

EXHIBIT 1


CLERK OF THE COURT

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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11
12 **HIGH NOON AT ARLINGTON RANCH**
13 **HOMEOWNERS ASSOCIATION, a**
14 **Nevada non-profit corporation, for itself**
15 **and for all others similarly situated,**

16 **Plaintiff,**

17 **v.**

18 **D.R. HORTON, INC., a Delaware**
19 **Corporation DOE INDIVIDUALS 1-100,**
20 **ROE BUSINESSES or**
21 **GOVERNMENTAL ENTITIES 1-100,**
22 **inclusive,**

23 **Defendant.**

CASE NO.: A542616
DEPT NO.: XXII

(ELECTRONIC FILING CASE)

**D.R. HORTON, INC.'S MOTION TO
STAY LITIGATION AND VACATE
TRIAL DATE**

24 COMES NOW Defendant D.R. Horton, Inc. ("D.R. Horton"), by and through
25 its counsel, the law firm of WOOD, SMITH, HENNING & BERMAN, LLP, and
26 hereby moves this Court for an Order to Stay Litigation and Vacate the Current
27 Trial Date.

28 This motion is made and based upon the attached Memorandum of Points

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1 and Authorities, exhibits and such other and further evidence as may be presented
2 to this Court.

3 DATED: June 21, 2009

WOOD, SMITH, HENNING & BERMAN LLP

4
5 By: 

JOEL D. ODOU

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Attorneys for D. R. Horton, Inc.

13 **NOTICE OF MOTION**

14 PLEASE TAKE NOTICE that Defendant D.R. Horton will bring the foregoing
15 Motion to Stay Litigation and Vacate Trial Date on for hearing on the 30th day of
16 July, 2009, at 9:00 a.m., in Department XXII, or as soon thereafter as Counsel can
17 be heard.

18 DATED: June 29, 2009

WOOD, SMITH, HENNING & BERMAN LLP

19
20 By: 

JOEL D. ODOU

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

CASE SUMMARY

This matter involves a condominium planned community known as High Noon at Arlington Ranch, located in Las Vegas (the "Subject Property"). The High Noon at Arlington Ranch Homeowners Association (the "Association") filed its Complaint on June 7, 2007, at which time the Association was represented by Jim Christensen, Esq. of Quon Bruce Christensen. Without serving a summons and the Complaint, the Association filed an ex parte Motion to Stay the Complaint on August 13, 2007. Following the Court's granting of the same, the Association served a **NRS 40.645** Notice for alleged construction defects on D.R. Horton on January 21, 2008. The Association alleged defects in both the common areas and in each of the 342 condominium units in the 114-building development.

Since serving the **NRS 40.645** Notice, Mr. Christensen's office made a number of efforts to interfere with and/or limit D.R. Horton and its subcontractors' statutorily entitled right to access the Subject Property to complete inspections and repairs.¹ However, on January 12, 2009, Mr. Christensen's office filed a Motion to Withdraw as Counsel with the District Court. That Motion was later granted by the Court and the Association retained Matthew Grode, from Gibb, Giden, Locher, Turner & Senet, to represent its interests in this matter.

With Mr. Grode as counsel, the Association has been working directly with D.R. Horton towards the resolution of this matter through the completion of repairs to the conditions warranting the same. The trial date of June 2, 2010 currently set for this matter fails to allow the parties sufficient time to complete the **NRS** Chapter 40 process and proceed through discovery. Moreover, under the current case

¹ Please see D.R. Horton's prior Motions to Compel on file with the Court.

1 agenda, parties will not be afforded ample time to exhaust efforts towards the
2 informal resolution of this matter. This would contradict both the **NRS** Chapter 40
3 statutory regime and public policy.

4 II.

5 **LEGAL ARGUMENT**

6 **A. The Current Trial Date Fails to Allow Parties Sufficient Time to**
7 **Complete the *NRS* Chapter 40 Process and Discovery.**

8 Pursuant to statute, the Chapter 40 statutory regime "prevail[s] over any
9 conflicting law otherwise applicable to the claim or cause of action." (*NRS*
10 40.635(2)). Before a plaintiff can commence an action for constructional defect
11 claims, the plaintiff **must proceed** through the **NRS** Chapter 40 process. (*NRS*
12 40.645(1)). This process includes the opportunity to inspect and effectuate
13 repairs under **NRS** 40.647 and **NRS** 40.648, and the opportunity to submit the
14 claims to mediation under **NRS** 40.680.

15 For the majority of the pending **NRS** Chapter 40 process, D.R. Horton and
16 its subcontractors have been denied their rights to inspect and repair. The denial
17 of these statutory rights was carried out primarily at the hands of the
18 Association's prior counsel. Further, these delays have impaired the **NRS**
19 Chapter 40 regime and disrupted the pre-litigation repair process.

20 As a result of these delays, D.R. Horton and its subcontractors have only
21 recently been allowed access to the Subject Property to effectuate repairs. While
22 the Association's prior counsel labored to make inspecting and performing
23 repairs as difficult as possible, lately the Association, under new counsel, has
24 shown significant efforts in working with D.R. Horton under **NRS** 40.600 *et seq.*
25 and towards the informal resolution of this matter.

26 While recent efforts are encouraging, over 17 months have passed since
27 D.R. Horton was first served with the Association's **NRS** 40.645 Notice and
28 repairs are only now being effectuated. As such, to anticipate that the parties to

1 be able to complete the repairs throughout the Subject Property, mediate the
2 claims, exhaust settlement discussions and proceed through discovery in the
3 next 13 months is unrealistic. Therefore, D.R. Horton respectfully requests that
4 this Court vacate the current trial date and stay this matter until the parties have
5 completed the repairs and exhausted settlement efforts.

6 **B. The Stay Currently in Effect Is Not Sufficient.**

7 As a result of Plaintiff's prior Ex Parte Motion to Stay Litigation, this matter
8 is currently stayed pending the completion of the **NRS** Chapter 40 process.
9 Under the current stay, the matter will only be stayed until the repairs are
10 completed and mediation is conducted, essentially limiting the time to and
11 manner in which the parties conduct settlement discussions.

12 Under **NRS** 40.680, before a Plaintiff commences an action, the matter
13 must be submitted to mediation. Further, **NRS** 40.695 provides that "statutes of
14 limitation or repose applicable to a claim based on constructional defects
15 governed by **NRS** 40.600 to 40.695, inclusive, are tolled from the time notice of
16 the claim is, until 30 days after mediation is concluded or waived in writing
17 pursuant to **NRS** 40.680."

18 Under the **NRS** 40.695, the statutes of limitation or repose are only tolled
19 until 30 days after mediation. As such, the **NRS** Chapter 40 process would be
20 considered concluded and the stay would be automatically lifted at the end of this
21 30 day period. Even if the parties do not require additional time for settlement
22 negotiations, under the current case agenda, after the stay is lifted, the parties
23 would only have 5 months to complete discovery and 7 months before trial.
24 Therefore, this matter should be stayed pending exhaustion of settlement efforts
25 and the trial date should be vacated.

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1 **C. Granting the Instant Motion Would Benefit Both Parties and Be**
2 **Consistent with Public Policy.**

3 Both parties would benefit if this honorable Court grants D.R. Horton's
4 request. Recently, the parties have begun discussing the potential for resolution
5 of this matter with each other directly. This practice has enabled the parties to
6 progress through the repair process while limiting the costs associated with the
7 same. Allowing the parties an extended period to complete the repairs and
8 engage in settlement discussions would help alleviate the expenses incurred.
9 Considering the great deal of expense incurred by previous counsel, limiting future
10 expenses is essential to increasing the likelihood for the settlement of this matter
11 and is, therefore, consistent with public policy.

12 Public policy promotes the resolution of matters outside of trial. As such,
13 allowing the parties ample time to informally resolve this matter is in the interest of
14 the same. The parties are currently making efforts to this effect and limiting these
15 efforts would be counterproductive and prejudicial to both parties. Therefore, D.R.
16 Horton respectfully requests that this Court vacate the current trial date and stay
17 this litigation pending the exhaustion of efforts towards settlement.

18 **III.**

19 **CONCLUSION**

20 Based on the foregoing, D.R. Horton respectfully requests that this
21 honorable Court vacate the current trial date and stay this matter until the parties
22 have completed the entirety of the Chapter 40 process including performing
23 repairs and participation in mediation, at which time the parties may, if necessary,
24 pursue or re-initiate the Action with the mutual agreement of the parties

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1 or leave from the Court and after providing, or moving for, an Amended Complaint
2 which takes into account the repairs completed to that date.

3 DATED: June 29, 2009

WOOD, SMITH, HENNING & BERMAN LLP

4
5 By: 

6 JOEL D. ODOU

Nevada Bar No. 7468

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1 Petitioner, D.R. Horton, Inc. (“Horton”) submits the following Reply to Real
2 Party in Interest, Arlington Ranch Homeowners Association’s (the “Association”)
3 Answering Brief:

4
5 **I. HORTON SEEKS A WRIT OF PROHIBITION RESTRAINING**
6 **THE DISTRICT COURT FROM ACTING IN EXCESS OF ITS**
7 **SUBJECT MATTER JURISDICTION.**

8 Horton presents one issue for the Supreme Court’s consideration in its
9 Petition for Writ of Prohibition and/or Mandamus. The issue for this Court’s
10 consideration is whether the jurisdiction of the District Court to entertain, hear and
11 grant the Association’s Ex Parte Motion to Stay Service and Enlarge Time for
12 Service on August 13, 2007 (“Ex Parte Motion”) was properly invoked. Horton
13 argues this proceeding and the subsequent Order entered by the District Court on
14 August 13, 2007 (the “August 2007 Stay”) were in excess of the District Court’s
15 subject matter jurisdiction. In order to determine whether the jurisdiction of the
16 District Court was properly invoked, the Supreme Court must determine if the pre-
17 litigation and jurisdictional requirements mandated by NRS 40.645 were exhausted
18 prior to the filing of the Complaint and whether grounds existed to issue a stay
19 pursuant to NRS 40.647(2)(b). In order to make this determination, the Supreme
20 Court must resolve whether claims for breach of the implied and express
21 warranties (hereinafter collectively “warranty claims”) are governed by NRS
22 40.600 *et seq.* (hereinafter “Chapter 40”) and therefore a stay was unwarranted as
23 NRS 40.695 tolled the applicable statute of limitations as to these claims. See,
24 *Landreth v. Malik*, 251 P.3d 163, 166, 127 Nev. Adv. Op. 16 (2011) where the
25 Supreme Court of Nevada, in order to determine whether a family court division of
26 a judicial district lacked subject matter jurisdiction to preside over matters outside
27
28

1 the family court division's jurisdiction, examined and analyzed Nevada
2 Constitution Article 6, Section 6(2), NRS 3.223 and case law interpreting both to
3 reach its determination.

4 Hence the only “issue” raised on appeal for this Court’s consideration is the
5 District Court’s lack of subject matter jurisdiction. It is well established Nevada
6 law lack of subject matter jurisdiction cannot be waived and can even be raised for
7 the first time on appeal. *Vaile v. District Court*, 118 Nev. 262, 275 (2002).

8 Moreover, the writ of prohibition is unquestionably the appropriate remedy to hold
9 proceedings in an inferior Court are not within the jurisdiction of such court. *G*
10 *and M Properties v. District Court*, 95 Nev. 301, 304, 594 P.2. 714, 715 (1979).

11 Accordingly, Horton does not raise for the first time on appeal it was entitled
12 to a dismissal of the Complaint under NRS 40.647(2)(a) as argued by the
13 Association (Answering Brief, 14:7-14).¹ It raises the issue the District Court acted
14 in excess of its subject matter jurisdiction on August 13, 2007, the determination of
15 which requires the resolution of underlying issues including whether the
16 Association exhausted its pre-litigation requirements prior to filing its Complaint
17 and whether warranty claims are governed by Chapter 40.

18
19 **A. The Association Ignores or Fails to Understand Horton’s Legal**
20 **Argument The District Court Acted In Excess of Its Subject Matter**
21 **Jurisdiction.**

22 The Association either ignores or completely misunderstands Horton’s legal
23 argument and the concept of subject matter jurisdiction to hear a particular motion
24 and enter an order as opposed to subject matter jurisdiction over an entire action.

25 ¹ Horton does agree the Action should have been dismissed but it does not seek that
26 ruling from the Supreme Court. Horton seeks only a ruling the District Court acted
27 in excess of its subject matter jurisdiction when it heard and adjudicated the Ex
28 Parte Motion and entered the August 2007 Stay, which rendered that order a
nullity.

1 Horton does not contend the District Court lacked subject matter during the period
2 of the August 2007 Stay, it contends it lacked subject matter jurisdiction to hear the
3 Ex Parte Motion and to issue the August 2007 Stay on August 13, 2007. There is a
4 fundamental distinction between lack of subject matter jurisdiction in the strict
5 sense over an entire action and lack of subject matter to act on a particular matter
6 before the Court, said to be an act “in excess of jurisdiction.”

7 The Association completely misconstrues Horton’s argument and contends
8 if the Court did not have subject matter over the *action* until the completion of pre-
9 litigation process then it follows that NRCP 41(e)’s five year prescriptive period
10 did not begin to run until the subject matter jurisdiction was satisfied on April 14,
11 2008, the date the District Court determined the August 2007 Stay was lifted
12 (Answering Brief, 1: 12-16). The Association also reasons NRCP 41(e)’s five year
13 prescriptive period is tolled where the jurisdiction of a court was suspended, based
14 on California Code of Civil Procedure section 583.340(b), or where a stay was
15 ordered, based on *Boren v. North Las Vegas*, 98 Nev. 5, 638 P.2d. 404 (1982)
16 (“*Boren*”) which provides “any period during which the parties are prevented from
17 bringing the action to trial by reason of a stay order shall not be computed in
18 determining the five year period of Rule 41(e)” *Id.* at 6.

19 Horton does not contend the District Court’s subject matter jurisdiction was
20 suspended, it argues it never existed for the purpose of hearing and determining the
21 Ex Parte Motion and issuance of the August 2007 Stay. Moreover, whether the
22 time period of the August 2007 Stay tolled NRCP 41(e)’s five year prescriptive
23 period pursuant to *Boren* is irrelevant to the arguments advanced by Horton in *this*
24 Writ Petition. That argument is addressed, in the alternative, in another Writ
25 Petition filed by Horton, Docket No. 66101, and accepted by the Supreme Court
26 for review wherein Horton argues *Boren* requires an examination into the diligence
27 of the parties to determine whether a stay order tolls Rule 41(e)’s five year
28

1 prescriptive period.² In this Writ Petition, Horton contends the August 2007 Stay
2 is *void*, as if it never existed. Thus, there is no time period to toll. The Complaint
3 was filed on June 7, 2007 and the five year prescriptive period began to run on this
4 date as mandated by NRCP 3(c) which provides a civil action is commenced by the
5 filing of a complaint. Without the tolling of the time period of the August 2007
6 Stay, the five year prescriptive period expired on December 23, 2013 and this case
7 must be dismissed for want of prosecution pursuant to NRCP 41(e).

8 **B. The District Court Lacked Subject Matter Jurisdiction to Hear and**
9 **Determine the Ex Parte Motion and Issue the August 2007 Stay.**

10 The California Supreme Court in *Abelleira v. District Court of App., Third*
11 *Dist.* (1941) 17 C.2d 280, 288, 109 P.2d 942 (“*Abelleira*”) cited with approval by
12 the Nevada Supreme Court in *Del Papa v. Steffen*, 112 Nev. 369, 375, 915 P.2d
13 245 (1996) sets forth the distinction between acts in excess of subject matter
14 jurisdiction, as argued herein by Horton, and a complete lack of subject matter
15 jurisdiction over the action, as argued by the Association. A lack of jurisdiction in
16 its fundamental or strict sense results in an entire absence of power to hear or
17 determine the case, an absence of authority over the subject matter or the parties.
18 On the other hand, a court may have jurisdiction in the strict sense but nevertheless
19 lack “jurisdiction” (or power) to act except in a particular manner, or to give
20 certain kinds of relief, or to act without the occurrence of certain procedural
21 prerequisites. When a court fails to conduct itself in the manner prescribed, it is
22 said to have acted in excess of jurisdiction.” See generally, 2 *Witkin, Cal.*
23 *Procedure* (5th ed. 2008) Jurisdiction, §§ 285, pp. 575–576, 891–892.)

24 The *Abelleira* court explained lack of subject matter jurisdiction in the strict
25 sense, over an entire action:

26
27 ²D.R. Horton v. Eight Judicial District Court, filed July 16, 2014, Docket No.
28 660101.

1 Familiar to all lawyers are such examples as these: A state court has no
2 jurisdiction to determine title to land located outside its territorial borders,
3 for the subject matter is entirely beyond its authority or power [citations
4 omitted]. A court has no jurisdiction to adjudicate upon the marital status of
5 persons when neither is domiciled within the state [citations omitted]. A
6 court has no jurisdiction to render a personal judgment against one not
7 personally served with process within its territorial borders, under the rule of
8 *Pennoyer v. Neff*, [citations omitted]. A court has no jurisdiction to hear or
9 determine a case where the type of proceeding or the amount in controversy
10 is beyond the jurisdiction defined for that particular court by statute or
11 constitutional provision [citations omitted].
12 *Id.* at 288.

13 *Abelleira* further explained a lack of subject matter jurisdiction where a
14 Court acts in “excess of jurisdiction” on a particular matter before it:

15 But in its ordinary usage the phrase ‘lack of jurisdiction’ is not limited to
16 these fundamental situations. For the purpose of determining the right to
17 review by certiorari, restraint by prohibition, or dismissal of an action, a
18 much broader meaning is recognized. Here it may be applied to a case
19 where, though the court has jurisdiction over the subject matter and the
20 parties in the fundamental sense, it has no ‘jurisdiction’ (or power) to act
21 except in a particular manner, or to give certain kinds of relief, or to act
22 without the occurrence of certain procedural prerequisites. Thus, a probate
23 court, with jurisdiction of an estate, and therefore over the appointment of an
24 administrator, nevertheless acts in excess of jurisdiction if it fails to follow
25 the statutory provisions governing such appointment [citations omitted]. The
26 Superior Court may have jurisdiction over a cause of action and the parties
27 to a suit for libel, but in the case of nonresidents, a bond for costs is required
28 by statute, and unless such bond is filed, it is without jurisdiction to proceed,
and will be restrained by writ of prohibition [citations omitted]. ... A court
may have jurisdiction to grant a new trial after motion based upon proper
statutory grounds, but has no jurisdiction to make the order unless the
moving party has given his notice of intention within the prescribed statutory
time [citations omitted]....”

Id. at 289.

Based on the foregoing the Supreme Court of California in *Abelleira*
concluded:

The concept of jurisdiction embraces a large number of ideas of similar
character, some fundamental to the nature of any judicial system, some
derived from the requirement of due process, some determined by the
constitutional or statutory structure of a particular court, and some based
upon mere procedural rules originally devised for convenience and
efficiency, and by precedent made mandatory and jurisdictional. Speaking
generally, any acts which exceed the defined power of a court in any
instance, whether that power be defined by constitutional provision, express
statutory declaration, or rules developed by the courts and followed under
the doctrine of stare decisis, are in excess of jurisdiction, in so far as that

1 term is used to indicate that those acts may be restrained by prohibition or
annulled on certiorari.

2 *Id.* at 291.

3 Horton does not assert the District Court lacked subject matter jurisdiction in
4 the strict sense over the action until the completion of the Chapter 40 process. It
5 contends it lacked subject matter jurisdiction over the Ex Parte Motion, the
6 proceeding, and exceeded its power because the mandatory and jurisdictional
7 requirements of NRS 40.645 were not exhausted. Once subject matter jurisdiction
8 is questioned, the Court's inquiry is limited to a determination of whether the act
9 complained of was in excess of jurisdiction. The Court is not, therefore, concerned
10 with the merits, nor in correcting or modifying the order made by the court. *Iveson*
11 *v. Second Judicial District*, 66 Nev. 145, 154, 206 P.2d 755 (1949).

12 *U.S. Homes Corp v. Parker-Hansens*, 2012 WL 5879807 (D. Nev. 2012)
13 recently addressed the jurisdictional mandates of NRS 40.645 and found the
14 federal court could maintain subject matter jurisdiction over the action while
15 simultaneously lacking subject matter jurisdiction over the counter -claims of the
16 Parker-Hansens for their failure to meet the pre-litigation notice requirements of
17 NRS 40.645. The federal court held:

18
19 This court has subject matter jurisdiction over the action based upon
20 diversity jurisdiction, and may enforce rights and obligations under NRS
21 Chapter 40. To the extent this court is or may be enforcing rights or
22 obligations under NRS Chapter 40, it is only finding that the Parker-
23 Hansens have not met the mandatory pre-litigation requirements under NRS
24 Chapter 40. The court may grant declaratory relief even if it means enforcing
those rights and obligations under NRS Chapter 40, while simultaneously
lacking subject matter jurisdiction over the counterclaims because the
Parker-Hansens have not met pre-litigation requirements under the very
same statutory provisions. Subject matter jurisdiction over the action and
subject matter jurisdiction over the counterclaims are dichotomous.

25 *Id.*, at 7.

26 Nevada state law is consistent. "Where a statute affords a remedy, the
27 jurisdictional requirements of the statute must be observed or the court is without
28

1 jurisdiction to act. *Iveson v. Second Judicial District*, 66 Nev. 145, 154, 206 P.2d
2 755 (1949). NRS 40.645 affords the remedies for failure to serve a Chapter 40
3 Notice prior to the filing of a complaint: dismiss the action or issue a stay if the
4 requirements are met. As the requirements for a stay were not met because the
5 warranty claims were governed by Chapter 40 and therefore the warranty claims
6 would not have been procedurally barred, the District Court was without
7 jurisdiction to issue the August 2007 Stay. See also, *G and M Properties*, 95 Nev.
8 301, 305 (1979) wherein the Nevada Supreme Court confirmed “where a trial court
9 misconceives the meaning of a mandatory statute and as a consequence acts when
10 the law expressly enjoins it from acting, [the court is without jurisdiction and] writ
11 relief is mandated.” The District Court misconstrued the meaning of NRS
12 40.647(2)(b) when it determined warranty claims “might not” be governed by
13 Chapter 40 and issued the August 2007 Stay on this basis.

14 Accordingly, the Association’s arguments Rule 41(e)’s prescriptive period is
15 tolled when jurisdiction is suspended has no application here where jurisdiction
16 was not suspended in the strict sense as contemplated by California Code of Civil
17 Procedure section 583.340(b) as argued by the Association. *Schwenke v. J & P*
18 *Scott, Inc.* 205 Cal.App.3d 71, 79, 252 Cal. Rptr. 91(1988)(CCP section
19 583.340(b) applies to jurisdiction in the strict sense, a total lack of jurisdiction,
20 unlike the present case where the District Court acted in “excess” of its
21 jurisdiction). Nor is the Association’s argument Rule 41(e) was tolled during the
22 time period of the August 2007 Stay relevant. Horton argues the August 2007 Stay
23 is void so there is nothing to toll. Based on the foregoing, the Association
24 completely failed to address or oppose Horton’s argument the District Court acted
25 in excess of its subject matter jurisdiction when it issued the August 2007 Stay
26 instead advancing irrelevant and flawed arguments regarding a lack of subject

1 matter jurisdiction over the entire action and principles of tolling Rule 41(e)'s
2 prescriptive period which have no application.

3 **C. The August 2007 Stay is Void not Voidable.**

4 As the jurisdictional requirements of NRS 40.645, service of a Chapter 40
5 Notice, must be observed in order to invoke the subject matter jurisdiction of the
6 Court, the August 2007 Stay is void not voidable. *State Indus. Ins. System v.*
7 *Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). *Cf. Vaile v. Dist. Ct.*, 118
8 Nev. 262, 272, 44 P.3d 506, 512–13 (2002), “when evidence before the court
9 provides a colorable case for *personal jurisdiction*, a district court order is merely
10 voidable rather than void.” Unlike lack of personal jurisdiction, however, a “lack
11 of subject matter jurisdiction is a jurisdictional defect of the fundamental type
12 where there is ‘an entire absence of power to hear or determine the case.’ ” *Shisler*
13 *v. Sanfer Sports Cars, Inc.*, 167 Cal.App.4th 1, 83 Cal.Rptr.3d 771, 775 (2008)
14 (quoting *Abelleira v. District Court of Appeal, Third District*, 17 Cal.2d 280, 109
15 P.2d 942, 947 (1941)). Thus, when the district court rendering a judgment lacks
16 subject matter jurisdiction, the judgment is definitively void. See, *Vaile*, 118 Nev.
17 at 275, 44 P.3d at 515; *Del Papa v. Steffen*, 112 Nev. 369, 375, 915 P.2d 245, 249
18 (1996); *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990); *Harrah's*
19 *Club v. Nevada State Gaming Control Bd.*, 104 Nev. 762, 764, 766 P.2d 900, 901–
20 02 (1988); *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273,
21 1274 (1984).

22
23 **D. Horton Cannot Waive or Be Judicially Estopped From Asserting the
August 2007 Stay is Void.**

24 The Association fails to provide any response to Horton’s argument the
25 doctrine of judicial estoppel cannot be invoked to prevent Horton from arguing the
26 August 2007 Stay is void. The Association does, however, contend Horton waived
27 its right to challenge the application of NRS 40.647(2)(b) by bringing its own
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1 Motion to Stay Litigation and Vacate Trial Date that was granted by the District
2 Court (Answering Brief, 15:9-16:16). The Association argues: “Pursuant to
3 [Horton’s] request the District Court granted the stay request “until the parties have
4 completed the entirety of the Chapter 40 process” but denied its request to vacate
5 the trial date. Therefore, [Horton] cannot now complain that the [August 2007
6 Stay] misapplied NRS 40.647(2) when it requested and obtained the exact same
7 relief that it now complains of.” (Id.) Both arguments lack merit.

8 First, Horton does not challenge the merits of the August 2007 Stay as this
9 would be improper. While it does disagree there were grounds to issue the August
10 2007 Stay, it challenges whether the District Court had subject matter jurisdiction
11 to *issue* the August 2007 Stay not its merits. “Once subject matter jurisdiction is
12 questioned, the Court’s inquiry is limited to a determination of whether the act
13 complained of was in excess of jurisdiction. The Court is not, therefore, concerned
14 with the merits, nor in correcting or modifying the order made by the court.”
15 *Iveson v. Second Judicial District*, 66 Nev. 145, 154, 206 P.2d 755 (1949). As lack
16 of subject matter jurisdiction cannot be waived, Horton has the right on appeal to
17 question the District Court’s exercise of jurisdiction. *Vaile v. District Court*, 118
18 Nev. 262, 268 (2002).

19 Moreover, Horton did not seek a stay pursuant to NRS 40.647(2)(b). It
20 sought a stay of the Action due to the Association’s previous denial of Horton’s
21 right to inspect and repair which impaired the pre-litigation repair process. Horton
22 requested the August 2009 Stay due to those prior abuses which prevented it
23 sufficient time to complete the Chapter 40 process and proceed through discovery
24 and in addition to pursue settlement efforts. (*D.R. Horton Inc.’s Motion to Stay*
25 *Litigation and Vacate Trial Date* attached hereto as **Exhibit “1”**, 3:14-4:3).
26 Neither Horton nor the August 2009 Stay make any mention of NRS 40.647(2)(b)
27 (*Petitioner’s Appendix*, Vol. 1, 000039-000040, 2:5-6).

1 Although the Association failed to address the doctrine of judicial estoppel,
2 Horton reiterates it has no application as Horton has never taken a position
3 contrary to the position it asserts in this Writ: the District Court acted in excess of
4 its subject matter jurisdiction when it issued the August 2007 Stay. The doctrine of
5 judicial estoppel should be sparingly applied only in cases where a party has taken
6 two inconsistent positions in judicial or quasi-judicial proceedings, the party
7 successfully asserted the first position, and the party did not take the first position
8 as a result of ignorance, fraud, or mistake. *Mainor v. Nault*, 120 Nev. 750, 765, 101
9 P.3d 308, 318 (2004) (whether the respondent was the child's biological father was
10 neither contested nor resolved in the proceeding to allow the appellant to adopt the
11 child and the Court therefore deemed judicial estoppel inapplicable because the
12 party had not successfully asserted an inconsistent position in a prior proceeding as
13 the district court's approval of a settlement agreement did not amount to a judicial
14 endorsement of the party's position); *Breliant v. Preferred Equities Corp.*, 112
15 Nev. 663, 669, 918 P.2d 314, 318 (1996) (concluding that the application of
16 judicial estoppel would be inappropriate when a party has not successfully asserted
17 a previous position).

18 Horton questions whether the doctrine of judicial estoppel may ever be
19 applied to confer subject matter jurisdiction. While the doctrine of judicial
20 estoppel has been applied to confer personal jurisdiction, *Vaile v. Dist. Ct.*, 118
21 Nev. 262, 268, 44 P.3d 506, 512–13 (2002), the Nevada Supreme Court has made
22 it clear, the doctrine of judicial estoppel cannot confer subject matter jurisdiction in
23 the context of the Uniform Child Custody Jurisdiction Act (UCCJEA). *Friedman*
24 *v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 264 P.3d 1161,
25 1168 127 Nev. Adv. Op. 7 (2011) “A court that lacks subject matter jurisdiction
26 under the UCCJEA does not acquire it by estoppel. It is a well-established
27 principle that ‘no action of the parties can confer subject-matter jurisdiction upon a
28

1 court' where the court has no authority to act." Regardless, the doctrine is
2 inapplicable to the facts of this case.

3 **II. THE DISTRICT COURT HAD TO DETERMINE THE**
4 **WARRANTY CLAIMS WERE NOT GOVERNED BY**
5 **CHAPTER 40 IN ORDER TO ISSUE THE AUGUST 2007**
6 **STAY.**

7 The Association argues the August 2007 Stay made no determination as to
8 Chapter 40's application to the warranty claims although it agrees it is "established
9 Nevada jurisprudence" warranty claims are governed by Chapter 40 (Answering
10 Brief, 17: 1-8). The Complaint was filed on June 7, 2007 prior to service of the
11 notice required by NRS 40.645. The Ex Parte Motion, filed on August 10, 2007,
12 sought to enlarge the time for service of the summons and complaint based on
13 good cause for delaying service arguing NRS 40.647(2)(b) granted the Court
14 authority to stay a construction defect complaint pending compliance with Chapter
15 40 and the filing of the Chapter 40 Notice would trigger good faith efforts toward
16 settling the matter. (*Petitioner's Appendix*, Vol. I., 000013 -000031, 5:2-5). In
17 making these arguments, the Association represented it was concurrently serving
18 its Chapter 40 Notice which would toll the applicable statute of limitations for all
19 causes of action. (*Id.* 3:13-15). The Association asserts now, although it knew the
20 warranty claims were governed by Chapter 40, it was concerned Horton might
21 successfully argue the warranty claims were governed by NRS 116.4113 and
22 116.4114, not Chapter 40, and the tolling provisions of NRS 40.695 inapplicable
23 (*Id.* at 3:15-18; Answering Brief, 17:9-14). The August 2007 Stay provides: "That
24 Plaintiff's Complaint is hereby stayed until the completion of the NRS 40.600 *et*
25 *seq.* pre-litigation process." (*Petitioner's Appendix*, Vol. I., 000039-000040, 2:5-6)

26 What the Association fails to understand is the only way the District Court
27 had authority to issue a stay pursuant to NRS 40.647(2)(b) was to find, with
28 certainty, the warranty claims *were not* governed by Chapter 40. That is, NRS
40.645 pre- litigation requirements must be exhausted or the case dismissed

1 without prejudice unless dismissal *would* prevent the claimant from filing another
2 action because the action would be procedurally barred by the statute of limitations
3 or statute of repose, then the Court shall stay the proceedings pending compliance
4 with those provisions by the claimant. This is mandatory and the Court has no
5 discretion. *U.S. Homes Corp. v. Parker-Hansen*, 2012 WL 5879807 (D. Nev.
6 2012. NRS 40.647(2) provides the Court *shall* dismiss the action or *shall* issue a
7 stay only if the action *would be* procedurally barred. The District Court had no
8 authority to issue a stay if the claims “*may not*” be governed by Chapter 40 as
9 asserted by the Association (*Petitioner’s Appendix*, Vol. I., 000013 -000031, 5: 15-
10 19). *U.S. Homes Corp*, 2012 WL 5879807 at footnote 6, finding the Parker-
11 Hansen’s claim the statute of limitations “may have already run” cannot be the sole
12 basis for staying the counterclaims under NRS 40.647(2)(b). See also, *Lexecon*
13 *Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (stating
14 “the mandatory ‘shall’ normally creates an obligation impervious to judicial
15 discretion.”). Thus, before the District Court could issue a stay pursuant to NRS
16 40.467(2)(b), it had to determine dismissal “would” prevent the Association from
17 later filing its warranty claims, thus, it had to determine warranty claims were not
18 governed by Chapter 40 and the statute of limitations therefore were not tolled
19 pursuant to NRS 40.695. This is the error committed by the District Court:
20 warranty claims *are* governed by Chapter 40 and the District Court was required to
21 dismiss the action without prejudice and force the Association to serve its Chapter
22 40 Notice. As the requirements of NRS 40.645 are mandatory and jurisdictional,
23 when a claimant does not comply with the notice requirements, jurisdiction cannot
24 be invoked and the court has no authority to act.

25 Accordingly, the Association is incorrect “nothing in the [August 2007 Stay]
26 reflected any misapplication of law or legal conclusion that Chapter 40 does not
27 encompass warranty claims” (Answering Brief, 18:6-9). The fact the August 2007
28

1 Stay was imposed demonstrates with certainty the District Court made a
2 determination the warranty claims were not governed by Chapter 40. Otherwise,
3 the District Court had to dismiss the action pursuant to NRS 40.647(2)(a) as there
4 was no showing the warranty claims would be procedurally barred as the
5 Association represented it was concurrently and immediately serving its Chapter
6 40 Notice which would have tolled the statute of limitations.

7 **III. THE WRIT PETITION MUST BE GRANTED AS THE**
8 **ASSOCIATION FAILED TO OPPOSE HORTON'S**
9 **ARGUMENT THE DISTRICT COURT LACKED SUBJECT**
10 **MATTER JURISDICTION TO ISSUE THE AUGUST 2007**
11 **STAY.**

12 Due to the Association's complete misunderstanding of subject matter
13 jurisdiction and the arguments advanced by Horton, the Association failed to
14 provide any factual or legal arguments opposing Horton's contention the District
15 Court acted in excess of jurisdiction in imposing the August 2007 Stay, the pre-
16 litigation exhaustion requirements of NRS 40.645 are jurisdictional and mandatory
17 and the August 2007 Stay is therefore void. Horton submits this failure to address
18 Horton's arguments in its Answering Brief amounts to confessed error on these
19 issues. *In re Parental Rights as to A.L.* 2014 WL 5893450 (2014); NRAP 31(d);
20 see also *Bates v. Chronister*, 100 Nev. 675, 681–82, 691 P.2d 865, 870 (1984)
21 (concluding that respondent confessed error by failing to respond to appellant's
22 argument).

23 As to the arguments presented by Horton regarding the District Court's
24 subject matter jurisdiction, the Association responds:

25 "It is irrelevant to the analysis whether the stay order was valid or void,
26 because parties and their counsel are categorically prohibited from simply
27 refusing to comply with court orders (Answering Brief, 7:7-10).
28 "Therefore, even if the [August 2007 Stay] was void for want of jurisdiction,
as asserted by [Horton], it is a distinction without a difference because
NRCF 41(e) would nonetheless be tolled" (Id. at 12:18-21).


1 Accordingly, the Association provides no opposing argument to Horton's
2 contention the District Court lacked subject matter jurisdiction to issue the August
3 2007 Stay, contending the argument is irrelevant. On this basis alone, the
4 Association admits, by confessed error, the District Court lacked subject matter
5 jurisdiction when it entered the Chapter 40 Stay rendering it void.

6 IV. CONCLUSION

7
8 For the foregoing reasons, Horton respectfully requests this Honorable Court
9 issue a writ of prohibition instructing the District Court to refrain from acting in
10 excess of its subject matter jurisdiction, to vacate the August 2007 Stay and
11 dismiss the action for want of prosecution pursuant to NRCPP 41(e). The
12 Association failed to exhaust the pre-litigation requirements mandated by NRS
13 40.645 and there were no grounds for the issuance of a stay pursuant to NRS
14 40.647(2)(b). As the requirements are jurisdictional and mandatory, the District
15 Court acted in excess of its subject matter jurisdiction and the August 2007 stay is
16 void. Without the benefit of tolling the period of the August 2007 Stay, Rule
17 41(e)'s five year prescriptive period expired on December 23, 2013 and the Action
18 must be dismissed for want of prosecution.

19 DATED this 8 day of December, 2014.

20
21 **WOOD, SMITH, HENNING & BERMAN LLP**

22
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CERTIFICATE OF SERVICE

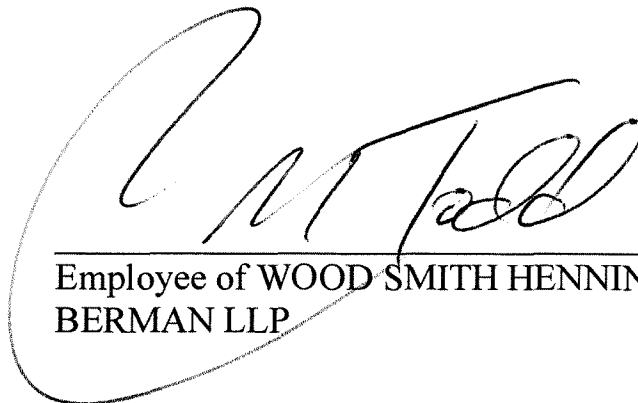
I HEREBY CERTIFY that on the 2 day of December, 2014, I submitted for electronic filing and electronic service the foregoing PETITIONER D.R. HORTON, INC.'S REPLY IN SUPPORT OF ITS PETITION FOR WRIT OF PROHIBITION AND/OR MANDAMUS.

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