IN THE SUPREME COURT OF NEVADA

Case Nos. 57371, 57625 and 59837

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.

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.

CASANDRA HARRISON; EUGENE VARCADOS; CONCEPCION QUINTINO; and MARY DUNGAN, individually and on behalf of all persons similarly situated,

Real Parties in Interest.

Case No. 57371

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

MOTION TO CONSOLIDATE CASES

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. 59837

MOTION TO CONSOLIDATE CASES

Principal Investments, Inc., *et al.*, ("Rapid Cash") the petitioners in 57371 and the appellants in 57625 and 59837, move to consolidate these cases before this Court. *See* NRAP 3(b). All three cases arise from orders denying Rapid Cash's motions to compel arbitration in the same underlying district court matter.

PROCEDURAL HISTORY

In 57371 and 57625, Rapid Cash contests the district court's November 29, 2010 order denying Rapid Cash's motion to compel arbitration. In 59837, Rapid Cash appeals from the district court's subsequent November 30, 2011 order denying Rapid Cash's renewed motion to compel arbitration, which Rapid Cash filed after plaintiffs amended their complaint.

Case No. 57371

On December 17, Rapid Cash sought review of the district court's November 29, 2010 order denying Rapid Cash's motion to compel arbitration by filing a petition for writ of mandamus. A panel of this Court denied the petition on January 18, 2011, holding that Rapid Cash had an adequate legal remedy—a direct appeal under NRS 38.247(1)(a)—that precluded writ relief.

Rapid Cash petitioned for rehearing on procedural grounds, arguing that its writ petition should be deemed the functional equivalent of a notice of appeal. On December 27, 2011, the panel denied the petition without comment.

Rapid Cash has petitioned for *en banc* reconsideration of the dismissal of the petition, on the limited procedural request that the Court treat the petition as a timely-filed notice of appeal and accept jurisdiction over this matter. The petition is pending.

Case No. 57625

After the panel denied the writ petition in 57371, in addition to petitioning for rehearing in that case, Rapid Cash filed a notice of appeal from the November 29, 2010 order denying Rapid Cash's motion to compel arbitration, resulting in 57625.[1]

[1] Plaintiffs moved to dismiss the appeal, arguing that the notice of appeal was untimely. Rapid Cash opposed the motion to dismiss, arguing that Rapid Cash's

(continued)

Case No. 59837

After plaintiffs amended their complaint on February 28, 2011, Rapid Cash moved again to compel arbitration. In addition to reiterating the points and authorities raised in the previous motion to compel, Rapid Cash also focused on recent authority from the U.S. Supreme Court, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). The district court denied the motion on November 30, 2011. Rapid Cash timely appealed from that order 10 days later, on December 9.

Plaintiffs Admit That All Issues Raised in 57371 and 57625 Are Properly Presented for Appellate Review in 59837

Plaintiffs have taken the position that 57371 and 57625 should be dismissed, in part because the same issues are properly presented in 59837, the appeal from the order denying Rapid Cash's renewed motion to compel arbitration. Arguing that 57625 should be dismissed, plaintiffs state:

> Rapid Cash will not be prejudiced by the inability to have the writ-challenged order reviewed. Rapid Cash renewed its motion to compel arbitration, had its request rejected by the district court a second time, and has filed an appeal from that decision, too. See Case #59837.

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appeal was not untimely for three alternative reasons. First, Rapid Cash's writ petition in 57371 should be treated as the functional equivalent of a notice of appeal such that the January 21, 2011 notice of appeal in 57625 should be considered an amended notice of appeal. Second, assuming the writ 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. Plaintiffs' motion to dismiss is pending.

("Reply in Support of Motion to Dismiss Untimely Appeal," filed Feb. 6, 2012, attached as Exhibit 1.) Then, in their answer to Rapid Cash's petition for *en banc* reconsideration in 57371, plaintiffs again conceded that all issues presented in the appeals from the first order denying arbitration are properly presented in the appeal from the second district court order:

> Rapid Cash will not be precluded from appellate review of the merits because the same arguments will be heard when this Court considers Rapid Cash's second appeal."

("The Class's Answer to Rapid Cash's Petition for En Banc Reconsideration," filed March 20, 2012, at 5:22, attached as Exhibit 2.) So, there is no dispute that the appeals overlap.

ARGUMENT

The Court should consolidate the writ proceeding in 57371 with the appeals in 57625 and 59837. Pursuant to NRAP 3(b), this Court may consolidate pending appeals "upon its own motion or upon motion of a party." Here, these cases are apt for consolidation, because the matters arise from the same underlying district court case. Indeed, 57371 and 57625 seek appellate review of the same district court order denying Rapid Cash's motion to compel arbitration.[2] Virtually the

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[2]Both cases also involve the common procedural issue of appellate jurisdiction. Under the particular circumstances of this case, the writ petition filed by Rapid

(continued)

same issues also are properly raised in 59837. Because the cases raise overlapping questions of law relating to the same facts, consolidation of these appeals "will assist in their disposition" and prevent duplication of effort. *See Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394, 395 n. 1 (1984); *Jacobson v. Manfredi*, 100 Nev. 231, 679 P.2d 251, 252 n. 1 (1984); *see also, Barnes v. District Court*, 103 Nev. 679, 748 P.2d 483, 484 (1987). Cases 57371, 57625 and 59837 should be consolidated.

Dated this 3rd day of April, 2012.

LEWIS AND ROCA LLP

BY: *s/ Joel D. Henriod*
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Cash in 57371 is the functional equivalent of a notice of appeal: (a) it notified this Court, the district court and the opposing parties of further appellate proceedings, (b) it specified the party taking the appeal, designated the district court appealed from, and the name of the court to which the appeal was taken, and (c) it was filed in the district court and served within the time to appeal. See NRAP 3(c); NRAP 4(a)(1). Thus, the writ petition should be deemed to be the functional equivalent of a notice of appeal, either to allow the petition in Case 57371 to be considered as an appeal, or to allow the notice of appeal in Case 57625 to be considered effective and timely, or both.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this MOTION TO CONSOLIDATE CASES was filed electronically with the Nevada Supreme Court on the 3rd day of April, 2012, Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

J. Randall Jones
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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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EXHIBIT 1

EXHIBIT 1

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IN THE SUPREME COURT OF THE STATE OF NEVADA

PRINCIPAL INVESTMENTS, INC., dba RAPID CASH, GRANITE FINANCIAL SERVICES, INC., dba RAPID CASH, FMMR INVESTMENTS, INC., dba RAPID CASH, PRIME GROUP, INC., dba RAPID CASH, AND ADVANCE GROUP, INC., dba RAPID CASH,

Appellants

v.

CASANDRA HARRISON, EUGENE VARCADOS, CONCEPCION QUINTINO, AND MARY DUNGAN, individually and on behalf of all persons similarly situated,

Respondents

Case No. 57625
(District Court Case # A624982)

REPLY IN SUPPORT OF MOTION TO DISMISS UNTIMELY APPEAL

I.

INTRODUCTION

When the district court denied Rapid Cash's Motion to Compel Arbitration, Rapid Cash attempted to challenge that decision with a petition for writ of mandamus instead of a proper and timely notice of appeal. This Court made Rapid Cash aware of its jurisdictionally significant mistake when denying the petition, prompting Rapid Cash to try and correct that error by filing a fatally late notice of appeal. Because the rules and precedent of this Court **require** this Court to dismiss Rapid Cash's untimely appeal of this arbitration denial, this payday lender asks this Court to make an exception and find that its petition for mandamus relief was close enough to a notice of appeal to invoke this Court's limited appellate jurisdiction. This Court's rules do not allow for such an exception, and even if this Court were inclined to create one, this is not the case to do it in.

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II.

ARGUMENT

A. This Court Lacks Authority to Excuse Rapid Cash's Failure to Timely File a Notice of Appeal.

NRS 38.247 provides that an appeal from an order denying a motion to compel arbitration "**must** be taken as from an order or a judgment in a civil action." NEV. REV. STAT. § 38.247(2) (emphasis added). NRAP 3(a)(1), which governs appeals from orders and judgments, is clear: "an appeal permitted by law from a district court to the Supreme Court may be taken **only** by filing a notice of appeal with the district court clerk within the time allowed by Rule 4." Nev. R. App. Proc. 3(a)(1) (emphasis added). In enforcing these provisions, this Court has consistently held that "the proper and timely filing of a notice of appeal is jurisdictional," *Rust v. Clark County Sch. Dist.*, 747 P.2d 1380, 1382 (Nev. 1987), and "an untimely appeal may not be considered." *Ross v. Giacomo*, 635 P.2d 298, 300 (Nev. 1981) (*ovr'd on other grounds in Winston Products Co. v. DeBoer*, 134 P.3d 726 (Nev. 2006)). A notice of appeal is the only way to properly invoke this Court's appellate jurisdiction to challenge the denial of a motion to compel arbitration.

B. A Writ of Mandamus is not a Substitute for a Timely Notice of Appeal.

The filing of a petition for writ relief is no substitute for a timely notice of appeal. As this Court noted in *Duran v. Second Judicial District Court, Washoe County*, 2011 WL 1045539 *1 n.3 (Nev. Mar. 18, 2011), when denying a petition for writ relief in a forfeiture matter, "[t]o the extent that petitioner filed the underlying writ as a vehicle to appeal that order, that avenue is closed **as we have previously held that writ relief cannot correct a failure to file a timely notice of appeal**." (Emphasis added). The same sentiment was expressed in *Maheu v. Eighth Jud. Dist. Court*, 493 P.2d 709, 722 (Nev. 1972), wherein the Court noted, "Writs of mandamus and prohibition are extraordinary writs and . . . may not be

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utilized as a substitute for an appeal." Thus, the only way to invoke the *appellate* jurisdiction of this Court is with a proper notice of appeal.

Rapid Cash urges this Court to treat its writ petition as "the functional equivalent" of a notice of appeal or exercise its discretion under a number of theories to allow this appeal to continue despite the untimeliness of its ultimately filed notice of appeal, and it cites primarily to federal cases in which the federal courts, applying the federal rules, have allowed this substitution. But federal authority in this regard cannot be persuasive because the federal rules are far more lenient than our state rules with respect to timeliness of a notice of appeal. Although the 30-day appellate period in the Nevada Rules of Appellate Procedure may not be extended or waived,[1] *Walker v. Scully*, 657 P.2d 94 (Nev. 1983), the federal counterpart allows the district court to extend the time to file a notice of appeal by up to 30 days or reopen the time to file an appeal. *See* FED. R. APP. PROC. 4(a)(5) & (6). Nevada's rules are clear, allow for no exceptions, and should not be compromised to allow Rapid Cash's late appeal to invoke the appellate jurisdiction of this Court.

C. This Case Does Not Merit an Exception.

Even if this Court were inclined to relax its rules and allow a petition for writ relief to invoke this Court's limited appellate jurisdiction, this is not the case to blaze that trail with. Rapid Cash was represented by several fine law firms, was in no way unwary of the rules of this Court, and made its choice to pursue a writ, not an appeal. But more importantly, Rapid Cash will not be prejudiced by the inability to have the writ-challenged order reviewed. Rapid Cash renewed its motion to compel arbitration, had its request rejected by the district court a second time, and has filed an appeal from that decision, too. *See* Case #59837. Accordingly, this case fails to present the type of compelling circumstances that

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[1] Except by tolling motion.

should compel this Court to make an exception for its failure to file a timely notice of appeal.

III.

CONCLUSION

Rapid Cash failed to timely take the steps required by the Rules of Appellate Procedure to perfect its right to appeal from the Order Denying Motion to Compel Arbitration. This Court should reject Rapid Cash's request to carve a new exception into the notice of appeal requirement and dismiss this appeal outright.

DATED this 6th day of February, 2012.

Respectfully submitted by:

KEMP, JONES & COULTHARD, LLP

/s/ *Jennifer Dorsey*

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2012, the foregoing **REPLY IN SUPPORT OF MOTION TO DISMISS UNTIMELY APPEAL** was served on the following person(s) by U.S. Mail:

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EXHIBIT 2

EXHIBIT 2

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

Casandra Harrison; Eugene Varcados; Concepcion Quintino; and Mary Dungan,

Real Parties in Interest

Case No.: 57371

THE CLASS'S ANSWER TO RAPID CASH'S PETITION FOR *EN BANC* RECONSIDERATION

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I.

INTRODUCTION

Not once in the 16,663 justice court actions filed by Petitioner Rapid Cash[1] in the last five years did this payday lender seek to enforce the arbitration clause in the loan agreements that it was collecting upon. But when its judgment debtors filed this now certified class action challenging those Justice Court default judgments on the grounds that they were obtained through "sewer service"—the practice of obtaining judgments against unwitting, never-served defendants upon false affidavits of service—Rapid Cash moved the district court—on two separate occasions—to compel arbitration of the class's claims. As Rapid Cash had **exclusively** used the court system as its personal collection agency, however, Eighth Judicial District Court Judge Elizabeth Gonzalez found that it had long-since waived its contractual rights to arbitrate the class's claims, and correctly denied both motions.

Rapid Cash sought to challenge the denial of its first motion to compel arbitration by filing a petition for writ of mandamus, but because Nevada statute and case law are clear that the denial of a motion to compel arbitration is immediately appealable, *see e.g.* NEV. REV. STAT. § 38.247(1)(a); *Mikohn Gaming Corp. v. McCrea*, 89 P.3d 36, 37 & n.2 (Nev. 2004), this Court rightly denied that petition. Doc. 11-01675. Rapid Cash responded by filing an untimely notice of appeal,[2] which the Class has moved to dismiss.[3]

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[1] Petitioners Principal Investments, Inc. dba Rapid Cash; Granite Financial Services, Inc. dba Rapid Cash; FMMR Investments, Inc. dba Rapid Cash; Prime Group, Inc. dba Rapid Cash; and Advance Group, Inc. dba Rapid Cash are collectively referred to as "Rapid Cash."

[2] Case #57625, Doc. 11-02632.

[3] The class's renewed motion to dismiss Rapid Cash's untimely first notice of appeal has been fully briefed and submitted to this Court. Case 57625, Doc. 11-39605, 12-01755 & 12-03897.

Although Rapid Cash has since secured itself a proper vehicle for this Court to review the merits of the district court's waiver finding by timely appealing from the denial of its second motion to compel arbitration,[4] Rapid Cash persists in its efforts to challenge the panel's denial of the writ petition, claiming there is a need for this Court to adopt the federal approach of treating certain denied petitions for writ of mandamus as the "functional equivalent" of a notice of appeal, and that need justifies use of the rarely used and disfavored en banc reconsideration. Petition for *En Banc* Reconsideration ("Petition"), Doc. 12-02756 at 2.

Rapid Cash, however, fails to establish that these circumstances meet the narrow standard for en banc reconsideration because it cannot. Rapid Cash tacitly admits that this Court's decisions on this issue are uniform,[5] *cf.* Petition pp. 8-9 (explaining the inconsistency that Rapid Cash perceives is between this Court and the federal courts), and this proceeding does not "involve[] a substantial precedential, constitutional[,] or public policy issue." *See* NEV. R. APP. PROC. 40A(a)(2). Regardless, the circumstances of this case do not merit application of the federal standard because it was not reasonable for Rapid Cash to believe that it could not immediately appeal the denial of its demand for arbitration, and the flat denial of its petition for mandamus will not have a "harsh result" or cause this repeat appellant to suffer "injustice"[6] because it will obtain appellate review of the merits in its second appeal. Rapid Cash's petition for en banc reconsideration should therefore be denied, its untimely

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[4] Case #59837.

[5] *See* NEV. R. CIV. PROC. 40A(a)(1).

[6] Petition pp. 6-8 (quoting *The Clorox Co. v. United States District Court for the Northern District of California*, 779 F.2d 517 (9th Cir. 1985) and *Lemmond v. State*, 954 P.2d 1179 (Nev. 1998) with approval).

notice of appeal dismissed, and the parties should proceed to the merits in Rapid Cash's second appeal.

II.

STATEMENT OF FACTS

When Rapid Cash filed lawsuits against its payday loan consumers from 2004 to 2010, it hired unlicensed process server Maurice Carroll d/b/a On Scene Mediations to discharge its JCRCP 4 duty to serve the defendants with a summons and a copy of the complaint. The Class has alleged that, instead of serving Rapid Cash's consumers with process, On Scene disposed of the summons and complaints and provided false affidavits of service on which[7] Rapid Cash obtained default judgments against 16,663 of its consumers.

After being garnished on default judgments of which they were not aware, the named Class Representatives, Real Parties in Interest, filed an independent action in equity in District Court in September 2010 seeking to set aside the Justice Court default judgments as they are void for lack of service of process and this widespread fraud on the court. Rapid Cash moved to compel arbitration of the class's claims, but that motion was denied after the district court found the payday lender had waived any right to arbitration it might have had under its loan agreements when it chose, thousands of time over, to litigate rather than arbitrate.

Rapid Cash did not timely appeal the denial of its first motion to compel arbitration; rather, it petitioned this Court for a writ of mandamus, but this Court dismissed Rapid Cash's petition because it had a plain and speedy

[7] Maurice Carroll has been convicted of 17 counts of perjury, 17 counts of offering false instrument to be filed/recorded, and 1 count of obtaining money under false pretenses in having failed to serve defendants in numerous Las Vegas Justice Court collection actions. *See State v. Caroll,* Clark County Dist. Ct. Case C266917-1.

remedy in the form of a direct appeal from the denial of its motion under NRS § 38.247. Rapid Cash then filed an untimely notice of appeal from the denial of its first motion to compel arbitration. In the meantime, the class amended its complaint and Rapid Cash filed a second motion to compel arbitration of the class's claims. The district court also denied Rapid Cash's second motion on waiver grounds, and also because the class's claims for fraud-on-the-court fall outside the scope of the arbitration clauses. Rapid Cash timely appealed from the denial of its second motion to compel arbitration; Rapid Cash's second appeal is still pending. *See* Case #59837. Although the district court's waiver finding is being challenged by Rapid Cash's second appeal, Rapid Cash seeks en banc review of the denial of writ relief.

III.

ARGUMENT

A. Rapid Cash Fails to Satisfy the Narrow Standard for En Banc Reconsideration.

Rapid Cash argues that this proceeding calls for en banc reconsideration because "interpretation of Nevada's appellate rules consistent with federal procedure is an important issue. . . ." Petition at 2 (emphasis omitted).[8] "En banc reconsideration of a panel decision is not favored and ordinarily will not be ordered except when (1) reconsideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." NEV. R. APP. PROC. 40A(a).

[8] To the extent that Rapid Cash is attempting to rely on the federal standard for en bank rehearing—"question of exceptional importance"—that reliance is misplaced because NRCP 40A(a)(2) does not "echo" FRAP 35(a)(2) and, in fact, is a much more stringent standard than its federal counterpart. *Cf. AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192-93 (Nev. 2010).

The circumstances in this case do not satisfy either of NRAP 40A(a)'s two exceptions. The first exception does not apply because Rapid Cash is not claiming that this Court's opinions are inconsistent; rather, the inconsistency that Rapid Cash perceives is between how this Court has interpreted its jurisdiction and how some federal appellate courts have interpreted theirs. Petition at 8-9. The second exception is equally inapplicable because whether or not this Court should adopt the federal "functional equivalent" approach is simply not a "substantial precedential, constitutional[,] or public policy issue." *See* NEV. R. APP. PROC. 40A(a)(2). In fact, there can be no such issues here because this private, habitual litigant's dispute of the district court's refusal to compel arbitration of the class's claims will be heard by this Court in Rapid Cash's second appeal.

B. This Case Does Not Merit Application of the Federal "Functional Equivalency" Approach.

Rapid Cash cites *Clorox Co. v. United States Dist. Ct.*[9] as support for its argument that this Court should adopt the federal "functional equivalency" approach. Petition at 4, 6 & 7. In that case, the Ninth Circuit treated Clorox's petition for writ of mandamus like a timely filed notice of appeal in order to avoid the "harsh result" and "injustice" of precluding Clorox from obtaining appellate review of the merits because it found Clorox's belief that the "district court's remand order was reviewable only by mandamus, not by direct appeal[,]" was "reasonable." 779 F.2d at 520. Unlike Clorox, however, Rapid Cash will not be precluded from appellate review of the merits because the same arguments will be heard when this Court considers Rapid Cash's second appeal. Further unlike *Clorox*, it was not reasonable for Rapid Cash to believe that direct appellate review was not available to it. The reason the Ninth Circuit

[9] 779 F.2d 517 (9th Cir. 1985).

found Clorox's belief to be "reasonable" was that there had been "an unforeseeable change in the law of the circuit" after the time for Clorox's filing a direct appeal had passed. *Id.* No such change occurred here and, in fact, the Nevada Legislature has allowed "immediate appeal of an order denying a motion to compel arbitration" since the enactment of NRS § 38.205 in 1969. *See Mikohn Gaming Corp. v. McCrea*, 89 P.3d 36, 37 & n.2 (Nev. 2004); NEV. REV. STAT. §§ 38.205 (repealed in 2001 and replaced with NRS 38.247(1)(a)) & 38.247. Rapid Cash's own petition for writ of mandamus tacitly acknowledges that the denial of a motion to compel arbitration is immediately appealable. *See* Petition for Writ of Mandamus, Doc. 10-33004 at 7 ("**appeal** of the order denying arbitration" and "a party [] undergo[ing] the expense and delay of litigation before being able to **appeal**" (emphasis added) (citing *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997) and *C.B.S. Employees' Fed. Credit Union v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 716 F. Supp. 307, 310 (W.D. Tenn. 1989), *aff'd*, 912 F.2d 1563 (6th Cir. 1990), respectively)). Because no "harsh result" or "injustice" will befall Rapid Cash absent this Court treating its petition for writ of mandamus like a timely filed notice of appeal, and it was not reasonable for Rapid Cash to believe that immediate appellate review was unavailable, there is no basis for this Court to apply the federal approach in this case.[10]

This is similar to the reason why this Court treated the writ of mandamus in *Pan v. Eighth Jud. Dist. Ct.*, 88 P.3d 840 (Nev. 2004), like a timely filed notice of appeal: "Given that our prior case law may have misled petitioners to forego their appeal, we will consider this petition." 88 P.3d at 841. That this Court has already applied its own version of the federal "functional equivalent"

[10] *Allah v. Superior Ct. of State of Cal.*, Los Angeles County, 871 F.2d 887 (9th Cir. 1989) and *Smith v. Barry*, 112 S.Ct. 678 (1992), Petition at 3 & 10, are also inapplicable because Rapid Cash is not a *pro se* litigant.

approach further eviscerates Rapid Cash's alleged need for en banc reconsideration for this Court to adopt that approach. Rapid Cash attempts to distinguish *Pan*, Petition at 9, and criticizes the panel for citing that case when it denied Rapid Cash's petition for writ of mandamus. *Id.* at p. 8-9. But Rapid Cash's claim that *Pan* "stands only for the proposition that a writ petition filed outside of the NRAP 4 period cannot be a substitute for a notice of appeal[,]" *id.* at 8-9, is not supported by this Court's opinion in that case. Although this Court stated in *Pan* that "writ relief is not available to correct an untimely notice of appeal[,]" it was simply reciting the general legal standard. 88 P.3d at 841. Indeed, the *Pan* court ultimately considered the writ petition, but for reasons that Rapid Cash cannot now avail itself of.

C. Rapid Cash's Reliance on Federal Authority is Unpersuasive.

Rapid Cash relies on *Washington* for the proposition that adopting the federal "functional equivalent" approach would be consistent with this Court's prior practice of adopting federal interpretation of appellate jurisdiction. But unlike in *Washington* where this Court compared NRCP 59(e) and NRAP 4(a)(4)(C) with FRCP 59(e) and FRAP 4(a)(4)(A)(iv), the Nevada rule at issue here, NRAP 4, does not "echo" its federal counterpart, FRAP 4, on the issue of appellate jurisdiction because the federal rule 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 does not. *Compare* FED. R. APP. PROC. 4(a)(5) & (6) *with* NEV. R. APP. PROC. 4(a); *see Walker v. Scully*, 657 P.2d 94 (Nev. 1983). Further, this Court found in *Washington* that "AA Primo's post-judgment 'motion to amend order' qualifie[d] as an NRCP 59(e) motion to alter or amend judgment **with tolling effect** under NRAP 4(a)(4)." 245 P.3d at 1193 (emphasis added.). No such tolling motion was filed in this case.

D. Treating Rapid Cash's Petition for Writ of Mandamus Like a Timely Filed Notice of Appeal Will Prejudice the Class.

Rapid Cash relies on *Lemmond v. State* for the proposition that this Court will not dismiss an appeal "due to technical defects in the notice of appeal" where "the intent to appeal from a final judgment can be reasonably inferred and the respondent is not misled." 954 P.2d 1179, 1179 (1998). Unlike the petitioner in *Lemmond* and the other Nevada cases that Rapid Cash cites, *see* Petition at 8, n.7, Rapid Cash did not make the mistake of appealing an order rather than a judgment or appealing the wrong judgment; rather, Rapid Cash altogether failed to file a timely notice of appeal from the denial of its first demand for arbitration. 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.

IV.

CONCLUSION

Rapid Cash has failed to provide this court reasons for en banc reconsideration of the panel's decision to dismiss this two-time appellant's writ for petition of mandamus without treating it like a timely filed notice of appeal, and there is no reason for this Court to adopt the federal "functional equivalent" standard or apply it to these facts. Accordingly, and for all the foregoing reasons, this Court should deny Rapid Cash's petition for en banc

reconsideration, dismiss its first, untimely notice of appeal, and allow Rapid Cash to pursue its challenge only on its second appeal.

DATED this 19th day of March, 2012.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this response 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:

[ ] proportionately spaced, has a typeface of 14 points or more, contains no more than 4,667 words; or

[X] Does not exceed 10 pages.

DATED this 19th day of March 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March, 2012, the foregoing **RESPONSE TO PETITION FOR EN BANC RECONSIDERATION** was filed electronically with the Nevada Supreme Court. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

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