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, Appellants, *vs*. CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated, Respondents.	Case No. 57625

RESPONSE TO MOTION TO DISMISS UNTIMELY APPEAL

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Rapid Cash's appeal was not untimely for three alternative reasons. *First*, Rapid Cash's writ petition in Case 57371 should be treated as the functional equivalent of a notice of appeal under the circumstances. As such, the January 21, 2011 notice of appeal in this case, 57625, should be considered an amended notice of appeal, and the case should proceed through this docketed appeal. *Second*, assuming the write petition was an invalid attempt to seek appellate review, (in other words, a deficient notice of appeal) any deficiency was cured by the January 21 notice of appeal that amended and related back to the filing of the writ petition, *Third*, even if the writ petition is not actually treated as a notice of appeal, its filing should equitably toll the NRAP 4 period for filing a notice of appeal under these limited circumstances.

INTRODUCTION AND SUMMARY

This appeal should be considered timely under these narrow circumstances:

1) Rapid Cash 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 under by a statute;

2) Rapid Cash filed a copy of the writ petition 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;

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.

5. Promptly after the panel dismissed the petition in 57371, Rapid Cash filed a notice of appeal, resulting in this case docketed as 57625.

Under these circumstances, this Court should deny the motion to dismiss.

ARGUMENT

I.

THIS COURT SHOULD TREAT THE PETITION IN 57371 AS A NOTICE OF APPEAL AND THE NOTICE OF APPEAL IN THIS CASE AS A NOTICE AMENDED SIMPLY AS TO FORM

A. Under these narrow Circumstances, this Court Should Consider the Petition in 57371 to be the "Functional Equivalent" of a Notice of Appeal

1. 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 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). 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 adopted the doctrine as well.[6]

Under this procedure, federal appellate courts have repeatedly treated writ petitions, as functionally equivalent to notices of appeal. *See, e.g., In re Urohealth*

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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).

[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); *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 843, 144 (S.D. 1990).

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);

a. WRIT PETITIONS FULFILL RULE 3(C) REQUIREMENTS

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").

b. 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).

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

Appellate courts are especially willing to treat petitions as notices of appeal 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 38.247, in the chapter dealing with arbitration, rather then the courts.

3. 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

The doctrine is often applied 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).

B. This Appeal Should Not be Dismissed, as *Appellate* Jurisdiction Arises out of the Writ Petition acting as a Notice of Appeal

Respondents' motion to dismiss exemplifies a clash of form over substance. The writ petition should be treated as a notice of appeal, giving jurisdiction to this court to review the arbitration order. This subsequent "notice of appeal" was simply a re-articulation of Rapid Cash's intent, differing only in form and title.

There are two dockets at issue here. Case 57371 was docketed as an "original proceeding," because it was initiated by a document styled as a writ petition. Indeed, the panel denied the petition only as a writ petition attempting to invoke this Court's discretionary jurisdiction. That petition, however, should properly be treated as invoking this Court's *appellate* jurisdiction.

On the other hand, Case 57625 was docketed as an "Appeal," because of the form of the January 21 "notice of appeal." But this Court's appellate jurisdiction is actually established by the earlier writ petition, operating as the functional equivalent to a notice of appeal. This appeal should be allowed to proceed,

because there is appellate jurisdiction, even though that jurisdiction is created by the writ petition operating as a notice of appeal. The January 21, 2011 notice of appeal in this matter was simply the vehicle to docket that jurisdiction as an appeal, rather than as a writ proceeding. Simply put, the appellate jurisdiction invoked by the functional equivalent of a notice of appeal should be manifested in this docket.

C. As the Petition Acts as the Equivalent an Appeal, another formal Notice of Appeal is Unnecessary

In a very real sense, then, the January 21 "notice of appeal" was a re-articulation of the same intent to appeal as the petition. indicating Rapid Cash's intent to appeal in another form. In this sense, it was an amendment of the petition, but only as to form. If, as appellants propose under the federal precedents, the petition already acts as the functional equivalent of a notice of appeal, that amendment was simply not necessary, and this appeal should proceed under the appellate jurisdiction created by writ petition acting as an appeal. The motion to dismiss should simply be denied, as the original petition was a timely notice of appeal.

II.

EVEN IF THE PETITION WERE NOT A NOTICE OF APPEAL, THE SUBSEQUENT NOTICE OF APPEAL FILED IN 57625 FUNCTIONS AS AN AMENDED NOTICE THAT RELATES BACK

Even if the Court determines that the writ petition could not stand on its own as the functional equivalent of a notice of appeal, the petition should at least be deemed a merely technically deficient notice of appeal. The January 21, 2011

notice of appeal effectively functioned as an amendment correcting any defects that may have prevented the writ petition from functioning as a notice of appeal.

Courts have allowed amendments to correct a defective notice of appeal even after the period for filing an appeal had elapsed where the "amendment [does] not in any way change the merits of the appeal." *See Ex Parte Singleton*, 475 So.2d 186, 189 (Ala. 1985) (holding that appellant could amend notice of appeal to name proper party after time for appeal had expired where opposing party suffered no prejudice); *see also See Stuart v. United States*, 23 F.3d 1483, 1485 (9th Cir. 1994) (permitting appellant to amend notice of appeal after thirty-day period had elapsed where intent to appeal was obvious from an initial timely filing and appellee was not prejudiced). An amendment to a notice of appeal relates back to the date of the notice it amends. *See, e.g., Chan v. Chan*, 748 P.2d 807, 811 (Haw. Ct. App. 1987); *In re Marriage of Betts*, 558 N.E.2d 404, 415 (Ill. Ct. App. 1990) (noting that amendments relate back under Illinois law and that the "purpose of an amended notice of appeal is to permit correction of omissions from the original notice of appeal.").

Here, Rapid Cash's January 21 notice of appeal filed in this case should relate back to the date of the filing of writ petition because it functioned as an amendment correcting any technical deficiencies that may have prevented its writ petition from functioning as a notice of appeal. *See Singleton*, 475 So.2d at 189 (Ala. 1985). Respondents would suffer no prejudice; Rapid Cash timely notified

Respondents of its intent to seek review of the denial of arbitration, and Respondents have had ample time to prepare a response. *See Stewart*, 23 F.3d at 1485.

In short, assuming *arguendo* that Rapid Cash's petition was defective as a notice of appeal, Rapid Cash corrected its defects by filing the notice of appeal in this case. The notice of appeal therefore relates back to the date of the writ petition and was timely filed.

III.

ALTERNATIVELY, RAPID CASH'S TIMELY FILED WRIT PETITION SHOULD EQUITABLY TOLL THE PERIOD FOR NOTICING AN APPEAL

If the Court does not accept either the writ petition or the subsequent amendment as timely, it should nevertheless deny respondents' motion to dismiss because, under these unique circumstances, a writ petition within the time to appeal should toll the period for filing a notice of appeal until the Court responds to the petition.

Nevada's public policy strongly favors adjudicating disputes on their merits rather than disposing of them on procedural technicalities. *See State Dep't of Motor Vehicles v. Moss*, 106 Nev. 866, 868, 802 P.2d 627, 628 (1990). Nevada's procedural rules are therefore intended to provide a simple and efficient framework for ensuring a fair appeal on the merits rather than to trap the unwary. *See Winston Prods. Co. v. DeBoer*, 122 Nev. 517, 526, 134 P.3d 726, 732 (2006). This Court has recently recognized that depriving a party of an appeal on the merits based

upon "arcane" technical distinctions is inconsistent with the aims of Nevada's procedural law. *See AA Primo Builders v. Washington*, 126 Nev. ___, 245 P.3d 1190, 1194 (2010) (abolishing procedural distinction which "serve[d] no purpose except to put an appellant who misjudges which category a post-judgment motion falls into at risk").

Here, even if the Court declines to treat the December 17, 2010 writ petition as the functional equivalent of a timely notice of appeal, the Court should still avoid a harsh result by regarding the NRAP 4 period as tolled while the mandamus petition was pending before the panel.

In short, the Court should regard the NRAP 4 period as tolled in these extremely narrow circumstances. Tolling the appeals period in this case would mean that Rapid Cash's notice of appeal was filed twenty-nine days after the issuance of the order. The Court should regard the appeal as timely filed.

CONCLUSION

For the above reasons, the motion to dismiss this appeal should be denied.

Dated this 25th day of January, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this RESPONSE TO MOTION TO DISMISS UNTIMELY APPEAL 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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