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 District Court Nev. A624981

PETITION FOR *EN BANC* RECONSIDERATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. UNDER THESE CIRCUMSTANCES, THIS COURT SHOULD CONSIDER THIS WRIT PETITION THE "FUNCTIONAL EQUIVALENT" OF A NOTICE OF APPEAL 2

A. Federal Courts have Treated Writ Petitions as Functionally Equivalent to Notices of Appeal 2

1. Writ Petitions Fulfill the Requirements of Rule 3(c) 4

2. This Petition was Filed within the Time to Appeal 5

B. Procedure Applies to Interlocutory Orders, where Appealability may not be Apparent 5

C. Treating the Petition as a Notice of Appeal Avoids "Harsh Results" where Opponents and the Court Did Not Raise the Procedural Issue until the Appeal Time Allegedly Expired 6

D. Treating the Petition as an Appeal Complies with the Policy of Deciding Cases on the Merits, not Technical Defects, where there is no Prejudice 7

II. REGARDING A TIMELY-FILED WRIT PETITION AS THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL IS CONSISTENT WITH THE *PAN* CASE 8

CONCLUSION 10

CERTIFICATE OF COMPLIANCE v

CERTIFICATE OF SERVICE vi

TABLE OF AUTHORITIES

Cases

AA Primo Builders, LLC v. Washington,
126 Nev. ___, 245 P.3d 1190 (2010) 2

Allah v. Superior Court,
871 F.2d 887 (9th Cir. 1989) 3

Allen Archery, Inc. v. Precision Shooting,
857 F.2d 1176 (7th Cir. 1988) 3

Benson v. SI Handling Sys., Inc.,
188 F.3d 780 (7th Cir. 1999) 4, 5, 10

Berrey v. Asarco, Inc.,
439 F.3d 636 (10th Cir. 2006) 3

Brown v. Simms,
681 So. 2d 778 (Fla. App. 1996) 3, 4

Cain v. State,
573 S.E.2d 46 (Ga. 2002) 3

Casey v. Long Island R.R. Co.,
406 F.3d 142 (2d Cir. 2005) 3

Christian v. Va. Dep't of Soc. Servs.,
610 S.E.2d 870 (Va. Ct. App. 2005) 4

*Clorox Co. v. United States Dist. Cour*t,
779 F.2d 517 (9th Cir. 1985) 4, 6, 7

Collins v. Union Federal Sav. & Loan Ass'n,
97 Nev. 88, 624 P.2d 496 (1981) 8

Diamond v. United States Dist. Court.,
661 F.2d 1198 (9th Cir. 1981) 5

Exchange Nat'l Bank v. Wyatt,
517 F.2d 453 (2d Cir. 1975) 7

Finch v. Vernon,
845 F.2d 256 (11th Cir. 1988) 3

Forman v. Eagle Thrifty Drugs & Markets,
89 Nev. 533, 516 P.2d 1234 (1973) 8

Garvin v. Dist. Ct.,
118 Nev. 749, 59 P.3d 1180 (2002) 8

In re Copley Press, Inc.,
518 F.3d 1022 (9th Cir. 2008) 3, 5

In re SDDS, Inc.,
97 F.3d 1030 (8th Cir. 1996) 3, 4

In re Urohealth Sys., Inc.,
252 F.3d 504 (1st Cir. 2001) 3, 4, 6

Int'l Union of Operating Engineers Local No. 49 v. Aberdeen,
463 N.W.2d 843 (S.D. 1990) 5

Krause Inc. v. Little,
117 Nev. 929, 34 P.3d 566 (2001) 8

Listenbee v. City of Milwaukee,
976 F.2d 348 (7th Cir. 1992) 3

Madej v. Briley,
371 F.3d 898 (7th Cir. 2004) 3, 4

McLin v. State,
840 So. 2d. 937 (Ala. Ct. App. 2002) 4

National City Bank v. Battisti,
581 F.2d 565 (6th Cir. 1977) 3

Pan v. District Court.,
120 Nev. 222, 88 P.3d 840 (2004) ..... i, 9, 10

Remer v. Burlington Area Sch. Dist.,
205 F.3d 990 (7th Cir. 2000) 3

Smith v. Barry,
502 U.S. 244 (1992) 3, 10

United States v. RMI Co.,
599 F.2d 1183 (3d Cir. 1979) 3, 5

Von Ramm v. Von Ramm,
392 S.E.2d 422 (N.C. Ct. App. 1990) 4

Yates v. Mobile County Personnel Bd.,
658 F.2d 298 (5th Cir. 1981) 3, 5

Statutes

NRS 38.245(1)(a) 6

Rules

NRAP 12 10

NRAP 3 ..... 1, 10

NRAP 4 9

Treatises

16 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3932.1 (2d ed. updated 2010) 9

16 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3949.1 (2d ed. updated 2010) 4

PETITION FOR EN BANC RECONSIDERATION

Petitioners are seeking to have their writ petition serve as the functional equivalent of a notice of appeal under NRAP 3 in very limited circumstances recognized by federal courts. Those circumstances are:

1) Petitioners sought to challenge an interlocutory order by extraordinary writ, as the order is not appealable under NRAP 3A, but instead the order was separately made appealable by a statute;

2) Petitioners filed their writ petition in this Court and in the district court and served the other parties within 18 days of the district court's order, well within the time limits of Rule 4;

3) The writ petition contained all the information required by Rule 3(c) and expressed the intent to seek review in this Court of the district court's order; and

4) Neither this Court nor real parties in interest raised the procedural issue within the time to appeal from the interlocutory order, which would have allowed petitioners to file another notice of appeal in time to avoid any procedural dispute.

Under these circumstances, federal courts have treated a writ petition as the functional equivalent of a notice of appeal.

The interpretation of Nevada's appellate rules consistent with federal procedure is an important issue, worthy of reconsideration *en banc* in these limited circumstances. Adopting the federal approach here, moreover, is consistent with this Court's adoption of the federal interpretation of appellate jurisdiction in *AA Primo Builders, LLC v. Washington*, 126 Nev. ___, 245 P.3d 1190, 1194-95 (2010).

ARGUMENT

Rapid Cash requests that the Court treat the petition as a timely-filed notice of appeal and accept jurisdiction over this matter.

I.

UNDER THESE CIRCUMSTANCES, THIS COURT SHOULD CONSIDER THIS WRIT PETITION THE "FUNCTIONAL EQUIVALENT" OF A NOTICE OF APPEAL

A. Federal Courts have Treated Writ Petitions as Functionally Equivalent to Notices of Appeal

Under federal procedure, a document filed within the time for filing a notice of appeal that gives notice of the litigant's intent to seek appellate review required by Rule 3 can be regarded as "effective as a notice of appeal." *Smith v. Barry*, 502 U.S. 244, 245-250 (1992).[1] This

[1] *Accord In re Urohealth Sys., Inc.*, 252 F.3d 504 (1st Cir. 2001); *Casey v.* (continued)

procedure "is designed for [cases] 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). Thus, federal circuit courts have found different types of pleadings and papers to be functionally equivalent to a notice of appeal, including an appellate brief,[2] "a petition for an interlocutory appeal,"[3] a motion for extension of time in which to file the notice of appeal,[4] and a motion to certify a trial court order as final.[5] Many state appellate courts have applied this principle as well.[6]

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).

[2] *Smith v. Barry*, 502 U.S. 244, 245 (1992); *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] *Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 994-95 (7th Cir. 2000).

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

[5] *Berrey v. Asarco, Inc.*, 439 F.3d 636, 642 (10th Cir. 2006).

[6] *See Brown v. Simms*, 681 So. 2d 778 (Fla. App. 1996) (treating *mandamus* petition as timely notice of appeal); *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"); *Von Ramm v. Von Ramm*, 392 S.E.2d 422, 424 (N.C. Ct. App. 1990); *Christian v. Va. Dep't of Soc. Servs.*, 610 S.E.2d 870, 872 (Va. Ct. App. 2005); *McLin v. State*, 840 So. 2d. 937, 942 (Ala. Ct. App. 2002); *Int'l Union of Operating Engineers Local No. 49 v. Aberdeen*, 463 N.W.2d

(continued)

Federal appellate courts have repeatedly 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; 16 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3949.1 (2d ed. updated 2010). *See also Brown v. Simms*, 681 So. 2d 778 (Fla. App. 1996) (treating *mandamus* petition as timely notice of appeal).

1. Writ Petitions Fulfill the Requirements of Rule 3(c)

Federal circuit courts have recognized that 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; *Yates*, 658 F.2d at 299 (a writ petition "clearly evinces [an] intent to appeal").

843, 144 (S.D. 1990).

2. This Petition was Filed within the Time to Appeal

For a writ petition to be considered the equivalent of a notice of appeal, it must be, as this one was, filed in the district court and served within the time to appeal. *See 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).

B. Procedure Applies to Interlocutory Orders, where Appealability may not be Apparent

Appellate courts are especially willing to apply this principle 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); *United States v. RMI Co.*. 599 F.2d 1183 (3d Cir. 1979).

In this case, the appealability of an order denying arbitration is not reflected in NRAP 3A. Instead, appealability was created in a

separate statute by the legislature in NRS 38.245(1)(a), in the chapter dealing with arbitration, rather then the courts.

C. Treating the Petition as a Notice of Appeal Avoids "Harsh Results" where Opponents and the Court Did Not Raise the Procedural Issue until the Appeal Time Allegedly Expired

Courts often apply the functional equivalence principle to avoid a "harsh result" where, as here, 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"). On the other hand, 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).

Here, denying appellate review would cause an especially harsh result because neither the Respondents nor the Court addressed the alleged procedural issue until the Rule 4 period had allegedly expired. *See Clorox Co.*, 779 F.2d at 520. Rapid Cash reasonably believed that mandamus was the appropriate avenue for challenging the district court's denial of arbitration because refusals to compel arbitration are not listed as appealable determinations under Rule 3A. For their part, respondents did not challenge the propriety of the writ petition. Rather, the petition was dismissed through a *sua sponte* order issued fifty days after the district court order. Rapid Cash was never given an opportunity to show cause why its writ petition should not be dismissed. Denying appellate review in this situation is a harsh result inconsistent with the policy of favoring adjudication on the merits. *See Clorox Co.*779 F.2d at 520 (noting that denying writ petition where petitioner reasonably believed district court order was only reviewable by mandamus would work a "manifest injustice").

D. Treating the Petition as an Appeal Complies with the Policy of Deciding Cases on the Merits, not Technical Defects, where there is no Prejudice

This Court recognizes that where "the intent to appeal . . . can be reasonably inferred and the respondent is not misled, we will not

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).[7] In light of Nevada's policy favoring adjudication on the merits and the potential injustice of denying Rapid Cash an appeal on the merits based on a procedural technicality, the Court should treat Rapid Cash's writ petition as the functional equivalent of a notice of appeal.

II.

REGARDING A TIMELY-FILED WRIT PETITION AS THE FUNCTIONAL EQUIVALENT OF A NOTICE OF APPEAL IS CONSISTENT WITH THE *PAN* CASE

The panel cited *Pan v. District Court.,* 120 Nev. 222, 224, 88 P.3d 840, 841 (2004), as authority for denying Rapid Cash's writ petition. Pan, however, stands only for the proposition that a writ petition filed

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[7] Along these lines, 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). *Forman v. Eagle Thrifty Drugs & Markets*, 89 Nev. 533, 536, 516 P.2d 1234, 1235 (1973), overruled on other grounds by *Garvin v. Dist. Ct.*, 118 Nev. 749, 751, 59 P.3d 1180, 1181 (2002) ("A defective notice of appeal should not warrant dismissal for want of jurisdiction 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 appellee.")

outside of the NRAP 4 period cannot be a substitute for a notice of appeal. *Pan* concerned a writ petition that had been filed *after* the Rule 4 period had expired, and the court correctly noted that "writ relief is not available to correct an *untimely* notice of appeal." *Pan*, 120 Nev. at 228, 88 P.2d at 844 (emphasis added). But *Pan* says nothing about whether a writ petition can itself *be* a timely filed notice of appeal if it is filed within the Rule 4 period.

This interpretation of *Pan* is consistent with Federal procedure. Federal courts often state that writ relief is not a substitute an appeal. *See* 16 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE § 3932.1 (2d ed. updated 2010), cited in the petition for rehearing. A writ petition can, however, serve as the functional equivalent of a notice of appeal if its contents satisfy Rule 3(c) and it is timely filed under Rule 4. *Id.* at n. 27 (listing cases). *See also*, *Urohealth Sys.*, 252 F.3d at 504; *Benson v. SI Handling Sys.*, 188 F.3d at 782; *Diamond*, 661 F.2d 1198. Under these circumstances, the writ petition is not a "substitute" for a notice of appeal; it essentially *is* a notice of appeal.

Pan is therefore consistent with federal principles, and consistent with idea that a writ petition may be the functional equivalent of a notice of appeal.

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.[8]

DATED this 25th day of January 2012.

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[8] *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 Rules [of Appellate Procedure] is not disturbed.").

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] It has been prepared in a proportionally spaced typeface using Microsoft Word 2007 with 14 point, double-spaced Century Schoolbook font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 40A because it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, contains 2,2,79 words; and

[X] Does not exceed 10 pages.

DATED this 25th day of January 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this PETITION FOR EN BANC RECONSIDERATION was filed electronically with the Nevada Supreme Court on the 25th day of January, 2012, Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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