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

REPLY IN SUPPORT OF PETITION FOR *EN BANC* RECONSIDERATION

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REPLY IN SUPPORT OF PETITION FOR EN BANC RECONSIDERATION

I.

PLAINTIFFS DO NOT DISPUTE THAT RAPID CASH'S WRIT PETITION FULFILLED THE CRITERIA FOR A NOTICE OF APPEAL PURSUANT TO NRAP 3 AND NRAP 4

Plaintiffs do not dispute that Rapid Cash's writ petition met all of the substantive requirements under NRAP 3 and NRAP 4 to perfect an appeal. Plaintiffs do not contest that Rapid Cash's writ petition: (1) specified the parties seeking review by naming each one in the caption and body of the filing;[1] (2) designated the order from which review was being sought;[2] and (3) named this Court as the court to which the appeal was being taken.[3] *See* NRAP 3(c) (listing requirements for notice of appeal). Rapid Cash filed the writ petition 12 days before expiration of the NRAP 4(a)(1) deadline for filing a notice of appeal. Thus, the writ petition provided the plaintiffs, the district court and this Court with timely notice of Rapid Cash's intent to appeal from the district court's November 29, 2010 order. That is all undisputed.

Because "no genuine doubt exists about who [was] appealing, from what judgment, to which appellate court", "imperfections in noticing an appeal should

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[1] *See* "Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition," Doc. 10-33004 (caption and introductory paragraph identifying all Rapid Cash defendants as parties seeking review)

[2] *See Id.* at 1:20-23 (requesting relief from the district court's "November 29, 2010 order denying the Rapid Cash entities' 'Motion to Compel Arbitration and Stay All Proceedings' in the underlying action, Case No. A-624982...")

not be fatal". *Becker v. Montgomery*, 532 U.S. 757, 767 (2001). Rapid Cash's writ petition should be deemed "effective as a notice of appeal" where there is no dispute that it was "filed within the time specified by Rule 4" and provided "the notice required by Rule 3". *Smith v. Barry*, 502 U.S. 244, 249 (1992). Were this Court to rule otherwise it would elevate form over substance, which the "functional equivalent" approach is designed to prevent. *See Baker v. State*, 128 P.3d 948, 956 (Idaho Ct. App. 2005).

II.

COURTS APPLY THE FUNCTIONAL EQUIVALENCE APPROACH IN A WIDE VARIETY OF SITUATIONS

Plaintiffs suggest that courts apply the functional equivalence approach only in cases involving (a) an unexpected change in the law or (b) *pro se* litigants. (Answer at 5-6.) It is not limited to those circumstances, however.

A. Writ Petitions May Be Functionally Equivalent to a Notice of Appeal Even Where Appealability is Settled

Plaintiffs are incorrect that the Ninth Circuit's holding in *Clorox Co. v. United States District Court*, 779 F.2d 517 (9th Cir. 1985), is limited to the particular circumstances of that case—*i.e.*, a lack of clarity in the law as to whether a direct appeal would lie from the district court's order. Merely because the facts in that case made application of functional equivalence compelling does not mean that functional equivalence is appropriate only in a similar circumstance.

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[3] *See id* at 1:1 ("In the Supreme Court of the State of Nevada").

The functional equivalence principle is not limited to unforeseeable changes in the law. For example, *In re Urohealth Systems, Inc.*, 252 F.3d 504 (1st Cir. 2001), a corporate defendant in a products liability suit petitioned for mandamus relief from a stay order, although the Supreme Court had held almost 20 years earlier that stay orders were immediately appealable. *Id.* at 507-08. The First Circuit nonetheless treated the writ petition as the functional equivalent of a notice of appeal. *Id.* at 507 (citing *Clorox* and other cases as authority for its holding). Similarly, in *In re SDDS, Inc.*, 97 F.3d 1030, 1034 (8th Cir. 1996), the Eighth Circuit deemed a writ petition to be functionally equivalent to a notice of appeal even though there had been no question that the district court's order was appealable. *See also Madej v. Briley*, 371 F.3d 898, 899 (7th Cir. 2004) (treating writ petition from denial of motion to set aside a judgment as functionally equivalent to a notice of appeal even though an order denying Rule 60(b) relief is appealable).

B. The Functional Equivalence Principle Will Benefit Sophisticated Parties, as Well as *Pro Se* Litigants

Courts employ functional equivalence on behalf of *pro se* and sophisticated parties alike. Plaintiffs argue in their answer that *Smith v. Barry*, 502 U.S. 244 (1992), and *Allah v. Superior Court*, 871 F.2d 887 (9th Cir. 1989), are "inapplicable" because those cases involved *pro se* litigants. (Answer at 6 n.10).

As the Tenth Circuit reasoned, however, this distinction makes no difference[4]: "The principles outlined in *Smith v. Barry* ... are not confined to the filings of *pro se* appellants." *See Rodgers v. Wyo. Atty. Gen.*, 205 F.3d 1201, 1205 (10th Cir. 2000), *overruled on other grounds by Slack v. McDaniel*, 529 U.S. 473 (2000).

Courts treat timely filings evidencing an intent to appeal as functionally equivalent to a notice of appeal even where litigants are sophisticated and counseled. For example, numerous courts have applied this principle to ***counseled corporations***. *See, e.g., Urohealth*, 252 F.3d at 508 (corporation's writ petition was functionally equivalent to a notice of appeal); *SDDS*, 97 F.3d at 1034 (same); *Intel Corp. v. Terrabyte Intern., Inc.*, 6 F.3d 614, 618 (9th Cir. 1993) (corporation's opening brief was functionally equivalent to notice of appeal); *Intern. Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357 (Fed. Cir. 2008) (corporation's motion for stay was the functional equivalent of a notice of appeal). Similarly, filings from ***state governments*** have been treated as functionally equivalent to a notice of appeal. *See Madej*, 371 F.3d at 899 (Illinois's timely-filed writ petition was functionally equivalent to a notice of appeal). Even ***federal government*** filings have been treated as functionally equivalent to a notice of appeal. *In re Copley Press, Inc.*, 518 F.3d 1022, 1025-26 (9th Cir. 2008) (treating

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[4] Notably, *Barry* is the seminal United States Supreme Court case in this area, and it has been cited as authority in numerous cases involving sophisticated, counseled parties. *See, e.g., Intel Corp. v. Terrabyte Intern., Inc.*, 6 F.3d 614, 618 (9th Cir.

(continued)

United States government's mandamus petition as a notice of appeal). The governing principal at issue is distaste for elevating form over substance and avoiding harsh results, not merely a desire to afford latitude to *pro se* litigants.

III.

DIFFERENCES IN THE WORDING OF NRAP 4 AND FRAP 4 ARE IMMATERIAL

The functional equivalence approach does not rest on the liberal language in FRAP 4. Plaintiffs suggest that federal authority is inapplicable because FRAP 4 "allows the district court to 'extend the time to file a notice of appeal' and 'reopen the time to file an appeal,' while the Nevada rule [NRAP 4] does not." (Answer at 7:19-22.) That is a red herring.

Deeming a timely writ petition from an appealable order to be the functional equivalent of a notice of appeal has nothing to do with "extending" or "reopening" the time to appeal. Indeed, a writ petition filed beyond the Rule 4 deadline cannot be functionally equivalent to a notice of appeal, even under federal law. *Diamond v. District Court*, 661 F.2d 1198, 1198-99 (9th Cir. 1981) (court would "ordinarily" construe writ petition as a notice of appeal, but declined to do so because petition was not timely filed). Rather, the point is that a writ petition that satisfies Rules 3 and 4 ***is*** a notice of appeal, because it provides all required notice and is timely filed. *See Barry*, 502 U.S. 248-49.

1993); *Intern. Rectifier Corp. v. IXYS Corp.*, 515 F.3d 1353, 1357 (Fed. Cir. 2008);
(continued)

IV.

THIS CASE SHOULD BE CONSOLIDATED WITH 59837, AS BOTH APPEALS PRESENT THE SAME ISSUES

To avoid any prejudice to the parties, this Court should consolidate this case with 59837. Plaintiffs contend that there is no need to regard Rapid Cash's writ petition as functionally equivalent to a notice of appeal because all of the same issues are properly presented in 59837:

> ...denial of [Rapid Cash's] petition for mandamus will not have a "harsh result" or cause this repeat appellant to suffer "injustice" because it will obtain appellate review of the merits on its second appeal.

(Answer at 2:20.) Further, plaintiffs argue that they would be prejudiced if this appeal is not dismissed, because otherwise they will have to brief the same issues twice:

> If this Court treats Rapid Cash's petition for writ of mandamus like a timely filed notice of appeal, the Class will be prejudiced because it will have to defend against two appeals on the exact same issue.

(Answer at 8:12-14.)

Rapid Cash agrees that the propriety of the district court's denial of Rapid Cash's motions to compel arbitration need not be briefed more than once. The Court, therefore, should consolidate both appeals, thereby avoiding any confusion or duplication of efforts. (See Rapid Cash's Motion to Consolidate, Doc. 12-

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In re Urohealth Systems, Inc. 252 F.3d 504, 508 (1st Cir. 2001).

10609.) The Court may then address the district court's arbitration rulings in the consolidated proceeding.

CONCLUSION

The Court should grant *en banc* rehearing in this case. In particular, the Court should consolidate this case with 59837 and allow the consolidated case to proceed to a review on the merits.

DATED this 4th day of April 2012.

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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 Times New Roman 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 1,532 words; and

[X] Does not exceed 10 pages.

DATED this 4th day of April 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this REPLY IN SUPPORT OF PETITION FOR EN BANC RECONSIDERATION was filed electronically with the Nevada Supreme Court on the 4th day of April, 2012, Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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