No. _____

In The

Supreme Court of the United States

D.R. HORTON, INC. and
DRH SOUTHWEST CONSTRUCTION, INC.,

Petitioners,

vs.

LOREN LYNDOE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The New Mexico Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

STEPHANIE LANDRY
Counsel of Record
GLENN R. SMITH
LANDRY & LUDEWIG, L.L.P.
300 Tenth Street SW
Albuquerque, NM 87102
(505) 243-6100
slandry@lanlud.com
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether imposing mass consolidation on parties whose arbitration clauses contained in separate property purchase agreements are silent on that issue is inconsistent with the Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2006) as set forth in controlling decisions by this Supreme Court, especially where the only evidence of the parties' expectations is that mass consolidation would not occur.

PARTIES TO THE PROCEEDING BELOW

The parties to the trial court proceedings that resulted in the judgment to be reviewed are D.R. Horton, Inc.; DRH Southwest Construction, Inc.; Elizabeth Fernandez, Gerardo Lopez, James Corwell, Kerri Corwell, Loren Lyndoe, Phyllis Lyndoe, Manuel Toledo, Isabel Toledo, Glenda Council, Robert Council, Ron Armstrong, Laura Armstrong, Michael Brown, Christine Brown, Patricia Sanchez, Francisca Cabriales, Jake Lamfers, Marta Lamfers, Cal Palmer, Veronica Palmer, Heather James, Haamid Hakam, Baxter Backer, Carolyn Backer, Jared Hunter, Jacqueline Hunter, Silvino Suarez, Vera Bluhm, Johanna Duncan, Richard Hoehne, Anabel Najera, Jeannette Paz, Robert Bruhn, Jake Nuttall, Diane Nuttall, Ron Stone, Stella Stone, Yvonne Baldonado, Robert Robles, Tina Robles, Joseph Craig, Alisa Shtromberg, Jesse Magallanez, Pamela Tafoya, Robert Bonilla, Alicia Bonilla, Ruben Valenzuela, Yvette Valenzuela, Ignacio Sanchez, Wendy Schmidt, Marcus Declouette, Danielle Declouette, Madeline R. Mani, Sanjay Chandran, Patrick Yokoyama, Roseanne Yokoyama, John Baca, Jessica Baca, Trevor Brasel, Kristi Brasel, Jose Carter, Emily Carter, Calvin Lucero, Erin Garcia, and Lakana Sangadej. Four of the parties Elizabeth Fernandez, Gerardo Lopez, James Corwell, and Kerri Corwell are not named parties to the appeal of the judgment to be reviewed but are parties to the proceeding before the court that rendered the judgment to be reviewed and

PARTIES TO THE PROCEEDING BELOW –
Continued

have agreed to abide by higher court decisions reviewing the judgment of the trial court. Three of the original parties to the appeal to the New Mexico Court of Appeals, Samuel and Misty Hauge and Louis Acanfrio, opted out of consolidated arbitration and proceeded through individual arbitrations.

CORPORATE DISCLOSURE STATEMENT

D.R. Horton, Inc., is a publicly held company; there is no parent or publicly held company owning 10% or more of the corporation's stock. D.R. Horton, Inc., solely owns DRH Southwest Construction, Inc.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS

RULES

PETITION FOR WRIT OF CERTIORARI

Petitioners D.R. Horton, Inc. and DRH Southwest Construction, Inc. (collectively "D.R. Horton") respectfully petition for a writ of certiorari to review the judgment and opinion of the New Mexico Court of Appeals in this case in which the New Mexico Supreme Court denied review.

OPINIONS BELOW

The Order dated September 24, 2012 by the New Mexico Supreme Court denying review, *Lyndoe v. D.R. Horton, Inc.*, No. 33,771 (N.M. filed Sept. 24, 2012) is not reported and is set forth at Petitioners' Appendix ("Pet. App.") 41-43.

The July 24, 2012 Opinion of the New Mexico Court of Appeals is reported as *Lyndoe v. D.R. Horton, Inc.*, 2012 NMCA 103, 287 P.3d 357, and is set forth below at Pet. App. 1-19.

The two Orders, one dated August 18, 2010 and one dated December 16, 2010, of the Hon. John Pope, Judge of the Thirteenth Judicial District of the State of New Mexico, *Fernandez v. D.R. Horton, Inc.*, Case No. D-1314-CV-2009-1578 (N.M. 13th Jud. Dist. Ct. filed Aug. 18, 2010 and Dec. 16, 2010), are not reported and are set forth at Pet. App. 23-40.

JURISDICTION

The two Orders entered by the trial court were entered on August 18, 2010 and December 2010 (Pet. App. 23-40), the New Mexico Court of Appeals entered its opinion on July 24, 2012 confirming the two Orders (Pet. App. 1-19), and the New Mexico Supreme Court denied discretionary review on September 24, 2012. (Pet. App. 41-43).

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) (2006), as it involves an issue of whether, under the Supremacy Clause of the United States Constitution (Art. VI, clause 2) and the Federal Arbitration Act, 9 U.S.C. § 1-307 (2006), federal law preempts New Mexico's consolidated arbitration statute, N.M. Stat. Ann. § 44-7A-11 (Michie 1978) as applied by the New Mexico courts.

While it is unclear as to whether the constitutionality of N.M. Stat. Ann. § 44-7A-11 (Michie 1978) is at issue or whether it is the application of the statute that is at issue, the notification required by Sup. Ct. R. 29.4(c) has been made, as 28 U.S.C. § 2403(b) (2006) may apply, and shall be served on the Attorney General of New Mexico.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Const. art. VI, cl. 2, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2 (2006), provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist in law or equity for the revocation of any contract.

The New Mexico Uniform Arbitration Act, N.M. Stat. Ann. § 44-7A-11 (Michie 1978), states in pertinent part:

> (a) Except as otherwise provided in Subsection (c), upon motion of a party to an agreement to arbitrate . . . , the court may order consolidation of separate arbitration

proceedings as to all or some of the claims if:

* * *

(2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;

* * *

(4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.

* * *

(c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

STATEMENT

This Petition reflects the state courts' continued failure to uphold "the central or primary purpose of the FAA [Federal Arbitration Act] . . . to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010) (internal quotation marks and citations omitted). In *Stolt-Nielsen S.A.*, the Court, applying the FAA, soundly rejected the notion that class arbitration procedures

may be imposed on parties to a private commercial arbitration when the arbitration agreement is silent on class-wide arbitration. The following year, the Court in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), reviewed California's rule conditioning the enforceability of certain arbitration agreements on the availability of class-wide arbitration procedures. As in *Stolt-Nielsen S.A.*, in reviewing whether FAA Section 2 preempts states from imposing enforceability conditions, the Court focused on the fundamental principle that private arbitration agreements must be enforced according to their terms. *Id.* at 1748.

Here, even though the arbitration clauses are silent on the consolidation issue, and the only evidence of the parties' expectations is that mass consolidation would not occur, the New Mexico courts imposed on Petitioners the condition that their bilateral arbitration agreements can only be enforced in a mass consolidated proceeding involving scores and scores of separate purchase agreements for separate pieces of property. In so doing, New Mexico courts have applied state law "in a fashion that disfavors arbitration." *Id.* at 1747. It is another example of the "devices and formulas" manifesting the state courts' continued hostility towards arbitration that prompted the enactment of the FAA. *Id.*

1. As in *Stolt-Nielsen S.A.*, the question presented concerns a similar forced imposition of procedures that bear no resemblance to the bilateral dispute resolution process agreed to by the parties.

Moreover, as observed in *AT&T Mobility LLC*, companies, and in this case the Petitioners, are willing to accept the risk of errors that may go uncorrected in the context of arbitration "since their impact is limited to the size of the individual disputes." But when forced consolidation aggregates alleged damages asserted by scores and scores of homeowners at once, defendants are "pressured into settling questionable claims." *AT&T Mobility LLC*, 131 S. Ct. at 1752. In *AT&T Mobility LLC*, the Court was referring to class actions involving hundreds of thousands of small purchase consumers, but the principle at issue here is no different. States should not impose a never-agreed-to mass consolidated arbitration, with stakes comparable to class-action arbitration or litigation, in place of an agreed-to standard bilateral arbitration. *Cf. Stolt-Nielsen S.A.*, 130 S. Ct. at 1776.

2. Every named Respondent is the direct purchaser of a home constructed by and offered for sale by Petitioners in New Mexico. Each purchase was separate and distinct from any other, and the purchases spanned a three-year period. Under each purchase agreement and limited warranty entered into with Petitioners, each home buyer individually agreed to arbitrate any claim regarding alleged problems with construction under the FAA as well as the New Mexico Uniform Arbitration Act, N.M. Stat. Ann. § 44-7A-1 to -32 (Michie 1978). Pet. App. at 44-48, 50-67, 73-74, 82-83 (Affidavit of Mark Ferguson with sample excerpts of exhibits supplied). According to the only evidence of the parties' expectations (which

was set forth in affidavits filed by the Petitioners), the Petitioners, who build residential dwellings nationwide, had a legitimate business expectation that any arbitration of a homeowner claim would take place in a separate arbitration proceeding. Pet. App. at 65-66. Further, again according to the only evidence provided regarding the complexity of a consolidated arbitration, the affidavit testimony indicated that the range of the claims in a consolidated arbitration of the Respondents' claims would complicate arbitration, as some of the Respondents' claims were cosmetic in nature, some were outside warranty periods, some have yet to make a prerequisite warranty claim, and other claims involved claims of structural defects. Pet. App. at 66-67.

3. In November 2009, violating their promises to resolve any claims through arbitration, Respondents instead filed a lawsuit in New Mexico state district court. Before filing suit, not one of the Respondents served a demand for arbitration. Petitioners demanded mandatory arbitration. Although Respondents did not dispute the requirement of arbitration, they moved to compel consolidated arbitration in state district court, in effect conditioning their promises to arbitrate on a demand that all arbitrations had to go forward as a consolidated proceeding.

4. Even though no arbitrations were in process, the district court ordered (in two separate orders) that 40 separate, not-yet-pending arbitrations should

be consolidated into one mass proceeding. Pet. App. at 8, 32, 35-40.[1] As reflected in the orders, the district

[1] There are 202 houses in the Sagebrush Subdivision in Los Lunas, New Mexico where the homes at issue are located, and Respondents' counsel has incrementally increased the number of plaintiffs, and therefore houses represented, in this litigation. Originally, Respondents' counsel filed the lawsuit below on behalf of plaintiffs who owned 16 houses between them. Respondents' counsel sought to amend the complaint to assert claims regarding two more houses, resulting in 18 houses at issue. Then Respondents' counsel sought to amend the complaint to assert claims on behalf of 3 more houses, resulting in 21 houses at issue. Respondents' counsel sought to amend the complaint again to assert claims regarding 11 more houses, resulting in 32 houses at issue. Respondents' counsel sought to amend the complaint again to assert claims regarding 6 more houses, resulting in 38 houses at issue. Respondents' counsel then sought to file a fifth amended complaint to amend the complaint yet again to assert claims regarding one more house, resulting in 39 houses at issue. Respondent Lakana Sangadej intervened in the case, thereby increasing the plaintiffs to those representing 40 houses. At the time of the appeal to the New Mexico appellate court, there were 40 houses for which the Respondents' counsel had made claims.

Four of the parties, Elizabeth Fernandez, Gerardo Lopez, James Corwell, and Kerri Corwell, are not named parties to the appeal of the judgment to be reviewed but are parties to the trial court proceeding. They are not the original owners of their houses, and therefore, they did not purchase directly from Petitioners. Thus, they were not included in the appeal because the trial court had not yet ruled that they were subject to the arbitration clauses as successors. However, they have agreed to be bound by higher court decisions regarding consolidation to the extent that their claims are arbitrable. Three of the original parties to the appeal to the New Mexico Court of Appeals, Samuel and Misty Hauge and Louis Acanfrio, opted out of consolidated arbitration and proceeded through individual arbitrations.

court then stayed its orders, allowing Petitioners to appeal to the New Mexico Court of Appeals. In affirming the district court, the New Mexico Court of Appeals failed to follow this Court's clear directives on the enforcement of the parties' agreements to arbitrate as written and as governed by the FAA. Pet. App. 11, 13-14, 16-18. The court of appeals did not identify why it was not following the parties' expectations or why it deviated from New Mexico contract law in refusing to adhere to those expectations. *See id.* The New Mexico Supreme Court denied Petitioners' request for further review. Pet. App. at 41-43.

5. Petitioners preserved their argument that consolidation violated the FAA by motion before the trial court, and the trial court addressed the matter of this preservation in Finding No. 9 and Paragraph 6 of the order portion of the trial court's December 16, 2010 Order (Pet. App. at 31, 33), which states that the Petitioners may amend the docketing statement filed on September 2, 2010 to include the arguments based on the FAA and the United States Supreme Court case of *Stolt-Nielsen S.A.* In the New Mexico Court of Appeal's order allowing amendment of the notice of appeal to include an appeal of the December 16, 2010 Order, the court ordered on January 10, 2011 that "no amended docketing statement is necessary" and that the "parties may brief issues related to the original appeal as well as any issues relevant to the order entered on December 16, 2010." Pet. App. at 20-22.

6. Under the FAA, courts must "rigorously enforce" arbitration agreements as written, thereby giving "effect to the contractual rights and expectations of the parties." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (citation omitted). The FAA "imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'" *Stolt-Nielsen S.A.*, 130 S. Ct. at 1773 (quoting *Volt*, 489 U.S. at 479). It is not for the courts to superimpose their "brand of industrial justice" (*Stolt-Nielsen S.A.*, 130 S. Ct. at 1767) and ignore the mandate to enforce arbitration agreements as written because of a belief that the arbitration process may entail multiple proceedings.

Moreover, instead of promoting any arbitral efficiencies of "simplicity, informality, and expedition," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), the decision of the New Mexico courts to require Petitioners to engage in a single consolidated arbitration proceeding involving scores and scores of disparate home purchase transactions allows claims to be aggregated without regard to individual circumstances or evidence, all to the prejudice to Petitioners. This type of mass arbitration contravenes the FAA's promotion of efficient bilateral arbitration, i.e. arbitration between the contracting parties, by combining multiple unrelated parties. *See AT&T Mobility LLC*, 131 S. Ct. at 1751-1752.

7. Federal law preempts application of state law to an arbitration agreement governed by the FAA

when doing so divests arbitration of the benefits envisioned by the FAA. The reason is simple: "Because it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 1753 (internal quotation marks and citation omitted). Imposing a mass consolidation as a prerequisite to arbitration contravenes "Congress' intent 'to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible.'" *Preston v. Ferrer*, 552 U.S. 346, 357 (2008), (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 (1983)).

Federal district courts cannot employ Fed. R. Civ. P. 42(a) to require the consolidation of arbitrations to which the parties have not agreed. *See Government of United Kingdom v. Boeing Co.*, 998 F.2d 68, 71 (2d Cir. 1993); *Glencore, Ltd. v. Schnitzer Steel Prods. Co.*, 189 F.3d 264 (2d Cir. 1999). In holding that federal courts have no authority to order consolidation unless the parties to the agreement consented to such procedures, the courts in *Government of United Kingdom* and *Glencore Ltd*. relied on this Court's precedent emphasizing that the FAA requires courts to enforce privately-negotiated arbitration agreements, like any other contract, in accordance with their terms, citing *Volt, Moses H. Cone Memorial Hospital,* and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). This Court's more recent decisions in *Stolt-Nielsen S.A.* and *AT&T Mobility LLC* have only further reinforced this imperative. Rather than adhere to this clear directive, however, the New Mexico

courts applied a procedural state statute to sanction a mass consolidated arbitration that wholly fails to enforce the individual agreements to arbitrate between the Petitioners and the Respondent home purchasers.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly explained that the intent behind the FAA was to reverse the long history of judicial refusal to enforce arbitration agreements. Nevertheless, state courts continue to ignore the Court's arbitration mandates. This case is yet another example of states permitting consumers to renege on their promises to engage in individual, bilateral arbitration. Review is warranted to reverse a lower court decision that seeks to circumvent this Court's precedent and to ensure that agreements to arbitrate under the FAA, on terms agreed to by the parties, will not be abrogated by the whims of lower courts seeking to impose their own sense of rough justice.

A. The Lower Courts Continue to Evade Controlling Court Precedent and Ignore the Supremacy of the FAA.

The judicial refusal to enforce arbitration agreements as written often manifests itself in the state courts championing consumer rights when the state courts perceive that the arbitral process presents a disadvantage to the consumer. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal.

2005). In *Discover Bank*, the California Supreme Court made a blanket pronouncement that it would be unconscionable to enforce an arbitration provision that waived access to class arbitration for small-purchase consumers involving claims for low value damages. Similarly in *Fiser v. Dell Computer Corp*., 2008 NMSC 46, 188 P.3d 1251, the New Mexico Supreme Court held that the FAA did not preclude invalidating an arbitration agreement's class-action ban, finding the ban unconscionable under New Mexico law. *AT&T Mobility LLC*, however, overruled both these cases by subsequently confirming the FAA's supremacy over states seeking to require arbitrations to allow class wide arbitration procedures.

New Mexico courts have ignored the directives in *Stolt-Nielsen S.A.* and *AT&T Mobility LLC* in this case. Once again, a lower court has conditioned operation of an arbitration agreement on the availability of procedures never contemplated, let alone agreed to by the parties. Contrary to the treatment to be afforded any other like contract, the New Mexico Court of Appeals did not engage in any analysis of the parties' intent in holding that mass consolidation would be consistent with the fundamental purpose of the FAA to enforce arbitration agreements according to their terms. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (courts must treat arbitration agreements under the FAA as they would any other contract). Moreover, the only evidence was that Petitioners never intended to have the right to arbitrate disputes under their purchase agreement

and limited warranty conditioned on proceeding to mass arbitration. Pet. App. at 65-66.

In *Stolt-Nielsen S.A.* as well as *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), the Court addressed contracts said to be silent with respect to what the parties might have conceivably contemplated as a possible material term. When the Court analyzes arbitration agreements and the parties' intent, it examines not only the agreement's language but also the transaction at issue. *Bazzle* concerned standard loan agreements available to untold numbers of consumers. Likewise, the shipping agreements in *Stolt-Nielsen S.A.* were standardized forms where, according to the Court, industry standards could be used to discern the parties' intent where the agreement was silent on the availability of class-wide arbitration (although in that case the parties agreed that the arbitration clause was silent and that it was not ambiguous to allow parol evidence.) In each, there were standardized and customary transactions where, as the Court explained, the commercial entity could have contemplated class arbitrations. Here, it is beyond reason and logic to expect that Petitioners ever contemplated that an individual arbitration provision in a single residential home purchase agreement would require language protecting against a proceeding involving scores and scores of separate home purchase transactions.

Unlike the commercial transactions at issue in the above cases, which involved ubiquitous, fungible, commercial transactions for a certain good or service,

a home purchase is unique in its essence, involving a one-of-a-kind piece of real property and a one-of-a-kind building, distinctive from other types of transactions such as standardized shipping agreements governed by maritime law, standard cell phone purchases, and standardized loan agreements. No one could argue, and indeed no Respondent has asserted, that in entering into their home-purchase agreements, the parties' intent was to only arbitrate if the process involved a mass consolidation. It is beyond debate that the agreement to arbitrate would involve streamlined arbitration between the home buyer and Petitioners concerning the particular home and purchase transaction.

Furthermore, unlike plaintiffs who invoke the savings clause in Section 2 of the FAA to argue the invalidity of agreements to arbitrate due to contract defenses such as fraud, duress or unconscionability, the Respondents made no such arguments, and the lower courts did not invalidate any aspect of the arbitration agreement. Rather, paying no heed to controlling federal law, the lower courts simply superimposed a condition of mass consolidated arbitration onto an agreement to arbitrate only intended for efficient arbitration proceedings.

B. Review is Warranted Because the Decision Below Conflicts with the FAA and this Court's Precedent.

Petitioners argued to the courts below that under both *Stolt-Nielsen S.A.* and *AT&T Mobility*, Petitioners could not be forced into a mass consolidated proceeding as a condition to arbitration. Refusing to follow *Stolt-Nielsen S.A.*, the New Mexico Court of Appeals noted that in *Stolt-Nielsen S.A.* there was no state law at issue and that the case concerned class arbitration, whereas here there is no class as defined under Fed. R. Civ. P. 23. Pet. App. 16-18. This facile attempt to distinguish this Court's precedent fails to acknowledge the holding of *Stolt-Nielsen S.A.*, its progeny, and its antecedents.

The public policy concerns that the Court recognized in *Stolt-Nielsen S.A.*, regarding class-action arbitration imposed without the consent of the parties, apply equally in this case. By ordering a mass, consolidated arbitration, the New Mexico Court of Appeals has circumvented the FAA's requirements and has given benefits similar to a class action through consolidation. Further, consolidation of such magnitude, involving numerous separate home purchasers, cannot be implied through the parties' agreement to arbitrate a dispute. To do so "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Stolt-Nielsen S.A.,* 130 S. Ct. at 1775.

In *Stolt-Nielsen S.A.*, the Court observed that class-action arbitration differs from bilateral arbitration in a number of substantial ways, including that the dispute no longer resolves a dispute between parties to a single agreement but instead multiple disputes between multiple parties; the parties no longer enjoy privacy and confidentiality as they would in bilateral arbitration; the arbitrator's award affects not only parties involved in the lawsuit but absent parties as well; and the commercial stakes in class-action arbitration are similar to those of class-action litigation. *Id.* at 1776. The same factors that *Stolt-Nielsen S.A.* considered to fundamentally alter the arbitration process exist here.

"The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate informal, streamlined proceedings." *AT&T Mobility LLC*, 131 S. Ct. at 1798. "The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute." *Id.* at 1749. Specifically applicable here, this Court has recognized that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 1751. Similarly, consolidating the arbitration of claims involving numerous home purchases will result in a complicated and lengthy process – a procedural morass.

The FAA's primary purpose is to ensure that "private agreements to arbitrate are enforced according to their terms." *Volt,* 489 U.S. at 479. The FAA imposes rules of significant importance, including the basic precept that arbitration "is a matter of consent, not coercion." *Id. Stolt-Nielsen S.A.* ruled against class-action arbitration because it denies fundamental considerations behind the FAA and also denies the parties their "contractual rights and expectations." *Stolt-Nielsen S.A.*, 130 S. Ct. at 1774.

The same holds true here. In their arbitration agreements, the parties did not allow for consolidation of the claims of numerous home purchasers. In holding to the contrary, the New Mexico Court of Appeals elevated its view of arbitration's purpose over the clear directives of this Court, and completely ignored the parties' expectations.

> "In our view, consolidation of the individual homeowners' arbitrations is consistent with the purpose of arbitration, which is 'to further judicial economy by providing a quick, informal and less costly alternative to judicial resolution of disputes.'" *K.R. Swerdfeger Constr., Inc. v. UNM Bd. of Regents*, 2006-NMCA-117, ¶ 26, 140 N.M. 374, 142 P.3d 962 (internal quotation marks and citation omitted).

Pet. App. at 18-19.

Not only is this perspective at complete odds with the reality of the procedural morass created by consolidating the arbitration of claims under numerous

separate unrelated home purchase agreements, it totally misses the mark as to the primary purpose of arbitration under the FAA, which is to rigorously enforce agreements to arbitrate according to the terms as agreed to by the parties. As such, the decision of the New Mexico Court of Appeals conflicts with the supreme law of the land and should not be allowed to stand as an impediment to purposes of the FAA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHANIE LANDRY
Counsel of Record
GLENN R. SMITH
LANDRY & LUDEWIG, L.L.P.
300 Tenth Street SW
Albuquerque, NM 87102
(505) 243-6100
slandry@lanlud.com
Counsel for Petitioners

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: **JULY 24, 2012**

NO. 30,663

LOREN LYNDOE, PHYLLIS LYNDOE, MANUEL TOLEDO, ISABEL TOLEDO, GLENDA COUNCIL, ROBERT COUNCIL, RON ARMSTRONG, LAURA ARMSTRONG, PATRICIA SANCHEZ, FRANCISCA CABRIALES, JAKE LAMFERS, MARTA LAMFERS, CAL PALMER, VERONICA PALMER, HEATHER JAMES, HAAMID HAKAM, BAXTER BACKER, CAROLYN BACKER, JARED HUNTER, JACQUELINE HUNTER, SILVINO SUAREZ, JOHANNA DUNCAN, RICHARD HOEHNE, ANABEL NAJERA, JEANNETTE PAZ, ROBERT BRUHN, JAKE NUTTALL, DIANE NUTTALL, RON STONE, STELLA STONE, YVONNE BALDONADO, ROBERT ROBLES, TINA ROBLES, JOSEPH CRAIG, ALISA SHTROMBERG, JESSE MAGALLANEZ, PAMELA TAFOYA, ROBERT BONILLA, ALICIA BONILLA, RUBEN VALENZUELA, YVETTE VALENZUELA, IGNACIO SANCHEZ, WENDY SCHMIDT, MARCUS DECLOUETTE, DANIELLE DECLOUETTE, MADELEINE R. MANI, SANJAY CHANDRAN, PATRICK YOKOYAMA, ROSEANNE YOKOYAMA, TREVOR BRASEL, KRISTI BRASEL, JOSE CARTER, EMILY CARTER, CALVIN LUCERO, ERIN GARCIA, and LAKANA SANGADEJ,

Plaintiffs-Appellees,

and

ELIZABETH FERNANDEZ,
GERARDO LOPEZ,
JAMES CORWELL, and
KERRI CORWELL,

Plaintiffs,

v.

D.R. HORTON, INC., and DRH SOUTHWEST CONSTRUCTION, INC.,

Defendants-Appellants,

and

CURB SOUTH, LLC,

Defendant.

APPEAL FROM THE DISTRICT COURT OF VALENCIA COUNTY
JOHN W. POPE, District Judge

Guebert Bruckner P.C.
Terry R. Guebert
Don Bruckner
Albuquerque, NM

for Appellees

Collins & Collins, P.C.
Alysan Boothe Collins
Albuquerque, NM

for Appellees Lucero & Erin Garcia

Crowley & Gribble, P.C.
Clayton E. Crowley,
Albuquerque, NM

for Appellee Lakana Sangedej [sic]

Landry & Ludewig, L.L.P.
Stephanie Landry,
Margaret C. Ludewig
Albuquerque, NM

Saucedo Chavez PC
Christopher T. Saucedo
Iris L. Marshall
Albuquerque, NM

for Appellants

OPINION

FRY, Judge.

{1} The district court ordered the consolidation of all arbitrations between Defendants D.R. Horton, Inc. and DRH Southwest Construction, Inc. (collectively, Horton) and Plaintiffs, who are owners of homes built and sold by Horton in the Sagebrush Subdivision at Huning Ranch in Los Lunas, New Mexico. We conclude that Plaintiffs satisfied all of the elements required for consolidation by NMSA 1978, Section 44-7A-11 (2001), of New Mexico's Uniform Arbitration Act (UAA), NMSA 1978, §§ 44-7A-1 to -32 (2001). Therefore, we affirm the district court's order.

I. BACKGROUND

{2} In November 2009, Plaintiffs sued Horton and other defendants seeking damages and rescission, alleging that they had experienced various deficiencies in their Horton-built homes, many of which were caused by the settlement of subsurface soils. Plaintiffs also alleged that their purchase agreements with Horton contained arbitration agreements, and they asked the district court to compel Horton to litigate their claims in a consolidated arbitration in accordance with Section 44-7A-11 of the UAA.

{3} In pleadings filed with the court, Horton acknowledged that the parties' dispute was subject to the purchase agreements' arbitration clause. However, Horton opposed consolidation of all of the claims into one arbitration and instead proposed a separate arbitration with each household. Consequently, Plaintiffs filed a motion to compel a consolidated arbitration between Horton and Plaintiffs who had signed purchase agreements with Horton. Plaintiffs argued that Section 44-7A-11 of the UAA permits consolidation of separate arbitration proceedings if certain requirements are met. Section 44-7A-11 states:

> (a) Except as otherwise provided in Subsection (c), upon motion of a party to an agreement to arbitrate or to an arbitration proceeding, the court may order consolidation of separate arbitration proceedings as to all or some of the claims if:

> (1) there are separate agreements to arbitrate or separate arbitration proceedings between the same persons or one of them is a party to a separate agreement to arbitrate or a separate arbitration proceeding with a third person;
>
> (2) the claims subject to the agreements to arbitrate arise in substantial part from the same transaction or series of related transactions;
>
> (3) the existence of a common issue of law or fact creates the possibility of conflicting decisions in the separate arbitration proceedings; and
>
> (4) prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.
>
> (b) The court may order consolidation of separate arbitration proceedings as to some claims and allow other claims to be resolved in separate arbitration proceedings.
>
> (c) The court may not order consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation.

{4} Plaintiffs argued that all of the statutory elements supporting consolidation existed because the arbitration agreements were entered into with Horton; Plaintiffs' claims arose from the same series of home

sales by Horton in the Sagebrush Subdivision since 2006; all of Plaintiffs' homes experienced similar problems; and Horton would not be prejudiced by a consolidated arbitration because such a proceeding would likely be more efficient than separate proceedings. Horton responded that Plaintiffs failed to establish (1) the statutory element requiring related transactions because Plaintiffs were not part of the *same* series of contractual negotiations; (2) the element requiring common issues of law or fact creating the possibility of conflicting decisions; and (3) the element related to prejudice because a consolidated arbitration would result in undue delay due to the widely varying claims of individual Plaintiffs.

{5} Following a hearing, the district court announced in a letter decision that it would grant Plaintiffs' motion and order a consolidated arbitration before a single arbitrator. The district court later denied Horton's motion for reconsideration, found that the order compelling consolidation was final for purposes of appeal, and stayed the proceedings pending appeal. This appeal followed.

II. DISCUSSION

{6} The parties agree that Plaintiffs' claims against Horton are subject to arbitration, and the only dispute is whether the district court properly ordered the consolidated arbitration. Horton challenges the district court's order based on three arguments, which we combine into two. First, Horton contends that the

district court did not have jurisdiction to order a consolidated arbitration because there were no arbitration proceedings pending at the time of the order. Second, it argues that consolidation was improper because Plaintiffs failed to satisfy the statutory factors necessary for consolidation and because permitting consolidation would thwart federally established policy and improperly allow the arbitrator to dictate public policy.

A. Standard of Review

{7} Horton argues that all of its arguments are subject to de novo review. We disagree in part. First, as we clarify below, Horton's argument regarding the district court's alleged lack of jurisdiction is misplaced. Horton's argument has nothing to do with jurisdiction; instead, Horton's contention is that a statutory prerequisite for consolidation of the arbitrations was not met. This involves a question of statutory construction, which we review de novo. *Estate of Nauert v. Morgan-Nauert,* 2012-NMCA-037, ¶ 8, 274 P.3d 799.

{8} Second, we disagree with Horton's contention that the propriety of the district court's order requiring consolidated arbitrations is subject to de novo review. The statutory provision permitting consolidation uses language associated with discretion. It provides that a court "*may* order consolidation of separate arbitration proceedings" under certain circumstances. Section 44-7A-11(a) (emphasis added). In

addition, the commentary to the uniform law on which our UAA is modeled clarifies that the provision permitting consolidation "gives courts *discretion* to consolidate separate arbitration proceedings." *Unif. Arbitration Act* § 10 cmt. 3, 7 U.L.A. 42 (2000) (emphasis added); *see Cummings v. Budget Tank Removal & Envtl. Servs, LLC,* 260 P.3d 220, ¶ 14 (Wash. Ct. App. 2011) (explaining that "[b]ecause the statute says the court 'may' order consolidation, [the court] review[s] the decision for an abuse of discretion"). Consequently, we review the district court's order compelling the consolidated arbitration for abuse of discretion.

B. Jurisdiction to Order Consolidated Arbitration

{9} Horton claims that the consolidation provision of the UAA, Section 44-7A-11, requires that there be pending separate arbitration proceedings before a court has the power to order a consolidated arbitration. In support, Horton relies on the title of the statute, which reads "Consolidation of separate arbitration proceedings," and a Hawaii case, *In re United Public Workers, AFSCME, Local 646, AFL-CIO,* 244 P.3d 609, 613 (Haw. Ct. App. 2010).

{10} We are not persuaded. Despite the title of Section 44-7A-11, the body of the statute clearly states that a court "may order consolidation of separate arbitration proceedings" pursuant to a motion "of a *party to an agreement to arbitrate* or to an arbitration

proceeding." Section 44-7A-11(a) (emphasis added). A common sense reading of this language establishes that consolidation may be ordered even if no arbitration proceeding is pending, providing there are agreements to arbitrate. Here, Plaintiffs were parties to virtually identical arbitration agreements with Horton, and the statutory requirement was satisfied. We reject Horton's contrary, overly technical interpretation of Section 44-7A-11.

{11} Given our interpretation of Section 44-7A-11, we are also unpersuaded by the Hawaii court's decision in *United Public Workers.* In interpreting a statutory provision nearly identical to Section 44-7A-11, that court employed the same hyper-technical reading urged by Horton. It stated that "[w]here there are no separate proceedings to consolidate, a fundamental prerequisite is not met, and this provision is inapplicable." *United Pub. Workers,* 244 P.3d at 614. The court relied on what it considered to be the plain language of the statute permitting consolidation "of *separate arbitration proceedings.*" *Id.* Apart from this reliance on only a portion of the statute's language, the court gave no persuasive reason for prohibiting consolidation of not-yet-pending arbitrations when, as in the present case, there is no dispute among the parties that arbitration is the proper forum for resolution of the claims at issue. Requiring the initiation of each separate arbitration before permitting consolidation is inefficient and unnecessary.

{12} We also clarify that, contrary to Horton's argument, satisfaction of the statutory requirements

has nothing to do with the district court's jurisdiction. Subject matter jurisdiction is defined as the power of a court to hear and determine cases. *Mares v. Kool,* 51 N.M. 36, 41, 177 P.2d 532, 535 (1946). That power is conferred by the sovereign authority that organizes the courts. *Id.* The subject matter jurisdiction of New Mexico district courts is established by the New Mexico Constitution. N.M. Const. art. VI, § 13. New Mexico district courts are courts of general jurisdiction having the power to hear all matters not excepted by the constitution and those matters conferred by law. *See ACLU of N.M. v. City of Albuquerque,* 2008-NMSC-045, ¶ 7, 144 N.M. 471, 188 P.3d 1222. In the present case, the UAA confers jurisdiction on the district court to hear motions for consolidation of arbitration proceedings as well as many other matters pertaining to arbitrations. Therefore, the district court had subject matter jurisdiction to hear and rule on the motion for consolidation filed by Plaintiffs.

C. Propriety of Consolidation

1. Statutory Elements Supporting Consolidation

{13} Section 44-7A-11 permits the consolidation of separate arbitrations when four factors are satisfied. Horton challenges Plaintiffs' showing in connection with only three of the four factors. It claims that Plaintiffs failed to establish (1) that their claims arose "in substantial part from the same transaction or series of related transactions" as required by

Subsection (a)(2); (2) that "a common issue of law or fact create[d] the possibility of conflicting decisions in the separate arbitration proceedings" as required by Subsection (a)(3); and (3) that the prejudice from a failure to consolidate outweighed any potential prejudice to Horton, as required by Subsection (a)(4).

{14} With respect to the element requiring the same transaction or related transactions, Plaintiffs alleged that all of their claims arise from their purchase of homes built and sold by Horton in the same subdivision since 2006. Horton based the subdivision's site development plan on a geotechnical report prepared by Vinyard & Associates, Inc., and, since purchasing their homes, Plaintiffs experienced deficiencies in their residences, many of which appear to be caused by soil settlement as evidenced by reports prepared by Horton's expert engineer. Thus, although the underlying cause of the soil settlement is in dispute, Plaintiffs nonetheless have demonstrated that their claims arise out of the series of purchase transactions between themselves and Horton and the series of homes constructed by Horton in reliance on the Vinyard report.

{15} Horton argues that Plaintiffs have not satisfied the related-transaction element because their claims arise from thirteen different form purchase agreements for 37 or 38 home sales that proceeded to

closing on different dates.[1] We fail to see how different form agreements and different closing dates would remove this series of sales from the statutory category of "related transactions." Plaintiffs have alleged sufficient facts to satisfy this element supporting consolidation.

{16} The consolidation statute also requires "a common issue of law or fact" that "creates the possibility of conflicting decisions" if the arbitrations proceed separately. Section 44-7A-1(a)(3). Plaintiffs argue that their claims share common issues involving the settlement of their respective homes and similar resulting damage, including cracks and separation. They maintain that multiple separate arbitrations, as opposed to one consolidated arbitration, could result in conflicting decisions. For example, one Plaintiff could be awarded rescission or damages while another Plaintiff with similar home deficiencies could receive no recovery.

{17} Horton contends that Plaintiffs have failed to satisfy this element because they presented no evidence supporting this element and because Horton's engineer opined that some deficiencies were caused by something other than negligent construction. Horton is incorrect. Plaintiffs presented considerable evidence of deficiencies common to their homes,

---

[1] In its brief in chief, Horton states that 38 homes are involved while Plaintiffs state in their brief that 37 homes are the subject of their claims.

including photographs and engineering reports attributing the deficiencies to soil settlement. While it is true that Plaintiffs did not present an engineering report for every home and that some engineering reports attribute some home deficiencies to overwatering or causes other than negligent construction, these issues do not result in failure to satisfy the common-issue element of Section 44-7A-11(a)(3). The question of whether to consolidate separate arbitrations is a threshold question for the district court and does not require definitive proof. The statute requires only common *issues* of law or fact, not common established facts. Plaintiffs have satisfied this element.

{18} Finally, Plaintiffs have satisfied Section 44-7A-11(a)(4)'s element because they have demonstrated that any prejudice to Horton does not outweigh the potential prejudice of conflicting outcomes that could result from failure to consolidate. As the district court noted in its decision letter, "having one arbitrator will be able to facilitate the arbitrations and move the case along as opposed to [multiple] arbitrators . . . making inconsistent rulings."

{19} Horton argues that "its contractual rights would be compromised with consolidation" because Horton had no expectation when it entered into the arbitration agreements that there was the possibility of a consolidated arbitration. This argument is not persuasive because it was Horton that drafted the arbitration agreements, and it could have easily included a provision prohibiting consolidation. Section 44-7A-11(c) provides that "[a] court may not order

consolidation of the claims of a party to an agreement to arbitrate if the agreement prohibits consolidation." Moreover, "the mere desire to have one's dispute heard in a separate proceeding is not in and of itself the kind of proof sufficient to prevent consolidation." *Unif. Arbitration Act* § 10 cmt. 3, 7 U.L.A. at 43. The type of prejudice contemplated by Section 44-7A-11(a)(4) as overriding the prejudice from non-consolidation includes the existence of conflicting provisions in the separate arbitration agreements regarding "arbitrator selection procedures, standards for the admission of evidence and rendition of the award, and other express terms of the arbitration agreement." *Unif. Arbitration Act* § 10 cmt. 3, 7 U.L.A. at 43. Horton does not argue that any of the express terms of the arbitration agreements are in conflict. Therefore, Plaintiffs have satisfied the element in Section 44-7A-11(a)(4).

{20} Horton also argues that Plaintiffs were required to establish the existence of all statutory elements supporting consolidation through the introduction of evidence and that the district court should have entered findings of fact and conclusions of law in support of its order requiring consolidation. We disagree. As previously noted, the question of consolidation is a threshold question answered by the district court based on allegations or evidence satisfying it that the elements supporting consolidation exist. Horton has cited no authority for the proposition that the consolidation question requires an evidentiary hearing. *See ITT Educ. Servs., Inc. v. Taxation &*

Revenue Dep't, 1998-NMCA-078, ¶ 10, 125 N.M. 244, 959 P.2d 969 (explaining that appellate courts will not consider propositions that are unsupported by citation to authority). In addition, Rule 1-052 NMRA, which governs the necessity for findings and conclusions, provides that "[f]indings of fact and conclusions of law are unnecessary in decisions on motions under Rule 1-012, 1-050 or 1-056 NMRA or any other motion except as provided in Paragraph B of Rule 1-041 NMRA." The motion for consolidation in this case is not an excepted motion and, as a result, findings and conclusions were not required.

{21} In our view, Plaintiffs' satisfaction of all of the statutory elements supporting consolidation leads to the conclusion that the district court did not abuse its discretion in ordering a single, consolidated arbitration. However, Horton also claims that considerations beyond the statutory elements mandate reversal of the district court's decision. We now turn to those arguments.

2. Horton's Other Arguments

{22} Horton appears to parse Plaintiffs' single motion into two separate motions – one to compel arbitration and one to compel a consolidated arbitration. With respect to the motion to compel arbitration, Horton argues that the motion should have been denied as a matter of law because Horton agrees to arbitration. We fail to see how Horton's approach would make sense or further the case's progress.

Because the parties agreed that arbitration was the appropriate method for resolving Plaintiffs' claims, it would make no sense to deny the motion to compel arbitration.

{23} As to the order requiring the arbitrations to be consolidated, Horton's argument is somewhat difficult to follow. It appears that Horton asserts two reasons – other than Plaintiffs' alleged failure to satisfy the statutory elements for consolidation – supporting its contention that the order of consolidation was erroneous: (1) federal law regarding class action arbitrations establishes public policy requiring denial of consolidation as a matter of law; and (2) allowing consolidation permits the arbitrator to create public policy.

a. Federal Law Regarding Class Action Arbitrations

{24} Horton argues that the district court, by ordering consolidation, "has created something akin to a class action without subjecting . . . Plaintiffs to the class action standards." As a result, Horton maintains, "the district court fundamentally changed the nature of the arbitration to such a degree that it cannot be presumed the parties consented to it." In support of this argument, Horton relies primarily on *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.,* which held that "a party may not be compelled under the [Federal Arbitration Act] to submit to class arbitration unless there is a contractual basis for

concluding that the party *agreed* to do so." 130 S. Ct. 1758, 1775 (2010). This argument is not persuasive for two reasons.

{25} First, in *Stolt-Nielsen* there was no statutory provision governing the availability of class arbitration while in the present case, Section 44-7A-11 expressly provides for consolidated arbitration under certain circumstances. *Stolt-Nielsen* involved the United States Supreme Court's reversal of an arbitration panel's decision to imply an agreement to permit class arbitration when the arbitration agreement itself was silent on the subject. 130 S. Ct. at 1766, 1777. Notably, the Federal Arbitration Act, maritime law, and state law did not answer the question of whether class arbitration was available in the absence of express consent. *Id.* at 1768-69. These circumstances are not analogous to those in the present case, given the existence of Section 44-7A-11.

{26} Second, we fail to see how a consolidated arbitration involving specific, named parties is the same as a class arbitration. As the Court noted in *Stolt-Nielsen,* in a class arbitration, the arbitrator's award may "adjudicate[ ] the rights of absent parties" as well as the rights of named parties. 130 S. Ct. at 1776. This cannot occur in the consolidated arbitration ordered in this case by the district court because only named parties with arbitration agreements will participate. In addition, the rules governing class arbitrations, presumably derived from the rules governing class litigation, are quite different from the statutory elements required for consolidated arbitration. For

example, prerequisites for class arbitration would include numerosity so great that joinder of all class members is impracticable, common issues of law or fact predominating over issues affecting individual class members, and certification of the class. *See generally* Rule 1-023 NMRA.

b. Risk of Arbitrator Creating Public Policy

{27} Horton argues that "[t]he district court's misinterpretation of [the consolidation statute] must be addressed by this Court to prevent the creation of public policy by the arbitrator." Horton maintains that "allow[ing] consolidation of similarly situated plaintiffs rather than requiring that the arbitration agreements . . . arise from the same transaction or related transaction allows the arbitrator too much discretion" in the resolution of discovery disputes and of questions regarding the consolidation of evidentiary hearings involving more than one home.

{28} We fail to see how an arbitrator's control over the procedural aspects of the consolidated arbitration will result in the creation of public policy. Instead, the arbitrator can reasonably orchestrate the arbitration to streamline the process, avoid duplication of effort, and resolve the individual claims in a consistent manner. In our view, consolidation of the individual homeowners' arbitrations is consistent with the purpose of arbitration, which is "to further judicial economy by providing a quick, informal, and less costly alternative

to judicial resolution of disputes." *K.R. Swerdfeger Constr., Inc. v. UNM Bd. of Regents,* 2006-NMCA-117, ¶ 26, 140 N.M. 374, 142 P.3d 962 (internal quotation marks and citation omitted). The district court did not abuse its discretion by ordering consolidation of Plaintiffs' arbitrations.

CONCLUSION

{29} For the foregoing reasons, we affirm the district court's order consolidating the arbitrations between Plaintiffs and Horton.

{30} IT IS SO ORDERED.

/s/ Cynthia F. Fry
CYNTHIA A. FRY, Judge

WE CONCUR:

/s/ Jonathan Sutin
JONATHAN B. SUTIN, Judge

/s/ J. Miles Hanisee
J. MILES HANISEE, Judge

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ELIZABETH FERNANDEZ, GERARDO LOPEZ, LOREN LYNDOE, PHYLLIS LYNDOE, MANUEL TOLEDO, ISABEL TOLEDO, GLENDA COUNCIL, ROBERT COUNCIL, RON ARMSTRONG, LAURA ARMSTRONG, MICHAEL BROWN CHRISTINE BROWN, PATRICIA SANCHEZ, FRANCISCA CABRIALES, JAKE LAMFERS, MARTA LAMFERS, SAMUEL HAUGE, MISTY HAUGE, CAL PALMER, VERONICA PALMER, HEATHER JAMES, HAAMID KAKAM, BAXTER BACKER, CAROLYN BACKER, JAMES CORWELL, KERRI CORWELL, JARED HUNTER, JACQUELINE HUNTER, SILVINO SUAREZ, VERA BLUHM, JOHANNA DUNCAN, LOUIS ACAMFRIO, RICHARD HOEHNE, ANABEL NAJERA, and JEANNETTE PAZ,

Plaintiffs-Appellees,

vs.

D.R. HORTON, INC., and DRH SOUTHWEST CONSTRUCTION, INC.,

Defendant-Appellant.
/

No. 30,663
Valencia County
D-1314-CV-
2009-1578

ORDER ALLOWING FILING OF AMENDED NOTICE OF APPEAL AND SETTING DEADLINES FOR APPEAL

(Filed Jan. 10, 2011)

This matter is before this Court pursuant to the filing of a joint motion by the parties, and this Court notes the following:

1. On October 4, 2010, this Court assigned this case to the general calendar.

2. On December 16, 2010, the district court entered another order in this case.

3. On December 28, 2010, the transcript in this case was filed with this Court.

4. On December 20, 2010, counsel filed a "Joint Motion to Allow Amended Notice of Appeal, Amended Docketing Statement, Additions to the Record, and Stay Briefing Until Extended Record is Certified to the Court of Appeals."

This Court **HEREBY ORDERS** the following:

A. By entry of this order, we nunc pro tunc give the district court jurisdiction to enter the December 16, 2010 "final order regarding the parties' stipulated motion".

B. The Appellants may file an amended notice of appeal no later than ten (10) days from the date of this order, and notice shall be considered timely filed.

C. In light of the fact that this case is already assigned to the general calendar, and will

remain assigned to the general calendar, no amended docketing statement is necessary. The parties may brief issues related to the original appeal as well as any issues relevant to the order entered on December 16, 2010.

D. The Clerk of the Thirteenth Judicial District Court is directed to file with this Court forthwith a Supplemental Record Proper with all documents filed with the district court after September 14, 2010.

E. It appears the complete transcript in this case was filed with the appellate court on December 28, 2010. In the event additional portions of the transcript are needed for this appeal, the parties shall file a designation of transcript with the district court designating any supplemental transcript needed for this appeal within ten (10) days of the date of this order, consistent with Rule 12-211 NMRA.

F. Briefing in this case shall commence upon service of notice by this Court that the supplemental record proper and any supplemental transcript has been filed with this Court.

G. In light of the district court's December 16, 2010, order, the parties are no longer required to brief the issue of finality, as previously directed in the general calendar notice filed on October 4, 2010.

/s/ Celia Foy Castillo
CELIA FOY CASTILLO, Judge

STATE OF NEW MEXICO
COUNTY OF VALENCIA
THIRTEENTH JUDICIAL DISTRICT

ELIZABETH FERNANDEZ, GERARDO LOPEZ, LOREN LYNDOE, PHYLLIS LYNDOE, MANUEL TOLEDO, ISABEL TOLEDO, GLENDA COUNCIL, ROBERT COUNCIL, RON ARMSTRONG, LAURA ARMSTRONG, MICHAEL BROWN, CHRISTINE BROWN, PATRICIA SANCHEZ, FRANCISCA CABRIALES, JAKE LAMFERS, MARTA LAMFERS, SAMUEL HAUGE, MISTY HAUGE, CAL PALMER, VERONICA PALMER, HEATHER JAMES, HAAMID HAKAM, BAXTER BACKER, CAROLYN BACKER, JAMES CORWELL, KERRI CORWELL, JARED HUNTER, JACQUELINE HUNTER, SILVINO SUAREZ, VERA BLUHM, JOHANNA DUNCAN, LOUIS ACAMFRIO, RICHARD HOEHNE, ANABEL NAJERA, and JEANNETTE PAZ,

Plaintiffs,

v.

D.R. HORTON, INC., and DRH SOUTHWEST CONSTRUCTION, INC.,

Defendants.

No. D-1314-CV-2009-1578

FINAL ORDER REGARDING THE PARTIES' STIPULATED MOTION REGARDING

(Filed Dec. 16, 2010)

(1) THREE MOTIONS TO AMEND TO ADD NEW PLAINTIFFS AND ONE MOTION TO INTERVENE;

(2) INCLUSION OF THE NEW PLAINTIFFS IN FINAL ORDER AND STAY REGARDING ARBITRATION CONSOLIDATION ENTERED ON AUGUST 18, 2010;

(3) ADDITIONAL REQUESTED FINDINGS OF FACT BY THE HORTON DEFENDANTS; AND

(4) THE FERNANDEZ/LOPEZES AND THE CORWELLS' CONSENT TO BE BOUND BY THE APPELLATE DECISION REGARDING THE ISSUE OF CONSOLIDATED ARBITRATION

This matter is before the Court in the above-captioned action (the "Action") with respect to the Parties' Stipulated Motion Regarding (1) Three Motions to Amend to Add New Plaintiffs and One Motion to Intervene; (2) Inclusion of the New Plaintiffs in Final Order and Stay Regarding Arbitration Consolidation Entered on August 18, 2010; (3) Additional Requested Findings of Fact by the Horton Defendants; and (4) the Fernandez/Lopezes and the Corwells' Consent to be Bound by the Appellate Decision Regarding the Issue of Consolidated Arbitration, which stipulated motion is referred to herein

as the "Stipulated Joinder Motion." According to such Stipulated Joinder Motion, the parties (all of the Original Plaintiffs and the Joining Plaintiffs as defined below and the Horton Defendants, that is D.R. Horton, Inc. and DRH Southwest Construction, Inc.) have entered into the Motion and this Order to facilitate bringing into an appeal (filed August 23, 2010) on the Consolidation Order (discussed below) new plaintiffs in this case who were sought to be added by three motions to amend and one motion in intervention. Based on the Stipulated Joinder Motion and the record and after considering the additional arguments and evidence set forth in the Stipulated Joinder Motion, the Court finds:

1. **Joinder Motions Before the Court.** There are four motions for joinder of persons as additional plaintiffs before the Court: (1) Motion for Leave to File Third Amended Complaint (filed June 10, 2010); (2) Motion for Leave to File Fourth Amended Complaint (filed September 8, 2010); (3) Motion for Leave to File Fifth Amended Complaint (filed December 9, 2010); and (4) Motion to Intervene by Lakana Sangadej (filed on June 29, 2010). Such motions are referred to herein as the "Four Joinder Motions." The Court ruled at the September 24, 2010 hearing that the Motion for Leave to File Third Amended Complaint and the Motion to Intervene by Lakana Sangadej are granted and indicated a willingness to grant the Motion for Leave to File Fourth Amended Complaint on the same basis, and also indicated that the new plaintiffs should be consolidated into the

pending appeal in this matter, as discussed below. The Horton Defendants object to any granting of the Motion for Leave to File Fourth Amended Complaint and the Motion for Leave to File Fifth Amended Complaint on the same basis as the Horton Defendants objected to the Motion for Leave to File Third Amended Complaint and the Motion to Intervene by Lakana Sangadej. The Horton Defendants' approval as to the form of this Order and the stipulated facts herein does not constitute a waiver of any of the Horton Defendants' rights regarding or in opposition to the Four Joinder Motions or of any of the Horton Defendants' rights regarding or opposition to the Consolidation Order (discussed below).

2. **The Joining Plaintiffs.** The Four Joinder Motions seek to add the following 33 persons (representing 19 additional houses) as plaintiffs in this case, which persons are referred to herein as the "Joining Plaintiffs":

1. John and Jessica Baca of 751 Deer Brush
2. Yvonne Baldonado of 3031 Desert Sage
3. Robert and Alicia Bonilla of 760 Deer Brush
4. Trevor and Kristi Brasel of 3021 Desert Sage
5. Robert Bruhn of 2871 Desert Sage
6. Jose and Emily Carter of 851 Blue Sage
7. Delanie Craig and Alisa Shtromberg of 2860 Desert Sage
8. Marcus and Danielle Declouette of 691 Blue Sage

9. Calvin Lucero and Erin Garcia of 847 Blue Sage
10. Jesse Magalianez of 2820 Desert Sage
11. Madeleine Mani and Sanjay Chandran of 751 Bear Grass Court
12. Jake and Diana Nuttall of 550 Rain Lily
13. Robert and Tina Robles of 2811 Desert Sage
14. Ignacio Sanchez and Wendy Schmidt at 581 Blue Sage
15. Lakana Sangadej of 530 Rain Lily
16. Ron and Stella Stone of 2810 Desert Sage
17. Pamela Tafoya of 730 Deer Brush
18. Ruben and Yvette Valenzuela of 670 Rain Lily
19. Patrick and Roseanne Yokoyama of 710 Deer Brush

3. **The Original Plaintiffs.** The plaintiffs named in this case before the Joined Plaintiffs are referred to herein as the "Original Plaintiffs."

4. **The Appeal and the Current Record on Appeal.** Before any hearings on the Joinder Motions (and before some of the Joinder Motions were filed), on August 18, 2010, this Court entered the Final Order Granting Arbitration Consolidation Regarding All Plaintiffs (Except for the Fernandez/Lopezes and the Corwells) and Stay Pending Appeal. Such order is referred to herein as the "Consolidation Order." The Horton Defendants appealed such Consolidation

Order on August 23, 2010. The record that existed in this Court for the period November 5, 2009 to September 14, 2010, which is the record certified by the Court Clerk for the appeal is referred to as the "Current Record on Appeal."

5. **The Motions on Appeal.** The Consolidation Order addressed the following motions (and related briefing and argument) filed in this Court and will be referred to as the Motions on Appeal:

A. First Motion (filed on March 3, 2010): Plaintiffs' Motion to Compel Consolidated Arbitration for Those Plaintiffs Who Signed Purchase Agreements

B. Second Motion (filed on April 16, 2010):

(1) D.R. Horton, Inc. and DRH Southwest Construction, Inc.'s Motion:

(A) To Dismiss All Plaintiffs' Claims Because of Mandatory Arbitration as to All Claims (Except For Plaintiffs Fernandez, Lopez and Corwells which Should Be Stayed),

(B) Determination that Arbitration Cannot Be Consolidated Absent Agreement of the Parties, and

(C) For Protection from Discovery Because Any Discovery Must Occur in the Arbitrations which Have Not Commenced; and

(2) Response to Plaintiffs' Motion to Compel Consolidated Arbitration for Those

Plaintiffs Who Signed Purchase Agreements,

C. Third Motion (filed June 10, 2010): Based on New Evidence and Statutory Requirements, D.R. Horton, Inc. and DRH Southwest Construction, Inc.'s:

(1) Motion for Reconsideration of the Decision to Consolidate Arbitration and, Instead, for Entry of an Order Compelling Segregated Arbitrations; or,

(2) Alternatively, Motion to Stay Arbitration Pending Petition for Writ or Appeal to the Appellate Court and a Request for Findings and Conclusions; and

(3) A Request for an Expedited Hearing on the Alternative Motions.

6. **Application of the Current Record on Appeal to all of the Plaintiffs.** The Current Record on Appeal (including without limitation the briefings, exhibits, affidavits, hearings, requested findings of fact, requested conclusions of law, proposed orders, orders, and objections thereto) apply to both the Joining Plaintiffs and the Original Plaintiffs.

7. **The Extended Record.** All of the additions to the record before this Court that occur from September 14, 2009 forward (which would be after the certification of the Current Record on Appeal) shall be referred to as the Extended Record and apply to both the Original Plaintiffs and the Joining Plaintiffs. Such Extended Record shall include,

without limitation, the Sixth Affidavit of David Van Doren and the attachments thereto (including **Exhibit 143**, the chart which sets out purchase information pertaining to the Joining Plaintiffs), and the briefing, exhibits, affidavits, and hearings on the Four Joinder Motions (to the extent that they are not already in the Current Record on Appeal). By agreeing to the supplementation of the record, the Plaintiffs are not agreeing to the statements made in the Sixth Affidavit of David Van Doren, but only that the Horton Defendants are supplementing the record with such affidavit and attachments. The Court Clerk should supplement the Current Record on Appeal (which was certified on September 14, 2010) with the Extended Record, which includes everything after the Current Record on Appeal through the amended notice of appeal, which amended notice of appeal will include this Order.

8. **Agreement by the Fernandez/Lopezes and the Corwells.** Elizabeth Fernandez and Gerardo Lopez ("Fernandez/Lopezes") and James and Kerri Corwell (the "Corwells') did not sign purchase agreements with the Defendants and, therefore, there is a dispute as to whether any of the Fernandez/Lopezes and Corwells' claims are arbitrable, with the plaintiffs contending that none of the Fernandez/Lopezes and Corwells' claims are arbitrable and with the Horton Defendants contending that the warranty claims by the Fernandez/Lopezes and the Corwells are arbitrable. The Horton Defendants, the Fernandez/Lopezes and the Corwells agree to be bound by

the appeal decisions on the Consolidation Order and the Motions on Appeal in the event the warranty claims by the Fernandez/Lopezes and the Corwells are subsequently determined to be subject to mandatory arbitration.

9. **Amendment of the Notice of Appeal to Include this Order and Amendment of the Docketing Statement.** The Parties agreed that the Horton Defendants may amend the notice of appeal to include this Order and may amend the docketing statement filed on September 2, 2010 to include this Order and all issues raised after the first notice of appeal filed on August 23, 2010. Such issues includes (without limitation) the appeal of the Court's failure to adopt Horton Defendants' Requested Finding of Fact Nos. 4A, 5A, 9A, 10A, and 30A in place of the original Requested Finding of Fact Nos. 4, 5, 9, 10, and 30, set forth in the Stipulated Motion (which provides the same detail regarding the Joining Plaintiffs as regarding the Original Plaintiffs) and the Horton Defendants' arguments based on the Federal Arbitration Act and the United States Supreme Court case of *Stolt-Nielsen v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010). The parties further agree that such amended notice of appeal and amended docketing statement shall be considered timely.

10. **Final Orders.** This Order and the Consolidated Order are final orders for purposes of appeal and are ripe for appeal. The Fernandez/Lopezes and the Corwells, although not participating of record in the appeal of this Order and the Consolidated Order

and will not be named parties to such appeal, agree to be bound by the appeal decisions on the Consolidation Order and the Motions on Appeal.

BASED ON THE FOREGOING FINDINGS, IT IS THEREFORE ORDERED:

1. The Four Joinder Motions are granted.

2. The Consolidated Order applies to both the Joining Plaintiffs and the Original Plaintiffs.

3. The Current Record on Appeal and the Extended Record apply to both the Joining Plaintiffs and the Original Plaintiffs.

4. The Horton Defendants' approval as to the form of this Order and the stipulated facts herein does not constitute a waiver of any of the Horton Defendants' rights regarding or in opposition to the Four Joinder Motions or of any of the Horton Defendants' rights regarding or opposition to the Consolidation Order.

5. The Horton Defendants' proposed findings are amended to replace the Horton Defendants' original Requested Finding Nos. 4, 5, 9, 10, and 30 with the Requested Finding of Fact Nos. 4A, 5A, 9A, 10A, and 30A set forth in the Stipulated Motion, which provide the same detail regarding the Joining Plaintiffs as the Original Plaintiffs. The Court rejects such amended requested findings of fact because the Court has found findings of fact and conclusions of law unnecessary in ruling on the Consolidation Order.

6. To the extent that an order of this Court is necessary regarding the matter, the Horton Defendants may amend the notice of appeal to include this Order and may amend the docketing statement filed on September 2, 2010 to include this Order and all issues raised after the first notice of appeal filed on August 23, 2010. Such issues includes (without limitation) the Court's refusal to adopt the Horton Defendants' Requested Finding of Fact Nos. 4A, 5A, 9A, 10A, and 30A and the Horton Defendants' arguments based on the Federal Arbitration Act and the United States Supreme Court case of *Stolt-Nielsen v. Animalfeeds International Corp.*, 130 S. Ct. 1758 (2010). Such amended notice of appeal and amended docketing statement shall be considered timely.

7. Once the amended notice of appeal is filed, which includes an appeal of this Order, the Court Clerk shall supplement the Current Record on Appeal (which was certified on September 14, 2010) with the Extended Record, which includes everything after the Current Record on Appeal through the amended notice of appeal.

8. This Order and the Consolidated Order are final orders for purposes of appeal and are ripe for appeal, and the Fernandez/Lopezes and the Corwells (although not participating of record in the appeal of this Order and the Consolidated Order and will not be named parties to such appeal) are bound by the appeal decisions on the Consolidation Order and the Motions on Appeal in the event the warranty claims by the Fernandez/Lopezes and the Corwells are

subsequently determined to be subject to mandatory arbitration.

/s/ John W. Pope
JOHN W. POPE
DISTRICT JUDGE

Submitted as to form only:

LANDRY & LUDEWIG, L.L.P.

By: /s/ Stephanie Landry
Stephanie Landry
Margaret C. Ludewig
300 10th Street, SW
Albuquerque, NM 87102

Attorneys for the Defendants

GUEBERT BRUCKNER PC

By: /s/ Electronic approval December 6, 2010
Don Bruckner
Christopher J. Supik
P. O. Box 93880
Albuquerque, NM 87199-3880
505/823-2300

Attorneys for the Plaintiff

CROWLEY & GRIBBLE, PC

By: /s/ Electronic approval December 1, 2010
Clayton E. Crowley
4811 Hardware Drive, NE
Building D, Suite 5
Albuquerque, New Mexico 87109-2023

Attorney for Lakana Sangadej

STATE OF NEW MEXICO
COUNTY OF VALENCIA
THIRTEENTH JUDICIAL DISTRICT

ELIZABETH FERNANDEZ, GERARDO LOPEZ, LOREN LYNDOE, PHYLLIS LYNDOE, MANUEL TOLEDO, ISABEL TOLEDO, GLENDA COUNCIL, ROBERT COUNCIL, RON ARMSTRONG, LAURA ARMSTRONG, MICHAEL BROWN, CHRISTINE BROWN, PATRICIA SANCHEZ, FRANCISCA CABRIALES, JAKE LAMFERS, MARTA LAMFERS, SAMUEL HAUGE, MISTY HAUGE, CAL PALMER, VERONICA PALMER, HEATHER JAMES, HAAMID HAKAM, BAXTER BACKER, CAROLYN BACKER, JAMES CORWELL, KERRI CORWELL, JARED HUNTER, JACQUELINE HUNTER, SILVINO SUAREZ, VERA BLUHM, JOHANNA DUNCAN, LOUIS ACAMFRIO, RICHARD HOEHNE, ANABEL NAJERA, and JEANNETTE PAZ,

Plaintiffs,

v.

D.R. HORTON, INC., and DRH SOUTHWEST CONSTRUCTION, INC.,

Defendants.

No. D-1314-CV-2009-1578

FINAL ORDER GRANTING ARBITRATION CONSOLIDATION REGARDING ALL PLAINTIFFS (EXCEPT FOR THE FERNANDEZ/LOPEZES AND THE CORWELLS) AND STAY PENDING APPEAL

(Filed Aug. 18, 2010)

This matter is before the Court with respect to the following three motions concerning consolidated arbitration for all of the Plaintiffs, except for Elizabeth Fernandez and Gerardo Lopez ("Fernandez/Lopezes") and James and Kerri Corwell (the "Corwells') who did not sign purchase agreements with the Defendants.

First Motion: Plaintiffs' Motion to Compel Consolidated Arbitration for Those Plaintiffs Who Signed Purchase Agreements, filed March 3, 2010.

Second Motion:

(1) D.R. Horton, Inc. and DRH Southwest Construction, Inc.'s Motion:

(A) To Dismiss All Plaintiffs' Claims Because of Mandatory Arbitration as to All Claims (Except For Plaintiffs Fernandez, Lopez and Corwells which Should Be Stayed),

(B) Determination that Arbitration Cannot Be Consolidated Absent Agreement of the Parties, and

(C) For Protection from Discovery Because Any Discovery Must Occur in the

Arbitrations which Have Not Commenced; and

(2) Response to Plaintiffs' Motion to Compel Consolidated Arbitration for Those Plaintiffs Who Signed Purchase Agreements,

which motion was filed on April 16, 2010.

Third Motion: Based on New Evidence and Statutory Requirements, D.R. Horton, Inc. and DRH Southwest Construction, Inc.'s:

(1) Motion for Reconsideration of the Decision to Consolidate Arbitration and, Instead, for Entry of an Order Compelling Segregated Arbitrations; or,

(2) Alternatively, Motion to Stay Arbitration Pending Petition for Writ or Appeal to the Appellate Court and a Request for Findings and Conclusions; and

(3) A Request for an Expedited Hearing on the Alternative Motions,

which motion was filed on June 10, 2010.

This matter is also before the Court with respect to the Defendants' requested findings of fact and conclusions of law.

Having considered the briefs and arguments of the parties, the Court finds that Plaintiffs' motion to compel consolidated arbitration should be granted but that the consolidated arbitration of the Plaintiffs' claims (other than the claims of Fernandez/Lopezes

and the Corwells regarding which the Court has not yet ruled regarding arbitration issues pertaining to the Fernandez/Lopezes or the Corwells) should be stayed pending appeal. The Court further finds that this order compelling consolidated arbitration is final for the purposes of appeal, and that no findings of fact or conclusions of law are required.

IT IS THEREFORE ORDERED that Plaintiffs' Motion to Compel Consolidated Arbitration for Those Plaintiffs Who Signed Purchase Agreements is hereby granted, and their claims are to be consolidated pursuant to NMSA 1978, § 44-7A-11, into a single arbitration presided over by a single neutral arbitrator. The parties are hereby ordered to attempt to reach agreement as to the appointment of a single neutral arbitrator. If the parties are unable to agree upon an arbitrator, then the Court will appoint the single neutral arbitrator pursuant to NMSA 44-7A-12. The arbitrator will decide all discovery issues and issues of fact and law between Plaintiffs and Horton subject to the arbitration agreements signed by the parties. Fees and expenses of the arbitrator will be paid by Horton as agreed to by the arbitration agreement.

IT IS FURTHER ORDERED that D.R. Horton, Inc. and DRH Southwest Construction, Inc.'s Motion for a Determination that Arbitration Cannot Be Consolidated Absent Agreement of the Parties is denied.

IT IS FURTHER ORDERED that D.R. Horton, Inc. and DRH Southwest Construction, Inc.'s Motion for Reconsideration of the Decision to Consolidate Arbitration and, Instead, for Entry of an Order Compelling Segregated Arbitrations is denied.

IT IS FURTHER ORDERED that D.R. Horton, Inc. and DRH Southwest Construction, Inc.'s Motion to Stay Arbitration Pending Petition for Writ of Appeal to the Appellate Court is granted, and that the consolidated arbitration is hereby stayed.

IT IS FURTHER ORDERED that D.R. Horton, Inc. and DRH Southwest Construction's Request for Findings and Conclusions is denied.

IT IS FURTHER ORDERED that the orders set forth herein are final orders for the purposes of appeal with respect to the claims of all of the Plaintiffs with the exception of the Fernandez/Lopezes and the Corwells, whose rights are not involved in this order.

/s/ John W. Pope
JOHN W. POPE
DISTRICT JUDGE

Submitted as to form only:

LANDRY & LUDEWIG, L.L.P.

By: /s/ Stephanie Landry
Stephanie Landry
Margaret C. Ludewig
300 10th Street, SW
Albuquerque, NM 87102

Attorneys for the Defendants

GUEBERT BRUCKNER PC

By: /s/ Don Bruckner
Don Bruckner
6801 Jefferson Street, NW, Suite 400
Albuquerque, New Mexico 87109

Attorneys for the Plaintiffs

THE SUPREME COURT OF THE STATE OF NEW MEXICO
September 24, 2012

NO. 33,771

LOREN LYNDOE, PHYLLIS LYNDOE, MANUEL TOLEDO, ISABEL TOLEDO, GLENDA COUNCIL, ROBERT COUNCIL, RON ARMSTONG [sic], LAURA ARMSTRONG, PATRICIA SANCHEZ, FRANCISCA CABRIALES, JAKE LAMFERS, MARTA LAMFERS, CAL PALMER, VERONICA PALMER, HEATHER JAMES, HAAMID HAKAM, BAXTER BACKER, CAROLYN BACKER, JARED HUNTER, JACQUELINE HUNTER, SILVINO SUAREZ, JOHANNA DUNCAN, RICHARD HOEHNE, ANABEL NAJERA, JEANNETTE PAZ, ROBERT BRUHN, JAKE NUTTALL, DIANE NUTTALL, RON STONE, STELLA STONE, YVONNE BALDONADO, ROBERT ROBLES, TINA ROBLES, JOSEPH CRAIG, ALISA SHTROMBERG, JESSE MAGALLANEZ, PAMELA TAFOYA, ROBERT BONILLA, ALICIA BONILLA, RUBEN VALENZUELA, YVETTE VALENZUELA, IGNACIO SANCHEZ, WENDY SCHMIDT, MARCUS DECLOUETTE, DANIELLE DECLOUETTE, MADELINE R. MANI, SANJAY CHANDRAN, PATRICK YOKOYAMA, ROSEANNE YOKOYAMA, TREVOR BRASEL, KRISTI BRASEL, JOSE CARTER, EMILY CARTER, CALVIN LUCERO, ERIN GARCIA, and LAKANA SANGADEJ,

Plaintiffs-Respondents,

and

ELIZABETH FERNANDEZ, GERARDO LOPEZ, JAMES CORWELL, and KERRI CORWELL,

Plaintiffs,

vs.

D.R. HORTON, INC., and DRH SOUTHWEST CONSTRUCTION, INC.,

Defendants-Petitioners,

and

CURB SOUTH, LLC,

Defendant.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised, Chief Justice Petra Jimenez Maes, Justice Patricio M. Serna, Justice Richard C. Bosson, Justice Edward L. Chavez, Justice Charles W. Daniels, and Justice Paul J. Kennedy concurring;

NOW, THEREFORE, IT IS ORDERED that the petition for writ of certiorari is denied in Court of Appeals number 30663.

IT IS SO ORDERED.

WITNESS, The Hon. Petra Jimenez Maes, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 24th day of September, 2012.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk

STATE OF NEW MEXICO
COUNTY OF VALENCIA
THIRTEENTH JUDICIAL DISTRICT

ELIZABETH FERNANDEZ, GERARDO LOPEZ, LOREN LYNDOE, PHYLLIS LYNDOE, MANUEL TOLEDO, ISABEL TOLEDO, GLENDA COUNCIL, ROBERT COUNCIL, RON ARMSTRONG, LAURA ARMSTRONG, MICHAEL BROWN, CHRISTINE BROWN, PATRICIA SANCHEZ, FRANCISCA CABRIALES, JAKE LAMFERS, MARTA LAMFERS, SAMUEL HAUGE, MISTY HAUGE, CAL PALMER, VERONICA PALMER, HEATHER JAMES, HAAMID HAKAM, BAXTER BACKER, CAROLYN BACKER, JAMES CORWELL, KERRI CORWELL, JARED HUNTER, JACQUELINE HUNTER, SILVINO SUAREZ, VERA BLUHM, JOHANNA DUNCAN, LOUIS ACAMFRIO, RICHARD HOEHNE, ANABEL NAJERA, and JEANNETTE PAZ,

Plaintiffs,

v.

D.R. HORTON, INC., DRH SOUTHWEST CONSTRUCTION, INC., and CURB SOUTH, LLC,

Defendants.

No. D-1314-CV-2009-1578

AFFIDAVIT OF MARK FERGUSON

1. I have personal knowledge of the facts stated herein. I am the President of the New Mexico Division of D.R. Horton, Inc. ("Horton").

2. In my position as Division President, I have the ultimate responsibility for the sale of homes by Horton in New Mexico, including the terms of the purchase agreements and related sales and warranty documents, although I delegate, my responsibilities through my first and second tier managers.

3. As the Division President, I am the ultimate custodian of the records for Horton's New Mexico division, and I have reviewed the sales file for those plaintiffs in the above-captioned case that purchased their houses directly from Horton, which would be all of the above-captioned plaintiffs with the exception of Elizabeth Fernandez and Gerardo Lopez (wife and husband) and James and Kerri Corwell.

4. The following plaintiffs purchased the following houses in Sagebrush Subdivision (which is in the Huning Ranch development in Los Lunas, New Mexico) directly from Horton, and such purchases spanned over a three year period; Louis Acanfrio (2710 Rain Sage) (spelled incorrectly in the caption as "Acamfrio") who came into title of such property on January 31, 2007, Ron and Laura Armstrong (2870 Desert Sage) who came into title of such property on January 25, 2007, Baxter and Carolyn Backer (501 Blue Sage) who came into title of such property on August 22, 2008, Vera Bluhm (2831 Rain Sage) who

came into title of such property on January 19, 2007, Michael and Christine Brown (740 Rain Lily) who came into title of such property on January 23, 2007, Francisca Cabriales (690 Rain Lily) who came into title of such property on February 26, 2007, Glenda and Robert Council (2940 Desert Sage) (only Robert Council came into title of such property, which was on November 28, 2006), Johanna Duncan (last name Poitier on the deed, assuming that the Johanna Duncan is the same person as the plaintiff) (2880 Desert Sage) who came into title of such property on December 18, 2006, Haamid Hakam and Heather James (3070 Desert Sage) who came into title of such property on August 29, 2008, Samuel and Misty Hauge (470 Blue Sage) (only Samuel Hauge came into title of such property, which was on May 28, 2008), Richard Hoehne and Anabel Najera (500 Blue Sage) who came into title of such property on February 11, 2009; Jared and Jacqueline Hunter (referred to as Jacqueline Finley in the deed) (511 Blue Sage) who came into title of such property on July 23, 2008, Jake and Marta Lamfers (710 Rain Lily) who came into title of such property on February 23, 2007, Loren and Phyllis Lyndoe (2891 Desert Sage) who came into title of such property on December. 15, 2006, Cal and (Eliana) Veronica Palmer (2910 Desert Sage) who came into title of such property on November 20, 2006, Jeannette Paz (referred to as Jeannette Jaramillo in the deed) (491 Blue Sage) who came into title of such property on January 21, 2009, Patrica Sanchez (2890 Desert Sage) (spelled incorrectly in the caption as "Patricia") who came into title of such

property on February 28, 2007, Silvino Suarez (510 Blue Sage) who came into title of such property on May 29, 2008, and Manuel and Isabella Toledo (3010 Desert Sage) (Isabella spelled incorrectly as "Isabel" in the caption) who came into title of such property on December 14, 2006. I will refer to the aforementioned plaintiffs as the "Direct Purchase Plaintiffs."

5. I am providing this affidavit in support of the following pleading in the above-captioned case entitled: (1) D.R. Horton, Inc, and DRH Southwest Construction, Inc.'s Motion (A) to Dismiss All Plaintiffs' Claims Because of Mandatory Arbitration as to All Claims (Except for Plaintiffs Fernandez, Lopez and Corwells Which Should Be Stayed), (B) for a Determination that Arbitration Cannot Be Consolidated Absent Agreement of the Parties, and (C) for Protection from Discovery Because Any Discovery Must Occur in the Arbitrations Which Have Not Commenced; and (2) Response to Plaintiffs Motion to Compel Consolidated Arbitration for Those Plaintiffs Who Signed Purchase Agreements.

6. According to Horton's files, the Direct Purchase Plaintiffs did not all purchase their homes in the same transaction. Instead, each house was purchased pursuant to a separate purchase transaction. Each house was purchased from Horton with a separate purchase agreement.

7. Moreover, there are seven different versions of the form of purchase agreement that were used in connection with the various Direct Purchase Plaintiffs

and nine over all different forms of purchase agreement related to this matter thus far, which various versions are dated 12/21/04, 4/19/06, 4/20/06, 5/5/06, 5/19/06, 04/04/07, 08/17/09, 1/17/08, and 3/31/08.

8. The terms of Horton's limited home warranty applicable to each house are set forth in the version of the Residential Warranty Company, LLC Limited Warranty booklet in effect at the time of each sale. The version of the homeowner warranty booklet can be different for different purchasers based upon the date of purchase.

9. With respect to the named Plaintiffs, there were two different versions of the homeowners warranty booklet, one of which applies to certain Direct Purchase Plaintiffs and the second that applies to the rest. The two form [sic] of home warranties, which are both by the Residential Warranty Company; LLC for Horton, are dated November of 2006 and October of 2007. A true and correct copy of pertinent portions of the Residential Warranty Company, LLC Limited Warranty booklet dated November of 2006 is attached as **Horton Exhibit 44** (November 2006 RWC Limited Warranty) and a true and correct copy of pertinent portions of the Residential Warranty Company Limited Warranty booklet dated October of 2007 is attached as **Horton Exhibit 45** hereto.

10. As shown by documents attached hereto, the purchase agreements and warranty documents for the Direct Purchase Plaintiffs provide that the Direct Purchase Plaintiffs shall not change the drainage

patterns established by Horton, although the language from the seven different forms of purchase agreements vary. For example, the 04/04/07 form purchase agreement states: "The Subdivision has been graded in accordance with the requirements of the City for the purpose of directing the flow and drainage of surface water. . . . Seller shall not be responsible for any damages to persons or property resulting from post closing changes in the existing drainage course as a result of (a) the alteration of the swales, drainage pipes or drainage courses, or failure to maintain the same as established by Seller and/or failure to keep them free of buildings, structures and obstructions, including but not limited to debris and weeds (b) a change in grading, (c) erosion, or (d) any landscaping or other improvements that are installed in such a way as to alter the drainage flow on the Lot. This applies both to drainage from Buyer's yard on to any other property as well as drainage within the yard." *See* **Exhibit 12** to Motion to Stay Litigation, Including Discovery, of Claims by Elizabeth Fernandez and Gerardo Lopez Pending Arbitration.

11. As well, although the drainage swales are visible, Horton also makes available to purchasers a plot plan showing the purchaser the location of the drainage swales. Horton has the purchaser sign off on a Grading-Plot Plan Verification form that confirms that Horton has shown the purchaser or purchasers the plot plan and explained the drainage as it exists and relates to the plot plan, that the location of the swales have been identified and their purpose is

understood, and that the purchaser acknowledges that any alteration in the drainage will result in a voiding of any warranty item determined to be a result of said alteration. Horton has attached the Grading-Plot Plan Verifications regarding the Direct Purchase Plaintiffs, to the extent that Horton has such verifications in its possession as discussed further below.

Acanfrio:

12. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Acanfrio Purchase Agreement") dated June 11, 2006 between Horton and Louis Acanfrio for 2710 Rain Sage ("Acanfrio House") is attached as **Horton Exhibit 46** hereto.

13. The Acanfrio Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

14. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (including RWC Limited Warranty Book)" executed by Mr. Acanfrio are attached as **Horton Exhibits 47** and **48** hereto.

15. Based on the date that the Acanfrio House was transferred to Mr. Acanfrio, Mr. Acanfrio would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Armstrong:

16. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Armstrong Purchase Agreement") dated September 5, 2006 between Horton and Ron and Laura Armstrong for 2870 Desert Sage ("Armstrong House") is attached as **Horton Exhibit 49** hereto.

17. The Armstrong Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

18. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Armstrongs are attached as **Horton Exhibits 50** and **51** hereto.

19. Based on the date that the Armstrong House was transferred to the Armstrongs, the Armstrongs would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Backer:

20. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Backer Purchase Agreement") dated April 25, 2008 between Horton and Baxter and Carolyn Backer for 501 Blue Sage ("Backer House") is attached as **Horton Exhibit 52** hereto.

21. The Backer Purchase Agreement is the 3/31/08 form of Horton purchase agreement.

22. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Backers is attached as **Horton Exhibit 53** hereto.

23. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Backer House are attached as **Horton Exhibit 54** hereto.

24. Based on the date that the Backer House was transferred to the Backers, the Backers would have received the October 2007 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 45** hereto.

Bluhm:

25. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Bluhm Purchase Agreement") dated June 29, 2006 between Horton and Vera Bluhm for 2831 Rain Sage ("Bluhm House") is attached as **Horton Exhibit 55** hereto.

26. The Bluhm Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

27. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC

Limited Warranty Book)" executed by Ms. Bluhm are attached as **Horton Exhibits 56** and **57** hereto.

28. A true and correct copy of a Grading-Plot Plan Verification and the Plot, Plan for the Bluhm House are attached as **Horton Exhibit 58** hereto.

29. Based on the date that the Bluhm House was transferred to Ms. Bluhm, Ms. Bluhm would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Brown:

30. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Brown Purchase Agreement") dated June 20, 2006 between Horton and Michael and Christine Brown for 740 Rain Lily ("Brown House") is attached as **Horton Exhibit 59** hereto.

31. The Brown Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

32. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Browns are attached as **Horton Exhibits 60** and **61** hereto.

33. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Brown House are attached as **Horton Exhibit 62** hereto.

34. Based on the date that the Brown House was transferred to the Browns, the Browns would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Cabriales:

35. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Cabriales Purchase Agreement") dated July 7, 2006 between Horton and Francisca Cabriales for 690 Rain Lily ("Cabriales House") is attached as **Horton Exhibit 63** hereto.

36. The Cabriales Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

37. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Ms. Cabriales is attached as **Horton Exhibit 64** hereto.

38. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Cabriales House is attached as **Horton Exhibit 65** hereto.

39. Based on the date that the Cabriales House was transferred to Ms. Cabriales, Ms. Cabriales would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Council:

40. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Council Purchase Agreement") dated November 15, 2006 between Horton and Robert Council for 2940 Desert Sage ("Council House") is attached as **Horton Exhibit 66** hereto.

41. The Council Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

42. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Mr. Council are attached as **Horton Exhibits 67** and **68** hereto.

43. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Council House is attached as **Horton Exhibit 69** hereto.

44. Based on the date that the Council House was transferred to Robert Council, Mr. Council would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit** 44 hereto.

Duncan:

45. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Duncan Purchase Agreement") dated June 2, 2006 between Horton and Johanna Duncan for 2880 Desert

Sage ("Duncan House") is attached as **Horton Exhibit 70** hereto.

46. The Duncan Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

47. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Ms. Duncan are attached as **Horton Exhibits 71** and **72** hereto.

48. A true and correct copy of a Plot Plan for the Duncan House executed by Ms. Duncan is attached as **Horton Exhibit 73** hereto.

49. Based on the date that the Duncan House was transferred to Ms. Duncan, Ms. Duncan would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Hakam/James:

50. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Hakam/James Purchase Agreement") dated April 10, 2008 between Horton and Haamid Hakam and Heather James for 3070 Desert Sage is attached as **Horton Exhibit 74** hereto.

51. The Hakam/James Purchase Agreement is the 1/17/08 form of Horton purchase agreement.

52. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Mr. Hakam and Ms. James are attached as **Horton Exhibits 75** and **76** hereto.

53. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Hakam/James House is attached as **Horton Exhibit 77** hereto.

54. Based on the date that the Hakam/James House was transferred to the Hakam/Jameses, the Hakam/Jameses would have received the October 2007 RWC. Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 45** hereto.

Hauge:

55. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Hauge Purchase Agreement") dated April 4, 2008 between Horton and Samuel Hauge for 470 Blue Sage is attached as **Horton Exhibit 78** hereto.

56. The Hauge Purchase Agreement is the 1/17/08 form of Horton purchase agreement.

57. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Mr. Hauge is attached as **Horton Exhibit 79** hereto.

58. Based on the date that the Hauge House was transferred to Mr. Hauge, Mr. Hauge would have received the October 2007 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 45** hereto.

Hoehne/Najera:

59. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Hoehne Purchase Agreement") dated March 14, 2009 between Horton and Richard Hoehne for 500 Blue Sage ("Hoehne/Najera House") is attached as **Horton Exhibit 80** hereto.

60. The Hoehne Purchase Agreement is the 3/31/08 form of Horton purchase agreement.

61. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Mr. Hoehne is attached as **Horton Exhibit 81** hereto.

62. Based on the date that the Hoehne House was transferred to Mr. Hoehne, Mr. Hoehne would have received the October 2007 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 45**.

Hunter:

63. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Hunter Purchase Agreement") dated April 2, 2008 between Horton and Jared Hunter and Jacqueline Hunter (referred to as Jacqueline Finley in the deed) for 511 Blue Sage ("Hunter House") is attached as **Horton Exhibit 82** hereto.

64. The Hunter Purchase Agreement is the 1/17/08 form of Horton purchase agreement.

65. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Hunters is attached as. **Horton Exhibit 83** hereto.

66. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Hunter House are attached as **Horton Exhibit 84** hereto.

67. Based on the date that the Hunter House was transferred to the Hunters, the Hunters would have received the October 2007 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 45** hereto.

Lamfers:

68. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Lamfers Purchase Agreement") dated June 27, 2006

between Horton and Jake and Marta Lamfers for 710 Rain Lily ("Lamfers House") is attached as **Horton Exhibit 85** hereto.

69. The Lamfers Purchase Agreement is the 5/19/06 form of Horton purchase agreement.

70. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Lamfers are attached as **Horton Exhibits 86** and **87** hereto.

71. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Lamfers House are attached as **Horton Exhibit 88** hereto.

72. Based on the date that the Lamfers House was transferred to the Lamfers, the Lamfers would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Lyndoe:

73. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Lyndoe Purchase Agreement") dated April 30, 2006 between Horton and Loren and Phyllis Lyndoe for 2891 Desert Sage is attached as **Horton Exhibit 89** hereto.

74. The Lyndoe Purchase Agreement is the 4/20/06 form of Horton purchase agreement.

75. True and correct copies of two different forms entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Lyndoes are attached as **Horton Exhibits 90** and **91** hereto.

76. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Lyndoe House are attached as **Horton Exhibit 92** hereto.

77. Based on the date that the Lyndoe House was transferred to the Lyndoes, the Lyndoes would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Palmer:

78. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Palmer Purchase Agreement") dated May 10, 2006 between Horton and Cal and (Eliana) Veronica Palmer for 2910 Desert Sage ("Palmer House") is attached as **Horton Exhibit 93** hereto.

79. The Palmer Purchase Agreement is the 5/5/06 form of Horton purchase agreement.

80. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Palmers is attached as **Horton Exhibit 94** hereto.

81. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Palmer House is attached as **Horton Exhibit 95** hereto.

82. Based on the date that the Palmer House was transferred to the Palmers, the Palmers would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Paz:

83. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Paz Purchase Agreement") dated January 13, 2009 between Horton and Jeannette Paz (formerly Jaramillo) for 491 Blue Sage ("Paz House") is attached as **Horton Exhibit 96** hereto.

84. The Paz Purchase Agreement is the 3/31/08 form of Horton purchase agreement.

85. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Ms. Paz is attached as **Horton Exhibit 97** hereto.

86. Based on the date that the Paz House was transferred to Ms. Paz, Ms. Paz would have received the October 2007 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 45** hereto.

Sanchez:

87. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Sanchez Purchase Agreement") dated October 3, 2006 between Horton and Patrica Sanchez for 2890 Desert Sage ("Sanchez House") is attached as **Horton Exhibit 98** hereto.

88. The Sanchez Purchase Agreement is the 4/19/06 form of Horton purchase agreement.

89. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Ms. Sanchez is attached as **Horton Exhibit 99** hereto.

90. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Sanchez House is attached as **Horton Exhibit 100** hereto.

91. Based on the date that the Sanchez House was transferred to Ms. Sanchez, Ms. Sanchez would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

Suarez:

92. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Suarez Purchase Agreement") dated May 14, 2008 between Horton and Silvino Suarez for 510 Blue Sage

("Suarez House") is attached as **Horton Exhibit 101** hereto.

93. The Suarez Purchase Agreement is the 3/31/08 form of Horton purchase agreement.

94. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual and Warranty Guide (Including RWC Limited Warranty Book)" executed by Mr. Suarez is attached as **Horton Exhibit 102** hereto.

95. Based on the date that the Suarez House was transferred to Mr. Suarez, Mr. Suarez would have received the October 2007 RWC Limited Warranty, pertinent portions of which are attached as Horton Exhibit 45 hereto.

Toledo:

96. According to Horton's files, a true and correct copy of portions of the purchase agreement ("Toledo Purchase Agreement") dated December 14, 2006 between Horton and Manuel and Isabella Toledo for 3010 Desert Sage is attached as **Horton Exhibit 103** hereto, which includes a Buyer Change Addendum changing the buyers to Manuel and Isabella Toledo.

97. The Toledo Purchase Agreement is the 12/21/04 form of Horton purchase agreement.

98. A true and correct copy of the form entitled the "Receipt and Disclaimer for Homeowner's Manual

and Warranty Guide (Including RWC Limited Warranty Book)" executed by the Toledos are attached as **Horton Exhibit 104** hereto.

99. A true and correct copy of a Grading-Plot Plan Verification and the Plot Plan for the Toledo House is attached as **Horton Exhibit 105** hereto.

100. Based on the date that the Toledo House was transferred to the Toledos, the Toledos would have received the November 2006 RWC Limited Warranty, pertinent portions of which are attached as **Horton Exhibit 44** hereto.

ARBITRATION AGREEMENTS

101. Each of the plaintiffs I address in this Affidavit has a separate arbitration agreement relating to each separate purchase agreement, The New Mexico division of Horton has never consolidated arbitrations of its homeowners regarding warranty claims or any other matter.

102. The New Mexico division of Horton had and still has a legitimate business expectation that in each situation where there is a dispute regarding a homeowner claim, such dispute will proceed in a separate arbitration proceeding because each homeowner with a disputed claim is a distinct claim specific to that homeowner.

103. Horton selected the arbitration remedy as an inexpensive and expedient way of resolving issues between homeowners and Horton. A combined

arbitration with twenty plus homeowners undermines Horton's expectations and would impede the resolution of Horton's warranty obligations to a specific homeowner.

104. The claims by each homeowner in this case are no exception and give rise to distinct issues according to Mr. McKeen, the engineer hired by Horton. As shown by the Affidavit of Mr. Gordon McKeen, P.E., D.GE, for certain houses owned by the plaintiffs and at issue in this case, he has found no structural damage. For other houses, he has identified excessive watering as the problem. For other houses, a very few houses to date, he has concluded there were leaks in the irrigation system or in the house's plumbing system, and where Horton has determined that such leaks are still within the warranty period and were caused by Horton's subcontractors, Horton has repaired or is repairing such leaks and any damage as a result of the leaks. For other houses, there are cosmetic issues that have nothing to do with water infiltration.

105. Joint arbitration will result in undue delay for those homeowner plaintiffs who have houses where the issues, if any, are relatively minor or purely cosmetic in nature, or for which Horton has, in fact, already agreed, without admitting liability, to make repairs to the houses. Joint arbitration will also result in further prejudice to Horton for having to combine claims involving houses where there is no liability on Horton's part with claims where Horton

has acknowledged a leak caused by a Horton subcontractor and has agreed to repair such house under Horton's warranty. Such combining of claims could suggest liability in cases where there is none.

106. As stated above, contrary to what the plaintiffs' counsel leads people to believe, Horton is attempting to work with the homeowners and if Horton finds that it is responsible for any damage to a particular house it is repairing that damage, and, even in some instance where there is no damage but merely cosmetic issues and/or regular homeowner maintenance issues for which Horton is not responsible, Horton has made offers to address some of those issues as a courtesy to the homeowner.

Affiant further sayeth naught.

/s/ Mark Ferguson
Mark Ferguson

SUBSCRIBED AND SWORN TO before me this 5th day of April 2010 by Mark Ferguson.

/s/ Melissa Parra Wilcox
Notary Public

My commission expires: June 12, 2012 [Notary Seal]

HORTON EXHIBIT 44

[LOGO]

RESIDENTIAL WARRANTY COMPANY, LLC
PRESENTS

THE LIMITED WARRANTY
10 YEAR WRITTEN WARRANTY FOR NEW HOMES

Within 90 days after receiving this Warranty book, you should receive a validation sticker from RWC. If you do not, contact your **Builder** to verify that the forms were properly processed and sent to RWC. You do **not** have a warranty without the validation sticker

Place validation sticker here.
Warranty is invalid without sticker.

This Limited Warranty does not cover consequential or incidental damages. The Warrantor's total aggregate liability of this Limited Warranty is limited to the Final Sales Price listed on the Application For Warranty form.

The Builder makes no housing merchant implied warranty or any other warranties, express or implied, in connection with the attached sales contract or the warranted Home, and all such warranties are excluded, except as expressly provided in this Limited Warranty. There are no warranties which extend beyond the face of this Limited Warranty.

Some states do not allow the exclusion or limitation of incidental or consequential damages by the Builder so

all of the limitations or exclusions of this Limited Warranty may not apply to you.

For your Limited Warranty to be in effect,
you should receive the following documentation:
• Limited Warranty #319 • Application For Warranty form #316 (Refer to I.B.3. for applicability) •
• Validation Sticker #385 •

Insurer: Western Pacific Mutual Insurance Company,
A Risk Retention Group

WPIC #319 Rev. 11/06

Section IV. Requesting Warranty Performance

A. Notice to Warrantor in Years 1 & 2

1. If a Defect occurs in Years 1 and 2, you must notify your Builder in writing. Your request for warranty performance should clearly describe the Defect(s) in reasonable detail.

2. Request for warranty performance to your Builder does not constitute notice to the Administrator, and it will not extend applicable coverage periods.

3. If a request for warranty performance to your Builder does not result in satisfactory action within a reasonable time, written notice must be given to RWC, Administrator, 5300 Derry Street, Harrisburg, Pennsylvania 17111-3598, Attn: Warranty Resolution Department. This notice should describe each item in reasonable detail and should be forwarded by certified mail, return receipt requested.

4. Please note that a written request for warranty performance must be mailed to RWC and postmarked no later than thirty (30) days after the expiration of the applicable warranty period. For example, if the item is one which is warranted by your Builder during your second year of coverage, a request for warranty performance must be mailed to RWC and postmarked no later than thirty (30) days after the end of the second year to be valid.

5. You must provide the Warrantor with reasonable weekday access during normal business hours in order to perform its obligations. Failure by your [sic] to provide such access to the Warrantor may relieve the Warrantor of its obligations under this Limited Warranty.

6. If your Builder does not fulfill its obligations under this Limited Warranty, the Administrator will process the request for warranty performance as described in the Limited Warranty and subject to the provisions of IV.F.

B. Notice to Warrantor in Years 3-10

If a Defect related to a warranted MSD occurs in Years 3 through 10 of this Limited Warranty, you must notify the Administrator to review the item. All such notices must be presented in writing to RWC, Administrator, 5300 Derry Street, Harrisburg, Pennsylvania 17111-3598, Attn: Warranty Resolution Department, by certified mail, return receipt requested, within a reasonable time after the situation arises. Any such notice should describe the condition of the MSD in reasonable

detail. Requests for warranty performance postmarked more than thirty (30) days after the expiration of the term of this Limited Warranty will not be honored.

C. Purchaser's Obligations

1. Your notice to the Administrator must contain the following information:
   a. Validation # and Effective Date Of Warranty;
   b. Your Builder's name and address;
   c. Your name, address and phone number (includinghome [sic] and work numbers);
   d. Reasonably specific description of the warranty item(s) to be reviewed;
   e. A copy of any written notice to your Builder;
   f. Photograph(s) may be required; and
   g. A copy of each and every report you have obtained from any inspector or engineer.
2. You have an obligation to cooperate with the Administrator's mediation, inspection and investigation of your warranty request. From time to time, the Administrator may request information from you regarding an alleged Defect. Failure by you or your appointed representative to respond with the requested information within thirty (30) days of the date of the Administrator's request can result in the closing of your warranty file.

D. Mediation and Inspection

Within thirty (30) days following the Administrator's receipt if proper notice of request for warranty performance, the Administrator may review and mediate your request by communicating with you, your Builder and any other individuals or entities who the Administrator believes possess relevant information. If, after thirty (30) days, the Administrator has not been able to successfully mediate your request, or at any earlier time when the Administrator believes that your Builder and you are at an impasse, then the Administrator will notify you that your request has become an Unresolved Warranty Issue. At any time following the receipt of proper notice of your request for warranty performance, the Administrator may schedule an inspection of the item. You must provide the Administrator reasonable access for any such inspection as discussed in Section IV.A.5. The Administrator, at its discretion, may schedule a subsequent inspection to determine Builder compliance.

When a request for warranty performance is filed and the deficiency cannot be observed under normal conditions, it is your responsibility to substantiate that the need for warranty performance exists including any cost involved. If properly substantiated, you will be reimbursed by the Warrantor.

E. Arbitration*

1. You begin the arbitration process by giving the Administrator written notice of your request for arbitration of an Unresolved Warranty Issue. Within twenty (20) days after the Administrator's receipt of your notice of request for arbitration, any Unresolved Warranty Issue that you have with the Warrantor shall be submitted to an independent arbitration service experienced in arbitrating residential construction matters upon which you and the Administrator agree. This binding arbitration is governed by the procedures of the Federal Arbitration Act, 9 U.S.C. 1 *et. seq*. If you submit a request for arbitration, you must pay the arbitration fees before the matter is submitted to the arbitration service. After arbitration, the Arbitrator shall have the power to award the cost of this fee to any party or to split it among the parties to the arbitration. The arbitration shall be conducted in accordance with this Limited Warranty and the arbitration rules and regulations to the extent that they are not in conflict with the Federal Arbitration Act.

---

* FHA/VA Homeowners, refer to HUD Addendum, Section V D

♦ Homeowners in Maryland, refer to Maryland Addendum, Section V E

★ Homeowners in Newark, Delaware, refer to Newark, Delaware, Addendum, Section V A

† Homeowners in the State of New York, refer to State of New York Addendum, Section V.B

Within one (1) year after an arbitration award, either party may apply to the U.S. District Court where the Home is situated to confirm the award. The Administrator's receipt of a written request for arbitration in appropriate form shall stop the running of any statute of limitations applicable to the matter to be arbitrated until the Arbitrator renders a decision). The decision of the Arbitrator shall be final and binding upon all parties.†

Since this Limited Warranty provides for mandatory binding arbitration of Unresolved Warranty Issues, if any party commences litigation in violation of this Limited Warranty, such party shall reimburse the other parties to the litigation for their costs and expenses, including attorney fees, incurred in seeking dismissal of such litigation.*

In Years 1 & 2, the Builder shall have sixty (60) days from the date the Administrator sends the Arbitrator's award to the Builder to comply with the Arbitrator's decision. In Years 3-10, the Warrantor shall have sixty (60) days from the date the Administrator receives the Arbitrator's award to comply with the Arbitrator's decision. Warranty compliance will begin as soon as possible and will be completed within the sixty-day compliance period with the exception of any repair that would reasonably take more than sixty (60) days to complete, including, but not limited to, repair delayed or prolonged by inclement weather. The Warrantor will complete such repair or replacement as soon as possible without incurring overtime or weekend expenses.

You may request a compliance arbitration within twenty (20) days after the sixty day compliance period has expired by giving the Administrator written notice of your request. You must pay the fees for the compliance arbitration prior to the matter being submitted to the arbitration service.

F. Conditions of Warranty Performance

1. When your request for warranty performance is determined to be a warranted issue, the Warrantor reserves the right to repair or replace the warranted item, or to pay you the reasonable cost of repair or replacement.

2. In Years 1 and 2, if your Builder defaults in its warranty obligations, the Administrator will process the request for warranty performance provided you pay a warranty service fee of $250 for each request prior to repair or replacement.*★♦

3. In Years 3 through 10 you must pay the Administrator a warranty service fee of $500 for each request.*★♦

4. If the Administrator elects to award you cash rather than repair or replace a warranted item, the warranty service fee will be subtracted from the cash payment.

5. If the Warrantor pays the reasonable cost of repairing a warranted item, the payment shall be made to you and to any mortgagee or mortgagee's successor as each of your interests may appear; provided that the mortgagee has notified the Administrator in writing of its security interest

in the Horne prior to such payment. Warrantor shall not have any obligation to make payment jointly to the Purchaser and mortgagee where the mortgagee has not notified your Builder or the Administrator in writing of its security interest in the Home prior to such payment Any mortgagee shall be completely bound by any mediation or arbitration relating to a request for warranty performance between you and the Warrantor.*

6. Prior to payment for the reasonable cost of repair or replacement of warranted items, you must sign and deliver to the Builder or the Administrator, as applicable, a full and unconditional release, in recordable form, of all legal obligations with respect to the warranted Defects and any conditions arising from the warranted items.

7. Upon completion of repair or replacement of a warranted Defect, you must sign and deliver to the Builder or the Administrator, as applicable, a full and unconditional release, in recordable form, of all legal obligations with respect to the Defect and any conditions arising from the situation. The repaired or replaced warranted item will continue to be warranted by this Limited Warranty for the remainder of the applicable period of coverage.

8. If the Warrantor repairs, replaces or pays you the reasonable cost to repair or replace a warranted item, the Warrantor shall be subrogated to all your rights of recovery against any person or entity. You must execute and deliver any and all instruments and papers and take any and all other notions necessary to secure such rights, including,

but not limited to, assignment of proceeds of any insurance or other warranties to the Warrantor. You shall do nothing to prejudice these rights of subrogation.

9. Any Warrantor obligation is conditioned upon your proper maintenance of the Home, common elements and grounds to prevent damage due to neglect, abnormal use or improper maintenance.

10. Condominium Procedures:

    a. In the case of common elements of a condominium, at all times, owner(s) of each unit affected by the common elements in need of warranty performance shall each be responsible to pay the warranty service fee ($250 in Years 1 and 2, $500 in Years 3 through 10) for each request for warranty performance.*★

    b. If a request for warranty performance under this Limited Warranty involves a common element in a condominium, the request may be made only by an authorized representative of the condominium association. If the Builder retains a voting interest in the association of more than 50%, the request may be made by unit owners representing 10% of the voting interests in the association.

    c. If a request for warranty performance under this Limited Warranty involves a common element affecting multiple units, and all affected units are not warranted by the RWC Warranty Program, the Insurer's liability shall be limited to only those units warranted

by the RWC Warranty. The limit of liability shall be prorated based upon the number of units warranted by this Limited Warranty.

HORTON EXHIBIT 49

For Office Use Only Sales Consultant: Hollie C Roerick Sales Consultant Phone: (505) 792-4542 Co-Broker: Linda DeVlieg Co-Broker Phone: (505) 293-3700

[LOGO]
America's Builder

NEW MEXICO CONTRACT OF SALE – RESIDENTIALCONSTRUCTION [sic]

1. PARTIES: Ronald R. Armstrong and Laura M. Armstrong (“Buyer”) agrees to purchase from D. R. Horton, Inc., a Delaware corporation (“Seller”), and Seller agrees to sell to Buyer, the following real property, located in Valencia County County, New Mexico, together with the house to be constructed thereon by Seller's corporate affiliate DRH Southwest (the “House”) [collectively the “Property”] on the terms and conditions set forth herein and in the addenda which are made part of this Contract, as they may be amended from time to time. Buyer ✓ is __ is not purchasing this property with the intent to occupy it as an owner occupant.

STREET ADDRESS: 2870 Desert Sage Ave SW Los Lunas, NM 87031 LOT: 0065 SUBDIVISION: Sagebrush @ Huning Ranch PLAN: 3526 ELEVATION: C-94700 GARAGE HAND: ~~Right~~ Left per CCO #1 APPROX. SQ. FT. BASE PLAN W/O OPTIONS: 2,575 FEATURE ADDENDUM VERSION (DATE): 4-13-06

2. SALE PRICE, OPTIONS and UPGRADES: The purchase money and terms regarding options and upgrades are set forth in Addendum No. 1 hereto as may be amended from time to time.

3. EARNEST MONEY DEPOSIT: Buyer shall tender to and deposit with Albuquerque Title Company (the "Title Company), or such other title company as Seller may from time to time select, an earnest money deposit of $500.00 (the the [sic] "Earnest Money") upon execution by Buyer of this Contract. The Earnest Money, and any funds collected for upgrades or optional items, are non-refundable except as expressly provided herein. Any checks returned unpaid will result in a twenty-five dollar ($25.00) charge. If Buyer has indicated an intent to occupy the property as an owner occupant at the time of the execution of this Contract, but subsequently decides the purchase will be as an investment property or he otherwise will not be occupying it as an owner occupant, Seller will have the option of requiring Buyer to increase the Earnest Money deposit to a nonrefundable $10,000 and agreeing to the additional terms set forth in an Investor Purchaser addendum to this Contract, or Seller may terminate this Contract in

which event Seller will return any Earnest Money already on deposit at that time and the parties will have no further obligation to each other. In such event, Seller shall have no obligation to refund deposits or payments collected by or for Seller for any options, extras or changes described in any addendum hereto (collectively the "Deposits"), except as provided therein for VA Buyers.

4. FINANCING CONDITIONS: Buyer shall apply for a loan (the "Loan") from, as lender, within five (5) business days from the date of this Contract. The Loan shall: (1) be evidenced by a promissory note in the amount of the loan as stated in Addendum No. 1 hereto, as may be amended from time to time, (2) be payable in monthly installments for a period of not more than 30 years, and (3) have a market rate of interest per annum. Buyer shall make every reasonable and diligent effort to obtain approval of the Loan. If Buyer has not obtained unconditional approval of the Loan within thirty (30) days from the date of this Contract, Seller may terminate this Contract, return the Earnest Money to Buyer, and Seller shall have no further liability to Buyer. Should it be necessary to move Buyer's loan application to a different lender to obtain approval, Buyer shall use all diligence to obtain financing from such lender or lenders. Failure of Buyer to furnish all information needed by such lenders, or to use diligence to obtain approval from any such lenders shall be a material default by Buyer causing the Earnest Money to be forfeited to Seller. If Buyer does not qualify for financing as set forth

herein through no fault of Buyer, the Earnest Money will be refunded. Seller shall in no event have any obligation to refund deposits or payments collected by or for Seller for any options, extras or changes described in any addendum hereto (collectively the "Deposits"), except as provided therein for VA Buyers.

If Buyer elects to pay cash, rather than finance the purchase of the House, within five (5) days of signing this Contract Buyer shall provide Seller with evidence satisfactory to Seller verifying Buyer's ability to do so. Satisfactory evidence of such ability may include, but not be limited to current bank and/or investment statement(s). Within thirty (30) days of the estimated Closing Date, Buyer shall again verify Buyer's ability to pay cash for the entire sales price and all options and upgrades.

(RA/LMA BUYER'S INITIALS)

5. FHA/VA LOANS (IF APPLICABLE): It is expressly agreed that notwithstanding any other provisions of this Contract, Buyer shall not be obligated to complete the purchase of the Property or incur any penalty by forfeiture of any deposit or otherwise unless Buyer has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commission, Department of Veteran Affairs, or a direct endorsement lender setting forth the appraised value of the Property at not less than the Base Price plus the mortgageable portion of any options, extras or changes (per Addendum No. 1,

or any other addendum hereto). Buyer shall have the privilege and option of

(RA/LMA Buyers' Initials)

EVENT, SELLER SHALL NOT BE LIABLE FOR ANY PERSONAL INJURY OR OTHER CONSEQUENTIAL OR SECONDARY DAMAGES AND/OR LOSSES WHICH MAY ARISE FROM OR OUT OF ANY AND ALL DEFECTS.

23. ARBITRATION: THIS CONTRACT IS SUBJECT TO ARBITRATION UNDER THE NEW MEXICO UNIFORM ARBITRATION ACT AND THE FEDERAL ARBITRATION ACT. In the event that a bona fide dispute should arise between Buyer and Seller prior to the Closing Date, and such dispute cannot in good faith be resolved completely and to the mutual satisfaction of all parties within ten (10) days after the beginning of the dispute, then Seller shall have the right, upon written notice to Buyer, to terminate this Contract and return the Deposits to Buyer, and no cause of action shall accrue on behalf of Buyer because of such termination. If this Contract is not so terminated, then Buyer and Seller agree that any disputes or claims between the parties, whether arising from a tort, this Contact [sic], any breach of this Contract or in any way related to this transaction, including but not limited to claims or disputes arising under the New Mexico Unfair Practices Act, Section 57-12-1 NMSA 1978, *et seq.*, and/or the terms of the express limited warranty referenced in Paragraph 22 of this Contract, shall be

settled by binding arbitration in accordance with the American Arbitration Association ("AAA") "Construction Industry Arbitration Rules" except as specifically modified herein or dictated by applicable statutes including the New Mexico Uniform Arbitration Act and/or the Federal Arbitration Act. Although the AAA rules shall be followed, the AAA shall not be used to arbitrate the matter. There shall be a single neutral arbitrator selected by the parties, and if the parties cannot agree to an arbitrator, then the parties shall each choose a neutral party who will then agree to a third neutral party as arbitrator. The arbitrator must be a lawyer holding a valid license to practice law in the State of New Mexico. Discovery will be allowed in accordance with the New Mexico Rules of Civil Procedure, and the place for arbitration shall be in Albuquerque, New Mexico. The decision of the arbitrator shall be in writing and signed by the arbitrator and shall be final and binding upon the parties. Each party shall bear the fees and expenses of counsel, witnesses and employees of such party, and any other costs and expenses incurred for the benefit of such party. All fees and expenses of the arbitrator shall be paid by Seller.

24. DISCLAIMER OF WARRANTIES: SELLER MAKES NO WARRANTIES, EXPRESS OR IMPLIED, ABOUT EXISTING OR FUTURE ENVIRONMENTAL CONDITIONS OF THE PROPERTY, INCLUDING POSSIBLE PRESENT OR FUTURE POLLUTION (RADON GAS INCLUDED) OF THE AIR, WATER OR SOIL FROM

ANY SOURCES INCLUDING UNDERGROUND MIGRATION OR SEEPAGE. SELLER'S SOLE WARRANTIES TO PURCHASER ARE THE LIMITED HOME WARRANTIES DESCRIBED IN PARAGRAPH 22 OF THIS CONTRACT, SELLER EXPRESSLY DISCLAIMS ANY DIRECT, INDIRECT OR CONSEQUENTIAL DAMAGES WHICH THE PROPERTY OR ANY PERSON MAY SUFFER BECAUSE OF ANY PRESENT OR FUTURE ENVIRONMENTAL CONDITIONS. BUYER ACKNOWLEDGES THAT SELLER HAS NO OBLIGATION TO INDEMNIFY BUYER FOR ANY SUCH DAMAGES.

25. ENTIRE AGREEMENT: This Contract, and any present or future amendments, addenda or supplements hereto, (together this "Contract") shall constitute the entire agreement between the parties, and all prior negotiations, promises and/or representations, whether oral or written, not expressly set forth herein, are of no force and effect and do not constitute a part of this Contract. **Buyer represents to Seller that Buyer has not relied and is not relying upon any warranties, promises, guaranties, or representations made by Seller, any agent of Seller, or any third party or anyone else acting or claiming to act on behalf of Seller with respect to the purchase of the Property, except as contained in this Contract and its addenda. Buyer also acknowledges he/they have been advised to seek legal counsel before executing this Contract.** The unenforceability or

invalidity of any provision of this Contract shall not affect the enforceability or validity of any other provision of this Contract. No amendment or modification of this Contract shall be enforceable unless made in writing and signed by the parties. **No salesperson, agent or employee of Seller has any authority to modify the terms of this Contract or the authority to make any oral representation or agreement upon which Buyer may rely to cancel, change or modify any portion of this Contract.** Buyer represents he/they have read and understand this Contract. Buyer shall write, in the blank space below, all representations or provisions which are not set out in the printed portions of this Contract, but which made [sic] have been made by Seller or its purported agents or employees and upon which Buyer is relying on in making this purchase, and if there are none Buyer shall so indicate: _____

_____

(RA/LMA Buyer's Initials)

26. NOTICES: All written notices required or permitted under this Contract shall be effective upon personal delivery to Seller or Buyer, upon confirmation of facsimile transmission, or upon deposit in the U.S. mail, first class, registered or certified with postage prepaid, addressed to the respective parties at the addresses specified in this Contract or to such other address as either party shall specify in the manner provided in this Section.

27. ASSIGNMENT: Seller may assign all or any portion of its rights, obligations and/or interests hereunder to an "affiliate" as defined by the rules and regulations of the Securities and Exchange Commission without further consent of Buyer. Buyer may not assign all or any portion of its rights, obligations and/or interests hereunder without the prior written consent of Seller.

28. TIME OF ESSENCE: Time is of the essence of this Contract.

29. GOVERNING LAW: The laws of the State of New Mexico shall govern the construction of this Contract.

30. BROKER/LICENSEE/COMMISSIONS: Buyer acknowledges that Seller (through certain of its officers and employees) is a licensed New Mexico Real Estate Broker dealing in its own property and that Seller has made certain disclosures to Buyer related thereto as set forth in an addendum to this Contract. Buyer represents and warrants that they have not dealt with any other agents, brokers, salespersons, finders or persons other than as disclosed to Seller in writing and Buyer shall hold Seller harmless from and against any and all liability, expenses or attorneys' fees sustained or incurred by Seller resulting from breach of this representation by Buyer.

31. SURVIVAL: Buyer and Seller agree that the provisions of Paragraphs 14, 22, 23, 24, 25 and 30 of this Contract, and this

(RA/LMA Buyers' Initials)

_____