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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 AZURE MANOR/RANCHO DE PAZ  
8 HOMEOWNERS ASSOCIATION,

Case No. 2:14-CV-2222 JCM (NJK)

ORDER

Plaintiff(s),

9  
10 v.

11 D.R. HORTON, INC.,

12 Defendant(s).

13 Presently before the court is defendant D.R. Horton, Inc.'s motion to stay litigation and  
14 motion to dismiss plaintiff Azure Manor/Rancho de Paz Homeowners Association's class action  
15 allegations. (Docs. ## 5, 6). The court previously entered an order granting defendant's motion to  
16 dismiss upon plaintiff's failure to timely respond to the motion after weighing the factors under  
17 Ghazali. See Ghazali v. Moran, 46 F.3d 52, 53 (9th Cir. 1995); (doc. # 11). Plaintiff objected to  
18 the order and moved for relief from the judgment under F.R.C.P 60(b)(1). (Doc. # 13).

19 Plaintiff argued that the case should be reopened because the failure to respond resulted  
20 from counsel's calendaring deficiency and that dismissal would result in substantial prejudice to  
21 plaintiff due to the statute of limitations period. (Id.). Although the court stated that it did "not take  
22 lightly counsel's failure to observe and adhere to deadlines[,] the court ultimately reopened the  
23 case because "dismissal . . . without an opportunity to respond . . . would unjustly prejudice  
24 plaintiff." (Doc. # 16 at 5–6). Thus, plaintiff was afforded an opportunity to respond and did so.  
(Docs. ## 16, 17). The defendant submitted a reply to the response. (Doc. # 18).

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1       **I.       Background**

2           This lawsuit concerns 103 homes constructed by D.R. Horton within a 202-home  
3 community; the remaining homes were developed and/or constructed by U.S. Home Corp.<sup>1</sup>  
4 Plaintiff filed this action in state court as a single-family home class action suit concerning  
5 construction defects of the residential homes within the plaintiff's community. (Doc. # 2 at 2–5).  
6 The defendant removed the action to this court. (Doc. # 1). D.R. Horton filed a motion to stay  
7 litigation and a motion to dismiss the plaintiff's class action allegations. (Doc. ## 5, 6). The motion  
8 alleges that plaintiff has failed to meet the notice requirements for construction defect claims under  
9 NRS Chapter 40 and requests that the court stay the proceedings until plaintiff has complied with  
10 the pre-litigation requirements. Defendant also requests that the court dismiss the class action  
11 allegations because defendant argues that class actions generally do not apply to single-family  
home construction defect actions due to the uniqueness of each home.

12       **II.       Legal Standard**

13           A. Standing

14           As an initial matter, the court must resolve the defendant's claim that the HOA lacks  
15 standing to bring the action on behalf of the homeowners. (See Doc. #6 at 7-10). See *Employers-*  
16 *Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920,  
17 923 (9th Cir. 2007) (standing is a threshold jurisdictional issue in any federal action). "A suit  
18 brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III  
federal court therefore lacks subject matter jurisdiction over the suit. In that event, the suit should  
19 be dismissed under Rule 12(b)(1)." *MVP Asset Mgmt. (USA) LLC v. Vestbirk*, 2:10-CV-02483-  
20 GEB, 2012 WL 2873371 (E.D. Cal. July 12, 2012) (quoting *Cetacean Cmty. v. Bush*, 386 F.3d  
21 1169, 1174 (9th Cir. 2004)).

22           The Supreme Court has held that in order to establish Article III standing for a particular  
23 law suit, a plaintiff must show that he has suffered an injury-in-fact, that the injury is traceable to  
24 the defendant, and that a favorable disposition of the suit would redress his injury. See *Friends of*  
25 *the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

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28           <sup>1</sup> Plaintiff also filed a separate complaint against U.S. Home Corporation and other  
defendants in case number 2:15-cv-00002-JAD-CWH.

1           B. Motion to dismiss

2           The court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief  
3 can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "[a] short and  
4 plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).  
5 Although rule 8 does not require detailed factual allegations, it does require more than labels and  
6 conclusions. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Furthermore, a formulaic  
7 recitation of the elements of a cause of action will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 677  
8 (2009) (citation omitted). Rule 8 does not unlock the doors of discovery for a plaintiff armed with  
nothing more than conclusions. *Id.* at 678–79.

9           To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state  
10 a claim to relief that is plausible on its face." *Id.* A claim has facial plausibility when the plaintiff  
11 pleads factual content that allows the court to draw the reasonable inference that the defendant is  
12 liable for the misconduct alleged. *Id.* When a complaint pleads facts that are merely consistent  
13 with a defendant's liability, and shows only a mere possibility of entitlement, the complaint does  
14 not meet the requirements to show plausibility of entitlement to relief. *Id.*

15           In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply  
16 when considering a motion to dismiss. *Id.* First, the court must accept as true all of the allegations  
17 contained in a complaint. However, this requirement is inapplicable to legal conclusions. *Id.*  
18 Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*  
19 at 678. Where the complaint does not permit the court to infer more than the mere possibility of  
20 misconduct, the complaint has "alleged – but not shown – that the pleader is entitled to relief." *Id.*  
21 at 679. When the allegations in a complaint have not crossed the line from conceivable to plausible,  
plaintiff's claim must be dismissed. *Twombly*, 550 U.S. at 570.

22           The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d 1202,  
23 1216 (9th Cir. 2011). The *Starr* court held,

24                 First, to be entitled to the presumption of truth, allegations in a complaint or  
25 counterclaim may not simply recite the elements of a cause of action, but must  
26 contain sufficient allegations of underlying facts to give fair notice and to  
27 enable the opposing party to defend itself effectively. Second, the factual  
allegations that are taken as true must plausibly suggest an entitlement to relief,  
such that it is not unfair to require the opposing party to be subjected to the  
expense of discovery and continued litigation.

28           *Id.*

1     **III.     Discussion**

2         A. *HOA's standing to bring suit*

3             NRS §§ 40.645(3) and 116.3102(d) establish standing for an HOA in constructional defect  
4 cases under certain circumstances. NRS 40.645(2) states that “[a] representative of a homeowners’  
5 association may send notice pursuant to this section on behalf of an association if the representative  
6 is acting within the scope of the representative’s duties pursuant to Chapter 116 or 117 of NRS.”

7             Under NRS § 116.3102(d), a homeowners’ association “may institute, defend[,] or  
8 intervene in litigation or in arbitration, mediation[,] or administrative proceedings in its own name  
9 on behalf of itself or two or more units’ owners on matters affecting the common-interest  
10 community.” The statute continues to state “[t]he [homeowners] association may not institute,  
11 defend[,] or intervene in litigation or in arbitration, mediation[,] or administrative proceedings in  
12 its own name on behalf of itself or units’ owners with respect to an action for a constructional  
13 defect pursuant to NRS 40.600 to 40.695, inclusive, and sections 2 and 3 of this act unless the  
14 action pertains exclusively to common elements.” NRS § 116.3102(d) (emphasis added).

15             Defendant argue 1) that class action treatment is improper for single-family residence  
16 constructional defect actions and 2) that because the NRS Chapter 40 pre-litigation requirements  
17 are not met, the HOA may not represent homeowners.

18             Under NRCP 23(c)(1), a district court may:

19             grant class action certification on a conditional basis. Conditional certification  
20 notifies the parties that a court may exercise its discretion to later revoke  
21 certification in complex litigation cases. Thus, in cases that appear complex, a  
22 district court should grant conditional class action certification, if appropriate, and  
23 then reevaluate the certification in light of any problems that appear post-discovery  
24 or later in the proceedings. At such point of difficulties, “the district court must  
25 reevaluate class action certification under NRCP 23.

26             Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 858–59 (2005).

27             The court finds that conditional classification is appropriate at this point in time considering  
28 the complexity of the case and the fact that certain pre-litigation requirements have not yet been  
met, as discussed below. NRCP 23 provides four elements that must be met for certification of  
class actions. See NRCP 23. The court has been provided with factual allegations regarding three  
homes, which are allegedly similarly situated within the community. A meaningful analysis of the  
NRCP 23 requirements with respect to those allegations will not be possible until the parties have  
conclusively fulfilled the pre-litigation procedural requirements of Chapter 40. Taking the  
plaintiff’s allegations as true, however, the court finds there is at least some commonality of the

1 defects in the tested homes. This provides the court a sufficient basis for granting a conditional  
2 class certification, which may be reevaluated later.

3 If the court determines later that class certification is inappropriate, then the similarly-situated  
4 construction defects may be appropriate for litigation via joinder action or consolidated action. See  
5 Shuette, 121 Nev. at 859. Again, the court cannot make this determination until the parties comply  
6 with the pre-litigation requirements. Accordingly, the court will conditionally grant class action  
7 certification. The HOA has standing to sue. The question of how the action should be classified—  
8 class action, joinder, consolidated, or otherwise—will be preserved for consideration after pre-  
litigation requirements have been met.

9 B. Motion to stay

10 This court now turns to the parties' request to stay the proceedings. This court concludes  
11 that the stay is appropriate. Under NRS Chapter 40, construction defect actions require notice,  
12 opportunity to inspect and cure alleged defects, and mediation, all to be met prior to litigation. See  
13 NRS §§ 40.645, 40.647, 40.680. If the parties fail to follow the requirements of providing notice  
14 and opportunities to inspect and cure, then the court shall either “dismiss the action without  
15 prejudice and compel the claimant to comply with those provisions before filing another action”  
16 or “[i]f dismissal of the action would prevent the claimant from filing another action because the  
17 action would be procedurally barred by the statute of limitations or statute of repose, the court shall  
18 stay the proceeding pending compliance with those provisions by the claimant.” NRS §§  
40.647(2)(a)–(b).

19 The fact that a plaintiff properly commenced an action under the statute of limitations  
20 exception does not, however, mean that litigation will simply proceed without compliance with  
21 the pre-litigation requirements. When plaintiff has not met the pre-litigation requirements of  
22 Chapter 40, but has commenced an action anyway due to the statute of limitations deadline  
23 approaching, the court must stay the proceedings. NRS § 40.647(2)(b).

24 In the present case, under this statute of limitations exception, the court finds that plaintiff  
25 has properly commenced its action, despite failing to meet the pre-litigation requirements.<sup>2</sup> See  
26 NRS § 40.647(2)(b). Thus, the “court shall stay the proceeding pending compliance” with the  
27 requirements of Chapter 40, as discussed below. *Id.*

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28 <sup>2</sup> The exact time at which the statute of limitations expired is not clear. However, defendant  
does not dispute the statute of limitations issue.

1           **1. Notice requirement (NRS § 40.645)**

2           The sufficiency of the sent pre-litigation notice is contested by the parties. The notice sent  
3 by plaintiff expresses that it is a “class notice of construction defects (NRS 40.645))” (doc. #13-1  
4 at 3, exh. 1) delivered by U.S. Certified Mail[,] return receipt requested to D.R. Horton, Inc.’s  
5 registered agent “The Corporation Trust Company of Nevada[,] 311 S. Division St.[,] Carson City,  
6 NV 89703.” (Id. at 2). The delivery to defendant was accepted on December 5, 2015. Plaintiff sent  
7 the notice to the defendant on November 21, 2014, and commenced this action on November 26,  
8 2014. (Doc. #2 at 2, Exh. A to petition for removal). Defendant claims that “because [p]laintiff  
9 commenced this action before it provided the required notice, D.R. Horton did not have an  
10 opportunity to inspect, offer repairs or mediate the claims . . . .” (Doc. #6 at 6).

11           Due to the exception discussed above, any argument that the notice being late is invalid  
12 because a plaintiff can commence an action without notice and then comply with the pre-litigation  
13 requirement after the proceeding is stayed by the court. Furthermore, the court finds that this  
14 notice, although late, would still be sufficient under the statute. The details alleged, taken on their  
15 face, appear to provide specificity of the alleged defects, including their location and details. The  
16 plaintiff’s experts tested several homes to display the existence of similarly situated defects in the  
17 homes.

18           The Nevada Supreme Court has held that extrapolation may be used to determine whether  
19 homes are similarly situated with defects “only if they are part of a subset of homes within the  
20 development.” D.R. Horton, Inc. v. Eighth Jud. Dist. Ct. ex. Rel. Cty. Of Clark, 123 Nev. 468, 480  
21 (2007). The Nevada Supreme Court refers to a “reasonable threshold test” which allows statistical  
22 extrapolation by experts who have analyzed “at least one of the homes in each subset of homes  
23 included within the scope of the extrapolated notice.” Id.

24           The purpose of the specificity requirement is to provide defendant(s) the particular location  
25 and extent of damages in order to direct defendant(s) to these defects during their opportunity to  
26 inspect and or cure the defects. While the notice is not explicit that the defendant is the cause of  
27 such defects, this fact is easily inferred from defendant’s role as the general contractor of the  
28 allegedly similarly situated homes. In sum, the court finds that notice was valid in the present case.

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2           **2. Opportunity to inspect and cure (NRS § 40.647) and the mediation requirement**  
3           **(NRS § 40.680)**

4           The parties have failed to comply with the requirements of NRS §§ 40.647 and 40.680.  
5           NRS § 40.647 requires a plaintiff to provide an opportunity for a defendant to inspect the exact  
6           locations of each alleged construction defect in order to assess whether repairing or curing the  
7           alleged deficiencies is preferable to litigation. NRS § 40.647(1)(a)–(c). Similarly, NRS § 40.680  
8           places a requirement of mediation on the parties “before a claimant commences an action or  
9           amends a complaint to add a cause of action for a constructional defect against a contractor,  
10          subcontractor, supplier, or design professional[.]” NRS § 40.680(1). Parties may waive this  
11          mediation requirement only via writing. *Id.*

12          In the present case, opportunity to inspect and opportunity to cure or repair both appear to  
13          be lacking. Defendant appears to have attempted to inspect the allegedly defective homes so that  
14          it could assess whether it would take advantage of the opportunity to cure or repair the alleged  
15          defects, but defendant was unsuccessful in its attempt to inspect. (Doc. #13-6 at 2). Plaintiff must  
16          provide defendant an opportunity to inspect the defects and, if defendant so desires, an opportunity  
17          to cure or repair the defects.

18          The record indicates no attempts to mediate have been made, nor does there appear to be  
19          any waiver of the mediation requirement. In fact, the defendant expressed the contrary in  
20          correspondence dated March 25, 2015, when it represented that:

21                 nothing in this letter should be construed as a waiver of D.R. Horton’s right’s under  
22                 Chapter 40 or any deficiencies of the subject Chapter 40 notices. Moreover, D.R.  
23                 Horton reserves all its rights with respect to objecting to and/or challenging any  
24                 substantive or procedural issue raised by the subject Chapter 40 notices.

25          (Doc. #17-4 at 3–4). The parties to this action are ordered to engage in the mediation prescribed  
26          by NRS § 40.680 or provide the court with proof that they have done so since the filing of this  
27          motion.

28          It is important to note that the NRS § 40.647(2)(b) exception discussed above prevents the  
                plaintiff’s claims from being procedurally barred but does not allow plaintiff to escape the pre-  
                litigation requirements altogether. Required notice appears to have been met, but the opportunity  
                to inspect and cure or repair and mandatory mediation requirements have not been met. Therefore,  
                due to the parties’ non-compliance with the pre-litigation requirements, the court will grant the  
                motion to stay the proceedings pending the completion of the pre-litigation requirements under

1 NRS Chapter 40. Furthermore, the court compels the parties to comply with any other Chapter 40  
2 pre-litigation requirements that have not been fulfilled in this matter prior to any litigation moving  
3 forward.

4 C. Motion to dismiss class action allegations

5 Based on the foregoing, the motion to dismiss class action allegations is denied without  
6 prejudice. If defendant discovers during the opportunity to inspect, opportunity to cure, or  
7 mediation that the single-family residences do not have the “commonality” discussed for class  
8 action suits, then the motion may be renewed at that time.

9 **IV. Conclusion**

10 IT IS HEREBY ORDERED, ADJUGED, AND DECREED that defendant D.R. Horton,  
11 Inc.’s motion to stay (doc. #5) be, and the same hereby is, GRANTED, consistent with the  
12 foregoing.

13 IT IS FURTHER ORDERED that defendant D.R. Horton, Inc.’s motion to dismiss (doc. #  
14 6) be, and the same hereby is, DENIED without prejudice.

15 The clerk shall stay this case pending notice from the parties that the Chapter 40 pre-  
16 litigation requirements have been met.

17 DATED March 15, 2016.

18   
UNITED STATES DISTRICT JUDGE