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.

CASE NO.: 62252

REAL PARTY IN INTEREST TOWER HOMES, LLC'S ANSWERING BRIEF

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a Petition for Writ of Mandamus arising from the District Court's Order denying Defendants William Heaton ("Heaton"), and the law firm of Nitz, Walton & Heaton, Ltd.'s ("NWH") (collectively referred to as "Defendants") Motion to Dismiss or in the alternative, Motion for Summary Judgment ("Motion for Summary Judgment") on Plaintiff Tower Homes, LLC's ("Tower") claims against Defendants. See Pet.'s App. at 531-533.

On June 12, 2012, Tower filed a legal malpractice action against Defendants. See Pet.'s App. at 2-8. The Complaint stems from Defendants' failure to properly provide legal services to Tower in the drafting of Purchase Contracts for the sale of condominium units in compliance with Nevada law which resulted in conversion of millions of dollars in numerous individual purchasers' earnest deposit monies. Id.

The issue before this Court is whether NRS 11.207(1) bars Tower's present legal malpractice lawsuit against Defendants. Specifically, this Court will be asked to address the meaning of the phrase "cause of action" as defined in the two year prong of NRS 11.207(1) to determine when the statute of limitation begins to run.

In denying Defendants' Motion for Summary Judgment, the District Court ruled that pursuant to NRS 11.207(1), the statute of limitation commences when a plaintiff sustains the damages necessary to constitute the cause of action of legal

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malpractice. In this regard, the District Court held that the Bankruptcy Trustee, who had the sole right to pursue any and all claims against any third party on behalf of Tower, did not discover and reasonably could not have discovered the existence of damages necessary to constitute the cause of action for legal malpractice against Defendants until the underlying litigation resolved on July 5, 2011. See Pet.'s App. at 517:20-518:9; 520:2-15. Thus, the Court ruled that because Tower filed this action on June 12, 2012, within the 2 year statute of limitations prong of NRS 11.207(1), this action is not barred by the statute of limitations. See Pet.'s App. at 532.

For the reasons below, the District Court's ruling was correct and in compliance with NRS 11.207(1); Gonzales v. Stewart Title of Northern Nevada, 111 Nev. 1350, 905 P.2d 176 (1995); and Kopicko v. Young, 114 Nev. 1333, 971 P.2d 789 (1998). Thus, this Court should deny the Petition for Writ of Mandamus.

II. STATEMENT OF RELEVANT FACTS

A. Yanke Retains Defendants to Provide Legal Services Necessary to Form Tower and Construct a Condominium Project.

Rodney Yanke ("Yanke") is a licensed contractor in the State of Nevada who invested and developed real property in and around Clark County, Nevada. Pet.'s App. at 198:15-24. On or about April 3, 2004, Yanke retained Defendants to provide legal services necessary to form Tower Homes, LLC ("Tower"). Id. Yanke

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is the managing member of Tower. The purpose of forming Tower was to establish a company that would construct and sell a residential condominium project known as the Spanish View Towers Project (hereinafter referred to as the "Project"). See Pet.'s App. at 199:15-22.

As part of Defendants' representation of Tower, Defendants drafted Purchase Contracts for the sale of the individual condominium units. Defendants were also obligated to properly advise Tower of all applicable legal requirements concerning the sale of the individual units, including the applicability of Chapter 116 of the Nevada Revised Statutes concerning the safeguarding of earnest money deposit. Pet.'s App. at 199:15-22.

B. The Project Fails Due to Insufficient Funding Resulting in Loss of Earnest Money Deposits.

Tower marketed the individual units for sale to members of the public prior to the completion of construction. Pet.'s App. at 198:28-199:2. Tower entered into written Purchase Contracts with numerous individual buyers (collectively referred to as the "Tower Homes Purchasers"). Id. Each purchaser gave Tower a significant earnest money deposit in order to reserve their purchase of the individual condominium unit pending completion of construction. Id. The Project was to be completed within two years of the date of the Purchase Contract. Id.

Unfortunately, due to the deteriorating real estate and credit markets, Tower was unable to obtain additional financing to complete the Project. See Pet.'s App. at

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333:6-13. Because of insufficient financing, only minimal work had been performed on the project. Pet.'s App. at 332:15-17. Consequently, the Project failed. The Tower Homes Purchasers lost all of their earnest money deposits totaling more than $3,000,000.00 because the earnest money deposits were not protected as required by NRS 116.411. Pet.'s App. at 332:19-28. As a result of the Project's failure, there were over twenty five million dollars in mechanic's lien filed for the work on the Project. Id.

C. The Underlying Litigation

On or about May 23, 2007, certain Tower Homes Purchasers filed a Complaint in the Eighth Judicial District Court, in Gaynor, et. al v. Tower Homes, LLC, et al., Case No. A541668 against Tower; Yanke; along with real estate professionals who participated in marketing the Project for sale including Prudential Real Estates Affiliates, Inc.; Americana, LLC; Mark L. Stark; Jeanine Cutter; and David Berg seeking the return of their earnest money deposits. See Pet.'s App. at 256. The May 23, 2007 Complaint alleged that the Tower Homes Purchasers entered into Purchase Contracts with Tower to purchase units of the Project that were expected to be completed on or before July 2007 (See Pet.'s App. at 259 ¶19); that the Tower Homes Purchases gave their earnest money deposit to Tower to reserve their purchase of units in the Project (Pet.'s App. at 260 ¶26); that because there is no longer financing available for the completion of the project, Tower will not be

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able to meet the completion date for the Project (Id. ¶s 30, 31); and that Tower refused to return the earnest deposit money back to the Tower Homes Purchasers (Pet.'s App. at 261 ¶37). Notably, nothing in the Complaint alleged any wrong doing by NWH, any malpractice by NWH, or any alleged violation of Chapter 116 of the Nevada Revised Statutes. At that time, the legal malpractice was unknown.

D. The Bankruptcy Proceeding

Tower never appeared in or defended the underlying lawsuit because eight days later, on May 31, 2007, various creditors and lien holders filed an involuntary bankruptcy proceeding against Tower in the United States Bankruptcy Court, District of Nevada pursuant to Chapter 11 of the United States Bankruptcy Code in order to stay foreclosure of the property. See Pet.'s App. at 333:6-13. Among Tower's creditors were the individual Tower Homes Purchasers. The Tower Homes Purchasers collectively filed Proofs of Claims totaling $3,560,000.00. There was no timely objection to the amount of the Tower Purchasers Proofs of Claims. These claims were now valid, liquidated unsecured claims against the Tower Bankruptcy Estate. William A. Leonard, Jr. is the post-confirmation Chapter 11 Trustee of the Tower bankruptcy estate. Pet.'s App. at 323:1-3 On December 8, 2008, the Bankruptcy Court entered an "Order Approving Disclosure Statement and Confirming Plan of Reorganization." Pet.'s App. at 306-403. Pursuant to the Order, "the Trustee and the Debtor's (Tower's) bankruptcy estate shall retain all Claims or

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Causes of Action that they have or hold against any party . . . whether arising pre-or post-petition, subject to the applicable state law statutes of limitation and related decision law, whether sounding in tort, contract or other theory or doctrine of law or equity." See Pet.'s App. at 311 ¶15. Simply put, the Trustee and the Estate retained all claims that Tower had against any parties and the Trustee and the Estate have the right to assert any future potential causes of action including any future claims for legal malpractice. This was to protect and satisfy creditor's claims against the Estate.

During the bankruptcy proceeding, on June 3, 2010, the Bankruptcy Court entered an "Order Granting Motion to Approve Stipulation to Release Claims and Allow Marquis & Aurbach, as Counsel for the Tower Homes Purchasers, To Pursue Claims on Behalf of Debtor" (herein after referred to as the "Marquis Aurbach Order" attached hereto as Pet.'s App. at 405-410). Pursuant to the Marquis Aurbach Order, the Trustee, the law firm Marquis Aurbach Coffing, as well as the Tower Homes Purchasers stipulated to release and assign certain claims of the debtor (Tower) and to allow Marquis Aurbach Coffing, as counsel for the Tower Homes Purchasers, to pursue claims on behalf of the debtor for the benefit of the Tower Homes Purchasers. Pet.'s App. at 409 ¶s 3,4,5. In particular, pursuant to the Marquis Aurbach Order, Marquis Aurbach Coffing and the Trustee signed and agreed to allow Marquis Aurbach Coffing, as counsel for the Tower Purchasers to pursue any and all claims on behalf of the debtor against any individual or entity who may have

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any liability owed to the debtor or others for the loss of the earnest money deposits provided by the purchasers of the units at Spanish View and the Project. Pet.'s App. at 409 ¶ 3. The scope of the Maquis Aurbach Order includes any potential claim for legal malpractice.

E. The Settlement of the Underlying Litigation

The trial in Gaynor, et. al v. Tower Homes, LLC, et. al was scheduled to commence on May 9, 2011. 413:22. In advance of the trial, a settlement agreement was reached between the Tower Home Purchasers and Yanke, individually. Pet.'s App. at 412-417. On or about May 2, 2011, a Stipulation to Entry of Order Granting Judgment Against Rodney C. Yanke and Dismissing Claims Against Rodney C. Yanke was entered in Case No. A541668. Id. As part of the Tower Homes Purchasers' settlement with Yanke, the parties stipulated that the total sum of $1,000,000.00 would be entered in favor of the Tower Homes Purchasers. Pet.'s App. at 414-415. Despite the settlement, Yanke has not paid any amount of the $1,000,000.00 judgment against him.

After reaching an agreement with Yanke, the Tower Homes Purchasers settled with the real estate professionals. Pet.'s App. at 420-422. As part of Tower Homes Purchasers' settlement with Mark L. Stark, Jeannine Cutter, and David Berg, all parties agreed that claims asserted against Mark L. Stark, Jeannine Cutter, and David Berg be dismissed with Prejudice and each party to bear their own attorneys'

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fees and costs. Pet. App. at 421. Mark L. Stark, Jeannine Cutter, and David Berg only partially paid the amount owed to the Tower Homes Purchasers.

F. Defendants' Duties to Tower

Defendants were obligated to properly advise Tower of all applicable legal requirements concerning the sale of the individual units, including the applicability of Chapter 116 of the Nevada Revised Statutes. Defendants knew that the Purchase Contracts they drafted would be utilized by Tower for the sale of the individual units. Defendants also knew that each pre-construction purchaser would be required to put up a substantial earnest money deposit toward the purchase price of the individual unit.

Defendants knew that Tower had a legal obligation to each individual purchaser to properly safeguard the earnest money deposits from mismanagement, theft or unlawful use as required by NRS 116.411. However, despite Defendants' legal obligations, Defendants failed to properly advise Tower pursuant to NRS 116.411 that the earnest money deposits were required to be held by a third party and could only be released for very limited purposes as allowed by the statute. Based on the poor legal advice of Defendants, the earnest money deposits were not placed into an escrow account as required, and instead were converted to other uses by Tower and its manager, Yanke.

In addition, Defendants drafted the Purchase Contracts in specific

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contravention of the strict requirements of NRS 116.411 which is designed for the protection of purchasers of common interest units such as the Project. Based on the manner in which Defendants drafted the contracts, Tower was in violation of NRS 116.411. Defendants created the risk that the earnest money deposits would be used for unlawful purposes by Tower. Tower now faces more than $3,000,000.00 in liability to the Tower Homes Purchasers due to not properly safeguarding the deposits.

G. The Present Legal Malpractice Action and Defendants' Motion for Summary Judgment

On June 12, 2012, Tower filed this instant action against Defendants alleging claims for legal malpractice and breach of fiduciary duty. See Pet.'s App. at 2-8. On July 19, 2012, Defendants filed a Motion to Dismiss, or in the alternative, Motion for Summary Judgment ("Motion for Summary Judgment") Against Tower Homes' Complaint. Pet.'s App. at 10-195. In Defendants' Motion for Summary Judgment, Defendants argued that (1) Tower and the law firm of Prince & Keating do not have standing to pursue this cause of action based on federal law and the orders entered in the bankruptcy proceedings (See Pet.'s App. at 17-20); and (2) Tower's Complaint for legal malpractice is barred by the statute of limitation because the Complaint was filed well after the two year statute of limitation prong of NRS 11.207 and well beyond the four year statute of limitations prong of NRS 11.207 (See Pet.'s App. at 21-24).

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The hearing on Defendants' Motion for Summary Judgment was heard on October 3, 2012. Pet.'s App. at 468-525. With regard to Tower and Prince & Keating's standing, the Court ruled that it agreed with Defendants that "there was a procedural defect here in this is the trustee's cause of action." See Pet.'s App. at 518:12-18. However, the District Court ruled that it was not fatal and allowed Tower to "go back to the bankruptcy court to get that approval." Pet.'s App. at 519:1-8. The District Court ruled that the "Marquis Aurbach Order" does not authorize Tower to bring this action through the law firm of Prince & Keating against Defendants but that Tower may attempt to remedy this procedural defect by obtaining the requisite authority from Tower's bankruptcy Trustee and Order from the Bankruptcy Court. See Pet.'s App. at 532:10-15.

With regard to the statute of limitations, Defendants' argue that because this legal malpractice action against Defendants arises from the transactional malpractice context, the statute of limitations commences when a Plaintiff sustains damages. Pet.'s App. at 22-24. Defendants argued that under Gonzales, Tower sustains damages on May 23, 2007 when the Tower Homes Purchasers filed their underlying Complaint against Tower. Id. Alternatively, Defendants also argued that because Tower also received demand letters from Paul Connaghan, Esq.[1] on August 11, 2006 and on August 23, 2006, which explained in detail the reasons why the Purchase Contract violated NRS 116.411, Tower discovered the material facts

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which constitute the cause of action of malpractice against Defendants in as early as August 11, 2006 and thus, this current legal malpractice action is time barred. See Pet.'s App. at 21-22.

Tower argued that pursuant to NRS 11.207(1), Gonzalez, and Kopico, the statute of limitation begins to run when Tower discovered or should have discovered facts which constitute the cause of action of malpractice against Defendants when Tower sustained damages. However, because bankruptcy proceedings were initiated against Tower, all of Tower's potential claims against third parties including Tower's claim for legal malpractice against Defendants were retained by the Trustee. See Pet.'s App. at 491:13-493:10. Thus, whether or not Tower sustained damages which constitute the cause of action for legal malpractice against Defendants must be viewed from the perspective of the Trustee sitting in the Bankruptcy Court. See Pet.'s App. at 511:25-512:1. Tower argued that there was no way for the Trustee to discover or determine that Tower sustained the damages necessary to constitute the cause of action for legal malpractice against Defendants until after the conclusion of the underlying litigation on July 5, 2011. Pet.'s App. at 495:17-497:4. Thus, Tower argued that the statute of limitations commenced on July 5, 2011.

The District Court agreed with Tower and concluded that the statute of limitations commenced on July 5, 2011 when the underlying litigation was

[1] Paul Connaghan is the attorney for Robert and Anne Muller who are individual Tower Homes Purchasers.

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concluded and it was determined that Tower sustained damages. Pet.'s App. at 520:2-15.Thus, the District Court denied Defendants' Motion for Summary Judgment. Id.

H. The Amended Marquis Aurbach Order allowing Prince & Keating to Pursue all Claims On Behalf of the Debtor

Pursuant to the District Court's instruction to obtain an order from the Bankruptcy Court authorizing Prince & Keating and Tower to bring this action against Defendants for the benefit of the Tower Homes Purchasers, on April 2, 2013, Tower obtained an "Order Granting Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffin, as Counsel for the Tower Homes Purchasers, To Pursue Claims on Behalf of Debtor" from the Bankruptcy Court. See RPI 0001-3. According to said Order, the Bankruptcy Court "authorized the law firm of Marquis Aurbach Coffin, and/or Prince & Keating LLP, or successive counsel, retained on behalf of Tower Homes Purchasers to recover any and all earnest money deposits, damages, attorneys fees and costs, and interest thereon **on behalf of the Debtor** and the Tower Homes Purchasers and that any such recoveries shall be for the benefit of the Tower Homes Purchasers." See RPI 0002 (emphasis added).

Thus, any issue of whether Prince & Keating and Tower may pursue this action against Defendants on behalf of the Tower Homes Purchasers to obtain recovery for the benefit of the Tower Homes Purchasers is no longer in dispute.

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I. The Writ for Petition of Mandamus

Defendants now file this Petition for Writ of Mandamus, or in the alternative, for Writ of Prohibition requesting that this Court order the District Court to issue a ruling dismissing Tower's Complaint against Defendants on the grounds that Tower's Complaint is barred by the statute of limitations for legal malpractice as outlined in NRS 11.207(1).

However, as will be demonstrated below, the District Court properly analyzed NRS 11.207(1), and properly ruled that the statute of limitation did not run until July 5, 2011 when the underlying litigation concluded and it was determine that Tower sustained the damages necessary to constitute the cause of action for legal malpractice because the Tower Homes Purchasers' claims were not fully satisfied. Thus, the District Court correctly denied Defendants' Motion for Summary Judgment.

III. THE STANDARD OF REVIEW

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." International Game Tech. v. Dist. Ct., 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted). When an adequate and speedy legal remedy exists, however, writ relief is not available. Id. An appeal typically is an adequate and speedy legal remedy. Id. Even if an appeal does not constitute an adequate and speedy legal remedy in a particular case, this

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Court generally will not exercise discretion to consider petitions for extraordinary writ relief that challenge district court orders denying motions for summary judgment, unless: (1) no factual dispute exists and summary judgment is clearly required by a statute or rule or (2) an important issue of law requires clarification and judicial economy favors granting the petition. Id. at 197–98, 179 P.3d at 558–59.

Statutory interpretation is a question of law that this Court review de novo, even in the context of a writ petition." International Game Tech., 124 Nev. at 198, 179 P.3d at 559.

IV. LEGAL ARGUMENT

A. NRS 11.207 DOES NOT BAR TOWER'S LEGAL MALPRACTICE ACTION AGAINST DEFENDANTS

NRS 11.207(1)[2], provides as follows:

> 1. An action against an attorney or veterinarian to recover damages for malpractice, whether based on a breach of duty or contract, must be commenced within 4 years after the plaintiff **sustains damage** or within 2 years after the plaintiff discovers or through the use of

[2] The prior version of NRS 11.207(1) (subsequently amended in 1997), states as follows:

> No action against any ..., attorney ... to recover damages for malpractice, whether based on a breach of duty or contract, may be commenced more than 4 years after the plaintiff sustains damage **and** discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action.

The only substantive change to NRS 11.207(1) was the imposition of a two year discovery period from a four year discovery period. The statute still requires a client to have sustained damages.

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reasonable diligence should have discovered the material facts which constitute the **cause of action**, whichever occurs earlier.

NRS 11.207(1) (emphasis added).

As will be described below, the language NRS 11.207(1) is clear that a plaintiff must sustain damages whether the statute of limitations period is four years or two years because in order to constitute a "cause of action" for legal malpractice, there must be damages. Thus, NRS 11.207(1) requires that a plaintiff must sustained damages before the statute of limitations commences.

1) Under NRS 11.207(1), The Statute of Limitation Does Not Commence Until a Plaintiff Sustains Damages Because Damages Are a Necessary Element of the Cause of Action For Legal Malpractice.

While the language of the current NRS 11.207(1) states that the statute of limitations is four years commencing when "plaintiff sustains damage" or two years commencing when "plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever occurs earlier," in order to "constitute the cause of action" of legal malpractice, a plaintiff must sustain damages as damages are a necessary element of the cause of action for legal malpractice.

For a "cause of action" for legal malpractice to commence, a plaintiff must prove the following five elements: (1) an attorney-client relationship; (2) a duty owed to the client by the attorney to use such skill, prudence, and diligence as

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lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake; (3) a breach of that duty; (4) the breach being the proximate cause of the **client's damages**; and (5) **actual loss or damage resulting from the negligence**. Day v. Zubel, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996) (emphasis added).

Damages are a necessary element of the "cause of action" of legal malpractice. Every element of legal malpractice must be independently satisfied in order for a plaintiff to even legally assert a cause of action for legal malpractice. This includes the existence of damages. The mere fact that a client may be aware of the facts that a lawyer may have breached a duty of care is not, by itself, sufficient to trigger the running of the statute of limitations. As such, the phrase "plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action" necessarily means that a plaintiff must sustain damages in order to assert the cause of action for legal malpractice even with the shortened two year discovery period. Thus, the time period under NRS 11.207(1) does not even begin to run until a plaintiff sustains and is aware of the existence of damages.

Consistent with this interpretation, this Court has stated that,

> In Nevada, legal malpractice is premised upon an attorney-client relationship, a duty owed to the client by the attorney, breach of that duty, and the breach as proximate cause of **the client's damages**. Such an action does not accrue until the plaintiff knows, or should know, all

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> facts relevant to the foregoing elements and **damage has been sustained**. More specifically, **where damage has not been sustained or where it is too early to know whether damage has been sustained, a legal malpractice action is premature and should be dismissed**. *See also Boulder City v. Miles,* 85 Nev. 46, 49, 449 P.2d 1003, 1005 (1969) ("[N]o one has a claim against another without having incurred damages").

Semenza v. Nevada Medical Liability Ins. Co., 104 Nev. 666, 667-668, 765 P.2d 184, 185-186 (1988) (other internal citations omitted) (emphasis added).

This Court has also stated that in general, damage to the client for the purpose of a legal malpractice claim occurs at the time there is an adverse resolution of the underlying action that is the subject of the malpractice claim. Clark v. Robison, 113 Nev. 949, 944 P.2d 788, 789-90 (1997) (per curiam). The Ninth Circuit has also stated that with regards to the two year prong of NRS 11.207(1), damage to the client is one of the "material facts which constitute the cause of action." Kopit v. White, 131 Fed.Appx. 107, 109, 2005 WL 1127065 at *2 (9th Cir. 2005)[3].

Thus, the dispositive question in this case is when did Tower-the Debtor-sustain damages necessary to constitute the "cause of action" of legal malpractice against Defendants?

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a. Whether Tower sustained damages necessary to constitute the cause of action for legal malpractice against Defendants must be viewed from the perspective of the bankruptcy Trustee.

In this case, the statute of limitations analysis is unique because it is judged from the perspective of the Bankruptcy Trustee. As previously discussed, the underlying lawsuit was filed on May 23, 2007 by the Tower Homes Purchasers. Pet.'s App. at 256-267. Eight days later on May 31, 2007, various creditors and lien holders filed an involuntary bankruptcy proceeding against Tower in the United States Bankruptcy Court in the District of Nevada pursuant to Chapter 11 of the United States Bankruptcy Code. Pet.'s App. at 333. Due to the Bankruptcy proceedings, Tower never appeared and defended the underlying litigation.

The filing of a bankruptcy petition "'triggers an automatic stay of actions against the debtor, the creation of an estate and the appointment of a trustee.' " In re Doser, 412 F.3d 1056, 1062 (9th Cir. 2005); Pioneer Const., Inc. v. Global Inv. Corp., 202 Cal.App.4th 161, 167 (2011) ["filing of a bankruptcy petition operates as an automatic stay of the commencement or continuation of any action against a bankrupt debtor or against the property of a bankruptcy estate"].) The purpose of the stay is to provide debtors with "'breathing room' " to reorganize and to "'prevent[ ] creditors from racing to the courthouse in an attempt to drain the debtor's assets.'" In re LPM Corp, 300 F.d 1134, 1137 (9th Cir.2002). The stay "serves as one of the

[3] While Kopit v. White is an unpublished decision, it interprets the current version of NRS 11.207(1) and is

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most important protections in bankruptcy law," and the scope of protection is broad. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1214 (9th Cir. 2002). The stay remains in effect with respect to property of the estate "until such property is no longer property of the estate." See In re Spirtos 221 F.3d 1079, 1081(9th Cir.2000). However, an automatic bankruptcy stay does not prevent a debtor from bringing or continuing a lawsuit as a plaintiff. (See In re Merrick 175 B.R. 333, 337 (Bankr. 9th Cir.1994) ["automatic stay is inapplicable to suits *by* the bankrupt"].)

However, the claims for legal malpractice and breach of fiduciary duty are property of the Debtor's bankruptcy estate. In re Mannie, 299 B.R. 603, 607 (Bkrtcy. N.D. Cal. 2003). If a debtor files and prosecutes his state court action for legal malpractice, the Debtor violated the automatic stay by exercising control over property of the estate. Id.

Here, once Bankruptcy proceedings were initiated against Tower, all actions against Tower were stayed. In addition, all of Tower's property and any claims it may have against any third party including Defendants belonged to the Estate. The Trustee of the Estate became the only person with the legal authority to initiate any legal malpractice actions against Defendants. Thus, whether or not Tower sustained the damages necessary to constitute a cause of action for legal malpractice against Defendants must be judged from the perspective of the Trustee.

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persuasive authority.

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b. The Trustee did not know whether Tower sustained damages necessary to constitute the cause of action for legal malpractice against Defendants until July 5, 2011 when the underlying litigation was resolved.

In this particular case, as the Trustee sits in the Bankruptcy Court, there is no way for the Trustee to know that the Tower Estate sustained damages or that there is an existence of damages necessary to constitute a cause of action for legal malpractice until the underlying action was resolved, and the settlement amounts did not satisfy the claims made by the Tower Homes Purchasers.

For example, the underlying Complaint filed by the Tower Homes Purchasers was against Yanke; Tower; Prudential Real Estate Affiliates, Inc.; Americana LLC; Mark Stark; Jeannine Cutter; and David Berg. Because there were other defendants in the underlying action other than Tower who could have been liable for the full amount of the Tower Homes Purchasers' damages, it was possible that the other defendants could have fully satisfied all of the Tower Homes Purchasers' claims. If all of the Tower Homes Purchasers' claims were fully satisfied by the remaining defendants, then the Tower Estate would have not sustained damages because the Tower Estate would not need to find ways to satisfy the Tower Homes Purchasers' claims through an action for legal malpractice against Defendants. If the Tower Estate did not sustain damages, then there would not be a "cause of action" for legal malpractice against Defendants.

Unfortunately, there was no way for the Trustee or anyone else to know

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whether the Tower Estate would sustain any damages caused by Defendants' malpractice until final resolution of the underlying case when the Tower Homes Purchasers did not obtain a full recovery from the other defendants.

The final resolution of the underlying litigation occurred on July 5, 2011 when the Tower Homes Purchasers entered a stipulation to dismiss the action against Stark, Cutter, and Berg. 420-422. It was at this point in time following the final dismissal of the underlying litigation on July 5, 2011, that the Trustee had imputed knowledge of the existence of damages (i.e. unpaid and unsecured creditor claims) necessary to constitute the cause of action of legal malpractice.

The statute of limitations ran at the date of the final dismissal. Under the two year statute of limitations prong of NRS 11.207(1), the Trustee had until July 5, 2013 to file a legal malpractice action against Defendants. Because this legal malpractice suit was filed on June 12, 2012, well before the July 5, 2013 deadline, this suit is not barred by the statute of limitations.

2) The Distinction Between Transactional Malpractice Versus Litigation Malpractice Is Immaterial In This Case Because The Statute of Limitation Commences When a Plaintiff Sustains Damages Necessary to Constitute the Cause of Action of Legal Malpractice Irrespective Of Whether The Malpractice Arises in the Litigation or Transactional Context.

This Court has recognized a distinction between litigation and transaction based causes of action for legal malpractice. See Kopicko v. Young, 114 Nev. 1333, 971 P.2d 789 (1998) (overruling Gonzales v. Stewart Title, 111 Nev. 1350,

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905 P.2d 176 (1995) in part, to the extent that Gonzales "rejects a distinction between transactional and litigation malpractice"); see also Hewitt v. Allen, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) (citations omitted)("in the context of litigation malpractice, that is, legal malpractice committed in the representation of a party to a lawsuit, damages do not begin to accrue until the underlying legal action has been resolved").

a. In litigation malpractice, the statute of limitations commences when the underlying legal action is resolved because only then can it determine that damages have been sustained.

In a litigation legal malpractice context, that is, legal malpractice committed in the representation of a party to a lawsuit, this Court has stated that damages do not begin to accrue until the underlying legal action has been resolved. Hewitt, 118 Nev. at 221, 43 P.3d at 348 (citations omitted). This Court reasoned that "[w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence." Semenza, 104 Nev. at 668, 765 P.2d at 186. This is because "[a]pparent damage may **vanish** with successful prosecution of an appeal and ultimate vindication of an attorney's conduct by an appellate court." Id.(emphasis added). Therefore, it is only after the underlying case has been affirmed on appeal that it is appropriate to assert injury and maintain a legal malpractice cause of action for damages. Id.

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Thus, this general rule regarding the running of the statute of limitation for litigation malpractice actions is based on the rationale that the existence of *any* damages from an error in ongoing litigation is not known until the litigation concludes because the existence of damages may "vanish". Gonzales, 111 Nev. at 1354, 905 P.2d at 179; Semenza, 104 Nev. at 668, 765 P.2d at 186.

b. In transactional malpractice, the statute of limitations commences when a plaintiff discovers the existence of damages.

Similarly, in the context of transactional malpractice, that is, malpractice committed in the form of a drafting defect or a drafting error, the statute of limitations commences "when the litigant discovers, or should have discovered, the *existence* of damages, not the exact numerical extent of those damages." Kopicko, 114 Nev. at 1337, 971 P.2d at 791 (1998) (citing Gonzales, 111 Nev. at 1353, 905 P.2d at 178) (emphasis in original).

i. This Court has never held that in the transactional malpractice context, a plaintiff always sustains damages prior to the conclusion of the underlying litigation.

Additionally, while this Court has ruled that in a litigation malpractice context, the statute of limitations does not run until the underlying litigation has concluded because no legal damages had yet been sustained as a result of the alleged negligence until after the underlying litigation has concluded (Kopicko, 114 Nev. at 1336-1337, 971 P.2d at 791), this Court has never gone so far as to rule that in the

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transactional malpractice context, a plaintiff always sustain damages prior to the conclusion of the underlying litigation.

Under certain circumstances in the transactional malpractice context, damages may be known before the initiation of the underlying litigation, in other circumstances, the existence of damages may not be known until the conclusion of the underlying litigation associated with the transaction. This is consistent with Semenza, as the damages may "vanish." Moreover, litigating a malpractice action concurrent with the transactional litigation can lead to significant disadvantages for the client.

ii. There may be situations in the transactional litigation context where a plaintiff does not sustain damages until the conclusion of the underlying litigation and thus the statute of limitations commences after the underlying litigation has concluded.

Based on the language of NRS 11.207(1), it is possible to envision situations in the transaction malpractice context where the plaintiff does not suffer damages necessary to constitute the cause of action of legal malpractice until after the underlying litigation has concluded.

For example, in this case, until the conclusion of the underlying litigation, there was no way to determine if the Tower Estate had been damaged at all. If the Tower Homes Purchasers had a complete recovery in the underlying litigation, then the Tower Estate would not sustain damages. It was not until the litigation

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concluded on July 5, 2011, wherein the Tower Home Purchasers were not fully satisfied, that the Trustee became aware that the Tower Estate sustained damages as the Trustee was now required to find ways to fully satisfy the judgment. Because Tower did not sustain the damages necessary to constitute the cause of action for legal malpractice until the underlying litigation was resolved on July 5, 2011, the statute of limitations did not commence until July 5, 2011.

3) Because NRS 11.207(1) Requires a Plaintiff to Sustain Damages Prior to the Commencement of the Statute of Limitation, The Commencement of Statute of Limitations Must be Applied Consistently Whether a Malpractice Arises in The Litigation or Transactional Context.

Notwithstanding the fact that a plaintiff must sustaining damages in both the litigation and transaction malpractice context before the statute of limitations can commence, Defendants argue that the District Court erroneously failed to recognize the distinction between litigation malpractice versus transactional malpractice in determining when the statute of limitation begins to run on a legal malpractice claim. In particular, Defendants argue the District Court's ruling that the statute of limitation begins to run when the underlying litigation concluded on July 5, 2011 can only apply in the context of a litigation malpractice.

Defendants' argument is without merit. In this case, the distinction between transactional malpractice versus litigation malpractice is inconsequential. As stated above, NRS 11.207(1) requires that a plaintiff sustain damages in order to assert a

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cause of action for legal malpractice applies regardless of whether a malpractice arises in the litigation context or the transactional context. See Hewitt, 118 Nev. at 221, 43 P.3d at 347–48(en banc) (quoting Semenza v. Nevada Med. Liability Ins. Co., 104 Nev. 666, 668,765 P.2d 184, 185–186 (1988)) (stating that a legal malpractice action does not accrue until the plaintiff knows, or should know, all the facts relevant to the foregoing elements **and** damage has been sustained).

Thus, Defendants' attempt to distinguish this case from the District Court's ruling which Defendants contend only applies in the context of litigation malpractice is misplaced as this distinction is of no consequence in this instant case. The commencement of the statute of limitation must be applied consistently regardless of whether a malpractice arises in the litigation or transactional context.

B. THE DISTRICT COURT DID NOT ERR WHEN IT DID NOT APPLY THE REASONING OF *GONZALES* BECAUSE *GONZALEZ* IS DISTINGUISHABLE FROM THE PRESENT CASE

Defendants argue that because this case arises in the context of transactional malpractice, pursuant to Gonzales, Tower sustained damages and knew of the material facts which constitute the legal malpractice against Defendants on March 23, 2007 when the Tower Homes Purchasers filed the underlying suit against Tower.

Defendants' reliance on Gonzales is misplaced because Gonzales is distinguishable from the present case. In Gonzales, appellant retained attorneys

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(respondents) to draft an agreement for the sale of real property. Specifically, the agreement called for the execution of a promissory note for property that was to be held in joint tenancy. Because the note was defective, appellant was sued on April 14, 1986 by a third party attempting to have the district court declare title to the property was held as tenancy in common. The district court ultimately entered an Order on September 1, 1987 holding that title was held in Joint tenancy and not tenants in common. On November 16, 1987, the district court granted Partial Summary Judgment in appellants favor but denied their request for attorney's fees. The underlying action was concluded on April 16, 1990 when the district court entered an order for dismissal with prejudice.

The appellants then filed a complaint against the attorneys for legal malpractice arising from the defective note. This Court then ruled that the statute of limitation ran on April 14, 1986 when the lawsuit was filed against appellants seeking construction of the note. Gonzales, 111 Nev. at 1352, 905 P.2d at 177. This Court reasoned that,

> Appellants in this case suffered harm and discovered, or should have discovered, their cause of action on the date respondents filed their lawsuit. It was at that time that appellants had to hire an attorney to defend against the suit. Therefore, the statute of limitation for an attorney malpractice action commenced running on that date.

Id. at 1355, 905 P.2d at 179.

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1) **Tower Did Not Sustain Damages When The Underlying Complaint Was File Because Tower Was Never Required To Defend The Lawsuit By Reason of The Bankruptcy Proceeding.**

Gonzales however, is distinguishable from the present case. In this case, unlike in the appellant in Gonzales, Tower did not sustain damages when the Tower Home Purchasers filed the underlying Complaint. As stated above, after the underlying Complaint was filed, eight days later, Bankruptcy proceedings were filed. The Bankruptcy proceedings protected Tower by reason of the automatic stay. Also, other potentially culpable parties were named as defendants. By operation of federal bankruptcy law, Tower was never required to defend that underlying action. In fact, no party ever obtained relief from the automatic stay to pursue Tower. Consequently, by not having to defend that underlying Complaint, Tower did not sustain damages based on the mere filing of the underlying Complaint. Instead, until the underlying litigation was resolved, Tower visa-via the Trustee, never knew the existence of damages.

2) **At Best, The Filing of The Underlying Complaint Merely Provided Tower With Notice of Defendants' Potential Breach of The Duty of Care.**

At best, the filing of the underlying complaint against Tower may have served to provide Tower with some knowledge of the potential breach of duty of care owed by Defendants to Tower. However, breach of the duty of care is only one element of the cause of action for legal malpractice. The filing of the underlying Complaint

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did not provide Tower with the damages necessary to constitute the cause of action of legal malpractice against Defendants.

3) In This Case, The Existence of Damages Was Unknown Until The Conclusion of the Underlying Litigation.

Further, the District Court considered whether Gonzales applied when she asked counsel to explain why Gonzalez does not apply in light of Gonzales ruling that "[a]n action accrues when the litigant discovers, or should have discovered, the *existence* of damages, not the exact numerical extent of those damages." See App 499:25-500:8.

In this case, unlike in Gonzales, there is no question as to the extent of damages. Here, the extent of damages are the lost of earnest deposit money by the Tower Homes Purchasers. The amount of their earnest deposit is a fixed amount. In particular, if the Tower Homes Purchasers were able to obtain a full recovery from the other defendants in the underlying case, then Tower would not have been damaged at all. Because it was unclear whether the other defendants would be able to fully satisfy the judgment, the issue here is one of the existence of damages, not the extent of damages.

In sum, the statute of limitations **does not** begin to run on March 23, 2008 when the Tower Homes Purchasers filed the underlying Complaint against Tower.

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C. THE STATUTE OF LIMITATIONS DOES NOT COMMENCE ON AUGUST 11, 2006 OR AUGUST 23, 2006 BECAUSE THE LETTERS FROM MR. CONNAGHAN DO NOT PROVIDE THE TRUSTEE WITH KNOWLEDGE THAT TOWER SUSTAINED DAMAGES NECESSARY TO CONSTITUTE THE CAUSE OF ACTION FOR LEGAL MALPRACTICE.

Defendants also argue that Tower sustained damages when Tower received demand letters from Paul Connaghan, Esq., an attorney for one of the Tower Homes Purchasers, on August 11, 2006 and on August 23, 2006. Defendants argue that these letters explained in detail the reasons why the Purchase Contract violated NRS 116.411. This argument is without merit.

First, the letter from Mr. Connaghan on August 11, 2006 (See Pet.'s App. at 148-151) was simply a letter providing notice to Defendants that Tower was in default of the Purchase Contract because Tower could not timely construct and deliver the Units at Spanish Towers. See Pet.'s App. at 149. In addition, Mr. Connaghan's letter was seeking a return of the Robert and Ann Muller's[4] earnest money deposit of $219,000.00. See Pet.'s App. at 149. The August 11, 2006 letter does not allege that the Purchase Contract violated NRS 116.411.

Second, the August 23, 2006 letter did not provide Tower or the Trustee with knowledge that Tower sustained damages necessary to constitute the cause of action for legal malpractice. See Pet.'s App. at 191-194. At best, the August 23, 2006 letter only provided Tower with knowledge of the breach of the duty of care by

[4] Robert and Ann Muller are individual Tower Homes Purchasers.

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Defendants. Breach of duty however, is only one element of the cause of action for legal malpractice.

Even assuming *arguendo* that the two letters provided Tower with the knowledge of damages necessary to constitute the cause of action for legal malpractice against Defendants, once Bankruptcy proceedings were initiated against Tower, all claims against Tower were stayed by operation of federal law and thus Tower was not required and did not even defend against the underlying lawsuit. By not defending the lawsuit, Tower never sustained damages.

In fact, the only person with legal authority to pursue any legal malpractice claims against Defendants was the Trustee. As the Trustee sits in the Bankruptcy Court, there was no way for the Trustee to know that the Tower Estate sustained damages necessary to constitute the cause of action for legal malpractice until the underlying litigation was concluded, and it was determined that the Trustee would have to use the assets of the Tower Estate to satisfy the judgment on behalf of the Tower Homes Purchasers.

D. THE STATUTE OF LIMITATIONS DOES NOT COMMENCE WHEN THE FIRST AND SECOND AMENDED COMPLAINTS WERE FILED BECAUSE THESE AMENDED COMPLAINTS TOWER DID NOT SUSTAIN THE DAMAGES NECESSARY TO CONSTITUTIE THE CAUSE OF ACTION FOR LEGAL MALPRACTICE AGAINST DEFENDANTS.

Likewise, the filing of the First Amended Complaint on October 23, 2007 and the Second Amended Complaint March 31, 2009 (collectively referred to as the

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"Amended Complaints") in the underlying litigation do not commence the statute of limitations. While the Amended Complaints asserted violation of NRS 116.411, at best, the Amended Complaints provided Tower or the Trustee with knowledge of breach of duty by Defendants. As explained above, breach of duty only satisfies one of the element of legal malpractice. The Amended Complaints did not provide the damage to Tower that was necessary to assert a cause of action for legal malpractice. Moreover, by operation of federal bankruptcy law, all actions against Tower were stayed and Tower was not even required to defend the underlying Complaint. Thus, because the Amended Complaints did not cause Tower to sustain damages, the filing of the Amended Complaints did not commence the statute of limitations for legal malpractice.

E. THE STATUTE OF LIMITATIONS DOES NOT COMMENCE ON SEPTEMBER 10, 2007 BECAUSE THE FILING OF THE BANKRUPTCY CLAIMS AGAINST TOWER DO NOT PROVIDE THE TRUSTEE WITH KNOWLEDGE THAT TOWER SUSTAINED DAMAGES NECESSARY TO CONSTITUTE THE CAUSE OF ACTION FOR LEGAL MALPRACTICE.

Similarly, the filing of the bankruptcy claims against Tower on September 10, 2007 does not commence the statute of limitations. As discussed above, once bankruptcy proceedings were initiated against Tower on May 31, 2007, all claims against Tower were stay by operation of federal bankruptcy law. As such, Tower was not required to even defend the underlying lawsuit. In fact, Tower never defended the underlying lawsuit.

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In addition, all of Tower's potential claims for legal malpractice against Defendants belonged to the Trustee. The Trustee was the only person who could bring an action for legal malpractice against Defendants. As previously stated, it was not until the underlying litigation concluded on July 5, 2011that it was determined that the Tower Homes Purchasers were not fully compensated by the other defendants and that the Trustee would have to find ways to satisfy the judgment. It was at this point that the Tower Estate sustained damages which triggered the statute of limitations.

V. CONCLUSION

The District Court did not err when it denied Defendants' Motion for Summary Judgment pursuant to NRS 11.207 and the relevant case law cited above. Specifically, the statute of limitations does not commence until a plaintiff has sustained damages necessary to constitute the cause of action for legal malpractice. In this case, the Trustee did not know that the Tower Estate sustained damages until the conclusion of the underlying litigation on July 5, 2011. At best, any information obtained prior to July 5, 2011 provided the Trustee or Tower with knowledge of Defendants' potential breach of the duty of care. The breach of duty however, is only one element of the cause of action for legal malpractice and is not sufficient to provide the Trustee or Tower with the damages necessary to constitute the cause of action for legal malpractice. Damages were still a requirement in order to assert the

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cause of action for legal malpractice. Because Tower filed this legal malpractice action on July 12, 2012, after the existence of damages were known, Tower's malpractice action against Defendants is not barred by the statute of limitations as set forth in NRS 11.207(1). Thus, this Court should deny Defendants Writ of Petition for Mandamus.

DATED this 12 day of April, 2013.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

1. I hereby certify that this brief complies with the formatting requirement of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2007 in Times New Roman 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 7,892 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rule of Appellate Procedure.

DATED this 12 day of April, 2012.

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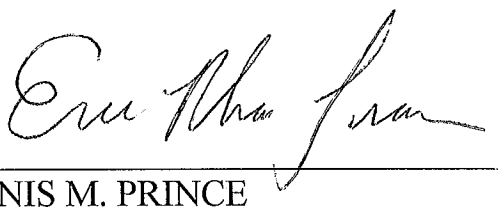

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CERTIFICATE OF MAILING

I hereby certify that on the 17 day of April, 2013, I caused service of the foregoing **Real Party in Interest Tower Homes, LLC's Answering Brief** to be made by depositing a true and correct copy of same in the United States Mail, postage fully prepaid, addressed to the following:

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