IN THE SUPREME COURT OF THE STATE OF NEVADA

PRINCIPAL INVESTMENTS, INC. d/b/a RAPID CASH; GRANITE FINANCIAL SERVICES, INC. d/b/a RAPID CASH; FMMR INVESTMENTS, INC. d/b/a RAPID CASH; PRIME GROUP, INC. d/b/a RAPID CASH; and ADVANCE GROUP, INC. d/b/a RAPID CASH, Petitioners, *vs*. The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, in and for the County of Clark; and THE HONORABLE ELIZABETH GOFF GONZALEZ, District Judge, Respondents, and CASSANDRA HARRISON; EUGENE VARCADOS CONCEPION QUINTINO; and MARY DUNGAN, Real Parties in Interest.	Case No. 57371 Electronically Filed Feb 14 2011 04:02 p.m. Tracie K. Lindeman District Court No. A624982

PETITION FOR REHEARING

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PETITION FOR REHEARING

This Court should adopt the "functional equivalence" doctrine and treat the writ petition, filed in both this Court and the district court, as the functional equivalent of a notice of appeal. Instead of denying the petition, the Court should lodge this matter as an appeal, rather than a writ petition.

STATEMENT OF THE CASE

The district court denied Rapid Cash's motion to compel arbitration on November 29, 2010. Within 18 days of the order, on December 17, Rapid Cash sought review of the district court's ruling in this Court by filing a petition for writ of mandamus. The petition maintained that "the district court's denial of arbitration ruling is erroneous and needs to be reversed." (Petition at 4.) The same day, Rapid Cash filed the petition in the district court as part of a "Notice of Filing Writ Petition." Rapid Cash filed these papers well before a notice of appeal would have been due. *See* NRAP 4(a)(1).

On January 18, 2011, over a month after Rapid Cash's petition was filed, this Court denied the petition, ruling that Rapid Cash had an adequate legal remedy—a direct appeal under NRS 38.247(1)(a)—that precluded writ relief. By that time, however, it was too late for Rapid Cash to file a notice of appeal. *See* NRAP 4(a)(1) ("notice of appeal" must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served.").

ARGUMENT

Under the "functional equivalence" doctrine, *any* court filing should be treated as a notice of appeal if it: (a) is filed in the district court and served on the opposing party within the time to appeal; (b) conveys the party's intention to appeal; and (c) identifies the order being appealed from and the appellate court in which review is sought. Rapid Cash's petition met all of those requirements and is "functionally equivalent" to a notice of appeal. The "functional equivalence" doctrine, adopted by both federal and state courts, is a logical extension of this Court's long-standing disinclination to dismiss an appeal due to "technical defects in the notice of appeal" as long as "the intent to appeal . . . can be reasonably inferred

and the respondent is not misled." *Lemmond v. State*, 114 Nev. 219, 220, 954 P.2d 1179, 1179 (1998). Rapid Cash requests that the Court treat the petition as a timely-filed notice of appeal and accept jurisdiction over this matter.

I. UNDER FEDERAL LAW, A WRIT PETITION MAY BE DEEMED THE "FUNCTIONAL EQUIVALENT" OF A NOTICE OF APPEAL

"[I]f a litigant files papers in a fashion that is technically at variance with the letter of a procedural rule, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the *functional equivalent* of what the rule requires." *Torres v. Oakland Scavenger Co.,* 487 U.S. 312, 316-17 (1988) (emphasis added). Under the "functional equivalence" doctrine, "a document filed within the time [for filing a notice of appeal that] gives the notice required by Rule 3"—that is, notice of "the litigant's intent to seek appellate review"—"is effective as a notice of appeal." *Smith v. Barry*, 502 U.S. 244, 245-250 (1992) (citing *Foman v. Davis,* 371 U.S. 178, 181-82 (1962) and *Torres,* 487 U.S. at 314-18 (1988)).[1] The doctrine "is *designed* for [cases like this one] where the litigant fails to file a notice of appeal, but files another paper that is its functional equivalent." *Allen Archery, Inc. v. Precision Shooting*, 857 F.2d 1176, 1177 (7th Cir. 1988) (emphasis added).

In short, under the federal "functional equivalence" doctrine, when a party timely files a document—however labeled—that conveys the same information that would be contained in a notice of appeal, it is functionally equivalent to a notice of appeal and should be treated as such.

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[1] *Accord In re Urohealth Sys., Inc*., 252 F.3d 504 (1st Cir. 2001); *Casey v. Long Island R.R. Co*., 406 F.3d 142, 146 (2d Cir. 2005); *United States v. RMI Co*., 599 F.2d 1183, 1187 (3d Cir. 1979); *Yates v. Mobile County Personnel Bd.*, 658 F.2d 298, 299 (5th Cir. 1981); *National City Bank v. Battisti*, 581 F.2d 565 (6th Cir. 1977); *Madej v. Briley*, 371 F.3d 898, 899 (7th Cir. 2004); *In re SDDS, Inc*., 97 F.3d 1030, 1034 (8th Cir. 1996); *In re Copley Press, Inc*., 518 F.3d 1022, 1025-26 (9th Cir. 2008); *United States v. Gundersen*, 978 F.2d 580, 582-83 (10th Cir. 1992); *In re Bethesda Mem'l Hosp.*, 123 F.3d 1407, 1408-09 (11th Cir. 1997).

A. In Determining Whether to Treat a Filing as a Notice of Appeal, Federal Courts Look to the Substance of the Filing, Not its Title

When considering whether a court filing should be treated as a notice of appeal, courts should not focus on "mere technicalities," but should analyze the function of the court filing and the intent of the petitioner. *See Foman v. Davis*, 371 U.S. 178, 181-82 (1962). In *Foman*, where an appellant filed two deficient notices of appeal, the United States Supreme Court looked past these technical shortcomings and held that the two notices considered together were the functional equivalent of one notice of appeal. It reached this conclusion because "petitioner's intention to seek review" of particular orders "was manifest" in the notices. 371 U.S. at 181 ("It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities").

The Supreme Court has also held that "a document intended to serve as an appellate brief may qualify as the notice of appeal required by Rule 3." *Smith v. Barry*, 502 U.S. 244, 245 (1992).[2] The *Smith* court explained that "Courts will liberally construe the requirements of Rule 3." Accordingly, "when papers are 'technically at variance with the letter of Rule 3, a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires.'"[3] *Id.* at 248, quoting *Torres,* 487 U.S. at 314. Because the purpose of a notice of appeal "is to ensure that the filing provides sufficient notice to the other parties and the courts," the *Smith* court reasoned, "[i]f a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal." *Id*. at 248-49.

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[2] *See also Casey*, 406 F.3d at 146 (treating brief as notice of appeal); *Allah v. Superior Court*, 871 F.2d 887, 889-90 (9th Cir. 1989) (same); *and Finch v. Vernon*, 845 F.2d 256, 259-60 (11th Cir. 1988) (same).

[3] Of course, this principle of liberal construction does not excuse complete noncompliance with the rule. Yet, while Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review, "courts should construe Rule 3 liberally when determining whether it has been complied with." *Smith v. Barry*, 502 U.S. at 248, quoting *Torres*, 487 U.S. at 316.

A court filing may be treated as "functionally equivalent" to a notice of appeal even if the document includes far more information than is required. "Filing too much," the Seventh Circuit has observed, "is a good example of 'functional equivalence,' because the functional requirement would be satisfied by the lesser included documentation." *In re Turner,* 574 F.3d 349, 353 (7th Cir. 2009) (Posner, J.).

The federal circuit courts have found a wide range of court filings to be functionally equivalent to a notice of appeal, including "a petition for an interlocutory appeal,"[4] a motion for extension of time in which to file the notice of appeal,[5] and a motion to certify a trial court order as final.[6] Many state appellate courts have broadly applied the doctrine as well.[7]

B. Writ Petitions Are Functionally Equivalent to Notices of Appeal

In addition to these court filings, federal courts have also treated *writ petitions* as functionally equivalent to notices of appeal. *See, e.g., In re Urohealth Sys., Inc.*, 252 F.3d 504 (1st Cir. 2001); *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 782 (7th Cir. 1999); *In re Bethesda Mem'l Hosp.,* 123 F.3d at 1408-09; *Diamond v. United States Dist. Court.,* 661 F.2d 1198, 1198 (9th Cir. 1981) (court would "ordinarily" construe mandamus petition as a notice of appeal, but declined to do so only because petition was not timely filed); *see also* 16 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE § 3932.1, n. 27 (2d ed. updated 2010) (listing cases).

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[4] *Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 994-95 (7th Cir. 2000) (the document "contained all the information required in such a notice, and more").

[5] *Listenbee v. City of Milwaukee*, 976 F.2d 348, 350-51 (7th Cir. 1992).

[6] *Berrey v. Asarco, Inc.*, 439 F.3d 636, 642 (10th Cir. 2006) (the motion to certify was the "functional equivalent" of a notice of appeal, as it "met all the requirements of Rule 3(c) and put Defendants and the district court on notice of its intent to appeal" and, therefore, was "the functional equivalent of a notice of appeal and was timely pursuant to Fed. R. App. P. 4(a)(1)").

[7] *See Brown v. Simms*, 681 So. 2d 778 (Fla. App. 1996) (treating mandamus petition as timely notice of appeal); *DI's, Inc. v. McKinney*, 673 A.2d 1199, 1202 (Del. 1996) (treating review petition as "functional equivalent" of a notice of appeal; recognizing "modern view" that "where possible and where there is no prejudice, appeals should not be dismissed on technicalities"); *Cain v. State*, 573 S.E.2d 46, 48 (Ga. 2002) ("pleadings should be liberally construed so as to bring about a decision on the merits and to avoid dismissal of cases").

After all, writ petitions "accomplish[] the same objectives as the notice of appeal." *See Clorox Co. v. United States Dist. Court*, 779 F.2d 517, 520 (9th Cir. 1985); *see also Madej*, 371 F.3d at 899; *In re SDDS, Inc*., 97 F.3d at 1034. They "notify the court and the opposing party of further appellate proceedings" (*Clorox Co*, 779 F.2d at 520), and "specif[y] the party taking the appeal, designate[] the district court order appealed from, and name[] the court to which the appeal was taken." *In re SDDS, Inc*., 97 F.3d at 1034; *see also SI Handling Sys., Inc.*, 188 F.3d at 782 ("Defendants did not file a document with the label 'notice of appeal,' but their petition for mandamus contains all of the information required by Fed. R. App. P. 3"); *Yates*, 658 F.2d at 299 (a writ petition "clearly evinces [an] intent to appeal"). For these reasons, timely writ petitions are excellent candidates for the "functional equivalence" doctrine. *See, e.g., In re SDDS, Inc*., 97 F.3d at 1034 ("Where the liberal standards for notice of appeal have been met in a case, a petition for a writ of mandamus may be construed as a notice of appeal from an immediately appealable order by a district court.").

1. Interlocutory Appeals, Such as Writ Petitions, Are Frequently Construed to Be "Functionally Equivalent" to Notices of Appeal

Appellate courts are especially willing to apply the doctrine in the context of interlocutory orders, where it may not be apparent to a party that a direct appeal is available. *See, generally, Benson v. SI Handling Sys.*, 188 F.3d at 782 (construing writ petition from interlocutory order after removal as notice of appeal); *In re Copley Press, Inc*., 518 F.3d at 1025-26 (pretrial order to unseal documents); *Gundersen*, 978 F.2d at 582-83 (order relating to release and detention in criminal matter during trial).

For example, the petitioner in *United States v. RMI Company* filed a motion with the district court to enter a protective order which would have prevented or limited disclosure of its documents. 599 F.2d 1183 (3d Cir. 1979). The district court summarily denied the motion, and petitioner sought review by means of a writ of mandamus, even though Supreme Court case law would have permitted direct appellate review. Before exercising jurisdiction over the writ, the Third Circuit paused, noting that "the presence of potential appellate jurisdiction may implicate the oft-repeated dictum that a petition for mandamus will not

ordinarily be granted where an adequate appellate remedy otherwise exists." *Id.* at 1187. The Third Circuit then concluded that this rule lacked force when a party is seeking review of a *collateral* order. It noted that the rule was intended to prevent use of writ petitions to "avoid[] the policies of the final judgment rule," and emphasized that these concerns were not present when a party seeks review of a collateral order, which is only "collaterally final." *Id.* With collateral orders, then, "there are no finality considerations militating against treating a petition for mandamus as the equivalent of a notice of appeal." *Id*. After observing that there "are no significant differences in scope of review" between writ relief and appeal, the Third Circuit considered the merits of the petitioner's challenge to the district court's order. *Id.*

2. The Doctrine Benefits Even Sophisticated Parties

Courts have applied the functional equivalence doctrine to writs filed by every type of litigant, from *pro se* plaintiffs to corporations, state entities, and even the United States government. *See, e.g., Clorox Co.*, 779 F.2d at 519 ("we construe [Clorox's] writ of mandamus as a notice of appeal and reverse the district court"); *Madej*, 371 F.3d at 899 ("The state's petition for mandamus contains the information required by Fed.R.App. P. 3 for a notice of appeal, so we treat the document as a notice of appeal."); *In re SDDS, Inc*., 97 F.3d at 1034 (petitioner South Dakota Disposal Systems, Inc.'s petition for writ was deemed the functional equivalent of a notice of appeal); *In re Copley Press, Inc*., 518 F.3d at 1026 (where U.S. Department of Justice filed a writ petition, instead of a direct appeal, the appellate court deemed the writ petition to serve as a notice of appeal).

3. The Doctrine Avoids "Harsh Results"

The doctrine is often applied to avoid "a harsh result" where a writ petition was submitted within the time to file a notice of appeal but the appellate court did not respond to the writ petition until after the deadline to file a proper notice of appeal had expired. *Clorox Co.*, 779 F.2d at 520; *see also In re Urohealth Sys., Inc.*, 252 F.3d at 508 (court noted that if it had acted on the writ petition sooner, there still would have been time for a notice of appeal to be filed); *Gunderson*, 978 F.2d at 583-84 ("Had this court acted promptly to

dismiss the petition for mandamus, plaintiffs would have had sufficient time to file a proper notice of appeal from the district court's order").[8]

II. THE FUNCTIONAL EQUIVALENCE DOCTRINE SHOULD APPLY IN NEVADA

The federal "functional equivalence" doctrine ought to apply in Nevada. To begin, the pertinent provisions of the Nevada and federal rules are identical, as FRAP 3(a)(1) and (2) mirror the key language in their Nevada counterparts.[9] *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005) ("federal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules").

The functional equivalence doctrine is also in harmony with this Court's long-standing preference for hearing appeals on the merits. *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963) ("justice is best served" by "hav[ing] each case decided upon its merits"); *see also Hansen v. Universal Health Servs. Inc*., 112 Nev. 1245, 1247-48, 924 P.2d 1345, 1346-47 (1996). Indeed, this Court has long recognized that rules of procedure are "but means to an end" and should not be administered so as to unnecessarily permit "the form [to] triumph[] over the substance." *Sherman v. Southern Pac. Co*., 31 Nev. 285, 291, 102 P. 257, 259 (1909). When interpreting procedural rules, "an oversight or technicality [that does] not affect the substantial rights of the parties should be disregarded." *See Lind v. Webber*, 36 Nev. 623, 642, 135 P. 139, 139-41 (1913).

The doctrine is in line with Nevada's treatment of defective notices of appeal. This Court has consistently refused to elevate form over substance, recognizing that where "the intent to appeal . . . can be reasonably inferred and the respondent is not misled, we will not

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[8] Some appellate courts have ruled on improvidently filed writ petitions when there was still time for the petitioner to file a timely notice of appeal. In those cases, the courts have denied writ petitions and directed the petitioners to file a notice of appeal. *See, e.g., Exchange Nat'l Bank v. Wyatt*, 517 F.2d 453 (2d Cir. 1975); *Baltimore Bank for Cooperatives v. Farmers Cheese Cooperative*, 583 F.2d 104 (3d Cir. 1978).

[9] *See* NRAP 3(a)(1) (an appeal permitted by law from a district court "may be taken only by filing a notice of appeal with the district court clerk within the time allowed by Rule 4"); NRAP 3(a)(2) ("[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal….").

dismiss an appeal due to technical defects in the notice of appeal." *Lemmond v. State*, 114 Nev. 219, 220, 954 P.2d 1179, 1179 (1998).[10] Similarly, NRAP 3(a)(3) explicitly requires the district court clerk to "file appellant's notice of appeal despite perceived deficiencies in the notice" to ensure that technical deficiencies do not bar meaningful appellate review. *See also Whitman v. Whitman*, 108 Nev. 949, 950-952, 840 P.2d 1232, 1232-34 (1993) (granting petition for rehearing after dismissing appeal as untimely, concluding that district court clerk had neglected its ministerial duty to file a defective notice of appeal). Drawing on its long tradition of interpreting procedural rules to advance the interests of justice, the Court should recognize the functional equivalence doctrine, as it advances the same ends.

III. RAPID CASH'S PETITION IS "FUNCTIONALLY EQUIVALENT" TO A NOTICE OF APPEAL

This Court should treat Rapid Cash's petition as a notice of appeal. It included all of the required "contents" of a notice of appeal, clearly indicating Rapid Cash's intention to seek review of the district court's order.[11] In it, Rapid Cash asked this Court to (i) direct the district court to vacate its order denying arbitration; and (ii) direct the district court to grant Rapid Cash's motion to compel arbitration. (Pet. at 1, 4, 29.) This is the very same relief that would have been requested in a notice of appeal. Thus, the 29-page petition put opposing counsel and the district court on notice of Rapid Cash's intent to seek appellate review. Beyond providing the bare-bones information required by Rule 3, the petition went

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[10] This practical approach is reflected in a line of decisions where this Court has overlooked technical deficiencies where a party had sufficiently communicated an intent to appeal. *See, e.g., Krause Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001) (exercising jurisdiction to hear appeal when a party mistakenly appealed from an order rather than a judgment); *Collins v. Union Federal Sav. & Loan Ass'n*, 97 Nev. 88, 90, 624 P.2d 496, 497 (1981) ("[A] notice of appeal which does not designate the correct judgment does not warrant dismissal where the intention to appeal from a specific judgment may be reasonably inferred from the text of the notice and where the defect has not materially misled the respondent.") (per curiam) (citations omitted).

[11] *See* NRAP 3(c) (a "notice of appeal shall (A) specify the party or parties taking the appeal . . . ; (B) designate the judgment, order, or part thereof being appealed; and (C) name the court to which the appeal is taken").

much further, providing detailed points and authorities supporting Rapid Cash's arguments.[12] Thus, under *Torres*, *Smith*, and the federal cases construing writ petitions as notices of appeal, this Court should treat the petition as a notice of appeal under the "functional equivalence" doctrine and accept jurisdiction over this matter. *See* Section I(B), *supra.*

Not only did the petition include all of the "contents" required by Rule 3, it was also timely filed. Rapid Cash filed 12 days before the 30-day time period for filing a notice of appeal had expired. By the time the Court issued its ruling, however—more than a month after the petition was filed—the 30 day timeframe had run, and it was too late for Rapid Cash to file a timely "notice of appeal." Treating the petition as a notice of appeal would avoid the "harsh results" of this ruling (potentially depriving Rapid Cash of any right to appeal the district court's order), *see* Section I.B.3*., supra*, and allow the appeal to be heard on the merits.[13]

Moreover, because plaintiffs were on notice of Rapid Cash's intention to seek appellate review of the district court's order within the 30-day timeframe of NRAP 4(a)(1), they cannot possibly be prejudiced if the Court grants the requested relief and treats the petition as a notice of appeal.

Under the narrow factual circumstances presented here—where Rapid Cash sought review 18 days after the order was entered; where Rapid Cash filed its petition in the district court as well as this Court; where Rapid Cash asked for "reversal" of the district court's ruling; where Rapid Cash not only expressed its intention to appeal but also set forth its detailed reasons for doing so; and where this Court denied Rapid Cash's timely petition after

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[12] This additional detail actually strengthens the case for functional equivalence. *See In re Turner*, 574 F.3d at 353 (filing "more comprehensive" documentation than what is required "is a good example of 'functional equivalence,' because the functional requirement would be satisfied by the lesser included documentation."); *c.f. Johns-Manville, Inc. v. Lander County*, 48 Nev. 244, 234 P. 518, 520 (Nev. 1925) ("[a]n appeal will not be dismissed merely because the notice of appeal contains more matter than is required.").

[13] On January 21, 2011, after the Court had denied Rapid Cash's petition, Rapid Cash filed a notice of appeal in the district court as a precautionary measure.

it was too late for a notice of appeal to be filed—we ask this Court to treat the petition as "functionally equivalent" to a notice of appeal.[14]

CONCLUSION

Rapid Cash requests that the Court accept jurisdiction over this matter. In particular, Rapid Cash asks the Court to vacate its January 18 Order, to deem Rapid Cash's petition to be a timely filed notice of appeal pursuant NRAP 3(c), and to docket the appeal in this Court pursuant to NRAP 12.[15]

DATED this 14th day of February 2011.

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[14] In denying the petition, this Court cited *Pan v. District Court.,* 120 Nev. 222, 224, 88 P.3d 840, 841 (2004). But *Pan* is not inconsistent with the application of the "functional equivalence" doctrine in this case. In *Pan,* a petitioner sought writ relief of a district court order dismissing its complaint. The petitioner sought this relief *after* the time to file a notice of appeal had expired. The Court concluded that writ relief was inappropriate to challenge a final, appealable order, but exercised its original jurisdiction to hear the merits of the appeal because the Court had "previously indicated that the proper method of review in this type of case is a petition for a writ of mandamus." *Pan*, 120 Nev. at 228, 88 P.2d at 844. The *Pan* Court did not expressly consider whether the writ petition was "functionally equivalent" to a notice of appeal, and it appears that the petition would not have qualified because it was filed after the 30-day deadline had expired. 120 Nev. at 225, 88 P.2d at 841 ("writ relief is not available to correct an untimely notice of appeal"). In short, unlike Rapid Cash's petition, the writ petition in *Pan* was not a good candidate for the "functional equivalence" doctrine.

[15] *See Smith v. Barry*, 502 U.S. at 249 ("Having accepted a paper as the notice of appeal…, an appellate court might require timely filing of a second document meeting its standards for a brief or, if the paper meets those standards, take such other action as it deems appropriate to ensure that the filing sequence contemplated by the [Federal] Rules [of Appellate Procedure] is not disturbed.").

CERTIFICATE OF COMPLIANCE

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

DATED this 14th day of February 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of February 2011, I served a copy of the foregoing PETITION FOR REHEARING by United States mail, postage prepaid to:

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