So for all these reasons, in and of itself this action should be dismissed. It violates federal law, and it therefore must be dismissed.

THE COURT: Readdress your statute of limitations argument. Because I guess one question I had is, I don't know what the status is of the bankruptcy. We don't have PACER. So at -- is it presumed that to the extent people were on notice that there were claims that this -- this claim was one of those claims that was known, so the statute really started to run when?

Is it stayed by the plaintiff filing -- or not filing bankruptcy, being involuntarily forced into bankruptcy? Does that stay it? What's the -- what are we talking about here with respect to statute of limitations?

MR. OLSTER: Sure. And if we -- we'll put aside the lack of authorization and we'll get the issue --

THE COURT: Right. Right.

MR. OLSTER: According to the Nevada Supreme Court in the Gonzales case, Gonzales v. Stewart Title, as a matter of Nevada law a client sustains damage, within the meaning of NRS 11.207 in the transactional malpractice context, alleged malpractice, when a lawsuit arising out of that alleged transactional malpractice is filed. It's different than litigation malpractice.

But what the Nevada Supreme Court said in Gonzales is, client, your attorney drafts up a contract or drafts up a promissory note, as was the case in the Gonzales case, and a lawsuit is filed because something was improper about that drafting of the promissory note or the purchase contract. That filing date you have now sustained damage, because you know you have to defend a lawsuit regardless of how it turns out.

Unlike in the litigation malpractice context when errors can resolve themselves, courts can correct rulings, change rulings. You don't know what's going to happen. The Nevada Supreme Court has made this clear. And then in the Kopicko case, the case -- the Nevada Supreme Court again reaffirmed this distinction between transactional and litigation malpractice.

It's critical here because we don't have to get into when certain things happened during the course of the bankruptcy proceedings, who knew what and when. We can, and we'll get into that and we discuss it in the papers. And even if you want to run through that analysis, it's still barred as a matter of law. But you don't have to. You can look at Gonzales. You can look at NRS 11.207. And from that you have several immutable undisputable principles emerging.

The law firm represented Tower Homes for transactional work, undisputed. A lawsuit arising out of that work was filed by the Tower Homes purchasers on May 23, 2007.

Under the Gonzales case, that starts the clock as a matter of law. Under 11.207, they have four years maximum, whichever is earlier as between the four year and two-year measures. They have four years from May 23, 2007, to file this lawsuit.

That gives us until May 23, 2011. The lawsuit was not actually filed until almost a year later, in June of 2012. So we submit respectfully, Your Honor, that that's beyond any factual or legal dispute that ends the inquiry on the statute of limitations of our argument.

Now, you raised the issue of tolling. The party was in bankruptcy. Doesn't that somehow delay or give them extra time? No, it doesn't. Of course, actions against bankruptcy debtors are automatically stayed pursuant to federal law. But that's not at issue.

This is -- and the law cited by Tower in their opposition all relates to the automatic stay against a debtor. The old rule, the two cases they cite, they're completely inapplicable. This is an action by a debtor. There is one vehicle under federal law that allows for, quote/unquote, tolling of the statute of limitations. I don't believe that word is used.

But Section 108 of the bankruptcy code -- let me make sure I get this right -- provides that a trustee has two years from the order for relief to file an action. Okay. And incidentally, Tower doesn't even argue this in their opposition. But you're right, it is relevant to consider this, because this is part of federal law and this is a conceivable tolling mechanism.

Well, Section 108 doesn't apply by its clear terms. First of all, it only applies to actions by trustees, and we have a trustee in this case. So the benefit of tolling only applies to a trustee. More importantly, it doesn't help even if Tower Homes could take advantage of Section 108 in its own right, because it can only extend a state statute of limitations for two years after the order ruling for relief is entered.

Well, it's undisputed here that the order for relief was entered on August 21, 2007. That's Exhibit I to our reply. So that Section 108 tolling, if it could apply to Tower in its own right and it doesn't, but if it could, it gives Tower until August 21, 2009. Again, that's -- we're about three years beyond that in terms of the filing of this lawsuit.

So that is the only animal of federal law, of federal bankruptcy law that would give Tower or the trustee any extra time. So absent any tolling, getting back to Nevada state law and the Gonzales case, we've got a very clear triggering of the statute of limitations clock when the underlying lawsuit was filed in 2007. Now, if you want to get into when Tower knew what and when, we've laid that all out with evidence that's undisputed.

For example, in 2000 -- in August of 2006, the firm sent Mr. Yanke, again, the sole principal and owner of Tower, in other words, Mr. Yanke is Tower, copies of demand letters from the underlying purchasers who were steaming mad. They wanted their money back. You didn't comply with Chapter 116, you didn't segregate these monies and escrow them properly, you didn't do X, Y and Z.

Mr. Yanke knew in August of 2006 that these allegations were being made against him. So if in fact his big picture theory is correct, and that the firm and Mr. Heaton and Mr. Walton didn't properly advise him of how he was supposed to handle these monies, that letter did or should have as a matter of law set off an alarm bell in his head.

Wait a minute, I used this money, or allegedly used this money to fund X, Y and Z, and now I don't have it and now they want it back. And wow, I'm going to be sued and the firm didn't tell me about this. That was August 2006. So under NRS 11.207, the two-year measure, that takes us to August 2008 maximum to file this lawsuit. It was three -- four years ago.

Also, during his Rule 2007 examination -- and again, all this evidence is in the papers and it's undisputed -- Mr. Yanke was asked numerous times about who represented him, who did the work on the contracts, what did he know, what didn't he know. Again, trigger. He knew or should have known that if he in fact was in trouble because of something that Nitz, Walton, Heaton did or didn't do, he knew this in 2007.

Not only did he knew that, Marquis and Aurbach knew that and the purchasers knew that. They all knew this back in 2006, 2007. So if you want to look at a two-year clock about when a party knew or didn't know, it's run.

THE COURT: Okay. So the fact that underlying litigation is filed in 2007, and then there's a bankruptcy, they're forced into bankruptcy August 2007 --

MR. PRINCE: No, no. Their actual -- their involuntary petition was May 31, 2007, eight days after the initial state court complaint was filed.

THE COURT: So the fact that there is litigation filed and there is bankruptcy filed at or about the same time -- I'm trying to understand.

It's your position that you have to wait until you know what the damages are, or that if in fact there was anything that was done by Mr. Heaton or Mr. Walton, that that litigation would actually result in any kind of liability against Mr. Yanke that he could say, well, that's not my fault, that's bad legal advice over here. But that starts the clock running.

MR. OLSTER: It's not my position. That's the position of the Nevada Supreme Court in the Gonzales case. And again, the theory is that -- or the rationale, I should say. I mean, to call it a theory, I think, does it a disservice.

Because this demarcation between when the clock starts running in the transactional context versus the litigation context was not only articulated mostly by the Gonzales case, but it has been recently reaffirmed again by the Supreme Court in the Kopicko case. And even the federal court has recognized the viability of this distinction just this year in an unpublished case that we cited to the Court.

So the rationale is when a lawsuit arising out of malpractice, transactional malpractice is filed, that client sustains damage. He has to defend the lawsuit. He has to pay attorney's fees. And as a matter of law, that is damages within the meaning of NRS 11.207. Not my theory.

THE COURT: So we don't have to wait until Mr. Yanke knows if in fact he has any liability, because his liability -- the litigation into whether Mr. Yanke had any liability is stayed.

MR. OLSTER: Well --

MR. PRINCE: Yanke is --

MR. OLSTER: Correct. Correct. I mean, no, as to Tower Homes. Litigation did proceed as to Mr. Yanke. But again, I would love to be able to develop law and make up law that suits my purposes, but this is established Nevada Supreme Court authority under Gonzales and reaffirmed by Kopicko. And it starts when a lawsuit is filed.

But again, if you're not -- for some reason we're not going to follow the Nevada Supreme Court's dictate, and you want to look at what was known and when, we've got these events in 2006 and 2007 that trigger as a matter of law, because the facts are undisputed.

Knowledge that if Nitz, Walton & Heaton did something wrong with the purchase contracts or did not advise them properly -- again, they deny this, but if that's the case, then stuff happened in 2006 and 2007 that beyond any possible dispute, including filings of the proofs of claims in the bankruptcy, which we've also included in the reply.

All of this beyond any possible dispute triggers the two-year clock. But it's important to understand the two-year clock can't extend the four-year clock, that the four-year measure from the suffering of damages is fixed as a matter of law.

But the final point on the breach of fiduciary duty claim, look, we could have a somewhat academic argument, I suppose, about whether a breach of fiduciary duty cause of action exists independently of a legal malpractice cause of action. I believe the -- in the context of the attorney-client relationship, I believe the Stalk case makes it clear that -- no, it really doesn't. It's subsumed and it doesn't matter.

But for today's purposes, there's no dispute that the fiduciary duty cause of action is subject to the time frames established by NRS 11.207. So for those very same reasons, a breach of fiduciary duty cause of action, to the extent it does exist, would also be barred as a matter of law.

THE COURT: Okay.

MR. OLSTER: Thank you.

THE COURT: Thank you. Mr. Prince.

MR. PRINCE: Your Honor, the -- for the purpose of my argument today, we need to draw a very clear distinction between the defendant and the underlying state court proceeding, Rod Yanke in his capacity as a manager and a member of Tower Homes, LLC, and the LLC itself. The LLC is the entity that had the contractual obligations to the individual purchasers, not Mr. Yanke.

It was the LLC's obligation to properly safeguard earnest money deposits and keep them free and out of an environment that put them at risk that someone may abuse them, use them for their own purpose, or use them for an otherwise unlawful purpose. And that is the malpractice committed by the law firm. It's to properly make sure that the corporate entity is properly safeguarding the earnest money deposits of these individual purchasers.

The impetus for the lawsuit is when did the existence of damage become known, or should have been known by the trustee or their assignee, which is my clients, and me in this case, that there's an existence of damage to the corporate entity. The lawsuit was filed -- the underlying lawsuit was filed on May 23, 2007, Your Honor. And that's Exhibit B to our motion. And at that time Tower Homes, LLC, they were a named defendant.

And the thrust of the complaint, and this is critical, because I'm going to compare it to what happened in the Gonzales case and why that is inapplicable, the -- it was a claim for breach of contract for not completing construction of the project in a timely manner, and therefore they -- the earnest money deposits should have been returned. And because they weren't, that's a separate breach of contract.

There was no allegation of under a Chapter 116, that there's improper safeguarding of the earnest money deposits. Tower Homes was one of only many defendants, which included Yanke, which included other real estate professionals. Within eight days of that lawsuit, an involuntary petition for bankruptcy was filed against Tower Homes.

As I understand, there was more than $25 million in mechanic lien claimants. You also had third party financing or bank financing concerning the construction of the project. They were also a major secured creditor of the bankruptcy estate.

So now we have a -- so once the lawsuit becomes filed, all actions against Tower Homes, LLC, the plaintiff here, they're stayed. They are no longer subject to any potential liability in the state court action. None. Now the -- then there are the assets after, upon the order of relief, become all property of the state, including any causes of action that the debtor entity, the LLC may hold against any third party.

And at that time, Your Honor, there was no way to know, by the trustee or anyone else, that there was any damage at all, number one, as it would relate to these purchasers, and two, if there was damage, that it was caused by the law firm. Upon the -- there was later -- after the order of relief, there's multiple iterations of the complaint later, which included violations of Chapter 116 against the remaining defendants, including Mr. Yanke himself.

But as the trustee sits in the -- in the bankruptcy context, he's then faced with protecting the assets of the debtor entity for the benefit of the individual creditors. The Tower Homes purchasers filed proofs of claims exceeding \$3.5 million. At that point the trustee does not, could not know and did not know whether or not there was any damage to the LLC at all by reason of the fact that the purchasers still had their state court action.

What would be the damage? You can only speculate that there would be damage. So he could not know and could not reasonably know the existence of damages. And that is the crux of a Section 11.207 argument.

In fact, in the Gonzales case the Court states that number one, they don't apply a different reasoning between litigation malpractice and transactional malpractice. The key component is an action accrues when the litigant, which means the law firm, or the claimant discovers or should have discovered the existence of damages, not the exact numeric extent of damages.

Until the state court litigation resolves, Your Honor, there is no way for the trustee to know that there's been any form of damage. Not even one dollar. For example, when the Marquis and Aurbach -- what we call the Marquis and Aurbach order was entered on June 3, 2010, the state court litigation was open and active. The state court litigation did not resolve until July 5, 2011. What is the trustee to do?

How is the trustee to expend resources of an estate until he knows that there's going to -- these claims are satisfied or remain unsatisfied, that there's any damage that would be caused by this debtor? For example, they could have adjudicated all of the purchasers -- or adjudicated all of their claims against the Americana Group, Mark Stark, Cutter, Berg and the other real estate professionals, and maintained a full recovery. And if they had a full recovery, then that was going to be a complete offset against the proofs of claim. The trustee would not have to satisfy those obligations.

One reason why a trustee retains the causes of action they do in a plan of reorganization is post petition they may need to pursue certain rights on behalf of the debtor to satisfy a creditor's claim. In this case the trustee could not have known in June of 2010 what damage, if any, would exist as of that date, because the underlying litigation in state court remained.

And so for that reason the trustee has to effect efficiently, administer the estate of a debtor. They have to make certain economic determinations which would allow the estate to be processed and creditors' claims to be satisfied. Because the purchaser claims, they would not know what the extent of their claim was until they resolve the underlying state court litigation. Their claims could have been zero at that point, because the trustee -- they can't have a double recovery obviously.

And so if you go to the Marquis and Aurbach order as to efficiently administer the estate -- because these purchaser claims were not even liquidated. Even though the amount's not in dispute as it may be affecting the debtor, that amount's not liquidated. The trustee made the determination to assign those rights, the trustee's rights under federal law and approved by the bankruptcy court, to the

Tower Homes purchasers and their then counsel, Marquis and Aurbach.

Now, the only entity that has any legal capacity to pursue a claim for legal malpractice is one, it could be the trustee, or the only other person it could be is the entity that the firm had a contractual relationship, Tower Homes. And so that's the entity. Obviously they have no contractual relationship with the purchaser or any of these Tower purchasers, and that's why the order's drafted so carefully.

The trustee determined that because of the costs and other aspects of the litigation that he wasn't going to pursue the claim, because of why continue to wait, because the underlying state court action could have gone on for a period of years. And the trustee still has to keep the claims open, because we don't know what's going to happen in that case.

So Section 2, of the June 3, 2010 Marquis and Aurbach order assigns the claims against a non-exhaustive list of people, which included the defendants in the state court action and any other individual entity later identified through discovery which have or may have, which or may have liability to the debtor. Unless and until the state court litigation is resolved, we do not know whether the firm has any liability to the debtor.

And so going to Section 4, it says, "The trustee hereby stipulates and agrees to allow Marquis and Aurbach as counsel for the Tower Homes purchasers to pursue any and all claims on behalf of the debtor." On behalf of the debtor means you can sue in the name of the debtor. Monies will then be processed through the bankruptcy court estate, and the trustee will then remit payment as required for these claims to these individual creditors in accordance with their interests. Because in the event there's not a full recovery, they may need to have a pro rata distribution of funds.

So whether my law firm's involved or not, Marquis and Aurbach associated my law firm in the case as counsel on behalf of the Tower purchasers, on behalf of the debtor pursuant to this order. I am working with the Marquis and Aurbach law firm. I am the lead trial counsel. One reason they can't be lead trial counsel is because they may be a witness as to certain aspects of the case.

And so we wind up with, Your Honor, the July 5, 2011 order, where now there's a dismissal of the underlying state court litigation. That now -- now, once that becomes -- that state court litigation is now concluded, the trustee now knows, yes, there is the existence of damage, and we believe that damage may have been caused by at least one third party, meaning the law firm. And now we are pursuing the law firm because of the remaining damages to these Tower purchasers.

Because had that claim -- had that claim fully adjudicated, there'd been a trial on the merits and it'd been paid in fully, there would be no liability. There would be no existence of damage as it relates to Tower Homes, LLC.

THE COURT: Well, then let's talk about what's really -- if the issue is that only Tower has the attorney-client relationship with the law firm, since that Tower has the legal malpractice action, and until Tower knows what its liability is and that that liability may or may not have been caused by the law firm, which they don't know until the conclusion of the litigation, then they -- their cause does not accrue. It does not become a mature cause of action for legal malpractice until they know that.

How are their damages calculated? Is the issue what it cost -- because Tower's been in bankruptcy, so they -- nothing -- there was no finding of liability against them.

MR. PRINCE: Well, there was. Because there are proof of claims filed by the Tower Homes purchasers which there was no objection, so those claims have been accepted. And that is a liability of the Tower Homes bankruptcy estate. That is a liability of them.

THE COURT: Is that estate still open?

MR. PRINCE: I don't know as I sit here. But I mean, yes, because the try -- I've had to work with the trustee, so yes, he does have ongoing responsibility. Because I've been -- I have worked with the trustee concerning this matter, because he had to reinstate -- he was the only person authorized to reinstate the LLC entity.

THE COURT: Right. And that was going to be where I was going to get to, how do you bring this action if we've got this entity that's defunct. It's not. He has reinstated the LLC already.

MR. PRINCE: Correct. That's correct. And so it is in good standing and he was -- the trustee is the only person who has that authority to reinstate that LLC under Nevada -- under federal bankruptcy law.

THE COURT: Right. Because it wouldn't be a -- the entity would not -- corporations are people too, but they've got to be valid.

MR. PRINCE: Right. I mean, certainly Mr. Yanke can no longer have authority to act on behalf of Tower Homes, LLC or anybody else. Only the trustee had those rights. Not only do they retain the rights of the entity, but they also assumed managerial rights of the entity. And it wasn't until you can end the state court litigation in July of 2011 that we know what the -- that the -- there's an existence of damage as it would relate to the debtor.

Because now the debtor has an obligation through the bankruptcy plan to repay this creditor. That is the existence of the damage. Had the purchasers made a full recovery, there would be no existence of any form of damage to Tower Homes, LLC, the debtor. And that's the only entity where our focus is.

They're trying to blur this distinction between Mr. Yanke on the one hand and the LLC on the other hand, but they know under Nevada law we do it here to the corporate formality. There is no claim of alter ego, and then certainly that would be a question of fact.

But as to the -- I go back to the Gonzales case and every case involving legal malpractice concerning statute of limitations arguments. An action accrues when the litigant discovers or should have discovered the existence of damages. You would not know the existence of any damage, not one single dollar caused by the law firm until the underlying lawsuit, state court litigation was resolved in July of 2011.

Then thereby we invoke the two-year provision of 11.207, because you can have a cause of action accrue even after the four-year period using under the discovery rule. Because unless you know the existence of damage, damage can accrue beyond four years. The four years also applies to the existence of damage. You don't have any claim until you have an existence of damage. And once you have the existence of damage, we believe that really the two-year statute is triggered.

And I really believe, Your Honor, forgetting for a moment the four-year provision, it's really a two-year statute. You can learn in year one that you have a claim against your lawyers because there was a damage plus other misconduct, then therefore you have to file by year three. Or you can learn by year four that there's the existence of damage, which is what happened here, and then you invoke the two-year, so now you're out six years.

So it really is a two-year statute. In effect it's a two-year statute. And so by filing in June of 2012, we filed well within the time requirements of 11.207, because we had up until July 5, 2013. Because the existence of damage wasn't known until the underlying state court litigation was --

THE COURT: Okay. So the whole -- this isn't really a case that turns on the unique aspects of the bankruptcy then. Well, for one thing, even if counsel's not been formally appointed by the bankruptcy court, you can always get that order. All the trustee has to do is send over an order, the bankruptcy judge signs off on it.

And if that's the issue, is there formal appointment of counsel, those are easy to get. Well, relatively easy to get. They may not like who you select to pursue the claim on behalf of the trustee, but, you know, it can be done. So that roadblock isn't really a true roadblock.

MR. PRINCE: Right.

THE COURT: I think you said that that's one of their -- the prongs of their attack.

MR. PRINCE: Yeah. But I mean, I guess the question is, is the -- putting aside who the counsel is for a moment, the question is for you whether you have [unintelligible] you can proceed, is whether the real party in interest is before you. Whether my law firm is authorized or not authorized, that's a separate issue for a separate court, whether I'm authorized to proceed.

The question before you is, is Tower Homes, LLC, is that the proper entity. And the answer to that question is unmistakably yes, because they're the debtor. They're the ones who have been damaged. They have the contractual relationship. The trustee authorized the Marquis and Aurbach law firm as counsel for the Tower Homes purchasers to pursue all claims on behalf of the debtor, which is Tower Homes.

THE COURT: So then we get to the state statute of limitations issue.

MR. PRINCE: Right.

THE COURT: That again, it's not affected by the bankruptcy, the filing of the bankruptcy.

MR. PRINCE: I agree.

THE COURT: That's not really the key factor here. The key factor here is, is it I believe -- is it Mr. Olster? Yes. As Mr. Olster argues, four years from the date that lawsuit was filed originally naming Tower Homes and Mr. Yanke, and it went forward just as Mr. Yanke or the other realtors. Is that the four -- does the four years trigger then, or is the four years triggered when you know you have a possible claim back against counsel?

Because Mr. Heaton and Mr. Walton defended that action and it resulted finally in an order. Now, I don't know. I guess there's two orders. There's Judge Gonzalez's order of 5/2/2011. I'm trying to figure out when the statute starts to run. So it's your position that the statute doesn't run with her 5/2. It wouldn't really affect you anyway, but -- the 5/2/11 order. It's the 7/5/11 order?

MR. PRINCE: Yes.

THE COURT: Okay.

MR. PRINCE: And the 5/2/11, because that only resolved a claim against Mr. Yanke. There was other real estate professionals that remained in the litigation.

THE COURT: So you had to know how much -- because there are offsets. You had to know how much --

MR. PRINCE: Right. Right. And so until you -- until that issue was determined -- because remember, we're drawing a distinction between Mr. Yanke and the debtor, the corporate entity. There is no evidence of any existence of any damage to the corporate entity pending the outcome of the underlying state court litigation. You wouldn't even know they had to pay any claim.

And so, Your Honor, just to be fair, and I'm actually going to 11.207, it says that an action against an attorney, et cetera, whether based on breach of duty or contract, must be commenced within four years after the plaintiff sustains damage.

Actually, if you're using that standard, we could have waited until July of 2015. But I believe the two-year statute is triggered because it's the earlier of, and once the existence of damage is known, you have to bring your action within the two years. So really, the four years is almost rendered superfluous by the two-year limitation.

But nevertheless, even using their four-year analysis, if they want to use that, it says four years after the plaintiff sustains damage. And there's no damage until July 5, 2011, when the purchasers did not have a complete recovery, and therefore now their claims subject to offsets are viable in the bankruptcy estate for payment and processing by the trustee.

Because then the trustee would know then, well, I would need to pursue these claims against other responsible third parties, because that could satisfy these creditors' claims. Which that is the form of the damage to the bankruptcy estate debtor.

And so it's really, it's July 5, 2011. That is the date. It's not May 23, 2007. Because at that point in time there's not even an alleged violation of Chapter 116. It's like you didn't build the project on time and you have not returned our earnest money deposits, LLC. And so once they go into bankruptcy, that action completely ceases against them. There's no adversary proceeding in the bankruptcy court, so it's a watch and wait.

THE COURT: Oh, thanks. That was -- I forgot. That was a question I had, was whether -- was it just stayed pending the outcome of this? Why wasn't this pursued then as an adversary? Isn't that --

MR. PRINCE: I'm not even sure if there's a basis for an adversary in the -- I mean, the complaint. I guess you're talking about whether the trust --

THE COURT: Well, because the bankruptcy actually was filed by, I think you said lien claimants or --

MR. PRINCE: Correct, lien claimants. I'm accepting what they have to say as true, and I believe that to be the case. It starts off involuntary, then there's ultimately an order for relief three months later, in August of 2007, which was the D-day for the bankruptcy court.

THE COURT: Okay.

MR. PRINCE: But all actions are stayed, even in the involuntary proceeding upon that petition being filed. But from a corporate entity standpoint and a debtor in bankruptcy, they're no longer going to be subject to the state court proceeding. There was no order granting a relief from stay allowing anybody to pursue them.

So they're going to reorganize, and they may not have to do anything vis a vis these purchasers if the purchasers obtain a complete recovery in the underlying state court litigation. The trustee would only know what to do once the underlying state court litigation is concluded. At that point you'd have to say, well, now I have viable claims.

Let's say the purchasers recover 1 1/2 million. There's $2 million in claims. That is the damage to the estate. That is the time that you start the clock for the statute of limitations, and that would be not until -- would not run until July of 2013, and we filed obviously well within that time period.

THE COURT: Okay. Thanks.

MR. PRINCE: And I agree with Mr. Olster that we're getting the academic exercise whether there's a fiduciary duty claim. It is subject to the 11.207 no matter what the claim is. I agree with that.

THE COURT: Yeah. I didn't see that that's --

MR. PRINCE: I don't think that's a big issue here today anyway.

THE COURT: I don't. I mean, I think it's --

MR. PRINCE: I do agree with his position that even assuming we have that claim, it's subject to 11.207 under the Stalk decision.

THE COURT: Okay.

MR. PRINCE: Let me see if there's anything else I wanted to...

Okay. No additional comments unless you have any questions, Your Honor.

THE COURT: I do. One last question. So it's your position that the statute does not begin to run in a transactional process -- well, I guess this is kind of almost a hybrid, because we do have litigation.

MR. PRINCE: Correct.

THE COURT: And Mr. Yanke was sued in that litigation, and Mr. -- he did defend him in that litigation.

MR. PRINCE: But well, that's different than the Tower Homes, LLC claim.

THE COURT: Right.

MR. PRINCE: Mr. Yanke is even -- because he had separate claims against him for conversion and a variety of other claims that weren't necessary asserted against Tower Homes. But you have a situation where within four days of the filing of the lawsuit Tower Homes is in bankruptcy, you can't take any action against them.

And the question is once they're in bankruptcy and everything is stayed as against them, the trustee does not need to pursue claims that aren't necessarily -- aren't even ripe for adjudication.

THE COURT: Well, before we go back to Mr. Olster, I just want to ask you one last time why this language in Gonzales doesn't apply. Do you have it in front of you? I'll read it to you. It's Gonzales vs. Stewart Title, 111 Nev. 1350, 1995 case. And it's footnote 2, if I can figure it out.

So it would be 1353. "An action accrues when the litigation -- when the litigant discovers or should have discovered the existence of damages, not the exact numerical extent of damages."

MR. PRINCE: I'm saying that's the thrust of the case. I'm saying that is my position in the case, that the trustee, meaning Tower Homes, LLC, until the underlying state court litigation is resolved, Tower Homes, LLC would not even know the existence of damage as it relates to these Tower Homes purchasers.

Because for example, if their claims are fully satisfied, if they had adjudicated the claims to judgment against the real estate professionals -- and let's assume they got a judgment for 3.5 million. Right. And that was paid by the real estate professionals and the other defendants in the state court litigation, there's no claim to be paid in the bankruptcy court, and therefore the Tower Homes, LLC debtor has no damage. Right. There's no --

And there's nothing for the trustee to do at that point. Thinking about -- thinking about the position of Tower Homes when they're in the bankruptcy context. Well, if the ongoing litigation continues and the claim is fully paid and the Tower Homes purchasers are fully satisfied, that is a claim we no longer have to consider in bankruptcy court because they've already been paid. It's been satisfied. So that's not a damage to the bankruptcy estate.

Once that claim has only been -- they've only had partial payment, partial resolution through a pretrial settlement, now the trustee would have to take the position, or the debtor, okay, well, now that claim is now viable against us. It's not the question of the amount. It's the question of existence of damage. Now it's like, okay, they didn't have a full recovery. They do have a valid claim.

It's a valid proof of claim, and we're going to have to liquidate and/or pay that claim in some capacity, the trustee being charged with the responsibility, saying -- at that point. Now it's the Marquis Aurbach law firm and me. Well, now we can now sue. Once we now know that there wasn't a complete recovery, now the estate needs to take care of these creditors' claims.

THE COURT: So that's more like this Kopicko --

MR. PRINCE: Correct.

THE COURT: -- case, which is 114 Nev. 1333, where the Kopickos argued that they did not sustain damage until the Dow issue, the underlying case was ultimately resolved. We agree.

MR. PRINCE: Right.

THE COURT: So until the underlying case is resolved, no such limitation is --

MR. PRINCE: Correct. And that's applicable here. Right. By reason of the bankruptcy.

THE COURT: Thank you.

MR. PRINCE: And also finally, I believe whether the issue it's a discovery issue, since we're arguing about the two-year rule, about the existence of damage, or should have discovered the existence of damage, I think that is a question of fact that's been determined by the Nevada Supreme Court, which would by itself be a basis to deny the motion.

THE COURT: Thank you.

Now, Mr. Olster. Thank you.

MR. OLSTER: These are the exact same arguments that the Nevada Supreme Court rejected in Gonzales. And you said something interesting. You said this was a hybrid situation. No. This is a classic transactional representation. Nitz, Walton & Heaton was retained for transactional work; in other words, to draft the purchase contracts and related advice relating to the sale of condominium units.

There was no litigation at the time Nitz, Walton & Heaton did its work. So let's just be clear that we're talking about transactional malpractice, not litigation malpractice. So to the extent that Nevada law draws a distinction on the statute of limitations triggering for transactional malpractice and litigation malpractice, we're undisputedly in the transactional side of the world.

THE COURT: Well, but doesn't the Nevada Supreme Court in Gonzales specifically say, we do not, as the dissent suggests, apply different reasoning to transactional attorney malpractice and malpractice occurring in that litigation?

MR. OLSTER: They absolutely did. But then, in 1998 in the Kopicko case, which is the -- which involved litigation malpractice, the Supreme Court took the opportunity, in footnote 3, when it looked at Gonzales and Charleson, which were transactional cases -- and I'm looking at the second from last sentences.

"These cases, Gonzales and Charleson, are inapposite because they involve claims of transactional rather than litigation malpractice. As explained, termination of the underlying proceedings was critical in the context of the claim of litigation negligence. Thus, to the extent that Gonzales rejects a distinction between transactional and litigation malpractice, Gonzales is overruled."

So what Kopicko does is -- and I realize this is a bit confusing. You really need to read Gonzales and Kopicko together as one. But Kopicko, despite the fact that was a litigation case, reaffirms the distinction that was implicitly recognized, not expressly, in Gonzales.

THE COURT: Mr. Prince's point is that the litigation 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. 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.

They are litigating with respect to that. And it's Mr. -- if I understand Mr. Prince's argument, is that until the liability -- this is like Kopicko, until the liability is resolved and we know that in fact, yes, there is still liability because there wasn't sufficient, I guess, coverage in the -- among the realtors and Mr. Yanke to satisfy the claims of the third parties, that until that litigation resolved you don't know if in fact.

And the whole -- nothing's ever been addressed with respect to the whole issue of -- and we aren't -- we would never -- this is way too early to get there. Who's to say that that was really anything that Mr. Walton or Mr. Heaton had any control over, that there was any liability there? I mean, we haven't even talked about that in any of this other litigation. It's all been against the individual, the people who supposedly didn't sequester the funds right.

MR. OLSTER: Right. Well --

THE COURT: Why is that not a Kopicko case and why is it a Gonzales case then?

MR. OLSTER: Because the focus is on what was the nature of the allegedly negligent work.

THE COURT: So not the problem in the underlying litigation, but the negligent work in this case?

MR. OLSTER: Yes. You have to look at the factual basis for a legal malpractice claim. And Nevada law draws two -- gives us two worlds.

One world, the transactional world, an attorney does transactional work for a client, drafts a contract, drafts a will, drafts a promissory note. You're not in court. That's one world. World two is when attorney -- a client hires attorney to file a lawsuit, an injury, a business dispute, a lien dispute. The purpose of the representation and the actual work performed by the attorney governs what world we're in.

And if we're in world two, the litigation world, where attorney represents client in a litigated matter, then Nevada Supreme Court is clear the client doesn't sustain damage until that litigation proceeding is complete. Because if the attorney screws up during the course of that litigation, there are vehicles in place to correct that. Appellate courts, motions for reconsideration, trials, settlements, so on and so forth.

In the transaction context, the attorney does its work, does his work, completes his work, drafts the promissory note, drafts the purchase contract, his work is done. It's over. So we need to be clear on what world we're in. We're in world one.

Now, yes, a lawsuit is ultimately filed. A lawsuit filed against a client or an attorney is self-evident. Once a lawsuit is filed, that's litigation. But what Gonzales and Kopicko make clear without exception is that when we're in world one, the transactional world, the attorney drafts a bad contract and the client is sued, that date of suit starts the clock.

Now, is there known -- is it known with absolute metaphysical certainty that that lawsuit has merit, or that that lawsuit was caused by the underlying practice? No. But the Nevada Supreme Court has made a decision on this and drawn a crystal-clear line that must be applied by district courts, and that is the filing of a lawsuit starts the clock because the client sustains damage when a lawsuit is filed.

Now, so we're not in a hybrid situation. We're in a --

THE COURT: Well, but Tower doesn't really, because within a couple of weeks or a week of that lawsuit being filed, Tower is stayed. They can't do anything. So they don't -- they don't incur any damages, because they're not a party to litigation. Litigation goes on without them.

MR. OLSTER: Well --

THE COURT: So they don't -- they don't really accrue any damages.

MR. OLSTER: Well -- well, first of all, there's no carve-out for this argument under Nevada state law or under federal law. I mean, again, if we get back to how federal law views this situation, you've got Section 108. And Section 108 accommodate -- contemplates this scenario by saying, look, we're going to give the trustee a two-year breathing period to allow claims to come in.

I mean, incidentally, the claims -- the proofs of claims here were all filed in 2007, which is yet another vehicle for triggering the clock. But we're going to give the trustee two years to breathe a little bit, assess what the assets are and make a reasoned determination about whether to bring suit. That's the only possible exception here.

THE COURT: But the trustee doesn't know until the litigation is resolved that in fact those claims that were pursued in state court weren't adequate to satisfy the proofs of claim. So doesn't the statute of limitations start to run, as Mr. Prince has suggested, two years from the date that the court has -- the state court action's concluded?

There is still X offset, however much they got, a million, whatever they got, and however much the proofs of claim were. That's when the trustee says, okay, I can now assess this, my two-year clock starts to run now.

MR. OLSTER: No, because that goes to the extent of damages, not to the existence of damages.

THE COURT: Okay.

MR. OLSTER: That goes to is Tower going to be responsible for X amount of damages because these other co-defendants couldn't pay, and you get to separate liabilities and separate dollar amounts paid in settlement. That's the -- that goes to the extent of damages.

The existence of damages happens when the underlying lawsuit is filed in 2007. There is no exception to that established by the Nevada Supreme Court, and the only exception established by federal law is Section 108, which I discussed. It doesn't apply. And the time ran anyway, because that extra time, the extra time that's given under Section 108 is two extra years running from the order of relief.

One point, and I don't know that it's still material to what you're saying, to what you're thinking. But Mr. Prince says, well, it's -- 11.207 is actually a two-year statute, it's not a four-year statute, because you've got this known or should have known component to the two-year rule and that's factual and so on and so forth.

Again I would submit there are no facts in dispute here about what was known and when, but more importantly, four years is the outside measure. Okay. The last phrase of 11.207(2) says, "Whichever occurs earlier." So in no circumstance can the two-year known or should have known measure take us beyond four years from when a client sustains damage.

And Mr. Prince's argument is creative, but there is simply no basis for it under the law that this court is required to file. Under Gonzales and Kopicko, Tower Homes sustained damage when the underlying lawsuit was filed in 2007. I don't believe there's any discretion here on that point.

Now, and if I could just -- if I could just go back to the Marquis-Aurbach order, because Mr. Prince continues to gloss over the language of that order. And it's important to see what it does. And again, it's Exhibit C to the motion, and it's at page 5 of 6 at the top. It's kind of confusing because there are three different page numberings on the document.

But the very top number is page 5 of 6. And paragraph 3 says, "The trustee hereby stipulates and agrees to release to the Tower Homes purchasers claims." The claims go to the Tower Homes purchasers, not to Tower Homes. This was a carefully crafted order that was approved by the bankruptcy court.

Now, if the parties wanted to amend this order and allow Tower to bring a claim in its own right through a different law firm against parties that are not contemplated within the scope of this order, that's fine. They could have done that and they should have done that, and they had to do that under federal law. The parties are not allowed to amend a federal bankruptcy court order by conduct or fiat or agreement. That's simply not permitted by federal law.

So again I get back to what we're talking about here. We're talking about clear issues of law. We've got federal law that only allows the trustee to control lawsuits. The Marquis and Aurbach order is the fruit of that control. It provides clearly who can bring claims and who can't. Doesn't authorize this claim.

Two, Gonzales and Kopicko are clear on their face. They provide no exception for the running of the statute of limitations clock when a lawsuit is filed. That was more than four years before this lawsuit was filed. NRS 11.207 bars this and the breach of fiduciary duty claim as a matter of law.

MR. PRINCE: Your Honor, I have a couple more comments. Is that --

THE COURT: Okay. Well, then Mr. Olster gets the final word.

MR. PRINCE: That's fine. Whether you apply Kopicko or Gonzales, the issue remains the same. Until a litigant discovers or should have discovered the existence of damage, the cause of action for legal malpractice does not accrue. That's the crux.

The seminal -- the principal argument advanced by the firm -- they're all over the place, but one that seems to be their primary position is that when the lawsuit was filed on May 23, 2007, that's the trigger date. But under Gonzales, that would only be the trigger date if the client, meaning Tower Homes, knew that the law firm's work was implicated as of that date.

The thrust, if Your Honor -- and it's a 12-page complaint [unintelligible] variety of claims. But the principal claim is we bought a unit, you said you'd have the project completed within two years, you didn't, therefore we're entitled to our money back. That is the claim. That does not implicate the work of the law firm.

There was no issue at that time of a Chapter 116 claim, hey, you've violated Chapter 116 by not properly safeguarding these assets, to trigger notice to Tower that it was the law firm's conduct which gave rise to a claim of damages. That would not be known. And then eight days later Tower Homes is in bankruptcy, no longer subject to potential liability against these Tower Homes purchasers except through the bankruptcy court process, the claim process.

Therefore you have to judge it from the perspective of the trustee. That's why I'm urging the Court that unless and until the underlying state court litigation is resolved, the trustee would not even know the existence of any damage because they're unknown. However, unlike what Mr. Olster is saying, the question -- it's not a question of extent of damage. It goes to the existence of damage.

The trust -- everyone knew the extent of damages. That's not unascertainable. It's 3.5 million. However much these individual purchasers put up for earnest money deposits, that's a finite sum of money. It's an exact amount. It's not subject to calculation where we need expert testimony or otherwise. We're not even talking about lost profits or future income.

We're talking about a specific dollar sum, a penal sum, so therefore we're not really talking about extent of damages. We still go back to the existence of damage, and one thing's for sure. Whether you look at Semenza, Gonzales or Kopicko, the action does not accrue until you have the existence of damage that's also in the plain language of 11.207 as it applies to the four-year rule, because the four-year rule specifically states four years from the time you sustain damage.

So sustaining -- the trustee -- the entity or the trustee, as the case may be, didn't sustain damage until -- as it relates to these clients -- these claimants, until July 5, 2011, subject to the two-year statute.

And to the extent that there's an issue concerning my law firm pursuing it, I mean, I guess you'll give us leave for some time to get an order from the bankruptcy court that I have approval as co-counsel for Marquis and Aurbach to proceed. But that's not fatal to whether or not Tower Homes, LLC has the requisite standing under either applicable state or federal law to pursue the claim.

THE COURT: Thank you. And Mr. Olster.

MR. OLSTER: Again, this was all rejected in Gonzales. It's important to understand what that case was about. The client hired law firm to draft a promissory note. Transactional malpractice in connection with the sale of property. Lawyer allegedly didn't draft it right, therefore a lawsuit followed.

The client was sued by the father's wife, because there was a dispute as to who got the proceeds from the promissory note. Now, that complaint didn't say client's lawyer screwed up. The complaint said there's a -- because this document says what it says and wasn't written in a way that was right, you owe us money, client.

And the argument that Mr. Prince is making is exactly what was rejected in the Gonzales case. The argument that they didn't know they sustained damage was -- the Court said, no, you sustained damage when you sued -- when you were sued.

And if -- and the argue -- Mr. Prince argues that nothing in the underlying complaints put Tower on notice that they had sustained damages as a result of malpractice. I think that's the crux of what he's saying.

Well, the original complaint, first of all, the one that was filed on May 23, 2007, we've laid out what it -- well, it's attached, first of all, as Exhibit A. And page 4 and 5 of our original motion tell us what was alleged. It alleges that Tower breached the terms of the purchase contracts. Tower failed to refuse to return their money, to deposit monies.

Tower accepted and retained benefits, and Tower and Yanke misappropriate unlawfully exercised domain over and converted funds to their own use. So that makes it clear that Tower took money that it shouldn't have taken. Okay. If we needed further clarification, we could look to the amended complaint.

MR. PRINCE: Well, that I'm going to object to, Your Honor, because those were filed after the order for relief was entered and so therefore the Tower Homes, LLC, they couldn't even be served with that. That couldn't even be pursued against that entity.

THE COURT: Okay. All right.

MR. PRINCE: So that's my objection on the amended complaints.

THE COURT: Okay. Thank you.

MR. OLSTER: I guess the object, that's an argument. But it nevertheless is what it is, and the trustee gets the amended complaint and again, the trustee gets two years to process this stuff under Section 108. So the trustee still is privy to this information in this lawsuit. And the amended complaint specifically alleges violations of NRS 116 relating to earnest money deposits.

There's no dispute that at that time the trustee, Tower, obviously the purchasers knew that Nitz, Walton & Heaton had drafted these contracts pursuant to NRS 116. There's no factual dispute on that issue.

THE COURT: Well, now what -- hypothetically, what could -- because clearly the trustee's the only person who could act on behalf of Tower. Because Tower being in bankruptcy, the trustee's the person who assumes all of its operations [inaudible].

So if the trustee was aware that there was some sort of a claim, what could the trustee have done? Could the trustee have said, okay, you can't pursue your claims against me in the state court litigation, but I'm going to bring in a third party here and --

Because I think that to the extent that there's exposure because some -- not all of these purchasers' claims can possibly be met through these other entities, Tower's still going to have some exposure in the bankruptcy. So in order to protect the debtors, which is what the trustee wants to try to do to make good on the debts of Tower, that I'm going to pursue this because I'm now on notice that there's a malpractice claim here?

MR. OLSTER: Well, first and foremost, the trustee should look to the language of the own plan, which is Exhibit B, which makes it clear that the trustee retains all claims subject to applicable state law statute of limitations, number one.

So the trustee knew or should have known of Gonzales and Kopicko if a trustee is practicing in the state of Nevada, that hey, you know, this clock started to run when this was filed. I realize the bankruptcy was filed a week later, but state's law statute of limitation apply here. I have Section 108, so I've got a two-year buffer after the order for relief is filed, so I've got some time.

But the trustee needs to be cognizant of state law statute of limitations as provided in the plan. He needs to be cognizant of NRS 11.207 and related caselaw. He needs to be cognizant of Section 108. Thereafter it's up to him procedurally how he wants to go about asserting a claim.

Does he bring Nitz, Walton & Heaton as a third party too? Does he intervene in the underlying lawsuit and make the legal malpractice claim part of that? Does he file a separate claim? Who knows. I mean, that's completely up to his discretion and involves strategy and procedure and the calculation that any attorney would make in filing a lawsuit.

But the salient point is state statute of limitations still apply, and this was simply filed too late, and this is not authorized by the Marquis-Aurbach order. If you have any further questions, I'm happy to --

THE COURT: Okay. Well, it is an interesting legal issue and it's kind of sort of hijacked, I guess, by this -- by the filing of this bankruptcy. It would be a little easier to rule on if we didn't have the fact that there was a bankruptcy filed and a trustee in place, and that technically this is the trustee's cause of action.

And to the extent that Tower has liability that the trustee is seeking to satisfy against anybody who might possibly owe a debt to Tower, I think that's how it has to be analyzed, because that's really what it's about. Was Tower on notice that it had a claim that it should be pursuing because it owed -- potentially owed money for the claims against it?

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 a 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.

MR. OLSTER: May I respond to that?

THE COURT: No.

And at this point I would agree with you that there's a -- there is a procedural defect here in that this is the trustee's cause of action. It is not the cause of action of the -- I agree with you. I have a problem with the way -- I don't read the Marquis-Aurbach order as broadly perhaps as Mr. Prince does. I think that this is the trustee's cause of action.

It sounds like the trustee's on notice of this, but I don't have any proof of that. So to that extent, since Mr. Prince did indicate that if we're going to allow this to go forward, and I think it has to be done with some sort of either specific order or with an amendment that it's, you know, the trustee of Tower Homes, LLC who's pursuing it. Because right now we don't have that.

We don't have any proof that somebody who is authorized to bring this cause of action has actually done so. And I -- I don't think it's fatal, because as I said, you can go back to bankruptcy court and get that approval. It's a relatively easy thing to do. It happens all the time. People are always forgetting when they file their bankruptcies that oh, I have to go get the trustee's approval to continue with my litigation.

It's not that hard to get. I don't think it's fatal to the case. But it is, I believe, an action that has to be brought with some sort of proof that this bankruptcy court has approved this and that in fact.

Because here's the thing. I don't know that this necessarily -- how do we say that this money that's recovered on behalf of Tower goes only to these claimants? There are other claimants. There are the claimants who forced Tower into bankruptcy. The trustee has to protect all of them. There's no liability on the part of these particular defendants arguably, against any of those other claimants. It's a big mess.

So that's why I think it needs to -- there needs to be some sort of understanding. If the trustee wants to say, I abandon this claim, pursue this if you can get some money for the people who are arguably owed some money by Tower, great. Because I think that hasn't been -- I don't see any proof that

that's been looked at, and I think it's a critical factor.

But I have to say, this is the problem that I've had with this, is I don't understand how the trustee could have had any notice of what it was that Tower's liability potentially was until the state court litigation was resolved. I think that to the extent that it's -- that's why I said is that I know that technically there is this distinction between litigation and transaction.

But I just, you know, I don't see how the trustee could have been on notice that this is a claim that it potentially had when that lawsuit was originally filed, how the trustee could have even pursued it at that time.

MR. PRINCE: All right. Thank you, Your Honor.

THE COURT: So I'm going to deny that, deny the motion to dismiss.

But I do think, Mr. Prince, that they're correct in that I am -- it's not entirely clear to me that the correct entity has brought this case, or that we -- that if Tower, LLC is given this to pursue as attorney in fact for the trustee to do this and on whose benefit it's for. That's the problem with bankruptcy, and that's not my jurisdiction. I don't have any jurisdiction on that.

MR. PRINCE: I understand. What I'm asking, Your Honor, then is give us 30 days to file an amended complaint to clarify the authority issue that you're talking about with the trustee, and then they can take the time to answer after that, if that's acceptable to the Court.

THE COURT: Right. And so I don't know to the extent that they may wish -- you know, this may be something that they may wish to seek some interim relief. I don't know if the court would entertain a writ on it or not.

MR. PRINCE: Okay.

THE COURT: If you need anything more specific, Mr. Olster, in order to evaluate whether you want to see if the Supreme Court agrees with me, that I've made an error on the statute of limitations.

MR. PRINCE: Thank you.

MR. OLSTER: Possibly a procedural point. Are you saying that you need to see a proper bankruptcy order to authorize this case before we can proceed; is that what you're saying?

THE COURT: I need to know that the party Tower Homes is in fact authorized to pursue this litigation. Because technically, to me, it would seem it would be the trustee. So I appreciate Mr. Prince's argument that I can just amend this and make it clear, but you're just going to be back in here with another motion.

MR. OLSTER: Should we stay this case until we get the requisite bankruptcy court, or until Mr. Prince gets a bankruptcy court order, if he can get that order?

MR. PRINCE: I'm not sure how you'd stay the case. I mean, I guess your question is do I have authority -- well, I guess that's fine.

MR. OLSTER: Stay this case so we don't have to engage in discovery, so on and so forth, until the bankruptcy court --

MR. PRINCE: I'm okay with that.

THE COURT: Well, I'm not willing to dismiss it on those grounds, Mr. Olster. I think that that's appropriate relief, because there are some bigger issues here with respect to who's actually got the authority to bring this. Because I have to agree with you, I'm not convinced the Marquis-Aurbach order gives authority for this litigation to Marquis Aurbach or their co-counsel, Mr. Prince.

MR. PRINCE: Okay. Then we'll stay this pending me providing that order from the bankruptcy court.

THE COURT: If you want to work together on that.

MR. PRINCE: That's fine. Okay.

THE COURT: Show Mr. Olster before you submit the order, Mr. Prince.

MR. PRINCE: Okay. I sure will.

THE COURT: Okay. Thank you. Thanks, gentlemen, for staying with us so long.

MR. OLSTER: Would we also, if we did want to take this up, would you also be willing to stay it on that grounds as well?

MR. PRINCE: Well, I'm going to oppose anything like that. I mean, to have them make the written application to, you know -- because number one, the court typically does not even entertain an order denying a motion for summary judgment, particularly on statute of limitations grounds. So they'd have to -- I'd have to see it, something in writing.

THE COURT: Well, this was -- it was a motion to dismiss. I think it's a motion to dismiss.

MR. OLSTER: Well, here, this seems to be the practical reality, Dennis. The case is stayed until the bankruptcy court authorizes this action.

THE COURT: Right. Then Mr. Prince, I guess, you're going to amend to put in something that tells us --

MR. PRINCE: Well, I may not have to amend anything. I may just present an order. I may not have to do anything.

THE COURT: Right.

MR. OLSTER: Fair enough. Right.

THE COURT: And then --

MR. OLSTER: And if that happens, then we'll confront the issue of whether there's going -- whether we want to make a motion for a stay.

MR. PRINCE: Well, number one, I guess, they have to file -- number one, file a writ proceeding, right, in the Supreme Court.

MR. OLSTER: Yes.

MR. PRINCE: And then there's a question whether or not that would even be accepted by the court, and who knows how long that would take. I guess you'll entertain a motion to stay when and if they seek writ relief.

THE COURT: Right. And here's the thing. I don't know if you're going to do an order right now.

MR. PRINCE: I'm going to.

THE COURT: Then while we're saying yes, we're going to stay it, nevertheless what if they want me to reconsider? I mean, is everything --

MR. PRINCE: I'm going to file a -- I'm going to prepare an order that says that you denied the motion to dismiss.

THE COURT: Right.

MR. PRINCE: And then we're going to have another order that says that this action is stayed pending an order from the bankruptcy court authorizing it either in the name of Tower Homes, LLC or the trustee to proceed with this litigation. That's what you're asking for. And I'm going to go get that order.

MR. OLSTER: And the case is stayed until --

MR. PRINCE: Pending order.

MR. OLSTER: -- pending that order.

MR. PRINCE: Pending that order. Right.

THE COURT: And so Mr. -- just show everything to Mr. Olster so he's --

MR. PRINCE: I will.

THE COURT: -- satisfied that he's protecting any statutes, any timelines, any deadlines he's got. That's my only concern.

MR. PRINCE: Okay.

MR. OLSTER: Thank you.

(Hearing concluded at 11:30 a.m.)

## CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

## AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| TOWER HOMES, LLC, a Nevada limited liability company;<br><br>Plaintiff,<br><br>vs.<br><br>WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive,<br><br>Defendants. | Case No.: A-12-663341-C<br>Dept. No.: 27<br><br>**NOTICE OF ENTRY OF ORDER REGARDING MOTION TO DIMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT** |

PLEASE TAKE NOTICE take notice that the attached Order on Motion to Dismiss, or Alternatively, Motion for Summary Judgment filed by Defendants was entered on November 1, 2012.

DATED this 2nd day of November, 2012

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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## CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 2nd day of November, 2012, a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER REGARDING MOTION TO DISMISS, OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT** was placed in an envelope, postage prepaid, addressed as stated below.

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

| | |
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| TOWER HOMES, LLC, a Nevada limited liability company;<br><br>Plaintiff,<br><br>vs.<br><br>WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive,<br><br>Defendants. | Case No.: A-12-663341-C<br>Dept. No.: 26<br><br>**ORDER REGARDING DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT**<br><br>Date of Hearing: October 3, 2012<br>Time of Hearing: 9:00 a.m. |

The Motion to Dismiss, or alternatively, Motion for Summary Judgment by defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. came on for hearing in Department 26 before the Hon. Gloria Sturman on October 3, 2012. Jeffrey Olster of Lewis Brisbois Bisgaard & Smith LLP appeared on behalf of defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. Dennis Prince of Prince & Keating appeared on behalf of plaintiff Tower Homes, LLC.

The Court has considered the moving, opposition and reply papers, as well as the oral arguments of counsel, and good cause appearing therefore, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss, or in the alternative, Motion for Summary Judgment, is denied. Defendants seek dismissal (or summary judgment) on two grounds: (1) Plaintiff is not authorized by its bankruptcy trustee and the Bankruptcy Court to bring this action; and (2) Plaintiff's claims for relief (legal malpractice and breach of fiduciary duty) are barred by the statute of limitations.

With respect to the statute of limitations issue, the Court denies Defendants' Motion because the bankruptcy trustee could not have known what the claims against Tower Homes, LLC were until the underlying state court litigation was resolved. The stipulation and order dismissing the underlying state court litigation was filed on July 5, 2011.

With respect to the Bankruptcy Court authority issue, the Court denies Defendants' Motion because this issue presents a procedural, not a fatal, defect. The Court, however, does agree with Defendants that the "Marquis Aurbach Order" does not authorize Plaintiff bring this action through the law firm of Prince & Keating against Mr. Heaton and Nitz, Walton & Heaton, Ltd. Plaintiff may attempt to remedy this procedural defect by obtaining the requisite authority from the Tower Homes, LLC bankruptcy trustee and order from the Bankruptcy Court.

IT IS FURTHER ORDERED, therefore, that this matter shall be stayed until Plaintiff obtains the requisite authority for this action from the bankruptcy trustee and order from the Bankruptcy Court.

Dated this 31 day of October, 2012.

DISTRICT COURT JUDGE

LEWIS BRISBOIS BISGAARD & SMITH LLP

4826-0215-6305.1

Submitted by:

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**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

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| TOWER HOMES, LLC, a Nevada limited liability company;<br><br>Plaintiff,<br><br>vs.<br><br>WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive,<br><br>Defendants. | Case No.: A-12-663341-C<br>Dept. No.: 26<br><br>**REPLY TO OPPOSITION TO MOTION TO DISMISS, OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT** |

Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd., by and through their attorneys of record, Lewis Brisbois Bisgaard & Smith, LLP, submit the following reply memorandum of points and authorities to "Tower Homes, LLC's Opposition to Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment" (hereafter the "Opposition").

## REPLY MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

In its Opposition, Tower concedes that the only authority for its purported right to bring this action in its own name (as opposed to through its bankruptcy trustee) is the Marquis Aurbach Order. Tower, however, fails to explain how the Marquis Aurbach Order, *which authorizes only the law firm of Marquis Aurbach Coffing to bring claims on behalf of the Tower Homes Purchasers against certain enumerated parties (none of whom are Mr. Heaton or NWH)*, somehow authorizes Tower to maintain the instant action, in its own name, through a different law firm, against parties (Mr. Heaton and NWH) who Marquis Aurbach Coffing were not authorized to sue. Accordingly, this action should be dismissed because Tower lacks the standing and requisite bankruptcy court authority to bring this action.

Additionally, even if, hypothetically, Tower had the requisite standing and authority to bring and maintain this action, it is still time-barred as a matter of law. In its Opposition, Tower effectively asks this Court to disregard well-established Nevada law based on a misplaced theory of "tolling." Specifically, Tower maintains that its bankruptcy proceedings somehow tolled or "stayed" the running of the statute of limitations during the pendency of the Underlying Lawsuit. Tower cites no authority for its contention. While the automatic bankruptcy stay operates to stay actions *against a debtor*, it does not affect, toll or stay actions *by* a debtor. Accordingly, under well-established accrual rules for legal malpractice claims arising out of alleged transactional malpractice, Tower "sustained damages" within the meaning of the controlling statute, NRS 11.207, when the Underlying Lawsuit was filed on May 23, 2007, which was more than four years before this action is filed.[1] There are no factual issues of "discovery" or "tolling" – rather, the controlling statute of limitations accrual rules in this case are governed by principles that have been firmly established and reaffirmed by Nevada courts. This action is therefore is subject to

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[1] Again, in raising the statute of limitations defense, Mr. Heaton and NWH in no way, shape or form concede any of Tower's substantive allegations relating to the underlying representation. Mr. Heaton and NWH vehemently deny Tower's allegations of malpractice.

dismissal, and/or Defendants are entitled to summary judgment, as a matter of law.

## II. REPLY ARGUMENT

### A. <u>The Marquis Aurbach Order does not authorize Tower to bring and maintain this action</u>.

In its Opposition, Tower makes several notable concessions. First, Tower concedes that, once it was in bankruptcy proceedings, a bankruptcy estate consisting of *all* of its interests, legal and equitable, in *all* of its property, tangible and intangible, is created. (Opp. at 8:7-16.) The bankruptcy trustee, as the representative of the estate, is then required to marshal all estate property for the estate's benefit. (*Id.*) Accordingly, Tower had the obligation to surrender all property to the trustee. (*Id.*) This lawsuit, of course, as Tower impliedly concedes, is part of the property that it was required to surrender to the trustee.[2]

Tower then further impliedly concedes, as it must, that, ***but for the Marquis Aurbach Order, it would not have capacity to bring this action***, as this action would otherwise belong solely and exclusively to the trustee and the bankruptcy estate.[3] Tower goes on to concede the substance and effect of the Marquis Aurbach Order. (Opp. at 9:8 – 10:11.) That is, Tower admits that "the Trustee released ***<u>to the Tower Homes Purchasers</u> <u>all claims</u> on behalf of Tower against third parties[4] who may have been liable to Tower for lost [sic] of the Tower Homes Purchasers' earnest deposits monies***. Further, the Trustee agreed to allow the Tower Homers Purchasers' counsel, ***Marquis Aurbach Coffing***, to pursue all claims on behalf of Tower for the benefit of the Tower Homes Purchasers." (Opp. at 10:6-11 [emphasis added].) Despite the clear and

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[2] The Plan Confirmation Order further confirms this undisputed conclusion of law that "the Trustee and the Estate shall retain all claims or Causes of Action that they have or hold against *any* party." (See Ex. B to Motion to Dismiss [the "Motion"] at 48:18-19 [emphasis added].)

[3] "A bankruptcy trustee is vested with the exclusive power to raise legal claims on behalf of the estate." *Spirtos v. One San Bernardino County Sup. Ct.*, 443 F.3d 1172, 1175 (9th Cir. 2006) (citations omitted); *Mwangi v. Wells Fargo Bank*, 473 B.R. 802, 810 (D. Nev. 2012) ("[T]he bankruptcy code endows the bankruptcy trustee with the exclusive right to sue on behalf of the estate.").

[4] Tower mischaracterizes the Marquis Aurbach Order in that the Order did not provide for claims "against third parties." Rather, the Order only released claims against specific individuals and entities, as well as against "any other individual or entity later identified through discovery," which undisputedly did not include Mr. Heaton or NWH.

unambiguous language of this Marquis Aurbach Order, Tower nevertheless asks this Court to disregard the language of the Order by maintaining that it somehow has the proper capacity and standing to bring this action.

Tower's first contention as to why this Court should disregard the language of the Marquis Aurbach Order is that only Tower, and not the Tower Homes Purchasers, has standing to bring a legal malpractice claim against NWH because Tower, and not the purchasers, had the attorney-client relationship with NWH. While this assertion is partially true – the Tower Homes Purchasers never had an attorney-client relationship with NWH – this does not somehow magically confer Tower with the authority to bring an action that is simply not permitted by federal bankruptcy law, or by the Marquis Aurbach Order.[5] If the Tower bankruptcy trustee wanted to bring a malpractice claim against NWH, he was free to do so. Such a claim, however, is simply not within the scope of the Marquis Aurbach Order, nor is any intent to allow Tower to pursue legal malpractice claims expressed anywhere in the Order. If the trustee had such an intention, he was free to assign or relinquish the claim to the appropriate party (i.e., Tower).

Tower further concedes in the Opposition that, "if Tower is successful in this legal malpractice action, Tower will not be the recipient of any award of damages. Instead, any award of damages will be for the benefit of the Tower Homes Purchasers pursuant to the Marquis Aurbach Order." (Opp. at 12:10-14.) Tower provides no evidentiary support for this assertion that it will simply fork over any monies it might recover in this action to the Tower Homes Purchasers (either from the language of the Marquis Aurbach Order itself or some other document).[6] Moreover, even if this were the case, it doesn't change the undisputable conclusion that the Marquis Aurbach Order simply does not authorize Tower to bring this action. The

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[5] Tower also asserts a deceptive straw-man argument – i.e., that NWH maintains that the Tower Homers Purchasers are the "proper plaintiffs" in this action. (Opp. at 10:18-20.) NWH makes no such argument – there are no "proper plaintiffs" in this action.

[6] Furthermore, if and to the extent any such agreement exists, it would be unenforceable because it violates Nevada's prohibition against assignment of legal malpractice causes of action. *See Achrem v. Expressway Plaza Limited Partnership*, 112 Nev. 737, 739-741, 917 P.2d 447, 448-49 (1996); *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982) (prohibiting assignment of legal malpractice claim).

Marquis Aurbach Order authorizes *only the Tower Homes Purchasers* to bring claims, not Tower itself.

Tower further concedes that the Marquis Aurbach Order authorizes *only the law firm of Marquis Aurbach Coffing* to sue any party for loss of the purchasers' earnest money deposits. (See Motion, Ex. C at 2:20-26; Opp. at 12:20-22.) Tower now apparently seeks to circumvent this clear and unambiguous mandate from the Marquis Aurbach Order by arguing that Marquis Aurbach has "associated" the law firm of Prince & Keating to pursue this action. (Opp. at 12:22-25.) Even assuming this factual representation as true for purposes of the instant Motion, it still does not avoid the mandate of the Marquis Aurbach Order.[7] If Tower (or the Tower Homes Purchasers) sought to bring this action by any law firm other than Marquis Aurbach, *it was incumbent upon Tower to obtain the approval of the bankruptcy trustee and the bankruptcy court prior to bringing this action.*

Finally, Tower dismisses the undisputed fact that Mr. Heaton and NWH are not among the parties that the Marquis Aurbach Order authorizes the law firm of Marquis Aurbach to sue. Arguing only that the Marquis Aurbach Order was meant to be "illustrative," and "expansive, not restrictive," Tower ignores the fact that neither Mr. Heaton nor NWH are among the parties listed in the Marquis Aurbach Order who may be sued by the Tower Homes Purchasers. There is no language whatsoever in the Marquis Aurbach Order indicating that the enumerated parties who may be sued by the Tower Homes Purchasers is merely "illustrative." The only arguably "expansive" language in the Marquis Aurbach Order is its provision for a lawsuit by the Tower Homes Purchasers against "any other individual or entity later identified through discovery." (Ex. C to Motion at Page 5 of 6, lines 13-19.) This language, however, does not provide blank check authority to allow the Tower Homes Purchasers to sue anyone. Moreover, it certainly does not apply to Mr. Heaton and NWH because, at the time the Marquis Aurbach Order was entered on

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[7] This is a liberal assumption, as Tower notably produces no writing with the Opposition (other than counsel's own affidavit regarding a telephone call) that evidences this "association," or, more importantly, the consent of Tower, the bankruptcy trustee and the bankruptcy court to the purported "association."

June 3, 2010, *both the Tower Homes Purchasers and the Marquis Aurbach firm undisputedly knew that NWH represented Tower* in connection with the preparation of the contracts for the Project. (See Motion at 11:5-28.) Indeed, the evidence presented with the Motion shows that the identities of Mr. Heaton and NWH were known years before the entry of the Marquis Aurbach Order. (See Exhibits D and E to Motion.) Tower ***does not dispute*** that the identities of Mr. Heaton and NWH were known well before the Order was entered, and, thus, ***neither Mr. Heaton nor NWH could possibly be individuals or entities "later identified through discovery."*** Tower merely contends, once again, that the clear, unambiguous language of the Marquis Aurbach Order should be disregarded as somehow meaningless or merely advisory. Federal law precludes Tower from playing so fast and loose with bankruptcy court orders.

If and to the extent the Tower bankruptcy trustee wanted to pursue a legal malpractice claim against Tower, he had two options: (1) bring the claim himself; or (2) authorize Tower to bring the action in its own right ***in the form of a properly approved and bankruptcy law compliant order***. Neither was done here. The *only* order from the Bankruptcy Court that authorizes *anyone* to bring any claim that belonged to Tower (in whole or in part) is the Marquis Aurbach Order, which simply does not permit the instant action as a pure matter of law. The inquiry ends here, and this case should be dismissed.

**B. This action is barred by the statute of limitations as a matter of law.**

Even if Tower was hypothetically authorized to bring this action, this action still must be dismissed because it is barred by the statute of limitations as a matter of law.

**1. The Nevada Supreme Court has established that the statute of limitations for a legal malpractice claim arising out of *transactional* legal work commences to run when a lawsuit arising out of the allegedly negligent transactional work is filed.**

In its Opposition, Tower erroneously contends that the statute of limitations for a legal malpractice claim does not commence to run until the conclusion of the underlying litigation where the malpractice occurred. (Opp. at 14:15-18.) While this legal conclusion may be true for legal malpractice actions arising out alleged malpractice committed during the course of a representation involving litigation, a fundamentally different principle applies when the alleged malpractice arises out of transactional representation – when there is no pending action at the time the legal work is performed. When transactional legal work is at issue, ***the statute of limitations begins to run, <u>as a matter of law</u>, when a lawsuit allegedly caused by the allegedly negligent transactional work is filed***. *See Gonzales v. Stewart Title*, 111 Nev. 1350, 1354-55, 905 P.2d 176 (1995) (granting attorney's motion to dismiss based on statute of limitations pursuant to NRS 11.207(1) when legal malpractice lawsuit arose out of transactional work).

None of the authorities cited by Tower in its Opposition dictate otherwise, as they all involve legal malpractice actions arising out alleged **<u>litigation</u>** malpractice (i.e., alleged legal malpractice committed during the course of representation in a litigated matter). *See Kopicko v. Young*, 114 Nev. 1333, 971 P.2d 789 (1998) (statute of limitations on legal malpractice claim arising out of attorneys' representation of clients for litigation purposes did not commence to run until underlying litigation was completed); *K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 811 P.2d 1305 (1991) (same); *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988) (same). Notably, Tower places primary reliance on *Kopicko, supra* (Opp. at 14:18-19), a case in which the Nevada Supreme Court ***reaffirmed the distinction between transactional and litigation malpractice for ascertaining the commencement of running of statute of limitations***. *See Kopicko, supra*, 114 Nev. at 1337 n. 3.

Notwithstanding Tower's reliance on inapposite authorities, there is no dispute that the instant case involves allegations of transactional malpractice, not litigation malpractice. Specifically, Tower alleges that NWH was retained to form Tower as a business entity and to draft the purchase contracts for the Project. (See Complaint ¶¶ 6, 9; Opp. at 3:26-4:3.) Tower further alleges that NWH committed malpractice by failing to advise Tower regarding the handling of earnest money deposits, and by failing to properly draft the purchase contracts as required by Nevada law. (See Complaint ¶¶ 11-13.) This is classic **<u>transactional</u>** legal representation, and Tower does not argue otherwise in its Opposition.

This distinction between transactional and litigation representation, which Tower largely ignores in its Opposition, is of critical significance for statute of limitations purposes. Again, as fully discussed in the Motion (at 13:13-14:24), a client who retains an attorney for transactional legal work "sustains damage," within the meaning of NRS 11.207(1), from any attorney negligence in connection with this transactional work when a lawsuit caused by the allegedly negligent transactional work ***is filed***. *See Gonzales v. Stewart Title*, 111 Nev. 1350, 1354-55, 905 P.2d 176 (1995) (granting attorney's motion to dismiss based on statute of limitations pursuant to NRS 11.207(1) based on commencement of statute upon filing of lawsuit arising out of transactional malpractice); *see also Kopicko, supra*, 114 Nev. at 1337 n. 3, 971 P.2d at 791 (1998) (reaffirming distinction between transactional and litigation malpractice for determining commencement of running of statute of limitations); *New Albertson's, Inc. v. Brady, Vorwerck, Ryder & Caspino*, 2012 U.S. Dist. Lexis 42369 at *14-*15 (D. Nev. March 28, 2012) (recent reaffirmation and recognition by federal court of the distinction between transaction-based and litigation-based causes of action for legal malpractice for purposes of analyzing statute of limitations).

Here, Tower concedes in its Complaint that the underlying lawsuit against Tower, which arose out of NWH's alleged malpractice, was filed on May 23, 2007. (Complaint ¶ 15; Ex. A to Motion.) In the Underlying Complaint, the Tower Homes Purchasers alleged precisely same wrongs that Tower now alleges NWH should somehow have prevented. (See Ex. A to Motion, Underlying Complaint ¶¶ 32-39, 54, 79-93, 95). ***Accordingly, by May 23, 2007, Tower "sustained damage" within the meaning of NRS 11.207, thereby commencing the four-year statute of limitations***. *See Gonzales, supra*, 111 Nev. at 1354-55. Under this outside four-year measure provided by NRS 11.207(1), ***Tower had until May 23, 2011, at the very latest, to file its legal malpractice claim against NWH***. Tower did not file its Complaint until June 12, 2012 – over a year too late.[8]

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[8] The Tower Homes Purchasers filed an amended complaint against Tower on October 23, 2007. (See Opposition, Exhibit C.) In this amended complaint, the Purchasers added a cause of action for alleged violations of NRS 116 relating to the earnest money deposits. (Opp., Ex C at 12-13.) Even if the filing of this amended pleading is used as the accrual date, this action is still time-barred. The amended complaint was filed more than four years before Tower filed its Complaint in the instant case. Note also that in September 2007 the Tower Homes Purchasers filed Proofs of Claim in the Tower Bankruptcy Proceedings
(footnote continued)

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Throughout its Opposition, Tower seeks refuge in the general and oft-stated proposition that the question of whether Tower should have discovered facts constituting its legal malpractice action presents an issue of fact. (Opp. at 15:1-4.) Plaintiffs seeking to avoid statute of limitations motions frequently resort to this standard verbiage, but they almost always leave out the second part of the legal proposition, which is that the time of a plaintiff's discovery of a defendant's allegedly wrongful conduct ***may be decided as a matter of law when uncontroverted evidence shows when a plaintiff discovered, or should have discovered, the alleged malpractice***. *See, e.g., Gonzales, supra*, 111 Nev. 1350, 1354-55 (granting attorney's motion to dismiss pursuant to NRS 11.207); *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); *Robin 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).

Here, it is uncontroverted that the Underlying Lawsuit was filed on May 23, 2007. Accordingly, because this case undisputedly involves allegations of transactional legal malpractice, and not litigation malpractice, Tower had, as a matter of law (NRS 11.207 and *Gonzales*), until May 23, 2011 to file this action. It is uncontroverted that this action was not filed until almost a year later, on June 23, 2012. Accordingly, this action is time-barred as a matter of

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(many through the Marquis Aurbach firm) in which they quantified the damages being sought against Tower. (See printout of Claims Register, attached hereto as **Exhibit H**.) Even if this September 2007 date is used as the accrual date for statute of limitations purposes, the action is still time barred. Again, the *Gonzales* case makes it clear that, in transactional malpractice matters, damages are sustained when the client becomes aware of the existence of damages (i.e., when the underlying lawsuit is filed), not when the extent of damages becomes certain. The filing of the first Proof of Claim by a Tower Homes Purchaser in September 2007 (i.e, more than four years prior to the date Tower filed its complaint in this action) removed any possible doubt , if any, about the existence of damages.

law.[9]

2. **The Tower bankruptcy proceedings did not toll the running of the statute of limitations.**

In its Opposition, Tower argues that *Gonzales* is "clearly distinguishable" because, shortly after the Underlying Lawsuit was filed, the Tower bankruptcy proceedings were initiated. (Opp. at 21:2-7.) Tower then appears to contend that the bankruptcy proceedings operated as a "stay" to somehow toll the statute of limitations. (Opp. at 18:17-20:9.) In support of this contention, Tower cites an old Federal Rule of Bankruptcy Procedure that no longer exists, [10] and two cases, *Chubb Pacific Indem. Group v. Twin Lakes Village, Inc.*, 98 Nev. 521, 654 P.2d 530 (1982) and *Greystone Bank v. Rosenson*, 2011 U.S. Dist. Lexis 104948 at *5 (D. Nev. 2011). (*Id.*) All of these authorities, however, stand for the unremarkable and entirely inapplicable proposition that actions ***against*** a bankruptcy debtor are stayed during the bankruptcy proceedings.[11] In contrast, actions ***by the debtor*** are not stayed. *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.

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[9] All of the cases relied upon by Tower to support its assertion that the date of accrual for statute of limitations presents a question of fact, including the *Siragusa* case, are readily distinguishable. First and foremost, none of the cases cited by Tower involve legal malpractice actions arising out of transactional work. For example, the *Shinn* case (Opp. at 15:4) was a breach of contract case applying Colorado law. The *Doyle* case (Opp. at 15:11), aside from being uncitable pursuant to SCR 123, was a medical malpractice case, which implicates an entirely different body of law relating to statute of limitations accrual. The *Siragusa* case was not a malpractice case at all, but a fraud, conspiracy and RICO case in which the plaintiff alleged that she did not know of her attorney's participation in the in the alleged fraudulent conspiracy. Here, in stark contrast, NWH's involvement in the preparation of the purchase contract is not in dispute – it was undisputedly known to the Tower Homes Purchasers as early as 2006, and was obviously known at all times to Tower.

[10] The non-existent Federal Rule of Bankruptcy Procedure relied upon by Tower (Opp. at 18 n. 3), on its face, only stays actions "against the debtor." (Opp. at 18 n. 3 [citing former F.R.B.P. 11-44, which only applied under the former Bankruptcy Act].) The rule says nothing about statutes of limitations applicable to claims by a debtor.

[11] Specifically, the "automatic stay" provision of the Bankruptcy Code provides generally that a bankruptcy filing "operates as a stay, applicable to all entities, of (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor*." 11 U.S.C. § 362(a) (emphasis added).

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).

***Tower cites no authority in support of its argument that the filing of its own bankruptcy somehow extends the statute of limitations for <u>its own actions</u>***. Furthermore, Tower ignores the language of the Order Approving Disclosure Statement and Confirming Plan of Reorganization from the bankruptcy proceedings (attached as Exhibit B to the Motion), which provides that "[T]he 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." (Motion, Ex. B at 48:18-22 [emphasis added].) In other words, Tower's own bankruptcy trustee recognized that he retained the right to assert Tower's claims against other parties, but only subject to state statutes of limitations.

Federal courts in other jurisdictions have enforced state law statutes of limitations in response to legal malpractice actions brought by bankruptcy debtors. *See, e.g., Laddin v. Belden (In re Verilink)*, 408 B.R. 420 (N.D. Ala. 2009) (defendant attorneys' motion to dismiss debtor's legal malpractice claims granted based on statute of limitations), *reversed on other grounds in later proceeding*, 410 B.R. 697 (N.D. Ala. 2009); *Ranasinghe v. Compton*, 341 B.R. 556 (E.D. Va. 2006) (same); *see also Bruce v. Homefield Financial*, 2011 U.S. Dist. Lexis 110243 at *5-*6 (D. Nev. 2011) (plaintiff bankruptcy debtor's claims under Truth-in-Lending Act barred by the statute of limitations).

As discussed in the *Laddin* and *Ranasinghe* cases, *supra*, the only potential grounds for "tolling" a debtor's own claim under the Bankruptcy Code is 11 U.S.C. § 108 -- a provision which is notably ***not*** cited by Tower in its Opposition, as it does not change the result here. 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). First, by its terms, this provision only applies to actions commenced by trustees. See *Ranasinghe, supra,* 341 B.R. at 564 ("[W]hen a trustee is serving in a chapter 11 case, only the trustee and not the debtor receives the benefit of the § 108(a) extension.") A trustee (William A. Leonard, Jr.) is serving in the Tower bankruptcy proceedings, but the instant action is brought and maintained by Tower itself. Second, even if Tower 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, May 23, 2011, as discussed above), 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 (see attached **Exhibit I**), thereby giving the trustee until August 21, 2009 to hypothetically have filed this action under the limited "tolling" provided by Section 108. Under either of Section 108's options, this action is still time-barred as a matter of law.

Recognizing that it has no basis in law to "toll" the running of the statute of limitations, Tower next argues that, because the Underlying Lawsuit did not conclude until July 5, 2011, "there was no way for Tower to even determine whether it suffered any damages" because the other defendants in the Underlying Lawsuit may have been able to compensate the Tower Homes Purchasers for their losses. (Opp. at 19:15-23.) This argument is fundamentally misplaced. First and foremost, as discussed above (and in the Motion), Tower suffered damages relating to any alleged negligence by NWH, as a matter of law, when it was sued by the Tower Homes Purchasers based on NWH's alleged malpractice. *See Gonzales, supra*, 111 Nev. at 1354-55. The statute of limitations accrual analysis ends here. Whether other alleged tortfeasors could conceivably have compensated the Tower Homes Purchasers for their losses is entirely immaterial to the issue of when the statute of limitations began to run on Towers' own legal malpractice claims.

Second, Tower fails to explain how the completion of the Underlying Lawsuit has any logical relationship to the bankruptcy proceedings for statute of limitations purposes. Again, under Tower's (unsupported and incorrect) theory, the bankruptcy proceedings somehow tolled the running of the statute of limitations. As discussed above, this theory is simply incorrect as a matter of federal law. Yet, Tower contends, apparently in an effort to concoct some alternative statute of limitations commencement date, that Tower finally "discovered" its damages on July 5, 2011, when the Underlying Lawsuit concluded. Nowhere does Tower explain or demonstrate what it "discovered" on July 5, 2011, or why this date should commence the running of the statute. Moreover, if, as Tower alleges, the bankruptcy proceedings somehow tolled the running of the statute of limitations, it is unclear why the completion of the Underlying Lawsuit (which was a separate filed state court action wholly independent of the bankruptcy proceedings) would have any effect whatsoever on tolling purportedly created by the bankruptcy.

The bottom line is that the bankruptcy proceedings initiated against Tower had ***no effect whatsoever*** on the statute of limitations applicable to any claims ***by*** Tower. As such, its claims in this lawsuit are time-barred.

**3. This action is also barred by the two-year measure provided by NRS 11.207 as a matter of law.**

As fully discussed above, the commencement of the running of the statute of limitations is established as a pure matter of Nevada law because this matter involves alleged transactional legal malpractice. Accordingly, because the Underlying Lawsuit arising out of this transactional work was filed on May 23, 2007, the four-year statute set forth in NRS 11.207 ran on May 23, 2011 pursuant to *Gonzales*, and ***any analysis of the two-year measure under NRS 11.207 is entirely unnecessary*** because the two-year measure cannot extend the statute of limitations beyond May 23, 2011. Again, NRS 11.207 establishes that a legal malpractice action "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 <u>earlier</u>***." (Emphasis added.) Because Tower sustained damage within the meaning of NRS 11.207 by May 23, 2011, the two-year measure cannot, as a matter of law, extend the running of the statute of limitations beyond this date.

Nevertheless, even if we apply the two-year measure, which examines when a client discovers or through the use of reasonable diligence should have discovered the material facts constituting the cause of action, it is apparent that the statute of limitations ran well before May 23, 2011 (the latest possible statute of limitations deadline). NWH demonstrated in the Motion that, in August 2006, Tower received copies of demand letters from counsel for one of the Tower

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

Homes Purchasers. (See Motion at 13:1-7 and Exhibits D and G, and Declaration of William H. Heaton ¶¶ 6, 9.)

In the August 11, 2006 demand letter (Ex. D to Motion), counsel for the purchasers demanded the return of two of the purchasers' earnest money deposits, and argued that the money should be held in trust. (Ex. D at page 3.) Contrary to Tower's argument in its Opposition, this demand was more than just a notice of default -- it advised Tower (through Yanke, its sole owner and principal) that the deposits were supposed to be held in trust, and therefore should be immediately available to return to the purchasers. *If this indeed was news to Yanke* (as Tower now apparently alleges in its Complaint and Opposition), *then he obviously knew that NWH failed to advise him of the requirement to hold the deposits in trust as early as August 2006.*[12] Moreover, Tower incurred attorneys' fees for having to respond to this letter. Accordingly, the statute of limitations, under this two-year measure, ran on August 11, 2008.

The same analysis applies to the August 23, 2006 letter from the purchasers' counsel. (Ex. G to Motion.) In this letter, counsel accused Yanke of criminal conduct, and quoted the applicable statute, NRS 116.411, which establishes the escrow requirements for deposits. (Ex. G at page 2.) So, again, if, as Tower now apparently contends, Yanke's mishandling of the deposits was done because of something that NWH did or did not do, then Yanke (i.e., Tower) certainly knew, or should have known as a matter of law, that he had been given bad legal advice by August 2006 based on the content and tenor of the demand letter. Accordingly, under the two-year measure, again, this action had to be filed by August 23, 2008 -- almost four years before this action was actually filed.[13]

---

[12] Again, Mr. Heaton and NWH vehemently dispute this version of the facts, as they fully advised Yanke of the requirements for handling purchaser deposits, and properly drafted the purchase contract in accordance with Nevada law.

[13] The cases cited by Tower with respect to the two-year statute of limitations measure are readily distinguishable. The *Kopit* case (Opp. at 15:21) is an unpublished opinion and involved litigation-based legal malpractice. The *Clark* case (Opp. at 15:24) involved legal malpractice arising out of criminal representation, which presents an entirely different and inapplicable analysis. Finally, the *Kopicko* case (Opp. at 15:25), as discussed above, involved malpractice claims arising out of litigation, and therefore turns on a completely different statute of limitations analysis.

In its Opposition, Tower splits hairs by arguing that the purchasers' counsel did not explain in his August 2006 letters why the purchase contracts did not comply with Nevada law, and that counsel merely stated that Yanke (as opposed to Tower) was in violation of Nevada law. Again, counsel's primary concern in the letter is the precise whereabouts of the purchasers' deposits, which, pursuant to NRS 116.411 (quoted in the letter), had to be placed in escrow, and could not be the subject of any lien. So, again, if, as Tower alleges, NWH had failed to advise Tower (i.e., Yanke, *Tower's sole owner and employee*) of the requirements of NRS 116.411, the two demand letters, as a matter of law (and common sense), put Yanke on notice of this alleged failure in August 2006. Two years from August 23, 2006 is August 23, 2008 – Tower's complaint was not filed until almost *four years* later.

Thus, under either the four-year or two-year measures provided by NRS 11.207, this action is time-barred as a matter of law.

C. **<u>Tower's cause of action for breach of fiduciary duty does not exist, and in any event is also time-barred as a matter of law</u>.**

Tower's second cause of action for "breach of fiduciary duty" simply does not exist in the attorney-client relationship context, and, in any event, is barred by the statute of limitations (based on NRS 11.207 and the analysis set forth above and in the Motion).

Again, the Nevada Supreme Court has made it clear that a separate breach of fiduciary duty cause of action does not exist in the context of a claim arising out of the attorney-client relationship: "A cause of action for legal malpractice *encompasses breaches of contractual as well as fiduciary duties* because both 'concern the representation of a client and involve the fundamental aspects of an attorney-client relationship.'" *Stalk v. Mushkin*, 125 Nev. Adv. Rep. 3, 199 P.3d 838, 843 (2009) (statute of limitations for breach of fiduciary duty claim against attorney subject to and analyzed under NRS 11.207) (emphasis added). In other words, "claims for breach of fiduciary duty arising out of an attorney-client relationship ***are legal malpractice claims*** subject to NRS 11.207(1)'s limitation period." *Id.* at 844 (emphasis added). In its Opposition, rather than engaging in a substantive discussion, Tower merely charges that Defendants have misinterpreted *Stalk*, or that Defendants are attempting to mislead the Court. Defendants submit that the language of the *Stalk* opinion – i.e., that claims for breach of fiduciary duty in the attorney-client context "are legal malpractice claims" could not be clearer – a cause of action styled as "breach of fiduciary" duty is unnecessary and duplicative in the attorney-client context.

In any event, Tower concedes that its breach of fiduciary duty cause of action – if it has an independent existence – is subject to the legal malpractice statute of limitations (i.e., NRS 11.207). Accordingly, as demonstrated in the Motion and above, Tower's breach of fiduciary duty cause of action, if and to the extent it exists separate and apart from a legal malpractice claim, is barred by the statute of limitations as a matter of law, under either the four-year or two-year measures.

## III. CONCLUSION

Based on the foregoing, as well as the points and authorities and evidence set forth in the Motion, defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. respectfully request that the Complaint be dismissed in its entirety, with prejudice. Alternatively, Defendants seek the entry of summary judgment in their favor and against Tower. Tower lacks the capacity and requisite bankruptcy court authorization to sue and, even if it had the requisite capacity and authorization to sue, the causes of action asserted are barred by the statute of limitations as a matter of law.

DATED this 19th day of September, 2012

LEWIS BRISBOIS BISGAARD & SMITH LLP

By Jeffrey D. Olster

V. Andrew Cass
Nevada Bar No. 005246
Jeffrey D. Olster
Nevada Bar No. 008864
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendants
*William H. Heaton and Nitz, Walton & Heaton, Ltd.*

**DECLARATION OF JEFFREY D. OLSTER**

I, Jeffrey D. Olster, do hereby declare,

1. I am a partner at the firm Lewis Brisbois Bisgaard & Smith LLP, counsel of record for defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. I have personal knowledge of the matters set forth herein, and if called upon to do so, I would testify competently to these matters.

2. Attached as **Exhibit H** is a true and correct copy of the Claims Register from the Tower Homes, LLC bankruptcy proceedings (United States Bankruptcy Court, District of Nevada, Case No. 07-13208-BAM).

3. Attached as **Exhibit I** is a true and correct copy of the "Order for Relief Under Chapter 11" (Doc. 64) from the Tower Homes, LLC bankruptcy proceedings.

I declare under penalty of perjury and pursuant to the laws of Nevada and the United States that the foregoing is true and correct and, if sworn as a witness, I would testify competently thereto.

DATED on this 19th day of September, 2012.

/S/ Jeffrey D. Olster

Jeffrey D. Olster

## CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 19th day of September, 2012, a true and correct copy of the foregoing **REPLY TO OPPOSITION TO MOTION TO DISMISS, OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT** was sent via electronic mail and placed in an envelope, postage prepaid, addressed as stated below.

Dennis M. Prince
Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117
dprince@princekeating.com
P: (702) 228-6800
F: (702) 228-0443
*Attorneys for Plaintiff*

By: /s/ Nicole Tallade
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

# EXHIBIT "H"

CM/ECF ?

- Query
- Reports
- Utilities
- Logout

# District of Nevada
# Claims Register

## 07-13208-bam TOWER HOMES, LLC

**Judge:** BRUCE A. MARKELL **Chapter:** 11
**Office:** Las Vegas **Last Date to file claims:** 01/01/2008
**Trustee:** WILLIAM A LEONARD **Last Date to file (Govt):**

| | | |
|---|---|---|
| *Creditor:* (2987103)<br>CLARK COUNTY TREASURER<br>500 S GRAND CENTRAL PKWY<br>PO BOX 551220<br>LAS VEGAS, NV 89155 | **Claim No: 1**<br>*Original Filed Date:* 06/04/2007<br>*Original Entered Date:* 06/04/2007<br>*Last Amendment Filed:* 06/08/2007<br>*Last Amendment Entered:* 06/08/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* CLARK COUNTY TREASURER<br>*Modified:* |

Amount claimed: $43515.24

Secured claimed: $43515.24

*History:*

Details 1-1 06/04/2007 Claim #1 filed by CLARK COUNTY TREASURER, Amount claimed: $41272.54 (CLARK COUNTY TREASURER)

Details 1-2 06/08/2007 Amended Claim #1 filed by CLARK COUNTY TREASURER, Amount claimed: $43515.24 (CLARK COUNTY TREASURER)

*Description:* (1-1) TAXES, PENALTIES, INTEREST AND FEES PURSUANT TO NRS 361-450
(1-2) TAXES, PENALTIES, INTEREST AND FEES PURSUANT TO NRS 361-450

*Remarks:* (1-2) AMEND, INCORRECT AMOUNT FILED

| | | |
|---|---|---|
| *Creditor:* (2992419)<br>THE PLUMBER, INC.<br>C/O WILLIAMS & WIESE<br>501 S. RANCHO DRIVE, ST. 0-22<br>LAS VEGAS, NV 89106 | **Claim No: 2**<br>*Original Filed Date:* 06/07/2007<br>*Original Entered Date:* 06/08/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* SL Hooks<br>*Modified:* |

Amount claimed: $109588.00

Secured claimed: $109588.00

*History:*

Details 2-1 06/07/2007 Claim #2 filed by THE PLUMBER, INC., Amount claimed: $109588.00 (Hooks, SL )

*Description:*

*Remarks:*

*Creditor:* (3074620)
Irving & Judith Shiffman
10744 Jubilee Mountain Ave.
Las Vegas, NV 89129

**Claim No: 3**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $181730.42

Priority claimed: $181730.42

*History:*

Details 3-1 09/10/2007 Claim #3 filed by Irving & Judith Shiffman, Amount claimed: $181730.42 (OSBORN, DONNA )

*Description:* (3-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

*Creditor:* (3102295)
ARTHUR WILLIAMS C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 4**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007
*Last Amendment Filed:* 02/04/2008
*Last Amendment Entered:* 02/04/2008

*Status:*
*Filed by:* CR
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $158491.52

Priority claimed: $158491.52

*History:*

Details 4-1 09/10/2007 Claim #4 filed by ARTHUR WILLIAMS C/O, Amount claimed: $128600.40 (OSBORN, DONNA )

Details 4-2 02/04/2008 Amended Claim #4 filed by ARTHUR WILLIAMS C/O, Amount claimed: $158491.52 (OSBORN, DONNA )

Details 4-3 02/04/2008 Amended Claim #4 filed by ARTHUR WILLIAMS C/O, Amount claimed: $158491.52 (OSBORN, DONNA )

*Description:* (4-1) DEPOSITS FOR PURCHASE OF CONDO UNIT
(4-2) DEPOSIT ON CONDO PURCHASE
(4-3) CONDO PURCHASE DEPOSIT

*Remarks:*

*Creditor:* (3102297)
JUDGE W. COOLEY C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 5**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $82706.60

Priority claimed: $82706.60

*History:*

Details 5-1 09/10/2007 Claim #5 filed by JUDGE W. COOLEY C/O, Amount claimed: $82706.60 (OSBORN, DONNA )

*Description:* (5-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

*Creditor:* (3102298)
EDWIN AND GAIL M. EDEJER C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 6**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $209925.00
Priority claimed: $209925.00

*History:*

Details 6-1 09/10/2007 Claim #6 filed by EDWIN AND GAIL M. EDEJER C/O, Amount claimed: $209925.00 (OSBORN, DONNA )

*Description:* (6-1) DEPOSITS FOR PURCHASE OF CONDO UNIT
*Remarks:*

*Creditor:* (3102299)
BARBARA L. CHANDLER C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 7**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $226284.86
Priority claimed: $226284.86

*History:*

Details 7-1 09/10/2007 Claim #7 filed by BARBARA L. CHANDLER C/O, Amount claimed: $226284.86 (OSBORN, DONNA )

*Description:* (7-1) DEPOSITS FOR PURCHASE OF CONDO UNIT
*Remarks:*

*Creditor:* (3102300)
ROBERT EMBLETON C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 8**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $184695.95
Priority claimed: $184695.95

*History:*

Details 8-1 09/10/2007 Claim #8 filed by ROBERT EMBLETON C/O, Amount claimed: $184695.95 (OSBORN, DONNA )

*Description:* (8-1) DEPOSITS FOR PURCHASE OF CONDO UNIT
*Remarks:*

*Creditor:* (3102302)
DAHN MIDORA C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 9**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $256937.50
Priority $256937.50

claimed:

*History:*

Details 9-1 09/10/2007 Claim #9 filed by DAHN MIDORA C/O. Amount claimed: $256937.50 (OSBORN, DONNA )

*Description:* (9-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3102303)<br>HAROLD J. AND CAROL P. HERZLICH C/O<br>DONNA M. OSBORN, ESQ.<br>MARQUIS & AURBACH<br>10001 PARK RUN DRIVE<br>LAS VEGAS, NEVADA 89145 | **Claim No: 10**<br>*Original Filed Date:* 09/10/2007<br>*Original Entered Date:* 09/10/2007 | *Status:*<br>*Filed by:* AT<br>*Entered by:* DONNA M. OSBORN<br>*Modified:* |

Amount claimed: $185299.15

Priority claimed: $185299.15

*History:*

Details 10-1 09/10/2007 Claim #10 filed by HAROLD J. AND CAROL P. HERZLICH C/O. Amount claimed: $185299.15 (OSBORN, DONNA )

*Description:* (10-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3102304)<br>RICHARD GOODALL C/O<br>DONNA M. OSBORN, ESQ.<br>MARQUIS & AURBACH<br>10001 PARK RUN DRIVE<br>LAS VEGAS, NEVADA 89145 | **Claim No: 11**<br>*Original Filed Date:* 09/10/2007<br>*Original Entered Date:* 09/10/2007 | *Status:*<br>*Filed by:* AT<br>*Entered by:* DONNA M. OSBORN<br>*Modified:* |

Amount claimed: $353487.45

Priority claimed: $353487.45

*History:*

Details 11-1 09/10/2007 Claim #11 filed by RICHARD GOODALL C/O, Amount claimed: $353487.45 (OSBORN, DONNA )

*Description:* (11-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3102305)<br>MELVA BROWN C/O<br>DONNA M. OSBORN, ESQ.<br>MARQUIS & AURBACH<br>10001 PARK RUN DRIVE<br>LAS VEGAS, NEVADA 89145 | **Claim No: 12**<br>*Original Filed Date:* 09/10/2007<br>*Original Entered Date:* 09/10/2007 | *Status:*<br>*Filed by:* AT<br>*Entered by:* DONNA M. OSBORN<br>*Modified:* 02/27/2008 |

Amount claimed: $253130.88

Priority claimed: $253130.88

*History:*

Details 12-1 09/10/2007 Claim #12 filed by MELVA BROWN C/O. Amount claimed: $253130.88 (OSBORN, DONNA )

*Description:* (12-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:* (12-1) This claim is amended by #48, under the name of NV Brown (02/27/08 jmg)

*Creditor:* (3102306)
BARBARA L. CHANDLER AS TRUSTEE OF THE SARALEE M. B
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 13**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $191323.50

Priority claimed: $191323.50

*History:*

Details 13-1 09/10/2007 Claim #13 filed by BARBARA L. CHANDLER AS TRUSTEE OF THE SARALEE M. B, Amount claimed: $191323.50 (OSBORN, DONNA )

*Description:* (13-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

*Creditor:* (3102307)
ALLISON G. GAYNOR C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 14**
*Original Filed Date:* 09/10/2007
*Original Entered Date:* 09/10/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $175805.54

Priority claimed: $175805.54

*History:*

Details 14-1 09/10/2007 Claim #14 filed by ALLISON G. GAYNOR C/O, Amount claimed: $175805.54 (OSBORN, DONNA )

*Description:* (14-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

*Creditor* (3074647)
OlsEn Precast
2750 Marion Dr.
Las Vegas, NV 89115

**Claim No: 15**
*Original Filed Date:* 09/11/2007
*Original Entered Date:* 09/13/2007

*Status:*
*Filed by:* CR
*Entered by:* SL Hooks
*Modified:*

Amount claimed: $7691.08

Secured claimed: $7691.08

*History:*

Details 15-1 09/11/2007 Claim #15 filed by OlsEn Precast, Amount claimed: $7691.08 (Hooks, SL )

*Description:*

*Remarks:*

*Creditor:* (3107883)
DEBRA JONES C/O
DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 16**
*Original Filed Date:* 09/14/2007
*Original Entered Date:* 09/14/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $73383.92

Priority $73383.92

claimed:

*History:*

Details 16-1 09/14/2007 Claim #16 filed by DEBRA JONES C/O, Amount claimed: $73383.92 (OSBORN, DONNA )

*Description:* (16-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3074675)<br>Water Movers<br>PO Box 66693<br>Phoenix, AZ 85082 | **Claim No: 17**<br>*Original Filed Date:* 09/12/2007<br>*Original Entered Date:* 09/17/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* SL Hooks<br>*Modified:* |

Amount claimed: $31574.55

Secured claimed: $31574.55

*History:*

Details 17-1 09/12/2007 Claim #17 filed by Water Movers, Amount claimed: $31574.55 (Hooks, SL )

*Description:*

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3074665)<br>Southern Nevada Storm Drain<br>PO Box 750067<br>Las Vegas, NV 89136 | **Claim No: 18**<br>*Original Filed Date:* 09/13/2007<br>*Original Entered Date:* 09/17/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* SL Hooks<br>*Modified:* |

Amount claimed: $17900.00

Secured claimed: $17900.00

*History:*

Details 18-1 09/13/2007 Claim #18 filed by Southern Nevada Storm Drain, Amount claimed: $17900.00 (Hooks, SL )

*Description:*

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3115787)<br>THE PLUMBER, INC.<br>C/O DONALD H. WILLIAMS<br>501 S. RANCHO DR. #D-22<br>LAS VEGAS, NV 89106-4832 | **Claim No: 19**<br>*Original Filed Date:* 09/17/2007<br>*Original Entered Date:* 09/21/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* SL Hooks<br>*Modified:* |

Amount claimed: $109588.00

Secured claimed: $109588.00

*History:*

Details 19-1 09/17/2007 Claim #19 filed by THE PLUMBER, INC., Amount claimed: $109588.00 (Hooks, SL )

*Description:*

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3115788)<br>JADE SUMMIT<br>810 S. CASINO CENTER #104 | **Claim No: 20**<br>*Original Filed Date:* 09/17/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* SL Hooks |

LAS VEGAS, NV 89101 | *Original Entered Date:* 09/21/2007 | *Modified:*

Amount claimed: $453541.21

Secured claimed: $453541.21

*History:*

Details 20-1 09/17/2007 Claim #20 filed by JADE SUMMIT, Amount claimed: $453541.21 (Hooks, SL )

*Description:*

*Remarks:*

*Creditor:* (3118266)
Toyota Motor Credit Corp
3200 West Ray Rd.
Chandler, AZ 85226

**Claim No: 21**
*Original Filed Date:* 09/25/2007
*Original Entered Date:* 09/25/2007

*Status:*
*Filed by:* CR
*Entered by:* TOYOTA MOTOR CREDIT CORPORATION(mi)
*Modified:*

Amount claimed: $48533.74

Secured claimed: $48533.74

*History:*

Details 21-1 09/25/2007 Claim #21 filed by Toyota Motor Credit Corp, Amount claimed: $48533.74 (TOYOTA MOTOR CREDIT CORPORATION(mi))

*Description:*

*Remarks:*

*Creditor:* (3074585)
Ann & Robert Mueller
8220 Sedona Sunrise Dr.
Las Vegas, NV 89128

**Claim No: 22**
*Original Filed Date:* 09/27/2007
*Original Entered Date:* 09/27/2007

*Status:*
*Filed by:* CR
*Entered by:* TIMOTHY R. O'REILLY
*Modified:*

Amount claimed: $236870.46

Priority claimed: $236870.46

*History:*

Details 22-1 09/27/2007 Claim #22 filed by Ann & Robert Mueller, Amount claimed: $236870.46 (O'REILLY, TIMOTHY )

*Description:* (22-1) Deposit for purchase of condo

*Remarks:*

*Creditor:* (3129826)
FERGUSON ENTERPRISES
C/O DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NEVADA 89145

**Claim No: 23**
*Original Filed Date:* 10/04/2007
*Original Entered Date:* 10/04/2007

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $10622.25

Secured claimed: $10622.25

*History:*

Details 23-1 10/04/2007 Claim #23 filed by FERGUSON ENTERPRISES, Amount claimed: $10622.25 (OSBORN, DONNA )

*Description:* (23-1) APN #176-04-601-019
*Remarks:* (23-1) LEIN RECORDED AGAINST APN 176-04-601-019

| | | |
|---|---|---|
| *Creditor:* (3129828)<br>HUGHES WATER & SEWER, LTD. DBA STANDARD WHOLESALE.<br>C/O DONNA M. OSBORN, ESQ.<br>MARQUIS & AURBACH<br>10001 PARK RUN DRIVE<br>LAS VEGAS, NEVADA 89145 | **Claim No: 24**<br>*Original Filed Date:* 10/04/2007<br>*Original Entered Date:* 10/04/2007 | *Status:*<br>*Filed by:* AT<br>*Entered by:* DONNA M. OSBORN<br>*Modified:* |

Amount claimed: $131620.60

Secured claimed: $131620.60

*History:*
Details 24-1 10/04/2007 Claim #24 filed by HUGHES WATER & SEWER, LTD. DBA STANDARD WHOLESALE., Amount claimed: $131620.60 (OSBORN, DONNA )

*Description:* (24-1) APN #176-04-601-019
*Remarks:* (24-1) LIEN RECORDED AGAINST APN 176-04-601-019

| | | |
|---|---|---|
| *Creditor:* (3074582)<br>Allied Trench & Shoring, Inc.<br>6680 Surrey St.<br>Las Vegas, NV 89118 | **Claim No: 25**<br>*Original Filed Date:* 10/03/2007<br>*Original Entered Date:* 10/04/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* SL Hooks<br>*Modified:* |

Amount claimed: $22407.85

Unsecured claimed: $22407.85

*History:*
Details 25-1 10/03/2007 Claim #25 filed by Allied Trench & Shoring, Inc., Amount claimed: $22407.85 (Hooks, SL )

*Description:*
*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3135781)<br>Ahern Rentals, Inc.<br>c/o Dixon Truman Fisher & Clifford, P.C.<br>2820 W. Charleston Blvd., #23<br>Las Vegas, NV 89102 | **Claim No: 26**<br>*Original Filed Date:* 10/10/2007<br>*Original Entered Date:* 10/10/2007 | *Status:*<br>*Filed by:* AT<br>*Entered by:* SHANE CLIFFORD<br>*Modified:* |

Amount claimed: $17008.60

Secured claimed: $17008.60

*History:*
Details 26-1 10/10/2007 Claim #26 filed by Ahern Rentals, Inc., Amount claimed: $17008.60 (CLIFFORD, SHANE )

*Description:* (26-1) Mechanic's lien for goods rented
*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3074580)<br>Abe Siemens<br>47 Princeton Dr.<br>Rancho Mirage, CA 92270 | **Claim No: 27**<br>*Original Filed Date:* 10/23/2007<br>*Original Entered Date:* 10/23/2007 | *Status:*<br>*Filed by:* AT<br>*Entered by:* DONNA M. OSBORN<br>*Modified:* |

Amount claimed: $170106.19

Priority claimed: $170106.19

*History:*

Details 27-1 10/23/2007 Claim #27 filed by Abe Siemens, Amount claimed: $170106.19 (OSBORN, DONNA )

*Description:* (27-1) Other - Deposits for purchace of condo unit

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3156887)<br>Geo Tek, Inc.<br>c/o Lars K. Evensen, Esq.<br>HOLLAND & HART LLP<br>3763 Howard Hughes Parkway, Suite 300<br>Las Vegas, NV 89169 | **Claim No: 28**<br>*Original Filed*<br>*Date:* 10/26/2007<br>*Original Entered*<br>*Date:* 10/26/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* LARS EVENSEN<br>*Modified:* |

Amount claimed: $135290.77

Secured claimed: $135290.77

*History:*

Details 28-1 10/26/2007 Claim #28 filed by Geo Tek, Inc., Amount claimed: $135290.77 (EVENSEN, LARS )

*Description:* (28-1) Real Estate - Mechanic's Lien

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (2986792)<br>ATLAS MECHANICAL, INC.<br>c/o Laurel E. Davis<br>Fennemore Craig, P.C.<br>300 South Fourth Street, Suite 1400<br>Las Vegas, NV 89101 | **Claim No: 29**<br>*Original Filed*<br>*Date:* 10/27/2007<br>*Original Entered*<br>*Date:* 10/27/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* LAUREL E. DAVIS<br>*Modified:* |

Amount claimed: $206296.54

Secured claimed: $206296.54

*History:*

Details 29-1 10/27/2007 Claim #29 filed by ATLAS MECHANICAL, INC., Amount claimed: $206296.54 (DAVIS, LAUREL )

*Description:*

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (2986791)<br>HELIX ELECTRIC OF NEVADA<br>c/o Laurel E. Davis<br>Fennemore Craig, P.C.<br>300 South Fourth Street, Suite 1400<br>Las Vegas, NV 89101 | **Claim No: 30**<br>*Original Filed*<br>*Date:* 10/27/2007<br>*Original Entered*<br>*Date:* 10/27/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* LAUREL E. DAVIS<br>*Modified:* |

Amount claimed: $524820.19

Secured claimed: $524820.19

*History:*

Details 30-1 10/27/2007 Claim #30 filed by HELIX ELECTRIC OF NEVADA, Amount claimed: $524820.19 (DAVIS, LAUREL )

*Description:*

*Remarks:*

*Creditor:* (2986788)
WPH ARCHITECTURE, INC.
c/o Laurel E. Davis, Esq.
Fennemore Craig, P.C.
300 South Fourth Street, Suite 1700
Las Vegas, NV 89101

**Claim No: 31**
*Original Filed Date:* 10/27/2007
*Original Entered Date:* 10/27/2007

*Status:*
*Filed by:* CR
*Entered by:* LAUREL E. DAVIS
*Modified:*

Amount claimed: $1076778.31

Secured claimed: $1076778.31

*History:*

Details 31-1 10/27/2007 Claim #31 filed by WPH ARCHITECTURE, INC., Amount claimed: $1076778.31 (DAVIS, LAUREL )

*Description:*

*Remarks:*

*Creditor:* (3162883)
PHILLIP & KATHERINE STROMER
C/O WALSH & FRIEDMAN, LTD.
400 SOUTH MARYLAND PARKWAY
LAS VEGAS, NV 89101

**Claim No: 32**
*Original Filed Date:* 10/30/2007
*Original Entered Date:* 10/31/2007

*Status:*
*Filed by:* CR
*Entered by:* SL Hooks
*Modified:*

Amount claimed: $180000.00

Unsecured claimed: $180000.00

*History:*

Details 32-1 10/30/2007 Claim #32 filed by PHILLIP & KATHERINE STROMER, Amount claimed: $180000.00 (Hooks, SL )

*Description:*

*Remarks:*

*Creditor:* (3164780)
LEDCOR CONSTRUCTION, INC.
c/o Laurel E. Davis, Esq
Fennemore Craig, P.C
300 S. Fourth Street, #1400
Las Vegas, NV 89101

**Claim No: 33**
*Original Filed Date:* 11/01/2007
*Original Entered Date:* 11/01/2007

*Status:*
*Filed by:* CR
*Entered by:* LAUREL E. DAVIS
*Modified:*

Amount claimed: $2133847.87

Secured claimed: $2133847.87

*History:*

Details 33-1 11/01/2007 Claim #33 filed by LEDCOR CONSTRUCTION, INC., Amount claimed: $2133847.87 (DAVIS, LAUREL )

*Description:*

*Remarks*

*Creditor:* (3168896)
Edward and Sandra Clark
c/o Bob L. Olson, Esq.
3993 Howard Hughes
Suite 600
Las Vegas, NV 89169

**Claim No: 34**
*Original Filed Date:* 11/06/2007
*Original Entered Date:* 11/06/2007

*Status:*
*Filed by:* CR
*Entered by:* MICAELA RUSTIA MOORE
*Modified:*

Amount claimed: $196448.15

Unsecured $196448.15

claimed:

*History:*

Details 34-1 11/06/2007 Claim #34 filed by Edward and Sandra Clark. Amount claimed: $196448.15 (RUSTIA MOORE, MICAELA )

*Description:* (34-1) Deposit for Purchase of Condo

*Remarks:*

*Creditor:* (3170553) History
Andrea Harris
2310 Fayette Avenue
Henderson, NV 89052

**Claim No: 35**
*Original Filed Date:* 11/07/2007
*Original Entered Date:* 11/07/2007

*Status:*
*Filed by:* CR
*Entered by:* MICAELA RUSTIA MOORE
*Modified:*

Amount claimed: $278181.19

Priority claimed: $2225.00

Unsecured claimed: $275956.19

*History:*

Details 35-1 11/07/2007 Claim #35 filed by Andrea Harris. Amount claimed: $278181.19 (RUSTIA MOORE, MICAELA )

*Description:* (35-1) Deposit for Condo

*Remarks:*

*Creditor:* (3176963)
Nevada Ready Mix Corporatino
c/o Matthew C. Zirzow, Esq.
Gordon & Silver, Ltd.
3960 Howard Hughes Pkwy, 9th Floor
Las Vegas, Nevada 89169

**Claim No: 36**
*Original Filed Date:* 11/13/2007
*Original Entered Date:* 11/13/2007

*Status:*
*Filed by:* CR
*Entered by:* MATTHEW C. ZIRZOW
*Modified:*

Amount claimed: $1507647.86

Secured claimed: $1507647.86

*History:*

Details 36-1 11/13/2007 Claim #36 filed by Nevada Ready Mix Corporatino, Amount claimed: $1507647.86 (ZIRZOW, MATTHEW )

*Description:*

*Remarks:*

*Creditor:* (3121833)
HB PARKCO CONSTRUCTION, INC.
C/O MATTHEW C. ZIRZOW
GORDON & SILVER
3960 HOWARD HUGHES PKWY., 9TH FLOOR
LAS VEGAS, NV 89169

**Claim No: 37**
*Original Filed Date:* 11/14/2007
*Original Entered Date:* 11/14/2007
*Last Amendment Filed:* 11/15/2007
*Last Amendment Entered:* 11/15/2007

*Status:*
*Filed by:* CR
*Entered by:* MATTHEW C. ZIRZOW
*Modified:*

Amount claimed: $31801483.50

Secured claimed: $31801483.50

*History:*

Details 37-1 11/14/2007 Claim #37 filed by HB PARKCO CONSTRUCTION, INC., Amount claimed: $31801483.50

(ZIRZOW, MATTHEW )
Details 37-2 11/15/2007 Amended Claim #37 filed by HB PARKCO CONSTRUCTION, INC., Amount claimed: $31801483.50 (ZIRZOW, MATTHEW )

*Description:*
*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3121834)<br>REGIONAL STEEL CORPORATION<br>C/O MATTHEW C. ZIRZOW<br>GORDON & SILVER<br>3960 HOWARD HUGHES PKWY., 9TH FLOOR<br>LAS VEGAS, NV 89169 | **Claim No: 38**<br>*Original Filed Date:* 11/14/2007<br>*Original Entered Date:* 11/14/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* MATTHEW C. ZIRZOW<br>*Modified:* |

Amount claimed: $2925381.23
Secured claimed: $2925381.23

*History:*
Details 38-1 11/14/2007 Claim #38 filed by REGIONAL STEEL CORPORATION, Amount claimed: $2925381.23 (ZIRZOW, MATTHEW )

*Description:*
*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3182401)<br>DK IV LIMITED PARTNERSHIP<br>JOHN & JENNIFER KILPATRICK<br>c/o DONNA M. OSBORN, ESQ.<br>MARQUIS & AURBACH<br>10001 Park Run Drive<br>Las Vegas, Nevada 89145 | **Claim No: 39**<br>*Original Filed Date:* 11/16/2007<br>*Original Entered Date:* 11/16/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* DONNA M. OSBORN<br>*Modified:* |

Amount claimed: $154939.34
Priority claimed: $154939.34

*History:*
Details 39-1 11/16/2007 Claim #39 filed by DK IV LIMITED PARTNERSHIP, Amount claimed: $154939.34 (OSBORN, DONNA )

*Description:* (39-1) DEPOSITS FOR PURCHASE OF CONDO UNIT
*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3074657)<br>Real Equity Pursuit, LLC<br>26895 Aliso Creek Rd., #B573<br>Aliso Viejo, CA 92656 | **Claim No: 40**<br>*Original Filed Date:* 12/18/2007<br>*Original Entered Date:* 12/18/2007 | *Status:*<br>*Filed by:* CR<br>*Entered by:* MICHAEL F LYNCH<br>*Modified:* |

Amount claimed: $502500.00
Secured claimed: $502500.00

*History:*
Details 40-1 12/18/2007 Claim #40 filed by Real Equity Pursuit, LLC, Amount claimed: $502500.00 (LYNCH, MICHAEL )

*Description:*
*Remarks:*

*Creditor:* (2986789)
BUILDING CONSENSUS, INC.
c/o Laurel E. Davis, Esq.
Fennemore Craig, P.C.
300 South Fourth Street, Suite 1400
Las Vegas, NV 89101

**Claim No: 41**
*Original Filed Date:* 12/18/2007
*Original Entered Date:* 12/18/2007

*Status:*
*Filed by:* CR
*Entered by:* LAUREL E. DAVIS
*Modified:*

Amount claimed: $3636909.48

Secured claimed: $3636909.48

*History:*

Details 41-1 12/18/2007 Claim #41 filed by BUILDING CONSENSUS, INC., Amount claimed: $3636909.48 (DAVIS, LAUREL )

*Description:*

*Remarks:*

*Creditor:* (3074648)
OneCap Mortgage
5440 W. Sahara Ave., 3rd Fl
Las Vegas, NV 89146

**Claim No: 42**
*Original Filed Date:* 12/27/2007
*Original Entered Date:* 12/27/2007

*Status:*
*Filed by:* CR
*Entered by:* JEFFREY R. SYLVESTER
*Modified:*

| | | |
|---|---|---|
| Amount | claimed: | $24574973.00 |
| Secured | claimed: | $24574973.00 |
| Priority | claimed: | $0.00 |
| Unknown | claimed: | $0.00 |
| Unsecured | claimed: | $0.00 |

*History:*

Details 42-1 12/27/2007 Claim #42 filed by OneCap Mortgage, Amount claimed: $24574973.00 (SYLVESTER, JEFFREY )

*Description:* (42-1) Real Estate Secured Loan

*Remarks:*

*Creditor:* (3074648)
OneCap Mortgage
5440 W. Sahara Ave., 3rd Fl
Las Vegas, NV 89146

**Claim No: 43**
*Original Filed Date:* 12/27/2007
*Original Entered Date:* 12/27/2007

*Status:*
*Filed by:* CR
*Entered by:* JEFFREY R. SYLVESTER
*Modified:*

| | | |
|---|---|---|
| Amount | claimed: | $7934730.00 |
| Secured | claimed: | $7934730.00 |
| Priority | claimed: | $0.00 |
| Unknown | claimed: | $0.00 |
| Unsecured | claimed: | $0.00 |

*History:*

Details 43-1 12/27/2007 Claim #43 filed by OneCap Mortgage, Amount claimed: $7934730.00 (SYLVESTER, JEFFREY )

*Description:* (43-1) Real Estate Secured Loan

*Remarks:*

*Creditor:* (3074648)
OneCap Mortgage
5440 W. Sahara Ave., 3rd Fl
Las Vegas, NV 89146

**Claim No: 44**
*Original Filed Date:* 12/27/2007
*Original Entered Date:* 12/27/2007

*Status:*
*Filed by:* CR
*Entered by:* JEFFREY R. SYLVESTER
*Modified:*

| | |
|---|---|
| Amount claimed: | $10913405.00 |
| Secured claimed: | $10913405.00 |
| Priority claimed: | $0.00 |
| Unknown claimed: | $0.00 |
| Unsecured claimed: | $0.00 |

*History:*
Details 44-1 12/27/2007 Claim #44 filed by OneCap Mortgage, Amount claimed: $10913405.00 (SYLVESTER, JEFFREY )

*Description:* (44-1) Real Estate Secured Loan
*Remarks:*

*Creditor:* (3246018)
CLARK COUNTY ASSESSOR
C/O M.W. SCHOFIELD
500 S. GRAND CENTRAL PKWY
LAS VEGAS, NV 89155

**Claim No: 45**
*Original Filed Date:* 01/09/2008
*Original Entered Date:* 01/10/2008

*Status:*
*Filed by:* CR
*Entered by:* SL Hooks
*Modified:*

| | |
|---|---|
| Amount claimed: | $2259.91 |
| Unknown claimed: | $2259.91 |

*History:*
Details 45-1 01/09/2008 Claim #45 filed by CLARK COUNTY ASSESSOR, Amount claimed: $2259.91 (Hooks, SL )

*Description:*
*Remarks:*

*Creditor:* (3276798)
CLIFFORD AND CARMENCHITA TEJADA
C/O DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NV 89145

**Claim No: 46**
*Original Filed Date:* 02/04/2008
*Original Entered Date:* 02/04/2008

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

| | |
|---|---|
| Amount claimed: | $21552.00 |
| Priority claimed: | $21552.00 |

*History:*
Details 46-1 02/04/2008 Claim #46 filed by CLIFFORD AND CARMENCHITA TEJADA, Amount claimed: $21552.00 (OSBORN, DONNA )

*Description:* (46-1) CONDO UNIT PURCHASE DEPOSIT
*Remarks:*

*Creditor:* (3276831)
LISA WESTFIELD
C/O DONNA M. OSBORN, ESQ.

**Claim No: 47**
*Original Filed Date:* 02/04/2008

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN

MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NV 89145

*Original Entered Date:* 02/04/2008

*Modified:*

Amount claimed: $32546.38

Priority claimed: $32546.38

*History:*

Details 47-1 02/04/2008 Claim #47 filed by LISA WESTFIELD, Amount claimed: $32546.38 (OSBORN, DONNA )

*Description:* (47-1) DEPOSIT FOR PURCHASE OF CONDO

*Remarks:*

*Creditor:* (3320000)
NEVADA BROWN, LLC
C/O DONNA M. OSBORN, ESQ.
MARQUIS & AURBACH
10001 PARK RUN DRIVE
LAS VEGAS, NV 89145

**Claim No: 48**
*Original Filed Date:* 02/25/2008
*Original Entered Date:* 02/25/2008

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:* 02/27/2008

Amount claimed: $253130.88

Priority claimed: $253130.88

*History:*

Details 48-1 02/25/2008 Claim #48 filed by NEVADA BROWN, LLC, Amount claimed: $253130.88 (OSBORN, DONNA )

*Description:* (48-1) DEPOSITS FOR PURCHASE OF CONDO UNIT

*Remarks:* (48-1) This claim amends #12 which is under the name of Melva Brown (02/27/08 jmg)

*Creditor:* (3416070)
PAC VAN LEASING & SALES
c/o RUBIN & LEVIN, P.C.
500 Marott Center
342 Massachusetts Ave.
Indianapolis, IN 46204-2161

**Claim No: 49**
*Original Filed Date:* 04/22/2008
*Original Entered Date:* 04/22/2008

*Status:*
*Filed by:* CR
*Entered by:* RUBIN & LEVIN, P.C. (ec)
*Modified:*

Amount claimed: $16052.63

Unsecured claimed: $16052.63

*History:*

Details 49-1 04/22/2008 Claim #49 filed by PAC VAN LEASING & SALES, Amount claimed: $16052.63 (RUBIN & LEVIN, P.C. (ec))

*Description:*

*Remarks:*

*Creditor:* (3552320)
DESIGN SPACE MODULAR
BUILDINGS, INC.
711 MALL RING CIRCLE, SUITE 104
HENDERSON, NV 89014

**Claim No: 50**
*Original Filed Date:* 06/30/2008
*Original Entered Date:* 07/01/2008

*Status:*
*Filed by:* CR
*Entered by:* SL Hooks
*Modified:*

Amount claimed: $6397.15

Unsecured claimed: $6397.15

*History:*

Details 50-1 06/30/2008 Claim #50 filed by DESIGN SPACE MODULAR, Amount claimed: $6397.15 (Hooks, SL )

*Description:*
*Remarks:*

*Creditor:* (3704812)
Construction Protective Services
c/o Becky A. Pintar, Esq.
Gibbs, Giden, Locher, Turner & Senet LLP
3993 Howard Hughes Parkway, Suite 530
Las Vegas, NV 89169

**Claim No: 51**
*Original Filed Date:* 08/26/2008
*Original Entered Date:* 08/26/2008

*Status:*
*Filed by:* CR
*Entered by:* BECKY A PINTAR
*Modified:*

Amount claimed: $7079.84
Unsecured claimed: $7079.84

*History:*
Details 51-1 08/26/2008 Claim #51 filed by Construction Protective Services, Amount claimed: $7079.84 (PINTAR, BECKY )

*Description:*
*Remarks:*

*Creditor:* (3753050)
PHILLIP AND KATHERINE STROMER
MARQUIS & AURBACH
C/O DONNA OSBORN, ESQ.
10001 PARK RUN DRIVE
LAS VEGAS, NV 89145

**Claim No: 52**
*Original Filed Date:* 09/18/2008
*Original Entered Date:* 09/18/2008

*Status:*
*Filed by:* AT
*Entered by:* DONNA M. OSBORN
*Modified:*

Amount claimed: $182425.00
Priority claimed: $2425.00
Unsecured claimed: $180000.00

*History:*
Details 52-1 09/18/2008 Claim #52 filed by PHILLIP AND KATHERINE STROMER, Amount claimed: $182425.00 (OSBORN, DONNA )

*Description:* (52-1) DEPOSITS FOR PURCHASE OF CONDO UNIT
*Remarks:* (52-1) AMENDING CLAIM #32

*Creditor:* (3074657)
Real Equity Pursuit, LLC
26895 Aliso Creek Rd., #B573
Aliso Viejo, CA 92656

**Claim No: 53**
*Original Filed Date:* 10/01/2008
*Original Entered Date:* 10/02/2008

*Status:*
*Filed by:* CR
*Entered by:* SL Hooks
*Modified:*

Amount claimed: $500000.00
Unsecured claimed: $500000.00

*History:*
Details 53-1 10/01/2008 Claim #53 filed by Real Equity Pursuit, LLC, Amount claimed: $500000.00 (Hooks, SL )

*Description:*
*Remarks:*

*Creditor:* (3074657)
Real Equity Pursuit, LLC
26895 Aliso Creek Rd., #B573
Aliso Viejo, CA 92656

**Claim No: 54**
*Original Filed Date:* 10/02/2008
*Original Entered*

*Status:*
*Filed by:* CR
*Entered by:* SL Hooks
*Modified:*

*Date:* 10/06/2008

Amount claimed: $500000.00

Unsecured claimed: $500000.00

*History:*

Details 54-1 10/02/2008 Claim #54 filed by Real Equity Pursuit, LLC, Amount claimed: $500000.00 (Hooks, SL )

*Description:*

*Remarks:*

| | | |
|---|---|---|
| *Creditor:* (3970469)<br>OTIS ELEVATOR COMPANY<br>ATTN: TREASURY SERVICES - J. PARENT 3RD<br>1 FARM SPRINGS<br>FARMINGTON, CT 06032 | **Claim No: 55**<br>*Original Filed Date:* 01/05/2009<br>*Original Entered Date:* 01/06/2009 | *Status:*<br>*Filed by:* CR<br>*Entered by:* GA Buchanan<br>*Modified:* |

Amount claimed: $22480.17

Unsecured claimed: $22480.17

*History:*

Details 55-1 01/05/2009 Claim #55 filed by OTIS ELEVATOR COMPANY, Amount claimed: $22480.17 (Buchanan, GA )

*Description:*

*Remarks:*

## Claims Register Summary

**Case Name:** TOWER HOMES, LLC
**Case Number:** 07-13208-bam
**Chapter:** 11
**Date Filed:** 05/31/2007
**Total Number Of Claims:** 55

| | |
|---|---|
| **Total Amount Claimed*** | $94171326.45 |
| **Total Amount Allowed*** | |

*Includes general unsecured claims

**The values are reflective of the data entered. Always refer to claim documents for actual amounts.**

| | Claimed | Allowed |
|---|---|---|
| **Secured** | $88855247.02 | |
| **Priority** | $3406997.54 | |
| **Administrative** | | |

| PACER Service Center |
|---|
| Transaction Receipt |

| 09/13/2012 09:16:16 | | | |
|---|---|---|---|
| **PACER Login:** | nw0187 | **Client Code:** | |
| **Description:** | Claims Register | **Search Criteria:** | 07-13208-bam Filed or Entered From: 5/31/2007 Filed or Entered To: 9/13/2012 |
| **Billable Pages:** | 6 | **Cost:** | 0.60 |

# EXHIBIT "I"

Entered on Docket
August 21, 2007

Hon. Bruce A. Markell
United States Bankruptcy Judge

GORDON & SILVER, LTD.
WILLIAM M. NOALL, ESQ.
Nevada Bar No. 3549
E-mail: wmn@gordonsilver.com
MATTHEW C. ZIRZOW, ESQ.
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Telephone (702) 796-5555
Facsimile (702) 369-2666
Attorneys for Petitioning Creditors HBParkco Construction, Inc.,
Regional Steel Corporation and Nevada Ready Mix Corporation

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

| | |
|---|---|
| In re:<br><br>TOWER HOMES, LLC,<br>a Nevada limited liability company,<br><br>Debtor. | Case No.: BK-S-07-13208-BAM<br>Chapter 11<br><br>**ORDER FOR RELIEF UNDER CHAPTER 11**<br><br>Date: August 15, 2007<br>Time: 10:30 a.m. |

A status hearing in this involuntary bankruptcy case took place on August 15, 2007 at 10:30 a.m. William M. Noall, Esq., of the law firm of Gordon & Silver, Ltd., appeared on behalf of HBParkco Construction, Inc., Regional Steel Corporation, and Nevada Ready Mix Corporation (collectively, "Petitioning Creditors"). Laurel E. Davis, Esq., of the law firm of Fennemore Craig, PC appeared on behalf of WPH Architecture, Inc., Building Consensus, Inc., Harly Ellis Devereaux, Helix Electric of Nevada, Ledcor Construction, Inc., and Atlas Mechanical, Inc., and William L. McGimsey, Esq., appeared on behalf of Tower Homes, LLC ("Debtor"). Other counsel's appearances are reflected in the Court's record of the hearing. The

Creditors' Motion For Summary Judgment Re: Involuntary Petition (Dkt. No. 32) set to be argued at the same time and date as today's status conference. However, on August 13, 2007, Debtor filed a Consent to Order for Relief as a Chapter 11 Debtor-in-Possession (Dkt. No. 50). Therefore, the Motion For Summary Judgment is moot. Based upon the foregoing, and good cause appearing;

IT IS HEREBY ORDERED, ADJUDGED and DECREED as follows:

1. This Order constitutes an "Order for Relief" against Debtor under Section 303(h), Chapter 11, Title 11, United States Code.

2. The date of the filing of the petition and the commencement of this case is May 31, 2007.

3. A status conference in this case shall be held on September 13, 2007 at 10:30 a.m.

4. The pretrial conference scheduled pursuant to Rule 7016 of the Federal Rules of Bankruptcy Procedure, trial on the involuntary petition and other deadlines set forth in this Court's Order Regarding Status Conference, Pretrial and Trial Matters entered July 16, 2007 (Dkt. Nos. 41 and 42) are vacated.

PREPARED AND SUBMITTED BY:

GORDON & SILVER, LTD.

By: 
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TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

| | | |
|---|---|---|
| TOWER HOMES LLC, | ) | |
| | ) | CASE NO. A663341 |
| Plaintiff, | ) | DEPT NO. XXVI |
| vs. | ) | |
| | ) | |
| WILLIAM HEATON, | ) | |
| | ) | |
| Defendant. | ) | **TRANSCRIPT OF** |
| | ) | **PROCEEDINGS** |

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

**DEFENDANT'S MOTION TO DISMISS OR ALTERNATIVELY MOTION FOR SUMMARY JUDGMENT**

WEDNESDAY, OCTOBER 3, 2012

APPEARANCES:

For the Plaintiff: DENNIS M. PRINCE, ESQ.

For the Defendant: JEFFREY D. OLSTER, ESQ.

RECORDED BY ROSALYN NAVARA, COURT RECORDER
TRANSCRIBED BY: KARR Reporting, Inc.

**LAS VEGAS, NEVADA, WEDNESDAY, OCTOBER 3, 2012, 9:00 A.M.**

* * * * *

THE COURT: Tower Homes.

MR. PRINCE: Your Honor, good morning. Dennis Prince for the plaintiff, Tower Homes.

MR. OLSTER: Good morning, Your Honor. Jeffrey Olster on behalf of defendants. I have James Walton and Will Heaton from the firm at counsel table as well.

THE COURT: Okay. This is the defendant's motion to dismiss or the alternative for summary judgment.

MR. OLSTER: Thank you, Your Honor. This case is much clearer.

THE COURT: These people have a budget. Just kidding.

MR. OLSTER: This action arises out of a failed condominium development. Plaintiff Tower Homes was the developer. Defendants -- or I should say Defendant Nitz, Walton & Heaton was a law firm retained to do transactional work in connection with the development, for example to prepare the purchase contracts. It was transactional work. There's no dispute about that, about the nature of the work that Nitz, Walton & Heaton did for Tower Homes.

When the development went south, the purchasers wanted their earnest money deposits back, understandably so. They weren't there. Rodney Yanke, the sole principal and owner of Tower Homes, had put the money to other uses against the counsel and advice of Nitz, Walton & Heaton. It's on the merits. It's not an issue before you today. That's our position. We don't need to resolve that today.

The money was gone, so the purchasers sue Mr. Yanke, Tower Homes and others for a variety of reasons, not the least of which was to get the money they had paid back. Shortly after the underlying lawsuit was filed, Tower Homes was forced into Chapter 11 bankruptcy proceedings by several of its creditors. I believe it was the subcontractors. Thereafter all property of Tower Homes, as a matter of federal law, becomes property of the bankruptcy estate. This is not disputed. You're nodding your agreement. I won't belabor the point.

Now, on this motion, I think it's first and foremost important to understand that there are no disputes of fact. Now, there are of course disputes as to the legal effect of facts. That's what we're arguing about. But there's nothing to discover. Tower Homes doesn't request further discovery. There's no Rule 56(f) affidavit or anything to that effect. There's nothing to discover here.

There are -- the issues before you today are pure issues of law. Does the bankruptcy court -- did the bankruptcy court authorize this action as it's required to do under federal law is Issue No. 1. And Issue No. 2, is even if

Tower Homes hypothetically could under federal law bring this action in its own name, is it barred by the statute of limitations and the clear authority of the Nevada Supreme Court.

On Issue 1, the bankruptcy issue, I'll try to summarize the points as best as possible. Please interrupt me if you have any questions. The proffered basis and authority for this action is what was referred to in the papers and attached as Exhibit C to the motion is the Marquis-Aurbach order.

There's one single order in the bankruptcy record that authorizes anyone to file any lawsuits. The plan itself, the plan approval itself, which is also attached in the papers, says the trustee retains all actions at law and equity subject to state statute of limitations, so on and so forth.

A couple years later the parties, meaning the purchasers who were claimants in the bankruptcy proceedings and the trustee, carve out an exception to this general rule that the bankruptcy estate controls all actions, and the Marquis-Aurbach order arises. What the Marquis-Aurbach order does is authorize the Tower Homes purchasers to bring actions which may belong to it and may belong to the estate, but there are grievances against certain people.

So the Tower Homes purchasers can bring actions that may belong in part to Tower Homes against certain enumerated individuals, including Mr. Yanke and including several other individuals and entities who are not part of this case. They were various brokers and parties associated with the development. But there are specifically named parties who could be sued, and the only additional language is parties later identified through discovery.

THE COURT: Now, at no time was it ever identified that Tower itself had basically this claim that's here before us today, and that this was being retained by the trustee or specifically not being retained by the trustee?

MR. OLSTER: Correct. That's correct. There's no express mention of this lawsuit or any hypothetical lawsuit, legal malpractice lawsuit that Tower Homes could bring at some point in time. To my knowledge, there's no -- there's no express mention of it one way or another in the bankruptcy record. I don't believe Tower has cited any either. And that's a good question, because the question becomes well, then what?

Well, then we default to federal law and the plan, which both establish beyond any dispute -- legal dispute that this cause of action, this intangible property belongs to the estate through the control of the trustee. So --

THE COURT: And the trustee would -- if there was going to be an action pursued on behalf of Tower, the trustee would have to consider -- there would have to be some sort of bankruptcy court approval saying we're appointing counsel to go and pursue this action on behalf of Tower. Because any recovery would go back to the bankruptcy estate and would be distributed to the claimants.

MR. OLSTER: Precisely. There were two options. One, the trustee could bring the action himself in his own name on behalf of the bankruptcy estate, or two, he could present the bankruptcy court with an order similar, in similar substance and intent to the Marquis-Aurbach order specifying Tower Homes has a legal malpractice claim, I've looked at this, I think it's in the best interest of the estate to bring this claim.

THE COURT: Or they could say, we don't think there's any merit, but if you want to take your chance, go fight it, God bless. I'm giving up my --

MR. OLSTER: Fair enough.

THE COURT: -- my claim to it.

MR. OLSTER: Fair enough. But the salient point is correct. There has to be trustee consent and bankruptcy court approval, period.

So again, we get back to the Marquis-Aurbach order, which is the only proffered authority under federal law through the bankruptcy court for this action. It doesn't authorize a legal malpractice action. It doesn't authorize suit against Mr. Heaton or Nitz, Walton & Heaton. Mr. Walton, Mr. Heaton and the firm are not parties later identified through discovery.

You're looking. I'll wait.

THE COURT: I got to get something up here. I wanted to look at this case on my computer. This is a really slow computer. Okay. Go ahead, Counsel.

MR. OLSTER: And Mr. Prince, with all due respect, he's been doing this a long time in this town and he's a great attorney, but he's not Marquis and Aurbach. And Marquis and Aurbach is the firm that's authorized to bring this action, and that was done for a reason.

I mean, Marquis and Aurbach represented the Tower Homes purchasers. It wasn't as if the trustee drew the name of that law firm out of the hat. There were specific negotiated coordinated reasons why that happened. That was what was presented to the bankruptcy court and that's why that firm was chosen.

In their opposition, Tower bends over backwards to try to convince you that the Marquis-Aurbach order says something other than what it says. The language is clear, unambiguous. It's not reasonably susceptible to differing interpretations. It simply does not authorize Tower to bring a lawsuit on its own behalf against this law firm under any theory, and it doesn't authorize Mr. Prince to bring this action.

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

Electronically Filed
Dec 11 2012 11:51 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**PETITIONERS' APPENDIX (VOLUME III OF III)**

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| **VOLUME III of III** | | |
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| Transcript of Proceedings | 10/3/2012 | 467 |
| Notice of Entry of Order Regarding Motion to Dismiss, or, Alternatively, Motion for Summary Judgment | 11/2/2012 | 527 |

## 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 **PETITIONERS' APPENDIX (VOLUME III OF III)** 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*

Dennis Prince
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3230 South Buffalo Drive
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*Attorneys for Plaintiff/Real Party Tower Homes, LLC*

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