owners, on whose behalf the Complaint was filed, have sold their units. (*Petitioner's Appendix*, Vol. III, Tab 7, pp. 0639-0643; *Petitioner's Appendix*, Vol. III, Tab 7, pp. 0644-0750; and *Petitioner's Appendix*, Vol. IV, Tab 7, pp. 0751 - 0854). As such, only ***112*** of the remaining unit owners owned their unit at the time the Association filed its Complaint. Further, as to the sub-class certified by the District Court consisting of the interior claims the of 192 unit owners, 130 of these unit owners no longer own their units. Accordingly, the sub-class consisting of the 192 unit owners now consists of 62 unit owners' claims. Despite these transfer in ownership, the Association asserts, pursuant to the representational standing granted to it by NRS 116.3102(1)(d), it may represent the interests of all current 342 unit owners regardless of changes in ownership.

In its Motion for Partial Summary Judgment, D.R. Horton argued the Association's assertion it can represent claims on behalf of the unit owners who purchased their unit after the Complaint was filed (hereinafter "Subsequent Purchasers") is, as a matter of law, improper. The Association did not, nor could it,

commence this case on behalf of *prospective* homeowners and cannot represent the interests of any homeowner who did not own his or her home at the time the initial Complaint was filed as to those asserted claims without an assignment of those claims. NRS 116.3102(1)(d) provides the Association "may institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community. The Association blurs the distinction between actions "in its own name" with actions "on behalf of two or more unit owners." The Association may only act on behalf of itself as to claims it possess, for example, actions to enforce the Covenants, Conditions and Restrictions ("CC&R's) or actions involving the Common Areas to which it has title. (*Real Party Interest's Appendix*, Vol. 1, pg. 0023). As such, it was not an abuse of discretion, nor an error, for the District Court to grant Partial Summary Judgment and to find as a matter of law the Association's claims are limited to 112 units as to exterior claims and 62 units as to interior claims.

The Association's Opposition to D.R. Horton's Motion for Partial Summary Judgment was completely lacking any affidavit, exhibit or even argument demonstrating a genuine factual issue to withstand D.R. Horton's Motion for Partial Summary Judgment. In fact, the Association did not dispute or raise one material issue of fact in its Opposition regarding the changes in ownership but, rather, focused on addressing D.R. Horton's legal arguments. *(Petitioner's Appendix*, Tab 14, Vol. IV, pp. 0899-0909.) The Opposition claimed D.R. Horton misinterpreted the authorities upon which it relied and obliterated the representational standing granted it pursuant to NRS 116.3102(1)(d). It was the Association, as discussed below, who misinterpreted authorities and misunderstood the law.

## III. SUMMARY OF THE ISSUES AND CONCLUSIONS

D.R. Horton contends there is one issue on appeal: whether the District

Court erred and/or abused its discretion in determining the Association, in its representative capacity, may not represent current owners who purchased their property after the Complaint was filed unless that subsequent purchaser obtained a valid assignment or transfer of interest of the cause of actions in the Complaint from the prior owner. Rather than asserting this one issue on appeal, the Association breaks the issues into five repetitive and irrelevant issues but cannot escape the inevitable conclusion: the District Court was correct in its ruling on D.R. Horton's Motion for Partial Summary Judgment. D.R. Horton responds to each issue presented as follow:

ISSUE ONE: Whether the Association is a Real Party in Interest pursuant to NRCP 17(a) and the Uniform Common-Interest Ownership Act?

CONCLUSION: As to the allegations in the Complaint, the Association is the Real Party In Interest pursuant to NRCP 17(a) and the Uniform Common-Interest Ownership Act and can represent the unit owners at the time the Complaint was filed and who currently still own their unit. The Association could also be the Real Party in Interest on behalf of a Subsequent Purchaser as to claims which were assigned to the Subsequent Purchaser at the time of the sale. The Association may further be the Real Party in Interest on behalf of current unit owners as to new claims arising after the sale of the Subject Property which are not alleged in the Complaint.

ISSUE TWO: Whether the Association's standing, Real Party in Interest Status and claims are affected, reduced or limited by its members' sales of units to new members subsequent to the filing of the Original Complaint?

CONCLUSION: The Association's standing to assert claims in this litigation on behalf of unit owners is affected by its members' sales of units to subsequent purchasers after to the filing of the original Complaint. A cause of action for injury to property as alleged in the Complaint is personal property, not real property. Those causes of action accrue to the owner of the Subject Property at the time the economic damage occurred. The subsequent sale of property does not automatically assign or transfer the causes of actions. Absent an assignment, the prior owner remains the real party in interest to bring those claims. The Association's original claims on behalf of the 342 unit owners are reduced by the number of units sold after the Complaint was filed unless there was a valid assignment of causes of action.

ISSUE THREE: Whether the District Court erred in concluding the Association can only assert claims for units not having changed ownership since the date the initial complaint was filed?

CONCLUSION: The District Court did not err when it ruled the Association's standing to assert claims on behalf of Subsequent Purchasers is limited to those owners who have an assignment of existing claims or to those owners who claim new defects not subject to this action.

ISSUE FOUR: Whether the District Court erred in relying on its ruling in a single family home case brought by individual homeowners – *Balle v. Carina Corp.*

CONCLUSION: The District Court did not err when it *referenced* and

provided the case of *Balle v. Carina Corp.* to counsel at the hearing on the Motion for Partial Summary Judgment. The District Court relied on current valid law.

ISSUE FIVE: Whether the District Court's Order Granting Partial Summary Judgment conflicted with, contradicted and is inconsistent with the District Court's prior rulings finding that the Association's claims had met the requirements for NRS 116.3102(1)(d).

CONCLUSION: The District Court's Order Granting Partial Summary Judgment did not conflict with, contradict nor was inconsistent with prior rulings because prior rulings did not examine the issue raised in the subject motion. The Association maintains its NRS 116.3102(1)(d) representative standing to act on behalf of two or more unit owners on matters affecting the common interest community. The prior rulings must be read in conjunction with the District Court's Order limiting the scope of the Association's representation to the owners at the time the Complaint was filed. The prior orders merely direct the manner in which those claims, as limited by the District Court Order, are permitted to proceed.

## IV. ARGUMENT

### A. The Owners at the Time the Complaint was Filed are the Real Parties in Interest to Bring the Alleged Constructional Defect Claims

It is black letter law causes of action for alleged constructional defects do not follow the real property upon transfer of ownership and a subsequent purchaser does not automatically become the real party in interest to bring prior owners' claims. If someone buys damaged property, it is the seller who is harmed by receiving a

reduced price for the property and the seller who has the right of action against whomever damaged their property, not the purchaser. The new purchaser of damaged property received the benefit of the bargain: a reduction in the purchase price as a result of the damaged property. The Association, pursuant to NRS 116.3102(1)(d), has the right to represent the interests *of homeowners*, not to assert claims on behalf of buildings or real property. The Association's entire argument rests on the misbelief NRS 116.3102(1)(d) confers representational standing to act on behalf of the units rather than on behalf of the unit owners. The law is explicit: The real party in interest is the party who has title to the cause of action. The rights of homeowners to recover for the damages suffered as a result of construction defect, prior to a sale of the defective property, are not extinguished due to a subsequent sale of the defective property. *Vaughn v Dame Construction Co.*, 223 Cal. App. 3d 144, 148 (1990).

In *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), the United States Supreme Court recognized a cause of action is "a species of property protected by the Fourteenth Amendment's Due Process Clause." Further, Article I, Section 8(5) of the Nevada Constitution incorporates the due process requirement of the 14th Amendment of the United States Constitution, "No person shall be deprived of life, liberty, or property, without due process of law." Accordingly, the rights of the former owners cannot simply be given to the current owners by virtue of transfer of the real property, and then given to the Association herein by virtue of NRS 116.3102(1)(d).

The rights of persons who sue for construction defects to continue to maintain their actions after they sell the affected property was addressed in *Vaughn v. Dame Const. Co.,* 223 Cal. App. 3d 144, 272 Cal. Rptr. 261 (1990). In *Vaughn*, a condominium owner sued the builder for damages for defective construction. While the suit was pending, she sold the condominium. The builder argued the plaintiff no

longer had standing to continue the suit. The Appellate Court rejected this argument finding the prior owner had suffered damage to her property before the sale and the subsequent sale of the property did not automatically assign or transfer her cause of action for damages. *Id.* at 149, 272 Cal. Rptr. 261. The *Vaughn* Court held:

> While ordinarily the owner of the real property is the party entitled to recover for injury to the property, the essential element of the cause of action is injury to one's interests in the property—ownership of the property is not.... Since it was [Vaughn's] interest in the property which was injured by [the contractor's] defective construction, she is the owner of the cause of action entitled to maintain the present action.

The Court went on:

> The cause of action for damages as a result of injury to property, which was fully vested in plaintiff at the time of the injury, is personal property—not real property. The right to recover damages for injury to property, being personal property, may be assigned or transferred. There is no authority, however, for the proposition that the transfer of the real property automatically transfers plaintiff's personal cause of action.

*Id.* at 148, 272 Cal. Rptr. 261 (*citations omitted*).

As to subsequent purchasers' rights, *Vaughn* explained:

> No one other than [Vaughn] can recover for the damages she sustained as owner of the property at the time the injury occurred. The fact that the property was sold after the damage occurred does not mean the new owners are now the parties entitled to recover for the damage suffered by [Vaughn] while she was the owner. In order for the new owners to maintain an action, they would first have to establish damage to their interests in the property. *If, the new owners bought the property with full knowledge of the defective construction and presumably paid no more than the fair market value of the property in its defective condition, there is little likelihood that*

> *the new owners would or could assert the same claim as [Vaughn].*

*Id.* at 148-149, 272 Cal. Rptr. 261 (*fns omitted.*)(*Emphasis added.)*

The *Vaughn* Court distinguished itself from *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969), where the subsequent owner of a home was permitted to maintain an action against the builder for defective installation of a radiant heating system. The *Vaughn* Court explained this was not because the cause of action had accrued in the original owner and passed to the subsequent owner upon sale of the property, but because the heating system failed after the sale. *Id.* at 149, fn 5, 272 Cal. Rptr. 261. The Association agrees *Vaughn* stands for the proposition "that a plaintiff suing for construction defects retains its standing irrespective of any changes of ownership of the unit." (*Petitioner's Appendix*, Vol. IV, Tab 14, p. 0906). However, they fail to recognize the distinction between actions it may bring in its own name on behalf of itself with actions they can bring in its name on behalf of two or more unit owners. The Association confuses their status as a representative (who can maintain an action for another) with the owner of the claim (who gets the benefit of the litigation). Because someone sells a unit damaged by another, it does not follow they lose the right of action to be made whole. So, if the original purchaser takes the claims they suffered with them, the question is: what rights do the subsequent purchasers have that can be represented by the Association.

The right of a subsequent owner to recover for damage done to property as result of construction defect before the property was acquired was more recently addressed in *Krusi v. S.J. Amoroso Construction Co.,* 81 Cal. App. 4th 995, 97 Cal. Rptr. 2d 294 (2000), where the Court determined not only was a subsequent owner's claim separate from its seller, its claim could not be essentially the same as its seller. In *Krusi*, the seller of a building knew there had been leaks and floor deterioration

due to defective construction prior to selling the building but believed the issues had been repaired. The buyer was unaware of the defects and the defects could not have been discovered without invasive inspection. After the sale, the leaks and floor deterioration increased in "frequency and magnitude" or as also described by the Court "there was a continuation, in increased form, of the same problems extent during the prior ownership." *Id.* at 1007. The buyers sued the contractor for the defects and the trial Court granted summary judgment because the causes of action which accrued to the prior owners were the same as those alleged by the subsequent owners. In that regard the Court recognized:

> [A] duty may run from an architect, engineer, or contractor to a subsequent owner of real property. It does not mean that, in a case implicating *damage to such property*, once a cause of action in favor of a prior owner accrues another cause of action against the same defendant or defendants can accrue to a subsequent property owner-unless, of course, the damage suffered by that subsequent owner is *fundamentally different from the earlier type*. Thus, if owner number one has an obviously leaky roof and suffers damage to its building on account thereof, a cause of action accrues to it against the defendant or defendants whose deficient design or construction work caused the defect. But, if that condition goes essentially un-remedied over a period of years, owners two and three of the same building have no such right of action against those defendants, unless such was explicitly (and properly) transferred to them by owner number one. But owners two and three could well have a cause of action against those same defendants for, e.g., damage caused by an earthquake if it could be shown that inadequate seismic safeguards were designed and constructed into the building. *Such is, patently, a new and different cause of action.*
>
> *Id.* at 1006 (*Emphasis added.*) [1]

[1] If this situation is applied to NRS Chapter 40, a new notice under NRS 40.645 would be required of owners two and three as it is a new and different alleged defect, to give the builder a chance to repair the issue and avoid litigation

As *Vaughn* and *Krusi* make clear, and as due process dictates, a former homeowner cannot lose vested rights simply due to the sale of her property and subsequent purchasers do not simply step into the shoes of the prior owner. [2] The Association relies the case of *Standard Fire Ins. Co. v. Spectrum Community Assn*, 141 Cal. App. 4th 1117 (2006) for its proposition *Vaughn*, *Krusi* and *Keru* are distinguishable. The Association asserts *Standard Fire* interpreted *Vaughn* and *Krusi*, and held, "[t]the intent of the Legislature is to enable homeowners associations to pursue causes of action against developers with respect to construction defects...rely[ing] on distinguishable cases such as *Vaughn*, [citation] *Keru*, [citation] and *Krusi* [citation] to achieve a contrary result would be to frustrate that legislative intent." (*Petitioner's Appendix*, Vol. IV, Tab 14, at p. 0908; *Petitioner's Brief*, p. 15:3-15].

The Association uses this statement to assert the District Court was in error in following the reasoning of *Vaughn, Krusi* and *Keru*. Notably, the Association fails to point out salient facts about why *Vaughn, Keru* and *Krusi* were distinguishable to the facts and claims in *Standard Fire*. *Standard Fire* was an insurance coverage case where the court was determining if, given undisputed facts, the Association did not exist during the policy period and none of the owners of the individual condominium units owned them during the policy period, there was any potential

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[2] The Nevada Supreme Court case, *Anse, Inc v. Eighth District Court,* 124 Nev. 862, (2008) is not inconsistent. *Anse* clarified a "new residence" under NRS 40.615 is one that has remained unoccupied as a dwelling from the completion of its construction to the point of its first sale. Subsequent owners of that residence, as claimants, may seek NRS Chapter 40's residential constructional defect remedies. In *Anse* the subsequent purchaser took title before the Chapter 40 process was initiated. Accordingly, *Anse* does not stand for the proposition subsequent purchasers automatically stand in the shoes of the original owner absent an assignment and injury.

for coverage under the policy. *Standard Fire Standard Fire Ins. Co. v. Spectrum Community Assn*, 141 Cal. App. 4th at 1125. Standard Fire, the insurance carrier for the general contractor and developer, filed a declaratory relief action asserting among other things there was no potential for insurance coverage because the homeowners association lacked standing to sue for damages since "no one can sue for property damage other than the party that owns the property at the time the damage occurs." *Id.* at 1139. Because it was undisputed the damage occurred before the association was even formed, Standard Fire claimed, absent an assignment, the Association had no cause of action. *Id.* at 1140. The court disagreed with Standard Fire's position when it stated:

> Who could have held a cause of action against the developers for construction defects before the Association acquired its interests in the Project? Bristol House Partnership, Ltd. was the declarant under the declaration of covenants, conditions and restrictions (CC&Rs) for the Project. Bristol House Partnership, Ltd. executed the CC&R's through Urban Ventures Corporation and Bluestar Realty Ventures, Inc., as its general partners. If we were to adopt Standard Fire's arguments and hold that the Association, as subsequent owner of interests in the Project, held no cause of action against the developers, then we would have to conclude either that the developers [as prior owners] held a cause of action against themselves, or that no one at all held a cause of action for construction defects....a cause of action cannot have accrued before there was someone in a position to actually assert it.

*Id.* at 1145.

When read in context, the statement, "[T]he intent of the Legislature is to enable homeowner associations to pursue causes of action against developers with respect to construction defects. To rely on distinguishable cases such as *Vaughn* [citation], *Keru* [citation], and *Krusi* [citation] to achieve a contrary result would be

to frustrate the legislative intent," takes on a different meaning." *Id.* at 1148 (Citations omitted). The statement means depriving a homeowners association (or the unit owners) the right to sue for construction defects by claiming it is a subsequent purchaser who does not own the cause of action since the defect or damage occurred during construction *before* the association was formed, does not support the legislative intent as noted by the Court. *Standard Fire* is not saying an association has standing to assert claims on a representational basis for subsequent unit owner purchasers who themselves do not have a valid claim. The reason *Vaughn*, *Keru* and *Krusi* were distinguished was on these facts, not on the law. The law remains consistent.

Unlike the insurer in *Standard Fire*, D.R. Horton is not alleging the Association or original unit owners are subsequent purchasers who are not entitled to recover for damage occurring prior to its creation or original purchase. It is alleging the Association has representational standing on behalf of certain matters for the units' owners at the time the Complaint was filed. Furthermore, neither *Vaughn, Keru* or *Krusi*, upon which D.R. Horton relied, involve the issue raised in *Standard Fire*. The court in *Standard Fire* specifically stated "the Association does not stand in the shoes of subsequent purchasers as in *Vaughn* who bought the individual condominium from the prior owner with knowledge of its defects and at a reduced price. Rather, it stands in the shoes of the plaintiff condominium unit owner who commenced the litigation, but for the fact that the Association has not resold the property." *Id.* at 1140.

Currently, only 112 of the 342 homeowners in Subject Property owned their homes at the time the Complaint was filed on June 7, 2007. For the "sub-class" of 192 interior claims, only 62 homeowners still own their homes. Several units have had more than one subsequent purchaser since the Complaint was filed and numerous homes were foreclosed upon by lenders and subsequently sold "AS IS" to

the current owners. Accordingly, the Subsequent Purchasers must prove their claims for continuing construction defects were assigned from the prior owner (and in some cases assigned more than once) AND they must further establish damage to their interests in the property. "If ... the new owners bought the property with full knowledge of the defective construction and presumably paid no more than the fair market value of the property in its defective condition, there is little likelihood the new owners would or could assert the same claim as plaintiff." [3] *Vaughn v. Dame Construction*, 223 Cal. App. 3d. at 149. Moreover, if the subsequent purchaser purchased the unit from a lender, it is likely it took ownership with knowledge of the defects for less than fair market value and in an "AS IS" condition and accordingly has no damage. In making its argument the Association ignores fundamental principles of law, makes no attempt to distinguish *Vaughn* which is directly on point but instead contends NRS 116.3102(1)(d) was intended to overrule existing case law and create standing on behalf of itself which is clearly inconsistent with the express language of NRS 116.3102(1)(d) which creates standing on behalf of the unit owners as to the claims asserted in the Complaint.

**B. The Association is the Real Party in Interest Pursuant to NRCP 17(a) and the Uniform Common-Interest Ownership Act to Bring Claims Owned by Its Members.**

It is a long standing legal principle, in the absence of an express statutory grant, an association does not have standing to bring suit on behalf of its member owners. NRCP 17(a); *Deal v. 999 Lakeshore Association*, 94 Nev. 301, 304, 579 P.2d 775, 777 (1978). D.R. Horton concedes NRS 116.3102(1)(d) provides express statutory grant of standing to the Association to bring matters on behalf of

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[3] *Vaughn v. Dame Construction* at 149; Nevada law requires disclosure: NRS 40.688 (duty to disclose defects) and NRS 47.250(16) (disputable presumption the law has been obeyed).

two or more of its members on matters affecting the community interest. However, the Association is incorrect in its assertion this standing is not affected by a change in ownership of a members' unit during the pendency of litigation. To the extent a homeowner transfers ownership of its unit during the pendency of construction defect litigation without a valid assignment or transfer of the owners' causes of action against the builder, the association's representational standing is affected by NRCP 17(a) as the new owner is not the real party in interest to bring those claims. The real party in interest to bring those claims is the prior owner and NRS 116.3102(1)(d) cannot override the requirements of NRCP 17(a) by conferring representational standing as to those claims. The Association ignores the fact this statutory grant must be reconciled with the principles and analysis of the statute and the law. "[A]n association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right. *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 136 Cal. App 4th 119, 129, 38 Cal. Rptr. 575, 582 (2006).

**1. NRS 116.3102(1)(d) Does Not Transfer The Rights of Unit Owners To the Association Upon the Sale of the Unit.**

NRS 116.3102(1)(d) provides an association may institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community. According to the legal theory advanced by the Association, NRS 116.3102 confers a greater right than permitted by underlying law. As discussed above, 130 of the individual unit owners do not own the causes of action advanced by the Association. *See, Vaughn v. Dame Construction,* 223 Cal. App. 3d 144, 148 (1990). To adopt the Association's position requires a finding the basic principles set out above with respect to property ownership rights

are irrelevant when an owner's rights are being advanced through a representative and/or because an owner is or was a part of a common-interest-community. Accordingly, the Association is either asking this Court to rule in direct conflict with established law or to create additional rights in the Association by virtue of its representational standing independent of the individual rights of the homeowner. In the latter scenario, if the Association prevails in this action with respect to damages to individual units, the individuals would not be entitled to the recovery obtained on their behalf due to existing law. Rather, a recovery would belong to the units through the Association based on an expansive reading of NRS 116.3102(1)(d).

Indeed, to take this position is to find NRS 116.3102(1)(d) did not just confer statutory representative standing on homeowner associations so as to allow them to sue on behalf of their unit owners: it automatically transferred all of the rights homeowners would otherwise have to personally recover damages individually suffered as a result of construction defects over to the association. This would in fact be transferring the property rights of the original owners at the time the Complaint was filed to the Association in direct violation of the Nevada and U.S. Constitution Due Process Protections. There is no basis in law which indicates a homeowner loses their personal causes of action and rights of recovery for defective construction when it becomes a member of a homeowner association and adopting this concept would be contrary to a reasonable interpretation of the statute, its purpose, and would likely cause NRS 116.3102(1)(d) to fail as an unconstitutional abridgement of fundamental rights. If such were the case, the Association could just sue in its own name on behalf of itself thus making the language "on behalf of two or more units' owners" superfluous. This is not what NRS 116.3102 grants; it grants representative standing on behalf of the real party in interest. It does not make the Association the real party in interest in all

matters[4].

The Supreme Court declined to provide greater rights to associations by virtue of NRS 116.3102 representational standing. See, *D.R. Horton, Inc. v. Eighth Judicial Dist. Court ("First Light II")*, 125 Nev. 449, 215 P.3d 697 (2009) holding NRS 116.3102(1)(d) representational standing did not create standing such that the association did not have to comply with underlying principles and procedures class action lawsuits related to constructional defect. If an association has standing under NRS 116.3102(l)(d) to institute a representative action on behalf of two or more of its members, the association still must satisfy the requirements of NRCP 23 if it wishes to bring its representative action as a class-action suit. *Id.*, at 458, 215 P.3d at 703; see also *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005). *First Light II* specifically found when determining an association had standing to assert claims that affect individual units "normal standing" requirements apply "If either the members on behalf of whom the association sues or the association *meets normal standing requirements*, the question whether the association has the right to bring a suit on behalf of the members is an internal question, which can be raised only by a member of the association." *First Light II*, 125 Nev. at 457 (emphasis added). The only claims where the Association itself meets normal standing requirements are claims regarding the enforcement of the CC&R's and the Common Areas raised on behalf of itself. All other claims are on behalf of the unit owners and must meet "normal standing requirements" as to those claims. *See Apartment Ass'n of Los Angeles v. City of Los Angeles*, 136 Cal. App 3d 581.

NRS 116.3102 representational standing is not an unconditional grant of

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[4] D.R. Horton does not dispute the Association is the real party in interest acting on behalf of itself as to those powers and causes of action granted it pursuant to the CC&R including enforcement of the CC&R and matters affecting the common areas to which it holds title. (*Real Party in Interest's Appendix*, Vol. 1, p. 0023)

standing to bring any claims on behalf of its members. NRS 116.3102 provides express limits to this standing as do guiding principles of established law. Accordingly D.R. Horton does not dispute NRS 116.3102(1)(d) confers representational standing to the Association, rather, it disputes D.R. Horton's contention this representational standing permits the Association to represent the interests of all members of the Association whether the members be past, present or future owners of units in the common-interest community. (*Petitioner's Brief,*). The representational standing conferred by NRS 116.3102(1)(d) does not create a super right to assert claims that do not exist in the individual members. It only allows the Association to stand in its members shoes and assert the claims owned by the member on its behalf.

**2. The Association's Statutory Standing to Assert Claims is Limited**

The Association asserts the District Court was in error because it concluded the Association was an "alter-ego" of the individual members or their claims rather than the real party in interest. The Association stated,

> The critical error in the District Court's rationale is that the District Court erroneously concluded that the "claimant" and "real party in interest" pursuant to NRS 40.610 and NRS 116.3102(1)(d) may *only* be the owner of a unit in a common-interest community, and never the Association. (citations omitted). The District Court erroneously concluded that the Association's standing under NRS 116.3102(1)(d) was only as a "surrogate" or "alter-ego" of the claims of its members (citations omitted). This is an error because it is the Association that is the "claimant" and "real party in interest" pursuant to NRS 40.610 and NRS 116.3102(1)(d)...
>
> (*Petitioner's Brief*, 26:1-12).

Even though the District Court never used the words alter-ego or surrogate,

the Association may be accurately characterizing NRS 116.3102(1)(d)'s representational standing. NRS 116.3102(1)(d) states an association, "may institute, defend or intervene... ***on behalf of*** .. two or more units' owners..." The statute is not conferring unlimited rights to the Association to own the personal causes of action and all rights associated with them, but instead is conferring limited standing for one party to file an action ***on behalf of another***. The Association, in its representative capacity, not in its own right, has standing to initiate litigation on behalf of the unit owners at the time of filing the Complaint.

The Association directs this Court to *Greystone Nev., LLC v. Anthem Highlands Cmty. Ass'n*, 2012 WL 7984490 (Nev. D. Ct. 2012) for the proposition under NRS 116.3102's statutory authorization to sue in a representative capacity, the claims of past, present and future members of the Association are asserted by the Association as the real party in interest and thus changes in ownership have no effect on the ability of the Association to prosecute those claims to verdict. (*Petitioner's Brief*, 24:9 – 25:5) The Association cites the following passage:

> There is, of course, a difference between a private assignment and a statutory authorization to sue in a representative capacity, but the difference only concerns the assignors' or represented parties' ability to take back the interest in the claim; an assignor's ability to take back his interest in the claim is governed by the terms of the assignment, whereas a statutory represented party's ability to take back his interest in the claim is governed by the statute. But because both an assignee and such a statutory representative are treated as real parties in interest under Rule 17, there is no reason to treat them differently for the purposes of aggregating claims under the diversity statute. ... So long as a statutory representative is the real party in interest for certain claims under Rule 17, it may join all such claims under Rule 18 for the purposes of diversity jurisdiction.[Citations omitted]. Defendant argues that the Homeowners must be individually joined as indispensable parties under Rule 19, but Plaintiffs correctly respond that "a

> party authorized by statute" is a real party in interest that "may sue in [its] own name without joining the person[s] for whose benefit the action is brought."

*Id.*

The quoted statement was made by the *Greystone* court in analyzing whether diversity jurisdiction for federal court was met. The Court examined whether it was permissible to aggregate the claims of all individual homeowners to meet the $75,000 diversity requirement even though the lawsuit was filed by the homeowners' association pursuant to NRS 116. 3102(1)(d) without joining any individual homeowners. The Court aggregated the claims of current homeowners; it did not aggregate the claims of past homeowners with current owners. Moreover, as the *Greystone* court stated, when statutory standing is conferred, the statute governs a represented party's ability to take back his interest. *Id.* NRS 116.3102(1)(d) provides the association may institute, defend or intervene… *on behalf of* … two or more units' owners…" Accordingly, the Association was entitled to represent the original owner until he sold his property. At the point of a sale, the original owner "took back his interest in his claim" from the Association as he was no longer a unit owner and NRS 116.3102(1)(d) representational standing could no longer be invoked.

The *Greystone* Court further noted "If defendant was never given Plaintiffs' Chapter 40 notices on behalf of homeowners, Plaintiffs could perhaps not aggregate homeowners' putative claims to implicate diversity jurisdiction" because the standing conferred by NRS 116.3102(1)(d) was not absolute and does not come into play until the homeowners' vote or agree in writing to accept such representation. *Id.* at 4-5. Using the reasoning of *Greystone*, the Subsequent Purchasers were required to send Chapter 40 notices and vote or consent in writing to approve the Association's representation. *Id.* at 4, citing NRS 116.31099(1). The Complaint and Chapter 40 notice served in this matter were done on behalf of

the original unit owners who conferred upon the Association the authority to pursue their claims, not on behalf of the Subsequent Purchasers. NRS 116.3102(1)(d) is not absolute and requires an acceptance on the part of the homeowners to ensure due process rights are protected.

Notably, the Association did not provide this Honorable Court the entire quotation from the *Greystone* case. The entire quote, including the omitted parts (which are delineated in bold below), is as follows:

> There is, of course, a difference between a private assignment and a statutory authorization to sue in a representative capacity, but the difference only concerns the assignors' or represented parties' ability to take back the interest in the claim; an assignor's ability to take back his interest in the claim is governed by the terms of the assignment, whereas a statutory represented party's ability to take back his interest in the claim is governed by the statute. But because both such an assignee and such a statutory representative are treated as real parties in interest under Rule 17, there is no reason to treat them differently for the purposes of aggregating claims under the diversity statute. **The fact that an assignee ultimately keeps the proceeds of a successful claim, whereas a statutory representative does not, is irrelevant to whether a sufficient amount is in controversy between a single plaintiff against a single defendant.** So long as a statutory representative is the real party in interest for certain claims under Rule 17, it may join all such claims under Rule 18 for the purposes of diversity jurisdiction. [Citations omitted]. Defendant argues that the Homeowners must be individually joined as indispensable parties under Rule 19, but Plaintiffs correctly respond that "a party authorized by statute" is a real party in interest that "may sue in [its] own name without joining the person[s] for whose benefit the action is brought. ..." *Greystone* at 5.

The Association intentionally and improperly omitted the above language from its quotation in an attempt to mislead this Court. The Association did so

because the Association intends to keep the proceeds of this litigation. When read in its entirety, *Greystone* supports D.R. Horton's position the Association is only acting on "behalf" of the unit owners. The sentence the Association omitted, that an assignee keeps the proceeds of the claim whereas a statutory representative does not, highlights the problem in claiming NRS 116.3102(1)(d) confers carte blanche standing upon the Association for past, present and future claims. *Greystone* makes clear the Association, in its representative capacity, cannot keep the proceeds of a successful claim. The proceeds are distributed to the current unit owners. The Association's argument is incongruous to representative standing as without knowing the details of the sale to the Subsequent Purchaser it is impossible for the Association to determine the entitlement to proceeds: if the seller reduced the purchase price due to the defects, the Subsequent Purchaser retains a windfall and the original owner remains uncompensated for his damages due to the constructional defects. The Association can only represent unit owners that are entitled to recovery. A valid assignment provides protection to the prior owner (evidencing he sold for full market value and transferred his rights to the damage claim), the subsequent owner (who having paid full value also purchased the potential benefit of the damage claim), and the defendants (who are only subject to one claim for the alleged deficiencies). This is why the law requires a valid assignment. With a valid assignment, there will be no windfall to either owner nor a double jeopardy to the defendants... Absent an assignment, there can be only one party entitled to receive damages for the construction defects: the prior owner.

### 3. The District Court Order is Consistent with the Express Language of NRS 116.3102(1)(d) and The Association's Right to Pursue Chapter 40 Remedies

The Association asserts the District Court's ruling inserted an artificial distinction resulting in an unreasonable outcome, to wit: "ownership changes in

units in common interest community strips both the new members and the association of standing to pursue Chapter 40 claims against liable contractors." (*Petitioner's Brief*, 27:20-25). The District Court's interpretation of the statute did not create an artificial distinction, nor did it create an unreasonable outcome. The Association misstates the court's ruling.

The District Court did not rule ownership changes in common-interest communities strip both the new members and the Association of standing pursuant to Chapter 40. To the contrary, the District Court stated the following:

> [C]onstructional defects that continue to exist in the house do not necessarily cease once ownership is transferred. As this Court has ruled in other cases, owners selling their homes to others can, in conjunction with the sale of real property, assign their ongoing claims for constructional defects existing in the residence to the purchasers...." (*Petitioner's Appendix*, Vol. IV, Tab 19, p. 0993, [9:1-4]).
>
> This Court also recognizes, in some instances, claims for continuing defects may cease or be dismissed upon transfer of ownership. Indeed, there may be situations where, for whatever reason, the prior owner does not assign his interest in the continuing or existing constructional defect claims within the residence to the purchaser.fn7 (*Petitioner's Appendix*, Vol. IV, Tab 19, p. 0993, [9:12-16]).
>
> In Footnote 7, the court went on to state,
>
> In those situations, the new owner can pursue his own constructional defect claim as a new action, once the NRS Chapter 40 pre-litigation requirements are followed...." (*Petitioner's Appendix*, Vol. IV, Tab 19, p. 0993, [9:27-28 Footnote 7]).

Finally, with regard to the claims of the Association on behalf of subsequent or even future owners, the Court ordered,

> "In the event of an assignment of claims for existing or continuing constructional defects by the seller or soon-to-be former owner to the

> purchaser in conjunction with the property's transfer, Plaintiff...may litigate, in its representative capacity, the claims of the subsequent owners with respect to such assigned claims." (*Petitioner's Appendix*, Vol. IV, Tab 19, p.0994, [10:25-28]).

The Association further asserts the delineation between former and current owners of units is an empty and meaningless distinction with regard to an association's rights under the Uniform Common Interest Ownership Act and standing has nothing to do with the identity of the unit owners or how long they have owned the units. They assert the only trigger is when there are claims "affecting two or more units within the common interest community-not the identity of the owners of the units." *Petitioner's Brief*, p. 30:25-26. The Association ignores words actually contained in NRS 116.3102(1)(d). NRS 116.3102(1)(d) confers standing "*on behalf of*...two or more *units' owners*." Again, the legislature was clear. If it desired standing to be conferred on behalf of the units themselves, it could have done so. "The Supreme Court must give a statute's terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." *Arguello v. Sunset Station, Inc.*, 127 Nev. Adv. Op. 29, 252 P.3d 206 (2011) (Citations Omitted). The District Court did not insert an artificial distinction, it inserted the correct and accurate distinction between actions "*on behalf of itself*" from actions "on behalf of two or more unit owners."

### C. The Association's Argument Contradicts Chapter 40 And Frustrates the Legislative Intent.

To permit the Association to represent ever changing homeowners in this litigation would violate D.R. Horton's ability to provide repairs for new issues, defend itself, would advance a policy of forcing litigation on behalf of potentially unwilling homeowners and frustrate the legislative intent of Chapter 40. Absent an

assignment, the Subsequent Purchasers never complied with the mandates of Chapter 40 and cannot be "claimants" under Nevada law or plaintiff's herein, and this Association cannot pursue claims on their behalf in a representative capacity. Should any Subsequent Purchaser decide they want to pursue Chapter 40 claims against D.R. Horton, the Subsequent Purchaser, or the Association, must serve D.R. Horton with a new NRS 40.645 Notice for that particular unit and those particular claims and proceed through the pre-litigation requirements of Chapter 40.

The Eighth Judicial District Court recently evaluated and decided almost an identical issue in another matter. In *Smith, et al. v. Central Park, LLC, et al.*, Case No. A605954, the District Court ruled "any future claims brought by later owners of the residences at issue do not relate back to the date of the Former Owner Plaintiffs issued their Chapter 40 notices." (*Petitioner's Appendix*, Vol. IV, Tab 15, pp.0921-0930). In other words, the District Court ruled if subsequent purchasers wanted to pursue construction defect claims for the homes at issue, they would need to issue their own Chapter 40 Notices and follow the mandatory pre-litigation procedures to allow for repair opportunities and the possibility of resolution without litigation, the purpose of Chapter 40.

While a Subsequent Purchaser may have his own separate and independent cause of action against a developer at the same time as a former owner, he cannot begin that cause of action until he serves the developer with a new NRS 40.645 Notice for that particular home and proceeds through the requirements of NRS Chapter 40.

**D. Allowing the Association to Represent Subsequent Purchasers for the Claims of the Original Owners at the Time of the Complaint Violates the Rights of D.R. Horton and the Rights of the Subsequent Purchasers**

The Association represented specific homeowners at the time the Complaint was filed. Its Complaint alleged: "Plaintiff's members are the individual owners of

the units within the Subject Property. Plaintiff brings this suit in its own name on behalf of itself and all of the High Noon at Arlington Ranch Homeowner's Association unit owners." *Petitioner's Appendix*, Vol. I, Tab 1, p. 0002 [2: 17 – 19]. They never claimed, nor could they claim, to bring the action on behalf of future homeowners or past homeowners. Those represented at the time of the Complaint cannot automatically change on any given day after that filing. To allow such unchecked fluidity of represented parties would violate D.R. Horton's rights. D.R. Horton has the right to know the exact claims being asserted against it. Without such knowledge, its ability to prepare a defense with respect to any individual homeowner would be laid to waste. Further, a new owner cannot automatically be forced to take part in litigation by an association simply because it purchased a residence within a common-interest-community. Moreover, there may be unit owners who purchased their home at a reduced purchase price due to the existence of the defect after the Complaint was filed or believed, based on its knowledge of the alleged defects, its unit is not defective at all. Those homeowners should not be forced to participate in litigation and should not be forced to put a potential purchaser on notice of pending litigation if the unit owner does not believe its unit suffers from any defect.

The Association fails to address what happens to the rights of the seller for damages it suffered as a result of constructional defects. It asserts they "disappear" after a sale of the dwelling. For example, as discussed herein, a seller is required by law to disclose the Complaint and the existence of the constructional defects to prospective purchasers. Accordingly, upon the sale of a home during the pendency of the Chapter 40 process or during the pendency of an action for construction defects, the parties have two options: the parties can chose not to reduce the purchase price of the home due to the existence of defects and the seller can assign his claims and/or causes of actions to the prospective purchaser who will be made

whole for the defects through the outcome of the litigation; or, the seller can reduce the purchase price of the home and maintain the right to recover the value of the reduction in the purchase price from the contractor as well as any damages recoverable pursuant to NRS 40.655. In the first scenario, the subsequent purchaser *was not* compensated for the constructional defects existing in his new home and therefore has the right, by virtue of the assignment, to recover against the contractor. The seller, however, was "compensated" because he did not reduce his purchase price as a result of the existence of the defects (and the association may represent his/her interests pursuant to NRS 116.3102(1)(d)). In the latter scenario, the subsequent purchaser *was* compensated for the defects through a reduction in the purchase price but the seller was not. Because there was no assignment, the seller maintains the right to recover against the contractor. The theories advanced by the Association permits the subsequent purchaser to maintain the right to recover against the contractor regardless of whether he was compensated in the sale of the unit and fails to account for how the seller will be compensated for his damages if the purchase price was reduced. Under the Association's theory, a subsequent purchaser could be permitted a double recovery through both the reduction in his purchase price and the proceeds of the litigation. The seller, on the other hand, could go uncompensated for his damages as a result of the reduction in purchase price, or, if he sues the contractor for those damages and prevails, the contractor could be liable twice for the same injury. The Association completely ignores these complications when it contends a transfer of the real property does not transfer the cause of action for damages resulting from the construction defect.

Perhaps the most important reason why a Subsequent Purchaser should not be forced into litigation, however, is doing so subjects the Subsequent Purchaser to a degree of liability should the Association fail to recover from a D.R. Horton. It is unconscionable for a Subsequent Purchaser to be liable for any claim for attorney's

fees or costs when the Subsequent Purchaser has not even agreed to be involved in litigation. Only an assignment protects the Subsequent Purchaser as the Subsequent Purchaser agrees to participate in the litigation and the agrees to the associated risks.

In fact, NRS 116.31088 requires in order to commence litigation by a homeowners association:

> "The association shall provide written notice to each unit's owner of a meeting at which the commencement of a civil action is to be considered at least 21 calendar days before the date of the meeting. Except as otherwise provided in this subsection, the association may commence a civil action only upon a vote or written agreement of the owners of units to which at least a majority of the votes of the members of the association are allocated."

As such, absent an assignment outlining all risks involved in the litigation, requiring a subsequent purchaser to "steps into the shoes" of the seller is not only a violation of case law, but an unconscionable violation of Due Process Rights.

**E. Chapter 40 Limits D.R. Horton's Liability to a Subsequent Purchaser with Knowledge of the Construction Defects**

Chapter 40 clearly contemplates whether subsequent owners can recover for constructional defects existing prior to their ownership. NRS 40.640 limits a contractor's liability for damages based upon certain acts of parties other than the contractor, including the acts of original owners and subsequent purchasers.

NRS 40.640 provides:

> In a claim to recover damages resulting from a constructional defect, a contractor is liable for the contractor's acts or omissions or the acts or omissions of the contractor's agents, employees or subcontractors and is not liable for any damages caused by:
>
> 1. The acts or omissions of a person other than the contractor or

> the contractor's agent, employee or subcontractor;
> 2. The failure of a person other than the contractor or the contractor's agent, employee or subcontractor to take reasonable action to reduce the damages or maintain the residence;
> 3. Normal wear, tear or deterioration;
> 4. Normal shrinkage, swelling, expansion or settlement; or
> 5. Any constructional defect disclosed to an owner before the owner's purchase of the residence, if the disclosure was provided in language that is understandable and was written in underlined and boldfaced type with capital letters.

NRS 40.640 specifically limits a contractor's liability for damages caused after construction and after the sale of the residence. For example, NRS 40.640(2), (3) and (4) are acts beyond the control of the contractor that occur after construction is completed and the dwelling sold by the contractor. NRS 40.640(5) specifically provides a contractor is not liable for any constructional defect disclosed to an owner before the owner's purchase of the residence, if the disclosure was provided in language that is understandable and was written in underlined and boldfaced type with capital letters. It is well established law sellers of homes are required by law to disclose all known defects to potential purchasers and whether the home is or has been subject to a construction defect action. See, NRS 113.150 and NRS 40.688. Moreover, there is a legal presumption individuals comply with the law. See, NRS 47.250(16). Accordingly, the express language of NRS 40.640(5) prohibits a subsequent purchaser from recovering damages from the contractor unless the defect was not disclosed, which the law presumes it was[5]. Chapter 40 contemplated a scenario like the present where a complaint for constructional defects is filed and the home sold during the pendency of that action. [6] A contractor is not liable to a

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[5] The Association failed to rebut this presumption.

[6] It would be rare to see a disclosure of defects from a contractor in the original purchase of the home following completion of construction by the contractor. Such disclosures would come in a subsequent sale of the dwelling.

subsequent purchaser who is aware of the constructional defects. [7] The reasoning behind this is, absent an assignment, the contractor remains liable to the seller for damages resulting from those constructional defects if he is able to prove such damages.

**F. The Law Prohibits the Association from Bringing the Alleged Claims for Construction Defect on Behalf of the Subsequent Purchasers as All Claims Are Barred Due To Knowledge of the Defects.**

The knowledge of the Subsequent Purchasers of the alleged construction defects prohibits them from bringing all of the claims alleged against D.R. Horton, absent an assignment.[8] This is the precise reason an assignment is necessary. The Complaint alleges claims for (1) breach of contract; (2) breach of the implied warranty; (3) breach of express warranty and (4) breach of fiduciary duty. (*Petitioner's Appendix*, Vol. 1, Tab 1, pp. 0001-0012.) D.R. Horton concedes any conveyance of a unit transfers to the purchaser all of the declarant's express and implied warranties of quality. NRS 40.610, NRS 116.4114. However, where the subsequent purchaser has knowledge of the alleged defects which are the subject of

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[7] *Anse v. Eight Judicial District Court,* 124 Nev. 862, 192 P.3d 738 (2008) makes clear Chapter 40 remedies are available to owners of homes who subsequently purchased the dwelling as long as it remained unoccupied as a dwelling from the completion of its construction to the point of its first sale.

[8] The law requires disclosure of a Complaint for construction defect (NRS 113.150 and NRS 40.688) and the law presumes compliance with this law (NRS 47.250(16). Additionally numerous courts have found the seller's knowledge is imputed to subsequent purchasers and damages are not recoverable. See e.g., *Maycock v. Asilomar Development, Inc.*, 207 Ariz. 495 (2004)("[i]f the defect had been discovered, or had become manifest, before the new owner purchased the home, the [implied] warranty would not exist."); See also, *Curry v. Thornsberry*, 81 Ark. App. 112, 98 S.W.3d 477, 482 (2003). ("The notice of a prior purchaser of defects in the construction of the house is imputed to the subsequent purchaser and bars the subsequent purchaser's action for negligence or breach of implied warranties. *Briggs v. Riversound Ltd. P'ship,* 942 S.W.2d 529 (Tenn.Ct.App.1996).

the warranty claims, the warranties are not transferred. NRS 116.4113 requires express warranties made by any seller to a purchaser of a unit must be *relied upon* by the purchaser. The law required disclosure of the Complaint and it is presumed the seller complied with the law such that the Subsequent Purchasers had knowledge of the defects. Accordingly, there can be no breach of the express warranties as to the Subsequent Purchasers because they cannot be said to have relied on any warranty when they were aware of the pending action expressly stating the warranties were breached. Likewise, the Association's claims for breach of contract are barred as there is no privity of contract between D.R. Horton and the Subsequent Purchasers. Absent an assignment, Subsequent Purchasers have no cause of action against D.R. Horton for breach of express warranties and breach of contract.

**1. The Association's Claim for Breach of the Implied Warranty are Barred as to Subsequent Purchasers**

Implied warranties only permit recovery for latent defects. The universal underlying policy behind implying these warranties is to protect homeowners from defects that are unknown and not discoverable upon reasonable inspection. *Old HH, Ltd. v. Henderson*, 2011 Tex. App. LEXIS 9669 (Tex. App. Austin Dec. 9, 2011) "The extension of the builder's liability to subsequent purchasers under a breach of implied warranty of habitability theory is limited to latent defects that manifest themselves after the purchase and are not discoverable by the subsequent purchaser's reasonably prudent inspection at the time of sale; "Latent defects" are those that are not known by or expressly disclosed to the buyer. *Centex Homes v. Buecher*, 95 S.W.3d 266, 274 (Tex. 2002); *Tassan v. United Dev. Co.*, 88 Ill. App. 3d 581 (Ill. App. Ct. 1st Dist. 1980)(finding the "implied warranty of habitability covers only latent defects. Hence, if the defects alleged are patent defects then plaintiffs have no action for breach of the implied warranty. A latent defect has been defined as one

which, in the circumstances of the case, could not have been discovered by the exercise of ordinary and reasonable care"; *Tyus v. Resta,* Pa. Super., 476 A.2d 427, 433 (1984): "Latent defects are those which are not obvious or not discoverable by a reasonable inspection...[T]he implied warranties of a builder-vendor do not "extend to defects of which the purchaser had actual notice or which are or should be visible to a reasonably prudent man upon an inspection of the dwelling.". Chapter 40 adopts this same rationale by providing a contractor is not liable for defects if a buyer has notice of the defects. See, NRS 40.640(5).

Moreover, the bar to purchasers with knowledge asserting a breach of implied warranty action is not overcome because the claim has been brought by a homeowner association instead of directly by the homeowner. See, *Jablonsky v. Klemm,* 377 N.W.2d 560 (N.D.1985)(condominium association prevailed against developer for construction defects on theories of negligence and implied warranty, but the court apportioned the damages and denied recovery to those owners who had purchased their units with notice of the defective condition); *Meadowbrook Condo v. South Burlington,* 152 Vt. 16, 565 A.2d 238, 243 (1989) (finding trial court erred in refusing to apportion damages awarded for defects in a common areas of a condominium project under an implied warranty theory when over half the owners purchased their units after the defects to common area became apparent). Accordingly, absent an assignment, Subsequent Purchasers have no claim for breach of the implied warranty.

**2. The Association's Claims for Breach of Fiduciary Duty are Barred as the Subsequent Purchasers had Knowledge of the Alleged Defects**

The Association also asserted a cause of action for Breach of Fiduciary Duty. (*Petitioner's Appendix*, Vol. 1, Tab 1, pp. 0001-0012). They asserted D.R. Horton was the creator of the Association, and that Defendant served as "directors

and officers of the Association, exercising direct and indirect control over the administration, management and maintenance of the Association and its property, including but not limited to the Common Areas of Subject Property. (*Id.* at 0008 [8:21-23]).

To the extent the Association asserts any breaches of fiduciary duties run to it alone, and not the individual homeowners, the reasoning is unsupported by the law.

> A developer's liability to a homeowner's association for breach of the basic fiduciary duty to act in good faith, exercise proper management and avoid conflicts of interest is well settled. *Raven's Cove Townhomes, Inc. v. Knuppe Development Co.* (1981) 114 Cal. App.3d 783, 171 Cal. Rptr. 334. This fiduciary duty extends to individual homeowners, not just the homeowners association. *Cohen v. Kite Hill Community Association, supra,* 142 Cal. App.3d 642, 652–653, 191 Cal. Rptr. 209.) *Cohen v. S & S Constr. Co.,* 151 Cal. App. 3d 941, 944-46, 201 Cal. Rptr. 173, 174-75 (Ct. App. 1983).

Under the Restatement (Second) of Torts, a "fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Restatement (Second) of Torts § 874 cmt. a (1979). Thus, a breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship. *Id.*; *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009). "A breach of fiduciary duty claim seeks damages for injuries that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Id.*

No relationship existed between the *purchasers* who bought their units after the filing of the Complaint and D.R. Horton. Because no relationship existed between them and D.R. Horton, it follows no fiduciary relationship existed between the Subsequent Purchasers and D.R. Horton and no breach of any

fiduciary duty can exist. Because NRS 116.3102(1)(d) allows the Association to stand in the shoes of the individual owners with individual legal claims, and its standing to make those claims is derivative in nature, the Association's claim for breach of fiduciary duty is limited to those homeowners who purchased their units and still own them. Accordingly, there can be no breach of the fiduciary duty on behalf of the Subsequent Purchasers.

### G. The District Court Relied on Applicable and Relevant Precedent

The Association asserts the District Court violated NRCP 56 because the Court's ruling was made on grounds not raised by the parties. In that regard, The Association asserts the District Court's reference to the *Balle vs. Carina Corporation* decision was an abuse of discretion.

This matter came on for hearing on February 27, 2014. A transcript of the proceedings is attached to Petitioner's Appendix. (*Petitioner's Appendix*, Vol. IV, Tab 16, pp. 0931-0966.) At the hearing, the District Court referenced a decision it made in *Balle v. Carina Corp.* and provided a copy of the ruling to all counsel. (*Petitioner's Appendix*, Vol. IV., Tab 16, pp. 0949-0950.) The District Court provided the ruling to all counsel prior to oral arguments to give them an opportunity to see what the District Court was thinking and how it previously ruled in a relevant matter. (*Petitioner's Appendix*, Vol. IV, Tab 16, p.0950; Line 8-9.) At no time during oral arguments did the Association's attorney object to the District Court's reference to the *Balle v. Carina Corp.* case. (*Petitioner's Appendix*, Vol. IV, Tab 16, pp 0949-0960.) In fact, the Association's counsel agreed the District Court's rulings in *Balle* and *Smith* (another case decided by the District Court) were correct, "And I think Your Honor's rulings that I just read and the ruling in the *Smith* case which Mr. Odou appended to his reply are a correct reflection of Nevada law..." (*Id.* at 0952, lines 3-5.) The District Court's Order makes no

reference to the *Balle* decision. Moreover, the reference to the decisions during the hearing was, if anything, tantamount to a tentative decision which attorneys for both sides can review and respond to during oral argument. The opportunity to review *Balle* prior to arguing should have made matters easier for the Association's attorney because he would know the areas upon which to focus his arguments. As expressed herein, the District Court's Order was wholly consistent with existing law.

### H. The District Court's Order Granting Partial Summary Judgment Does Not Conflict With, Contradict or is Inconsistent with the District Court's Prior Rulings

Finally, the Association asserts the District Court's ruling limiting the claims the Association may pursue was irreconcilable with its own orders dated November 1, 2013 and March 20, 2014. The Association contends the District Court previously ordered the Association's claims met NRS 116.3102(1)(d) standing requirements and further set forth the manner in which those claims were to proceed at trial. (*Petitioner's Appendix*, Vol. 1, Tab, 2, pp. 0013-0022; Vol. IV, Tab 20.) D.R. Horton does not disagree. The Orders determined the Association had representational standing pursuant to NRS 116.3102 to bring certain claims on behalf of the unit owners who possessed those claims as a class action. This does not make the Orders inconsistent or irreconcilable. They did not order the Association's representational standing was unconditional as long as it was acting on behalf of two or more unit owners. The November 12, 2013 Order was an order on standing certifying a portion of the claims to proceed as a class action and portion to proceed as a representative action other than a class action. (*Petitioner's Appendix*, Vol. I, Tab 2, p. 0013-0022). The March 20, 2014 Order merely clarified that Order following the Association's Motion for Reconsideration to include all 342 units. (*Petitioner's Appendix*, Vol. IV, Tab 20, pp. 0996-0998).

Both Orders were specifically addressing the NRCP 23 analysis required by *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 53 (2005) and *Beazer Homes Holding* v. Dist. Ct., 291 P.3d 128, 128 Nev. Adv. Op. 66 (2012) certify a class action. The prior orders concerned how the case would proceed to trial in terms of proof of claims, which claims could proceed as a class action by way of generalized proof and which could proceed as a representative action other than a class action. *(Petitioner's Appendix*, Vol. I, Tab 2, pp. 0013-0022 and Vol. IV, Tab 20, pp. 0996-0998). With regard to standing pursuant to NRS 116.3102(1)(d), the District Court's November 12, 2013 and March 20, 2014 ordered the elements of a class action were met as to certain claims. The Motion underlying the prior orders regarding standing was originally filed on September 30, 2010, a writ petition followed and, on remand from the Supreme Court, the November 12, 2013 was issued and thereafter clarified on March 20, 2013. *Id.* The District Court was not examining whether the particular unit owners had the ability to assert claims against D.R. Horton based upon basic principles of real property law – those issues were not raised or briefed. Regardless, the lack of standing may be raised at any time in the proceedings. *Apartment Ass'n of Los Angeles v. City of Los Angeles*, 126 Cal. App 4th 582. D.R. Horton agrees once this Court affirms the District Court's Order regarding the Subsequent Purchasers, D.R. Horton may move to have the class actions de-certified based on the District Court's Order, i.e. the remaining unit owners' claims no longer satisfy NRCP 23 requirements. See, NRCP 23(c)(4); *First Light II*, 125 Nev. 459. However, that potential does not make the orders inconsistent. A court can continue to issue orders impacting the parties and the manner in which a trial can proceed.

Moreover, the terms of the Orders are not inconsistent but rather consistent with the arguments contained herein. The November 12, 2013 Order states, "While there is no doubt NRS 116.3102(1)(d) accords Plaintiff authority to institute

litigation for constructional defects suffered by *certain owners*..." and, "Plaintiff...may institute and/or maintain litigation on behalf of two or more *individual owners* suffering the same constructional defects." (*Petitioner's Appendix*, Vol. I, Tab 2, p. 0019: 20-21, p 0020:8-10.). This supports the clear reading of NRS 116.3102(1)(d) which accords the Association the right to assert a cause of action on behalf "owners" not "units."

## V. CONCLUSION

For the foregoing reasons, the District Court did not err and/or abuse its discretion in granting D.R. Horton's Motion for Partial Summary Judgment and find the Association may litigate in its representative capacity only the claims of the 112 original owners relating to continuing or existing defects within the building envelopes and the claims of the of the 62 original owners as to defects within the interiors of the units. Absent an assignment, the Association, in its representative capacity pursuant to NRS 116.3102(1)(d), may not litigate claims on behalf of Subsequent Purchasers as to the causes of action pled in the Complaint. While changes in ownership do not in of itself strip the Association of its representative standing, changes in ownership can change the particular claims and damages the Association may pursue on behalf of unit owners.

The District Court did, however, err in ruling the Association may continue to former owners, in its representative capacity for other damages suffered as specified under NRS 40.655. NRS 116.3210(1)(d) allows an association to act on behalf of two or more unit owners. As former owners are no longer unit owners, the Association has no statutory authority to represent their interests. Accordingly,

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D.R. Horton respectfully requests this Court affirm the District Court's Order in part and amend the Order as set forth herein.

Dated this 11th day of June, 2014.

**WOOD, SMITH, HENNING & BERMAN LLP**

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## CERTIFICATE OF SERVICE

I certify that on the 11 day of June, 2014, I submitted for electronic filing and electronic service the foregoing REAL-PARTY IN-INTEREST, D.R. HORTON'S ANSWER TO PETITIONER'S WRIT OF PROHIBITION OR MANDAMUS.

I HEREBY CERTIFY that on the 11 day of June, 2014, a copy of REAL-PARTY IN-INTEREST, D.R. HORTON'S ANSWER TO PETITIONER'S 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 11 day of June, 2014, a copy of REAL-PARTY IN-INTEREST, D.R. HORTON'S ANSWER TO PETITIONER'S WRIT OF PROHIBITION OR MANDAMUS was hand delivered to the following:

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