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Tracie K. Lindeman
Clerk of Supreme Court

Petitioner,

V.

Respondent,

Real Party in Interest

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NRAP 26.1 DISCLOSURE

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

D.R. Horton, Inc. is publicly traded and has no parent corporation, nor is there a publicly held corporation that owns 10% or more of D.R. Horton, Inc.'s stock.

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

Dated: July 15, 2014

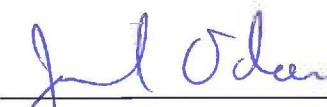


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1 COMES NOW PETITIONER D.R. HORTON, INC., a Delaware Corporation,
2 by and through Joel Odou, Esq., of the law firm of Wood, Smith, Henning, & Berman,
3 LLP, its attorneys, hereby petitions this Court for a Writ of Prohibition ordering the
4 District Court to stand down from its assertion of subject matter jurisdiction and a
5 Writ of Mandamus instructing the District Court to vacate the stay imposed by it on
6 August 13, 2007, and to dismiss this action with or without prejudice for failure to
7 bring to trial within NRCP 41(e)'s five year prescriptive period.

8 This Petition is based on the following Memorandum of Points and Authorities,
9 the Appendix of record and such oral arguments as may be presented to this
10 Honorable Court.

11
12 Dated: July 14, 2014



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AFFIDAVIT OF JOEL D. ODOU, ESQ.

STATE OF NEVADA }
COUNTY OF CLARK }

I, JOEL D. ODOU, ESQ. being first duly sworn on oath, deposes and states under penalty of perjury that the following assertions are true and correct, and of my own personal knowledge:

1. I am an attorney duly licensed to practice law in the State of Nevada, and I am an attorney with the law firm WOOD, SMITH, HENNING & BERMAN, LLP, attorneys for Petitioner, D.R. HORTON, INC. in support of D.R. HORTON, INC.'S PETITION FOR WRIT OF MANDAMUS, and/or WRIT OF PROHIBITION.

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

4. I have discussed the PETITION FOR WRIT OF MANDAMUS and/or WRIT OF PROHIBITION, with the Petitioner and have obtained authorization to file the same.

1 5. Included with the Petition are Memorandum of Points and Authorities
2 and Petitioner's Appendix.

3 FURTHER YOUR AFFIANT SAYETH NAUGHT.

4 
5 JOEL D. ODOU, ESQ.

6
7 SUBSCRIBED and SWORN to before
8 me this 15 day of July
9 2014.

10 
11 NOTARY PUBLIC

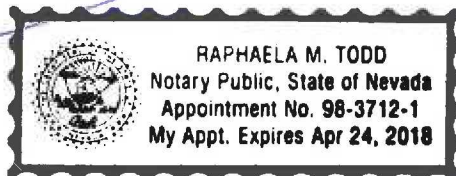


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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

High Noon at Arlington Ranch Homeowners Association (“High Noon”) filed suit against D.R. Horton, Inc. (“D.R. Horton”) on behalf of itself and its homeowners in its representative capacity for alleged residential constructional defects on June 7, 2007, without compliance with Nevada Revised Statutes (“NRS”) Chapter 40.600, *et seq.*, (hereinafter, “Chapter 40”) pre-litigation requirements including the service of notice required by NRS 40.645 (“Chapter 40 Notice”). On August 13, 2007, High Noon filed an Ex Parte Motion to Stay the Service of the Complaint and Enlarge the Time for Service and represented High Noon’s intent to “concurrently” commence the Chapter 40 process by serving D.R. Horton with its Chapter 40 notice as required by NRS 40.645. High Noon did not notify D.R. Horton of the ex parte hearing, nor was D.R. Horton aware a Complaint was filed against it for constructional defects. The District Court granted the Motion and stayed High Noon’s Complaint until the completion of the Chapter 40 pre-litigation process based on High Noon’s contention its claims for breach of the express and implied warranties were governed by NRS 116.4113 and NRS 116.4114, not Chapter 40, and therefore were not subject to the statute of limitation tolling provisions of NRS 40.695 (“August 2007 Stay”). Contrary to its representations to the District Court, High Noon served its Chapter 40 Notice on D.R. Horton on January 21, 2008, approximately seven (7) months after filing its Complaint and five (5) months after its representation it was filing the Chapter 40 Notice concurrently with the Ex Parte Motion. The Chapter 40 Notice triggered D.R. Horton to file pleadings with the District Court, which the District Court determined ended the August 2007 Stay on April 14, 2008.

A second stay was imposed by the District Court on August 10, 2009, following D.R. Horton’s Motion to Stay Litigation and Vacate Trial Date due to High Noon’s refusal to permit D.R. Horton access to the property to conduct repairs (“August 2009 Stay”). A third stay was imposed by the Nevada Supreme Court on October 19, 2011

1 to hear writ petitions filed by the parties regarding standing ("Supreme Court Stay").
2 On more than one occasion, the District Court advised High Noon the August 2007
3 Stay and August 2009 Stay did not toll NRCP 41(e)'s five (5) year prescriptive period.

4 On January 21, 2014, third-party defendant Firestop, Inc. filed a Motion
5 Seeking Dismissal of High Noon's Complaint based upon NRCP 41(e) for failure to
6 bring to trial on or before September 14, 2013, which time included the tolling period
7 of the Supreme Court Stay but not the August 2007 and August 2009 Stays. D.R.
8 Horton filed a Joinder. High Noon opposed the Motion and argued in addition to the
9 time period of the Supreme Court Stay, the August 2007 and August 2009 Stays tolled
10 the prescriptive period, resulting in a tolling period of 810 days ending the five (5)
11 year period on August 26, 2014. On February 27, 2014, the District Court issued an
12 order denying the Motion and ordered, in addition to the Supreme Court Stay, the
13 August 2007 and August 2009 Stays tolled NRCP 41(e) five year prescriptive period.

14 Accordingly, only after the District Court's denial of Firestop's Motion to
15 Dismiss did it become relevant and necessary to challenge the imposition of the
16 August 2007 Stay. D.R. Horton contends the District Court erred in imposing the
17 August 2007 Stay based on the erroneous conclusion High Noon's claims for breach
18 of the express and implied warranties were not governed by Chapter 40. D.R. Horton
19 contends the District Court was required to dismiss the action without prejudice as
20 mandated by NRS 40.647(1)(a). As the pre-litigation requirements mandated by NRS
21 40.645 are jurisdictional, unless its requirements are met, a court's subject matter
22 jurisdiction cannot be invoked. Accordingly, the District Court acted in excess of its
23 jurisdiction in imposing the August 2007 Stay. The August 2007 Stay is void, and the
24 action must be remanded to the District Court with instructions to vacate the August
25 2007 Stay and dismiss the action for failure to bring to trial within NRCP 41(e)'s five
26 (5) year prescriptive period.

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1 **II. RELIEF SOUGHT**

2 Petitioner seeks a Writ of Prohibition restraining the Respondent Court from
3 allowing the August 2007 Stay and ignoring the requirements of NRS 40.647. D.R.
4 Horton challenges the August 2007 Stay, arguing the express language of NRS
5 40.647(2)(a) required a mandatory dismissal of the action without prejudice due to
6 High Noon's failure to comply with the pre-litigation notice requirements prescribed
7 by NRS 40.645. High Noon's failure to comply with the requirements of NRS 40.645
8 deprived the District Court of subject matter jurisdiction, and the August 2007 Stay
9 is void. Without the benefit of the tolling period of the August 2007 Stay, NRCP
10 41(e)'s five (5) year prescriptive period expired on December 23, 2013. Accordingly,
11 D.R. Horton additionally seeks a writ of mandamus directing the District Court to: (1)
12 vacate the August 2007 Stay; and (2) remand the action with instructions to dismiss
13 the action, with or without prejudice, for failure to bring to trial within the five (5)
14 year prescriptive period required by NRCP 41(e).

15 **ISSUE ONE:** Whether the definition of "construction defect" in NRS 40.615
16 encompasses claims for breach of express and implied warranties against a
17 contractor of new construction and are governed by Chapter 40.

18 **CONCLUSION:** Claims for breach of warranty (or any other theory of
19 liability) against a contractor, as defined in NRS 40.620, of new construction
20 based on defective design, construction, manufacture, repair or landscaping are
21 constructional defect claims within the definition of NRS 40.615, and the
22 remedies available to claimants pursuant to Chapter 40 govern the claim.

23 **ISSUE TWO:** Whether the District Court lacked subject matter jurisdiction
24 when it granted the August 2007 Stay pursuant to NRS 40.647(2)(b) as claims
25 for breach of express and implied warranty against a contractor of new
26 construction for constructional defects are governed by Chapter 40, and it was
27
28

1 therefore required to dismiss the action without prejudice pursuant to NRS
2 40.647(2)(a).

3 **CONCLUSION:** The District Court lacked subject matter jurisdiction when it
4 imposed the August 2007 Stay pursuant to NRS 40.647(2)(b) based on High
5 Noon's ex parte contention its claims for breach of express and implied
6 warranties may not be governed by Chapter 40 and therefore not subject to the
7 statute of limitations tolling provisions of NRS 40.695. Claims for breach of
8 warranty (or any other theory of liability) against a builder of new construction
9 based on defective design, construction, manufacture, repair or landscaping are
10 constructional defect claims within the definition of NRS 40.615. As High
11 Noon filed its Complaint against D.R. Horton, a builder of new construction,
12 alleging construction defects prior to service of the notice required by NRS
13 40.645, the District Court was required to dismiss the Complaint without
14 prejudice pursuant to NRS 40. 647(2)(a) rather than grant a stay. The failure of
15 High Noon to satisfy the requirements of NRS 40.645(1) stripped the District
16 Court of subject matter jurisdiction and the August 2007 Stay is a nullity.

17 **III. RELEVANT PROCEDURAL HISTORY AND FACTS**

18 The following are undisputed facts relevant to this Writ petition:

19 On June 7, 2007, High Noon filed a Complaint against D.R. Horton seeking
20 damages for residential construction defects on behalf of itself and its homeowners
21 for claims for breach of the implied warranties of workmanlike quality and
22 habitability, breach of express warranties, breach of contract, and breach of fiduciary
23 duty (the "Complaint"). (*Petitioner's Appendix*, Vol. I, 00001-00012). The Complaint
24 makes the following pertinent allegations:

25 **PARTIES**

26 7. As the owner, developer, general contractor and seller of the Subject
27 Property, Defendant was directly responsible for the planning, design, mass
28 production, construction and/or supervision of construction of the Subject
Property and, therefore, is responsible in some manner for the defects and

1 deficiencies in the planning, development, design, and/or construction of the
2 Subject Property, as alleged herein, and Plaintiff's damages related to such
3 defects and deficiencies.

4 **GENERAL ALLEGATIONS**

5 13. Defendants were merchants and sellers with respect to the Subject
6 Property, nonintegrated products and all individual units therein, which are the
7 subject of this action described above;

8 14. By reason of the sale, transfer, grant and conveyance to Plaintiff and its
9 members, Defendant's impliedly warranted that the Subject Property and all
10 individual units therein, were of merchantable quality;

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

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

24 19. Plaintiff alleges that the defects and deficiencies as described above are,
25 among other things violations of breaches of local building and construction
26 practices, industry standards governmental codes and restrictions,
27 manufacturer requirements, product specifications, the applicable Building
28 Department Requirements, Chapter 523 of the Nevada Administrative Code,
and the Uniform Building Code, National Electrical Code, Uniform Plumbing
Code, and Uniform Mechanical Code as adopted by Clark County and the City
of Las Vegas at the time the Subject Property was planned, designed,
constructed and sold;

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

23 **Breach of Implied Warranties of Workmanlike Quality and Habitability**

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

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

1 **Breach of Express Warranties**

2 43. By designing and constructing the residences, improvements and
3 appurtenances incident thereto in a defective and deficient manner violating
4 building and construction codes, ordinances and industry standards then in
5 force as described herein above, Defendants breached said express warranties
6 made to Plaintiff and its members. As a proximate cause of Defendants'
7 conduct, Plaintiff and its members have and continue to suffer damages which
8 include, without limitation, the cost to repair the defects and deficiencies in the
9 design and construction of the residences and improvements and appurtenances
10 thereto, which are now and will continue to pose a threat to health, safety,
11 welfare of Plaintiff, its members, their guests and the general public until such
12 repairs are effected.

13 (*Petitioner's Appendix*, Vol. I, 000001-000012).

14 On August 10, 2007, High Noon submitted an Ex Parte Motion to Stay the
15 Complaint and Enlarge Time for Service, based on NRS 40.647(2)(b), with the
16 District Court. (*Petitioner's Appendix*, Vol. I, 000013-000031). The Motion indicated
17 the Complaint set forth causes of action for breach of express and implied warranties
18 which were "provided by NRS 116.4113 and NRS 116.4114." (*Id.* 3:6-10). The
19 Motion advised the Court High Noon was concurrently serving its notice of defects
20 required by NRS 40.645 on D.R. Horton and acknowledged the statutes of limitations
21 and repose would be tolled "for all causes of action that arise out of construction
22 defect allegations." (*Id.* 3:11-15). High Noon stated, "out of abundance of caution that
23 a defendant may successfully argue that Association's claims for breach of express
24 and implied warranties is governed by NRS 116.4113 and 116.4114 and not NRS
25 40.600 *et seq*, Association respectfully moves this Court ex parte for an order staying
26 the complaint...". (*Id.* 3:15-18). High Noon argued: "[T]his matter is properly stayed
27 pursuant to NRS 40.647 pending outcome of the 'right to repair' process". Such stay
28 avoids the express and implied warranty claims from being litigated while the
29 defendants are addressing the basis of the warranty claims (the construction defects)
30 under the "right to repair" regime. (*Id.* 5:24-6:2). The District Court granted the
31 Motion the same day, and the Order was entered on August 14, 2007. The Order
32 states: "Plaintiff's Complaint is hereby stayed until the completion of the NRS 40.600

1 et. seq. pre-litigation process.” (*Petitioner’s Appendix*, Vol. I, 000034-000035, p. 2:5-
2 6). The Complaint and the Ex Parte Motion were the only documents filed with the
3 Court (the “August 2007 Stay”).

4 Approximately five months later, on January 21, 2008, High Noon sent its
5 Chapter 40 Notice to D.R. Horton and the parties thereafter attempted to engage in
6 the pre-litigation and right to repair process.

7 On June 29, 2009, D.R. Horton filed a Motion to Stay Litigation and Vacate
8 Trial Date due to High Noon’s denial of D.R. Horton’s right to inspect and repair,
9 which impaired the pre-litigation repair process.¹ The District Court granted the stay
10 to allow the parties to complete the Chapter 40 process, including performing repairs,
11 participating in mediation and exhausting efforts toward an informal resolution
12 (“August 2009 Stay”)(*Petitioner’s Appendix*, Vol. I, 000039-000040, 2:5-6). On more
13 than one occasion, the District Court advised High Noon the August 2007 and the
14 August 2009 Stays did not toll NRCP 41(e)’s five (5) year prescriptive period.
15 Specifically, on July 30, 2009, at the hearing on the August 2009 Stay, the District
16 Court expressed concerns regarding the trial date and made a suggestion to counsel to
17 consider filing a request for dismissal without prejudice due to the five (5) year rule.
18 (*Petitioner’s Appendix*, Vol. I, 000038). On September 29, 2011, the District Court
19 heard and denied High Noon’s Motion to Vacate the Trial Date. The District Court
20 advised counsel again of its concern in granting the Motion indicating a Chapter 40
21 stay “does not stop 41(e).” The District Court advised counsel regarding the five (5)
22 year rule and the chance counsel would be taking if its Motion was granted.

23
24 ¹ D.R. Horton was forced to file various motions with the court to address High
25 Noon’s failure to comply with the Chapter 40 process, including a Motion to Compel
26 Compliance to obtain access to the subject property. A second Motion to Compel
27 Compliance was later required and also granted. An Order was issued on December
28 19, 2008 compelling compliance and appointing Floyd Hale as Special Master.

1 Accordingly, the District Court denied the Motion without prejudice requesting the
2 parties to file a stipulation to waive the five (5) year rule. (*Petitioner's Appendix*, Vol.
3 I, 000146-000154 p. 3:14-22; p. 7:11-23; p. 8:16-19). The August 2009 Stay was
4 lifted on November 5, 2009 when the Case Management Order was issued.
5 (*Petitioner's Appendix*, Vol. I, 000041-000069).

6 On October 19, 2011, the Supreme Court issued a stay pending its decision on
7 petitions for writ relief filed by the parties relating to High Noon's standing which
8 was lifted on January 25, 2013 when the Supreme Court issued its rulings on the writ
9 petitions and remanded the action to District Court. (*Petitioner's Appendix*, Vol. I,
10 000155-000156). On January 21, 2014, third party defendant Firestop, Inc. filed a
11 Motion Seeking Dismissal of High Noon's Complaint based upon NRCP 41(e) for
12 failure to bring to trial on or before September 14, 2013, which included the tolling
13 period of the Supreme Court Stay but not the August 2007 and August 2009 Stay.
14 D.R. Horton filed a joinder and a Reply. (*Petitioner's Appendix* Vol. I, 000157-
15 000175; *Petitioner's Appendix*, Vol. I, 000176-000178 and *Petitioner's Appendix*,
16 Vol. II, 000236-000256). High Noon opposed the Motion and argued in addition to
17 the time period of the Supreme Court Stay, the August 2007 and August 2009 Stays
18 tolled the prescriptive period, resulting in a tolling period of 810 days ending the five
19 (5) year period on August 26, 2014. (*Petitioner's Appendix*, Vol. I, 000181-000182,
20 pp. 3:10-4:9). On February 27, 2014, the District Court issued an order denying the
21 Motion and agreeing with High Noon that the August 2007 and August 2009 Stays
22 tolled NRCP 41(e) five year prescriptive period. (*Petitioner's Appendix*, Vol. II,
23 000257-264, p. 7:11-17). Although recognizing High Noon's lack of diligence, and
24 contrary to its prior position on several occasions, the District Court found *Boren v*
25 *City of Las Vegas*, 98 Nev. 5, 638 P.2d 404 (1982), required, without exception, it toll
26 the time during which the August 2007 and August 2009 Stays were imposed.
27 (*Petitioner's Appendix*, Vol. II, 000257-000264, pp. 7:18-8:4). The District Court
28

1 determined the August 2007 Stay tolled NRCP 41(e)'s five (5) year prescriptive
2 period for a total of 246 days, the August 2009 Stay for a total of 99 days and the
3 Supreme Court Stay for a total of 465 days for a total tolling period of 810 days. (*Id.*).²
4 Based on the arguments contained herein, D.R. Horton contends the August 2007 Stay
5 is void. Accordingly, the five (5) year prescriptive period in which to bring an action
6 to trial pursuant to NRCP 41(e) expired on December 23, 2013.

7 **IV. STANDARD OF REVIEW**

8 **A. General Standards of Writ Review and Relief**

9 Petitions for Writ of Prohibition are permitted pursuant to NRS 34.320 and are
10 an appropriate vehicle through which to challenge the district court's improper
11 exercise of jurisdiction. *South Fork Band, Te-Moak Tribe v. Dist. Ct.*, 116 Nev. 805,
12 811, 7 P.3d 455, 459 (2000). A Writ of Mandamus is available to compel the
13 performance of an act the law requires as a duty resulting from an office, trust, or
14 station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160.

15 This Court has considered a writ appropriate when no factual disputes exist,
16 and the district court was obligated to dismiss an action pursuant to clear authority
17 under a statute or rule, *Advanced Countertop Design, Inc. v. Dist. Ct.*, 115 Nev. 268,
18 269, 984 P.2d 756, 758 (1999), including when dismissal of a case was required under
19 NRCP 41(e). *Smith v. Dist. Ct.*, 113 Nev. 1343, 1345 n.1, 950 P.2d 280, 281 n.1
20 (1997). This Court will consider writ petitions challenging a district court order when
21 an important issue of law needs clarification and considerations of sound judicial
22 economy and administration militate in favor of granting the petition." *Beazer Homes*
23 *Nevada, Inc. v. Dist. Ct.*, 120 Nev. 575, 578–79, 97 P.3d 1132, 1134 (2004).

24
25
26 ² D.R. Horton disputes the August 2007 Stay and the August 2009 Stay tolled the five
27 (5) year prescriptive period of NRCP 41(e) on other grounds, which is the subject of
28 another Writ petition filed currently by D.R. Horton regarding NRCP 41(e).

1 This Court has found a party lacks a plain, speedy, and adequate remedy at law
2 when the petition raises important issues of law and public policy and will promote
3 judicial economy. See, *Beazer Homes Holding Corp., v. Dist. Ct.*, 128 Nev. Ad. Op.
4 66, 291 P.3d 128, 113, (2012); see also, *Wheble v. Dist. Ct.*, 128 Nev. Adv. Op. 11,
5 272 P.3d 134, 136 (2012) (finding review appropriate to clarify an issue of law if the
6 petition involves an issue of first impression and the Court has found there is potential
7 for the district courts to inconsistently interpret the legal issue). Both subject matter
8 jurisdiction and statutory construction are questions of law subject to *de novo* review.
9 *Ogawa v. Ogawa*, 125 Nev. 660, 668 221 P.3d 699, 704 (2009); *Westpark Owners'*
10 *Ass'n v. Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 426–27 (2007); see also, *Shuette*
11 *v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 846, 124 P. 3d 530, 537 (2005).

12 **B. This Petition Presents Extraordinary Circumstances Calling for**
13 **Extraordinary Relief**

14 This Honorable Court should hear D.R. Horton's Petition for a Writ of
15 Prohibition and/or Mandamus. D.R. Horton challenges the August 2007 Stay and the
16 District Court's subject matter jurisdiction. The law requires a claimant to comply
17 with the pre-litigation procedures of Chapter 40 prior to commencing an action for
18 residential construction defects. However, plaintiffs' attorneys too often file actions
19 without compliance with these requirements and seek *ex parte* motions to stay the
20 action pending compliance with Chapter 40 pre-litigation procedures based on
21 unfounded assertions.³ The District Court grants such stay requests although these
22 requests violate the facial requirement and spirit of the statutes. When, as here, the
23 claimant obtains a NRS 40.647(2)(b) stay of a prematurely-filed complaint, the spirit
24 and intent of Chapter 40 is frustrated as Chapter 40 is intended to avoid litigation.

25 ³ D.R. Horton questions the legitimacy of Plaintiff's counsel's motives in seeking a
26 stay and suggests the possibility of reasons unrelated to preserving the statute of
27 limitations, such as obtaining financing to bring the claims, which required a
28 complaint be filed, or maximizing pre-judgment interest.

1 Moreover, a prematurely-filed complaint increases the time the complaint is pending
2 in the court and is more likely to trigger a need to address NRCP 41(e). As such, a
3 prematurely-filed complaint unreasonably burdens contactors with prolonged
4 expensive pending litigation⁴, impacts the recovery of prejudgment interest and
5 attorney fees and costs and has a disparate impact on similarly-situated parties who
6 comply with the pre-litigation requirements of Chapter 40.

7 This Court considered a writ petition under similar facts in *D.R. Horton, Inc. v.*
8 *Eighth Judicial District Court*, 123 Nev. 468, 168 P.3d 731 (2007), where this Court
9 recognized a fundamental disagreement existed regarding the interpretation of NRS
10 40.645 and the sufficiency of the notice required under this provision. The Supreme
11 Court recognized the interpretation of Chapter 40 was of great importance to both
12 claimants and contractors and the review of NRS 40.645's application in
13 construction defect cases would aid the district courts in managing them. *Id.*, at 475.
14 In addressing the application of NRS 40.645 and establishing the reasonable
15 threshold" test, the Supreme Court noted it was "avoiding the fate of this case, which
16 has wallowed in pre-litigation quagmire while the parties litigate the level of detail
17 required in a notice that is intended to prevent litigation." *Id.*, at 476.

18 Likewise, this Petition will allow this Court to clarify the pre-litigation process
19 and reconcile NRS 40.647(2)(b) with the definition of claims governed by Chapter
20 40, as set forth in NRS 40.615, in order to avoid abuses of the Chapter 40 pre-litigation
21 process and streamline the Chapter 40 process. As it stands today, claimants are
22 permitted to file a complaint prior to compliance with NRS 40.645 and not risk
23 dismissal as long as the complaint alleges causes of action for breach of the express
24 and/or implied warranty may not be governed by Chapter 40 (or any potential claim),

25 ⁴ During this very case a number of Third Party Defendants exhausted their insurance
26 and filed for Bankruptcy, thereby increasing the burden of this litigation on the
27 remaining parties. Prejudice for these delays is not only presumed in the law, but it
28 did in fact occur here.

1 which virtually every construction defect complaint alleges. Without clarification and
2 an express determination by this Court that warranty claims based on alleged
3 construction defects (or any theory of liability) against the developer of new
4 construction are governed by Chapter 40, district courts will continue to inconsistently
5 impose stays pursuant to NRS 40.647(2)(b), and claimants will continue to abuse
6 Chapter 40. As acknowledged in previous decisions of this court, “interpretation of
7 NRS Chapter 40 is a matter of great importance for thousands of homeowners
8 throughout Nevada.” *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court, ex rel.*
9 *123 Nev. at 356, 167 P.3d at 426.*

10 Furthermore, a Writ of Prohibition is the proper remedy to test the propriety of
11 the District Court’s jurisdiction and the imposition of the August 2007 Stay. “The
12 Writ of Prohibition is unquestionably the appropriate remedy to hold proceedings in
13 an inferior court which are not within the jurisdiction of such court.” *G and M*
14 *Properties v. Dist. Court*, 95 Nev. 301, 304, 594 P2d 714, 715 (1979). The fact an
15 appeal is available from the final judgment does not preclude issuance of the writ
16 particularly in circumstances where, as here, the District Court is alleged to have
17 exceeded its jurisdiction and the challenged order is not appealable. *Id.*, at 304; NRAP
18 3A(b); *Clack v. Jones*, 62 Nev. 72, 140 P.2d 580 (1943), citing *Public Service Comm.*
19 *v. Court*, 61 Nev. 245, 123 P.2d 237 (1942).

20 Finally, it is not in the public interest to require D.R. Horton to wait until after
21 trial to raise these issues on appeal. While D.R. Horton’s eventual right to appeal from
22 a final judgment below may provide an adequate means to challenge the August 2007
23 Stay, sound judicial economy and administration favors this Court’s intervention.
24 This construction defect action will take many months to try, taxing the resources of
25 the judicial system and place a great burden on jurors. If this Court were to later
26 overturn the case on appeal, not only will the District Court have wasted its time,
27 energy and resources conducting at trial, it would undoubtedly create a very negative
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1 impact on the jurors' view of our judicial system. The jurors will have spent months
2 of their time diligently reaching the correct conclusion in a highly complex and
3 intricate case only to have it dismissed on appeal for an error that occurred over seven
4 (7) years ago but only recently manifested its prejudice when the District Court denied
5 Firestop's Motion to Dismiss and included the August 2007 Stay in calculating the
6 five year prescriptive period.

7 For the foregoing reasons, D.R. Horton respectfully requests this Court exercise
8 its discretion and consider the instant Petition for Writ of Mandamus and/or
9 Prohibition.

10 **V. ARGUMENT**

11 High Noon's Complaint was filed prior to service of its Chapter 40 Notice.
12 (*Petitioner's Appendix*, Vol. I, 000013-000031, p. 4:17). High Noon filed an Ex Parte
13 Motion seeking to stay the Complaint based on the representation it was concurrently
14 serving its Chapter 40 Notice and the contention its claims for breach of express and
15 implied warranties against D.R. Horton may not be governed by Chapter 40 and the
16 tolling provisions of NRS 40.695. (*Id.* p. 3:15-19). D.R. Horton contends NRS
17 40.647(2)(a) required the District Court to dismiss the Complaint without prejudice
18 as the warranty claims were clearly governed by Chapter 40 and there was no basis
19 for a stay pursuant to NRS 40.647(2)(b). As High Noon failed to comply with the
20 mandatory and jurisdictional pre-litigation exhaustion requirements, the District
21 Court's subject matter jurisdiction was never invoked, and the August 2007 Stay is
22 void. Without the benefit of the tolling period of the August 2007 Stay, NRCP 41(e)
23 requires the case must be dismissed for failure to bring to trial within five (5) years of
24 filing the Complaint.

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1 **A. Chapter 40 Provides Mandatory Pre-Litigation Requirements Must Be**
2 **Exhausted or the Case Dismissed Without Prejudice.**

3 NRS 40.645 provides, before a claimant may commence a construction defect
4 action against a contractor, the claimant must give written notice to the claimant that
5 adequately comports with NRS 40.645. After providing adequate notice of the alleged
6 defects, a claimant must allow for an inspection and provide a reasonable opportunity
7 to repair the defect. NRS 40.647(1). NRS 40.647(2) provides the consequences if a
8 claimant fails to comply with the notice requirement and/or fails to allow the pre-
9 litigation inspection and reasonable opportunity to repair.

10 NRS 40.647(2) provides:

11 If a claimant commences an action without complying with subsection 1 or
12 NRS 40.645, the court *shall*:

- 13 a) Dismiss the action without prejudice and compel the claimant to comply
14 with those provisions before filing another action; or
- 15 b) If dismissal of the action would prevent the claimant from filing another
16 action because the action *would be* procedurally barred by the statute of
17 limitations or statute of repose, the court shall stay the proceeding
18 pending compliance with those provisions by the claimant.

19 (Emphasis added).

20 The court has no discretion. *U.S. Homes Corp. v. Parker-Hansen*, 2012 WL
21 5879807 (D. Nev. 2012), citing *Lexecon Inc. v. Milberg Weiss, Bershad, Hynes &*
22 *Lerach*, 523 U.S. 26, 35 (1998) (stating “the mandatory ‘shall’ normally creates an
23 obligation impervious to judicial discretion.”); the use of the word “shall” imposes a
24 duty to act (NRS 0.025(1)(d)). “[S]hall’ is mandatory and does not denote judicial
25 discretion”. *Otak Nevada LLC v. Eighth Judicial Dist.*, 127 Nev. Adv. Op. 53, 260
26 P.3d 408, 411 (2011); “[s]hall’ is mandatory unless the statute demands a different
27 construction to carry out the clear intent of the legislature” (*Washoe Med. Ctr. v. Dist.*
28 *Ct.*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006)).

1 Moreover, under common usage and understanding, NRS 40.647(2)(b)'s
2 phrase "would be prevented" denotes a level of certainty. As the past tense of the
3 word "will", common understanding of the word "would" is generally thought to
4 require complete certainty. When used in statutes, it can denote a burden of showing
5 something is more probable than not. See, *e.g.*, *Washington Post Co. v. U.S. Dept. of*
6 *Justice*, 863 F.2d 96, 102 (C.A.D.C.,1988) (distinguishing the use of the word
7 "would" in an exemption within the Freedom of Information Act to other exemptions
8 using the word "could" and applying a "more probable than not" standard to show the
9 former); *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 131 (6th 1978) (finding
10 consistent employment of the term "would" in place of "could," appears rather clearly
11 to have required a greater degree of certainty).

12 The mandatory language of NRS 40.647 is clear. A district court has only two
13 options when a claimant files an action without having complied with the pre-
14 litigation requirements of NRS 40.645: it must either dismiss the action *or, if the*
15 *requirements are met*, it must issue a stay. Therefore, the determinative fact as to
16 whether a mandatory stay or a mandatory dismissal will issue is whether dismissal
17 would prevent the claimant from filing another action because the action would be
18 procedurally barred by the statute of limitations or statute of repose. High Noon
19 argued it filed its Complaint to preserve its claims for breach of the express and
20 implied warranty, which it contended "may not" be governed by Chapter 40 and the
21 statute of limitations tolling provisions of NRS 40.695. High Noon represented it was
22 serving its Chapter 40 Notice concurrently with the filing of the Complaint, which
23 would trigger the tolling of the statute of limitations mandated by NRS 40.695.
24 (*Petitioner's Appendix*, Vol. I, 000013-000031, p. 3:11-12; p. 4:17). Accordingly, had
25 the District Court properly determined the warranty claims were governed by Chapter
26 40, as D.R. Horton contends, a stay was not warranted and dismissal mandatory.

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1 **B. Claims for Breach of Express and Implied Warranties Against a**
2 **Contractor Based on Alleged Defects in the Design and Construction of a**
3 **New Residence Are Construction Defects Governed By Chapter 40.**

4 NRS Chapter 40 provides Nevada homeowners with a remedial process for
5 asserting constructional defect claims against contractors for defects in the
6 construction of a new residence or for defects in the alteration of or addition to an
7 existing residence. NRS 40.615; *Westpark Owners' Assn*, 123 Nev. at 352, 167 P.3d
8 at 424. NRS 40.615 defines "constructional defect" as a "defect in the design,
9 construction, manufacture, repair or landscaping" which is done in violation of the
10 law, including local codes, and which proximately causes physical damage to the
11 residence which "is not completed in a good and workmanlike manner in accordance
12 with generally accepted standard of care." Although Chapter 40 does not specifically
13 create new theories of liability beyond those provided at common law upon which a
14 constructional defect claim can be based, Chapter 40 remedies prevail over any
15 conflicting law otherwise applicable to the claim or cause of action but do not bar or
16 limit any defense otherwise available. NRS 40.635; *Westpark Ass'n*, 123 Nev. at 357.
17 NRS 40.655 provides for the recovery of damages, including reasonable attorney's
18 fees and costs, cost of repair, reduction in market value, loss of use, property damage
19 and prejudgment interest.

20 The Chapter 40 statutory scheme applies exclusively to constructional defect
21 claims lodged in connection with new residences as defined in Chapter 40 and case
22 law interpreting its provisions. *Id.*, at 353. In summary, for Chapter 40 remedies to
23 apply, a claimant must assert the existence of constructional defects in a dwelling that
24 is a residence under NRS 40.630, and the defects must exist in either "new" or newly
25 completed improvements under NRS 40.615. D.R. Horton requests this Court clarify
26 the scope of NRS. 40.615 and provide any claim for construction defect based on
27 express or implied warranty (or any theory of liability) against a contractor of new
28 construction based on defective design, construction, manufacture, repair or
landscaping are constructional defect claims within the definition of NRS 40.615,

1 regardless if they are also provided by another statute. The Nevada Supreme Court in
2 *Westpark Owners Ass'n*, established the standard of statutory construction in Chapter
3 40 cases:

4
5 When the language of a statute is unambiguous, the courts are not
6 permitted to look beyond the statute itself when determining its meaning.
7 However, when the Legislature has addressed a matter with "imperfect
8 clarity," it becomes the responsibility of this court to discern the law.
9 Similarly, when a statute is susceptible to more than one reasonable but
10 inconsistent interpretation, the statute is ambiguous, and this court will
11 resort to legislative history and its rules of statutory interpretation. Given
12 an ambiguous statute, this court must interpret the statute 'in light of the
13 policy and the spirit of the law, and the interpretation should avoid
14 absurd results.' Finally, this court will resolve any doubt as to the
15 Legislature's intent in favor of what is reasonable.

16 *Westpark Owners Ass'n*, 123 Nev. at 357.

17 While D.R. Horton contends the application of Chapter 40 remedies to
18 warranty claims against a contractor of new construction for constructional defects is
19 clear, the imposition of the August 2007 Stay suggests "imperfect clarity" and
20 ambiguity requiring this Court to discern the law. *Id.*, at 359. D.R. Horton requests
21 this Court clarify theories of liability do not exclude a claimant from the Chapter 40
22 remedies, as the District Court apparently determined. Instead, the determination of
23 Chapter 40's application depends on whether the claims come within the definitions
24 of the statutory scheme. The Legislature intended to create a comprehensive scheme
25 to aid in resolving construction defect disputes between contractors and homeowners
26 and not to create a case by case analysis of its application. See, *Olson v. Richards*,
27 120 Nev. 240, 243, 89 P.3d 31, 33 (2004). Consequently, the plain wording of NRS
28 40.615 instructs the events conferring the remedies of Chapter 40. Thus, once a
claimant asserts claims against a contractor for construction defects of a new
residence, as a result of any theory of liability, the claimant must avail itself of the
exclusive Chapter 40 remedies.

Based on the District Court's actions, it is apparent district courts are
interpreting the scope of Chapter 40 inconsistently and/or improperly. The District

1 Court made a determination the theories of liability, breach of the express and implied
2 warranties, were not governed by Chapter 40 while other district courts have correctly
3 determined the claims alleged and the party being sued determine the applicability of
4 Chapter 40. ⁵See, *Westpark Owners Ass'n*, 123 Nev. at 349; see also, *U.S. Homes*
5 *Corp.*, 2012 WL 5879807 (2012) (Nevada federal district court finding cross-claims
6 for breach of implied and express warranty dismissed due to inadequate Chapter 40
7 notice and no stay imposed). In reaching its conclusion, the District Court either failed
8 to examine the parties and the claims to determine the applicability of the Chapter 40
9 remedies or examined them and came to an incorrect determination. Simple
10 allegations that a theory of liability “may not” be governed by Chapter 40 cannot serve
11 to avoid the mandatory application of the Chapter 40 remedies. In fact, High Noon’s
12 use of the words “may not” in its Ex Parte Motion strongly suggests error on the part
13 of the District Court as NRS 40.647(2)(b) requires certainty; that it be “more probable
14 than not” High Noon’s warranty claims would be procedurally barred because they
15 were not governed by Chapter 40. This does not comply with the mandatory
16 requirement in NRS 40.647(2)(b) that require a stay only if dismissal “would” prevent
17 High Noon from later filing its warranty claims. “When interpreting a statute, this
18 court first examines its plain language to determine the Legislature's intent behind the
19 statute. If the statute's language is clear and unambiguous, this court will not look
20 beyond the statute.” *Westpark Owners Ass'n*, 123 Nev. at 357, 167 P.3d at 427. This
21 court avoids statutory interpretation that would render words or phrases superfluous.
22 *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551
23 (2009).

24
25 ⁵ Pending district court case *Gunderson v. D.R. Horton, Inc.* A495059, settled
26 District Court cases *Court at Aliante Homeowner's Ass'n v. D.R. Horton*, A527641,
27 *Dorrell Square Homeowners Ass'n v. D.R. Horton*, A527688, stay pursuant to NRS
28 40.645(2)(b) improperly issued based on allegation warranty claims were outside
the scope of Chapter 40.

1 High Noon did not assert any legal argument in support of its contention but
2 merely concluded it was possible the claims were “governed by NRS 116.4113 and
3 116.4114 and not Chapter 40”. (*Petitioner’s Appendix*, Vol. I, 000013-00031, p. 3:15-
4 18). There is no logic to this statement. NRS 116.4113 and 116.4114 provide statutory
5 causes of action for breach of express and implied warranty. Chapter 40 provides the
6 remedies for these causes of action when brought by a claimant against a contractor
7 of new construction for constructional defects. NRS 116.4113 and NRS 116.4114
8 provide a theory of recovery for claimants within the Chapter 40 statutory scheme,
9 they do not preempt or override it. NRS 40.635 expressly states Chapter 40 applies
10 to all claims for construction defect and prevail over any conflicting law otherwise
11 applicable to the claim or cause of action, do not bar or limit any defense otherwise
12 available and do not create a new theory of liability upon which liability may be based.
13 See also, *Westpark Owners Ass’n*, 123 Nev. at 357.

14 In contrast to High Noon’s assertions, the allegations in the Complaint clearly
15 demonstrate the parties and the claims were governed by Chapter 40. The Complaint
16 alleges D.R. Horton was “the owner, developer general contractor and seller” of new
17 construction.” It alleges “defendants failed to properly and adequately investigate,
18 design, inspect, plan, engineer, supervise, and construct” the subject property and,
19 these failures “in violation of the law, including local codes” which “is not completed
20 in a good and workmanlike manner in accordance with generally accepted standard
21 of care” and which “proximately causes (sic) physical damage to the residence.”
22 (*Petitioner’s Appendix*, Vol. I, 000001-000012, p. 3:3-8; pp. 3:25-6:20; pp. 7:26-8:14).
23 The District Court committed error when it determined the causes of action for breach
24 of express and implied warranty, as pled by High Noon, were not governed by Chapter
25 40. NRS 40.647(2)(b) is clear and unambiguous: there was no risk the warranty claims
26 would be barred because they did not gain the protection of NRS 40.695 which tolled
27 the statute of limitations. The District Court cannot add its discretion to a mandatory
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1 statute. To permit such renders the legislature's use of the word "would" superfluous
2 and the mandatory application of the Chapter 40 scheme meaningless.

3 Since Chapter 40 was enacted Nevada courts have sought to define and clarify
4 the scope of Chapter 40 remedies giving tremendous weight and effect to the
5 legislative intent. NRS 40.640 states a contractor is liable for any construction defects
6 resulting from its acts or omissions or the acts of omissions of its agents, employees
7 or subcontractors, and the clear intent is to provide homeowners a right to recovery
8 for construction defects covered by a contract or warranty. *Olson*, 120 Nev. at 240,
9 243. In keeping with this mandate to maintain judicial results consistent with the
10 legislative intent, in *Westpark Owners Ass'n.*, the Court determined the definition of
11 "new" residence did not encompass units occupied as apartments for a period of time
12 before they were sold to the general public as condominiums unless they were altered
13 or modified prior to their sale. *Westpark Owners Ass'n.*, 123 Nev. at 349. The Supreme
14 Court noted, however, the association could continue to advance the claims for breach
15 of warranty and negligence as non-Chapter 40 claims. *Id.*, at 361. Accordingly, the
16 determination of whether the claims were governed by Chapter 40 was based solely
17 on whether the claims and parties came within the definition of NRS 40.615 and NRS
18 40.630. There was no argument the claims might not be covered by Chapter 40
19 because they were warranty claims. The only argument was the construction was not
20 new, and therefore the parties did not fit within the definition of claims governed by
21 Chapter 40. The Nevada Supreme Court made clear it would not adopt a definition
22 that would defeat the legislative purpose of enacting the statutory scheme to protect
23 the rights of homeowners by providing a process to hold contractors liable for
24 defective original construction or alterations. *Id.*, at 359. "The purpose is defeated if
25 contractors escape the provisions of NRS Chapter 40 by building housing units and
26 then waiting to sell the units for a period of time until they are no longer 'new'". *Id.*
27 Likewise, the purpose is defeated if High Noon escapes the provisions of Chapter 40
28

1 by simply asserting its claims “might not” be governed by Chapter 40 with no
2 supporting legal argument.

3 The Court in *Anse, Inc. v. Eight Judicial District Court*, 124 Nev. 862,873 192
4 P.3d 738, 746 (2008), also examined the scope of Chapter 40 and the definition of a
5 new residence and concluded a “new residence” under NRS 40.615 is one that has
6 remained unoccupied as a dwelling from the point of construction to the point of its
7 first sale, and a subsequent purchaser of that residence prior to commencement of
8 Chapter 40 claims is not barred from seeking its remedies. The Supreme Court’s
9 decision was based almost entirely on a definition that operates in harmony with the
10 legislative intent of Chapter 40. *Id.* The Supreme Court noted:

11 [P]etitioners' expansion of “new residence” in *Westpark* as precluding a
12 homeowner who is not the home's original purchaser from obtaining the
13 remedies available under NRS Chapter 40 violates that chapter's spirit,
14 leads to unreasonable and absurd results, and ignores *Westpark's* unique
15 factual background. Specifically, Nevada's residential constructional
16 defect provisions are intended to provide expansive remedies for
17 homeowners and protection for developers in resolving constructional
18 defect disputes. Petitioners' interpretation of “new residence,” however,
19 would significantly reduce the availability of NRS Chapter 40's remedies
20 and protections to homeowners and developers, forcing those parties to
21 resolve constructional defect disputes outside of that statutory scheme.
22 Indeed, the owners of almost 60 percent of the residences involved in
23 this case may not obtain the NRS Chapter 40 residential constructional
24 defect remedies, according to petitioners. That result subverts the
25 Legislature's intent for NRS Chapter 40 - to provide a comprehensive
26 structure for homeowners and developers to resolve constructional
27 defect disputes.

28 *Id.*, at 870-717.

21 The District Court’s imposition of the August 2007 Stay defeated the purpose
22 of Chapter 40 and ignored the clear applicability of the statutory scheme in direct
23 contradiction with this Court’s opinions in *Anse* and *Westpark*. The District Court’s
24 interpretation of Chapter 40’s applicability to warranty claims subverts the legislative
25 intent: to provide a comprehensive structure for homeowners and developers to
26 resolve constructional defect disputes. High Noon pled D.R. Horton is a contractor
27 who constructed new residences which were defective and not completed in a good
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1 and workmanlike manner in accordance with the generally accepted standard of care,
2 which allegedly caused High Noon damages. NRS 40.615. (*Petitioner's Appendix*,
3 Vol. I, 000001-000012, p. 3:3-8; pp. 3:25-6:20; pp.7:26-8:14). High Noon never
4 sought clarification from the District Court as to the applicability of Chapter 40 to its
5 warranty claims as it knew there was no legal basis for its assertion a stay would avoid
6 the warranty claims from being litigated while D.R. Horton was addressing the basis
7 for the warranty claims (the construction defects) under the "right to repair" regime.
8 (*Petitioner's Appendix*, Vol. I, 000013-000031, pp. 5:24-6:3). If baseless assertions
9 are permitted to avoid the mandatory application of Chapter 40, the legislative intent
10 is completely undermined and ignored. High Noon cannot both enjoy the remedies of
11 Chapter 40 and at the same time contend Chapter 40 might not apply in order to gain
12 an unfair advantage over D.R. Horton through the premature filing of its Complaint.⁶

13 Finally, the District Court's conclusion High Noon's breach of warranty claims
14 may not be governed by Chapter 40 leads to disparate treatment among otherwise
15 similarly-situated homeowners and reduces the availability of Chapter 40's remedies
16 and protections to homeowners and developers by permitting claimants to abuse the
17 process while forcing others to comply. *Anse, Inc.*, 124 Nev. at 871. Virtually every
18 Chapter 40 claim includes warranty claims that proceed through the pre-litigation
19 process. Permitting inconsistent results encourages claimants to abuse the Chapter 40
20 process by seeking to reap its pre-litigation benefits and at the same time enjoy the
21 benefits of having filed a complaint, which is evident by the fact High Noon waited 7
22 months after its Complaint was filed to serve its Chapter 40 notice.

23 After imposition of the August 2007 Stay, High Noon engaged in the Chapter
24 40 pre-litigation process and never again asserted its warranty claims were outside the

25 ⁶ The fact High Noon did not serve its NRS 40.645 notice until approximately five (5)
26 months later is immaterial on review. At the time the District Court imposed the
27 August 2007 Stay, High Noon represented it was concurrently filing its Chapter 40
28 notice.

1 scope of the process, nor did D.R. Horton. Given High Noon did not actually serve its
2 notice until approximately five (5) months after High Noon represented it was going
3 to serve the notice, it is apparent the Complaint was filed for improper purposes.
4 Undoubtedly, High Noon knew it was not serving its Chapter 40 Notice concurrently
5 with the filing of the Ex Parte Motion. As such, it is likely High Noon sought to abuse
6 the Chapter 40 process, enacted to protect it, for the purpose of seeking financing to
7 prosecute the litigation (which required a complaint be filed), to maximize pre-
8 judgment interest and the recovery of attorney's fees, and/or to gain unjust leverage
9 over D.R. Horton through the stigma of a pending action for construction defects, thus
10 frustrating the purpose and spirit of Chapter 40 which seeks to promote resolution of
11 claims without formal litigation by providing the contractors the right to repair.

12 **C. The Requirements of NRS 40.645 Are Jurisdictional.**

13 The legislature made clear the jurisdictional character of the exhaustion
14 requirements of both NRS 40.645 and NRS 40.647. When a claimant does not comply
15 with the notice requirements imposed in NRS 40.645, or the inspection and right to
16 repair requirements of NRS 40.647(1), jurisdiction cannot be invoked, and the court
17 has no authority to act unless it meets the requirements for a stay pursuant to NRS
18 40.647(2) (b). High Noon failed to meet the notice requirements of NRS 40.645 and
19 failed to meet the requirements of a stay. The District Court was therefore without
20 jurisdiction, and the August 2007 Stay is a nullity. *Iveson v. Dist. Ct.*, 66 Nev. 145,
21 150, 206 P.2.d 755 (1949).

22 In *U.S. Home Corp.*, 2012 WL 5879807, the Federal District Court of Nevada
23 addressed the jurisdictional nature of NRS 40.645 and determined the claimant's
24 failure to comply with the notice requirements prescribed by NRS 40.645 stripped the
25 court of its subject matter jurisdiction to hear the counter-claims of the homeowners
26 for breach of implied warranties, breach of express warranties, negligence and strict
27 products liability resulting from the allegedly defective yellow brass plumbing
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1 systems that failed. The builder, U.S. Homes, argued the NRS 40.645 notice was
2 inadequate and the federal court agreed. *Id.*, at 6. The Court thereafter determined it
3 lacked subject matter jurisdiction over the homeowner's counter-claims while
4 maintaining subject matter jurisdiction over the declaratory relief action filed by U.S.
5 Homes as to the rights and obligations of the parties under Chapter 40. The Court
6 noted: "A party's failure to exhaust administrative or other pre-filing requirements
7 deprives federal courts of subject matter jurisdiction in those cases in which [the
8 legislature] makes plain the jurisdictional character of the exhaustion requirement in
9 question." *Id.*, at 2. The court concluded the language of NRS 40.645 jurisdictional
10 requirements were clear and the failure of the homeowners to comply stripped it of
11 jurisdiction over all the counterclaims." *Id.*, at 2. ⁷

12 *U.S. Homes Corp.*'s conclusion is consistent with Nevada law where a statute
13 dictates the events conferring jurisdiction. "Statutes dealing with the same subject as
14 the one being construed are an aid for interpretation." *In re City Center Constr. & Lien*
15 *Master Litig.*, 310 P.3d 574, 129 Nev. Adv. Op. 70 (2013), citing 2B Norman J. Singer
16 & J.D. Shambie Singer, Sutherland Statutory Construction §51:1, at 183 (7th ed.
17 2012).

18 In *Iveson*, 66 Nev. 145, 206 P.2.d 755, the petitioner filed a petition for writ of
19 certiorari challenging the lower court's jurisdiction in granting a motion to set aside
20 default and argued the acts of the district court were void and in excess of the court's
21 jurisdiction. The court noted: "Whenever a statute affords a remedy, the jurisdictional
22 requirements of the statute must be observed or the court is without jurisdiction to
23 act." *Id.* The court addressed the statutory requirements for a motion to set aside a
24 default pointing out a motion must be supported by explicit requirements: an affidavit
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26 ⁷ Plaintiffs, the Parker-Hansens, pled claims for breach of the express and implied
27 warranties. Tellingly, there was no argument stay pursuant to NRS 40.647(2)(b) must
28 issue in order to avoid dismissal.

1 showing good cause, must be based upon mistake, inadvertence, surprise or excusable
2 neglect and notice must be given to the adverse party. *Id.* Petitioners challenged the
3 order granting the motion to set aside and strike the defaults of the defendants which
4 they asserted were in excess of jurisdiction because the requirements were not satisfied
5 and the condition accrediting the district court's exercise of power were wanting. As
6 to the statutory requirements, the Court held:

7 Notice must be given to the adverse party and the lack of any one of these
8 jurisdictional requirements would deprive the court of jurisdiction, though the
9 district court has general jurisdiction to relieve of defaults. Thus an order made,
10 which is not based upon a record showing all of these requirements, is in excess
11 of jurisdiction. We here repeat a principle given recognition by this court many
12 years ago. Where a statute prescribes the mode of acquiring jurisdiction, that
13 mode must be complied with or the proceedings will be a nullity.

14 *Id.*, at 151.

15 Likewise, in *G and M Properties*, 95 Nev. at 305, this Court found statutory
16 notice requirements required by NRS 533.170 were jurisdictional and mandatory
17 requiring strict compliance and the district court therefore lacked jurisdiction to
18 consider parties' late filed exceptions to a determination of water rights. In finding a
19 writ of prohibition was the appropriate remedy to hold proceedings in an inferior court
20 were not within the jurisdiction of such court, the Supreme Court noted: "We find the
21 language of NRS 533.170 plain and unambiguous and interpret the statutory notice
22 requirements as mandatory requiring strict compliance. *Id.*, at 305, citing *Carpenter*
23 *v. District Court*, 59 Nev. 42, 73 P 2d. 1310 (1937)."⁸ Although noting trial courts are
24 generally afforded reasonable discretion in controlling the conduct of the proceedings
25 pending before them, the Supreme Court nonetheless concluded: "[T]he error
26 complained of here is the trial judge's exercise of jurisdiction where none was legally
27 available. Where, as here, a trial court misconceives the meaning of a mandatory
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⁸ The Supreme Court largely relied on the statutory language of the NRS 533.170, which consistently used the word "shall" thereby refuting respondents' argument they had substantially complied with the statute, and it was within the district court's equitable authority to permit tardy exceptions. *G and M Properties*, 95 Nev. at 304.

1 statute and as a consequence acts when the law expressly enjoins it from acting, relief
2 through an extraordinary writ is mandated.” *Id.*

3 Moreover, lack of subject matter jurisdiction cannot be waived and can even be
4 raised for the first time on appeal. *Vaile v. Dist. Ct.*, 118 Nev. 262 (2002); *Swan v*
5 *Swan*, 106 Nev. 464, 796 P.2d 221 (1990). “As an initial matter, whether a court lacks
6 subject matter jurisdiction “can be raised by the parties at any time, or *sua sponte* by
7 a court of review, and cannot be conferred by the parties.” *Swan*, 106 Nev. at 469.

8 Nor does the doctrine of judicial estoppel apply to invoke subject matter
9 jurisdiction. Judicial estoppel, otherwise referred to as the doctrine of inconsistent
10 position, is a discretionary doctrine to prevent litigants from taking a position that
11 contradicts or is inconsistent with a prior position successfully asserted in a prior
12 judicial or administrative proceeding. The primary purpose of judicial estoppel is to
13 protect the judiciary's integrity rather than the litigants. The court may invoke the
14 doctrine at its discretion. However, “[j]udicial estoppel is an extraordinary remedy”
15 that should be cautiously applied only when “a party's inconsistent position [arises]
16 from intentional wrongdoing or an attempt to obtain an unfair advantage.” *Mainor v.*
17 *Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004). Judicial estoppel does not
18 preclude changes in position not intended to sabotage the judicial process. This Court
19 has determined it may invoke judicial estoppel when: (1) a party takes two positions;
20 (2) in judicial proceedings; (3) the party successfully asserted the first position; (4)
21 the positions are inconsistent, and (5) the first position did not result from ignorance,
22 fraud, or mistake. *Id.* at 765. None of these elements are present in this matter.

23 Until the District Court’s ruling on Firestop’s Motion to Dismiss, D.R. Horton
24 believed the August 2007 and August 2009 Stay did not toll NRCP 41(e)’s
25 prescriptive period based on unequivocal representations by the District Court that
26 were clearly known and understood by High Noon. Accordingly, only after the
27 District Court’s ruling did D.R. Horton conclude it was prejudiced and needed to
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1 challenge the imposition of the August 2007 Stay. D.R. Horton has never taken a
2 position contrary to the assertion the August 2007 Stay was improper and D.R. Horton
3 has consistently argued High Noon failed to comply with Chapter 40. In addition,
4 D.R. Horton has not taken the position the August 2007 and the August 2009 Stays
5 tolled the prescriptive period. Although it was forced to seek the August 2009 Stay,
6 this is not inconsistent with its position the August 2009 Stay did not toll the
7 prescriptive period. D.R. Horton was forced to seek the August 2009 Stay only
8 because High Noon's initial non-compliance with the Chapter 40 Notice and
9 subsequent lack of compliance with the right to repair and inspection process and
10 prejudiced Horton.

11 *Vaile*, 118 Nev. at 267, 44 P.3d at 510, is illustrative of an application of judicial
12 estoppel to confer subject matter jurisdiction where none exists based on facts clearly
13 distinguishable from the present. In *Vaile*, the Supreme Court, on a writ of mandamus
14 and/or prohibition, applied the doctrine of judicial estoppel to a divorce decree where
15 the petitioner judicially admitted the fact of her husband's Nevada residency in her
16 answer and represented to the district court her husband had resided in Nevada for the
17 jurisdictionally required six weeks before filing which was untrue. Relying on these
18 representations, the district court granted the divorce. *Id.* at 267. Two years later the
19 wife contested Nevada's jurisdiction over the divorce decree based on the fact none
20 of the parties never resided in Nevada. Although the District Court agreed it did not
21 have jurisdiction, it refused to set aside the divorce decree based on the doctrine of
22 judicial estoppel. On a writ petition the Supreme Court agreed Nevada did not have
23 statutory subject matter jurisdiction to grant the divorce but the wife was judicially
24 estopped from contesting jurisdiction given she admitted her husband's residency
25 allegations in her answer. *Id.* at 273-74. However, the estoppel in *Vaile* only applied
26 to the parents' divorce. The child custody portions of the divorce decree remained
27 governed by the UCCJA (the governing child custody statute at the time). The
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1 Supreme Court held the child custody portions of the divorce decree were void for
2 want of jurisdiction and declined to invoke jurisdiction by estoppel regardless of the
3 parents' representations. *Id.* at 275. Unlike the wife, the husband did not make
4 conflicting representations on key matters of fact. As discussed herein, there are no
5 facts in the present case warranting the imposition of jurisdiction by judicial estoppel
6 as Horton has never taken a position contrary to the position the August 2007 Stay
7 was improper.

8 NRS 40.645 and NRS 40.647(1) prescribed the precise manner in which the
9 District Court could obtain jurisdiction: once the pre-litigation requirements were
10 exhausted (notice, inspection and right to repair) subject matter jurisdiction was
11 invoked. The only way subject matter jurisdiction could be invoked prior to
12 compliance with NRS 40.645 and 40.647(1) was if a dismissal would prevent the
13 claimant from filing another action because it would be procedurally barred by the
14 statute of limitations or repose. The District Court clearly misconstrued the meaning
15 of the mandatory nature of NRS 40.647 when it imposed the stay in lieu of dismissal
16 because it concluded High Noon's claims "may not" be governed by Chapter 40. As
17 the NRS 40.645 notice was not sent and the exception contained in NRS 40.647(2)(b)
18 did not apply, subject matter jurisdiction was not invoked.

19 **D. The Case Must Be Dismissed For Failure to Bring to Trial Within the**
20 **Five (5) Year Prescriptive Period of NRCP 41(e).**

21 When the district court lacks subject matter jurisdiction, the judgment or order
22 of the court is rendered void. *Vaile*, 118 Nev. at 275, 44 P.3d at 515; *Landreth v. Malik*,
23 127 Nev. Adv. Op. 16, 251 P.3d 163 (2011), citing *State Indus. Ins. System v. Sleeper*,
24 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). "Lack of subject matter jurisdiction
25 is a jurisdictional defect of the fundamental type where there is 'an entire absence of
26 power to hear or determine the case.'" *Shisler v. Sanfer Sports Cars, Inc.*, 167
27 Cal.App.4th 1, 6, 83 Cal.Rptr.3d 771, 775 (2008).
28

1 The Complaint was filed on June 7, 2007. The August 2009 Stay and the
2 Supreme Court Stay tolled the NRCP 41(e) prescriptive period for 564 days.
3 (*Petitioner's Appendix*, Vol. II, 000257-000264, p. 7:1-10). Without the benefit of the
4 tolling of the August 2007 Stay, the five (5) year prescriptive period expired on
5 December 23, 2013. D.R. Horton requests this Court issue a writ of mandamus
6 remanding this action to the District Court with instructions to vacate the August 2007
7 Stay and to dismiss the action with or without prejudice based on its discretion
8 pursuant to NRCP 41(e).

9 **VI. CONCLUSION**

10 The District Court erred in determining Chapter 40 did not apply to High
11 Noon's claims for breach of express and implied warranty and in determining the
12 August 2007 Stay was mandated. Such a result subverts the legislative intent of
13 Chapter 40 and the clear and unambiguous definition of claims subject to Chapter 40
14 remedies contained in NRS 40.615. As High Noon failed to serve its Chapter 40
15 Notice, the District Court was required to dismiss the action without prejudice. The
16 District Court had no discretion. As the pre-litigation requirements of NRS 40.645 and
17 NRS 40.647(1) are jurisdictional, the District Court lacked subject matter over this
18 action and the August 2007 Stay is void. Without the benefits of the tolling period of
19 the August 2007 Stay, NRCP 41(e)'s five (5) year prescriptive period expired on
20 December 23, 2013. D.R. Horton hereby requests this Court issue an Writ of
21 Prohibition ordering the District Court to stand down from its assertion of subject

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1 matter jurisdiction and a Writ of Mandamus instructing the District Court to vacate
2 the August 2007 Stay and dismiss the action.

3
4 Respectfully submitted on this 15th day of July, 2014.

5
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CERTIFICATE OF SERVICE

I certify that on the 16 day of July, 2014, I submitted for electronic filing and electronic service the foregoing PETITIONER, DR HORTON'S PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS.

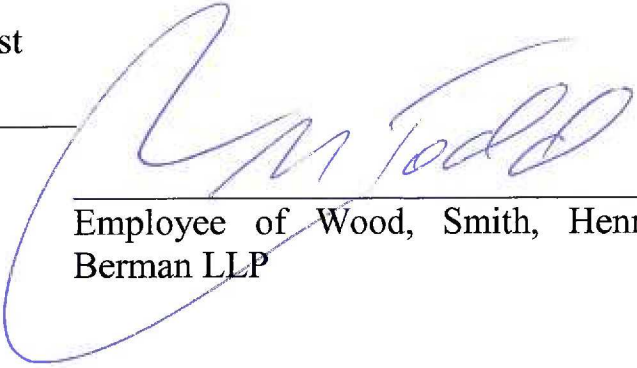
I HEREBY CERTIFY that on the 16 day of July, 2014, a copy of PETITIONER, D.R. HORTON'S PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS was hand delivered to the following:

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 16 day of July, 2014, a copy of PETITIONER, D.R. HORTON, INC.'S PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS was hand-delivered to the following:

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