

# EXHIBIT B

1                                    AFFIDAVIT OF BRUNO WOLFENZON, ESQ.

2            STATE OF NEVADA        }  
3            COUNTY OF CLARK      }

4            I, Bruno Wolfenzon, Esq. being first duly sworn on oath, deposes and  
5            states under penalty of perjury:

6            1.        I am an attorney duly licensed to practice law in the State of  
7            Nevada, and I am an attorney with the law firm, WOLFENZON ROLLE to  
8            represent Petitioner D.R. HORTON, INC., in relation to the Petition for Writ of  
9            Prohibition or Mandamus and in this Motion for Consolidation of Oral  
10          Argument in *D.R. Horton v. Eighth Judicial District Court (First Light)*, Case  
11          No. 65993.

12          2.        Joel D. Odou, an attorney with the law firm, WOOD, SMITH,  
13          HENNING & BERMAN authorized to represent represents D.R. Horton, Inc. in  
14          the case of *High Noon at Arlington Ranch Homeowners Association v. Eighth*  
15          *Judicial District Court, Case No. 65456.*

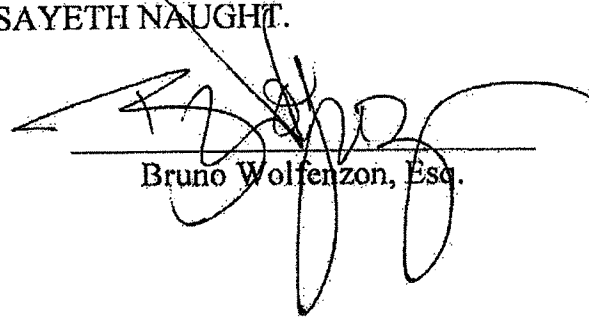
16          3.        I was contacted by counsel for Plaintiffs in the *High Noon* matter  
17          on or about October 22, 2014 regarding potential consolidation of the Writ  
18          Petitions in *D.R. Horton v. Eighth Judicial District Court (First Light)*, Case  
19          No. 65993 and *High Noon at Arlington Ranch Homeowners Association v.*  
20          *Eighth Judicial District Court, Case No. 65456* for purposes of oral argument  
21          only.

22          4.        Since then, counsel for the Plaintiffs in both actions have agreed  
23          consolidation is appropriate, and to consolidate the matters for the purposes of  
24          oral argument only so long as each case has adequate time for argument.

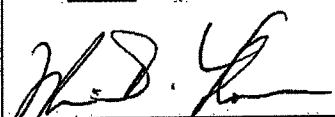
25          5        I have read this Affidavit and the facts stated herein are true of my  
26          own knowledge, except as to those matters stated on information and belief, and  
27          as to those matters, I believe them to be true.  
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FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
Bruno Wolfenzon, Esq.

SUBSCRIBED and SWORN to before me  
this 26 day of November 2014.

  
\_\_\_\_\_  
NOTARY PUBLIC



# EXHIBIT A

1 CASE NO. A636669

2 DOCKET U

3 DEPT. 16

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6

DISTRICT COURT

7

CLARK COUNTY, NEVADA

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\* \* \* \* \*

9 ROBERT NOYES,

10 Plaintiff,

11 vs.

12 DR HORTON INC.,

13 Defendant.

14

REPORTER'S TRANSCRIPT  
OF  
MOTIONS

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17 BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

18

DISTRICT COURT JUDGE

19

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DATED WEDNESDAY, AUGUST 13, 2014

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REPORTED BY: PEGGY ISOM, RMR, NV CCR #541

25

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33 \* \* \* \* \*

1 LAS VEGAS, NEVADA; WEDNESDAY, AUGUST 13, 2014

2 9:20 A.M.

3 P R O C E E D I N G S

4 \* \* \* \* \*

5  
6 THE COURT: Noyes versus D.R. Horton.

09:30:40 7 MR. WOLFENZON: Sure. Bruce Wolfenzon on  
09:30:47 8 behalf of D.R. Horton.

09:30:51 9 THE MARSHAL: Counsel, you still going to want  
09:30:52 10 to hook up into this?

09:30:54 11 MR. WOLFENZON: If it's possible, yeah.

09:30:55 12 THE MARSHAL: No one else is going to see it  
09:30:57 13 except you through here.

09:32:26 14 Calling Jeremy Beal, your Honor.

09:32:29 15 THE COURT: Oh, well. Let the record reflect  
09:32:35 16 that we attempted to call Mr. Beal.

09:34:38 17 All right. Let's go ahead and note our  
09:34:38 18 appearances on the record.

09:34:38 19 MR. CARSON: Good morning, your Honor.  
09:34:40 20 Christopher Carson, Mark Bourassa for the plaintiffs.

09:34:43 21 MR. WOLFENZON: Bruno Wolfenzon on behalf of  
09:34:44 22 D.R. Horton, your Honor.

09:34:46 23 MR. TURTZO: Chris Turtzo for third-party  
09:34:47 24 defendant New Creation Masonry.

09:34:49 25 MS. WEIR: Shana Weir on behalf of KB Framers.



09:34:52 1 MR. GIBBONS: Brad Gibbons on behalf of Rising  
09:34:54 2 Sun Plumbing and Sunrise Mechanical.  
09:34:57 3 MS. MAZZEI: Stephanie Mazzei on behalf of  
09:34:58 4 Central Valley Insulation.  
09:34:59 5 MS. DelCARMEN: Good morning, your Honor.  
09:34:59 6 Jennifer DelCarmen on behalf of OPMD.  
09:35:02 7 MR. WALKER: Kirk Walker on behalf of Quality  
09:35:04 8 Wood.  
09:35:05 9 MS. HUMMEL: Megan Hummel on behalf of Nova  
09:35:09 10 Engineering and Owens Geotechnical.  
09:35:12 11 MR. SLATER: Good morning. Craig Slater on  
09:35:13 12 behalf of Harrison Door, Harrison Landscape, and  
09:35:17 13 co-counsel for Rising Sun Plumbing.  
09:35:30 14 THE COURT: All right. Has everybody noted  
09:35:30 15 their appearance for the record?  
09:35:30 16 Don't we have one matter here that -- which  
09:35:32 17 one was it? Oh, yeah, the motion for leave to file --  
09:35:37 18 I guess, KB Framers' motion for leave to file -- for  
09:35:41 19 leave to amend its answer to include a fourth-party  
09:35:45 20 complaint on an order shortening time.  
09:35:47 21 MS. WEIR: That's correct, your Honor. That's  
09:35:48 22 my motion. Amid discovery recently, the truss  
09:35:54 23 manufacturer/supplier, which was a subcontractor of  
09:35:57 24 KB Framers, was implicated. And so I filed the motion.  
09:36:00 25 I believe that Mr. Carson had a limited opposition

09:36:04 1 wherein he was not sure whether or not my motion would  
09:36:08 2 leave the door open to have his trial continued. And I  
09:36:11 3 have not asked for that relief.

09:36:13 4 THE COURT: I understand. All right.

09:36:16 5 So there's no opposition, is there?

09:36:19 6 MR. CARSON: So long as there's no delay of  
09:36:20 7 the October trial date, understanding what the Court's  
09:36:24 8 calendar may be --

09:36:25 9 THE COURT: Yeah.

09:36:26 10 MR. CARSON: -- we have no opposition.

09:36:27 11 THE COURT: And there's no delay.

09:36:28 12 All right, ma'am, we'll grant that.

09:36:31 13 MS. WEIR: I have an order, your Honor. May I  
09:36:33 14 approach?

09:36:33 15 THE COURT: Yes, you may.

09:36:35 16 MS. WEIR: Does anybody want to see this?

09:36:58 17 THE COURT: There you go, ma'am.

09:37:00 18 MS. WEIR: Thank you.

09:37:01 19 THE COURT: You're welcome.

09:37:01 20 All right. We'll move on. Next up we have --  
09:37:05 21 let's see here. I guess this would be plaintiff's  
09:37:26 22 motion for leave to file a third amended complaint; is  
09:37:29 23 that correct?

09:37:30 24 MR. CARSON: Correct, your Honor.

09:37:31 25 THE COURT: Okay.

09:37:38 1 MR. CARSON: The documentation -- your Honor,  
09:37:39 2 the motion's pretty clear. This was -- we thought, was  
09:37:42 3 a relatively benign motion to essentially correct the  
09:37:46 4 pleadings to properly document the name of a party who  
09:37:48 5 bought the -- bought one of the homes in the litigation  
09:37:50 6 as an assignment of one of the owners in the case.

09:37:53 7 In fact, this --

09:37:54 8 THE COURT: Is assignment really necessary,  
09:37:56 9 No. 1?

09:37:57 10 MR. CARSON: You know, your Honor, I think for  
09:37:59 11 a long time that was kind of a question. But --

09:38:03 12 THE COURT: I mean, I'll just -- I'll cut to  
09:38:04 13 the chase. Why isn't there a 25(c) analysis in this  
09:38:08 14 case? No one has made a reference to Nevada Rule of  
09:38:14 15 Civil Procedure 25(c), transfer of ownership during  
09:38:18 16 pending litigation. That would be the appropriate  
09:38:19 17 analysis for me to look at.

09:38:21 18 Sir, I understand you cited California cases.  
09:38:23 19 I don't know what California cases are specifically.

09:38:25 20 MR. WOLFENZON: They did.

09:38:26 21 THE COURT: Didn't you -- in the opposition,  
09:38:27 22 wasn't there a citation of a stream of California  
09:38:32 23 cases?

09:38:32 24 MR. WOLFENZON: Referring to what plaintiffs  
09:38:34 25 cited.

09:38:34 1 THE COURT: Yeah. But, I mean, I don't know  
09:38:35 2 what California law is, but I know Nevada has Rule  
09:38:40 3 Civil of Procedure 25(c) which is pretty  
09:38:43 4 straightforward, No. 1.

09:38:45 5 Number 2, there's no Nevada discussion of  
09:38:48 6 these cases; however, there's a plethora of federal  
09:38:53 7 decisions specifically dealing with Rule 25(c). I  
09:38:57 8 mean, I've looked at them, but I'm not going to do  
09:39:00 9 anybody's homework. I'm not going to brief it for you.

09:39:04 10 But I'll read the rule to you, "Transfer of  
09:39:06 11 interest." It's right here in Nevada Rule of Civil  
09:39:09 12 Procedure 25(c). In a case of any transfer of  
09:39:15 13 interest, the action may be continued by or against the  
09:39:18 14 original party, unless the Court upon motion directs  
09:39:22 15 the person to whom the interest is transferred to, to  
09:39:25 16 be substituted in the action or joined with the  
09:39:29 17 original party. Service of the motion shall be made as  
09:39:33 18 provided in subdivision (a) of this rule.

09:39:36 19 MR. WOLFENZON: Right.

09:39:36 20 THE COURT: I mean, that's the rule right  
09:39:37 21 here. It's my understanding that there's been a  
09:39:39 22 transfer of ownership interest in this case during the  
09:39:42 23 pending litigation.

09:39:43 24 MR. WOLFENZON: Your Honor, that -- Bruno  
09:39:44 25 Wolfenzon for D.R. Horton. That begs the question of

09:39:48 1 what interest is transferred. And let me explain that,  
09:39:50 2 if I may.

09:39:51 3 THE COURT: But -- but -- but see, I don't  
09:39:52 4 know if it begs the question because if you do some  
09:39:56 5 research as far as the application of 25(c), it talks  
09:39:59 6 about the types of interest that can be transferred.  
09:40:02 7 For example, there's federal cases involving transfer  
09:40:06 8 of ownership interest to real property.

09:40:09 9 MR. WOLFENZON: Yes.

09:40:09 10 THE COURT: That's what happened here, right?

09:40:13 11 MR. WOLFENZON: Yes.

09:40:13 12 THE COURT: Okay.

09:40:15 13 MR. WOLFENZON: But if I transfer to you a  
09:40:18 14 piece of property that is worth \$20,000 because it has  
09:40:26 15 a hundred-thousand-dollar problem associated with it  
09:40:30 16 and you pay me \$20,000 for that property, you don't  
09:40:37 17 acquire a right or have an interest transferred to you  
09:40:42 18 that says you can now go mount your own lawsuit for  
09:40:46 19 that \$100,000 worth of damage to whatever third party  
09:40:50 20 caused that damage.

09:40:52 21 THE COURT: Well, I mean --

09:40:54 22 MR. WOLFENZON: Do you --

09:40:54 23 THE COURT: -- I read that in there. That  
09:40:56 24 statement was in the opposition. But, sir, I recommend  
09:41:00 25 you take a look at Moore's Federal Practice and

09:41:03 1 Procedure. And specifically, it talks about the  
09:41:06 2 transfer of ownership interest of real property.

09:41:08 3 And here's -- and this is on -- I'll tell you  
09:41:10 4 the section so you can take a look at it. And that's  
09:41:12 5 why I want this thoroughly briefed and vetted  
09:41:16 6 appropriately because if I'm going to make a decision,  
09:41:17 7 I want the decision based upon 25(c). I really do.

09:41:21 8 MR. WOLFENZON: Okay. And just to let you  
09:41:28 9 know, your Honor, I know it's not before this Court,  
09:41:31 10 but we have addressed that situation, and there's  
09:41:34 11 currently some briefing in front of the Supreme Court  
09:41:36 12 dealing with this very issue of subsequent ownership.

09:41:40 13 THE COURT: I understand, but if I'm going to  
09:41:42 14 make a decision --

09:41:43 15 MR. WOLFENZON: Understood.

09:41:43 16 THE COURT: -- and it's going to be appealed,  
09:41:45 17 I want to make sure that I make, No. 1, the appropriate  
09:41:48 18 decision; but No. 2, it's going to be based upon the  
09:41:50 19 appropriate or the proper rule of the Nevada Rules of  
09:41:52 20 Civil Procedure. Because if there's a 25(c) analysis,  
09:41:55 21 then it opens up the door to a lot of case law that's  
09:41:59 22 out there on the federal level. And Nevada has been  
09:42:01 23 pretty clear when it comes to civil procedure,  
09:42:03 24 specifically as it relates to our rules which are based  
09:42:06 25 upon the federal rules.

09:42:07 1 MR. WOLFENZON: Sure.

09:42:08 2 THE COURT: And our Supreme Court has stated  
09:42:09 3 on more than one occasion that if we're silent, we can  
09:42:13 4 look to the federal rules. Haven't they?

09:42:16 5 MR. WOLFENZON: I would agree with that.

09:42:17 6 THE COURT: Yeah, they have. So I'm looking  
09:42:18 7 at this, and I understand that -- and I realize this is  
09:42:21 8 based upon some California cases and some of the  
09:42:24 9 analysis of California cases back in the '80s and '90s  
09:42:27 10 and the like, and I read them. And I said, well, you  
09:42:30 11 know, I don't know if this really applies because I  
09:42:33 12 don't know if California has 25(c). I don't. Number  
09:42:36 13 1.

09:42:36 14 Do they? Does anybody know?

09:42:40 15 MR. WOLFENZON: They have a version of it.

09:42:41 16 THE COURT: Okay. But they never discussed  
09:42:43 17 that -- was the version adopted at the time those cases  
09:42:46 18 were being decided? I mean, there's so much I don't  
09:42:48 19 know, you know.

09:42:49 20 But I do know this: We have the rule. And --  
09:42:51 21 and, I mean, I didn't do an in-depth detailed analysis  
09:42:56 22 of the application of Nevada Rule 25(c) to this case.  
09:43:00 23 But I did do what I always do when these issues come  
09:43:03 24 up. I don't limit myself to just the rule. I read a  
09:43:06 25 few cases. I went and took a look at my trusty Moore's

09:43:08 1 Federal Practice and Procedure. I actually like  
09:43:12 2 Wright & Miller better, but it's more expensive, and  
09:43:15 3 the county can't afford it. So, you know, I deal with  
09:43:18 4 what I have in front of me. You know, I do.

09:43:21 5 And -- and I'll give you an example. Here's  
09:43:23 6 one statement -- here's a couple of statements from --  
09:43:27 7 this would be Section 25.31(1). It says, 25(c) allows  
09:43:37 8 substitution if an interest is transferred but gives no  
09:43:40 9 definition of transfer of interest. So there's no  
09:43:43 10 definition under the rule.

09:43:44 11 It goes further. It says, Courts have applied  
09:43:47 12 the rule broadly to include transfers by either the  
09:43:50 13 plaintiff or the defendant of various kinds of property  
09:43:54 14 interests that may be involved in a lawsuit. For an  
09:43:58 15 example, when a party transfers all the assets of a  
09:44:00 16 business to another entity and the transferee carries  
09:44:04 17 on essentially the same business, substitution has been  
09:44:07 18 allowed.

09:44:08 19 And what's interesting about the rule, it  
09:44:10 20 says -- if you look at the rule, it says you can  
09:44:13 21 continue to proceed in the name of the original  
09:44:15 22 business. But I guess at the end of the day, the  
09:44:17 23 courts want to make sure there's no double recovery.  
09:44:20 24 That's the real concern there.

09:44:21 25 But it goes on. It says, Substitution is



09:44:24 1 usually appropriate in situations involving corporate  
09:44:28 2 mergers or acquisitions or other transfers in which one  
09:44:33 3 corporation ceases to exist and another entity has  
09:44:37 4 taken over its rights and obligations. Okay. It cites  
09:44:41 5 it, and it goes further, though, which is really  
09:44:44 6 interesting.

09:44:44 7 It says, Other examples include transfers  
09:44:47 8 because of bankruptcy, assignments of contract rights,  
09:44:52 9 or other legal rights and transfers of real property  
09:44:57 10 involved in the suit. You know, that seems like it  
09:45:01 11 might involve this case here.

09:45:02 12 Then it cites three federal cases, a Sixth  
09:45:09 13 Circuit case, an Eighth Circuit case, and a D.C.  
09:45:15 14 Circuit case.

09:45:17 15 And, for example, here's an 190 FRD 428 case,  
09:45:23 16 Western District of Michigan 1999. Defendant joined  
09:45:27 17 when interest in property was transferred to her during  
09:45:31 18 litigation. Okay. I mean, I'd like to know what  
09:45:34 19 that -- I'd like to have a little analysis, see if that  
09:45:37 20 case has been cited, Shepardized, and so on and so on.

09:45:47 21 Here's another case, an Eighth Circuit Case,  
09:45:50 22 ELCA Enters, Inc., versus Cisco Equipment Rental and  
09:45:55 23 Sales. It's a 53 F.3d 186 case, 1995 case, Eighth  
09:46:00 24 Circuit. Plaintiff transferred interest in real  
09:46:04 25 property that was subject of the litigation. And so

09:46:06 1 the property is the subject of this litigation, I would  
09:46:08 2 think, knows Chapter 40.

09:46:11 3 And what's really unique about it, and you  
09:46:12 4 look at all the cases, and what's unique about Nevada  
09:46:15 5 when it comes to Chapter 40, how do you define a  
09:46:20 6 claimant? Owner of a residence or appurtenant,  
09:46:24 7 right -- appurtenance. I mean, that's kind of how that  
09:46:28 8 goes. I didn't look at it, but it's in there.

09:46:30 9 Here's another D.C. Circuit case. It says,  
09:46:32 10 Substitution or joinder under Federal Rule of Civil  
09:46:36 11 Procedure 25(c) was proper when the defendant  
09:46:39 12 transferred real property that was subject of the suit,  
09:46:41 13 for reasons unrelated to the suit, to a university.

09:46:47 14 So what do I do under these cases because this  
09:46:50 15 appears to be a transfer of interest?

09:46:52 16 And my trusty law clerk says, yeah, there's a  
09:47:03 17 19 -- 2008 Nevada case with a short discussion about  
09:47:08 18 subsequent homeowners obtaining Chapter 40 remedies  
09:47:12 19 when they are not the first purchasers of the home. So  
09:47:15 20 that kind of --

09:47:16 21 MR. WOLFENZON: Right. That's the Anse case.

09:47:17 22 THE COURT: Anse case, yeah.

09:47:18 23 MR. WOLFENZON: If I can speak real quick to  
09:47:20 24 that just to get the Court kind of thinking along the  
09:47:24 25 lines of the way we are thinking about it.

09:47:26 1 The United States Supreme Court says as soon  
09:47:29 2 as you or your property is injured, you acquire a right  
09:47:33 3 to recovery for those damages. That becomes a personal  
09:47:37 4 right. So if a piece of property --

09:47:39 5 THE COURT: But you -- but Anse, you know  
09:47:41 6 what, I don't -- what -- you talk about a personal  
09:47:44 7 right, well, I guess it depends if you've expended sums  
09:47:50 8 of money for repair --

09:47:51 9 MR. WOLFENZON: No.

09:47:52 10 THE COURT: -- that might be an issue.

09:47:53 11 But you're telling me that, okay, I buy a car.  
09:47:55 12 My car has an express warranty. I have -- I own the  
09:47:59 13 car, and I transfer ownership interest to another  
09:48:03 14 individual, and I no longer own the car. That person  
09:48:07 15 can't make breach of warranty claims because I bought  
09:48:10 16 the car? Is that what's going on here? I'm trying to  
09:48:13 17 figure it out.

09:48:14 18 MR. WOLFENZON: They may not be able to except  
09:48:15 19 for the fact that we have statutes that say warranties  
09:48:21 20 transfer. So that allows that right to transfer and  
09:48:24 21 that those warranties transfer upon the sale.

09:48:27 22 THE COURT: But don't we have a Nevada Supreme  
09:48:28 23 Court case that says Chapter 40 rights transfer?

09:48:32 24 MR. WOLFENZON: Not --

09:48:33 25 THE COURT: Isn't that what that case just

09:48:35 1 said?

09:48:36 2 MR. WOLFENZON: Not really. If you read Anse  
09:48:37 3 closely, this is why this one is different. This one  
09:48:40 4 is different because I've labeled --

09:48:42 5 THE COURT: But there's no -- I actually  
09:48:44 6 flowcharted everything too. I did.

09:48:46 7 MR. WOLFENZON: I did that for me because I  
09:48:47 8 can't --

09:48:48 9 THE COURT: I came in, I flowcharted it. I  
09:48:48 10 think my flowchart even has the date the lawsuit was  
09:48:52 11 filed, or the Chapter 40 notices went out also.

09:48:55 12 MR. WOLFENZON: Right.

09:48:55 13 THE COURT: I don't see that up there, but --

09:48:58 14 MR. WOLFENZON: So the Chapter 40 notice went  
09:49:00 15 out June 29, 2010, under the AB Trust.

09:49:09 16 THE COURT: Yes.

09:49:09 17 MR. WOLFENZON: Right. So the AB Trust says,  
09:49:11 18 hey, I'm damaged. My property is damaged. I'm sending  
09:49:16 19 out a Chapter 40 notice saying it's damaged. I have  
09:49:21 20 real damages, right? That establishes the date the  
09:49:27 21 property is damaged. So if you have a car and you're  
09:49:31 22 driving down the road and I hit you and cause damage to  
09:49:36 23 it -- let's say it's a \$20,000 car and now there's  
09:49:39 24 \$10,000 worth of damage. If you were to sell that car  
09:49:44 25 to somebody else, that somebody else who buys it from

09:49:49 1 you for \$10,000 because it's got a lot of damage would  
09:49:53 2 not be able to sue me for a \$10,000 loss. They bought  
09:49:58 3 the car they bargained for, a \$10,000 car that was  
09:50:02 4 worth 20 but is now significantly damaged. You,  
09:50:05 5 however --

09:50:06 6 THE COURT: But --

09:50:06 7 MR. WOLFENZON: -- would retain the right to  
09:50:08 8 continue to sue me.

09:50:09 9 THE COURT: I have a question for you.

09:50:10 10 MR. WOLFENZON: Sure.

09:50:11 11 THE COURT: And this is where the -- this is  
09:50:12 12 where I think there's a flaw in the entire analogy in  
09:50:17 13 this respect: Because doesn't Rule 25(c) cover this?

09:50:21 14 MR. WOLFENZON: No.

09:50:22 15 THE COURT: It does because it talks about  
09:50:23 16 transfer of ownership interest during pending  
09:50:25 17 litigation. And there's a distinction between -- you  
09:50:29 18 got to understand this, and the case law talks about  
09:50:31 19 this, there's a distinction between Rule 25(c) and  
09:50:36 20 Rule 17 standing. Standing issues occur prior to the  
09:50:40 21 filing of the litigation. 25(c) basically focuses on  
09:50:43 22 transfer of ownership interest during litigation. And  
09:50:47 23 that's why the Rule 25(c), they say -- this is what the  
09:50:52 24 rule provides, that the case may continue in the name  
09:50:56 25 of the original person who filed the lawsuit. Just

09:50:58 1 because they transfer of ownership does not change the  
09:51:02 2 lawsuit, No. 1.

09:51:03 3 And, No. 2, what the rule says is this: That  
09:51:05 4 the trial court upon motion by the parties may join the  
09:51:11 5 new owner. And I think the concern there is  
09:51:13 6 essentially this: You don't want double recovery.  
09:51:16 7 However, simply because you transfer ownership doesn't  
09:51:20 8 extinguish the claim.

09:51:23 9 Now, that's what I'd like some discussion  
09:51:25 10 on --

09:51:25 11 MR. WOLFENZON: Right.

09:51:25 12 THE COURT: -- because, remember, I mean, the  
09:51:27 13 rule is pretty clear as to what it says. In any case  
09:51:29 14 of any transfer of ownership, the action may be  
09:51:33 15 continued by or against the original party. It may be  
09:51:41 16 continued. Just because there's been a change of  
09:51:44 17 ownership, the action will stay in the name of the  
09:51:47 18 original party.

09:51:48 19 Then it goes further. Unless the Court, upon  
09:51:50 20 motion -- we have a motion -- directs the person to  
09:51:55 21 whom the interest is transferred to to be substituted  
09:51:59 22 in the action or joined. That's what the rule says,  
09:52:04 23 right?

09:52:05 24 MR. WOLFENZON: And, again --

09:52:06 25 THE COURT: So I can -- I can keep -- the case

09:52:10 1 can remain in the name of the original party or I could  
09:52:17 2 join in a new party. I mean, that's what the rule  
09:52:19 3 says.

09:52:19 4 MR. WOLFENZON: Right. Well, the name of the  
09:52:20 5 original party in this case is actually the trust.

09:52:28 6 THE COURT: Well, I know, but there was a  
09:52:30 7 motion filed -- I mean, apparently the prior motion to  
09:52:33 8 amend --

09:52:33 9 MR. CARSON: Was unopposed.

09:52:34 10 THE COURT: -- was unopposed. That was my  
09:52:36 11 understanding, right?

09:52:36 12 MR. WOLFENZON: It was.

09:52:38 13 THE COURT: Okay. Because I looked at -- I  
09:52:39 14 read the history. I looked at everything.

09:52:41 15 MR. WOLFENZON: Right. But that doesn't mean  
09:52:43 16 that because it's not opposed, rights transfer. If you  
09:52:47 17 don't transfer the rights -- and I understand the cases  
09:52:50 18 you're talking about.

09:52:51 19 THE COURT: No. I'm just citing the rule  
09:52:53 20 right here. That's what I'm doing.

09:52:55 21 MR. WOLFENZON: Right. And the cases cited  
09:52:56 22 under the rule talk about corporations that transfer  
09:52:58 23 all of their assets including property that is in  
09:53:01 24 litigation.

09:53:02 25 THE COURT: Well, that's just one example.

09:53:03 1 There was -- there was real estate. I cited three  
09:53:06 2 cases that specifically deal with the owner -- transfer  
09:53:10 3 of ownership interest in real property. And we didn't  
09:53:12 4 do this. Karlie would do it for me if I asked her to  
09:53:16 5 do it, but I'm quite sure that those cases have been  
09:53:18 6 cited. If you go out and do some research, that  
09:53:21 7 they've been cited quite a bit. And there's probably a  
09:53:23 8 lot of authority out there in the different circuits.  
09:53:26 9 And if I'm going to make this decision -- and I don't  
09:53:27 10 know what happened in the other case and what happened  
09:53:29 11 in the other department --

09:53:30 12 MR. WOLFENZON: Sure.

09:53:30 13 THE COURT: -- and whether someone discussed  
09:53:32 14 Rule 25(c) like we're discussing today. I don't know  
09:53:35 15 that. That's why I tend not to really focus on what  
09:53:38 16 other trial judges do. I just kind of do my own little  
09:53:42 17 thing in Department 16.

09:53:43 18 MR. WOLFENZON: So what I hear the Court  
09:53:44 19 saying is you want us to go back and rebrief it with  
09:53:47 20 special focus to the 25(c).

09:53:49 21 THE COURT: Absolutely. Yeah, I think that's  
09:53:49 22 the only appropriate way to handle that because if  
09:53:52 23 this -- I'm not going to make -- the reason why I  
09:53:54 24 brought this up -- I mean, I have some ideas as to  
09:53:57 25 where it should go, but I'm not 100 percent certain.



09:54:00 1 I'm inviting everyone -- maybe Mr. Bourassa, you can  
09:54:03 2 get -- Mr. Carson, you can get supplement points and  
09:54:06 3 authorities on file in 10, 12, how much time you need,  
09:54:09 4 and then you can do an opposition, and you can come  
09:54:12 5 back, and we can really make a good record on this.  
09:54:16 6 And you might find some really good cases out for us to  
09:54:18 7 take a look at. I'd love to do that.

09:54:21 8 MR. WOLFENZON: Okay. Do we want to agree on  
09:54:23 9 a timetable now or should we converse among ourselves  
09:54:26 10 and call?

09:54:28 11 THE COURT: I'm going to let you converse  
09:54:28 12 amongst yourselves. I always let lawyers control their  
09:54:32 13 own destiny, right?

09:54:34 14 MR. CARSON: Absolutely, your Honor, we'll do  
09:54:34 15 that.

09:54:35 16 THE COURT: That's a good thing, isn't it?  
09:54:37 17 Absolutely.

09:54:37 18 MR. CARSON: One slight procedural issue --

09:54:39 19 THE COURT: Yes.

09:54:39 20 MR. CARSON: -- that we talked about  
09:54:40 21 yesterday. I had a discussion with John. Right now,  
09:54:43 22 we've -- we have a MSC scheduled in this case for  
09:54:46 23 September 9th, and our current deadline for the motions  
09:54:50 24 in limine to be filed is October 29th. I had a call,  
09:54:54 25 and we had the discussion --

09:54:56 1 THE COURT: If you -- if everyone agrees, I  
09:54:58 2 agree.

09:54:58 3 MR. CARSON: That's --

09:54:59 4 THE COURT: Okay.

09:54:59 5 MR. WOLFENZON: We agree.

09:55:00 6 MR. CARSON: We agree. Everybody is in  
09:55:02 7 agreement.

09:55:02 8 THE COURT: All right. If you want to sit  
09:55:03 9 down and you want to agree on maybe changing the  
09:55:06 10 scheduling on filing pretrial motions, do it. And I --  
09:55:10 11 because how many times has this case been continued?  
09:55:12 12 Do you know?

09:55:13 13 MR. CARSON: Two or three.

09:55:14 14 THE COURT: Yeah. When does the five year  
09:55:16 15 run?

09:55:19 16 MR. CARSON: 2015. 2015 I believe.

09:55:21 17 MR. WOLFENZON: We have a little bit of time.

09:55:23 18 THE COURT: At the end of 2015?

09:55:25 19 MR. CARSON: I believe so.

09:55:25 20 THE COURT: Find all that out for me. And as  
09:55:27 21 long as it doesn't impact the five-year rule, I'm going  
09:55:29 22 to let you control your own destiny. I'll put you at a  
09:55:32 23 trial date, but whatever happens, if this case gets  
09:55:35 24 moved -- I don't know what's going to happen, but the  
09:55:37 25 bottom line is this: Try to work it out. Tell me what

09:55:39 1 you need. I'll step down for a moment, give you a  
09:55:42 2 chance to meet and confer, and I'll hit the bench when  
09:55:46 3 you're ready.

09:55:47 4 MR. WOLFENZON: All right. Thank you, your  
09:55:48 5 Honor.

6 (A short recess was taken)

10:04:33 7 THE COURT: Let's go ahead and note our  
10:04:33 8 appearances for the record to make sure we didn't  
10:04:36 9 overlook anybody.

10:04:38 10 MR. BOURASSA: Mark Bourassa, Chris Carson for  
10:04:39 11 the plaintiff, your Honor.

10:04:40 12 MR. WOLFENZON: Bruno Wolfenzon for  
10:04:40 13 D.R. Horton, your Honor.

10:04:43 14 MR. TURTZO: Chris Turtzo for New Creation  
10:04:45 15 Masonry.

09:34:49 16 MS. WEIR: Shana Weir for KB Framers.

09:34:52 17 MR. GIBBONS: Brad Gibbons for Rising Sun  
09:34:54 18 Plumbing and Sunrise Mechanical.

09:34:57 19 MS. MAZZEI: Stephanie Mazzei for Central  
09:34:58 20 Valley Insulation.

09:34:59 21 MS. DelCARMEN: Jennifer DelCarmen for OPMD.

09:35:02 22 MR. WALKER: Kirk Walker on behalf of Quality  
09:35:04 23 Wood.

09:35:05 24 MS. HUMMEL: Megan Hummel for Nova Engineering  
09:35:10 25 and Owens Geotechnical.

09:35:12 1 MR. SLATER: Craig Slater on behalf of  
09:35:14 2 Harrison Door, Harrison Landscape, and co-counsel for  
09:35:19 3 Rising Sun Plumbing.

10:05:07 4 THE COURT: All right. Counsel, what -- what  
10:05:12 5 sort of agreement have we come up with?

10:05:14 6 MR. CARSON: With respect to the instant  
10:05:16 7 motion, your Honor, we, I think have a briefing  
10:05:17 8 schedule. It looks like on September 24th is our  
10:05:20 9 calendar call for this case, so we'd like to continue  
10:05:21 10 this hearing to that date.

10:05:23 11 THE COURT: That's fine if you agree to it.

10:05:26 12 MR. CARSON: And then we have a briefing  
10:05:27 13 schedule agreed to between plaintiffs and  
10:05:29 14 Mr. Wolfenzon. That would be plaintiffs will submit  
10:05:34 15 their supplemental points and authorities on or before  
10:05:38 16 August 29th. Defendant will submit its supplemental  
10:05:42 17 points and authorities in opposition on September 12th.  
10:05:47 18 And then five days prior to the hearing, if any reply  
10:05:53 19 is deemed necessary, we'll submit the same in the  
10:05:57 20 ordinary course.

10:05:57 21 THE COURT: That is fine.

10:05:59 22 MR. CARSON: Hear the matter on the 24th, if  
10:06:02 23 that works for the Court's calendar.

10:06:04 24 THE COURT: That works for me.

10:06:05 25 MR. CARSON: Okay.

10:06:06 1 MR. BOURASSA: Okay. And, Mr. Turtzo, did you  
10:06:08 2 have some comments with respect to jury questionnaires  
10:06:10 3 and motions in limine?

10:06:12 4 MR. TURTZO: Yeah. I think there's some dates  
10:06:13 5 on motions in limine, looking at Mr. Wolfenzon.

10:06:16 6 I just want to check with the Court. Do you  
10:06:18 7 have a deadline on when you want us to submit the  
10:06:20 8 questionnaire to your Honor? That way, it can be  
10:06:23 9 approved and then sent out to jury services in time?

10:06:25 10 THE COURT: We do. There's a -- how much --

10:06:28 11 THE COURT CLERK: She likes it a month in  
10:06:30 12 advance.

10:06:30 13 THE COURT: She likes it a month in advance.

10:06:31 14 MR. TURTZO: A month before --

10:06:32 15 THE COURT: Yeah.

10:06:32 16 MR. TURTZO: -- the trial date?

10:06:34 17 MR. WOLFENZON: So September 16th or 15th.

10:06:36 18 MR. TURTZO: So you want that to your  
10:06:37 19 department?

10:06:37 20 THE COURT CLERK: To the JEA.

10:06:39 21 THE COURT: The JEA. What date would that be?

10:06:43 22 THE COURT CLERK: Let's see. The trial date?

10:06:45 23 MR. TURTZO: 16th.

10:06:48 24 THE COURT CLERK: Yeah, be the 13th of  
10:06:49 25 October -- I'm sorry, of September.

10:06:52 1 THE COURT: September 13th would be the  
10:06:54 2 drop-dead time for the jury questionnaire.  
10:06:57 3 MS. WEIR: That's a Saturday, your Honor.  
10:06:58 4 THE COURT: Okay. Let's make it the next  
10:06:59 5 Monday, the following Monday.  
10:07:01 6 MR. WOLFENZON: Perfect.  
10:07:02 7 THE COURT CLERK: That would be the 15th.  
10:07:03 8 MR. TURTZO: And along the same lines, one of  
10:07:06 9 the things on our status check for today is trial  
10:07:08 10 protocol. Do you want us to brief that as part of the  
10:07:12 11 other --  
10:07:13 12 THE COURT: We can talk about that right now.  
10:07:13 13 MR. TURTZO: -- motions in limine or pretrial  
10:07:14 14 motion?  
10:07:14 15 THE COURT: We'll talk --  
10:07:15 16 MR. TURTZO: Maybe you have some ideas.  
10:07:17 17 THE COURT: Yeah, I have some ideas.  
10:07:18 18 Number 1, let's go back to the jury  
10:07:19 19 questionnaire. I guess that was on for today. Any --  
10:07:23 20 do we need any discussion regarding that? Because I'll  
10:07:26 21 share with you after we discuss it my thoughts on the  
10:07:28 22 jury questionnaire.  
10:07:30 23 Is there any objection to the jury  
10:07:31 24 questionnaire?  
10:07:34 25 MR. BOURASSA: No. They prove to be, I think,

10:07:37 1 quite helpful, your Honor.

10:07:39 2 MR. WOLFENZON: We agree.

10:07:41 3 MS. WEIR: I agree, your Honor.

10:07:42 4 THE COURT: Okay. So we'll have one.

10:07:43 5 Next, regarding the contents of the jury  
10:07:48 6 questionnaire. Any issues there? And I know it's hard  
10:07:51 7 to have issues when you don't know what's going to be  
10:07:54 8 in it, right? Is that true?

10:07:57 9 MR. BOURASSA: (No audible response.)

10:07:57 10 THE COURT: Okay. A couple of things that I  
10:08:00 11 feel are very important. Could we have -- could you go  
10:08:03 12 in and tell Lynn to give us the first page for our jury  
10:08:06 13 questionnaire.

10:08:07 14 Because I want to make sure we prepare it  
10:08:10 15 appropriately. There's a couple of things I do with  
10:08:12 16 jury questionnaires. Number 1, we don't -- on the  
10:08:14 17 first page when you have the name of the panel member,  
10:08:16 18 we don't put that on the questionnaire. What we have  
10:08:19 19 them do, we have them put their badge number and juror  
10:08:23 20 ID. And there's a reason for that. It gives them some  
10:08:25 21 anonymity, I think, that kind of helps a little bit.  
10:08:30 22 Because as lawyers, when they fill out the  
10:08:32 23 questionnaire, you want them to be forthright and  
10:08:36 24 truthful. So I think that helps.

10:08:39 25 Just as important, too, as you probably know

10:08:41 1 the questionnaires are public record. I think our  
10:08:44 2 Nevada Supreme Court ruled that. I don't know why  
10:08:46 3 because they don't get filed necessarily in the case.  
10:08:49 4 I don't get that. But I guess they felt that was --  
10:08:52 5 that was the right decision and that is how it is.

10:08:57 6 Secondly, when it comes to the contents of  
10:09:01 7 jury questionnaires, I think it's important to focus on  
10:09:05 8 one important point. And I think it's essentially  
10:09:09 9 covered by Nevada Rule of Professional  
10:09:11 10 Responsibility 3.5(e). You can take a look at it. But  
10:09:16 11 3.5(e) is really kind of interesting. It talks about  
10:09:20 12 or discusses, No. 1, duties and responsibilities of  
10:09:23 13 lawyers and what they can't do because it's under the  
10:09:27 14 Nevada Rule of Professional Responsibility.

10:09:29 15 If you're going to trial, you can't go out and  
10:09:32 16 hire a private investigator. And that's one of the  
10:09:35 17 things I think they talk about in the rule, to go out  
10:09:37 18 and investigate the veniremen. You know, you can't do  
10:09:42 19 that. There's a lot of things you can't do.

10:09:44 20 However, they talk about what you can do. And  
10:09:46 21 we know there's only two ways to do it, and one would  
10:09:48 22 be with a questionnaire, and No. 2 would be with voir  
10:09:54 23 dire. But when you investigate or inquire, the rule  
10:09:56 24 says any basis for challenge. Now, think about that  
10:10:01 25 because I remember I started with certain judges, and



10:10:04 1 they would say -- when I was practicing, they say, oh,  
10:10:07 2 Counsel, you shouldn't ask that. That has nothing to  
10:10:10 3 do with bias and/or prejudice. But the rule says any  
10:10:14 4 basis for challenge.

10:10:17 5           Implicit in that rule is the fact that lawyers  
10:10:19 6 have peremptory challenges they have to exercise and to  
10:10:22 7 be -- I'm going to tell everybody here, those are the  
10:10:26 8 most difficult challenges to exercise. And the only  
10:10:28 9 way -- I mean, as a lawyer today, if I was in practice,  
10:10:32 10 I'd want to be real specific as far as the preparation  
10:10:36 11 of a jury questionnaire because I would hope it would  
10:10:39 12 give me some incite as to the veniremen and what their  
10:10:43 13 core values are. Because you can look at a case -- you  
10:10:46 14 can put the same facts in front of people, and they'll  
10:10:49 15 look at it differently. They just will. And at the  
10:10:52 16 end of the day, it goes to their core values. That's  
10:10:54 17 why we have all these jury consultants making a lot of  
10:10:58 18 money, you know.

10:10:59 19           But -- and the reason why I think that's kind  
10:11:01 20 of important, I had a case -- I think I can talk about  
10:11:03 21 it now. I think it was an Adam Springel case, and it  
10:11:06 22 was a -- and I think it was that firm. It might have  
10:11:10 23 been Lenny Fink, because I know the case is long  
10:11:13 24 settled. But in the jury questionnaire, you don't see  
10:11:15 25 this very often, but they wanted to know the income

10:11:18 1 level because it was a single-family custom home, you  
10:11:21 2 know. And so they wanted to know -- you know, and I  
10:11:25 3 forget what -- how they did it. Do you make 40 to 50  
10:11:27 4 or, you know, some sliding scale. And normally the  
10:11:32 5 plaintiffs want that, right? But this was a scenario  
10:11:34 6 where the defendants wanted that. And obviously they  
10:11:39 7 had a good reason for that. And I don't know what  
10:11:41 8 their -- their consultant, and that's between them and  
10:11:44 9 their consultant.

10:11:45 10 And so I thought about it and I thought about  
10:11:47 11 it, and one of the things I decided to do was this: I  
10:11:50 12 said, you know what, that -- because I know some judges  
10:11:54 13 just, you know, in a reflective-like or reflex-type  
10:11:59 14 manner might say, ah, you don't need to know that.  
10:12:03 15 They deny it, right? But I don't know if that's really  
10:12:05 16 right. I really and truly don't. So what I decided to  
10:12:08 17 do was I made it optional for the jury to answer, you  
10:12:11 18 know.

10:12:11 19 And interestingly -- because I felt maybe it  
10:12:14 20 was offensive, but I says, you know -- I try to weigh  
10:12:18 21 and balance potential privacy issues with the veniremen  
10:12:23 22 versus the parties and the right to a fair trial and to  
10:12:26 23 be able to exercise their peremptory challenges, you  
10:12:33 24 know, based upon the information they had in front of  
10:12:37 25 them. That's why I made it optional. Interestingly, I

10:12:39 1 think like 98 percent answered the question. They  
10:12:42 2 didn't find it offensive, you know. So I learned a lot  
10:12:45 3 from that.

10:12:46 4 So the reason why I'm using that as an  
10:12:48 5 example, pretty much within reason -- I mean, it can't  
10:12:50 6 be anything outrageous in there. But, you know, you  
10:12:53 7 can ask some specific questions you feel that go to  
10:12:56 8 core values. I'm going to let you do that.

10:12:58 9 I guess the limitation would be EDCR 7.70, you  
10:13:03 10 know, as to what can happen during voir dire. You  
10:13:06 11 know, you can't -- and you can take a look at that.  
10:13:08 12 That would be the limitation on the questions. But  
10:13:10 13 typically 80 -- I'd say 95, 99 percent of the time  
10:13:14 14 lawyers agree to the contents anyway. Because you can  
10:13:17 15 ask the same question for -- that can be one way, and  
10:13:20 16 it can be beneficial to the defense if asked another  
10:13:23 17 way, you know, and kind of -- you know, you know how to  
10:13:26 18 do that. So I pretty -- I believe in the  
10:13:28 19 questionnaires.

10:13:29 20 What I do require, and I'll just hand out --  
10:13:31 21 we have a couple copies of this. This is -- and I'll  
10:13:35 22 give you this so you can take it with you. We have the  
10:13:39 23 jury questionnaire front page, and the front page we  
10:13:44 24 have it done a certain way as far as the form is  
10:13:49 25 concerned. And if we need this to make more copies of

10:13:52 1 this you can. But you can see here I have the juror  
10:13:55 2 ID, the badge number.

10:13:56 3 And one issue that comes up all the time is a  
10:14:05 4 description of the case. You know, make it just  
10:14:09 5 neutral, you know, the best you can. It's not opening  
10:14:14 6 statement. Everybody understands that. Just give them  
10:14:16 7 a little idea as to what the type of case it is, you  
10:14:19 8 know, and how long it's going to take, that type --  
10:14:21 9 those types of issues. So I want you to, you know --  
10:14:23 10 you can pass these out if you need more.

10:14:25 11 MR. WOLFENZON: Can I approach, your Honor?

10:14:27 12 THE COURT: Yeah, you can approach.

10:14:27 13 MR. WOLFENZON: What I'll do is, so we don't  
10:14:29 14 burden the Court with making copies, we'll put this on  
10:14:32 15 our --

10:14:33 16 THE COURT: Yeah.

10:14:33 17 MR. WOLFENZON: -- scanner and send it out to  
10:14:35 18 all the parties.

10:14:36 19 THE COURT: Send it out to everybody so you  
10:14:37 20 have the front page. Because I like to sign that also.

10:14:41 21 How long do we think this trial is going to  
10:14:43 22 take?

10:14:44 23 MS. WEIR: Actually, your Honor, I just have a  
10:14:45 24 quick question about the jury questionnaire. The jury  
10:14:47 25 ID number and the badge number are the only things on

10:14:52 1 the front page and their name is not contained on the  
10:14:53 2 front page?

10:14:54 3 THE COURT: No.

10:14:54 4 MS. WEIR: Can we get a list of the names that  
10:14:55 5 match the badge number?

10:14:56 6 THE COURT: Oh, you'll get that.

10:14:57 7 MS. WEIR: Okay. I just want to make sure  
10:14:59 8 'cause if I'm able only to identify someone by a name,  
10:15:03 9 if they say they work in a law firm and it's a giant  
10:15:05 10 law firm, I would want to know what the name of that  
10:15:07 11 person is for purposes of --

10:15:08 12 THE COURT: And you'll get that well in  
10:15:09 13 advance of trial. In fact, you'll get that shortly  
10:15:12 14 after they come in and sign -- fill them out I should  
10:15:15 15 say.

10:15:16 16 MS. WEIR: Okay.

10:15:17 17 THE COURT: You'll know who everybody is,  
10:15:18 18 because what we'll try to do is we'll try to -- once  
10:15:21 19 they fill them out, I think we make them -- my judicial  
10:15:24 20 executive assistant knows how we do this from a  
10:15:28 21 protocol standpoint. But we make them available, and  
10:15:30 22 you'll get the list. So you at least have two, three  
10:15:33 23 weeks before trial. We can go back, and you can go  
10:15:35 24 through all the responses and you have the names, and  
10:15:38 25 you know who they are.

10:15:40 1 In fact, they'll be in the same -- you know  
10:15:42 2 which order they'll be in as far as being called into  
10:15:45 3 the box and all those things, and they'll be in the  
10:15:47 4 gallery. So that will be good, and you'll have it  
10:15:49 5 there. And I think it's a great tool to the lawyers if  
10:15:53 6 they take advantage of it, you know. I really feel  
10:15:58 7 strongly about that.

10:16:00 8 Just as important, too, as far as -- we'll  
10:16:02 9 talk about this maybe a little later, but as far as  
10:16:05 10 voir dire is concerned, the only limitations I place on  
10:16:08 11 you would be EDCR 7.70, you know. And of course you  
10:16:11 12 can't ask the same question over and over again. But  
10:16:16 13 I've had voir dire go for a week. I think maybe even  
10:16:19 14 longer, you know, because I understand the importance  
10:16:21 15 of it.

10:16:21 16 And if you want to utilize the process, you  
10:16:26 17 can. If you don't want to take advantage of it, oh,  
10:16:28 18 well. It's your case not my case.

10:16:31 19 And any questions as far as that's concerned,  
10:16:34 20 ma'am?

10:16:35 21 MS. WEIR: I just have another question about  
10:16:36 22 the jury questionnaire. Do you require us to meet or  
10:16:39 23 confer somehow beforehand to provide a list of jurors  
10:16:42 24 that we would all agree to dismiss --

10:16:44 25 THE COURT: Absolutely.

10:16:45 1 MR. TURTZO: -- for whatever reason?

10:16:46 2 THE COURT: I'm glad you brought that up, and  
10:16:48 3 that's another great thing about the questionnaire. It  
10:16:55 4 assists all of us from a hardship standpoint and also  
10:16:57 5 potential conflicts. It's right there.

10:16:59 6 This is -- to give you a little guidance as  
10:17:03 7 far as hardships are concerned. I mean, the economy is  
10:17:08 8 picking up, but for the most part, if you have small  
10:17:11 9 business owners, if you have individuals that aren't --  
10:17:14 10 that were missed -- because this case is going to take  
10:17:17 11 what? The way it looks now, what, 10 weeks?

10:17:20 12 MR. WOLFENZON: Probably at least that much,  
10:17:21 13 your Honor.

10:17:21 14 THE COURT: Okay. Yeah, I mean, you know, so  
10:17:23 15 we're talking about a long time. Consequently, there's  
10:17:27 16 a lot of, you know, citizens in this great state and  
10:17:32 17 across the country that are just making it. You know,  
10:17:35 18 we forget that as lawyers. And maybe we don't, you  
10:17:38 19 know. But there -- you can. I'm not going to overlook  
10:17:41 20 that. And so the person who's going to have difficulty  
10:17:43 21 paying their rent or child care issues and all those  
10:17:46 22 things, I'm going to let them off. I can just you tell  
10:17:49 23 that, you know. And so you can anticipate that I'll  
10:17:53 24 grant that hardship, just to give you a little bit of  
10:17:56 25 parameters to work with.

10:17:59 1 You can say, yeah, the judge is going -- this  
10:18:01 2 looks like a hardship to me; can we agree to it?  
10:18:03 3 Because what I -- there's no -- I don't want to waste  
10:18:06 4 your time bringing them down here, because I would like  
10:18:08 5 to have a panel we can really make some -- spend some  
10:18:13 6 quality time with. And you can, you know, take this as  
10:18:16 7 an opportunity to conduct the voir dire. And then we  
10:18:19 8 can, you know, impanel a fair jury. That's my goal.

10:18:27 9 All right. Any other -- so I guess trial  
10:18:29 10 protocol, right?

10:18:30 11 MR. TURTZO: Yeah.

10:18:31 12 MR. WOLFENZON: Yes.

10:18:31 13 THE COURT: I can't see why this would be any  
10:18:34 14 different from any other construction defect case we've  
10:18:38 15 had go to trial in Department 16. I would anticipate,  
10:18:41 16 as far as trial protocol is concerned, we have, you  
10:18:46 17 know, plaintiff, plaintiff's case in chief. We have  
10:18:50 18 the defense case in chief.

10:18:52 19 One thing I've always permitted as far as the  
10:18:55 20 cases are concerned, I've permitted subcontractor  
10:19:00 21 participation in the defense case in chief specifically  
10:19:02 22 as it relates to the scope of work issues for each  
10:19:06 23 subcontractor. So they will participate.

10:19:09 24 The only one little concern I have, and I  
10:19:11 25 think the law clearly addresses this, say,



10:19:14 1 hypothetically, the developer has an expert that says,  
10:19:20 2 yeah, the plumbing installation was according to the  
10:19:25 3 code and there's no defect, right? Then the plumber  
10:19:27 4 has an expert that says the same thing. That's kind of  
10:19:31 5 cumulative.

10:19:31 6 Do you understand what I'm saying?

10:19:34 7 MR. WOLFENZON: Yeah.

10:19:34 8 THE COURT: Because at the end of the day,  
10:19:35 9 the -- and, I mean, I don't know the facts of this  
10:19:37 10 case, but there would be a third-party claim for  
10:19:40 11 contribution and/or indemnity, express or implied. And  
10:19:44 12 that's typically the case. So that's one of the things  
10:19:46 13 I kind of look at, just to give you a little guidance.  
10:19:49 14 But I'm not going -- I'm going to permit full  
10:19:53 15 participation.

10:19:53 16 And as far as the -- I would hope that we can  
10:19:57 17 posture the case from a special interrogatory  
10:20:02 18 standpoint that will address specific key issues as it  
10:20:06 19 relates to the scope of works. And I don't know what  
10:20:08 20 they are in this case. But that would assist me in the  
10:20:12 21 second phase of the case if there's -- where we would  
10:20:16 22 handle any indemnity issues, express or implied, you  
10:20:21 23 know. And that can -- and in all probability that  
10:20:24 24 would be handled potentially by motion practice and the  
10:20:27 25 like, assuming we're smart during the first phase of

10:20:31 1 the case and we have special interrogatories that  
10:20:35 2 address those issues.

10:20:38 3 Does everybody understand that as far as  
10:20:39 4 defects are concerned?

10:20:41 5 IN UNISON: Yes, your Honor.

10:20:42 6 THE COURT: Any questions on that? So really  
10:20:46 7 typical, 'cause there's nothing really unique about  
10:20:48 8 this case, is there?

10:20:49 9 MR. WOLFENZON: Couple questions and I guess  
10:20:50 10 one statement. In the past in other cases that at  
10:20:53 11 least we've tried, we definitely work with the  
10:20:56 12 subcontractors in terms of their participation.

10:20:58 13 THE COURT: Right.

10:20:58 14 MR. WOLFENZON: And -- as to the case in chief  
10:21:00 15 and make sure we don't duplicate either by experts or  
10:21:04 16 even cross-examination and questioning. So we'll work  
10:21:06 17 that out amongst ourselves. If the soils guy is more  
10:21:11 18 capable of asking certain questions, we'll let the  
10:21:16 19 soils guy ask the questions. Same thing with the HVAC  
10:21:19 20 gal or whoever is doing whatever.

10:21:22 21 THE COURT: Because I think that's important.  
10:21:22 22 Isn't that one of the issues the subcontractors fought  
10:21:24 23 for at the legislature?

10:21:26 24 MR. WOLFENZON: Yes.

10:21:26 25 THE COURT: You know, I get that.

10:21:27 1 MR. WOLFENZON: Right.

10:21:27 2 THE COURT: So I'm going to -- I've always  
10:21:30 3 felt it's very -- because you got to remember, there  
10:21:33 4 was a time when the subcontractors didn't participate  
10:21:36 5 at all. Years ago. That's my understanding.

10:21:38 6 MR. WOLFENZON: Much easier that way. Did I  
10:21:39 7 say that out loud? Just kidding.

10:21:42 8 THE COURT: But it's not -- I wonder about the  
10:21:45 9 inherent fairness -- I mean, yes, you could do it that  
10:21:47 10 way. You could bifurcate those issues. But I wonder  
10:21:50 11 about the unfairness potentially because the  
10:21:52 12 contractors look at it this way: Well, if the  
10:21:55 13 developer's counsel is not doing an adequate job  
10:21:58 14 defending my scope of work, I get stuck with it, you  
10:22:00 15 know.

10:22:00 16 MR. WOLFENZON: Right.

10:22:01 17 THE COURT: You know, and I get that. I do.  
10:22:02 18 And that's why I think it's probably even more efficient  
10:22:06 19 from an efficiency standpoint to handle it that way.

10:22:09 20 Sir, go ahead.

10:22:10 21 MR. WOLFENZON: Question about the second  
10:22:11 22 phase with respect to indemnity. I know in other  
10:22:18 23 places what we've done is we've had the jury go and  
10:22:21 24 deliberate after the plaintiff puts on their case, the  
10:22:25 25 developer puts on the defense together with the subs.

10:22:27 1 They do their rebuttal if necessary. Jury comes back  
10:22:33 2 with basically a verdict as between plaintiff and  
10:22:37 3 D.R. Horton.

10:22:37 4 THE COURT: Right.

10:22:38 5 MR. WOLFENZON: And then we proceed to, if  
10:22:42 6 need be, the indemnity phase. And I think what you're  
10:22:46 7 saying is in that first phase, we're going to ask some  
10:22:51 8 special interrogatory questions of the jury to  
10:22:54 9 identify, if they find an item has an aspect of damages  
10:23:00 10 to it, whose scope of work does that fall under? Am I  
10:23:04 11 understanding that correctly?

10:23:06 12 THE COURT: I think -- I mean, I don't know  
10:23:07 13 anything about this case, but say one of the  
10:23:09 14 allegations, and I think plumbing is a good example,  
10:23:11 15 that the plumbing was defective. I think the jury  
10:23:17 16 making that determination that the plumbing was  
10:23:20 17 defective and assessing the amount of damages, once  
10:23:22 18 that happens, I don't think there would be a necessity  
10:23:25 19 for any additional evidence as it relates to the  
10:23:29 20 indemnity claim.

10:23:30 21 Because I would -- I would anticipate there's  
10:23:33 22 potentially an express indemnity claim. And  
10:23:36 23 assuming -- I mean, the jury would address the scope of  
10:23:38 24 work issue, right? And once that's done, then that  
10:23:42 25 would trigger, I would assume, an express indemnity

10:23:46 1 provision under the contract between the developer  
10:23:49 2 and/or subcontractor.

10:23:52 3 MR. WOLFENZON: Right. But there are some  
10:23:54 4 elements -- for instance, like plumbing. Let's say a  
10:23:56 5 plumbing pipe penetrates a wall and the allegation is  
10:23:59 6 there's not the correct sealant around that  
10:24:02 7 penetration. And so the jury comes back and says,  
10:24:05 8 yeah, you get \$25 to put sealant in that penetration.  
10:24:09 9 The argument would inevitably come up of the plumber  
10:24:14 10 saying, whoa, whoa, whoa. It's just my pipe going  
10:24:16 11 through the wall. I don't have sealant in my truck.  
10:24:18 12 And the drywaller coming back and saying, hey, I put up  
10:24:21 13 my drywall. I don't know who goes out there and cuts  
10:24:23 14 holes in the drywall after I'm gone. And if they put  
10:24:27 15 their plumbing pipe through there, you know, I wasn't  
10:24:29 16 ever called back to do the sealant. So that's why --

10:24:32 17 THE COURT: But wouldn't it be ultimately  
10:24:35 18 somebody's scope of work.

10:24:36 19 MR. TURTZO: I would just say, your Honor, I  
10:24:39 20 don't think this case is necessarily the same. I think  
10:24:40 21 in this particular case, not letting the cat out of the  
10:24:44 22 bag, we have a geotechnical engineer in the case which,  
10:24:46 23 in and of itself, I think, makes this rare for CD  
10:24:48 24 cases. There is a very significant design component of  
10:24:52 25 the case. I think. I think there's also going to be a

10:24:56 1 component of the case that deals with selection of a  
10:24:59 2 site. I mean, I think there are -- there's going to be  
10:25:01 3 some very significant issues in this case about  
10:25:04 4 concurrent causes and not just causes by the  
10:25:08 5 subcontractors.

10:25:08 6 It's going to be the position of the  
10:25:09 7 subcontractors that D.R. Horton is solely responsible  
10:25:13 8 for certain of the defects in this case. And  
10:25:14 9 Mr. Wolfenzon says it's no surprise.

10:25:18 10 THE COURT: Assuming that's true, and that's  
10:25:19 11 the position the subcontractors are going to take in  
10:25:21 12 this case, why wouldn't there be a -- I would  
10:25:25 13 anticipate there would have to be a special  
10:25:27 14 interrogatory as it relates to sole proximate cause.

10:25:33 15 MR. TURTZO: Well, that's something that we  
10:25:35 16 could definitely do.

10:25:36 17 THE COURT: You see what I mean?

10:25:37 18 MR. TURTZO: That's why we're asking for your  
10:25:39 19 Honor's guidance. Do you want that sort of testimony  
10:25:41 20 in evidence that really doesn't deal with defect --  
10:25:44 21 does a defect exist? Yes or no? Cost of repair exist?  
10:25:47 22 You know, X dollars or 0 dollars? That's one thing.

10:25:51 23 And then evidence -- in order to allow the  
10:25:53 24 jury to answer special interrogatories of that kind,  
10:25:55 25 we're going to have to put on a significant case

10:25:58 1 dealing with whose responsibility was what at the  
10:26:03 2 particular site and what potentially caused the defects  
10:26:06 3 which complicates that first phase of the trial beyond  
10:26:09 4 which, I think, you did particularly in the Gunnerson  
10:26:12 5 case and would lead to a much longer first phase in  
10:26:15 6 order to give the jury the requisite evidence to answer  
10:26:19 7 the interrogatories. I guess that's the short version  
10:26:21 8 of it.

10:26:22 9           So what we can do, I guess, is -- I think my  
10:26:24 10 hope would be that we would confer with everybody  
10:26:26 11 together, the subcontractors probably, and then as a  
10:26:28 12 group see if we can agree on something to submit to  
10:26:31 13 your Honor, and then you could see it, we can get  
10:26:33 14 something in place. But of course, we defer to your  
10:26:35 15 Honor's discretion.

10:26:36 16           THE COURT: I understand.

10:26:37 17           Mr. Bourassa, what's your -- have you thought  
10:26:39 18 about it, sir, as far as trial protocol is concerned?

10:26:42 19           MR. BOURASSA: Well, with respect to  
10:26:44 20 plaintiff's case against D.R. Horton, I think we're  
10:26:46 21 obviously just looking for a general verdict for each  
10:26:50 22 particular homeowner. And they can sort out their mess  
10:26:53 23 on the back end.

10:26:54 24           THE COURT: Okay.

10:26:56 25           MR. WOLFENZON: So maybe --

10:26:57 1 THE COURT: You know -- and this -- I'll say  
10:26:59 2 this: I know nothing about this case factually today.  
10:27:06 3 I don't even know what all the defects are, you know.  
10:27:09 4 MR. WOLFENZON: There are none, your Honor.  
10:27:12 5 THE COURT: I don't know even know what the  
10:27:15 6 defect allegations are. If from a trial -- what you  
10:27:17 7 can do is this: Prepare -- if you can prepare a joint  
10:27:21 8 trial protocol for me to take a look at.  
10:27:23 9 MR. TURTZO: Okay.  
10:27:24 10 MR. WOLFENZON: Okay.  
10:27:24 11 THE COURT: And, say, get that done by -- in  
10:27:28 12 three weeks -- when do you come back again?  
10:27:33 13 MR. WOLFENZON: 24th.  
10:27:34 14 MR. BOURASSA: Be back on the 24th for that  
10:27:36 15 calendar call and hearing.  
10:27:37 16 THE COURT: 24th of September?  
10:27:39 17 MR. BOURASSA: Yes, your Honor.  
10:27:40 18 THE COURT: Yeah. Get the joint trial  
10:27:43 19 protocol prepared and filed a week before that.  
10:27:49 20 MR. TURTZO: Okay.  
10:27:50 21 THE COURT: So I can review it before the  
10:27:51 22 pretrial. And if everything appears to be fine, we'll  
10:27:55 23 go with it.  
10:27:57 24 MR. TURTZO: Sound great, your Honor.  
10:27:58 25 THE COURT: I think that's the best way to



10:27:59 1 handle it.

10:28:01 2 MS. HUMMEL: Your Honor, I have one small  
10:28:03 3 thing I just wanted to put on the record.

10:28:04 4 THE COURT: Yes, ma'am. And for the record,  
10:28:05 5 your name?

10:28:05 6 MS. HUMMEL: Megan Hummel. I have Nova  
10:28:05 7 Engineering and Owens Geotechnical.

10:28:09 8 THE COURT: Yes.

10:28:10 9 MS. HUMMEL: Discovery is closed in this  
10:28:11 10 matter, but we're still doing deposition with regards  
10:28:13 11 to my client specifically. I believe we have noticed  
10:28:17 12 the deposition of Bob Construction's PMK for  
10:28:20 13 September 10th, and that's through agreement by  
10:28:23 14 counsel. And the subpoena was served timely before the  
10:28:25 15 close of discovery. I just wanted to put that on the  
10:28:29 16 record.

10:28:29 17 THE COURT: Counsel agrees?

10:28:30 18 MR. WOLFENZON: Discovery is actually going to  
10:28:32 19 close on Friday technically, but knowing how many  
10:28:35 20 different parties and issues there are --

10:28:37 21 THE COURT: I understand.

10:28:37 22 MR. WOLFENZON: -- we're still working on it.  
10:28:38 23 And yeah, we have agreements to go beyond that --

10:28:42 24 THE COURT: The bottom line is --

10:28:42 25 MR. WOLFENZON: -- cutoff date.

10:28:43 1 THE COURT: -- in construction defect -- in a  
10:28:45 2 lot of cases, more complex cases, I realize that  
10:28:49 3 discovery occurs beyond the discovery cutoff. And if  
10:28:55 4 everyone is agreeing to that, that that's a good thing  
10:28:58 5 because it tells me the lawyers are at least working  
10:29:01 6 together, and I have no problem with it.

10:29:03 7 MR. WOLFENZON: Okay.

10:29:04 8 MR. TURTZO: Along those lines, we have an  
10:29:05 9 agreement on the modifications to the motion in limine  
10:29:07 10 schedule.

10:29:07 11 MR. WOLFENZON: Right. On the motion in  
10:29:08 12 limines, what we are anticipating is that initial  
10:29:13 13 filings will be done on September 15th, any oppositions  
10:29:18 14 will be done on September 22nd, and then any replies  
10:29:22 15 can be filed on September 29th.

10:29:26 16 THE COURT: Fine.

10:29:29 17 MS. WEIR: Your Honor, when do you typically  
10:29:30 18 hear the motions in limine?

10:29:31 19 THE COURT: Pardon?

10:29:32 20 MS. WEIR: When do you hear the motions in  
10:29:33 21 limine, on the first day of trial or in advance of  
10:29:36 22 that?

10:29:36 23 THE COURT: I think in this case, I'll  
10:29:38 24 probably hear it the first day of trial because it  
10:29:40 25 seems like to me you'll be working until the first day

10:29:42 1 of trial; is that correct?

10:29:43 2 MR. WOLFENZON: Yes, your Honor.

10:29:44 3 MR. BOURASSA: I'm sure.

10:29:45 4 THE COURT: Yeah, so --

10:29:46 5 MS. WEIR: Your Honor --

10:29:47 6 THE COURT: -- ideally in a perfect world, I'd  
10:29:51 7 love to hear the motions in limine 60 days before  
10:29:54 8 trial.

10:29:55 9 MR. TURTZO: There's nothing that prevents us  
10:29:57 10 from filing them earlier.

10:29:58 11 THE COURT: Yeah. I mean, you know. But  
10:29:59 12 here's what -- that's true, but you have to be at  
10:30:02 13 least -- have the discovery completed before you file  
10:30:06 14 them, right?

10:30:06 15 But as far as motions in limine, and this is  
10:30:09 16 more philosophical from my standpoint, they sometimes  
10:30:12 17 get filed late many times. And -- and although the  
10:30:18 18 rules mandate they have to be filed on a certain day,  
10:30:20 19 assuming I have time to read them, I'd much rather have  
10:30:24 20 a motion in limine that I've had a chance to vet and at  
10:30:26 21 least get a general understanding as to what's going on  
10:30:29 22 versus during trial, Objection, your Honor. I mean,  
10:30:33 23 maybe, maybe not. I don't know all the facts. I can  
10:30:37 24 flip a coin maybe. I don't know. But I'd rather be --  
10:30:40 25 I'd rather have the information in front of me. And

10:30:43 1 that's why I do entertain those on orders shortening  
10:30:45 2 time when we get closer to trial.

10:30:47 3 And just as important, too, this happens,  
10:30:48 4 depending on the complexity of the case; things just  
10:30:52 5 come up you don't even think about and you're reading  
10:30:55 6 the deposition, you're saying, oh, my God, I can't say  
10:30:59 7 that. Get a motion in limine, right?

10:31:01 8 MR. TURTZO: Absolutely.

10:31:02 9 THE COURT: That happens. I get it. Okay.

10:31:04 10 MR. WOLFENZON: I think we're done, your  
10:31:05 11 Honor.

10:31:05 12 MS. DelCARMEN: Your Honor, I just have one  
10:31:06 13 question. It's really more my personal schedule. You  
10:31:08 14 had asked about the five-year rule and it kind of  
10:31:11 15 hinted around the trial may not actually start on the  
10:31:14 16 13th.

10:31:15 17 THE COURT: It's going to start.

10:31:16 18 MS. DelCARMEN: At this point --

10:31:16 19 THE COURT: Yes, we're going to trial. When  
10:31:19 20 is the five-year rule?

10:31:22 21 MR. WOLFENZON: End of 2015, I think.

10:31:24 22 THE COURT: Oh, we got plenty of --

10:31:25 23 The thing about it -- and this is all I can  
10:31:30 24 say. All I can say is this: I mean, I have no clue  
10:31:31 25 what my other -- what my whole stack looks like and

10:31:34 1 other cases. I have no clue what's going on.

10:31:36 2 MR. BOURASSA: We're No. 1.

10:31:37 3 THE COURT: You're No. 1. That's good.

10:31:40 4 MR. WOLFENZON: Always.

10:31:40 5 THE COURT: Where are we at? Have we had

10:31:43 6 settlement conferences in this case, any of that stuff?

10:31:45 7 MR. BOURASSA: We have one set I think for

10:31:46 8 September 9th, your Honor.

10:31:47 9 THE COURT: Who's your settlement judge?

10:31:49 10 MR. BOURASSA: That would be Justice Becker.

10:31:53 11 MR. TURTZO: Could have just skipped this

10:31:55 12 whole discussion, right?

10:31:56 13 THE COURT: Okay. She's really good.

10:31:58 14 MR. WOLFENZON: She is.

10:32:00 15 THE COURT: She settles some really tough

10:32:01 16 cases that we've had in this department. It's

10:32:05 17 phenomenal. I tell her you need to just open up your

10:32:08 18 own shop and forget doing this senior judge stuff, you

10:32:11 19 know, and charge 500 an hour. I think she's worth it,

10:32:15 20 clearly.

10:32:16 21 All right. Well, good luck with that.

10:32:20 22 IN UNISON: Thank you, your Honor.

10:32:21 23 THE COURT: Okay. Enjoy your day. And if any

10:32:22 24 issues come up, you can -- and everyone agrees, you can

10:32:25 25 get me on a conference call if I'm here.

10:32:28 1 IN UNISON: Thank you.

10:32:29 2 MR. WOLFENZON: If I could get the subs to

10:32:31 3 hang around the back of the hallway.

10:32:34 4

10:32:34 5 (PROCEEDINGS WERE CONCLUDED.)

10:32:34 6

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## REPORTER'S CERTIFICATE

STATE OF NEVADA)

:SS

COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO  
HEREBY CERTIFY THAT I TOOK DOWN IN STENOGRAPHY ALL OF THE  
PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE  
TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID  
STENOGRAPHY NOTES WERE TRANSCRIBED INTO TYPEWRITING AT  
AND UNDER MY DIRECTION AND SUPERVISION AND THE  
FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND  
ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE  
PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED  
MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF  
NEVADA.

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PEGGY ISOM, RMR, CCR 541

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

2  
3                   HIGH NOON AT ARLINGTON  
4                   RANCH HOMEOWNERS  
5                   ASSOCIATION, Nevada non-profit  
                    corporation,

6                                   Petitioner,  
7                                   vs.

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

11                                   Respondent.

12                  D.R. HORTON, INC.,

13                                   Real Party in Interest

**SUPREME COURT CASE # 65456**

Electronically Filed  
Eighth Judicial District Court  
Clark County, Nevada  
Case No.: 07A542616  
Dec 01 2014 02:01 p.m.  
T. K. Lindeman  
Clerk of Supreme Court

**REAL-PARTY IN-INTEREST,  
D.R. HORTON, INC.'S MOTION  
TO CONSOLIDATE WRIT  
PETITIONS FOR ORAL  
ARGUMENT**

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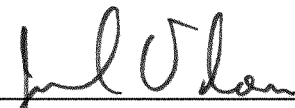
21                                   **Attorneys for Real-Party-In-Interest, D.R. HORTON, INC.**

1                                    **MOTION TO CONSOLIDATE WRIT PETITIONS FOR**  
2                                    **ORAL ARGUMENT**

3            Real-Party-In-Interest, D.R. Horton, Inc. ("Horton"), by and through its attorney  
4 Joel D. Odou, Esq. and Victoria L. Hightower, Esq., of Wood, Smith, Henning &  
5 Berman LLP, hereby files its Motion to Consolidate Writ Petitions for Oral Argument.  
6 This Motion is made pursuant to NRAP 27, and is supported by the attached  
7 Memorandum of Points and Authorities.

8            Dated this 1<sup>st</sup> day of December, 2014.

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

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **I. INTRODUCTION AND STATEMENT OF FACTS**

4 In this case, *High Noon at Arlington Ranch Homeowners Association v. D.R.*  
5 *Horton*, District Court Case No. 07A542616, the Arlington Ranch Homeowners  
6 Association (hereinafter “Arlington Association”) asserted claims against D.R. Horton  
7 (hereinafter “Horton”) for constructional defects on behalf of individual homeowners.  
8 Between the time the Complaint was filed alleging real damages suffered by specific  
9 homeowners and the time Horton filed a Motion for Partial Summary Judgment, only  
10 112 homeowners who were homeowners at the time the Complaint was filed in 2007  
11 remained current owners. The other owners purchased their homes after the  
12 Complaint was filed and did not produce valid assignments of the claims for past  
13 damages from the prior owners. Horton contended through a Motion for Partial  
14 Summary Judgment based upon common law, absent a valid assignment, a  
15 homeowners association cannot maintain causes of action on behalf of homeowners  
16 who themselves do not own the causes of action. Judge Susan Johnson agreed with  
17 Horton and granted Horton’s Motion for Partial Summary Judgment. The Arlington  
18 Association filed a Petition for Writ of Prohibition or Mandamus on April 18, 2014,  
19 titled *High Noon at Arlington Ranch Homeowners Association v. Eighth Judicial*  
20 *District Court, Case No. 65456* (hereinafter “High Noon at Arlington Ranch”). In its  
21 Writ, the Arlington Association did not raise the question of the applicability of NRCP  
22 25(c). When Horton Answered on June 11, 2014, it did not raise the issue of NRCP  
23 25(c) both because the Arlington Association did not raise NRCP 25(c) in its Petition,  
24 and Horton believed it was irrelevant to the issues presented as NRCP 25(c) provides  
25 only a procedural remedy to substitute in a party after transfer of rights to the claims  
26 asserted has occurred.

27 In addition to *High Noon at Arlington Ranch*, Horton has another case in which a  
28 Petition for Writ of Mandamus or Prohibition was recently accepted. In *First Light*

1 *Homeowners Association v. D.R. Horton*, District Court Case No. A499743  
2 (hereinafter "*First Light*"), the First Light Homeowners Association (hereinafter "First  
3 Light Association") filed a Complaint against Horton in 2005 asserting constructional  
4 defects on behalf of 414 individual unit owners. Since the time the Complaint was  
5 filed on behalf of individual homeowners for defects existing within their homes, 304  
6 of the homeowners who owned their units at the time the Complaint was filed, sold  
7 their properties leaving only 110 original owners. The subsequent purchasers did not  
8 produce valid assignments of the claims from the prior owners. Horton filed a Motion  
9 for Partial Summary Judgment in First Light, raising the same legal arguments as in  
10 High Noon at Arlington Ranch but that motion was denied by Judge Earl. Horton filed  
11 a Petition for Writ of Prohibition or Mandamus on July 3, 2014, in the case titled *D.R.*  
12 *Horton v. Eighth Judicial District Court*, Case. No. 65993, challenging Judge Earl's  
13 decision. Horton again did not raise issues concerning NRCP 25(c) because it  
14 believed the statute was inapplicable to cure the issue regarding the transfer of the  
15 causes of action in the Complaint to the subsequent purchasers.

16 After Horton filed the Petition for Writ of Prohibition or Mandamus in *First*  
17 *Light* in Case No. 65993, it argued another similar motion for summary in the District  
18 Court case of *Noyes v. D.R. Horton*, A-11-636669-D, before Judge Timothy Williams.<sup>1</sup>  
19 On August 13, 2014, at the hearing on the motion, Judge Williams raised the question  
20 whether NRCP 25(c) acts as a mechanism to transfer the claims from a prior  
21 homeowner to a subsequent purchaser effectively curing the subsequent purchaser issue  
22 and asked the parties for additional briefing. (See Transcript of Proceedings, Page 7: 12  
23 - page 21:7 at **Exhibit "A"** attached hereto). Pursuant to the Court's request at the  
24 August 13, 2014 hearing, Horton thoroughly analyzed whether NRCP 25(c) was

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25 <sup>1</sup> That motion concerned subsequent purchaser issues alone without examining  
26 homeowner association standing issues raised by opposing parties in *First Light* and  
27 *High Noon at Arlington Ranch* because *Noyes* is not a homeowner's association  
28 representative action. Horton was opposing a motion for leave to file a Third Amended  
Complaint because the amendment would be futile as the Amended Complaint sought  
to assert claims of subsequent purchasers absent a valid assignment.

1 applicable and prepared a brief concluding it was a procedural mechanism for  
2 substituting a new party where the cause of action was legally transferred either by  
3 operation of law or by an assignment of rights and did not transfer the causes of action  
4 from a prior homeowner to a subsequent purchaser. Horton's NRCP 25(c) brief,  
5 however, was not filed in the Noyes action because the case settled.

6       Thereafter in *First Light*, Case No. 65993, on or about August 25, 2014, the  
7 Nevada Justice Association (hereinafter "NJA") filed a Motion before this Court for  
8 leave to file a Brief as Amicus Curiae in Opposition to Petitioner's Petition. The  
9 Amicus Curiae brief was filed and raised NRCP 25(c) as a means to cure the  
10 subsequent purchaser problem. (See NJA Amicus Curiae Brief at page 19). In its Reply  
11 Brief to the First Light Homeowner's Association Answering Brief and in addressing  
12 the NJA Amicus Brief, Horton proactively addressed NRCP 25(c) as follows:

13       Although the Association did not raise NRCP 25(c) in its  
14 Answering Brief, the brief of Amicus Curiae NJA referenced it in its  
15 argument that implied warranties automatically transfer to a subsequent  
16 purchaser by virtue of NRS 116.4114(6) regardless of the subsequent  
17 purchaser's knowledge of the defects or whether the implied warranty had  
18 already been breached. Amicus Curiae NJA stated NRCP 25(c) provides  
19 pending claims be continued in the case of any transfer of interest.  
20 (Amicus Curiae Brief, p. 20-21). While unclear, it appears NJA makes  
21 the reference to NRCP 25(c) as support for the argument a transfer in the  
underlying real property is the interest referred to in NRCP 25 (c) and  
therefore automatically permits the Subsequent Purchaser to maintain the  
action for breach of the implied warranty on this basis. In addition, this  
Court addressed NRCP 25(c) in *Anse* [*Anse Inc. v. Eight Judicial Dist. Ct.*,  
124 Nev. 862192 P.3d 738(2008)] in reaching its conclusion the definition  
of new residence encompassed subsequent purchasers. For these reasons,  
Horton clarifies NRCP 25 (c)'s application and concludes it is irrelevant  
to the issues raised in this Writ.

22       NRCP 25 (c) provides, in pertinent part:

23       (c) Transfer of Interest. In case of any transfer of  
24 interest, the action may be continued by or against  
25 the original party, unless the court upon motion  
26 directs the person to whom the interest is  
transferred to be substituted in the action or joined  
with the original party. Service of the motion shall  
be made as provided in subdivision (a) of this rule.

27       Rule 25(c) only applies when an "interest is transferred"; the rule  
28 does not create a transfer, or even infer one just to keep the claim viable  
where the parties take no action. Because the causes of action alleged in

1 the Complaint were never assigned (i.e. “transferred”) from the prior  
2 owners to the Subsequent Purchasers, NRCP 25(c) is irrelevant to an  
3 analysis of whether an interest has been transferred in the first place. This  
4 is not a case of substituting a successors in interest to the cause(s) of  
5 action into the current litigation. Rule 25(c) has no application. The  
6 Subsequent Purchasers are simply new parties.

7 In the case of an assignment of a cause of action, the assignor of a  
8 claim no longer has standing to pursue that claim. An assignment of a  
9 right is a manifestation of the assignor’s intention to transfer the right by  
10 virtue of which the assignor’s right to performance by the obligor is  
11 extinguished in whole or in part and the assignee acquires a right to such  
12 performance. See Restatement (Second) of Contracts Section 317  
13 (1981). An assignee typically “steps in the shoes” of an assignor. See, *In*  
14 *re Boyajian*, 367 B.R. 138, 145 (9th Cir BAP 2007). The corollary of this  
15 rule is when a claim is assigned, the assignee becomes the real party in  
16 interest with standing to sue. *Castleman v. Redford*, 61 Nev. 259, 124 P.2d  
17 293 (1942). The claim does not disappear, in other words, it simply must  
18 be asserted by someone else, the real party in interest.

19 This is apparent from the text of NRCP 17(a), which provides, in  
20 pertinent part, “[e]very action shall be prosecuted in the name of the real  
21 party in interest.” The purpose of this rule is to allow the defendant all  
22 evidence and defenses against the real party in interest and to protect him  
23 against another suit on the same matter brought by the real party at  
24 interest, *NAD, Inc. v. Eighth Judicial Dist. Ct.*, 115 Nev. 71, 76, 976 P.2d  
25 994, 997 (1999). The rule, in other words, is meant to afford the defendant  
26 a fair trial. It is not meant to permit him to avoid trial altogether.  
27 Underscoring this caveat is the final sentence of Rule 17(a), which  
28 declares: “No action shall be dismissed on the ground that it is not  
prosecuted in the name of the real party in interest until a reasonable time  
has been allowed after objection for ratification of commencement of the  
action by, or joinder or substitution of, the real party in interest; and such  
ratification, joinder or substitution shall have the same effect as if the  
action had been commenced in the name of the real party in interest.” See,  
e.g., *Lawler v. Ginocchio*, 94 Nev. 623, 627 n.1, 584 P.2d 667, 669 n.1  
(1978).

NRCP 25(c) provides the authority for that substitution when the  
*interest in the litigation* is transferred by express assignment or by  
operation of law. Thus, NRCP 25(c)’s reference to a “transfer of interest”  
does not refer to a transfer of interest in real property. It refers to a  
transfer of interest in the cause of action, personal property, in the event of  
death or incompetency (by operation of law) or a transfer by express  
assignment, neither of which exist in the present action. NRCP 25 (c)  
declares, “[i]n case of any transfer of interest, the action may be continued  
by or against the original party, unless the court upon motion directs the  
person to whom the interest is transferred to be substituted in the action or  
joined with the original party”. Rule 25(c), thus, applies the general real-  
party-in-interest provisions of Rule 17(a) to the specific context of a  
transfer of interest in the litigation. This is not a case with a successor in  
interest under Rule 25(c). There were no assignments of the causes of  
action. This is more appropriately a case of new real-parties-in-  
interest. The Subsequent Purchasers do not assert the same interest as the  
prior owners; they assert their own interest by virtue of owning the unit,



1 not by a transfer of the “claim” held by the prior owner. While the prior  
2 owner has transferred title in the realty to the Subsequent Purchaser, that  
title is not the interest at issue in Rule 25(c).

3 Accordingly, the following statement by the Supreme Court’s in  
4 *Anse* should be clarified: “NRCP 25(c) provides that an action may be  
“continued by or against the original party” in case of any transfer of  
5 interest. Under NRCP 25(c), applying petitioners’ definition of “new  
6 residence,” a subsequent purchaser arguably could maintain an action  
under NRS Chapter 40 against a developer so long as he or she purchased  
7 the home after the original purchaser commenced the construction defect  
action.” *Anse*, 124 Nev. at 871-872. This is true only if the subsequent  
8 purchaser had an assignment of causes of action. Without this  
clarification, it is possible to interpret *Anse*’s application of NRCP 25(c)  
9 as applying to a transfer of interest in the underlying real property, which  
clearly it does not.” (See *Petitioner D.R. Horton’s Reply in First Light*  
(Case 65993) at Page 30:7 - 33:8)

10 Horton received notice *High Noon at Arlington Ranch* (which does not address  
11 NRCP 25(c)) is set for Oral Argument on January 7, 2015. Horton has not received  
12 notice concerning oral argument for *First Light*. The generic facts of each case are the  
13 same as they each involve a homeowner’s association representative action asserting  
14 claims on behalf of homeowners including a large number of subsequent purchasers  
15 after a complaint has been filed on behalf of prior owners. Additionally, common  
16 issues of law are argued in each case. It is apparent Nevada District Courts are  
17 concluding NRCP 25(c) is relevant utilizing it to resolve the subsequent purchaser issue  
18 in the context of pending Chapter 40 litigation.

19 Moreover, the Nevada Supreme Court commented on NRCP 25(c) in *Anse v.*  
20 *Eight Judicial District Court* as addressed by Horton in the First Light Reply Brief. In  
21 order to eliminate confusion and misapplication of the law and to provide consistency  
22 throughout the jurisdiction without the necessity of additional Writ Petitions, the  
23 decisions in both *High Noon at Arlington Ranch* and *First Light* should address the  
24 applicability of NRCP 25(c) to the subsequent purchaser issue. Accordingly, Horton  
25 requests the oral argument on *High Noon at Arlington Ranch* currently set for January  
26 7, 2015 be consolidated with the oral argument not yet set in *First Light* to ensure it is  
27 adequately addressed by the Supreme Court.  
28

Counsel for High Noon at Arlington Ranch Association approached counsel for Horton on or about October 22, 2014 and requested the oral arguments of both cases be consolidated. Since then, counsel for the Plaintiffs in both actions have agreed with counsel for Horton consolidation is appropriate, and to consolidate the matters for the purposes of oral argument so long as each case has sufficient time for oral argument. (See Affidavit of Bruno Wolfenzon attached hereto as **Exhibit "B"**).

## **II. ARGUMENT**

*Nevada Rules of Appellate Procedure Rule 3(B)(2)* provides, “When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the Supreme Court upon its own motion or upon motion of a party.” Consolidation is appropriate where cases present common issues or facts. See e.g. *Ewell v. State*, 785 P.2d 1028, 1030 fn. 1 (Nev. 1989)(consolidation appropriate where appeals presented identical issues); *Prieur v. D.C.I. Plasma Center of Nevada, Inc.*, 726 P.2d 1372, 1372 Affirmance filed October 27, 2011. (Nev. 1986)(consolidation under 3(b) appropriate where appeals presented identical issues and similar facts). Here identical generic factual and common legal issues exist because both cases involve homeowners associations asserting claims on behalf of individual homeowners pursuant to NRS 116.3102(1)(d), including claims of subsequent purchasers who purchased their units after the suits were filed, had notice of the litigation at the time of purchase, but who did not obtain valid assignments of the causes of action from the unit owners who owned the claims. Both cases also involve Motions for Partial Summary Judgment and the ability of a homeowners’ association to assert claims on behalf of subsequent owners who were not owners at the time the Complaint was filed and purchased with notice of defects without obtaining assignments of rights from the prior owners.

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1 The fact that the matters are not on appeal but are raised through Petitions for  
2 Writ of Mandamus and/or Prohibition does not change this Court's analysis on the issue  
3 of consolidation. While there appears to be no Nevada Rule of Appellate Procedure  
4 concerning the consolidation of Writ Petitions, in Nevada, as in the federal system,  
5 consolidation is permitted as a matter of discretion to avoid unnecessary costs or delays  
6 or as a matter of convenience and economy in administration. See, e.g., *Mikulich v.*  
7 *Carner*, 68 Nev. 161, 228 P.2d 257 (1957). For example:

8 When exercising its discretion, this court may entertain mandamus  
9 petitions when judicial economy and sound judicial administration  
10 militate in favor of writ review. (Citation omitted). Additionally, this court  
11 may exercise its discretion and entertain a writ petition when "an  
12 important issue of law requires clarification." (Citation omitted). **These consolidated writ petitions present such an issue** (emphasis added), and  
therefore, we begin by clarifying in this opinion Nevada's competency  
procedure. *Scarbo v. Eighth Judicial Dist. Court of State ex rel. County of*  
*Clark*, 125 Nev. 118, 121, 206 P.3d 975, 977 (2009).

13 Further, other courts have consolidated Writ Petitions. (See for example,  
14 *Merchants Mut. Ins. Co. v. Newport Hosp.*, 260 A.2d 727 (R.I. 1970); *Gilday v. Com.*,  
15 373 Mass. 860, 369 N.E.2d 716 (1977)). Horton requests this Honorable Court  
16 consolidate these cases for purposes of oral argument only. They raise common issues  
17 of law and fact and consolidation would promote judicial economy. Additionally, an  
18 important issue of law requires clarification: the effect of NRCP 25(c) on the  
19 subsequent purchaser analysis. Without consolidation of the hearings, NRCP 25(c)  
20 may not be addressed in *High Noon at Arlington Ranch*, leaving the issue unclear and  
21 potentially inconsistently decided in the District Courts. Consolidation of the hearings  
22 will allow this Court to address all the issues at one time including NRCP 25(c) which  
23 was raised only in *First Light* and not in *High Noon at Arlington Ranch* to prevent this  
24 confusion or misinterpretation of the law in the District Courts.

### 25 III. CONCLUSION

26 Therefore, because common issues of law and fact exist in *High Noon at*  
27 *Arlington Ranch Homeowners Association v. Eighth Judicial District Court*, Case No.  
28 65456 and *D.R. Horton v. Eighth Judicial District Court*, Case. No. 65993, this Court

1 should exercise its discretion to consolidate the oral arguments thereby promoting  
2 judicial economy, avoiding unnecessary costs in having two hearings on the same  
3 issues, and avoiding delays in resolution of the application of NRCP 25(c) to the  
4 subsequent purchaser issues.

5 Dated this 1<sup>st</sup> day of December, 2014.

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

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17 *D.R. HORTON, INC.*  
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**CERTIFICATE OF SERVICE**

I certify that on the 15<sup>th</sup> day of December, 2014, I submitted for electronic filing and electronic service the foregoing REAL-PARTY-IN-INTEREST D.R. HORTON, INC.'S MOTION TO CONSOLIDATE WRIT PETITIONS FOR ORAL ARGUMENT.

I HEREBY CERTIFY that on the 15<sup>th</sup> day of December, 2014, a copy of REAL-PARTY-IN-INTEREST D.R. HORTON, INC.'S MOTION TO CONSOLIDATE WRIT PETITIONS FOR ORAL ARGUMENT 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 15<sup>th</sup> day of December, 2014, a copy of REAL-PARTY-IN-INTEREST D.R. HORTON, INC.'S MOTION TO CONSOLIDATE WRIT PETITIONS FOR ORAL ARGUMENT was hand delivered to the following:

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