

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

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2 ***Supreme Court Case No. 66085***  
3 **District Court Case No. 07-A542616**

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4 D.R. HORTON, INC.,

5 *Petitioner,*

6 v.

7 EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,  
8 IN AND FOR THE COUNTY OF CLARK;  
9 THE HONORABLE SUSAN H. JOHNSON

10 *Respondents,*

11 And

12 HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION,

13 *Real Party in Interest*

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14  
15 **REAL PARTY IN INTEREST HIGH NOON AT ARLINGTON RANCH**  
16 **HOMEOWNERS ASSOCIATION'S ANSWERING BRIEF**

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1 **NRAP 26.1 DISCLOSURE**

2  
3 The undersigned counsel of record certifies that the following are persons  
4 and entities as described in NRAP 26.1(a) and must be disclosed. These  
5 representations are made in order that the Justices of this Court may evaluate  
6 possible disqualification or recusal.  
7

8 High Noon at Arlington Ranch Homeowners Association has no parent  
9 corporation and there is no publicly held corporation that owns 10% or more of  
10 High Noon at Arlington Ranch Homeowners Association's stock:  
11

12 High Noon at Arlington Ranch Homeowners Association is represented in  
13 the District Court and in this Court by Paul P. Terry, Jr., Esq., Scott P. Kelsey,  
14 Esq. and David M. Bray, Esq. of the law firm of Angius & Terry, LLP.  
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16 Dated: November 7, 2014

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	FACTUAL SUMMARY.....	3
III.	LEGAL ARGUMENT.....	3
A.	If The District Court Did Not Have Subject Matter Jurisdiction Over The Action During The Time Period Covered By The Stay Order, As Asserted By D.R. Horton, Then NRCP 41(e)'s Five-Year Prescriptive Period Did Not Begin To Run Until Subject Matter Jurisdiction Was Satisfied On April 14, 2008.....	3
1.	Without Subject Matter Jurisdiction, A District Court Cannot Try An Action And Thus There Cannot Be A "Want Of Prosecution" Under NRCP 41(e).....	4
2.	Statutory Interpretation Principles Strive To Avoid Absurd Results Such As The Scenario Advocated By D.R. Horton's "No Jurisdiction, No Tolling" Theory.....	5
3.	<i>Boren</i> And Its Progeny Established The Rule That NRCP 41(e)'s Five-Year Prescriptive Period Is Tolloed During Court Ordered Stays Irrespective Of The Reasons For The Stay Orders.....	6
4.	NRCP 41(e)'s Five-Year Prescriptive Period Is Tolloed During Court Ordered Stays Irrespective Of The Reasons For The Stay Orders Or Subsequent Determinations Of The Validity Of Such Orders.....	7
B.	The Nevada Supreme Court Has Extended To <i>Boren</i> Rule To Apply To Circumstances Where The Draconian Effects Of NRCP 41(e) Conflicted With The Intent Of The Statute And D.R. Horton's Arguments Run Afoul Of Established Case Law On This Issue.....	8

1	1. <i>Rickard v. Montgomery Ward &amp; Co.</i> Stands For The Proposition That	
2	The Tolling Of NRCP 41(e) Is Applicable Upon A Stay Order	
3	Irrespective Of The Source Of The Stay Order.....	8
4	2. <i>Morgan v. Las Vegas Sands</i> Does Not Undermine Or Abrogate The	
5	<i>Boren</i> Rule.....	9
6	C. The Nevada Supreme Court May Refer To California Jurisprudence For	
7	Persuasive Support And Indeed The <i>Boren</i> Rule Is Supported By	
8	California's Interpretation Of An Analogue Statute.....	10
9	1. NRCP 41 Is Descended From California's Analogue Statute And Thus	
10	Reference To California Jurisprudence Is Warranted.....	10
11	2. California's Analogue of NRCP 41 Excludes From The Five-Year	
12	Prescriptive Period Any Time Period Where A Stay Is In Effect Or	
13	Jurisdiction Is Absent.....	11
14	3. The California Supreme Court's Interpretation of California's Analogue	
15	of NRCP 41 Reject D.R. Horton's "No Jurisdiction, No Tolling"	
16	Theory.....	12
17	D. D.R. Horton's Challenge To The Validity Of The District Court's Stay	
18	Order Is Both Procedurally And Substantively Deficient Because The	
19	District Court Did Not Violate The Prescriptions Of NRS 40.647.....	14
20	1. Arguments Related To The District Court's Application Of NRS 40.647	
21	Cannot Be Considered For The First Time On Appeal.....	14
22	2. D.R. Horton Waived Any Challenge To The Application Of NRS	
23	40.647(2)(b) By Bringing A Motion To Stay Litigation And Vacate The	
24	Trial Date That Was Granted By The District Court.....	15
25	3. Contrary to D.R. Horton's Mischaracterization Of The District Court's	
26	Stay Order, The Record Shows That The Stay Order Made No	
27	Determinations As To Chapter 40's Application To Warranty	
28	Claims.....	17

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
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13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

IV. CONCLUSION.....19

## TABLE OF AUTHORITIES

### CASES

<i>Baker v. Noback</i> , 922 P.2d 1201.....	6
<i>Brannen v. State</i> , 102 Nev. 7, 714 P.2d 175 (1986).....	4
<i>Boren v. City of North Las Vegas</i> , 98 Nev. 5, 638 P.2d 404 (1982).....	passim
<i>Foster v. Dingwall</i> , 227 P.3d 1042 (2010).....	7
<i>Hamlett v. Reynolds</i> , 963 P.2d 457 (1998).....	7
<i>Harris v. Harris</i> , 196 P.2d 402 (1948).....	10
<i>Holland v. Dave Altman's R.</i> , 271 Cal. Rptr. 706 (1990).....	13
<i>Kopicko v. Young</i> , 971 P.2d 789 (1998).....	6
<i>Massey v. Sunrise Hosp.</i> , 724 P.2d 208 (1986).....	5
<i>Mill-Spex, Inc. v. Pyramid Precast Corp.</i> , 710 P.2d 1387 (1985).....	15
<i>Morgan v. Las Vegas Sands</i> , 43 P.3d 1036 (2002).....	9, 10
<i>NOLM, LLC v. Cnty. of Clark</i> , 100 P.3d 658 (2004).....	18

1	<i>Patterson v. Four Rent,</i>	
2	101 Nev. 651, 654, 707 P.2d 1147, 1149 (1985).....	4
3	<i>Power Co. v. Henry,</i>	
4	321 P.3d 858, 861 (2014).....	2
5	<i>Reno Sparks Convention Visitors Auth. v. Jackson,</i>	
6	112 Nev. 62, 66-67, 910 P.2d 267, 270 (1996).....	4
7	<i>Rickard v. Montgomery Ward &amp; Co.,</i>	
8	(200496 P.3d 743).....	8, 9
9	<i>State ex rel. State Bd. of Equalization v. Barta,</i>	
10	188 P.3d 1092 (2008).....	14
11	<i>Schouweiler v. Yancey Co.,</i>	
12	712 P.2d 786 (1985).....	18
13	<i>Webb v. Shull,</i>	
14	270 P.3d 1266, 1272 (Nev. 2012).....	5
15	<b><u>STATUTES</u></b>	
16	11 U.S.C. §362(a).....	8
17	NAR 3.....	10
18	NRA 21.....	10
19	NRS 40.645.....	2
20	NRS 40.647(2).....	2, 16
21		
22	NRS 40.647(2)(a).....	14-16
23	NRS 40.647(2)(b).....	15, 17
24		
25	NRS 40.695.....	17
26		
27		
28		

**RULES**

California Code of Civil Procedure §585.310.....	2
California Code of Civil Procedure § 583.340(a).....	12
California Code of Civil Procedure § 583.340(b).....	12
NRCP 41(e).....	passim



1           **I.     INTRODUCTION**

2           Petitioner D.R. HORTON, INC.'s (hereinafter referred to as "DRH")  
3  
4       Petition for Writ of Prohibition and/or Mandamus should be denied because it is  
5       premised upon an internally-inconsistent and tortured theory that the District  
6       Court's August 13, 2007 Stay Order was void for want of subject matter  
7       jurisdiction. DRH then concludes that this Action is time-barred because the 246  
8       days during which the Stay Order was in effect should be counted against NRCP  
9       41(e)'s five-year prescriptive period.  
10

11  
12           DRH's theory fails because if the District Court truly did not have subject  
13       matter jurisdiction over the action until completion of the Chapter 40 pre-litigation  
14       process, then it follows that NRCP 41(e)'s five-year prescriptive period did not  
15       *begin to run* until subject matter jurisdiction was satisfied on April 14, 2008. It is  
16       axiomatic that NRCP 41(e)'s five-year prescriptive period does not run when an  
17       action cannot be "brought to trial within five years" because the district court  
18       allegedly lacked jurisdiction.<sup>1</sup>  
19  
20

21           The idiom "all roads lead to Rome" is especially appropriate here because  
22       either the District Court had jurisdiction and its Stay Order tolled NRCP 41(e)  
23       pursuant to *Boren v. N. Las Vegas*, 98 Nev. 5, 638 P.2d 404 (1982), or it did not  
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27       <sup>1</sup> NRCP 41(e).  
28

1 have jurisdiction and NRCP 41(e) did not begin to run until jurisdiction was  
2 satisfied on April 14, 2008 – the same day that the Stay Order expired. *Boren's*  
3 observation of “so obviously unfair and unjust as to be unarguable” is on all fours  
4 with the basis of DRH’s Writ Petition.<sup>2</sup>

6 California’s analogue of NRCP 41(e), California Code of Civil Procedure  
7 section 585.310, et seq., and its interpretive decisions, show that the five-year  
8 prescriptive period is tolled where the jurisdiction of a court to try the action was  
9 suspended, or where a stay was ordered.<sup>3</sup> The Nevada Supreme Court has often  
10 referred to California jurisprudence in order to rebut attempts to unfairly and  
11 unreasonably expand the scope and effect NRCP 41(e).<sup>4</sup>

14 Finally, denial of the Writ Petition may be accomplished upon the  
15 aforementioned issues of law without delving into DRH’s ancillary arguments  
16 related to application of NRS 40.647(2), whether NRS 40.645 is jurisdictional or  
17 if warranty claims are governed by Chapter 40. Indeed, *Boren's* rule is that tolling  
18 is appropriate for “[a]ny period during which the parties are prevented from  
19 bringing an action to trial by reason of a stay order . . . .”<sup>5</sup> The Stay Order  
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23  
24 <sup>2</sup> *Id.* at 404.

25 <sup>3</sup> Code of Civ. Proc. § 585.340.

26 <sup>4</sup> *See Power Co. v. Henry*, 321 P.3d 858, 861 (2014).

27 <sup>5</sup> *Ibid.*  
28

1 prevented Real Party in Interest HIGH NOON AT ARLINGTON RANCH  
2 HOMEOWNERS ASSOCIATION (hereinafter referred to as "HIGH NOON")  
3 and DRH from adjudicating the underlying action to trial.  
4

## 5       **II.     FACTUAL SUMMARY**

6       For the Court's convenience, the relevant and pertinent facts to HIGH NOON's  
7 Answering Brief are incorporated into its Legal Argument analysis with  
8 appropriate citations to the record. The critical consideration here is that the facts  
9 are generally agreed-upon and this petition to the Court involves primarily a *de*  
10 *novo* review of DRH's interpretation of *Boren* and this Court's prior decision  
11 relating to the same.  
12  
13

## 14       **III.    LEGAL ARGUMENT**

### 15               **A. If The District Court Did Not Have Subject Matter Jurisdiction** 16               **Over The Action During The Time Period Covered By The Stay** 17               **Order, As Asserted By D.R. Horton, Then NRCP 41(e)'s Five-Year** 18               **Prescriptive Period Did Not Begin To Run Until Subject Matter** 19               **Jurisdiction Was Satisfied On April 14, 2008**

20       As previously noted, "all roads lead to Rome" in regards to DRH's  
21 argument that the District Court lacked subject matter jurisdiction to issue its Stay  
22 Order. HIGH NOON contends that such an argument is absurd, and that the  
23 District Court's Stay Order was valid. Hence, the *Boren* rule is satisfied and the  
24 Stay Order tolled NRCP 41(e), and the District Court properly denied the Motion  
25 to Dismiss joined by DRH. Even assuming *arguendo* that DRH's argument has  
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28

1 any merit, which it does not, NRCP 41(e) has no application until a district court  
2 obtains subject matter jurisdiction over the claims asserted in the action.

3  
4 Therefore, the Writ Petition fails even under DRH's interpretation of the law.

5 **1. Without Subject Matter Jurisdiction, A District Court**  
6 **Cannot Try An Action And Thus There Cannot Be A**  
7 **"Want Of Prosecution" Under NRCP 41(e)**

8 The analysis begins with the well-established rule that district courts cannot  
9 hold a trial on a matter where subject matter jurisdiction is lacking.<sup>6</sup> The express  
10 language of NRCP 41(e) requires that dismissal for "want of prosecution" may  
11 only be ordered where the plaintiff fails to bring the action to trial within five  
12 years after filing the complaint.<sup>7</sup> The Nevada Supreme Court in *Boren* observed  
13 that even where an action was stayed for four years, "[f]or a court to prohibit the  
14 parties from going to trial and then dismiss their action for failure to bring it to  
15 trial is so obviously unfair and unjust as to be unarguable."<sup>8</sup>

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24 <sup>6</sup> *Brannen v. State*, 102 Nev. 7, 714 P.2d 175 (1986); *Reno Sparks Convention*  
25 *Visitors Auth. v. Jackson*, 112 Nev. 62, 66-67, 910 P.2d 267, 270 (1996);  
26 *Patterson v. Four Rent*, 101 Nev. 651, 654, 707 P.2d 1147, 1149 (1985).

27 <sup>7</sup> NRCP 41(e).

28 <sup>8</sup> *Boren v. N. Las Vegas*, 638 P.2d 404 (1982).

1                   **2. Statutory Interpretation Principles Strive To Avoid**  
2                   **Absurd Results Such As The Scenario Advocated By D.R.**  
3                   **Horton's "No Jurisdiction, No Tolling" Theory**

4           The Nevada Supreme Court has explained that it will interpret statutory  
5 provisions in harmony with one another and the statutory scheme in order to avoid  
6 absurd results.<sup>9</sup> There can be no greater an absurdity than to claim that a plaintiff's  
7 action must be dismissed pursuant to NRCP 41(e) if he or she fails to bring the  
8 matter to trial within five (5) years, irrespective of whether the district court  
9 possesses subject matter jurisdiction.<sup>10</sup>  
10

11  
12           HIGH NOON contends that the legal scenario advocated by DRH presents  
13 a "Hobson's Choice" where any stay order issued by a district court is subject to  
14 challenge years later, yet NRCP 41(e) continues to run unabated in the interim.  
15 The unaddressed fallacy in DRH's position is that it serves no recognized purpose  
16 and violates the *Massey* holding that the spirit of the law contemplates trial on the  
17 merits.<sup>11</sup> In sum, DRH's "No Jurisdiction, No Tolling" theory, as applied to the  
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23           <sup>9</sup> *Webb v. Shull*, 270 P.3d 1266, 1272 (Nev. 2012) *citing Southern Nev.*  
24           *Homebuilders v. Clark County*, 117 P.3d 171, 173 (2005).

25           <sup>10</sup> *See Massey v. Sunrise Hosp.*, 724 P.2d 208, 209 (1986) ["The spirit of the law  
26           contemplates a trial on the merits."].

27           <sup>11</sup> *Ibid.*  
28

1 Stay Order issued seven (7) years ago and never challenged until now, serves no  
2 purpose other than providing DRH with an escape-hatch from a trial on the merits.  
3

4 **3. *Boren* And Its Progeny Established The Rule That NRC**  
5 **41(e)'s Five-Year Prescriptive Period Is Tolloed During**  
6 **Court Ordered Stays Irrespective Of The Reasons For The**  
7 **Stay Orders**

8 *Boren* established the rule that "[a]ny period during which the parties are  
9 prevented from bringing an action to trial by reason of a stay order shall not be  
10 computed in determining the five-year period of Rule 41(e)." <sup>12</sup> In *Baker v.*  
11 *Noback*, 922 P.2d 1201, the Nevada Supreme Court expanded the tolling rule first  
12 established in *Boren* to situations where a statutory scheme, similar to Chapter 40,  
13 prevented parties from bringing an action to trial due to a court ordered stay.<sup>13</sup>  
14 Furthermore, in *Kopicko v. Young*, 971 P.2d 789 (1998), the Nevada Supreme  
15 Court extended the tolling rule to stays caused by competing malpractice  
16 actions.<sup>14</sup>  
17

18  
19 DRH's arguments fail to address the holdings of these on-point legal  
20 authorities and that failure is indicative of the strained nature of its attack on the  
21 validity of the Stay Order.  
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23

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25 <sup>12</sup> *Boren, supra*, 638 P.2d at 404.

26 <sup>13</sup> *Id.* at 1210-1211.

27 <sup>14</sup> *Id.* at 791, n.4.  
28

1                   **4.    NRCp 41(e)'s Five-Year Prescriptive Period Is Tolloed**  
2                   **During Court Ordered Stays Irrespective Of The Reasons**  
3                   **For The Stay Orders Or Subsequent Determinations Of**  
4                   **The Validity Of Such Orders**

5                   The critical consideration under these decisions is that the tolling rule is  
6 triggered by the parties' inability to bring the action to trial due to a court ordered  
7 stay. It is irrelevant to the analysis whether the stay order was valid or void,  
8 because parties and their counsel are categorically prohibited from simply  
9 refusing to comply with court orders.<sup>15</sup>  
10

11                  The rationale underlying the *Boren* rule and its progeny is that there cannot  
12 be a "want of prosecution" where the parties are presented with the choice of  
13 complying with court ordered stays or risk sanctions by defying such orders.<sup>16</sup>  
14 DRH's anticipated argument that HIGH NOON requested the Stay Order is  
15 irrelevant. The *Boren* rule applies to all parties equally, and critically, nothing in  
16 NRCp 41(e) reveals an intent to discourage litigants from requesting, or for courts  
17 to order, a stay of proceedings.  
18  
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21                  ///

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23                  <sup>15</sup> See *Hamlett v. Reynolds*, 963 P.2d 457, 458 (1998) [upholding the district  
24 court's strike order where the defaulting party's "constant failure to follow [the  
25 court's] orders was unexplained and unwarranted."].

26                  <sup>16</sup> *Foster v. Dingwall*, 227 P.3d 1042, 1049 (2010) ["ultimate sanctions were  
27 necessary to demonstrate to future litigants that they are not free to act with  
28 wayward disregard of a court's orders."].

1       **B. The Nevada Supreme Court Has Extended To *Boren* Rule To**  
2       **Apply To Circumstances Where The Draconian Effects Of NRCP**  
3       **41(e) Conflicted With The Intent Of The Statute And D.R.**  
4       **Horton's Arguments Run Afoul Of Established Case Law On This**  
5       **Issue**

6               **1.     *Rickard v. Montgomery Ward & Co.* Stands For The**  
7               **Proposition That The Tolling Of NRCP 41(e) Is**  
8               **Applicable Upon A Stay Order Irrespective Of The Source**  
9               **Of The Stay Order**

10       In *Rickard v. Montgomery Ward & Co.*, 96 P.3d 743 (2004), the Nevada  
11       Supreme Court extended the *Boren* rule to bankruptcy stays pursuant to  
12       Bankruptcy Code section 362(a).<sup>17</sup> *Rickard* explained that the purpose of NRCP  
13       41(e) was to “compel expeditious determinations of legitimate claims.”<sup>18</sup> *Rickard*  
14       reaffirmed the *Boren* rule and observed that, “[w]e do not discern any reason for  
15       distinguishing between the court ordered stay in *Boren* and the automatic stay  
16       imposed by federal bankruptcy law . . . .”<sup>19</sup>

17  
18       Critically, *Rickard* recognized that even stays issued under the Federal  
19       Bankruptcy Code will operate to toll NRCP 41(e).<sup>20</sup> *Rickard* recognized that “[i]n  
20       today’s legal system, crowded court calendars make it impractical, if not  
21

22  
23       <sup>17</sup> *Id.* at 747, overruled on other grounds in *Carstarphen v. Milsner*, 270 P.3d  
24       1251, 1256 (2012).

25       <sup>18</sup> *Id.* at 746.

26       <sup>19</sup> *Ibid.*

27       <sup>20</sup> *Ibid.*



1 impossible, for a case to be brought to trial within [30 days under the Bankruptcy  
2 Code].”<sup>21</sup> “Thus, in order to permit proper vindication of rights, we extend the  
3 rule in *Boren* and conclude that NRCP 41(e)'s five-year prescriptive period is  
4 tolled for the time that the bankruptcy stay remains in effect.”<sup>22</sup>

5  
6 The significance of *Rickard* is the simple proposition that the *Boren* rule is  
7 triggered whenever a court issues a stay order because the purpose of NRCP 41(e),  
8 to “compel expeditious determinations of legitimate claims,” is not served by  
9 penalizing litigants for stays issued by the judicial forum.<sup>23</sup> Indeed, *Rickard*  
10 recognized that NRCP 41(e) should never be used as a shield or procedural booby-  
11 trap that prevents the “proper vindication of rights” by way of trial on the merits.<sup>24</sup>  
12 Therefore, DRH’s arguments to the contrary are without merit.

## 13 14 15 16 **2. *Morgan v. Las Vegas Sands* Does Not Undermine Or** 17 **Abrogate The *Boren* Rule**

18 DRH will likely cite to *Morgan v. Las Vegas Sands*, 43 P.3d 1036 (2002)  
19 for the strained proposition that NRCP 41(e) is not tolled where a plaintiff is  
20 compelled to an extra-judicial process such as arbitration, and thus the Chapter 40  
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23  
24 <sup>21</sup> *Id.* at 747.

25 <sup>22</sup> *Ibid.*

26 <sup>23</sup> *Id.* at 746-747.

27 <sup>24</sup> *Id.* at 747.  
28

1 pre-litigation procedure is similar. *Morgan* is immediately distinguishable and  
2 inapplicable because there was never a stay order issued and thus the *Boren* rule  
3 was never implicated.<sup>25</sup> Indeed, the *Boren* rule is never mentioned in the  
4 majority's opinion.<sup>26</sup> Furthermore, the Nevada Supreme Court recognized that  
5 the *Morgan* case involved NAR 21, a statute that incorporated a court-annexed  
6 arbitration program into the regular course of litigation for applicable matters.  
7 NAR 21 was clearly not applicable to the case at bar which involved claims in  
8 excess of \$50,000.<sup>27</sup>

12 **C. The Nevada Supreme Court May Refer To California**  
13 **Jurisprudence For Persuasive Support And Indeed The *Boren***  
14 **Rule Is Supported By California's Interpretation Of An Analogue**  
15 **Statute**

16 **1. NRCP 41 Is Descended From California's Analogue**  
17 **Statute And Thus Reference To California Jurisprudence**  
18 **Is Warranted**

19 In 1943, Nevada enacted and adopted what is now NRCP 41 from  
20 California Code of Civil Procedure section 583.<sup>28</sup> *Harris* also made the cogent  
21 observation that, "[s]ince the statute was taken from California, it is presumed that  
22

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23  
24 <sup>25</sup> *See id.* at 1037-1039.

25 <sup>26</sup> *See id.* at 1039-1041.

26 <sup>27</sup> *See* NAR 3.

27 <sup>28</sup> *Harris v. Harris*, 196 P.2d 402, 403-04 (1948).  
28

1 it was adopted by the legislature with the construction given it by the courts of  
2 that state before its adoption.”<sup>29</sup> Therefore, reference to California jurisprudence  
3 is instructive and persuasive in order to dispel any semblance of legitimacy related  
4 to DRH’s tortured argument that an allegedly void stay order would not toll NRCP  
5 41(e).  
6

7  
8 **2. California’s Analogue of NRCP 41 Excludes From The**  
9 **Five-Year Prescriptive Period Any Time Period Where A**  
10 **Stay Is In Effect Or Jurisdiction Is Absent**

11 Nearly identical to NRCP 41(e), California Code of Civil Procedure section  
12 583.310 *et seq.*, prescribes that matters not brought to trial within five years of  
13 commencement shall be dismissed.<sup>30</sup> Specifically, however, California Code of  
14 Civil Procedure section 583.340 [Tolling of period] prescribes that, “[i]n  
15 computing time within which an action must be brought to trial pursuant to this  
16 article, there shall be excluded the time during which any of the following  
17 conditions existed: (a) The jurisdiction of the court to try the action was  
18 suspended. (b) Prosecution or trial of the action was stayed or enjoined. (c)  
19 Bringing the action to trial, for any other reason, was impossible, impracticable,  
20 or futile.”<sup>31</sup>  
21  
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23

24  
25 <sup>29</sup> *Id.* at 404.

26 <sup>30</sup> Cal. Code of Civ. Proc. §§ 583.310-583.360.

27 <sup>31</sup> *Ibid.*  
28

1 California Code of Civil Procedure section 583.340(b) is on all fours with  
2 the *Boren* rule. DRH, likely recognizing the well-established parameters of the  
3 *Boren* rule, asserts a subject matter jurisdiction argument in order to avoid tolling  
4 of NRCPP 41(e). However, California Code of Civil Procedure section 583.340(a)  
5 specifically recognizes that tolling of the five-year prescriptive period of section  
6 583.310 is appropriate where the jurisdiction of the court to try the action is  
7 suspended. The Writ Petition failed to provide any discernable reason why NRCPP  
8 41(e) would continue to run-down even where jurisdiction is allegedly absent.

12 **3. The California Supreme Court's Interpretation of**  
13 **California's Analogue of NRCPP 41 Reject D.R. Horton's**  
14 **"No Jurisdiction, No Tolling" Theory**

15 In contrast to DRH's view, California's analogue statute recognizes that  
16 without jurisdiction, it would be so obviously unfair and unjust as to be  
17 unarguable, to penalize a plaintiff with dismissal in such circumstances.  
18 Therefore, even if the District Court's Stay Order was void for want of  
19 jurisdiction, as asserted by DRH, it is a distinction without a difference because  
20 NRCPP 41(e) would nonetheless be tolled. California's interpretive decisions are  
21 in accord. For instance, the *Boren* rule and its California analogue of 583.340(b)  
22 represents a "bright-line, nondiscretionary rule that excludes from the time in  
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1 which a plaintiff must bring a case to trial only that time during which all the  
2 proceedings in an action are stayed.”<sup>32</sup>

3  
4 *Bruns* further noted that, “[o]bviously, if a complete stay is in effect,  
5 bringing the action to trial is impossible . . . [i]t makes sense for the Legislature  
6 to state a bright-line rule in this situation.”]. In *Holland v. Dave Altman's R.*, 271  
7 Cal. Rptr. 706 (1990), the California Supreme Court addressed the absence of  
8 jurisdiction issue on tolling and noted that, “the evident purpose of section  
9 583.340 . . . is to exclude from the mandatory dismissal provision time periods  
10 during which the case could not be brought to trial . . . [and] [t]he absence of trial  
11 court jurisdiction to try it (the contingency covered by subdivision ‘(a)’ is one  
12 reason . . . .”<sup>33</sup> Therefore, DRH’s contentions have no merit.  
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26 <sup>32</sup> *Bruns v. E-Commerce Exch., Inc.*, 248 P.3d 1185, 1191 (Cal. 2011)

27 <sup>33</sup> *Id.* at 708.  
28

1           **D. D.R. Horton's Challenge To The Validity Of The District Court's**  
2           **Stay Order Is Both Procedurally And Substantively Deficient**  
3           **Because The District Court Did Not Violate The Prescriptions Of**  
4           **NRS 40.647**

5           **1. Arguments Related To The District Court's Application**  
6           **Of NRS 40.647 Cannot Be Considered For The First Time**  
7           **On Appeal**

8           The Nevada Supreme Court established the long-standing rule that  
9 arguments raised for the first time on appeal generally will not be considered.<sup>34</sup>  
10 DRH argues for the first time on appeal that it was entitled to a dismissal of the  
11 Complaint under NRS 40.647(2)(a), yet DRH never requested such relief from  
12 the District Court.<sup>35</sup> Although DRH emphasized that the Stay Order was the result  
13 of an *ex parte* application, DRH never objected to the Stay Order and in fact, filed  
14 a Motion to Stay Litigation and Vacate the Trial Date before even filing its  
15 Answer to Plaintiff's Complaint.<sup>36</sup> Indeed, until the instant Writ Petition, DRH  
16 never once challenged the Stay Order in the seven (7) years since its issuance.  
17

18           Conspicuously missing from DRH's Appendix is a copy of its Motion to  
19 Stay Litigation and Vacate the Trial Date. This sleight of hand and omission of  
20 critical records should not go unnoticed by the Nevada Supreme Court. Yet now  
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25           <sup>34</sup> *State ex rel. State Bd. of Equalization v. Barta*, 188 P.3d 1092, 1103 (2008).

26           <sup>35</sup> *See Petitioner's Appendix Vol. I Index.*

27           <sup>36</sup> *Petitioner's Appendix* at 000036-000040, 000070-000145.  
28

1 on appeal, and for the first time, DRH contends that instead of staying the Action,  
2 the District Court should have dismissed the Action pursuant to NRS 40.647(2)(a)  
3 [dismissal without prejudice]. DRH's contention conflicts with its own Motion  
4 to Stay Litigation and Vacate the Trial Date, submitted to the District Court under  
5 NRS 40.647(2)(b) [stay of proceedings] without any reference to NRS  
6 40.647(2)(a).<sup>37</sup>  
7

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9 **2. D.R. Horton Waived Any Challenge To The Application**  
10 **Of NRS 40.647(2)(b) By Bringing A Motion To Stay**  
11 **Litigation And Vacate The Trial Date That Was Granted**  
12 **By The District Court**

13 The idiom "what is good for the goose, is good for the gander" is  
14 appropriate in this circumstance. HIGH NOON contends that any objection DRH  
15 may have had to the District Court's application of NRS 40.647(2), under either  
16 subsection (a) [dismissal without prejudice] or (b) [stay of proceedings], was  
17 waived by DRH's election to pursue the stay of proceedings remedy.<sup>38</sup> Nothing  
18 in NRS 40.647 compels a District Court's *sua sponte* dismissal absent a request  
19 by a party – such relief must be requested by a party.  
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25 <sup>37</sup> See *Petitioner's Appendix* at 000036-000040, 000070-000145.  
26

27 <sup>38</sup> *Mill-Spex, Inc. v. Pyramid Precast Corp.*, 710 P.2d 1387, 1388 ["A waiver is  
28 the intentional relinquishment of a known right."] (1985).

1 DRH's Motion to Stay Litigation and Vacate the Trial Date requested that  
2 a stay be issued to complete the Chapter 40 prelitigation procedures.<sup>39</sup> Pursuant  
3 to DRH's request, the District Court granted the stay request "until the parties  
4 have completed the entirety of the Chapter 40 [prelitigation] process" but denied  
5 its request to vacate the trial date.<sup>40</sup> Therefore, DRH cannot now complain that  
6 the District Court's Stay Order misapplied NRS 40.647(2) when it requested and  
7 obtained the exact same relief that it now complains of.

10 The Writ Petition attempts to obviate this fallacy by claiming that  
11 "[a]lthough it was forced to seek the August 2009 Stay, this is not inconsistent  
12 with its position the (sic) August 2009 Stay did not toll the prescriptive period."<sup>41</sup>  
13 That statement ignores the crux of DRH's argument that the 2007 Stay Order is  
14 invalid because under the circumstances of the Action, dismissal without  
15 prejudice pursuant to NRS 40.647(2)(a) is the only valid order that the District  
16 Court could have issued.<sup>42</sup> In sum, DRH waived any objections to the Stay Order  
17 by requesting and obtaining its own stay order from the District Court.  
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23 <sup>39</sup> *Petitioner's Appendix* at 000038-000039.

24 <sup>40</sup> *Ibid.*

25 <sup>41</sup> *DRH's Writ Petition* at 27:5-27:7.

26 <sup>42</sup> *Id.* at 4:13-4:14 ["the District Court was required to dismiss the Complaint  
27 without prejudice pursuant to NRS 40.647(2)(a) rather than grant a stay."].  
28



1                   **3.     Contrary to D.R. Horton's Mischaracterization Of The**  
2                   **District Court's Stay Order, The Record Shows That The**  
3                   **Stay Order Made No Determinations As To Chapter 40's**  
4                   **Application To Warranty Claims**

5                   HIGH NOON's Ex Parte Motion to Stay Complaint and Enlarge Time for  
6                   Service asserted that all causes of action in the Complaint, including the warranty  
7                   claims, were tolled by NRS 40.695.<sup>43</sup> This is entirely consistent with established  
8                   Nevada jurisprudence on the issue. However, HIGH NOON sought a stay of  
9                   proceedings pursuant to NRS 40.647(2)(b) out of the concern that DRH would  
10                  subsequently argue that Chapter 40 tolling would not apply to such claims.<sup>44</sup>  
11                  Indeed, HIGH NOON advised the District Court that DRH "attempted to limit the  
12                  implied warranties in their sales contracts to the two year period."<sup>45</sup>

13                  The District Court was also advised that although the Complaint was filed  
14                  on June 7, 2007, units at the Project had been sold since August 31, 2004, a time  
15                  span approximately 33 months.<sup>46</sup> Therefore, based on the information provided  
16                  to the District Court regarding DRH's anticipated legal attacks and the time span  
17                  involved, the District Court properly applied NRS 40.647(2)(b). Nothing in the  
18                  involved, the District Court properly applied NRS 40.647(2)(b). Nothing in the  
19                  involved, the District Court properly applied NRS 40.647(2)(b). Nothing in the  
20                  involved, the District Court properly applied NRS 40.647(2)(b). Nothing in the  
21                  involved, the District Court properly applied NRS 40.647(2)(b). Nothing in the  
22                  involved, the District Court properly applied NRS 40.647(2)(b). Nothing in the  
23                  involved, the District Court properly applied NRS 40.647(2)(b). Nothing in the

24                  <sup>43</sup> *Petitioner's Appendix* at 000015.

25                  <sup>44</sup> *Ibid.*

26                  <sup>45</sup> *Id.* at 000016.

27                  <sup>46</sup> *Ibid.*

1 Writ Petition refutes the accuracy of those assertions to the District Court. The  
2 District Court's findings of fact should not be disturbed absent an abuse of  
3 discretion or unless such findings are not supported by substantial evidence.<sup>47</sup> The  
4 Writ Petition has not presented substantial evidence to the contrary.  
5

6 Indeed, nothing in the District Court Stay Order reflected any  
7 misapplication of the law or legal conclusion that Chapter 40 does not encompass  
8 warranty claims.<sup>48</sup> The Writ Petition attempts to create error where none exists  
9 by extensive citation to irrelevant legal authorities that do not address the central  
10 issue here.<sup>49</sup> The critical consideration here is that nowhere in the Stay Order was  
11 there a finding of fact or conclusion of law asserting that the warranty claims were  
12 not governed by Chapter 40. DRH cannot create a non-existent error by asking  
13 the Nevada Supreme Court to read between the lines of the Stay Order.  
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17 Finally, DRH's arguments ignore the well-established rule that unless a  
18 district court's exercise of discretion is arbitrary or capricious, the Nevada  
19 Supreme Court will not disturb the lower court's ruling on appeal.<sup>50</sup> Here, DRH  
20 does not and cannot show, let alone establish, that the District Court's Stay Order  
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24 <sup>47</sup> *NOLM, LLC v. Cnty. of Clark*, 100 P.3d 658, 660-661 (2004).

25 <sup>48</sup> *Petitioner's Appendix* at 000035.

26 <sup>49</sup> *DRH's Writ Petition* at 16:1-23:11.

27 <sup>50</sup> *Schouweiler v. Yancey Co.*, 712 P.2d 786, 790 (1985).  
28

1 was arbitrary or capricious based on the uncontested facts of the record.  
2 Therefore, it follows that the District Court's Stay Order was valid, enforceable  
3 and the product of its proper exercise of discretion. DRH's challenge to that order  
4 seven (7) years later cannot obscure that inevitable conclusion.  
5

6 **IV. CONCLUSION**  
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8 For the foregoing reasons, HIGH NOON respectfully requests that this Court  
9 summarily deny DRH's Petition for Writ of Prohibition and/or Mandamus.  
10

11 Dated: November 7, 2014

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12  
13  
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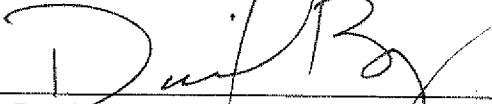
20 *HIGH NOON AT ARLINGTON*

*RANCH HOMEROWNERS*

21 *ASSOCIATION*  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 7<sup>th</sup> day of November, 2014, I submitted for electronic filing and electronic service to all parties the foregoing Real Party In Interest High Noon At Arlington Ranch Homeowners Association's Answering Brief.

I HEREBY CERTIFY that on the 7<sup>th</sup> day of November 2014, a copy of Real Party In Interest High Noon At Arlington Ranch Homeowners Association's Answering Brief 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 7<sup>th</sup> day of November, 2014, a copy of Real Party In Interest High Noon At Arlington Ranch Homeowners Association's Answering Brief was hand delivered to the following:

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