IN THE SUPREME COURT OF THE STATE OF NEVADA

NITZ, WALTON & HEATON, LTD.; WILLIAM H. HEATON, Petitioners, vs. EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE, Respondents, and TOWER HOMES, LLC, Real Party in Interest.	Supreme Court No. District Court No. A-12-663341-C Department No. 26

PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, FOR WRIT OF PROHIBITION

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Petitioners Nitz, Walton & Heaton, Ltd. and William H. Heaton (collectively referred to hereafter as "NWH"), by and through their attorneys, Lewis Brisbois Bisgaard & Smith LLP, and pursuant to NRS 34.150 *et seq*., NRS 34.320 *et seq*. and Nevada Rule of Appellate Procedure ("N.R.A.P.") 21, hereby petition for a writ of mandamus or, alternatively, for a writ of prohibition. This petition is supported by the memorandum of points and authorities set forth below, the concurrently filed Appendix (hereafter "App."), the records of the district court and the attached declaration of Petitioner's counsel pursuant to NRS 34.170 and NRS 34.330.

INTRODUCTION AND SUMMARY

This legal malpractice case arises out of a failed high-rise condominium project that real party Tower Homes, LLC (hereafter "Tower Homes") sought to develop in 2004. In connection with the project, Tower Homes retained the law firm of NWH to perform transactional work, such as creating the limited liability company, preparing the purchase contracts for the condominium units and rendering advice regarding the handling of unit purchasers' earnest money deposits.

When the development went south, largely due to a lack of funding, the condominium purchasers demanded the return of their earnest money deposits. Tower Homes was unable or unwilling to return the deposits because it chose to use the deposited funds to pay the projects expenses, and the purchasers sued. In this underlying litigation, Tower Homes was accused of, among other things, improperly and unlawfully misappropriating the purchasers' deposits. Tower Homes was forced into Chapter 11 bankruptcy proceedings shortly after the underlying lawsuit was filed.

In the instant legal malpractice lawsuit, *which was filed more than four years after the underlying lawsuit was filed and almost six years after Tower Homes had knowledge of facts constituting the crux of the causes of action it now asserts against NWH*, Tower Homes alleges primarily that NWH failed to (a) properly advise it regarding the safeguarding of the purchasers' deposits, and (b) draft a

purchase contract for the units that complied with the requirements of NRS 116.411. In other words, Tower Homes maintains that it was inadequate legal advice and the inadequate purchase contract, and not its own mishandling and misappropriation of the funds, that caused the loss of the purchasers' earnest money deposits. NWH strongly denies Tower Homes' malpractice allegations (though the substantive allegations are not at issue in this Petition).

The statute of limitations for legal malpractice actions is governed by NRS 11.207. This Court has provided additional guidance through its opinions in *Gonzales v. Stewart Title*, 111 Nev. 1350, 905 P.2d 176 (1995) and *Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998), which, when read together, establish an important distinction between legal malpractice actions arising out of transactional legal work and legal malpractice actions arising out of legal representation involving litigation.

In connection with NWH's motion for summary judgment, the district court here failed to follow NRS 11.207 and this Court's opinions, and failed to properly consider the undisputed evidence. Specifically, the evidence and law presented to the district court establish that there are only four possible statute of limitations scenarios in this case, each of which, separately and independently, lead to the same inescapable conclusion -- that this action is time-barred as a matter of law:

- The *two-year* statute of limitations provided by NRS 11.207 began to run in August 2006 when Tower Homes received demand letters providing detailed explanations of the purchasers' position that Tower Homes' handling of the earnest money deposits violated Nevada law. If Tower Homes mishandled and lost the deposits because NWH failed to properly advise or protect against such mishandling, as Tower Homes now alleges in the instant action, then Tower Homes undisputedly knew this in August 2006 -- thereby giving Tower Homes

until August 2008 to sue NWH. The instant action, commenced on June 12, 2012, was filed almost four years too late under this scenario.

- Alternatively, pursuant to this Court's opinion in *Gonzales*, the *two-year* statute of limitations provided by NRS 11.207 "necessarily" commenced by May 23, 2007, the date on which the underlying action was *filed*. Under this alternative scenario (which gave Tower Homes until May 23, 2009 to file), the instant action, commenced on June 12, 2012, was filed over three years too late.
- Alternatively, pursuant to this Court's opinion in *Gonzales*, the *four-year* statute of limitations provided by NRS 11.207 commenced on May 23, 2007, the date on which the underlying action was filed, thereby giving Tower Homes until May 23, 2011 to file. Under this generous alternative analysis (which is unnecessary given the undisputed facts), the instant action was *still* filed over a year too late.
- Alternatively, pursuant to NRS 11.207's *four-year* measure, Tower Homes "sustain[ed] damage" in September 2007 when at least eleven of the purchasers filed claims against Tower Homes in the bankruptcy proceedings due to the unreturned earnest money deposits. Even under this generous (and, again, wholly unnecessary) analysis, Tower Homes had only until September 2011 to file the instant action. The result here is the same – Tower Homes' complaint against NWH was simply filed too late.

The applicable statute and case law, combined with the undisputed evidence that was presented to the district court, leave absolutely no wiggle room. This Court has provided clear, reliable guidance to the Nevada legal community, including the district courts, as to the time limits in which legal malpractice claims can be brought. This Court has also now made it clear that summary judgment is not somehow a "disfavored" remedy. This guidance strongly advances the interests of

judicial economy, sound judicial administration and certainty, which are critical policy concerns as Southern Nevada courts struggle to manage their caseloads. Accordingly, writ relief should issue.

A.

RELIEF SOUGHT

NWH seeks a writ of mandamus or, alternatively, for a writ of prohibition, directing the district court to dismiss Tower Homes' action, or to enter summary judgment in favor of NWH.

B.

ISSUE PRESENTED

The issue in this Petition is whether the district court was permitted to disregard the authority of this Court, which establishes, *without exception*, that the statute of limitations for a legal malpractice claim (and a related "breach of fiduciary duty" claim) arising out of transactional legal representation begins to run, *at the very latest*, when a lawsuit arising out of the alleged malpractice is filed. Here, not only did the district court fail to apply this well-established rule, it compounded its clear error by disregarding wholly undisputed evidence that the statute of limitations actually began running *well before* the underlying lawsuit arising out of the alleged transactional legal malpractice was filed, and additional evidence showing, separate and apart from the filing of the underlying lawsuit, that the instant lawsuit is still time barred as a matter of law.

C.

FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

The following provides an overview of the factual and procedural background material to this Petition. (Citations are to the concurrently filed Appendix ("App."), which consists primarily of the briefing and exhibits that were before the district court in connection with the subject motion proceedings).

1. NWH's transactional representation of Tower Homes

This action arises out of the former attorney-client relationship between NWH and Tower Homes. In 2004, NWH caused or assisted in the formation of the Tower Homes entity (a limited liability company) at the request of an NWH client, Rodney C. Yanke. (App. at 3.) *During all relevant times, Mr. Yanke was Tower Homes' sole member, owner and principal*. (App. at 3, 71.)

Tower Homes was created to develop and construct a common interest condominium ownership project known as Spanish View Towers (hereafter the "Project"). (App. at 3-4.) In addition to assisting in the formation of Tower Homes, NWH also prepared the purchase contracts for the individual condominium units and, in connection with this transactional legal work, advised Tower Homes regarding the requirements under Nevada law for the handling and safeguarding of the condominium unit purchasers' earnest money deposits. (App. at 4-5, 154-55.)

2. The Project's failure, the loss of the Purchasers' earnest money deposits and the Underlying Lawsuit

Due to financing and market issues, the Project was never constructed. Once the construction became delayed, the people who had purchased condominium units in the Project (hereafter the "Purchasers"), not surprisingly, became anxious, and began demanding the return of their earnest money deposits, which they were required to tender when they purchased their units. Tower Homes, however, was unable to return the deposits because Tower Homes, acting through its sole member, owner and principal, Mr. Yanke, chose to use the deposit funds to pay Project expenses, instead of maintaining the funds in trust, as NWH had advised.

In August 2006, Tower Homes received copies of two demand letters from counsel for two of the Purchasers, Paul Connaghan. (App. at 148-151, 192-94.) In these letters, Mr. Connaghan explained, in great detail, the reasons why the Purchasers believed that the earnest money deposits had been mishandled by Tower

Homes in violation of Nevada law. (*Id.*)[1]

After not receiving their deposits back, the Purchasers, on May 23, 2007, filed a complaint in Clark County District Court against Tower Homes, Mr. Yanke and others seeking the return of their earnest money deposits and other damages (*Gaynor, et al. v. Tower Homes, LLC, et al.*, Case No. A541668, hereafter the "Underlying Lawsuit"). (App. at 5, 32.) In their complaint in the Underlying Lawsuit (hereafter the "Underlying Complaint"), the Purchasers alleged, among other things, that Tower Homes breached the terms of the purchase contracts (App. at 36-37), failed and/or refused to return their deposit monies (App. at 37), accepted and retained benefits (i.e., the purchasers' deposits) "under circumstances where it would be unjust and inequitable for them to retain the benefits") (App. at 38) and "misappropriated, unlawfully exercised domain over, and converted for their use and benefit the [Tower Homes Purchasers'] purchase money to the detriment of the [Tower Homes Purchasers]." (App. at 42.)[2] During the course of the Underlying

[1] Further details regarding the contents of these two letters, which provided the material facts and law that form the basis of Tower Homes' claims against NWH, are set forth below at pages 16-18.

[2] The Purchasers filed an amended complaint on October 23, 2007. (App. at 269.) In this amended complaint, the Purchasers added an express cause of action for alleged violations of NRS Chapter 116 relating to earnest money deposits, including the allegation that Mr. Yanke improperly used the deposits to pay the personal expenses of Mr. Yanke and others on the Project. (App. at 280; Para. 106 of First Amended Complaint.) Tower Homes argued at the hearing that this amended complaint should not be considered because it was filed after the bankruptcy proceedings were initiated. This contention is misplaced. The allegations of the amended complaint provide further actual notice to Tower Homes, through Mr. Yanke (its sole owner and member who was still a party in the Underlying Lawsuit), of the Purchasers' allegations as to how their deposits should have been handled. Tower Homes cited no authority to the district court to support its contention that a party in bankruptcy is somehow absolved of its duty to timely initiate civil actions when its sole principal obtains actual notice of the potential for an alleged cause of action. Furthermore, at the time the amended complaint was filed, Tower Homes was a debtor-in-possession in the bankruptcy proceedings, and the bankruptcy

Lawsuit, Mr. Yanke admitted he had taken the deposit monies from the bank account into which they had been deposited and used them on the Project, such as to cover draws and other operational expenses.

3. The Tower Homes Bankruptcy

On May 31, 2007, shortly after the Underlying Lawsuit was filed, Chapter 11 bankruptcy proceedings were initiated against Tower Homes by several creditors. (App. at 5, 72.) On September 10, 2007, at least eleven of the Purchasers filed bankruptcy claims against Tower Homes to obtain a return of their earnest money deposits. (App. at 139, 445-49.) These claims ranged in amounts from approximately $82,000 to $353,000. (App. at 445-49.)

On or about November 17, 2008, the Tower Homes bankruptcy trustee submitted a proposed "Disclosure Statement and Plan of Reorganization" (hereafter the "Bankruptcy Plan"). (App. at 57.) Notably, the Bankruptcy Plan, in a section entitled "Litigation," provides, in relevant part: "[F]rom and after the Confirmation Date, the Trustee and the Estate shall retain all claims or Causes of Action that they have or hold against any party . . . whether arising pre- or post-petition, ***subject to applicable state law statutes of limitation and related decisional law***, whether sounding in tort, contract or other theory or doctrine of law or equity." (App. at 109 [Bankruptcy Plan at 48:18-22] [emphasis added].)

On December 8, 2008, an "Order Approving Disclosure Statement and Confirming Plan of Reorganization" was entered. (App. at 45.) The Purchasers' claims against Tower Homes are included as "Class 13" claims in the Bankruptcy Plan. (App. at 93.) No objections to the Purchasers' claims were filed.

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trustee was not even appointed until January 18, 2008 (App. at 72), which was nearly three months after the amended complaint was filed.

4. The subject legal malpractice lawsuit and NWH's Motion

Tower Homes filed its complaint in the instant lawsuit on June 12, 2012. (App. at 2.) NWH filed a Motion to Dismiss, or, alternatively, for Summary Judgment (hereafter the "Motion") on July 19, 2012. (App. at 10.)[3] In the Motion, NWH sought dismissal or summary judgment on two grounds: (1) Tower Homes lacks capacity to sue under federal law due to the bankruptcy proceedings (i.e., this action belongs to the Bankruptcy estate or the trustee, but not to Tower Homes in its own capacity) (App. at 17-21); and (2) this action is barred by the statute of limitations (App. at 21-25). Tower Homes opposed the Motion (App. at 197), and NWH filed a reply (App. at 426).

The Motion was heard by the district court (Hon. Gloria Sturman) on October 3, 2012. (See Transcript of Proceedings, App. at 468.) After oral argument, the district court agreed with NWH that Tower Homes is not authorized by federal law or the Bankruptcy trustee to bring this action. (App. at 51-52.)[4] The district court denied the Motion as to the statute of limitations. (App. at 520-22; 531-32.) The parties were unable to agree on the language for a proposed order, and therefore submitted two proposed orders. The district court ultimately signed NWH's order (App. at 531-32), and notice of entry was served on November 2, 2012. (App. at 528.)

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[3] Both NWH and Tower Homes submitted evidence with the moving papers, thereby enabling the district court to treat the Motion as one for summary judgment.

[4] Tower Homes had maintained that it had authority to bring this action based on an order issued by the Bankruptcy Court, which authorized the law firm of Marquis Aurbach to bring certain claims on behalf of the Purchasers against certain parties (and NWH is not included among these enumerated parties). The district court properly disagreed, but concluded that this was a procedural defect that Tower Homes could attempt to cure by obtaining a new order from the Bankruptcy Court. This ruling, and the issues surrounding the Bankruptcy Court authorization for this action, are not at issue in the instant Petition.

D.

POINTS AND AUTHORITIES AS TO WHY WRIT SHOULD ISSUE

Though this Court does not generally consider writ petitions which challenge orders denying motions to dismiss or for summary judgment, a well-established exception applies when no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss the action. *See State of Nevada v. Eighth Jud. Dist. Ct.*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002) (citing and distinguishing *State ex rel. Dept. of Trans. v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983)); *Smith v. Eighth Jud. Dist. Ct.*, 113 Nev. 1343, 1344-45, 950 P.2d 280, 281 (1997). Alternatively, a writ petition based on a denial of a motion for summary judgment may be considered when an important issue of law requires clarification and considerations of sound judicial economy and administration militate in favor of granting the petition. *See State, supra,* 118 Nev. at 147, 42 P.3d at 238; *Smith, supra,* 113 Nev. at 1344-45, 950 P.2d at 281.

Based on these standards, this Court has repeatedly considered the merits of writ petitions challenging questionable denials of motions to dismiss or motions for summary judgment that involve important or recurring questions of law. *See, e.g. Moseley v. Eighth Judicial Dist. Ct*., 124 Nev. 654, 658-59, 188 P.3d 1136 (2008); *Int'l Game Tech. v. Second Judicial Dist. Ct*., 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008); *Washoe Med. Center v. Second Judicial Dist. Ct.*, 122 Nev. 1298, 1301-02, 148 P.3d 790, 792 (2006); *Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Ct.*, 120 Nev. 632, 635-636, 97 P.3d 607, 609 (2004); *Resort at Summerlin, L.P. v. Eighth Judicial Dist. Ct*., 118 Nev. 110, 112, 40 P.3d 432, 434 (2002); *Smith, supra,* 113 Nev. at 1344-45.

This Court has further explained that the "interests of judicial economy" provide "the primary standard by which this court exercises its discretion" with respect to writ relief. *See Smith, supra*, 113 Nev. at 1345. Thus, an appeal is not an adequate and speedy legal remedy when a motion to dismiss is improperly denied at

the early stage of a case due to the policy of sound judicial administration. *See Int'l Game Tech., supra*, 124 Nev. at 198 (entertaining merits of writ petition following denial of motion to dismiss).

NWH respectfully submits that the foregoing principles are implicated here and compel this Court's immediate intervention. No factual dispute exists and the district court was obligated to dismiss this action, or grant summary judgment, pursuant to the undisputed facts and the clear authority of NRS 11.207, *Gonzales v. Stewart Title*, 111 Nev. 1350, 905 P.2d 176 (1995) and *Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998).

1. <u>There are no disputed factual issues</u>.

In order to fall within this Court's exception to the general rule against consideration of writ petitions challenging orders denying motions for summary judgment, a petitioner must first show that there are no disputed factual issues. *See, e.g., State of Nevada, supra,* 118 Nev. at 147. This requirement is satisfied here – the parties do not dispute the facts; rather, they disagree only as to the application of law to the undisputed facts.

The only material facts necessary to adjudicate the statute of limitations issue in this case are (1) whether the legal work at issue was transactional in nature or for representation in a litigated matter; (2) whether Tower Homes received the two August 2006 demand letters by counsel for two of the Purchasers (App. at 148-151 and 192-194), in which the theories as to why the handling of the earnest money deposits by Tower Homes violated Nevada law, are unambiguously articulated in great detail; (3) the date on which the Underlying Complaint was filed; and (4) the date on which the first of the Purchasers' bankruptcy claims were filed. Tower Homes did not dispute any of these (undisputable) facts in its opposition to the Motion.

2. <u>Pursuant to clear Nevada authority, the district court was obligated to enter summary judgment in favor of NWH</u>.

In addition to requiring the absence of any disputed issue of fact, this Court requires "clear authority" in order to grant writ relief following the denial of a dispositive motion. *See, e.g., State of Nevada, supra*, 118 Nev. at 147; *Smith, supra*, 113 Nev. at 1344-45. This requirement is also satisfied here. Indeed, the only way the district court could deny the Motion on the statute of limitations issue was to refuse to follow the clear authority of the Nevada legislature (NRS 11.207) and this Court (*Gonzales* and *Kopicko*).

In its complaint, Tower Homes asserts two causes of action against NWH: (1) legal malpractice (this "First Cause of Action" is not labeled in the complaint, but can be fairly read as attempting to plead a legal malpractice cause of action); and (2) breach of fiduciary duty. Both causes of action are subject to the statute of limitations provided by NRS 11.207.[5]

NRS 11.207 establishes the statute of limitations for legal malpractice claims as follows:

> An action against an attorney . . . to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced **within 4 years after the plaintiff sustains damage or within 2 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier**.

[5] The parties agree that Tower Homes' breach of fiduciary duty cause of action is subject to the time limitations established by NRS 11.207. *See Stalk v. Mushkin*, 125 Nev. Adv. Rep. 3, 199 P.3d 838, 843 (2009). NWH also maintains that a "breach of fiduciary duty" cause of action does not exist independently of a legal malpractice claim. (App. at 24-25; 440-41.) The district court did not rule on this discrete issue of law.

NRS 11.207(1) (emphasis added).[6] Here, the district court was obligated to grant summary judgment because, under both the two-year and four-year measures provided by NRS 11.207, and the opinions of this Court construing this statute, Tower Homes' causes of action are time-barred as a matter of law.

a. <u>By failing to enter summary judgment pursuant to the two-year measure provided by NRS 11.207, the district court failed to follow the opinions of this Court and failed to consider and apply the undisputed evidence</u>.

Under NRS 11.207(1), Tower Homes was required to bring the instant action within two years after it discovered (or should have discovered) the facts suggesting that it had a legal malpractice claim against NWH. For the benefit of both the district courts and the Nevada legal community, this Court has established, *as a matter of a law*, a date certain on which this "discovery" occurs when the nature of the allegedly negligent work performed by the attorney is *transactional* in nature (as opposed to when an attorney represents a client in a litigation matter).

Specifically, this Court has explained that a client who has retained an attorney for transactional legal work "***necessarily*** discovers the material facts which constitute the cause of action" within the meaning of NRS 11.207 when a lawsuit caused by the allegedly negligent transactional work is ***filed***. *See Gonzales v. Stewart Title*, 111 Nev. 1350, 1354, 905 P.2d 176 (1995) (granting attorney's motion to dismiss based on statute of limitations because, as a matter of law, clients discovered their cause of action and sustained damages when lawsuit arising out of alleged transactional legal malpractice was filed) (emphasis added); *see also*

[6] "This time limitation is tolled for any period during which the attorney or veterinarian conceals any act, error or omission upon which the action is founded and which is known or through the use of reasonable diligence should have been known to the attorney or veterinarian." NRS 11.207(2). Tower Homes did not contend that this tolling provision applied in its opposition to the Motion.

Kopicko v. Young, 114 Nev. 1333, 1337 n. 3, 971 P.2d 789, 791 (1998) (reaffirming distinction between transactional and litigation malpractice for determining commencement of running of statute of limitations).

In *Gonzales*, the plaintiff clients retained defendant attorney to prepare documents, including a promissory note, for the sale of the clients' property. In other words, the clients retained the defendant attorney to handle transactional work. Because the promissory note prepared by the attorney was allegedly defective, the clients got sued. Just like Tower Homes here, the clients in *Gonzales* argued that the statute of limitations should not begin to run until the underlying lawsuit which arose out of the alleged malpractice had concluded. In rejecting this argument, this Court reasoned that the *filing* of the underlying lawsuit against the clients, *and not the final resolution of the underlying lawsuit*, commenced the running of the statute of limitations, explaining as follows:

> The rule set forth herein is ***in accordance with reason and the relevant statute, NRS 11.207(1)***. A plaintiff ***necessarily*** 'discovers the material facts which constitute the cause of action' for attorney malpractice when he files or defends a lawsuit occasioned by that malpractice, and he 'sustains damage' by assuming the expense, inconvenience and risk of having to maintain such litigation, even if he wins it. Other statutory limitations are not tolled to wait for damages to accrue in an amount certain. The limitation period for medical malpractice is not tolled to await all the bills for remedial treatment, which could include a lifetime of special care. See NRS 41A.097. A homeowner who knows of a construction defect would be ill advised to wait until the house falls down to sue the builder. [Citation.] We see no reason to impose a special rule for attorney malpractice.

Gonzales, supra, 111 Nev. at 1354 (emphasis added). Accordingly, because the plaintiffs in *Gonzales* did not file their lawsuit within four years of the date on which the lawsuit occasioned by the alleged malpractice was filed against them, their legal malpractice lawsuit was time-barred as a matter of law. *Id*. at 1355.[7]

[7] The version of NRS 11.207 in effect at the time of the *Gonzales* opinion did not include the two-year measure that is now contained in the statute. The two-year

Here, there is no dispute that the Underlying Complaint against Tower Homes was filed on May 23, 2007. (App. at 5, 32.) In the Underlying Complaint, the Purchasers alleged that Tower, among other things, failed and/or refused to return their deposit monies (App. at 37), accepted and retained benefits (i.e., the purchasers' deposits) "under circumstances where it would be unjust and inequitable for them to retain the benefits" (App. at 38), used the purchasers' deposits for improper purposes (App. at 41-42) and had "misappropriated, unlawfully exercised domain over, and converted for [its] use and benefit the [Tower Homes Purchasers'] purchase money to the detriment of the [Tower Homes Purchasers]." (App. at 42.) In other words, ***in their Underlying Complaint, the Purchasers alleged precisely the same wrongs that Tower Homes now alleges, in the instant action, that NWH should somehow have prevented***.[8]

Accordingly, by May 23, 2007 (or, at the very latest by October 23, 2007 if the amended complaint is used), Tower Homes "necessarily" discovered the material facts constituting its cause of action against NWH within the meaning of NRS 11.207. *See Gonzales, supra*, 111 Nev. at 1354-55. Thus, ***under the two-year measure provided by NRS 11.207(1), Tower Homes had until May 23, 2009 (or***

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measure was enacted pursuant to 1997 amendments. This distinction makes no difference here, however, as the analysis is conceptually identical, whether one applies a two-year or a four-year statute. Moreover, as discussed below, Tower Homes' causes of action are in any event barred by *both* the two-year and four-year measures.

[8] Additionally, the Purchasers filed an amended complaint on October 23, 2007. (App. at 269.) In this amended complaint, the Purchasers added an express cause of action for alleged violations of NRS Chapter 116 relating to earnest money deposits. (App. at 280.) This newly asserted cause of action provided an additional theory of legal recovery, but did not otherwise alter or add to the basic factual allegations. It is not necessary to consider this amended complaint in the analysis, as *Gonzales* makes it clear that the filing of any complaint arising out of the transactional malpractice will suffice. Nevertheless, even if this amended complaint is used to start the statute of limitations clock, the instant claims are still time-barred.

October 23, 2009) to file a complaint for legal malpractice against NWH.

By failing to enter summary judgment in favor of NWH, the district court disregarded this Court's clear mandate to look to the filing date of a complaint arising out of alleged transactional legal malpractice to commence the running of the statute of limitations. Instead, the district court apparently relied on Tower Homes' argument that the statute of limitations did not begin to run until the Underlying Lawsuit had concluded. Tower Homes based this argument on *Kopicko* and other inapposite cases which involved alleged legal malpractice ***in the litigation context***. (App. at 210.) By adopting the framework applicable only to litigation malpractice, both Tower Homes and the district court failed to recognize the critical distinction, established and reaffirmed by this Court, between transactional and litigation malpractice. *See Kopicko, supra*, 114 Nev. at 1337 n. 3 (reaffirming distinction between transactional and litigation malpractice for statute of limitations purposes).

The district court notably confused the issue by improperly concluding that this case involves some kind of "hybrid" situation: "[Tower Homes' counsel's] point is that the [Underlying Lawsuit] was filed by people who were third parties, who were not a party to the professional relationship between Tower and Mr. Heaton, or Walton Heaton [sic]. So its litigation, the third party's litigation against Mr. Yanke and ultimately Tower, but it was stayed, that litigation is – that's why I said it's kind of a hybrid, because that – their litigation is ongoing." (App. at 504 [Transcript at 37:1-7].)

This district court's belief that this case involves a "hybrid" situation is simply wrong. It is entirely ***undisputed***, from a factual standpoint, that the representation that comprises the alleged basis for Tower Homes' malpractice claim against NWH involved transactional work, and not litigation work. NWH's assistance with the formation of Tower Homes, the preparation of the purchase contracts and the related consultation regarding the handling of the Purchasers' deposits all constitute *classic* transactional representation. Of course, a lawsuit

arising out of alleged transactional malpractice will frequently be brought by "third parties" (i.e., people who are not parties to the attorney-client relationship). *See, e.g., Gonzales, supra*, 111 Nev. at 1351 (lawsuit brought by "third party" arising out of alleged transactional malpractice). This practical reality, however, does not alter the analysis, or somehow transform the nature of the attorney's underlying representation.

Not only did the district court fail to recognize the critical distinction between transactional and legal malpractice (thereby laying the groundwork for its circumvention of *Gonzales*), it compounded this clear error by disregarding wholly undisputed evidence ***establishing that the statute of limitations in this case in fact started running well before the filing of the Underlying Complaint***. Specifically, in August 2006, Tower Homes undisputedly received copies of two demand letters (one dated August 11, 2006 and the other dated August 23, 2006) from counsel for two of the Tower Homes Purchasers, Paul Connaghan, in which Mr. Connaghan explained in great detail the reasons why he felt that the earnest money deposits had been mishandled by Tower Homes in violation of Nevada law. (App. at 148-151, 190-95.)

Specifically, Mr. Connaghan stated in his August 11, 2006 letter (to Mr. Yanke as Managing Member of Tower Homes, care of Mr. Heaton) that Mr. Yanke had refused to divulge the location of or otherwise account for the deposit which was due to be returned because of Tower Homes' default. (App. at 149.) Counsel further explained the requirement under the purchase contract that the deposit was required to be held in an interest bearing trust account, and that the deposit was to be returned in the event Tower Homes defaulted under the purchase contract. (*Id*.) Mr. Connoghan notably went so far as to threaten the initiation of criminal proceedings against Mr. Yanke if the identity of the bank in which the deposit was held was not immediately disclosed. (App. at 150.)

In his August 23, 2006 letter (again to Mr. Yanke as Managing Member of Tower Homes, care of Mr. Heaton), Mr. Connaghan spelled out the theories as to how the deposits had been mishandled in violation of Nevada law in even greater detail. First, counsel requested proof, including a sworn statement, that the purchasers' deposits were being handled as required by Nevada law (NRS 116.411). (App. at 193.) Counsel also explained again that Mr. Yanke's refusal to disclose the specific bank which was holding the deposits made it appear as though he embezzled and/or misappropriated the deposits. (*Id*.) Additionally, Mr. Connaghan *quoted* the applicable statute (NRS 116.411(1)) and argued why he thought that Mr. Yanke (again, as the *sole* member, officer and owner of Tower Homes) had violated the statute by allegedly borrowing against the Purchasers' deposits. (*Id*. at 193-94.) This letter was notably copied to the Nevada Real Estate Division, the federal Department of Housing and Urban Development and the Nevada Attorney General's office. (*Id*. at 194.)

It is difficult to conceive of a more crystal clear "discovery" of "material facts which constitute the cause of action" within the meaning of NRS 11.207, as both of these letters provided express and unmistakable notice to Tower Homes, *in 2006*, that the unit owners were contending that the purchase contracts and the handling of the deposits by Tower Homes did not comply with Nevada law. The crux of the instant lawsuit is Tower Homes' allegation that NWH failed to adequately advise Tower Homes with respect to the safeguarding of the Purchasers' earnest money deposits as required by Nevada law, and failed to draft the purchase contracts in a manner consistent with the statutory safeguarding requirements. (App. at 4-5; 483.) The two demand letters unambiguously show that, in August 2006, the Purchasers were articulating the same fundamental problem – i.e., that the earnest money deposits were not being handled as required by Nevada law. ***If this alleged mishandling of the Purchasers' deposits was, as Tower Homes now alleges, the result of something that NWH did or did not do – or did or did not***

advise Tower Homes to do or not do – then Tower Homes obviously knew (or should have known) this in August 2006, when its sole principal, Mr. Yanke, was being threatened with criminal proceedings due to the allegedly unlawful mishandling of the Purchasers' deposits.

Notably, *Tower Homes does not dispute the fact that it received the two August 2006 demand letters (in August 2006)*.[9] In its Motion, NWH attached copies of both of the August 2006 demand letters, as well as the declaration of Mr. Heaton establishing that he caused copies of these letters to be promptly delivered to Tower Homes. (App. at 29-30.) Tower Homes also does not dispute that, during all relevant times, it was relying on NWH for the preparation of the purchase contracts and advice relating to the handling of the Purchasers' deposits. ***The district court failed to explain at the hearing how it considered this undisputed evidence, or how this evidence could possibly be reconciled with its decision to deny the Motion as to the statute of limitations***.

If this undisputed evidence had properly been considered by the district court, it would have concluded that Tower Homes had until August 2008 to bring this action based on NRS 11.207's two-year measure. In August 2006, Tower Homes undisputedly knew that it had entrusted the preparation of the purchase contracts and the advisement of the proper handling of Purchaser deposits to NWH. Then, in

[9] Accordingly, the date on which Tower Homes knew or should have known of its alleged claims against NWH can be ascertained as a matter of law. *See, e.g.*, *Siragusa v. Brown*, 114 Nev. 1384, 1391, 971 P.2d 801, 806 (1998); *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998); *see also Phoebe Leal v. Computershare*, 2010 U.S. Dist. Lexis 101710 (D. Nev. 2010) (summary judgment granted on statute of limitations grounds, and dismissing claim for breach of fiduciary duty, where it was undisputed that the plaintiff's attorney had received a letter advising of the facts that established the plaintiff's claim); *Orr v. Bank of America*, 285 F.2d 764 (9th Cir. 2002) (summary judgment affirmed on statute of limitations grounds where it was undisputed that plaintiff was aware of facts underlying a possible claim).

August 2006, when it received the two demand letters, it "discovered" that its handling of the Purchasers' deposits was alleged to have not complied with Nevada law. Accordingly, Tower Homes had two years from this discovery, or until August 2008, to file its complaint in the instant action. By the time it actually filed the instant action in June 2012, *it was almost four years too late*.

b. <u>The district court again failed to follow this Court's authority and properly apply the undisputed material facts when it refused to enter summary judgment based on NRS 11.207's four-year measure</u>.

The Nevada Legislature has unambiguously established that, regardless of any "discovery" of a cause of action, four years from the date on which a client "sustains damage" ***is the absolute outside limit for when a legal malpractice claim can be initiated***. *See* NRS 11.207(1) (concluding with "whichever occurs earlier."). Thus, even if one chooses to engage in the academic exercise of utilizing the alternative four-year measure provided by NRS 11.207 (which is unnecessary due to the clear expiration of the two-year measure on two separate and independent grounds, as detailed above), the instant action is still time-barred as a matter of law.

Again, in *Gonzales*, this Court explained that a client "sustains damage by assuming the expense, inconvenience and risk of having to maintain such litigation [i.e., a lawsuit arising out the alleged transactional malpractice], even if he wins it." *Gonzales*, *supra*, 111 Nev. at 1354.[10] Thus, as a rule of law designed to create clarity and predictability, this Court established that the statute of limitations on a legal malpractice claim *arising out of transactional legal* work begins to run when a lawsuit arising out of the alleged malpractice is filed because this is the date on

[10] Indeed, the clients in *Gonzales* did prevail in the underlying lawsuit. This further solidifies this Court's analysis that the statute starts to run, at the latest, upon the commencement of the lawsuit arising out of the alleged transactional malpractice – not upon the completion of the lawsuit.

which the client "sustains damage." *Id*.

Here, again, the only necessary material fact (i.e., the filing date of the Underlying Complaint) is undisputed. The Underlying Complaint, which arose primarily out of Tower Homes' failure to return the purchasers' earnest money deposits, was filed on May 23, 2007. In other words, as a matter of law, Tower Homes "sustained damage" within the meaning of NRS 11.207 on May 23, 2007. Thus, under this Court's *Gonzales* rule, Tower Homes had until May 23, 2011 to commence the instant action against NWH. The instant action, however, was not commenced until June 12, 2012 – more than one-year beyond the date on which the four-year limitations period ran.

Instead of applying the well-established *Gonzales* rule, which leads to the straightforward conclusion that Tower Homes' claims against NWH are time-barred as a matter of law, the district court instead concluded that Tower Homes did not "sustain damage" within the meaning of NRS 11.207 until the Underlying Litigation was resolved. Specifically, at the hearing on the Motion, the district court reasoned:

> I don't know how the trustee could have known what the claims against Tower were until the underlying state court litigation was resolved.
>
> I appreciate the argument that it's malpractice, it's transactional malpractice, that the trustee should have been on notice the minute the lawsuit was filed, that anybody involved in that transaction could be liable and the trustee should have looked at everybody involved in the transaction and said, do I have any claims here that I can assert on behalf of Tower. But I just don't understand how the trustee could have been on notice of that kind of claim until the underlying state court litigation was resolved, and there's an unsatisfied liability against Tower that's still pending in the bankruptcy and Tower needs to look for ways to pay it.

(Trans. at 50:20-51:9.)

Though purporting to "appreciate" that, under Nevada law, a client "sustains damage" in the context of transactional legal representation when a lawsuit arising out the transactional work is filed, the district court inexplicably refused to follow

Gonzales, even though it is entirely undisputed that the work that NWH performed for Tower Homes was transactional in nature. Instead, the district court improperly shifted the focus of analysis to what the bankruptcy trustee knew or didn't know, and whether Tower Homes would have unsatisfied liabilities to third-parties in the context of bankruptcy proceedings.

The analysis utilized by the district court was misplaced. Again, as a pure matter of Nevada law (i.e., *Gonzales*), Tower Homes "sustained damages" for purposes of NRS 11.207 when the Underlying Complaint was filed. This Court has not recognized any 'bankruptcy exception' to this general rule. Furthermore, the existence of other potential defendants (in the Underlying Action) who could possibly, by virtue of settlements or judgments, *also* pay compensation to the Purchasers did not operate to somehow toll the statute of limitations clock as to Tower Homes' alleged malpractice claims against NWH, which is governed solely by NRS 11.207 and *Gonzales*. Not only was there no legal authority before the district court to permit this judicially-created exception to *Gonzales*, the Bankruptcy Plan language itself belies the district court's ruling – i.e., pursuant to the Plan, the trustee had the authority to handle claims, but only "*subject to applicable state law statutes of limitation and related decisional law*." (App. at 109 [Bankruptcy Plan at 48:18-22] [emphasis added].) In other words, the district court's ruling (in addition to violating well-established Nevada law) essentially re-writes the Bankruptcy Plan.

Additionally, as with the analysis on the two-year measure, the district court further compounded its primary error (i.e., its failure to follow *Gonzales*) ***by failing to recognize the filing of the bankruptcy claims against Tower Homes on September 10, 2007 to obtain the Purchasers' earnest money deposits, as another obvious statute of limitations commencement date***. Again, on September 10, 2007, at least eleven of the Purchasers filed bankruptcy claims against Tower Homes (ranging in amounts from approximately $82,000 to $353,000) to obtain a return of their earnest money deposits. (App. at 139, 445-49.)

Again, under Tower Homes' theory of liability in the instant case, these claims (i.e., the loss of the earnest money deposits) were caused by NWH's alleged negligence. Thus, Tower Homes *separately and independently* "sustained damage" within the meaning of NRS 11.207(1) when these Purchaser claims were filed. These claims constitute damages that the Tower Homes bankruptcy estate is obligated to pay, *regardless of the outcome of the Underlying Lawsuit* (and assuming hypothetically that the conclusion and outcome of the Underlying Lawsuit were somehow relevant, which they are not). Accordingly, applying NRS 11.207's four-year measure to the filing of the bankruptcy claims, Tower Homes had four years from the filing of these Purchasers' claims, or until September 10, 2011, to file this action. Yet again, under this alternative scenario, the instant action (filed on June 12, 2012) was simply commenced too late as a pure matter of law.

c. <u>The district court's implicit conclusion that the bankruptcy proceedings operated to somehow "toll" the running of the statute of limitations was also contrary to law and the undisputed facts</u>.

Finally, the district court's implicit acceptance of Tower Homes' argument that the statute of limitations was somehow "tolled" during the bankruptcy proceedings was not only contrary to the otherwise clear guidance provided by this Court and the unambiguous language of the Bankruptcy Plan,[11] it is simply not supported by federal bankruptcy law or by the precedent of this Court. *See, e.g.*, *Edwards v. Ghandour*, 123 Nev. 105, 108, 159 P.3d 1086 (2007) ("[T]he automatic stay applies only to actions against the debtor . . .") (later overruled on other grounds). Tower Homes cited no authority to the district court to support the argument that the statute of limitations on claims asserted ***by*** a bankruptcy debtor

[11] Again, the Bankruptcy Plan provides that the trustee and estate retain all claims "subject to applicable state law statutes of limitation and related decisional law." (App. at 109.)

are somehow tolled while the bankruptcy proceedings are pending.[12]

In contrast, NWH provided the district court with ample federal case law,[13] including an unpublished decision from the federal court in Nevada (*Bruce v. Homefield Financial*, 2011 U.S. Dist. Lexis 110243 at *5-*6 (D. Nev. 2011)), demonstrating that statutes of limitations are routinely enforced against claims asserted by bankruptcy debtors. (App. at 436.) This federal case law also shows that the ***only*** potential basis for "tolling" the statute of limitations on a debtor's own claim is 11 U.S.C. § 108, a provision which does not apply here as a matter of law. (*Id*. at 436-37.)

Specifically, Section 108(a) provides, in relevant part: "If applicable nonbankruptcy law . . . fixes a period within which the debtor may commence an action, and such period has not expired before the date of the filing of the petition, the *trustee* may commence such action only before the later of -- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or (2) two years after the order for relief. 11 U.S.C. § 108(a) (emphasis added).

Thus, by its terms, Section 108 only applies to actions commenced *by trustees*. A trustee (William A. Leonard, Jr.) is serving in the Tower Homes bankruptcy proceedings, but the instant action is brought and maintained by Tower

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[12] Instead, Tower Homes cited only a non-existent Federal Rule of Bankruptcy Procedure and case law relating to the correct, but obviously inapplicable, principle that claims *against* a debtor are stayed during the bankruptcy proceedings. (App. at 435-36.) Actions *by* a debtor, in contrast, are not stayed. (App. at 435.)

[13] *See, e.g., Phillips v. Okla. Publ'g Co.*, 2011 U.S. Dist. Lexis 119077 at *22-23 (W.D. Wash. 2011) (automatic stay applies only to actions against the debtor, and not to lawsuits brought by the debtor) (citations omitted); *Brown v. Armstrong*, 949 F.2d 1007 (8th Cir. 1991); *Carley Capital Group v. Fireman's Fund Ins. Co*., 889 F.2d 1126 (D.C. Cir. 1989); *Rett White Motor Sales Co. v. Wells Fargo Bank*, 99 B.R. 12 (N.D. Cal. 1989); *In re Kaiser Aluminum Corp*., 303 B.R. 299 (D. Del. 2003).

Homes itself.[14] Section 108 simply does not apply to actions brought by debtors when a trustee has been appointed.

In any event, even if Tower Homes hypothetically could take advantage of Section 108, this action is still time-barred. Section 108 gives the trustee only until the later of the end of the statute of limitations period (here, as detailed above -- August 2008, May 23, 2009, May 23, 2011 or September 10, 2011 – take your pick), or until two years after the order for relief. The "Order for Relief Under Chapter 11" was entered in the Tower bankruptcy proceedings on August 21, 2007 (App. at 464), thereby giving the trustee until August 21, 2009 to hypothetically have filed this action under the limited "tolling" provided by Section 108. In sum, Section 108 provides no assistance to Tower Homes, practically or analytically.[15]

3. Considerations of sound judicial economy and administration also militate in favor of granting this Petition.

Finally, this Court has explained that writ relief based on a denial of a motion for summary judgment may be considered when an important issue of law requires clarification and considerations of sound judicial economy and administration militate in favor of granting the petition. *See, e.g., State, supra*, 118 Nev. at 147; *Smith, supra*, 113 Nev. at 1344-45.

The commencement of the statute of limitations period for claims against Nevada attorneys presents an important issue of law. It is critical that the Nevada legal community, as well as the district courts, have certainty and predictability as to when claims must be brought. This Court has recognized that "[p]ublic policy encourages litigants to bring their actions to an end as quickly as possible, hence the

[14] As noted above, the Bankruptcy Court's order approving the appointment of the trustee was entered on January 18, 2008 (App. at 72), which was well after the filing of the Underlying Complaint (and after the filing of the amended complaint as well).

[15] Tower Homes notably did not rely upon (or even cite to) Section 108 in its opposition – implicitly conceding its inapplicability.

existence of statutes of limitation." *Gonzales, supra*, 111 Nev. at 1352. This case presents an opportunity for this Court to clarify that a client's bankruptcy does not somehow alter the *Gonzales* rule or implicitly amend NRS 11.207, nor does it provide grounds for disregarding basic summary judgment principles (i.e., that district courts *must* enter summary judgment when the undisputed facts show that the moving party is entitled to judgment as a matter of law).

With respect to judicial economy, again, this Court has explained that the "interests of judicial economy" are "the *primary standard* by which this court exercises its discretion" with respect to writ relief. *See Smith, supra*, 113 Nev. at 1345 (emphasis added). Thus, an appeal is not an adequate and speedy legal remedy when a motion to dismiss is improperly denied at the early stage of a case due to the policy of sound judicial administration. *See Int'l Game Tech., supra*, 124 Nev. at 198.

The district court here was obligated to grant summary judgment. If the district court had properly applied *Gonzales* and NRS 11.207's two-year measure to the undisputed facts, it would have concluded that Tower Homes had until 2008, or, at the very latest, 2009, to commence this action. Alternatively, if the district court had properly applied *Gonzales* and NRS 11.207's four-year measure to the undisputed facts, it would have had no choice but to conclude that Tower Homes had until 2011, at the very latest, to commence this action. Either way, the inescapable conclusion is that all causes of action asserted by Tower Homes in this case – in 2012 -- are time-barred as a matter of law. Forcing NWH to continue to litigate under these circumstances is inimical to the interests of judicial economy and sound judicial administration.

Accordingly, this Court should issue a writ mandating that the district court enter summary judgment in favor of Petitioners and prohibiting the district court from entertaining further proceedings in this case.

Dated this 10th day of December, 2012.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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DECLARATION OF JEFFREY D. OLSTER

I, Jeffrey D. Olster, declare and state as follows:

1. I am an attorney duly licensed to practice before all courts of the State of Nevada. I make this affidavit pursuant to N.R.A.P. 21(a)(5). This affidavit is not made by Petitioners personally because the salient issues involve pure questions of law based on undisputed facts presented during the course of summary judgment proceedings.

2. Pursuant to NRS 34.170 or NRS 34.330, Petitioners request the issuance of a writ of mandamus or writ of prohibition directing the respondent district court to enter a new order granting Petitioners' motion to dismiss or, alternatively, for summary judgment, on statute of limitations grounds.

3. Writ review is warranted because no disputed factual issues exist and, pursuant to clear authority established by this Court, the district court was obligated to dismiss the action, or enter summary judgment in favor of Petitioners. Considerations of sound judicial economy and administration militate in favor of granting the Petition.

4. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law. *See Int'l Game Tech. v. Second Judicial Dist. Ct*., 124 Nev. 193, 198, 179 P.3d 556 (2008) (an appeal is not an adequate and speedy legal remedy when a motion to dismiss is improperly denied at the early stage of a case due to the policy of sound judicial administration).

I declare under penalty of perjury under the laws of the State of the Nevada that the foregoing is true and correct.

Dated this 10th day of December, 2012.

/s/ Jeffrey D. Olster
JEFFREY D. OLSTER

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5), and the type style requirements of N.R.A.P. 32(a)(6), because:

This brief has been prepared in a proportionally spaced typeface using **Microsoft Office Word 2010** in **Times New Roman** font, **size fourteen (14).**

2. I further certify that this brief complies with the page or type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the brief exempted by N.R.A.P. 32(a)(7)(C), it is either:

[] Proportionately spaced, has a typeface of 14 points or more, and contains **9,165 words**; or

[] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

[] Does exceed by ____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposes for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 29(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, 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 10th day of December, 2012.

/s/ Jeffrey D. Olster
JEFFREY D. OLSTER

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP and, pursuant to N.R.C.P. 5(b), that on the 10th day of December, 2012, I deposited for first class United States mailing, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the foregoing **PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, FOR WRIT OF PROHIBITION** addressed as follows:

The Honorable Gloria Sturman
District Court Judge
Clark County District Court, Dept. 26
200 Lewis Avenue
Las Vegas, Nevada 89155
Respondent Court

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/s/ *Nicole Etienne*.
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP