IN THE SUPREME COURT OF THE STATE OF NEVADA

TOWER HOMES, LLC, a Nevada limited liability company; Plaintiff, vs. WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive, Defendants.	CASE NO.: 65755

APPELLANT TOWER HOMES, LLC'S APPENDIX

VOLUME 5

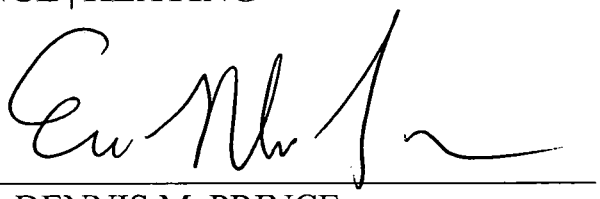
Appellant, Tower Homes, LLC, by and through its attorneys of record, PRINCE | KEATING, hereby concurrently files this Appendix in supplement to its Opening Brief. This Appendix contains true and accurate portions of the district court record and other sources that are essential to understand the matters set forth in the aforementioned Petition.

CHRONOLOGICAL APPENDIX OF DOCUMENTS

Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Supplemental Exhibit in Support of Motion for Summary Judgment	03/21/2014	Vol. 6 AA892-899
Discovery Commissioner's Reports and Recommendations on Plaintiff's Motion to Compel	03/19/2014	Vol. 6 AA900-906
Minute Order Granting Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Motion for Summary Judgment	03/25/2014	Vol. 6 AA907-908
Order Granting Defendants' Motion for Summary Judgment	05/15/2014	Vol. 6AA909-915
Notice of Entry of Order	05/15/2014	Vol. 6 AA916-924
Notice of Appeal	05/28/2014	Vol. 6 AA925-926
Transcript of Proceedings on Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Motion for Summary Judgment heard on March 21, 2014	12/02/2014	Vol. 6 AA927-948

DATED this 4th February, 2015.

PRINCE | KEATING



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DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company; Plaintiff, vs. WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive, Defendants.	CASE NO.: A-12-663341-C DEPT. NO.: XXVI **PLAINTIFF TOWER HOMES, LLC'S OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS**

Plaintiff Tower Homes, LLC, by and through its attorneys of record, Prince & Keating, hereby submits this Opposition to Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd.'s Renewed Motion to Dismiss.

This Opposition is made and based upon the papers and pleadings on file, the attached Memorandum of Points and Authorities, and the arguments of counsel that may be entertained

at the date and time of the hearing of this Motion.

DATED this 16 day of August, 2013.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

Background

This is a legal malpractice action arising out of the failure of attorney William Heaton ("Heaton"), and the law firm of Nitz, Walton & Heaton, Ltd. ("NWH") (collectively referred to as "Defendants") to properly provide legal services to their clients, Rodney C. Yanke (hereinafter "Yanke") and Tower Homes, LLC ("Tower") in the drafting of Purchase Contracts for the sale of condominium units in compliance with Nevada law.

Yanke is a licensed contractor in the State of Nevada who invested and developed real property in and around Clark County, Nevada. On or about April 3, 2004, at Yanke's request, NWH caused or assisted in the formation of Tower Homes, LLC ("Tower"). Yanke was the managing member of Tower. At that time, Yanke informed Heaton and NWH of his intent to construct a residential common interest ownership project known as Spanish View Towers

Project (hereinafter referred to as the "Project"). Yanke, in his capacity as the manager of Tower, informed Heaton and NWH that the Project was to consist of three 18 story condominium towers combining for a total of 405 units located generally at the southwest corner of Interstate 215 and south Buffalo Drive in Las Vegas, Nevada.

In addition to other legal services, Yanke requested that Heaton and NWH draft Purchase Contracts for the sale of the individual condominium units. Prior to and during the initial phases of construction, Tower marketed the individual units for sale to members of the public. Accordingly, Tower entered into written Purchase Contracts with numerous individual investors (collectively referred to as the "Tower Homes Purchasers") prior to the completion of construction. Each purchaser was to give Tower a significant earnest money deposit. The agreement between Tower and the Tower Home Purchasers called for the Project to be completed within two years of the date of the Purchase Contract.

Unfortunately, there was insufficient financing available for the Project's completion and thus, the Project failed. As a result of the Project's failure, there were over twenty five million dollars in mechanics lien filed for the work on the Project. In addition, many of the Tower Homes Purchasers lost millions of dollars of their money deposits.

Defendants Heaton and NWH's Duties to Tower

Heaton and NWH 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. Heaton and NWH knew that the Purchase Contracts they drafted would be utilized by Tower for the sale of the individual units. Heaton and NWH 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.

Heaton and NWH knew that Tower had a legal obligation to each individual purchaser to properly safeguard the earnest money deposits from mismanagement, theft or unlawful use

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as required by Chapter 116 of the Nevada Revised Statutes. However, despite Heaton and NWH's legal obligations, Heaton and NWH 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. In addition, Heaton and NWH drafted the Purchase Contracts in specific 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 Heaton and NWH drafted the contracts, Tower was in violation of NRS 116.411. In addition, by reason of the failure to properly advise Tower and draft contracts in strict accordance with NRS 116.411, Heaton and NWH created the risk that the earnest money deposits would be used for unlawful purposes to the detriment of Tower.

The Underlying Litigation

As a result of Heaton and NWH's failure to satisfy their legal obligations and duties to Tower and Yanke, 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, and other Defendants including Prudential Real Estates Affiliates, Inc., Mark L. Stark, Jeanine Cutter, and David Berg seeking the return of their earnest money deposits

The Bankruptcy Proceeding

On May 31, 2007, Bankruptcy proceedings in the United States Bankruptcy Court in the District of Nevada pursuant to Chapter 11 of the United States Bankruptcy Code were initiated against Tower. Among Tower's creditors were the individual Tower Home 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. William A. Leonard, Jr. is the post-confirmation Chapter 11 Trustee of the Tower

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bankruptcy estate. On December 8, 2008, the Bankruptcy Court entered an "Order approving Disclosure Statement and Confirming Plan of Reorganization." See Defendants' Exhibit A.

Pursuant to the Order, "the Trustee and the Debtor's (Tower's) bankruptcy 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 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 Id. at page 6, ¶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.

The First Marquis Aurbach Order

During the bankruptcy proceeding, 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 as Defendants' **Exhibit B**). 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. Id. 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 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. Id. The scope of the Maquis Aurbach Order includes any potential claim for legal malpractice.

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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. In advance of the trial, a settlement agreement was reached between the Tower Home Purchasers and Yanke, individually. 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.

The Present Legal Malpractice Action

On June 12, 2012, Plaintiff Tower filed this instant action against Defendants Heaton and NWH alleging claims for legal malpractice and breach of fiduciary duty.

Defendants' First Motion to Dismiss

On July 19, 2012, Defendants filed their Motion to Dismiss, or in the alternative, Motion for Summary Judgment arguing 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 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.

Defendants' Motion for Summary Judgment was heard on October 3, 2012. With regard to Tower and Prince & Keating's standing, this 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 Defendants' Exhibit C at 2:10-15. This Court also ruled that this was a procedural defect and not a fatal defect. Id. at 2:10-12.

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With regard to the statute of limitations, this Court agreed with Tower and concluded that the statute of limitations commenced on July 5, 2011 when the underlying litigation was concluded and it was determined that Tower sustained damages. Id. at 2:6-9. Thus, this Court denied Defendants' Motion for Summary Judgment and stayed the matter until Plaintiff obtains the requisite authority for this action from the bankruptcy trustee and order from the Bankruptcy Court. Id. at 2:16-18.

Heaton and NWH's Petition for Writ of Mandamus to the Nevada Supreme Court

On December 11, 2012, Heaton and NWH file a Petition for Writ of Mandamus to the Nevada Supreme Court. See **Exhibit 1**. On February 20, 2013, the Nevada Supreme Court issued an Order Directing Supplemental Petition and Directing an Answer. See **Exhibit 2**. Specifically, the Nevada Supreme Court stated that,

> Having reviewed the petition and appendices, it appears that petitioner has set forth issues of arguable merit. Nonetheless, **the district court's challenged order indicates that Tower Homes, LLC is not the proper plaintiff in this case. Consequently, petitioner shall have 11 days from the date of this order in which to file a supplement to its writ petition addressing whether the proper party issue has been resolve in the district court**, and if not, whether petitioner has renewed its motion to dismiss the underlying action on that basis. . . .

Id. (emphasis added).

By issuing this Order Directing Supplemental Petition, the Nevada Supreme Court was clearly concerned with the issue of whether Tower was the proper plaintiff in this case, and whether Tower had standing to pursue this legal malpractice action against Defendants. Thus, the Nevada Supreme Court directed the parties to brief this issue as a preliminary matter so that the Nevada Supreme Court can determine whether it even needs to address the merits of Defendants' petition.

On March 1, 2013, Defendants filed its Supplement to Petition for Writ of Mandamus. See **Exhibit 3**. In Defendants' supplement to Petition for writ of Mandamus, Defendants'

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argued that the issue of whether Tower has authority to bring this action has not been resolved, as there have been no further proceedings in the district court since the Petition was filed. See Id. at page 2:8-11. In addition, Defendants also argued that pursuant to the Marquis Aurbach Order, the Trustee stipulated with some of the claimants from the bankruptcy proceedings (the Purchasers) to allow the Purchasers to pursue claims on behalf of Tower against certain enumerated parties through certain enumerated attorneys. Id. at 3:2-6. Defendants further argued as follows:

> However, nothing in the Plan Confirmation Order authorized the Trustee to delegate his authority to another. Moreover, even if such a delegation were permissible, the instant action was not brought by the Purchasers or by the Marquis Aurbach firm. Even more fundamentally, Petitioners are not among the specifically enumerated parties authorized to be sued by the Marquis Aurbach Order. Accordingly, as fully discussed in its motion to dismiss, Tower Homes lacks the legal capacity to bring this action, the law firm of Prince & Keating is not authorized to bring this action and nobody (no party and no law firm) is authorized to sue Petitioners on behalf of Tower Homes.

Id. at 3: 7:16.

On April 12, 2013, Tower filed its Answering Brief. See **Exhibit 4**. In Tower's Answering Brief, Tower argued that the Amended Marquis Aurbach Order authorized Prince & Keating and Tower to pursue this legal malpractice claim against Defendants. Id. at 12:5-28.

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

Pursuant to this 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" (hereon after referred to as "Amended Marquis Aurbach Order") from the Bankruptcy Court.

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See Defendants' Exhibit D. According to the Amended Marquis Aurbach 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, attorney's 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**." Id. at 2: 15-20 (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.

The Nevada Supreme Court Denies Defendants' Petition for Writ of Mandamus

On June 14, 2013, the Nevada Supreme Court issued an Order Denying Petition for Writ of Mandamus or Prohibition. See **Exhibit 5**. The Nevada Supreme Court ruled that "[h]aving considered the petition, answer, reply, and appendices, we conclude that petitioner has not demonstrated that our intervention by way of extraordinary relief is warranted." Id.

Defendants' Renewed Motion to Dismiss

On July 26, 2013, Defendants filed their Renewed Motion to Dismiss again arguing that Tower's legal malpractice action against Defendants should be dismissed because Tower does not have standing to bring forth this action as Tower is not the proper plaintiff and that the Amended Marquis Aurbach Order does not authorize Tower to bring forth this action.

However, because Tower is the only party with standing to bring forth this legal malpractice action against Defendants; and because the Nevada Supreme Court has at least implicitly ruled that Tower may bring forth this legal malpractice action against Defendants, Tower now submits this Opposition to Defendants' Renewed Motion to Dismiss.

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II. LEGAL ARGUMENT

A. TOWER IS THE ONLY PARTY THAT CAN BRING FORTH THIS LEGAL MALPRACTICE ACTION AGAINST DEFENDANTS

Federal Bankruptcy law is clear that when a bankruptcy petition is filed, an "estate" is created, consisting of all of the debtor's interests, both legal and equitable, in all property, both tangible and intangible. Suter v. Goedert, 396 B.R. 535, 541 (D.Nev. 2008) (citations omitted). The bankruptcy trustee is required to marshal all of the estate's property for the estate's benefit. In re Mwangi, 473 B.R. 802, 808 (D.Nev. 2012) (citing 11 U.S.C. § § 541(a)). Property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." Id. The trustee becomes the representative of the estate, and the debtor has an obligation to surrender all property to the trustee. Id.

Consistent with federal Bankruptcy law, on or about December 8, 2008, the Bankruptcy Trustee filed an "Order Approving Disclosure Statement and Confirmation Plan of Reorganization" ("Plan Confirmation"). See **Defendants' Exhibit A**. Specifically, the Plan Confirmation Order states in pertinent part as follows,

> [T]he Trustee and the Estate shall retain all claims or Causes of Action that they have or hold against any party, including against "insiders" of the Debtor (as that term is Defined in Section 101(31) of the Bankruptcy Code), 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. Confirmation of the Plan effects no settlement, compromise, waiver or release of any Cause of Action unless the Plan or Confirmation Order specifically and unambiguously so provide. The non disclosure or nondiscussion of any particular Cause of Action is not and shall not be construed as a settlement, compromise, waiver or release of such Cause of Action. Upon the Effective Date, the Trustee will be designated as representatives of the Estate under section 1123(b)(3) of the Bankruptcy code and shall, except otherwise provided herein, have the right to assert any or all of the above Causes of Action post-confirmation in accordance with applicable law.

Id. at page 16, ¶5.

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As stated above, pursuant to the Plan Confirmation Order, the Trustee and the Estate retained all claims that they had against any parties and have the right to assert any future potential causes of action.

Thereafter, on June 3, 2012, the Trustee issued 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 the Debtor" ("Marquis Aurbach Order"). The Marquis Aurbach Order states in pertinent part as follows,

> 1) **The Trustee has determined that he does not intend, and in any event, does not have sufficient funds in the Estate to pursue claims on behalf of the Debtor** against Rodney C. Yanke, Americana LLC dba Americana Group, Mark L. Stark, Jeannine Cutter, David Berg, Equity Title of Nevada, LLC or any other individual or entity later identified through discovery which has or may have liability to Debtor or others for the loss of the earnest money deposit provide by purchasers for units in the Spanish View Tower Homes condominium project.
>
> 3) **The Trustee hereby stipulates and agrees to release to the Tower Homes Purchasers any and all claims on behalf of the Debtor** against Rodney C. Yankee, Americana [,]LLC dba Americana Group, Mark L. Stark, Jeanine Cutter, David Berg, Equity Title of Nevada, LLC or any other individual or entity later identified through discovery which has or may have any liability or owed any duty to Debtor or others for the loss of the Tower Homes Purchasers earnest money deposits and all claims to any and all earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project.
>
> 4) **The Trustee hereby stipulates and agrees to allow Marquis & Aurbach**, as counsel for the Tower Homes Purchasers, **to pursue any and all claims on behalf of the Debtor** against Rodney C. Yanke, Americana LLC dba Americana Group, mark l. Start, Jeannine Cutter, David berg, Equity Title of Nevada, LLC **or any other individual or entity later identified through discovery which has or may have any liability or owed any duty to Debtor** or others for the loss earnest money deposits provided by purchaser for units in the Spanish View Towers Homes condominium project.
>
> 5) **The Trustee hereby stipulates and agrees to allow Marquis & Aurbach**, as counsel for the Tower Homes Purchasers, to recover any and all earnest monies deposits, damages, attorneys fees and costs, and interest thereon on behalf of the Debtor and the Tower Homes Purchasers with respect to those claims released to the Tower Homes Purchasers herein.

See Defendants' Exhibit B.

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As emphasized above, the Trustee released/abandoned his right to pursue claims on behalf of the Debtor (Tower). In particular, the Trustee released to the Tower Homes Purchasers all claims on behalf of Tower against third parties who may have been liable to Tower for lost of the Tower Homes Purchasers' earnest deposit monies . Further, the Trustee agreed to allow Tower Homes Purchasers' counsel, Marquis & Aurbach, to pursue all claims on behalf of Tower for the benefit of the Tower Homes Purchasers.

The Amended Marquis Aurbach Order states in pertinent part as follows:

> IT IS FURTHER ORDERED ADJUDGED AND DECREED that this Order Authorizes the Trustee to permit the Tower Homes Purchasers, to pursue any and all claims on behalf of Tower Homes, LLC (the "Debtor") against any individual or entity which has or may have any liability or owed any duty to Debtor or others for the loss of earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project which shall specifically include, but may not be limited to, pursuing the action currently filed in the Clark County District Court styled as Tower Homes, LLC v. William H. Heaton et. al. Case No. A-12-663341-C.
>
> IT IS FURTHER ORDERED ADJUDGED AND DECREED that **this Court hereby authorizes 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 Debtor and Tower Homes Purchasers **and that any such recoveries shall be for the benefit of the Tower Homes Purchasers**.

Id. (emphasis added).

With this framework in mind, Defendants argue that federal Bankruptcy law; the Plan Confirmation Order; and the first and Amended Marquis Aurbach Order do not authorize Tower to bring this action against Defendants. Specifically, Defendants continues to argue that because the Marquis Aurbach Orders above expressly "released" all claims to the Tower Homes Purchasers, and not to Tower, the Marquis Aurbach Orders does not authorize Tower to file this action. Essentially, Defendants argue that Tower is not the proper plaintiff in this legal malpractice litigation and instead, the Tower Homes Purchasers are the proper plaintiff to this litigation. This argument is baseless and must be rejected.

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As an initial matter, it must be clearly stated that pursuant to the Marquis Aurbach Orders, the Trustee chose to release/abandon its right to pursue claims on behalf of the Debtor (Tower) for the specific benefit of the Tower Homes Purchasers. Stated differently, the Marquis Aurbach Orders simply allowed claims held by Tower against third parties would remain for the benefit of the Tower Homes Purchasers as it relates to the earnest money deposits. Thus, while the Marquis Aurbach Orders did release the rights to the legal malpractice claim to the Tower Homes Purchasers, Tower is still the proper Plaintiff in this legal malpractice action against Defendants.

Consistent with the Marquis Aurbach Orders, 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 Orders.

In addition, in order for a plaintiff to assert a cause of action for legal malpractice, 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 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).

An attorney-client relationship exists when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. Todd v. State, 113 Nev. 18, 24, 931 P.2d 721, 725 (1997). An attorney-client relationship does not require the parties to execute a formal agreement. Williams v. Waldman, 108 Nev. 466, 471, 836 P.2d 614, 618 (1992). Instead, an

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attorney-client relationship can even arise from a contract, whether written or oral, implied or expressed. Purdy v. Pacific Auto. Ins. Co., 57 Cal. App. 3d 59, 75, 203 Cal. Rptr. 524, 533 (Cal. App. 2 Dist. 1984).

In this case, an attorney-client relationship clearly existed between Tower and Defendants and not between the Tower Homes Purchasers and Defendants. As previously discussed, Defendants were retained to assist in the formation of Tower and to provide other legal services, including drafting Purchase Contracts for the individual units. Once Defendants explicitly accepted the representation of Tower, Defendants had the duty to advise Tower 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 Chapter 116 of the Nevada Revised Statutes. Because there was clearly an attorney-client relationship between Tower and Defendants, Tower is the **only** entity with standing to pursue this claim for legal malpractice against Defendants. Thus, Tower is the proper named plaintiff in this action.

Notably, had the Tower Homes Purchasers been named as plaintiffs in this legal malpractice action, then Defendants could have also asserted that the Tower Homes Purchasers do not have standing because there was no attorney-client relationship between the Tower Homes Purchasers and Defendants. Defendants cannot have it both ways. Specifically, Defendants cannot be allowed to argue, on one hand, that Tower is not the proper plaintiff because the Amended Marquis Aurbach Order only authorizes the Tower Homes Purchasers to pursue claims against Defendants, while on the other hand, had the Tower Homes Purchasers brought forth this legal malpractice action against Defendants, Defendants could argue that the Tower Homes Purchasers are not the proper party because there is no attorney-client relationship between the Tower Homes Purchasers and Defendants.

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B. THE NEVADA SUPREME COURT HAS ALREADY IMPLICITLY RULED ON THIS ISSUE AND HAS DETERMINED THAT TOWER DOES HAVE STANDING TO BRING FORTH THIS LEGAL MALPRACTICE ACTION AGAINST DEFENDANTS

Further, the Nevada Supreme Court has already implicitly ruled that Tower may bring forth this action against Defendants. As stated above, prior to the Nevada Supreme Court's ruling on Defendants' Petition for Writ of Mandamus, the Nevada Supreme Court was also concerned about the issue of whether Tower was the proper plaintiff to bring forth this action. In fact, Defendants made the very same arguments to the Nevada Supreme Court that is being made before this Court. The Nevada Supreme Court was also provided a copy of the Amended Marquis Aurbach Order.

After reviewing all of Defendants' arguments as to why Tower does not even have standing to bring forth this legal malpractice action, and after reviewing the Amended Marquis Aurbach Coffin Order, the Nevada Supreme Court decided to consider Defendants' Petition on the merits and ruled that Defendants did not meet its burden that extraordinary relief was warranted. Had the Nevada Supreme Court decided that the Amended Marquis Aurbach Coffin Order did not provide Tower with authorization to bring forth this action, the Nevada Supreme Court could have simply overturned the District Court's ruling and granted Defendants' Petition for Writ of Mandamus on the grounds that Tower was not the proper plaintiff. However, because the Nevada Supreme Court ruled that Defendants did not meet their burden that extraordinary relief was warranted, clearly the Nevada Supreme Court was satisfied that Tower was the proper plaintiff in this action. As such, this Court should deny Defendants' Renewed Motion to Dismiss and rule that Tower is the proper plaintiff in this action.

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III. CONCLUSION

Based on the foregoing, Tower requests that this Honorable Court deny Defendants' Renewed Motion to Dismiss and rule that Tower is the proper plaintiff to bring forth this legal malpractice action against Defendants.

DATED this 16 day of August, 2013.

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CERTIFICATE OF MAILING

I hereby certify that on the 16th day of August, 2013, I caused service of the foregoing PLAINTIFF TOWER HOMES, LLC'S OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS 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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EXHIBIT "1"

IN THE SUPREME COURT OF THE STATE OF NEVADA

NITZ, WALTON & HEATON, LTD.; WILLIAM H. HEATON,

Petitioners,

vs.

EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK; THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE,

Respondents,

and

TOWER HOMES, LLC,

Real Party in Interest.

Supreme Court No.
District Court No. A-12-663341-C
Department No. 26

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

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

INTRODUCTION AND SUMMARY

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

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

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

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

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

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

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

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

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

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

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

A.

RELIEF SOUGHT

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

B.

ISSUE PRESENTED

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

C.

FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

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

1. NWH's transactional representation of Tower Homes

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

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

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

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

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

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

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

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

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

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

3. The Tower Homes Bankruptcy

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

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

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

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

4. <u>The subject legal malpractice lawsuit and NWH's Motion</u>

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

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

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

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

D.

POINTS AND AUTHORITIES AS TO WHY WRIT SHOULD ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dated this 10th day of December, 2012.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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DECLARATION OF JEFFREY D. OLSTER

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

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

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

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

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

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

Dated this 10th day of December, 2012.

/s/ Jeffrey D. Olster
JEFFREY D. OLSTER

CERTIFICATE OF COMPLIANCE

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

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

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

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

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

[] Does exceed by ____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposes for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 29(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of December, 2012.

/s/ Jeffrey D. Olster
JEFFREY D. OLSTER

CERTIFICATE OF SERVICE

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

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

Dennis Prince
Prince & Keating
3230 South Buffalo Drive
Las Vegas, Nevada 89169
Attorneys for Plaintiff/Real Party Tower Homes, LLC

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

EXHIBIT "2"

IN THE SUPREME COURT OF THE STATE OF NEVADA

NITZ WALTON & HEATON, LTD.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,
Respondents,
and
TOWER HOMES, LLC,
Real Party in Interest.

No. 62252

ORDER DIRECTING SUPPLEMENT TO PETITION AND DIRECTING ANSWER

This original petition for a writ of mandamus, or alternatively, prohibition, challenges a district court order denying a motion to dismiss in a legal malpractice action.

Having reviewed the petition and appendices, it appears that petitioner has set forth issues of arguable merit. Nonetheless, the district court's challenged order indicates that Tower Homes, LLC is not the proper plaintiff in this case. Consequently, petitioner shall have 11 days from the date of this order in which to file a supplement to its writ petition addressing whether the proper party issue has been resolved in the district court and, if not, whether petitioner has renewed its motion to dismiss the underlying action on this basis. Thereafter, Tower Homes shall have 20 days from the date when petitioner's supplement is served to file an answer addressing the issues raised in petitioner's original writ petition and supplement.

It is so ORDERED.

_____, A.C.J.

cc: Hon. Gloria Sturman, District Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Prince & Keating, LLP
Eighth District Court Clerk

EXHIBIT "3"

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. 62252
District Court No. A-12-663341-C
Department No. 26

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

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Petitioners Nitz, Walton & Heaton, Ltd. and William H. Heaton (collectively referred to hereafter as "NWH"), by and through their attorneys, Lewis Brisbois Bisgaard & Smith LLP, submit the following supplemental information as requested by the Court in its "Order Directing Supplement to Petition and Directing Answer" (hereafter the "Order"), dated February 20, 2013. Specifically, in its Order, the Court requests Petitioners to address "whether the proper party issue has been resolved in the district court and, if not, whether petitioner has renewed its motion to dismiss the underlying action on this basis." (Order at 1.) *The short answer to both questions is no – the issue of Tower Homes' authority to bring this action has not been resolved, as there have been no further proceedings in the district court since the Petition was filed.*

As a point of clarification, the issue raised by the Court is more than just a "proper party" concern. Rather, the issue is whether Tower Homes' claims are barred by federal bankruptcy law and the applicable Plan Confirmation Order entered in the Tower Homes bankruptcy proceedings. In this regard, the Plan Confirmation Order from the bankruptcy proceedings provided, in part, that "from and after the Confirmation Date, ***the Trustee and the Estate shall retain all claims or Causes of Action*** that they may have or hold against any party, including against 'insiders' of the Debtor (as that term is defined in section 101(31) of the Bankruptcy Code), whether arising pre- or post-petition, ***subject to applicable state law statutes of limitation and related decisional law***, whether sounding in tort, contract or other theory or doctrine of law or equity." (App. at 15-18, 45 and 109 [lines 17-22] [emphasis added].) The Plan Confirmation Order further designated the Trustee "as representative of the Estate under section 1123(b)(3) of the Bankruptcy Code [11 U.S.C. § 1123(b)(3)] and shall . . . have the right to assert any or all of the above Causes of Action post-confirmation in accordance with applicable law." (App. at 109 [line 27] -110 [line 1].) Other than the Trustee, no other representative was appointed in the Plan Confirmation Order, and the instant action was clearly not

brought by the bankruptcy Trustee.

In an attempt to avoid this limitation (that only the Trustee can sue to enforce Tower Homes' potential claims), the Trustee stipulated with some of the claimants from the bankruptcy proceedings (the Purchasers) to allow the Purchasers to pursue claims on behalf of Tower Homes against certain enumerated parties through certain enumerated attorneys. (App. at 15-16, 18-20, 141-46.) This stipulation is referred to in this case as the "Marquis Aurbach Order." (App. at 16.) However, nothing in the Plan Confirmation Order authorized the Trustee to delegate his authority to another. Moreover, even if such a delegation were permissible, the instant action was not brought by the Purchasers or by the Marquis Aurbach firm. Even more fundamentally, Petitioners are not among the specifically enumerated parties authorized to be sued by the Marquis Aurbach Order. Accordingly, as fully discussed in its motion to dismiss, Tower Homes lacks the legal capacity to bring this action, the law firm of Prince & Keating is not authorized to bring this action and nobody (no party and no law firm) is authorized to sue Petitioners on behalf of Tower Homes. (App. at 17-21.)

In its order on the motion to dismiss, the district court agreed with Petitioners "that the 'Marquis Aurbach Order' does not authorize [Tower Homes] to bring this action through the law firm of Prince & Keating against Mr. Heaton and Nitz, Walton & Heaton, Ltd." (App. at 532, lines 11-13.) Nevertheless, the district court viewed this defect as procedural, and concluded that "[Tower Homes] 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." (App. at 532, lines 14-15.)

There has been no activity in the district court since the underlying order was entered. Moreover, no documents were filed in the bankruptcy proceedings relating to this issue until February 21, 2013 – the day after this Court issued its Order – when the Purchasers filed an "Amended Stipulation and Order to Release Claims

and Allow Marquis Aurbach Coffing, as Counsel for the Tower Homes Purchasers, to Pursue Claims on Behalf of the Debtor." (See Supplemental Appendix ["Supp. App."] at 534.) On February 25, 2013, the Purchasers filed a Motion to Approve this Amended Stipulation. (Supp. App. at 537.) This motion is set for hearing on April 1, 2013 in the Bankruptcy Court. (Supp. App. at 547.)

Accordingly, the issue of whether this new stipulation in the Bankruptcy Court authorizes the instant action against Petitioners has not been determined. In any event, *regardless of who has or who may attempt to bring this action against Petitioners, it still time-barred as a matter of law based on this Court's well-established authorities, as fully set forth in the Petition.*

Dated this 1st day of March, 2013.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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Attorneys for Petitioners
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WILLIAM H. HEATON

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 1st day of March, 2013, I deposited for first class United States mailing, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the foregoing **SUPPLEMENT TO PETITION FOR WRIT OF MANDAMUS, OR ALTERNATIVELY, FOR WRIT OF PROHIBITION** addressed as follows:

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

Dennis Prince
Prince & Keating
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Las Vegas, Nevada 89169
Attorneys for Plaintiff/Real Party Tower Homes, LLC

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

EXHIBIT "4"

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

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[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) <u>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.</u>

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) <u>In This Case, The Existence of Damages Was Unknown Until The Conclusion of the Underlying Litigation.</u>

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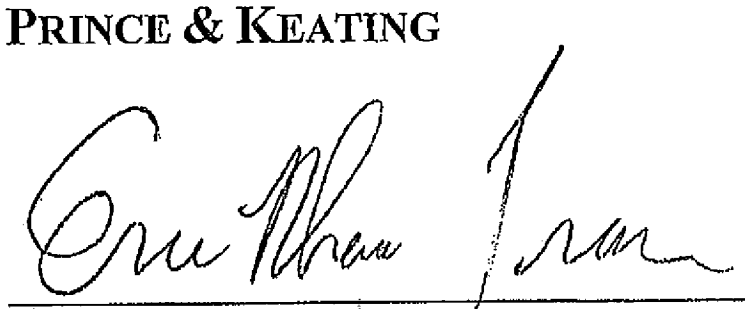
cause of action for legal malpractice. Because Tower filed this legal malpractice action on July 12, 2012, after the existence of damages were known, Tower's malpractice action against Defendants is not barred by the statute of limitations as set forth in NRS 11.207(1). Thus, this Court should deny Defendants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

DATED this 12 day of April, 2013.

PRINCE & KEATING



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CERTIFICATE OF COMPLIANCE WITH NRAP 28 AND 32

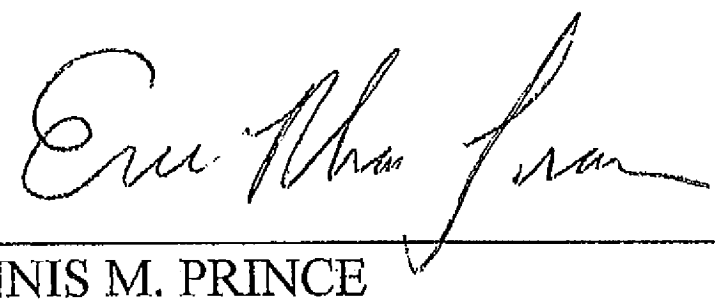
1. I hereby certify that this brief complies with the formatting requirement of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using MS Word 2007 in Times New Roman 14.

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.

PRINCE & KEATING



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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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EXHIBIT "5"

IN THE SUPREME COURT OF THE STATE OF NEVADA

NITZ WALTON & HEATON, LTD.,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,
Respondents,
and
TOWER HOMES, LLC,
Real Party in Interest.

No. 62252

ORDER DENYING PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This original petition for a writ of mandamus, or alternatively, prohibition, challenges a district court order denying a motion to dismiss in a legal malpractice action.

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition may be warranted when the district court exceeds its jurisdiction. NRS 34.320. Either writ is an extraordinary remedy, and whether such a writ will be considered is within our sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Moreover, it is petitioner's burden to demonstrate that our extraordinary intervention is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

13-17678

Having considered the petition, answer, reply, and appendices, we conclude that petitioner has not demonstrated that our intervention by way of extraordinary relief is warranted. *Id.*; *Smith*, 107 Nev. at 677, 818 P.2d at 851. Accordingly, we

ORDER the petition DENIED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. Gloria Sturman, District Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Prince & Keating, LLP
Eighth District Court Clerk

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DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company;

Plaintiff,

vs.

WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive,

Defendants.

Case No. A-12-663341-C
Dept. No. 26

REPLY TO PLAINTIFF'S OPPOSITION TO RENEWED MOTION TO DISMISS

Hearing Date: August 28, 2013
Hearting Time: 9:00 a.m.

Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. (collectively "NWH"), by and through their attorneys, Lewis Brisbois Bisgaard & Smith, LLP, submit the following reply to "Plaintiff Tower Homes, LLC's Opposition to Defendants' Renewed Motion to Dismiss (the "Opposition"). NWH's Renewed Motion to Dismiss will be referred to hereafter as the "Renewed MTD."

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It is now abundantly clear that this case has nothing to do with obtaining compensation for Tower because some theoretical and alleged breach of the standard care caused damages *to Tower*. Rather, this action is being used as a vehicle to attempt to find another "deep pocket" for the Tower Homes Purchasers, who lost their earnest money deposits due to the Las Vegas real estate market crash and the misfeasance of Tower Homes and its principal.[1] While this scheme by the Tower Homes Purchasers and the Tower Homes bankruptcy trustee is questionable for numerous reasons, the salient point for purposes of the Renewed MTD is that, unless and until the Bankruptcy Court authorizes ***Tower*** to bring this action, it simply cannot be brought as a matter of federal law. ***The parties do not dispute this critical issue of law***. Rather, they only dispute whether the New Marquis Aurbach Order authorizes this action. As discussed below and in the Renewed MTD, it does not – it only authorizes the Tower Homes Purchasers and their attorneys to bring actions. Moreover, Tower's argument that the Nevada Supreme Court has somehow decided the Bankruptcy Court authorization issue is incorrect.

Accordingly, the Renewed MTD should be granted, and this action should be dismissed with prejudice.

II. REPLY ARGUMENT

A. Tower does not explain how the New Marquis Aurbach Order authorizes *Tower*, as opposed to the Tower Homes Purchasers, to bring and maintain this action.

Citing to the Plan and to federal law, Tower (correctly) argues in its Opposition that it is the only party that can maintain a legal malpractice action against NWH. This "argument"

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[1] At this stage of the proceedings, Plaintiff's continued attempts to prejudice the Court by mischaracterizing the services provided by NWH (without even providing any evidence) should be disregarded. NWH strongly denies Plaintiff's substantive malpractice allegations and, should it ultimately become necessary, NWH will show that it properly advised Tower and properly prepared the purchase contracts in accordance with Nevada law.

however sidesteps the critical issue, however, which is whether the Bankruptcy Court has in fact authorized Tower to bring this action against NWH. Without this authorization, as Tower effectively concedes, this action is barred by federal law. [Renewed Motion at 8:5 – 9:13; Opposition at 10:4 – 11:3.)

The primary flaw with the original Marquis Aurbach Order was that it released Tower's theoretical claims *to the Tower Homes Purchasers*, and not to Tower. (See Renewed MTD, Ex. B at Page 5 of 6 [numbering at top right], lines 13-19.) Specifically, under the original Marquis Aurbach Order, the Trustee stipulated and agreed "to release ***to the Tower Homes Purchasers*** any and all claims on behalf of [Tower]." (See Marquis Aurbach Order, attached as Exhibit B, at Page 5 of 6, lines 13-14 [emphasis added].) As this Court will recall, it has previously held that this original Marquis Aurbach Order did not authorize Tower to bring this action. (See Ex. C to Renewed Motion).

The New Marquis Aurbach Order simply does not remedy this flaw, as it identically "authorizes the Trustee to permit ***the Tower Homes Purchasers*** to pursue any and all claims on behalf of Tower Homes, LLC (the "Debtor")." (See Renewed MTD, Ex. D at 2 of 3, lines 7-14.) ***This is precisely the same language that this Court has already found to be insufficient to authorize this action***. In addition, while the New Marquis Aurbach Order does authorize the law firm of Prince & Keating, LLP to bring a legal action, it indicates that Prince & Keating, LLP has been "retained *on behalf of Tower Homes Purchasers*" to recover the earnest money deposits on behalf of Tower and the Tower Homes Purchasers. (See Renewed MTD, Ex. D at 2 of 3, lines 15-20 [emphasis added].)[2] This provision of the New Marquis Aurbach Order notably does not authorize *any* law firm, ***retained on behalf of Tower***, to bring any action for the benefit of Tower. Rather, consistent with the prior paragraph, the New Marquis Aurbach Order *only authorizes counsel for the Tower Homes Purchasers* to bring this (or any other) lawsuit, and, as previously stated, it only "authorizes the Trustee to permit ***the Tower Homes Purchasers*** to pursue any and

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[2] Another flaw of the original Marquis Aurbach Order was that it only authorized the law firm of Marquis Aurbach to bring a legal action.

all claims . . ." (See Ex. D to Renewed Motion at 2 of 3, lines 7-8.) What remains notably absent from the two Marquis Aurbach Orders is any language that expressly authorizes *Tower* to bring this (or any other) lawsuit. Instead, both Marquis Aurbach Orders merely authorize *the Tower Homes Purchasers, through the Tower Homes Purchasers' own attorneys* (whoever they may be), to bring this (or any other) action.

Tower effectively concedes that the New Marquis Aurbach Order is deficient, as it states: "Thus, *while the Marquis Aurbach Orders did release the rights to the legal malpractice claim to the Tower Homes Purchasers*, Tower is still the proper Plaintiff in this legal malpractice action against Defendants." (Opposition at 13:7-9 [emphasis added].) Notably, Tower cites no factual evidence or legal authority for this wishful proposition. Rather, this argument is based on the same "straw-man" argument that Tower maintained during the original motion to dismiss proceedings. Specifically, Tower asserts: "Essentially, Defendants argue that Tower is not the proper plaintiff in this legal malpractice litigation and instead, the Tower Homes Purchasers are the proper plaintiff to this litigation." (Opp. at 12:26-28.) This argument was incorrect before, and it is incorrect now. NWH has not, and does not, maintain that the Tower Homes Purchasers are the "proper plaintiffs." Rather, NWH maintains that, in order for Tower to file this action, it needed to be authorized by the Bankruptcy Court to do so, and the salient point is that ***the language of the New Marquis Aurbach Order still only authorizes the Tower Homes Purchasers, and not Tower itself, to bring this action***. Tower simply does not argue otherwise in its Opposition.

B. The Nevada Supreme Court has not ruled, implicitly or otherwise, on the salient issue of whether this action is barred by federal law.

Perhaps recognizing that the language of the New Marquis Aurbach Order still does not authorize Tower to bring that this action, and that Tower's continued maintenance of this action violates federal law, Tower next argues that "the Nevada Supreme Court has already implicitly ruled that Tower may bring forth this action against Defendants." (Opp. at 15:4-5.) In making this argument, Tower misleadingly asserts that NWH made "the very same arguments" during the writ proceedings that it is making in the instant Motion. (*Id.* at 15:8-11.) Plaintiff's

characterization of what was argued and decided in the writ proceedings is simply wrong. As this Court is aware, NWH's Writ Petition dealt *only* with the statute of limitations issue. As discussed below, the Nevada Supreme Court did not rule, expressly or impliedly, on the merits of the issue that is now before this Court.

Tower is essentially arguing that the Bankruptcy Court authorization issue has been decided under the "law of the case" doctrine. "Under the law of the case doctrine, [w]hen an appellate court *states a principle or rule of law* <u>necessary</u> *to a decision*, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal." *Tien Fu Hsu v. County of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724 (2007) (emphasis added); *see also Dictor v. Creative Mgmt. Servs.*, 223 P.3d 332, 334, 126 Nev. Adv. Rep. 4 (2010) ("In order for the law-of-the-case doctrine to apply, the appellate court *must actually address and decide the issue explicitly or by necessary implication*." *Id*. (Emphasis added). "The doctrine only applies to issues previously determined, not to matters left open by the appellate court." *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 266, 71 P.3d 1258, 1262 (2003); *Emeterio v. Corp. Licensed to do Business in West Virginia*, 114 Nev. 1031, 1034, 967 P.2d 432, 434 (1998) (holding that law of case did not apply because issue was not decided).

The law of the case doctrine does not apply here for several reasons. First, even under Tower's misleading version of the writ proceedings, the Nevada Supreme Court did not decide any *rule or principle of law*. Rather, Tower's argument is that the Court implicitly made a conclusive finding that New Marquis Aurbach Order was sufficient to authorize this action. As detailed below, this argument is incorrect – the Court did not decide this issue one way or another. Nevertheless, even under Tower's argument, the Court did not decide an issue of law.

More fundamentally, the sufficiency of the New Marquis Aurbach Order was not necessary to the Court's denial of the Writ Petition, and the issue was simply not decided, expressly or implicitly. (The issue was obviously not expressly decided in the Court's June 14, 2013 Order denying the Writ Petition [Ex. 5 to Opposition], and Tower does not assert otherwise; rather, Tower's argument is that the Court *implicitly* decided the issue).

First, NWH made it clear in its Writ Petition that "this ruling [this Court's ruling on the original Motion to Dismiss that Tower could attempt to obtain a new order from the Bankruptcy Court to attempt to remedy the flaws in the original Marquis Aurbach Order], and the issues surrounding the Bankruptcy Court authorization for this action, ***are not at issue in the instant Petition***." (NWH's Writ Petition, attached as Exhibit 1 to the Opposition, at 9, fn. 4 [emphasis added].)

Second, in its February 20, 2013 "Order Directing Supplement to Petition and Directing Answer," (Exhibit 2 to Tower's Opposition), the Nevada Supreme Court merely requested a supplement "addressing whether the proper party issue *[had] been resolved* in the district court, and if not, whether [NWH] [had] renewed its motion to dismiss the underlying action on that basis." (See Exhibit 2 to the Opposition at 1.) In other words, the Court was merely requesting a *procedural status update* on the issue. The Court did not, as Tower contends, "direct[ed] the parties to brief this issue as a preliminary matter." (Opp. at 7:24-25.) Had the Court desired substantive briefing on the issue, it would have requested it. Instead, the Court was merely interested in knowing whether it was wasting its time because another issue not raised in the Writ Petition could have already disposed of the case.

In the Supplement that had been requested by the Court (Exhibit 3 to the Opposition), NWH advised the Court that the issue of Tower's authority to bring this action had not been resolved, and that no further proceedings had taken place in the district court since the Writ Petition was filed. (See Ex. 3 to Opposition at 2:8-12.)[3] NWH did provide the Court with additional clarification of the issue, as it had been mischaracterized by the Court as merely as "proper party" issue. Beyond this, however, ***NWH made no argument as to the sufficiency (or lack thereof) of the New Marquis Aurbach Order in its Supplement***. In fact, the New Marquis Aurbach Order had not even been entered yet at the time NWH filed its Supplement. Subsequently, it its Answering Brief for the writ proceedings (Exhibit 4 to the Opposition), Tower

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[3] As the Court will recall, the parties agreed to stay proceedings in this Court while the Writ Petition was pending.

does not address or argue the Bankruptcy Court authorization issue anywhere in the argument portion of its brief.

Finally, there is no evidence in the Nevada Supreme Court's "Order Denying Petition for Writ of Mandamus or Prohibition" (Exhibit 5 to the Opposition) that it had considered the *merits* of even the statute of limitations issue, let alone the Bankruptcy Court authorization issue. Rather, the Court merely concluded that NWH had not carried its burden of demonstrating that the Nevada Supreme Court's intervention "by way of extraordinary relief" was warranted. (Ex. 5 to Opp. at 2.) Based on the Nevada Supreme Court's citation to the *International Game, Smith and Pan* cases in its Order, it is reasonably apparent that the Court's ruling was based on the general principle that writ relief is generally not available to challenge orders denying motions to dismiss because an appeal from a final judgment typically constitutes an adequate and speedy remedy at law. *See Int'l Game Tech. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556 (2008); *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840 (2004); *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849 (1991).

There is no indication in the Court's Order that it was ruling on the "merits" of the statute of limitations issue, which was the issue that the parties actually briefed and argued. There is certainly no indication that the Court had even considered, let alone ruled upon, the Bankruptcy Court authorization issue. Moreover, it certainly was not "necessary" for the Nevada Supreme Court to decide the Bankruptcy Court authorization issue to deny the Writ Petition. *See Tien Fu Hsu, supra,* 123 Nev. at 629-30 (the law of the case doctrine only applies when an appellate court states a principle or rule of law that is "necessary" to the decision). Again, the most likely conclusion is that the Court denied NWH's Writ Petition – not on the merits of any issue – but because NWH was seeking extraordinary relief (i.e., the reversal of an order denying a motion to dismiss) prior to a final judgment, and because the Court was not persuaded that there was any imminent irreparable harm.

Accordingly, Tower's contention that the Nevada Supreme Court has somehow decided the issue now before the Court is misplaced and incorrect. Rather, this argument appears to be asserted to distract from the otherwise (effectively) undisputed fact that the New Marquis Aurbach

Order simply does not authorize Tower to bring and maintain this action. As such, the continued maintenance of this action by Tower will (continue to) violate federal law.

C. Dismissal of this action is the proper remedy.

In it Opposition, Tower did not even respond to the argument that dismissal of a bankruptcy debtor's action is the appropriate remedy when proper authority for the action has not been obtained from the Bankruptcy Court. (See numerous cases cited by NHW on page 11 of its Renewed MTD). Therefore, dismissal is the appropriate remedy here.

III. CONCLUSION

Based on the foregoing, as well as the points and authorities and evidence set forth in the Renewed Motion, defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. respectfully request that the Complaint be dismissed in its entirety, with prejudice.

DATED this 20th day of August, 2013

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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Attorneys for Defendants
William H. Heaton and Nitz, Walton & Heaton, Ltd.

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 20th day of August, 2013, a true and correct copy of the foregoing **REPLY TO PLAINTIFF'S OPPOSITION TO RENEWED MOTION TO DISMISS** was placed in an envelope, postage prepaid, addressed as stated below.

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CLERK OF THE COURT

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DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company; Plaintiff, vs. WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive, Defendants.	CASE NO.: A-12-663341-C DEPT. NO.: XXVI **ORDER DENYING DEFENDANTS' RENEWED MOTION TO DISMISS**

Defendants' Renewed Motion to Dismiss having regularly come on for hearing on August 28, 2013 at 9:00 a.m., Dennis M. Prince and Eric N. Tran of Prince & Keating appearing on behalf of Plaintiff; and Jeffrey D. Olster of Lewis Brisbois Bisgaard & Smith, appearing on behalf of Defendants. The Court having considered the papers and pleadings filed by the parties, and good cause appearing therefore,

. . .

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IT IS HEREBY ORDERED that Defendants' Renewed Motion to Dismiss is DENIED. The Court finds that any procedural defect at issue in the Court's October 3, 2012 Order Regarding Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment has been cured.

IT IS FURTHER ORDERED that this litigation is no longer stayed. Defendants shall file their Answer to Plaintiff's Complaint within ten (10) days of the filing of the Notice of Entry of this Order Denying Defendants' Renewed Motion to Dismiss.

DATED this 3rd day of ~~August~~ September, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:

PRINCE & KEATING

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DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company;

Plaintiff,

vs.

WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive,

Defendants.

Case No. A-12-663341-C
Dept. No. 26

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. (collectively referred to hereafter as "NWH"), by and through their attorneys, Lewis Brisbois Bisgaard & Smith, LLP, hereby move for summary judgment pursuant to N.R.C.P. 56. This motion is based on the following memorandum of points and authorities, all pleadings and records in this matter and any further argument and/or evidence that may be presented at the hearing of this motion.

DATED this 18th day of February, 2014

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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William H. Heaton and Nitz, Walton & Heaton, Ltd.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the undersigned will bring this motion for summary judgment on for hearing in Department 26 of this Court on the 21 day of March, 2014 at 9:30 AM, or as soon thereafter as counsel may be heard.

DATED this 18th day of February, 2014

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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William H. Heaton and Nitz, Walton & Heaton, Ltd.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This legal malpractice case arises out of NWH's representation of the nominally denominated "Plaintiff," Tower Homes, LLC (hereafter "Tower Homes"), in connection with a residential property development. When the property development failed, Tower Homes and its sole owner and manager, Rodney Yanke, were sued by purchasers (hereafter the "Tower Homes Purchasers") who had paid earnest money deposits for units in the development that were never built. In this underlying litigation, Tower Homes and Mr. Yanke were accused of, among other things, wrongfully misappropriating the purchaser's deposits – in direct contravention to the advice provided by NWH. Tower Homes was eventually forced into bankruptcy proceedings by several of its creditors.

NWH has previously challenged whether the instant action violates *federal* law, insofar as there is no Bankruptcy Court order permitting *Tower Homes* to bring this action in its own right. This Court has rejected these challenges. The instant Motion for Summary Judgment now challenges this action on *state law* grounds. There is now no factual dispute that the "real parties in interest" are the Tower Homes Purchasers, not Tower Homes (notwithstanding the deceptive case caption). Because the Tower Homes Purchasers are not the named plaintiffs in this action, NWH is entitled to summary judgment pursuant to N.R.C.P. 17 ("Every action shall be prosecuted in the name of the real party in interest."). Moreover, even if the Tower Homes Purchasers were actually the named plaintiffs in this action, NWH would still be entitled to summary judgment. As a well-established matter of Nevada law, legal malpractice claims are simply not assignable, and any such purported assignment violates Nevada law and public policy.

II. BACKGROUND

A. NWH's representation of Tower Homes

This action arises out of an attorney-client relationship between NWH and Tower Homes. (Complaint ¶¶ 5-7.) In particular, NWH represented Tower Homes with respect to a residential common interest ownership development known as Spanish View Tower Homes (hereafter the "Development"). (Complaint ¶ 6.) As part of this representation, NWH prepared the purchase

contracts for the individual condominium units. (Complaint ¶ 9.) The crux of the substantive dispute is whether the purchase contracts complied with applicable Nevada law. NWH maintains that the purchase contracts did comply with Nevada law, and that any loss of the Tower Homes Purchasers' deposits was attributable to the misfeasance of Tower Homes' agents.

B. The Tower Homes Purchasers and the Underlying Lawsuits

Many of the individuals and entities that agreed to purchase units in the Development (the "Tower Homes Purchasers") paid earnest money deposits towards their units. Due to financing and market issues, the Development was not successful, and construction was never completed. Due to the misfeasance of Tower Homes' agents, the earnest money deposits were never returned to the Tower Homes Purchasers. Consequently, the Tower Homes Purchasers filed lawsuits in Clark County District Court against Tower Homes, its sole owner and manager, Rod Yanke and other individuals and entities involved in the sale of the units (hereafter the "Underlying Lawsuits").[1] In these Underlying Lawsuits, the Tower Homes Purchasers alleged, among other things, that Tower Homes breached the terms of the purchase contracts and wrongfully misappropriated the earnest money deposits.

C. The Tower Homes Bankruptcy

Due to the delays and non-payment of various creditor claims relating to the Development, Chapter 11 bankruptcy proceedings were initiated against Tower Homes on May 31, 2007. On or about December 8, 2008, Tower Homes' federal bankruptcy trustee (hereafter the "Trustee") filed and confirmed the plan of reorganization pursuant to United States bankruptcy laws. Notably, in a section of the plan entitled "Litigation," the plan provides, in relevant part, 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. . . . Upon the Effective Date, ***the Trustee*** will be designated as representative of the Estate under section 1123(b)(3) of the Bankruptcy code and ***shall, except as otherwise provided herein, have the right to assert***

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[1] See *McClelland v. Tower Homes, LCC*, Case No. A528584 and *Gaynor v. Tower Homes, LLC*, Case No. A541668. Both of these lawsuits are closed.

> ***any or all of the above Causes of Action post-confirmation in accordance with applicable law***.

(See the Bankruptcy Court's "Order Approving Disclosure Statement and Confirming Plan of Reorganization" [hereafter the "Bankruptcy Plan"], attached as **Exhibit A**, at 48:18 – 49:1 [based on numbering at bottom of page] [emphasis added].) Thus, the Bankruptcy Plan establishes, consistent with federal law, that only the Trustee has the authority to bring actions on behalf of Tower Homes.

D. The First Marquis Aurbach Order

Subsequent to the Tower Homes Bankruptcy Plan confirmation, the Trustee agreed to relinquish certain alleged causes of action to specifically enumerated parties against certain enumerated individuals or entities. This agreement was embodied in a June 3, 2010 "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" (hereafter the "Marquis Aurbach Order"). This Marquis Aurbach Order provides, in part:

> The Trustee hereby stipulates and agrees ***to release to the Tower Homes Purchasers*** any and all claims on behalf of [Tower] against Rodney C. Yanke, Americana LLC dba Americana Group, Mark L. Stark, Jeannine Cutter, David Berg, Equity Title of Nevada, LLC or any other individual or entity later identified through discovery which has or may have any liability or owed any duty to [Tower] or others for the loss of the Tower Homes Purchasers earnest money deposits and all claims to any and all earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project.

(See Marquis Aurbach Order, attached as **Exhibit B**, at Page 5 of 6, lines 13-19 [page numbering at top] [emphasis added].) In other words, notwithstanding the Bankruptcy Plan's express retention of all causes of action belonging to Tower Homes, the Trustee agreed "to release and ***assign*** certain claims of [Tower Homes] and allow Marquis Aurbach Coffing as counsel for the Tower Homes Purchasers to pursue claims on behalf of the debtor." (Complaint ¶ 17 [emphasis added].)

E. The instant action and NWH's first Motion to Dismiss

Presumably based on the Marquis Aurbach Order, Tower Homes (and notably not the Tower Homes Purchasers) filed the instant action on June 12, 2012. On July 19, 2012, NWH filed its original Motion to Dismiss, or, Alternatively, Motion for Summary Judgment" (hereafter the "MTD"). In the MTD, NWH argued that Tower Homes lacked the capacity and authority to bring the instant action based on both federal law and the language of the Bankruptcy Plan, and that the Marquis Aurbach Order did not provide the requisite authorization that would permit Tower Homes to bring a civil action against NWH. (See MTD at 8:6 – 12:3.)[2]

In ruling on the MTD, this Court agreed with NWH that the Marquis Aurbach Order did not authorize Tower Homes to bring the instant action through the law firm of Prince & Keating against NWH. (See Order Regarding Defendants' Motion to Dismiss, or, Alternatively, Motion for Summary Judgment, attached as **Exhibit C**, at 2:11-13.) This Court denied the MTD, however, reasoning that the deficient language of the Marquis Aurbach Order presented "a procedural, not a fatal, defect." (Ex. C at 2:10-11.) Accordingly, this Court ruled that Tower Homes "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." (*Id*. at 2:14-15.)

F. The Second Marquis Aurbach Order

In an attempt to remedy what this Court characterized as a "procedural defect," on or about April 8, 2013, Tower Homes filed with this Court an order from the Bankruptcy Court entitled "Order Granting Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, as Counsel for the Tower Homes Purchasers, to Pursue Claims on Behalf of Debtor (hereafter the "Second Marquis Aurbach Order"). (This Second Marquis Aurbach Order is

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[2] NWH also argued in the MTD that this action is barred by the statute of limitations. This Court rejected the statute of limitations argument. In response to NWH's Petition for Writ of Mandamus, the Nevada Supreme Court ruled that extraordinary writ relief was not warranted. NWH still maintains that this action is barred by the statute of limitations as a matter of fact and law, and reserves the right to re-assert this defense.

attached as **Exhibit D**.) The Second Marquis Aurbach Order (1) "authorizes the Trustee *to permit the Tower Homes Purchasers to pursue any and all claims* on behalf of Tower Homes, LLC (the "Debtor") . . . which shall specifically include, but may not be limited to, pursuing the action currently filed in the Clark County District Court styled as Tower Homes, LLC v. William H. Heaton et al. Case No. A-12-663341-C; and (2) "authorizes the law firm of Marquis Aurbach Coffing 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 Debtor and the Tower Homes Purchasers and that *any such recoveries shall be for the benefit of the Tower Homes Purchasers*." (Ex. D at Page 2 of 3, lines 7-20 [emphasis added].)

G. <u>NWH's Renewed Motion to Dismiss</u>

Because the Second Marquis Aurbach Order, by its own terms, still did not authorize or permit *Tower Homes* to bring a lawsuit as a plaintiff, NWH filed a Renewed Motion to Dismiss on July 26, 2013 (the "Renewed MTD"). Pursuant to the Bankruptcy Plan, only the Trustee (and the Tower Homes bankruptcy estate), and not Tower Homes itself, has the lawful authority under federal law to bring and maintain any civil action. (See Ex. A at 48:17-22.) In other words, ownership of the causes of action brought in the instant lawsuit has never vested in Tower Homes, and the two Marquis Aurbach Orders, by their terms, also do not authorize Tower Homes to bring this action. Rather, at best, the Second Marquis Aurbach Order purports to authorize the Tower Homes Purchasers, not Tower Homes, to bring and maintain this action. (See Ex. D at 2:7-14.) This Court rejected NWH's argument and denied the Renewed MTD. (The order denying the Renewed MTD is attached as **Exhibit E**.)

H. <u>The pending discovery dispute – The Tower Homes Purchasers' demand for confidential and privileged documents</u>

The parties held their early case conference on October 17, 2003. Thereafter, the parties were unable to agree on terms of production for NWH's voluminous file (which consists of over 42,000 pages). Specifically, NWH has ongoing duties under the Rules of Professional Conduct (e.g., RPC 1.6(a) and RPC 1.9(c)) to protect the confidentiality of its files. Unlike a standard legal

malpractice case, where the interests of the plaintiff-client are genuinely represented by counsel, and both the plaintiff-client and the defendant-attorneys have a mutual interest in protecting the attorney's files from disclosure to strangers to the attorney-client relationship, this case presents an entirely different situation.

For one thing, it is not clear who Tower Homes' alleged attorneys actually represent (it appears that they represent the interests of the Tower Homes Purchasers, not Tower Homes), and there has not been any authorization by Tower Homes (or NWH's joint client, Mr. Yanke), to produce NWH's files to an attorney who does not actually represent Tower Homes or Mr. Yanke. Moreover, Tower Homes' alleged counsel is unwilling to enter into a standard confidentiality stipulation to protect the files from disclosure to strangers to the attorney-client relationship (such as the Tower Homes Purchasers and their respective attorneys).

Tower Homes filed a motion to compel, and NWH filed a counter-motion for protective order. These motions are currently set to be heard before the Discovery Commissioner on February 21, 2014. This discovery dispute illustrates precisely why legal malpractice claims are not assignable, as defendant attorneys cannot, consistent with their ethical obligations, simply produce their files to strangers to the attorney-client relationship.

III. ARGUMENT

In their Complaint, the Tower Homes Purchasers assert two causes of action against NWH: (1) legal malpractice;[3] and (2) breach of fiduciary duty. Both causes of action arise out of the attorney-client relationship between NWH and Tower Homes. As such, both effectively constitute legal malpractice claims.[4] NWH is entitled to summary judgment because (1) it is undisputed that the "real parties in interest" are the Tower Homes Purchasers, who are not parties to this case; and (2) even if the Tower Homes Purchasers were the named plaintiffs, they cannot pursue assigned

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[3] This "First Cause of Action" is not labeled in the Complaint, but can be fairly read as attempting to plead a legal malpractice cause of action.

[4] *See Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838 (2009) ("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.").

legal malpractice claims on behalf of Tower Homes as a well-established matter of Nevada law and public policy.

A. <u>Legal malpractice claims are not assignable under Nevada law</u>.

Legal malpractice claims are not assignable under Nevada law. *See Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982).[5] In *Chaffee*, a non-client attempted to assert a legal malpractice claim after purportedly acquiring the former client's assets, including the legal malpractice cause of action. The Nevada Supreme Court rejected this attempt to bring an assigned legal malpractice claim: "As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment or by levy and execution sale, but which was never pursued by the original client." *Chaffee*, 98 Nev. at 223-24. "The decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Id*. at 224.

In support of its conclusion that legal malpractice claims are not assignable, the Nevada Supreme Court in *Chaffee* relied on two leading decisions from other states -- *Goodley v. Wank & Wank, Inc*., 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (Cal. App. 1976) (holding that legal malpractice claims are not assignable under California law) and *Christison v. Jones*, 405 N.E.2d 8 (Ill. App. 1980) (holding that legal malpractice claims are not assignable under Illinois law).

In *Goodley*, the California Court of Appeal explained why legal malpractice claims are not assignable:

> It is ***the unique quality of legal services***, the ***personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship*** that invoke ***public policy considerations*** in our conclusion that malpractice claims should not be subject to assignment. ***The assignment of such claims could relegate the legal malpractice action to the market place*** and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice ***is rife with probabilities that could only debase***

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[5] This rule is consistent with Nevada's general prohibition against the assignment of tort claims. *See, e.g., Achrem v. Expressway Plaza Ltd*., 112 Nev. 737, 741, 917 P.2d 447 (1996).

> ***the legal profession. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty and force attorneys to defend themselves against strangers***. The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the ***already overburdened judicial system***, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.

Goodley, supra, 133 Cal. Rptr. at 87 (emphasis added). Accordingly, the assignment of a legal malpractice cause of action is "contrary to sound public policy." *Id.*

In *Christison, supra*, the Illinois Court of Appeal applied this same general rule to an assignment of a legal malpractice claim brought on behalf of a bankruptcy debtor:

> Given the policy considerations discussed and the personal nature of the duty owed by an attorney to his client, the decision as to whether a malpractice action should be instituted ***should be a decision peculiarly for the client to make. To allow that decision to be made by an assignee or by a trustee in bankruptcy, without any regard to the client's wishes or intentions (or completely contrary to the client's wishes) would be to encourage the untoward consequences set forth in the Goodley California appellate case referred to***. We conclude that a cause of action for legal malpractice is not assignable and, therefore, is not part of the estate of the bankrupt under section 70(a) of the bankruptcy act. 11 U.S.C. § 110(a) (1966).

Christison, supra, 405 N.E.2d at 11-12 (emphasis added).

As demonstrated by the *Chaffee* case, Nevada is squarely aligned with this majority law – legal malpractice claims simply cannot be assigned as a pure matter of law.

B. <u>Bankruptcy courts cannot circumvent state law prohibitions against the assignment of legal malpractice claims</u>.

Though no court in Nevada has confronted the situation presented in this case (at least not in any published opinion), courts in other jurisdictions have rejected attempts by bankruptcy trustees and creditors to avoid the well-established rule prohibiting the assignment of legal

malpractice claims, even when the assignment, transfer or "release" of the claim is done with the purported approval of a federal bankruptcy court. *See, e.g., Baum v. Duckor, Spradling & Metzger*, 72 Cal. App. 4th 54, 84 Cal.Rptr.2d 703 (Cal. App. 1999); *Curtis v. Kellogg & Andelson*, 73 Cal. App. 4th 492, 86 Cal.Rptr.2d 536 (Cal. App. 1999); *see also In re J.E. Marion*, 199 B.R. 635, 638 (S.D. Tex. 1996) (explaining that policy considerations underlying the rule prohibiting assignment of legal malpractice claims "must be extrapolated into the federal bankruptcy context when determining the prudence of assigning legal malpractice claims."). ***These cases squarely demonstrate that NWH is entitled to judgment as a matter of law***.

For example, in *Baum*, *supra*, a creditor of two bankrupt corporations sought to bring a malpractice claim against the corporations' attorneys. The creditor had acquired the legal malpractice cause of action from the bankruptcy trustee, and the bankruptcy court had approved the purported assignment. The California Court of Appeal phrased and answered the issue to be decided as follows: "The principal issue of law we must decide is thus whether a legal malpractice claim belonging to the bankruptcy estate of a corporation may be assigned by the trustee of that estate to a creditor of the corporation for prosecution in state court. We conclude such a chose in action is not assignable as a matter of California law and public policy." *Baum*, 84 Cal.Rptr.2d at 708.

Similarly, in *Curtis*, *supra*, an individual who had purchased the assets of a corporation that was in bankruptcy (including the corporation's "causes of action") brought a legal malpractice claim against the corporation's attorneys. The bankruptcy court had entered an order purporting to authorize the individual to bring the professional malpractice claim in the name of the debtor. *See Curtis, supra*, 86 Cal.Rptr.2d at 540. The claims were ultimately brought using the names of both the individual and the corporation. Recognizing the well-established rule that legal malpractice claims are not assignable, the court held that neither the individual nor the debtor corporation had standing to sue the defendant law firm. *Id*. at 544-45.

Just as in *Baum*, the court in *Curtis* rejected the argument that the bankruptcy court purporting to authorize the action somehow avoided the unlawful assignment of the legal malpractice lawsuit, reasoning as follows: "The trustee was apparently attempting to give [the

individual] permission to proceed against [the law firm] in the name of the [client/debtor]. The difficulty here is we are aware of no Bankruptcy Code provision--and appellants cite us to none--that would permit the trustee to proceed in this fashion." *Id.* at 546.[6]

Thus, in sum, these cases – *Baum*, *Curtis* and *J.E. Marion* – all stand for the squarely applicable proposition that a bankruptcy court simply cannot assign, release or somehow give a creditor of a bankruptcy estate the right to bring a state law legal malpractice claim against a debtor's attorneys when doing so would violate a state law prohibition against the assignment of legal malpractice claims. In this situation, the state law prohibition against the assignment of such claims controls. As detailed above, Nevada, like most states, clearly prohibits the assignment of legal malpractice claims.

C. The Tower Homes Purchasers accordingly cannot bring and maintain this action as a matter of law.

Though the "plaintiff" in this case is nominally designated as "Tower Homes, LLC," the actual plaintiffs – the "real parties in interest" – are the Tower Homes Purchasers. The Second Marquis Aurbach Order authorizes *only* the Tower Homes Purchasers to sue on behalf of Tower Homes (and not vice versa). (See Ex. D at Page 2 of 3, lines 7-9.) Furthermore, the Second Marquis Aurbach Order provides that "any such recoveries [in this action] shall be for the benefit of the Tower Homes Purchasers." (Ex. D at Page 2 of 3, lines 19-20.) Accordingly, there is no factual dispute that the "real parties in interest" are the Tower Homes Purchasers.

Under Nevada law, "[e]very action shall be prosecuted in the name of the real party in interest." N.R.C.P. 17(a). The purpose of this rule is "to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party

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[6] Notably, the court in *Curtis* also observed that "a suit brought on a claim acquired by involuntary assignment, and against the client's wishes, places the attorney in an untenable position: *He must preserve the attorney-client privilege (the client having done nothing to waive the privilege)* while trying to show that his representation of the client was not negligent." *Id.* at 544-45 (emphasis added). This dilemma has presented itself precisely with the parties' ongoing discovery dispute relating to the production of NWH's files.

at interest on the same matter." *Painter v. Anderson*, 96 Nev. 941, 943, 620 P.2d 1254 (1980). On this basis alone, NWH is entitled to summary judgment because only the Tower Homes Purchasers have any interest in the outcome of these proceedings, and they are not the named parties.

Moreover, *even if the Tower Homes Purchasers were the named plaintiffs in this action, NWH is still entitled to summary judgment*. As explained by the courts above in *Baum*, *Curtis* and *J.E. Marion*, *supra*, a bankruptcy court simply cannot authorize a non-client to bring a legal malpractice claim against former attorneys of a client-debtor when state law prohibits the assignment of legal malpractice claims. As the Nevada Supreme Court recognized in *Chaffee*, *supra*, any assignment of a legal malpractice claim violates Nevada public policy and is prohibited as a well-established matter of law.

IV. CONCLUSION

Based on the foregoing, defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. respectfully request the entry of summary judgment in their favor and against plaintiff Tower Homes, LLC.

DATED this 18th day of February, 2014

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Jeffrey D. Olster

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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 an attorney, duly licensed and authorized to practice law in the State of Nevada. My office represents defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. ("NWH"). As such, I have personal knowledge of the following.

2. Attached as **Exhibit A** is a true and correct copy of the Bankruptcy Court's December 8, 2008 "Order Approving Disclosure Statement and Confirming Plan of Reorganization" from the Tower Homes bankruptcy proceedings (United States Bankruptcy Court, District of Nevada, Case No. BK-07-13208-BAM).

3. Attached as **Exhibit B** is a true and correct copy of the "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 the Debtor" from the Tower Homes bankruptcy proceedings (the "Marquis Aurbach Order").

4. Attached as **Exhibit C** is a true and correct copy of this Court's "Order Regarding Defendants' Motion to Dismiss, or, alternatively, Motion for Summary Judgment," which was electronically filed on November 1, 2012.

5. Attached as **Exhibit D** is a true and correct copy of the "Order Granting Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, as Counsel for the Tower Homes Purchasers, to Pursue Claims on Behalf of the Debtor" from the Tower Homes bankruptcy proceedings (the "Second Marquis Aurbach Order").

6. Attached as **Exhibit E** is a true and correct copy of this Court's "Order Denying Defendants' Renewed Motion to Dismiss," which was electronically filed on September 4, 2013.

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

DATED this 18th day of February, 2014.

/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 18th day of February, 2014, a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was placed in an envelope, postage prepaid, addressed as stated below.

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Eric N. Tran
Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117
P: (702) 228-6800
F: (702) 228-0443
Attorneys for Plaintiff

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

EXHIBIT "A"

Entered on Docket
December 08, 2008

Hon. Bruce A. Markell
United States Bankruptcy Judge

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Attorneys for William A. Leonard, Jr.,
Chapter 11 Trustee

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re TOWER HOMES, LLC, a Nevada limited liability company, dba Spanish View Tower Homes, Debtor.	CASE NO. BK-S-07-13208-BAM Chapter 11 (Involuntary) Date: November 17, 2008 Time: 9:30 a.m. Ctrm.: BAM - Courtroom 3 Foley Federal Building 300 Las Vegas Blvd. South Las Vegas, NV 89101 Judge: Hon. Bruce A. Markell

ORDER APPROVING DISCLOSURE STATEMENT AND CONFIRMING PLAN OF REORGANIZATION

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The Motion to Confirm Plan of Reorganization ("Motion") filed by William A. Leonard, Jr. ("Trustee"), the Chapter 11 trustee of the bankruptcy estate of Tower Homes, LLC ("Debtor"), came on regularly for hearing on November 17, 2008, at 9:30 a.m. in Courtroom 3 of the above-entitled Court, United States Bankruptcy Judge Bruce A. Markell presiding. The Trustee appeared in person and by his counsel, James P. Hill of Sullivan, Hill, Lewin, Rez & Engel. All other appearances are noted in the Court's record of the hearing.

The Court having considered the Motion, its supporting papers, the combined Disclosure Statement and Plan of Reorganization, the opposition filed thereto, and the stipulation resolving the opposition; the Court having previously entered an order conditionally approving the Trustee's disclosure statement; the Court having entered findings of fact and conclusions of law concurrently herewith; notice of the Motion appearing sufficient and proper; and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. The disclosure statement aspect of the plan is granted final approval as containing "adequate information" within the meaning of section 1125 of the Bankruptcy Code (11 U.S.C. §§ 101, et seq.).

2. The Plan, subject to the modifications announced in open court ("Plan"), is confirmed and approved in its entirety. A copy of the Plan as amended is attached as Exhibit "A" hereto. To the extent of any conflict between the Plan and this order ("Confirmation Order"), this Confirmation Order shall control. The Trustee is authorized to take all steps and do all things necessary to implement the Plan. All terms not defined herein shall have the meaning given them in the Plan, or if not defined in the Plan, then in the Motion.

3. The failure to reference or discuss any particular provision of the Plan in this Confirmation Order shall have no effect on the Court's approval and authorization of, or the validity, binding effect, and enforceability of, such provision. Each provision of the Plan is authorized and approved and shall have the same validity, binding effect, and enforceability as every other provision of the Plan, whether or not mentioned in this Confirmation Order.

4. Pursuant to section 1141 of the Bankruptcy Code (11 U.S.C. § 101, et seq.), and except as expressly provided in the Plan, related settlement agreements referred to in the Plan, or this

Confirmation Order, the provisions of the Plan (including the exhibits thereto, and all documents and agreements executed pursuant to the Plan) and this Confirmation Order shall be binding on (i) the Debtor, (ii) the Trustee, (iii) any person acquiring property under the Plan, and (iv) all holders of Claims against and Interests in the Debtor or its bankruptcy estate, whether or not impaired under the Plan and whether or not, if impaired, any such holder accepted the Plan.

5. On the Effective Date, except as provided in the Plan or related settlement agreements referred to in the Plan; (A) Creditors of the Debtor whose Claims are dealt with by the Plan and this Confirmation Order are restrained and enjoined from the commencement, taking, or continuance of any action, or the employment of any process: (i) to collect such Claims or debts from the Trustee, the Debtor or its bankruptcy estate, or from property of the Debtor or its bankruptcy estate; (ii) which may directly or indirectly interfere with or impair the Trustee's administration of property of the Debtor's bankruptcy estate; or (iii) to collect on a claim or alleged claim that is satisfied or treated under the Plan; (B) this injunction shall be binding on all Creditors, parties in interest, and other Persons, and their respective officers, agents, members, employees, successors, and assigns; and (C) the assets and property of the Debtor and its bankruptcy estate shall be held by the Trustee to be administered free and clear of each and every claim, lien, encumbrance, action, successor liability proceeding, setoff, counterclaim, or claims for equitable relief of any type or nature, except as expressly provided for by the Plan.

6. In the event that a Timely Refinancing is achieved in accordance with the terms of the Plan, then (a) all executory Purchase Contracts shall be assumed pursuant to the provisions of sections 365 and 1123 of the Bankruptcy Code, other than any executory Purchase Contract that is the subject of a motion to reject filed prior to and pending on the Confirmation Date, which shall be rejected according to the terms of such motion; and (b) all other executory contracts to which the Debtor may be a party shall be rejected, other than any executory contract or unexpired lease that is the subject of a motion to assume filed prior to and pending on the Confirmation Date, which shall be assumed according to the terms of such motion. In the event that a Timely Refinancing is not achieved, then (i) all executory contracts and unexpired leases to which the Debtor may be a party shall be rejected, other than any executory contract or unexpired lease that is the subject of a motion

to assume filed prior to and pending on the Confirmation Date, which shall be assumed according to the terms of such motion. Any assumption or rejection effected under this paragraph and not the subject of a specific assumption or rejection order shall be deemed to have occurred on the date that the Trustee files the notice described in Section V(B)(3)(i) of the Plan; provided, however, that in the event of a dispute over whether a Timely Refinancing has been achieved, any assumption or rejection effected under this paragraph shall be deemed to have occurred on the date that any Court order resolving the dispute becomes final.

7. Pursuant to section 1142(b) of the Bankruptcy Code, the Trustee is authorized and empowered to (a) execute and deliver any instrument, agreement or document required to effect a transfer of property dealt with by the Plan; and (b) to perform any other act that is necessary, desirable or required to consummate the Plan.

8. Pursuant to section 105 of the Bankruptcy Code, the Trustee is authorized and empowered to take any and all actions reasonably necessary to implement the transactions contemplated by the Plan and this Confirmation Order, all without further corporate action or action of the managers or members of the Debtor, including, without limitation, matters under the Plan involving the organizational structure of the Debtor or corporate action by the Debtor.

9. Pursuant to section 1146(a) of the Bankruptcy Code, the issuance, transfer, or exchange of notes or equity securities under the Plan, the creation of any mortgage, deed of trust, or other security interest, the making or assignment of any lease or sublease, or the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Plan, including, without limitation, any agreements of consolidation, deeds, bills of sale or assignments executed in connection with any of the transactions contemplated under the Plan, shall not be subject to any stamp tax, transfer tax, mortgage recording fee, or other similar tax.

10. All Professional Persons, or other Persons requesting compensation or reimbursement of expenses pursuant to any of sections 327, 328, 330, 331, 503(b) and 1103 of the Bankruptcy Code for services rendered on or before the Confirmation Date (including, inter alia, any compensation requested by any Professional Person or any other Person for making a substantial contribution in the Bankruptcy Cases) shall file with the Court and properly serve an application for final allowance

of compensation and reimbursement of expenses no later than (i) sixty (60) days after the Confirmation Date, or (ii) such later date as this Court shall order upon application made prior to the end of such 60-day period. The Trustee shall be paid in accordance with the terms of Section VIII(J) of the Plan.

11. Compensation for services rendered and for reimbursement of expenses by the Trustee or a Professional Person after the Confirmation Date need not be approved by the Court. The Trustee or Professional Persons may invoice the estate directly, and shall provide a copy of such invoice to the Office of the United States Trustee and any other party specifically requesting in writing to the Trustee a copy of such post-confirmation invoices (not merely having requested notice generally in the bankruptcy case). In the event that no objection is served on the Trustee and the party requesting payment within 10 days of service of a given invoice, the Trustee may pay such invoice without further order of the Court. In the event that an objection to a given invoice is served on the Trustee and the party requesting payment within 10 days of service of a given invoice, the party requesting payment may submit an application to the Court for review of the request for compensation and reimbursement, and the Court retains jurisdiction to hear and approve such application and compel payment thereon. Such post-Confirmation Date compensation for services rendered and reimbursement of expenses shall be considered an ordinary expense of the Debtor's bankruptcy estate.

12. All fees payable by the Trustee on behalf of the Debtor on or before the Effective Date pursuant to section 1930 of Title 28 of the United States Code shall be paid by the Trustee on or before the Effective Date.

13. Except as otherwise provided in the Plan and this Confirmation Order, notice of all subsequent pleadings in these Chapter 11 cases shall be limited to counsel for the Debtor; the Trustee; the United States Trustee; Yanke; Bank of George; OneCap; the Petitioning Creditors; the Joining Creditors; as well as Donna Osborn, Esq.; any party directly affected by the relief requested in a pleading; and any other party requesting such notice by a writing delivered to the undersigned counsel after the Effective Date, unless otherwise specified in an order by this Court. The Trustee

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shall provide notice to all creditors and parties in interest of (i) such future limitation of notice, and (ii) the opportunity to request in writing continued notice.

14. Pursuant to sections 1123(a) and 1142(a) of the Bankruptcy Code, the provisions of this Confirmation Order, the Plan, or any amendments or modifications thereto shall apply and be enforceable notwithstanding any otherwise applicable non-bankruptcy law.

15. The Trustee and the Debtor's bankruptcy estate shall retain all Claims or Causes of Action that they have or hold against any party, including against "insiders" of the Debtor (as that term is defined in Bankruptcy Code section 101(31)), 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. Confirmation of the Plan effects no settlement, compromise, waiver or release of any Claim or Cause of Action unless the Plan, related settlement agreements referred to in the Plan, or this Confirmation Order specifically and unambiguously so provide. Upon the Effective Date, the Trustee will be designated as representative of the Estate under section 1123(b)(3) of the Bankruptcy Code and shall, except as otherwise provided herein, have the right to assert any or all of the above Causes of Action post-confirmation in accordance with applicable law. Notwithstanding the foregoing, neither the Trustee, the Debtor, nor the Estate have, or shall assert, any claims or Causes of Action against Bank of George, or with respect to the SPF Financing.

16. When the Trustee has determined in his reasonable business judgment that the Plan has been substantially consummated, he shall file an application for a final decree as required by Federal Rule of Bankruptcy Procedure 3022. This application may be granted prior to full consummation of the Plan. Notwithstanding the entry of such final decree and the closing of the Chapter 11 case, the Court shall hear controversies arising thereafter that are within the scope of the provisions of the Plan, of this Confirmation Order, or of other order of this Court regarding retained jurisdiction over the case and the parties in interest thereto. In addition, any party in interest may move to reopen the Chapter 11 case if necessary to obtain relief that otherwise could not be obtained absent reopening of the case. Any request for such relief may be heard concurrently with a motion

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to reopen the case, and the same may be heard on an emergency basis if expedited relief is necessary under the circumstances.

17. The Court reserves jurisdiction to the extent set forth in Section X(I) of the Plan and as provided by law.

IT IS SO ORDERED.

Submitted by:

SULLIVAN, HILL, LEWIN, REZ & ENGEL
A Professional Law Corporation

By: */s/ James P. Hill*
JAMES P. HILL
ATTORNEYS FOR WILLIAM A. LEONARD, JR.,
CHAPTER 11 TRUSTEE

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SHEA & CARLYON, LTD.

By: *failed to respond*
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COUNSEL FOR BANK OF GEORGE

APPROVED/DISAPPROVED:

SYLVESTER & POLEDNAK, LTD.

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APPROVED/DISAPPROVED

NITZ, WALTON & HEATON, LTD.

By: _____
WILLIAM H. HEATON, ESQ.
COUNSEL FOR RODNEY YANKE

CERTIFICATION - LOCAL RULE 9021

In accordance with Local Rule 9021, counsel submitting this document(s) certifies as follows (check one):

_____ The Court waived the requirements of L.R. 9021.

_____ No parties app eared or filed written objections, and there is no Trustee appointed in the case.

__X__ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and any Trustee appointed in this case, and each has approved or disapproved the order, or failed to respond, as indicated below (list each party and whether the party has approved, disapproved, or failed to respond to the document):

- William A. Leonard, Jr., is the appointed Trustee and the client of undersigned counsel.
- Donna Osborn, counsel for Ferguson Enterprises, Hughes Water & Sewer, Ltd., and numerous pre-purchasers, approved the order.
- Shlomo Sherman, counsel for Bank of George, failed to respond.
- James MacRobbie, counsel for OneCap Mortgage Co., failed to respond.
- William M. Noall, counsel for HB Parkco Construction, Inc.; Regional Steel Corporation; and Nevada Ready Mix Corporation, failed to respond.
- Jon T. Pearson, counsel for Atlas Mechanical, Inc.; Building Consensus, Inc.; Harry Ellis Devereaux; Helix Electric of Nevada; Ledcor Construction, Inc.; and WPH Architecture, Inc., failed to respond.
- William H. Heaton, counsel for Rodney Yanke, failed to respond.

By: */s/ Christine A. Roberts*
Christine A. Roberts
228 South Fourth Street, First Floor
Las Vegas, NV 89101
Attorneys for William A. Leonard, Jr.

###

EXHIBIT "A"

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Attorneys for William A. Leonard, Jr.,
Chapter 11 Trustee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re TOWER HOMES, LLC, a Nevada limited liability company, dba Spanish View Tower Homes, Debtor.	CASE NO. BK-S-07-13208-BAM Chapter 11 (Involuntary) **Date: November 17, 2008** **Time: 9:30 a.m.** Ctrm.: BAM - Courtroom 3 Foley Federal Building 300 Las Vegas Blvd. South Las Vegas, NV 89101 Judge: Hon. Bruce A. Markell

TRUSTEE'S DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION
(amended as approved at confirmation hearing)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

William A. Leonard, Jr. (the "Trustee"), the Chapter 11 trustee of the bankruptcy estate of Tower Homes, LLC (the "Debtor"), hereby files his Disclosure Statement and Plan of Reorganization (the "Disclosure Statement," or the "Plan").[1]

I.

EXECUTIVE SUMMARY

A. Overview

The Trustee's Plan is described in detail below. In summary, it offers two alternative solutions for satisfaction of Creditors' Claims. One alternative provides the Debtor and its principal, Rodney Yanke, a short period of time (in addition to that already enjoyed) to complete a refinancing of the Debtor's Spanish View Towers real estate project. The second alternative provides sale procedures for the certain sale of the Property within a definite time period should the Debtor and Yanke fail to consummate and close a refinancing of the Property in the time afforded them to do so. Payments on account of Creditors' Claims depend on which alternative is implemented. If the Debtor and Yanke achieve a refinancing, all Allowed Claims will be paid in full. If the Debtor and Yanke fail to achieve a timely refinancing, Creditors' Claims will be paid, if at all, depending on the ultimate sale price achieved for the Property, and upon each Creditor's relative priority in terms of allowed, perfected liens against the Property and in terms of the priority their Claims hold as established by this Plan and the Bankruptcy Code. The treatment set forth herein represents the results of arms length settlement negotiations between and among the Trustee, Yanke, OneCap (as holder of multiple classes and priorities of Claims), the Mechanics' Lien Claimants, and the Pre-Purchaser Claimants. Creditors and other parties in interest are urged to read this Plan carefully to more fully understand the treatment of Creditors' Claims, Equity Interests and the Debtor's assets.

B. The Plan Will Allow for Greater Recoveries by Creditors

The Trustee believes that the treatment of Creditors under this Plan will result in a greater recovery for Creditors than that which is likely to be achieved under liquidation in a case under

[1] A glossary of defined terms is provided at the end of this document, beginning at page 59 below.

Chapter 7 of the Bankruptcy Code. Absent confirmation of the Plan, the Trustee believes that senior Secured Creditors would likely foreclose on the Property, and that a foreclosure sale would not realize maximum value for the Property. The Plan avoids a hurried "fire sale" of the Property, and instead provides for a fully-advertised sale of the Property over a reasonable time period with the help of seasoned professionals -- all of which should help realize maximum value for the Property. The Plan also provides for the possibility -- albeit remote -- of a Timely Refinancing, under which all Allowed Claims will be satisfied in full -- a result not probable in a liquidation under either Chapter 7 or the Plan. The Plan will also allow distributions to Creditors to be made sooner than would be possible under Chapter 7. Earlier payment will likely mean higher payment, because the more time passes, the more interest accrues on the senior Secured Claims.

Attached as Exhibit "1" hereto are the Trustee's Financial Projections which show various possible outcomes for Creditors in the Bankruptcy Case. The models make clear that in order for Class 14 Unsecured Claims to receive any distribution, (i) Yanke must achieve a Timely Refinancing (including the required negotiation of discounted Claim amounts), or (ii) the Property must sell for $90 million or more, and the Trustee must achieve success with Claim objections.

The Trustee believes that the alternative to the Plan is liquidation through foreclosure by the senior priority Secured Creditors and likely litigation among Classes of Secured Creditors spanning many years and involving many tens of thousands of dollars of litigation expenses, and offering no guaranteed returns.

C. The Trustee Recommends that You Vote to Accept the Plan

Based on the factors described above, the Trustee believes that confirmation of the Plan is in the best interest of Creditors. The Trustee, in consultation with senior priority Creditors and the Debtor, recommends that Creditors vote to accept the Plan.

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II.

INTRODUCTION

Chapter 11 of the Bankruptcy Code allows a debtor, a court-appointed trustee, creditors and other parties in interest to propose a plan of reorganization. A plan of reorganization provides the means for a debtor to reorganize its financial affairs and continue to operate, or to liquidate, or a combination of both. A disclosure statement describes the assumptions that underlie the Plan, how the Plan will be executed, and the treatment of creditors' and other parties' claims and interests. A disclosure statement must contain information of a kind and in sufficient detail to enable creditors and other parties who are affected by the Plan to vote intelligently for or against the Plan or to object to the Plan.

THE DOCUMENT YOU ARE READING IS A COMBINED DISCLOSURE STATEMENT AND PLAN OF REORGANIZATION, AS THOSE TERMS ARE USED IN THE BANKRUPTCY CODE. The Trustee is the party proposing the Plan and sending you this combined Disclosure Statement and Plan of Reorganization. The Trustee, in consultation with the Debtor and the secured creditors holding the largest claims in this case, has proposed the Plan to provide the treatment for all claims against and equity interests in the Debtor. The Plan provides that the Debtor be afforded a brief opportunity (60 or 90 days) to attempt to refinance its real property. If the Debtor timely achieves such a refinancing, all allowed claims of creditors will be paid in full. If the Debtor does not timely achieve such a refinancing, then the Trustee will liquidate the Debtor's assets and use the liquidation proceeds to pay allowed claims of creditors in the priority set forth below, to the extent that such proceeds allow. The procedures for refinancing and sale are discussed in detail below.

The Bankruptcy Court has preliminarily approved the document you are reading as a Disclosure Statement containing adequate information in sufficient detail to enable parties affected by the Plan to make informed judgments about the Plan. The Bankruptcy Court will make a final determination respecting the adequacy of this Disclosure Statement at the Confirmation Hearing (defined below). The Bankruptcy Court has not yet confirmed the Plan, and therefore the Plan is not yet binding.

READ THIS DISCLOSURE STATEMENT CAREFULLY TO FIND OUT THE FOLLOWING IMPORTANT INFORMATION:

1. HOW THE PLAN WILL AFFECT YOUR CLAIM;

2. WHAT RIGHTS YOU HAVE WITH RESPECT TO VOTING FOR OR AGAINST THE PLAN;

3. WHAT RIGHTS YOU HAVE WITH RESPECT TO OBJECTING TO THE PLAN; AND

4. HOW AND WHEN TO VOTE FOR OR AGAINST THE PLAN.

This Disclosure Statement cannot tell you everything about your rights. You should consider consulting your own lawyer to obtain more specific advice on how the Plan will affect you and what is the best course of action for you.

The information contained in this Disclosure Statement has been submitted by the Trustee, unless expressly attributed to other sources. The Trustee has authorized no representations concerning the Debtor or its financial affairs other than those representations set forth in this Disclosure Statement.

Except as may be set forth in this Disclosure Statement, the Bankruptcy Court has not approved any representations concerning the Debtor or the value of its assets. The Trustee has not authorized any representations or inducement to secure acceptance or rejection of the Plan other than as contained herein and approved by the Bankruptcy Court.

The statements contained in this Disclosure Statement are based upon information obtained by the Trustee from the Debtor's books and records, as well as through formal and informal discovery conducted by the Trustee with the Debtor's former officers, directors, employees, attorneys and accountants, and with other parties in interest. Such statements are made as of the date of this document, unless another date is specified. Neither delivery of this Disclosure Statement nor any exchange of rights made in connection with this Disclosure Statement or the Plan shall under any circumstances create an implication that there has been no change in the facts set forth in the Disclosure Statement since the date the Disclosure Statement was prepared. Although the Trustee believes that the contents of the Disclosure Statement are

complete and accurate to the best of his knowledge, information and belief, the Trustee is unable to warrant or represent that the information contained herein is without any inaccuracy.

The financial data and other facts relied upon in formulating the Plan are based upon the Debtor's books and records. The Trustee, as the Plan proponent, represents that everything stated in the Disclosure Statement is true to his best knowledge and belief. The Trustee has included in this Disclosure Statement as Exhibit "1" certain Financial Projections reflecting how claims will be paid either through sale or refinancing of the Debtor's assets. Those projections represent the Trustee's predictions of future events based upon various assumptions. Those anticipated or expected future events may or may not occur, and the projections may not be relied upon as either a guarantee or as other assurance that the projected results will actually occur. Thus, while the Trustee believes that such projections are reasonable, there is no assurance that they will prove to be accurate. Because of all the uncertainties inherent in any predictions of future events, all Creditors and other interested parties should be aware of the risk associated with these projections and the possibility that the actual experience in the future may differ in material or adverse ways.

The Bankruptcy Court has not yet confirmed the Plan described in this Disclosure Statement. In other words, the terms of the Plan are not yet binding on anyone. If, however, the Bankruptcy Court later confirms the plan, then the Plan will be binding on all Creditors in this case, and will provide the means for treatment of all Creditors' and other parties' Claims and interests.

The Plan is intended to resolve, compromise and settle all Claims, disputes, and Causes of Action between and among all participants and as to all matters relating to these proceedings, except as expressly provided otherwise in the Plan. If the Bankruptcy Court confirms the Plan, Creditors' Claims, if and to the extent allowed, will receive the treatment provided by the terms of the Plan.

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III.

VOTING INSTRUCTION AND THE PLAN CONFIRMATION PROCESS

All Creditors are asked to vote to accept or reject the Plan. All voting will be by ballots in a form approved by the Bankruptcy Court. Based on the results of voting, the Bankruptcy Court will examine whether each Creditor Class has accepted the Plan by the requisite majority. If all Classes vote to accept the Plan, the Plan will be confirmed if the Bankruptcy Court determines that the Plan meets certain legal requirements. See generally, Bankruptcy Code section 1129(a). If at least one Class of Creditors, but fewer than all Classes, has voted to accept the Plan (without considering the vote of insiders), the Trustee will seek confirmation of the Plan pursuant to the "cramdown" provisions of Bankruptcy Code section 1129(b). Cramdown is discussed in greater detail in section III(D)(4) below.

A. Approval of the Disclosure Statement

The Bankruptcy Code requires that a disclosure statement contain "adequate information" sufficient to allow a reasonable hypothetical investor to make an informed decision regarding a plan of reorganization. The document you are reading is a combined disclosure statement and plan of reorganization. The disclosure statement aspect of this document has been conditionally approved by the Bankruptcy Court's order entered August 21, 2008. It has not yet received final approval by the Bankruptcy Court. The Bankruptcy Court will address the issue of final approval of the disclosure statement aspect of this document at a hearing on November 17, 2008. If you wish to object to the adequacy of this Disclosure Statement, you must file an objection with the Bankruptcy Court and serve it on the undersigned counsel and other parties requesting special notice in this case no later than October 21, 2008.

B. Holders of Claims Eligible to Vote For or Against the Plan

Under the Bankruptcy Code, only the members of those Classes whose Claims are impaired under the Plan are entitled to vote for acceptance or rejection of the Plan. "Impaired" generally means "changing or altering the legal or equitable rights of such Creditor." In this case, Classes 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16 are impaired under the Plan.

Accordingly, the holders of all Claims in those Classes are entitled to vote to accept or to reject the Plan.

C. Voting Instructions

A ballot accompanies this document for Creditors to use in voting on the Plan. To vote on the Plan, indicate the amount of your Claim, and whether you accept or reject the Plan on the ballot. If you have a Claim in more than one Class, you should submit a ballot for each Claim falling within each Class. Creditors entitled to vote to accept or reject the Plan may vote by completing, dating, signing and returning the accompanying ballot via regular United States Postal Service mail or by personal hand delivery to the Trustee's counsel, Sullivan, Hill, Lewin, Rez & Engel, Attn: James P. Hill Esq., 228 South Fourth Street, First Floor, Las Vegas, Nevada, 89101, or via facsimile actually received at (702) 384-9102.

IN ORDER TO BE COUNTED, YOUR BALLOT MUST BE RECEIVED NOT LATER THAN 5:00 P.M. (PACIFIC) ON NOVEMBER 3, 2008. The risk of non-receipt or late receipt of ballots, whether due to United States Postal Service error or any other reason, is entirely on the voting Creditor.

D. Acceptance of the Plan

For the Plan to be accepted and thereafter confirmed without resort to "cramdown," it must be accepted by each impaired Class.

1. Acceptance by a Class of Claims

In accordance with Bankruptcy Code section 1126, a particular Class of Claims will be deemed to have accepted the Plan only if holders representing at least two-thirds (2/3) in amount and more than one-half (1/2) in number of Claims against the Debtor that have voted in that Class have accepted the Plan.

2. Deemed Acceptance/Rejection

Pursuant to Bankruptcy Code section 1126(f), an unimpaired Class and each holder of a Claim in that Class are deemed to have accepted the Plan, and those Creditors do not vote on the Plan. Under the Plan, Classes 1 and 11 are unimpaired, and, accordingly, such Classes are deemed to have accepted the Plan under this provision.

3. Comparison to Chapter 7

In order to confirm the Plan, the Bankruptcy Court must determine that the Plan provides to each Creditor (in an impaired class) who does not accept the Plan property of a value, as of the Effective Date, not less than the Distribution that such Creditor would receive or retain if the Debtor were liquidated in a case under Chapter 7 of the Bankruptcy Code. This requirement, set forth in Bankruptcy Code section 1129(a)(7)(A), is commonly referred to as the "best interests of creditors" test. The Trustee believes that the Plan meets this requirement and that, if necessary, the Bankruptcy Court will make such a determination. A hypothetical Chapter 7 liquidation analysis is set forth in detail at section IX below.

4. Confirmation Without Acceptance ("Cramdown")

Bankruptcy Code section 1129(b) provides that the Plan may be confirmed by the Bankruptcy Court, even if not accepted by every impaired Class, if (i) at least one impaired Class has accepted the Plan (determined without including any acceptance of the Plan by any insider), and (ii) the Bankruptcy Court finds that the Plan does not discriminate unfairly against, and is fair and equitable with respect to, the rejecting Class(es).

With respect to each Class of Secured Claims, the requirement that the Plan be fair and equitable to an impaired rejecting Class means that a Plan must provide:

(a) that each holder of a Claim in such Class will (i) retain the liens securing such Claim, and (ii) receive deferred cash payments totaling at least the value of the security interest (as of the effective date of the plan);

(b) for the sale of property subject to the liens securing such Claim, free and clear of such liens, with the liens to attach to the proceeds of such sale, and to be treated as described in section (a) above or (c) below; or

(c) for the realization by each holder of a Claim in such Class of the indubitable equivalent of such Claim.

With respect to each Class of Unsecured Claims, the requirement that the Plan be fair and equitable to an impaired rejecting Class means that (i) each holder of a Claim in such Class will receive property of a value equal to the allowed amount of such Claim, plus interest, or (ii) no

holder of a Claim or Equity Interest that is junior to such Class will receive any property under the Plan on account of such junior Claim or Equity Interest.

If any impaired Class does not accept the Plan, the Trustee will seek confirmation by the "cramdown" provisions of section 1129(b), provided that all of the applicable requirements of section 1129(a), other than section 1129(a)(8), have been met.

5. Confirmation Hearing

The Bankruptcy Court will hold a hearing with respect to confirmation of the Plan to determine whether the Plan has been accepted by the requisite number of Creditors and whether the other requirements for confirmation of the Plan have been satisfied. The issues to be determined through the confirmation hearing include (without limitation) issues relating to notice, value of property, and feasibility of the Plan. In the event of a cramdown, the Trustee must also prove, among other things, that the Plan does not discriminate unfairly against, and is fair and equitable to, any non-accepting Class(es). THE TIME, PLACE AND DATE OF THE HEARING ON CONFIRMATION, AND THE DATE BY WHICH OBJECTIONS TO CONFIRMATION MUST BE FILED AND SERVED, ARE SPECIFIED IN THE BANKRUPTCY COURT ORDER APPROVING THIS DISCLOSURE STATEMENT AND THE NOTICE OF HEARING THAT ACCOMPANIES THIS DISCLOSURE STATEMENT.

6. Identity of Person to Contact For More Information Regarding the Plan

Any interested party desiring further information about the Plan should contact the Trustee's general bankruptcy counsel, James P. Hill, Esq., of Sullivan, Hill, Lewin, Rez & Engel, whose contact information is set forth above on the cover sheet to this combined Plan and Disclosure Statement.

E. The Trustee Recommends That You Vote to Accept the Plan

Based on the factors described in this document, the Trustee believes that his Plan will allow for the greatest possible Distributions to Creditors. Accordingly, the Trustee strongly urges all Creditors to vote to accept the Plan in accordance with the procedures described herein.

IV.

FACTUAL BACKGROUND

A. The Debtor's Background and Pre-Bankruptcy Operating History

The Debtor is a limited liability company formed under the laws of the State of Nevada. Rodney C. Yanke is the sole member and manager of the Debtor, holding 100 percent of its Equity Interests. The Debtor's most significant asset consists of a real estate development project comprising approximately 15 acres of partially developed real property located in the Southwest Las Vegas Valley along the I-215 Beltway at Buffalo, commonly referred to as the Spanish View Tower Homes. The real property was initially purchased by the Debtor in July of 2004 through an acquisition and development loan from OneCap. The project as presently configured contemplates three 21-floor condominium towers, each with 144 luxury residential units with projected sales prices in the $800,000 to $8,000,000 range. The Debtor asserts that an approved tract map has been filed; all necessary government permits, exemptions, entitlements and approvals have been obtained; and substantially all excavation work has been completed. Foundations are in place for Towers "A" and "B." The parking deck platform has been completed for Tower "A." Due to the Debtor's inability to secure sufficient financing to continue construction, minimal work has been performed on the project since the spring of 2006. The real property and its improvements may be described herein as the "Property."

The project was originally envisioned to cost over $600,000,000. The Debtor alleges that approximately $90,000,000 has been invested in the project to date, including $28,000,000 from Yanke and his affiliates. OneCap asserts that it is the loan servicer for and services three separate fractionalized promissory notes secured by fully perfected deeds of trust against the Property upon which the Debtor owes OneCap's noteholders approximately $36,000,000 secured against the Property. In addition, various mechanics' lien claimants assert that they are owed in excess of $30,000,000, secured by valid and perfected mechanics' liens on the Property. Benchmark Enterprises, LLC asserts that it is owed approximately $15,000,000 secured by a junior deed of trust on the Property. Sizable additional Claims are also asserted by parties who claim to have made down payments or pre-payments toward the purchase of individual

condominium units. Other Creditors have asserted Unsecured Claims entitled to neither priority or secured status. The Debtor's bankruptcy schedules list over $100,000,000 in debt of all Classes (i.e., secured and unsecured). Over the last two years, the Debtor has attempted to obtain additional financing for the project, but has been unable to do so.

B. Events Leading to the Debtor's Bankruptcy

In 2006, with the project far from complete, the Debtor began to experience financial difficulties. The Debtor attempted to obtain additional financing to continue developing the Property, but was unable to do so due to the deteriorating real estate and credit markets. The Debtor defaulted on various obligations owed to OneCap, and in response, OneCap threatened to foreclose on the Property. On May 31, 2007, three mechanics' lienholders, HBParkco Construction, Inc., Regional Steel Corporation, and Nevada Ready Mix Corporation, filed an involuntary bankruptcy petition against the Debtor under section 303 of the Bankruptcy Code in order to stay foreclosure of the Property.

C. The Chapter 11 Case

On August 21, 2007, with the consent of the Debtor, the Bankruptcy Court entered an order for relief in the Bankruptcy Case. Almost immediately thereafter, various Creditors and parties in interest began to seek the appointment of a trustee in the Bankruptcy Case. On January 18, 2008, the Bankruptcy Court entered its order approving the United States Trustee's appointment of the Trustee as the Chapter 11 trustee in the Bankruptcy Case.

Upon his appointment, the Trustee began investigating the Debtor's assets, liabilities and prospects for reorganization. He quickly determined that whatever course the case was to take, immediate funding was required in order to preserve the value of the Property. Absent such funding, the Property might suffer significant devaluation in the form of damaged property; stolen property; degraded property; loss of permits; loss of entitlements; increased fees; and penalties. Accordingly, the Trustee filed motions seeking Bankruptcy Court approval of interim super-priority financing for the Estate to provide essential funding through Plan confirmation and beyond. On May 7, 2008, the Bankruptcy Court approved the Trustee's motion to borrow $550,000 from Bank of George on a super-priority, priming lien basis. The proceeds of this SPF

Financing are to be used specifically to pay certain critical expenses, which must be satisfied in order to avoid potential significant loss of value of the Property. Bank of George is secured by a senior priority lien against the Property and must be repaid from the first dollars recovered by the Estate from any source, including but not limited to any sale or refinancing of the Property.

Based on his investigation of the Debtor's assets, liabilities and prospects for reorganization, the Trustee has proposed the Plan on the terms set forth below.

V.

CRITICAL PLAN PROVISIONS

A. Overview

The Trustee's Plan provides for two possible solutions (alternatives) for payment of Creditors' Claims. If the Plan is confirmed, the Debtor will be afforded a very short window of time to attempt to reorganize by refinancing the Property in a fashion which brings into the Estate sufficient funds to allow the Trustee to satisfy all Allowed Claims against the Estate. If the Debtor fails to achieve a Timely Refinancing (as defined below), then the Trustee will instead liquidate the Debtor's assets, including by an orderly sale of the Property, and will distribute the proceeds to Creditors in accordance with the terms of this Plan. The Plan embodies the results of extensive arms length negotiations between the Trustee, Yanke, OneCap and the Mechanics' Lien Claimants, and the votes of these creditors and parties in interest on the Plan represent their respective consents and agreements to the treatment afforded each of them and one another under the Plan.

B. First Alternative - Refinancing

1. Generally

Under the first Plan alternative, the Debtor will be allowed a "Refinance Period" during which it may to attempt to refinance the project. Under this alternative, the Debtor will have 60 days from the Confirmation Date to deliver to the Trustee a binding commitment from a credible lender to provide financing, which commitment shall be:

(i.) in form and content satisfactory to the Trustee in the Trustee's reasonable discretion;

(ii.) is subject only to reasonable conditions which are capable of being satisfied within the period provided;

(iii.) for an amount under which the Estate would receive funds sufficient to satisfy in full all Allowed Claims against the Estate (considering reduced amounts negotiated between Creditors and the Debtor and/or Yanke); and

(iv.) is accompanied by sufficient evidence in Trustee's reasonable discretion of lender's ability to close the transaction timely upon satisfaction of all applicable conditions.

The financing commitment may provide for the lender to obtain a senior priority deed of trust against the Property free and clear of all liens, claims and interests (other than the Bank of George Claim, which shall be satisfied from refinancing proceeds directly from the close of escrow), with all such other existing liens, claims and interests to attach to the proceeds of the refinancing, pursuant to Bankruptcy Code section 1129(b)(2)(A), and to be deemed unenforceable and no longer valid against the Property, pursuant to Bankruptcy Code sections 1123(b)(1) and (5).

If the Debtor timely delivers a binding financing commitment satisfactory to the Trustee, then the Trustee will file a notice with the Bankruptcy Court that Debtor will have an additional 30 days to close such financing (with the Bank of George Claim to be paid in full directly from the proceeds of closing) and to cause the balance of the refinancing proceeds to be deposited with the Trustee for satisfaction of Creditors' Claims as provided for below.

2. Determination of Amount Needed to Satisfy All Claims

For purposes of determining whether the refinancing proceeds are sufficient to satisfy all Allowed Claims against the Estate, each Claim will be tallied at the amount shown on its respective proof of claim, or, if no proof of claim was filed, at the amount shown in the Debtor's bankruptcy schedules. As part of the foregoing process, the Debtor or Yanke may deliver to the Trustee during the Refinance Period consents by Creditors of any Class to have their Claims allowed at amounts less than either scheduled or filed.

3. Effect of Timely Refinancing

In the event that the Debtor accomplishes all of the foregoing within the Refinancing Period, the Debtor will have achieved a "Timely Refinancing." In the event that the Debtor achieves a Timely Refinancing:

(i.) the Trustee will file with the Bankruptcy Court and serve on all Creditors and parties in interest notice of such Timely Refinancing;

(ii.) upon closing of the Timely Refinancing, and payment of the proceeds thereof to Bank of George and the Trustee, as provided above, the Debtor will immediately be granted control over the Property, including the right to continue developing it, to encumber it, or to transfer it; and

(iii.) Yanke will retain his Equity Interest in the Debtor.

In the event of a dispute over whether or not the Debtor has either provided the Trustee with a sufficient binding financing commitment or has otherwise achieved a Timely Refinancing, the Bankruptcy Court shall determine the issue upon noticed motion. The Debtor and/or Yanke shall have 120 days from the Confirmation Date to file and serve such a motion. Absent (y) a timely filing of such motion or (z) the Trustee's filing of the notice described in subparagraph (i) above, no Timely Refinancing will have taken place, and the time to achieve a Timely Refinancing will have expired.

4. Control of Estate Funds/Satisfaction of Claims

Confirmation of the Plan will not terminate the Estate nor re-vest Estate assets in the Debtor. The Trustee shall direct and control all Distributions made to Creditors on account of Allowed Claims. Until such time as all Allowed Claims against the Estate are satisfied, all proceeds of any refinancing shall remain under the control of the Trustee. Any funds remaining in the Estate after full satisfaction of all Allowed Claims against the Estate shall remain property of the Estate, and shall re-vest in the Debtor upon entry of a final decree.

The Trustee questions whether the Debtor can achieve a Timely Refinancing, particularly given the time the Debtor has had to date to secure refinancing. The Trustee believes, however, that the Debtor should be given the opportunity to attempt to do so for a variety of reasons, including because a Timely Refinancing would allow for the full satisfaction of all Allowed

Claims against the Estate -- a result that may not be achieved under the second Plan alternative discussed immediately below. During the Refinance Period afforded to the Debtor, the Trustee will not file a motion seeking Bankruptcy Court approval of a sale of the Property; provided, however, that during such Refinance Period, the Trustee will begin the process of marketing and selling the Property, including, but not limited to, seeking Bankruptcy Court approval of the retention of real estate professionals, preparing due diligence materials, exposing the Property to prospective buyers, and other similar steps.

C. Second Alternative - Liquidation

1. Generally

The second Plan alternative will control in the event the Debtor does not achieve a Timely Refinancing. Under the second Plan alternative, if the Debtor does not achieve a Timely Refinancing, the Trustee will liquidate all of the Debtor's assets, pursuant to Bankruptcy Code section 1123(b)(4), and distribute the net proceeds to pay Creditors' Allowed Claims in accordance with the priorities set forth in this Plan, which priorities track those established under Chapter 7 of the Bankruptcy Code. Any remaining net proceeds from the liquidation of the Debtor's assets after payment of Creditors' Allowed Claims as treated under this alternative will be paid to holders of Equity Interests in the Debtor. As described above, the Trustee does not believe that the liquidation of the Debtor's assets will result in full satisfaction of all Allowed Claims against the Estate. As also described above, confirmation of the Plan will not terminate the Estate nor re-vest Estate assets in the Debtor.

2. Sale Procedure

The following "Sale Procedure" will govern the sale of the Property, pursuant to Bankruptcy Code section 1123(b)(4): Upon the Effective Date, the Trustee will begin marketing the Property for sale, although, as described above, during the Debtor's Refinance Period, the Trustee will not file a Sale Motion seeking Bankruptcy Court approval of a sale of the Property; provided, however, that during the Refinance Period, the Trustee will begin the process of marketing and selling the Property.

The Trustee will market the Property for a minimum of 60 days following the Effective

Date prior to filing a motion to sell the Property, or for a minimum of 90 days in the event that the Debtor timely delivers a binding financing commitment satisfactory to the Trustee. The marketing will include publication of the opportunity in national and regional publications. Any asset purchase agreement entered into by the Trustee must contain the following terms:

(a) The initial bidder must provide the Trustee with a deposit in the amount of $1,000,000, which deposit is non-refundable unless (i) the initial bidder is not approved by the Bankruptcy Court as the purchaser, or (ii) the sale does not close despite the initial bidder's timely performance of all its obligations.

(b) The sale shall be subject to overbid, with an initial overbid increment of three percent (3%) of the purchase price, and subsequent overbid increments of one percent (1%) of the purchase price.

(c) In the event that (i) the initial bidder is not approved by the Bankruptcy Court as the purchaser, or (ii) the sale does not close despite the initial bidder's timely performance of all its obligations, the initial bidder shall be entitled to a "break up fee" of the lesser of (i) reasonable and actual out-of-pocket due diligence costs as determined by the Bankruptcy Court (including fees and costs of attorneys, accountants, bankers, and other professionals customarily used in transactions of a similar nature), or (ii) one percent (1%) of the purchase price.

(d) The party approved as the purchaser at the sale hearing shall have 10 days from entry of a Bankruptcy Court order approving the sale to close the transaction.

(e) The Trustee shall be authorized to accept one or more back-up bids.

Parties wishing to overbid must "qualify" no later than 5 days prior to the hearing on the Trustee's sale by:

(i) entering into an asset purchase agreement with the Trustee in form substantially identical to that entered into by the initial bidder,

(ii) depositing with the Trustee a deposit in the amount of $1,000,000, which deposit is non-refundable unless (i) the overbidder is not approved by the Bankruptcy Court as the purchaser, or (ii) the sale does not close despite the overbidder's

timely performance of all its obligations; and

(iii) providing evidence of financial ability to close, satisfactory to the Trustee.

In the event that the Trustee has not received a satisfactory offer within 180 days following the Effective Date, he will file and serve on all creditors and parties in interest a notice of a sale hearing at which the Bankruptcy Court will conduct a "no-minimum" auction of the Property.

3. Sale Free and Clear/Credit Bids

The Property will transfer to the successful purchaser free and clear of all liens, claims and interests, allowing the purchaser to obtain fully insurable "clear" title, pursuant to Bankruptcy Code sections 1123(b)(1) and (5). All such liens, claims and interests shall attach to the proceeds of the sale, pursuant to Bankruptcy Code section 1129(b)(2)(A). Amounts outstanding to Bank of George will be paid directly from sale proceeds at closing.

Rights of Secured Creditors to "credit bid" at any sale of the Property are fully preserved, whether such rights arise under Bankruptcy Code section 363(k) or otherwise.

Any other terms of the sale may be addressed in the Trustee's Sale Motion.

4. Operation of Bankruptcy Code Section 506(a)

In the event that the Property is sold in accordance with the Sale Procedures, the sale will be deemed to have fairly and conclusively determined the fair market value of the Property, and accordingly, the values of the various Secured Claims against the Property, for purposes of determining the extent to which such Claims are Secured Claims under Bankruptcy Code section 506(a). The holder of any Secured Claim not satisfied in full from the proceeds of a sale shall receive an Unsecured Claim to the extent of any such deficiency, to be treated in Class 14.

D. Allowance and Satisfaction of Claims

Regardless of whether the Debtor achieves a Timely Refinance or the Trustee sells the Property, the Trustee shall direct the process of satisfying Claims, including holding and accounting for all funds of the Estate, and making Distributions to Creditors on account of Allowed Claims in accordance with the terms of this Plan. Pursuant to Bankruptcy Code section 502, any party in interest may file an objection to a Claim.

E. Timing of Distributions

Upon a Timely Refinancing or sale of the Property, the Trustee, as soon as practicable, shall distribute the proceeds thereof in accordance with the terms of this Plan. The Trustee shall not distribute the proceeds of the liquidation of any other assets of the Estate to Creditors (other than Bank of George, pursuant to the SPF Financing) until such time as the Plan is substantially consummated, and the Trustee is prepared to move the Bankruptcy Court for a final decree.

VI.

DESIGNATION AND TREATMENT OF UNCLASSIFIED CLAIMS

Bankruptcy Code section 1123(a)(1) provides that a plan should classify all Claims other than Claims of the kinds specified in sections 507(a)(2), 507(a)(3), and 507(a)(8). As such, the Trustee has not placed the following Claims in separate Classes:

A. Administrative Expense Claims

Administrative Expense Claims consist of Claims entitled to priority under Bankruptcy Code section 507(a)(2). They include professional fees and expenses incurred in connection with administering the Bankruptcy Case. Administrative Expense Claims also include obligations incurred by the Debtor or the Trustee after the Petition Date. The Bankruptcy Code generally requires that all Administrative Expense Claims be paid in full in Cash on the Effective Date (or on such later date as the Administrative Expenses Claims are approved by a Final Order of the Bankruptcy Court), unless a particular Administrative Claimant agrees to a different treatment.

The Plan provides that, upon (i) the closing of a sale or a refinancing of the Property, and (ii) the full satisfaction of the Bank of George Claim, all Allowed Post-Trustee Administrative Expense Claims will be paid in full in Cash directly from the proceeds of such sale or refinancing, with each Class of Secured Claims to bear its Ratable Share of Administrative Expenses.

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All Allowed Pre-Trustee Administrative Expense Claims will be paid at such time as the Estate has sufficient available Cash to do so, in the Trustee's reasonable discretion, whether from

the proceeds of a sale or refinancing (after payment of Allowed Secured Claims), or from recoveries from other sources. The Trustee is informed and believes that all Persons holding Pre-Trustee Administrative Expense Claims consent to such treatment.

B. Section 506(c) Stipulation

Pursuant to the Stipulation Re Plan Treatment of Petition Creditors' and Joining Creditors' Administrative Expense Claims entered into among the Trustee, OneCap and more than a majority in number and more than two-thirds in amount of the Class 5 claimants:

1. All allowed Post-Trustee Administrative Expense Claims (inclusive of the fees and costs of the Trustee and his professionals from and after the Confirmation Date) constitute reasonable and necessary costs and expenses of preserving or disposing of the Property, and as such are entitled to be paid as a "surcharge" or assessment against the Property, pursuant to Bankruptcy Code section 506(c) and the Plan, to be satisfied in accordance with Section VI(A) of the Plan.

2. All allowed Petitioning Creditors' Administrative Expense Claims (as defined in the Stipulation) constitute reasonable and necessary costs and expenses of preserving or disposing of the Property, and as such are entitled to be paid as a "surcharge" or assessment against the Property, pursuant to Bankruptcy Code section 506(c) and the Plan, to be satisfied in accordance with Section VI(A) of the Plan.

3. All allowed administrative expense claims of the Joining Creditors ("Joining Creditors' Administrative Expense Claims") constitute reasonable and necessary costs and expenses of preserving or disposing of the Property, and as such are entitled to be paid as a "surcharge" or assessment against the Property, pursuant to Bankruptcy Code section 506(c) and the Plan, to be satisfied in accordance with Section VI(A) of the Plan.

4. Post-Trustee Administrative Expense Claims, Petitioning Creditors' Administrative Expense Claims and Joining Creditors' Administrative Expense Claims are subject to Court review, approval and allowance.

C. Priority Tax Claims

Priority Tax Claims consist of the Claims of governmental units that are entitled to

priority under Bankruptcy Code section 507(a)(8). The Bankruptcy Code requires that each holder of an Allowed Priority Tax Claim receive the present value of such Claim in deferred Cash payments, over a period not exceeding six years from the date of the assessment of such tax, unless the holder of a Priority Tax Claim agrees to a different treatment. The Plan provides that all Allowed Priority Tax Claims will be paid in full in Cash from the proceeds of the SPF Financing, or if such proceeds are insufficient, then directly from the proceeds of the sale or refinancing of the Property, as applicable. The SPF Loan Documents require the Trustee to pay all real property tax claims on a timely basis, and the Trustee has done so.

VII.

DESIGNATION, CLASSIFICATION AND TREATMENT OF CLAIMS AND INTERESTS

All other Claims or Equity Interests are classified and treated in 16 different Classes under the Plan. Unless provided otherwise below, after satisfaction of all Allowed Unclassified Claims, then Allowed Classified Claims shall be paid in the priority set forth below from the net proceeds of a Timely Refinancing if one is achieved, or from the net proceeds of the sale of the sale of the Property, and in any event from the net proceeds of any additional Estate assets from which value can be realized. In the event that insufficient funds are available to pay a Class in full, then the claimants within such Class shall share all remaining available funds on a Pro Rata basis based upon their respective Allowed Claim amounts. The treatment set forth herein represents the results of arms length settlement negotiations between and among the Trustee, Yanke, OneCap (as holder of multiple classes and priorities of Claims), the Mechanics' Lien Claimants, and the Pre-Purchaser Claimants. Under the Plan, Classes 1 and 11 are unimpaired. Classes 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15 and 16 are impaired.

A. Class 1

1. Classification: Class 1 consists of the super-priority Secured Claim of Bank of George for funds advanced under the Super-Priority Financing Facility approved by the Bankruptcy Court's order entered May 7, 2008, which claim is secured by a first priority, fully perfected "priming lien"

upon all of the Debtor's assets.

2. Treatment: The Class 1 Claim shall be paid in full in accordance with the SPF Loan Documents. The Plan shall not alter the rights of Bank of George under the SPF Loan Documents, nor extend or modify any obligation of the borrower under the SPF Loan Document, the provisions of which shall survive confirmation of the Plan.

Pursuant to the Bankruptcy Court's May 7, 2008 order, the terms of the SPF Financing cannot be altered through this Plan or any other, and the terms of the May 7, 2008 order are incorporated herein. The automatic stay set forth in Bankruptcy Code section 362 shall not apply to Bank of George, including to Bank of George's rights to take any other action or to exercise any other right or remedy as permitted to Bank of George under the SPF Financing loan documents. No entity shall be entitled to any relief which may operate to delay or interfere with Bank of George's rights (including, without limitation, any injunction or stay), whether or not any changed circumstance or cause is demonstrated. The foregoing provisions mean that, should the Estate default on its obligations to Bank of George, the bank (owed approximately $270,000 as of the filing of this pleading) could foreclose on the Property (worth tens of millions of dollars). Such a foreclosure, which is not subject to stay or injunction by the Bankruptcy Court or any other court, is likely to yield far less proceeds to pay Creditors than would a sale through this Plan.

As provided by the SPF Loan Documents, the Bank of George Claim must be repaid via cashier's check, wire transfer, or other cash equivalent, on the earliest of the following:

(a) June 7, 2009;

(b) The sale of substantially all of the Debtor's assets;

(c) The funding of additional financing secured by a lien or liens on

the Property.

(d) Such date as the Trustee may determine in his discretion is in the best interests of the Estate; or

(e) Upon Default under the SPF Financing loan documents.

Class 1 is unimpaired.

B. Class 2

1. Classification: Class 2 consists of the Secured Claim of the Clark County, Nevada Treasurer's Office for real property taxes. As of the filing of this Plan, all such taxes had been paid in full; nonetheless, such taxes will continue to accrue going forward.

2. Treatment: Any amounts then outstanding on the Class 2 Claim shall be paid in full in Cash from the proceeds of the SPF Financing, or if such proceeds are insufficient, directly from the proceeds of the sale or refinancing of the Property, as applicable. In the event that the foregoing proceeds are insufficient to pay the Class 2 Claim in full, the Class 2 claimant shall be Allowed a "deficiency" Claim in Class 14 for any remaining unpaid balance. Class 2 is impaired.

C. Class 3

1. Classification: Class 3 consists of the Secured Claim of OneCap arising out of a promissory note in the original principal amount of $9,500,000, which is secured by a deed of trust against the Property recorded December 22, 2004 held by various entities by and through their collateral agent and loan servicer, OneCap.

2. Treatment: To the extent Allowed and secured by a lien against the Property after satisfaction of all senior Claims (including the Class 3 Ratable Share of Administrative Expenses), the Class 3 Claim shall be paid in Cash from the net proceeds of the sale or refinancing of the Property an amount equal to the then outstanding principal balance of that

note together with interest at the non-default rate plus $2,000,000.[2] The Trustee shall make the Distribution on account of the Class 3 Claim no later than 30 days from the later of (i) closing of the sale or refinancing of the Property, or (ii) entry of a Final Order fixing and allowing such Secured Claim pursuant to Bankruptcy Code sections 502 and 506. In the event that the proceeds of a sale or refinancing of the Property are insufficient to pay in full the Claim allowed herein, then the holder of the Class 3 Claim shall be Allowed a "deficiency" Claim in Class 14 for any remaining unpaid balance. Class 3 is impaired.

D. Class 4

1. Classification: Class 4 consists of the Secured Claim of OneCap arising out of a promissory note in the original principal amount of $13,000,000 secured by a deed of trust recorded December 22, 2004 held by various entities by and through their collateral agent and loan servicer, OneCap.

2. Treatment: To the extent Allowed and secured by a lien against the Property after satisfaction of all senior Claims (including the Class 4 Ratable Share of Administrative Expenses), the Class 4 Claim shall be paid in Cash from the net proceeds of the sale or refinancing of the Property an amount equal to the then outstanding principal balance of that note together with interest at the non-default rate. The Trustee shall make the Distribution on account of the Class 4 Claim no later than 30 days from the later of (i) closing of the sale or refinancing of the Property, or (ii) entry of a Final Order allowing such Secured Claim pursuant to Bankruptcy Code sections 502 and 506. In the event that the proceeds of a

[2] The treatment afforded to OneCap herein was negotiated by the Debtor prior to the Trustee's appointment. The Trustee believes that such treatment is in the best interest of the Debtor's Creditors and the Estate. Because the Estate will likely lack Cash on the Effective Date sufficient to cure the default in the OneCap Claims, the Plan cannot utilize section 1124(2) of the Bankruptcy Code which allows a debtor to "de-accelerate" a debt that was accelerated pre-petition. Accordingly, in order to confirm the Plan, OneCap's consent to the Plan is required.

sale or refinancing of the Property are insufficient to pay in full the Claim allowed herein, then the holder of the Class 4 Claim shall be Allowed a "deficiency" Claim in Class 14 for any remaining unpaid balance. Class 4 is impaired.

E. Class 5

1. Classification: Class 5 consists of all Claims of all Mechanics' Lien Creditors asserting mechanics' lien claims under applicable state law. In general, mechanics' lien claims are subject to adjustment due to accrued interest and attorneys' fees and costs under Nevada law and the Bankruptcy Code. Importantly, under applicable state law, including Nevada Revised Statute 108.236(1), certain types of mechanics' lien claims are subordinate to other types of mechanics' lien claims. This legal framework could possibly result in "sub-priorities" within Class 5.

2. Treatment:

(a) Allowance of Secured Claims: Each Mechanics' Lien Creditor listed below shall be deemed to hold an allowed secured Class 5 Claim in the respective amounts listed below, secured as a mechanics' lien Claim against the Property recognized under Nevada state law, specifically under Nevada Revised Statute 108.236(1). The Allowed Class 5 Claims will be paid in whole or in part after satisfaction of all senior priority secured Claims (including the Class 5 Ratable Share of Administrative Expenses). The Allowed Claim amounts listed below for each of the Class 5 Creditors represents the results of arms length settlement negotiations between and among the Trustee, Yanke, OneCap (as holder of multiple classes and priorities of Claims) and the Mechanics' Lien Claimants:

AHERN RENTAL	$17,008.60
ALLIED TRENCH SHORING SERVICE	$22,407.00
ATLAS MECHANICAL, INC.	$185,000.00
BUILDING CONSENSUS, INC.	$1,500,000.00[3]
CASHMAN EQUIPMENT	$62,000.00
DESERT FIRE PROTECTION	$151,000.00
FERGUSON ENTERPRISES	$2,963.13
GEOTEK, INC.	$151,599.52
GRG, INC.	$50,874.57
HBPARKCO CONSTRUCTION	$15,734,066.49[4]
HELIX ELECTRIC	$470,500.00
HUGHES WATER & SEWER, LTD.	$105,815.91
JADE SUMMIT, LLC	$181,138.76[5]
LAS VEGAS BUILDING DEVELOPMENT	$1,826,406.64
LAS VEGAS PAVING	$12,600.00
LEDCOR CONSTRUCTION, INC.	$2,003,432.64
NEVADA READY MIX, CORP.	$1,507,647.86
OLSEN PRECAST	$8,000.00
REGIONAL STEEL CORP.	$2,925,381.23
SOUTHERN NEVADA STORM DRAIN	$17,900.00
STANTEC CONSULTING, INC.	$86,486.88
THE PLUMBER, INC.	$81,588.00
WATER MOVERS	$31,574.55
WPH ARCHITECTURE	$997,755.22

(b) Issues of Priority Reserved: All issues of relative priority of liens against the Property between and among the individual Class 5 claimants, including which individual Claims within Class 5 may be senior to and which may be subordinate to one another within this Class under applicable state law, including Nevada Revised Statute 108.236(1), are fully reserved, to be determined, if and to

[3] This claim includes the claims of Harley Ellis Devereaux, formerly known as Fields Devereaux Architects and Engineers, and Fields Deveraux Miyamoto International, which have a total principal amount of $3,153,613.88. Additionally, the Debtor asserts an affirmative claim against Building Consensus in the amount of $5.2 million. The Debtor had previously proposed a compromise and settlement of these potentially offsetting claims in the form of a payment to Building Consensus in the amount of $400,000, and those settlement negotiations are ongoing. The Debtor and Building Consensus have agreed to continue their discussions in good faith in an effort to determine the dollar amount of the Building Consensus Allowed Claim.

[4] This amount does not include the claims of Nevada Ready Mix and Regional Steel.

[5] This amount does not include the claims of Ahern Rental, Allied Trench, Ferguson Enterprises, Hughes Water, Southern Nevada Storm Drain and Stantec.

the extent required, by subsequent proceedings in the Bankruptcy Court as more fully discussed below. The settlements embodied within this Plan, however, fully resolve all disputes as to the relative priority of the liens against the Property held by all Class 5 claimants, considered in the aggregate, on the one hand, as measured against, on the other hand, the respective liens against the Property of other secured creditors provided under this Plan (meaning Classes 1, 2, 3, 4, 6, 7 and 8).

(c) Possible Mootness of Priority: In the event that the net proceeds of the sale or refinancing of the Property after payment of all senior priority Secured Claims and assessments either (i) are not sufficient to pay any amount on account of any portion of an Allowed Class 5 Claim, or (ii) are sufficient to pay all Class 5 Claims in full in the Allowed amounts set forth above in the aggregate, then all issues of sub-priority between and among the various holders of Class 5 Claims under applicable state law, including Nevada Revised Statute 108.236(1), will be moot and will not require further Bankruptcy Court determination.

(d) Future Determination of Priority (If Needed): If, however, the net proceeds of sale or refinancing of the Property after payment of all senior priority Secured Claims and assessments as provided above are sufficient to pay only part of but not all of the Allowed Class 5 Claims in the aggregate, then the Bankruptcy Court will proceed to determine and fix (in the adversary proceeding described below) the relative priority between and among each of the individual holders of Class 5 Claims under applicable state law, including Nevada Revised Status 108.236(1), for purposes of determining which claimant or claimants within Class 5 are entitled to be paid

first, second, third, and so on within Class 5 until all available net proceeds of sale are exhausted.

(e) Stay of Adversary Proceeding: The Bankruptcy Court will make all determinations of relative priorities between and among Claims within Class 5 as part of the currently-pending Adversary No. 07-1150 (Building Consensus, Inc. v. Tower Homes, LLC, et al.). Upon confirmation of the Plan, all proceedings within Adversary No. 07-1150 shall be stayed until such time as (i) net proceeds of sale or refinancing are available for distribution among members of Class 5, and the Trustee or any other party in interest notices and schedules a status conference in Adversary No. 07-1150 (and serves notice of same on all holders of Class 5 Claims and any other affected parties), or (ii) the Bankruptcy Court enters a final decree closing the Bankruptcy Case, at which time Adversary No. 07-1150 may be dismissed.

(f) Distributions: If particular Claims within Class 5 fall within the same sub-priority under applicable Nevada state law, then such similarly ranked sub-priority Claims will be paid on a Pro Rata basis within such sub-priority until the net proceeds of sale or refinancing are exhausted within that sub-priority. If and to the extent all or a portion of any Claim within Class 5 is not paid in full, then the unsatisfied deficiency portion of such Claim shall be allowed and treated as a general unsecured Claim within Class 14. Distributions on account of Class 5 Claims will be made as soon as practicable in the Trustee's reasonable discretion once (i) net proceeds of sale or refinancing become available for distribution to holders of Class 5 Claims after satisfaction of all senior priority secured Claims(including the Class 5 Ratable Share of

Administrative Expenses), and (ii) all issues with respect to relative priority between and among holders of Class 5 Claims have been resolved by Final Order of the Bankruptcy Court within Adversary No. 07-1150. Prior to distributing any funds on account of a Class 5 Claim, the Trustee will file with the Bankruptcy Court and serve upon all holders of Class 5 Claims a notice of his intended distributions, providing that interested parties shall have 30 calendar days from date of service of such notice to request and schedule a status conference in Adversary No. 07-1150 and to ask the Bankruptcy Court to hear and determine any dispute as to relative priority of Claims within Class 5, as described above.

(g) Compromise of Claims: The treatment set forth above for Class 5 Claims is intended to be a compromise and settlement of the Claims asserted in Adversary No. 07-1150. Class 5 is impaired.

F. Class 6

1. Classification: Class 6 consists of the Secured Claim of OneCap arising out of a promissory note in the original principal amount of $5,200,000 secured by a deed of trust recorded March 16, 2006 held by various entities by and through their collateral agent and loan servicer, OneCap, and encumbering the Property in a position junior to the Class 5 Creditors.

2. Treatment: To the extent Allowed and secured by a lien against the Property after satisfaction of all senior Claims (including the Class 6 Ratable Share of Administrative Expenses), the Class 6 Claim shall be paid in Cash from the net proceeds of the sale or refinancing of the Property an amount equal to the then outstanding principal balance of that note together with interest at the non-default rate. The Trustee shall make the Distribution on account of the Class 6 Claim no later than 30 days from the later of (i) closing of the sale or refinancing of the Property, or

(ii) entry of a Final Order allowing such Secured Claim pursuant to Bankruptcy Code sections 502 and 506. In the event that the proceeds of a sale or refinancing of the Property are insufficient to pay in full the Claim allowed herein, then the holder of the Class 6 Claim shall be Allowed a "deficiency" Claim in Class 14 for any remaining unpaid balance. Class 6 is impaired.

G. Class 7

1. Classification: Class 7 consists of the Claim of Benchmark arising out of a promissory note dated in the original principal amount of $15,000,000 purportedly secured by the deed of trust recorded May 2, 2006 held by Benchmark encumbering the Property in a position junior to the Class 6 Creditors.

2. Treatment: To the extent Allowed and secured by a lien against the Property after satisfaction of all senior Claims (including the Class 7 Ratable Share of Administrative Expenses), the Class 7 Claim shall be paid in Cash from the net proceeds of the sale or refinancing of the Property an amount equal to the Allowed Amount of the Claim (believed to be $4,300,000 in principal) together with interest at the non-default rate. The Trustee shall make the Distribution on account of the Class 7 Claim no later than 30 days from the later of (i) closing of the sale or refinancing of the Property, or (ii) entry of a Final Order allowing such Secured Claim pursuant to Bankruptcy Code sections 502 and 506. In the event that the proceeds of a sale or refinancing of the Property are insufficient to pay in full the Claim allowed herein, then the holder of the Class 7 Claim shall be Allowed a "deficiency" Claim in Class 14 for any remaining unpaid balance. Class 7 is impaired.

H. Class 8

1. Classification. Class 8 consists of the Claim of OneCap arising from a

"Memorandum of Revenue Participation" recorded August 14, 2006.

2. Treatment. To the extent Allowed and secured by a lien against the Property after satisfaction of all senior Claims (including the Class 8 Ratable Share of Administrative Expenses), the Class 8 Claim shall be paid in Cash from the net proceeds of the sale or refinancing of the Property an amount equal to the then outstanding principal balance of that note together with interest at the non-default rate. The Trustee shall make the Distribution on account of the Class 8 Claim no later than 30 days from the later of (i) closing of the sale or refinancing of the Property, or (ii) entry of a Final Order allowing such Secured Claim pursuant to Bankruptcy Code sections 502 and 506. In the event that the proceeds of a sale or refinancing of the Property are insufficient to pay in full the Claim allowed herein, then the holder of the Class 8 Claim shall be Allowed a "deficiency" Claim in Class 14 for any remaining unpaid balance. Class 8 is impaired.

I. Class 9

1. Classification: Class 9 consists of any other Allowed Claims secured by the Property in a position junior to the Class 8 Creditors.

2. Treatment: To the extent Allowed and secured by a lien against the Property after satisfaction of all senior Claims (including the Class 9 Ratable Share of Administrative Expenses), each Class 9 Claim shall be paid in Cash from the net proceeds of the sale or refinancing of the Property an amount equal to the Allowed Amount of such Claim. The Trustee shall make the Distribution on account of the Class 9 Claim no later than 30 days from the later of (i) closing of the sale or refinancing of the Property, or (ii) entry of a Final Order allowing such Secured Claim pursuant to Bankruptcy Code sections 502 and 506. In the event that the proceeds of a sale or refinancing of the Property are insufficient to pay in

full the Claim allowed herein, then the holder of the Class 9 Claim shall be Allowed a "deficiency" Claim in Class 14 for any remaining unpaid balance. Class 9 is impaired.

J. Class 10

1. Classification: Class 10 consists of the Secured Claim of Lexus Financial Services secured by a 2007 Lexus 460, on which both the Debtor and Yanke are obligated.

2. Treatment: Lexus shall retain its lien in the vehicle. Yanke will retain the vehicle and will continue making the required monthly payments on the debt. In the event that he defaults on such payments (or other obligations), Lexus will have the right to foreclose upon its lien against the vehicle. In the event that the proceeds of a foreclosure are insufficient to satisfy Lexus' Claim, Lexus will be entitled to a general unsecured Class 14 Claim for any deficiency remaining. The Estate waives any further rights in the vehicle. Class 10 is impaired.

K. Class 11

1. Classification. Class 11 consists of the Secured Claim of GMAC secured by a 2005 Cadillac Escalade, on which both the Debtor and Yanke are obligated.

2. Treatment. The Claim of GMAC has been paid in full by Yanke, and GMAC has released its lien against the automobile. GMAC shall be Allowed no claim against the Estate, and shall receive no distribution from the Estate. The Estate shall retain the vehicle and any rights to dispose of it, provided, however, that Yanke shall be entitled to credit for amounts he actually paid towards the vehicle. Class 11 is unimpaired.

/ / /

L. Class 12

1. Classification: Class 12 consists of all Priority Non-Tax Claims, other

than unclassified Claims and Claims held by the Pre-Purchaser Claimants.

2. Treatment: Allowed Class 12 Claims shall be paid from the proceeds of a Timely Refinancing if one is achieved, or from the proceeds of the sale of the Property, and of any additional assets of the Debtor from which value can be realized. The Trustee believes that there are no priority Unsecured Claims. Class 12 is impaired.

M. Class 13

1. Classification: Class 13 consists of all Claims of Pre-Purchaser Claimants. Attached as Exhibit "2" hereto is a list of all Pre-Purchaser Claimants presently known to the Trustee.

2. Treatment:

(a) Allowance. Each Class 13 Claim shall be allowed in an amount equal to (i) the actual dollars paid by such creditor as a deposit toward a condominium unit in the Property, plus simple interest of 4 percent per annum, less (ii) any recoveries achieved to date or which may hereafter be achieved from any third party source, including but not limited to Yanke; Prudential Real Estate Affiliates, Inc.; Americana LLC; Americana Group; Mark L. Stark; Jeannine Cutter; David Berg; Equity Title of Nevada, LLC; any surety or insurance company; or any affiliate of any of the foregoing, with any such reduction applied first to the Priority Non-Tax Claim (described below), and then to the general unsecured portion of the Class 14 claim (described below).

(b) Relief from Stay. Pursuant to agreement between the Class 13 creditors and the Trustee on behalf of the Estate, each member of Class 13 shall, upon the Effective Date, be granted relief from the automatic stay provided in Bankruptcy Code section 362 in order to prosecute claims against any third parties relating to their

contracts of purchase and their payments toward the purchase of condominium units in the Property, whether asserted in Case No. A541668 currently pending in the Eighth Judicial District, Nevada or otherwise; furthermore, each member of Class 13 shall be granted relief from the automatic stay to collect against insurance policies, if any, insuring the Debtor for acts relating to claims of Pre-Purchaser Claimants, but not against any other assets of the Debtor or the Estate. Payment of Class 13 Claims from property of the Debtor or the Estate shall only be in accordance with the terms of this Plan.

(c) Priority Non-Tax Claim Treatment. To the extent the holder of an allowed Class 13 Claim is an individual who deposited funds before the commencement of this Case for the purchase of one or more condominium units for their own personal, family, or household use, the first $2,425 of such allowed Class 13 Claim shall receive treatment under this plan as a Priority Non-Tax Claim pursuant to Bankruptcy Code section 507(a)(7). Each member of Class 13 shall be deemed to have consented to this treatment of the priority portion of their Allowed Class 13 Claim, and to have waived any right to payment in full on plan confirmation, if any such right exists, under Bankruptcy Code section 1129(a)(9).

(d) General Unsecured Claim Treatment. Each holder of an Allowed Class 13 Claim shall receive the same treatment afforded under this Plan to Allowed Class 14 Claims (General Unsecured Claims, as described below), to be paid out at the same time and at the same rate on a pari passu basis as such Allowed Class 14 Claims, in an amount equal to the amount allowed under subparagraph 2(a) above, less any distributions received under subparagraph 2(c)

in this section above.

(e) Distributions. Payment on account of the Claims Allowed herein shall be made on the later of (i) the Effective Date, or (ii), such date as the Trustee determines that the Estate has sufficient unrestricted funds to make such distributions, after payment of all allowed Secured Claims and all allowed senior priority Claims. Prior to making such distributions, the Trustee will file with the Court and serve on all holders of Class 13 Claims a notice of his intent to distribute, which will attach a form declaration to be filled out and executed by the Class 13 Claim creditor regarding (1) the amount and nature of the pre-purchase deposit made for personal, family or household use, and (2) the amount of recoveries from third parties, as described in section 2(b) above, which declaration shall be completed and executed by each claimant and returned to the Trustee no later than 30 days following service of the notice of intent. In the event of a dispute over the nature of a deposit or the amount due on account of a Class 13 Claim, either the Pre-Purchaser Claimant or the Trustee may move the Bankruptcy Court for a resolution of the dispute through the claim objection process.

(f) Compromise of Claims. The treatment set forth above for Class 13 Claims is intended to be a compromise and settlement of the Claims asserted in Case No. A541668 and elsewhere, and represents the results of arms length negotiations between the Trustee and the Pre-Purchaser Claimants. Class 13 is impaired.

N. Class 14

1. Classification: Class 14 consists of all general, non-priority Unsecured Claims.

2. Treatment: All Allowed Unsecured Claims shall be paid if and only if all Allowed unclassified Claims, Secured Claims and Priority Non-Tax Claims have been fully satisfied. The total amount of Allowed Class 14 Claims may increase over time by virtue of (i) rejection damage Claims arising from the Debtor's rejection of executory contracts and leases, and (ii) deficiency Claims arising as a result of one or more Secured Creditors' Secured Claims not being fully satisfied by a sale of the Property. In the event that the estate has sufficient funds to pay Claims in this Class after satisfaction of all senior Claims, the Trustee will consider conducting a comprehensive round of Claim objections. The Trustee believes that the Claim objection process would dramatically reduce the Allowed amount of Class 14 Claims. Class 14 is impaired.

O. Class 15

1. Classification: Class 15 consists of all Claims subordinated pursuant to section 510 of the Bankruptcy Code. As of the filing of this Plan, no Claims exists in this Class. The Class is reserved for Claims which may be subordinated pursuant to (i) agreements with Creditors negotiated by Yanke; (ii) litigation prosecuted by the Trustee; or (iii) other means.

2. Treatment: All Allowed subordinated Claims shall be paid after all Allowed unclassified Claims, Secured Claims and Priority Non-Tax Claims, and Unsecured Claims have been paid in full. Class 15 is impaired.

P. Class 16

1. Classification: Class 16 is comprised of all Equity Interests.

2. Treatment: In the event of a Timely Refinancing, the holders of Equity Interests in the Debtor shall retain such interests. In the event that no Timely Refinancing is achieved, the holder(s) of the Debtor's Equity Interests shall receive the remainder of the net proceeds of the Trustee's

liquidation of all Estate assets, if any, only if all senior Claims are paid in full, and all Equity Interests will be cancelled. Class 16 is impaired.

VIII.

MEANS OF IMPLEMENTATION OF THE PLAN

A. Assets and Liabilities of the Estate

In August of 2007, the firm of Integra Realty Resources-Nevada issued an appraisal of the Property. That report indicated an "as is" value (without any improvements) of $42,400,000, and a value of $89,700,000 if the costs of improvement as reported by the Debtor are added to this amount. The value of the Debtor's other assets (such as recoveries by the Trustee from transfers avoidable as fraudulent or preferential) is uncertain, and the Trustee is not likely to be able to place a value on such other assets until after Plan confirmation. Pursuant to Bankruptcy Code section 546, the Trustee must file avoidance actions under Chapter 5 of the Bankruptcy Code no later than August 21, 2009 (although Chapter 5 claims may be asserted by the Trustee against parties asserting claims against the Estate at any time).

According to Debtor's schedules on file with the Bankruptcy Court, the Debtor's liabilities are $106,900,000 or more.

B. Source of Funds to Pay Claims

As described in section V(B)(1) above, the Debtor will be afforded a brief Refinancing Period during which it may attempt to refinance the Property, including by granting a lender a first priority deed of trust against the Property (junior only to Bank of George). In the event of a Timely Refinancing, all liens against the Property will attach to the proceeds of the refinancing, pursuant to Bankruptcy Code section 1129(b)(2)(A), and will be deemed unenforceable and no longer valid against the Property, pursuant to Bankruptcy Code sections 1123(b)(1) and (5). The Trustee will use the proceeds of the refinancing to satisfy in full all Allowed Claims.

Absent a Timely Refinancing, the Trustee will liquidate the Debtor's assets, including the Property, in accordance with Bankruptcy Code section 1123(b)(4) and the Sale Procedures described in section V(C)(2) above. All liens against the Property will attach to the proceeds of the sale, pursuant to Bankruptcy Code section 1129(b)(2)(A), and will be deemed unenforceable

and no longer valid against the Property, pursuant to Bankruptcy Code sections 1123(b)(1) and (5). The Trustee will distribute the proceeds in accordance with the payment scheme set forth herein (which tracks that established by the Bankruptcy Code). The Trustee believes that the proceeds of a Timely Refinancing would allow for significantly greater Distributions to Creditors as a whole than would be possible if the Trustee liquidates the Debtor's assets.

The Trustee may but shall not be required to set off or recoup against any Claim or the payments to be made pursuant to this Plan in respect of such Claim (before any Payment is made on account of such Claim), claims of any nature whatsoever that the Trustee, the Debtor or the Reorganized Debtor may have against the holder of such Claims to the extent such Claims may be set off or recouped under applicable law, but neither the failure to do so nor the allowance of any Claim hereunder shall constitute a waiver or release by the Trustee or the Debtor of any such Claim that either of them may have against such holder.

C. Continued Management of the Debtor

From and after the Effective Date, the Trustee shall continue to manage the affairs of the Debtor's Estate, until such time as the Bankruptcy Court enters a final decree closing the Bankruptcy Case, or enters an order otherwise. The Trustee will be responsible for the collection and disbursement of all funds under the Plan. In the event of a Timely Refinancing, the Debtor will obtain control of the Property as described in section V(B)(3) above. From and after the Effective Date, the Trustee shall not be required to maintain a bond.

D. Further Development of Property/Additional Debt

From and after the Effective Date, the Trustee shall be authorized, without further order of the Bankruptcy Court:

(1) to further develop the Property from its current state, and

(2) to obtain credit or incur debt (including debt secured by an interest in the Property)

as the Trustee in his reasonable discretion determines likely to maximize the value ultimately realized from the Property or other assets of the Estate. Prior to exercising any powers under this section, the Trustee shall consult on the subject with the Debtor, OneCap, and William Noall,

Esq. and Laurel Davis, Esq., counsel for the two largest groups of Mechanics' Lien Creditors. No transfer of any interest in the Property or lien thereon will be permitted absent prior payment in full of the Bank of George Claim, and absent the consent of Bank of George, any such transfer shall trigger an obligation on the Estate's part to repay in full amounts outstanding under the SPF Financing.

E. Objections to Claims

1. Generally

The deadline for any party in interest to file objections to Claims within a given Class shall be the Claims Objection Date, unless the Bankruptcy Court, upon request, extends such period. Such extension may be granted without notice to the affected Creditor. Objections may include a request for subordination pursuant to Bankruptcy Code section 510. Filing, service and prosecution of such objections shall be subject to and in accordance with the Bankruptcy Rules and local rules and procedures.

2. Resolution of Disputes

Disputes regarding the validity or amount of Claims shall be resolved pursuant to the procedures established by the Bankruptcy Court, the Plan, the Bankruptcy Code, the Bankruptcy Rules, and other applicable law, and such resolution shall not be a condition precedent to confirmation or consummation of the Plan.

3. Settlement

From and after the Effective Date, the Trustee may compromise, liquidate or otherwise settle any undetermined or objected to Claim or Cause of Action without notice and a hearing and without approval of the Bankruptcy Court.

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4. Allowed Amount

No holder of a Claim shall receive a Distribution in excess of the amount allowed, either by the Bankruptcy Court or as provided herein, with respect to such Allowed Claim.

F. Assumption or Rejection of Unexpired Leases and Executory Contracts

1. Assumption or Rejection

Pursuant to sections 365 and 1123 of the Bankruptcy Code, the Confirmation Order will constitute Bankruptcy Court approval of both: (1) the rejection of all executory contracts and unexpired leases to which the Debtor may be a party, other than any executory contract or unexpired lease that is the subject of a motion to assume filed prior to the Confirmation Date; and (2) the assumption of all executory contracts and unexpired leases that are the subject of one or more motions to assume filed prior to the Confirmation Date; provided, however, that in the event that a Timely Refinancing is achieved, then, with respect to all executory Purchase Contracts, the Confirmation Order will constitute Bankruptcy Court approval of both: (1) the assumption of all executory Purchase Contracts to which the Debtor may be a party, other than any executory contract or unexpired lease that is the subject of a motion to reject filed prior to the Confirmation Date; and (2) the rejection of all executory Purchase Contracts and unexpired leases that are the subject of one or more motions to reject filed prior to the Confirmation Date.

2. Reservation of Rights

The Trustee reserves the right to file applications or motions for the assumption or rejection of any executory contract or unexpired lease at any time prior to the Confirmation Date, and to prosecute any such application to entry of a Final Order any time thereafter. The SPF Loan Documents shall not be subject to rejection, and shall not be modified by the Plan (or otherwise, except as specifically permitted in the SPF Loan Documents, with the written consent of the Bank of George). Notwithstanding the rejection of any executory contract or unexpired lease, the Trustee reserves any and all rights or defenses he, the Debtor or the Estate may hold or may have held against the other parties to such contract or lease. In the event that the Bankruptcy Court enters a Final Order denying assumption of a particular executory contract or unexpired lease, such Final Order shall be deemed to be a rejection by the Trustee of such executory contract or unexpired lease. In the event that the Bankruptcy Court enters a Final Order denying rejection of a particular executory contract or unexpired lease, such Final Order shall be deemed to be an assumption by the Trustee of such executory contract or unexpired lease.

3. Proof of Claim for Rejection Damages

Each Person that is a party to an executory contract or unexpired lease rejected pursuant to the Plan, and only such Person, shall be entitled to file, not later than thirty (30) days after the Confirmation Date, a proof of claim for damages alleged to arise from the rejection or termination of the contract or lease to which such entity is a party. Any such timely-filed Claim will be determined by the Bankruptcy Court pursuant to Bankruptcy Code section 502(g), and to the extent allowed, will be classified in the appropriate Class. Any Claim for rejection damages not timely filed in accordance with this paragraph will be deemed disallowed.

G. Retention of Liens

In the event of a Timely Refinancing, all valid, duly-perfected and enforceable liens against the Property (other than that held by Bank of George) shall attach to the proceeds of the refinancing, and shall no longer be valid and enforceable against the Property itself. In the event of a sale of the Property under the Plan, such sale shall be made free and clear of all liens, claims and interests (other than that held by Bank of George), and such liens, claims and interests shall attach to the proceeds of the refinancing, and shall no longer be valid and enforceable against the Property itself. Holders of Secured Claims shall retain any valid, perfected liens against Estate assets other than the Property.

Each of the foregoing provisions in the paragraph above is expressly subject to the provisions of this Plan, and to any avoidance actions or Claim objections that the Trustee may bring.

H. Deadline For Administrative Expense Claims/Other Claims Related to Bankruptcy Case

All Administrative Claimants shall file motions for allowance of Administrative Expense Claims incurred from and after the Petition Date through and including the Confirmation Date not later than sixty (60) days after the Effective Date of the Plan or such Administrative Expense Claims shall be disallowed and forever barred. Any Creditor or party in interest having any Claim or cause of action against the Debtor, the Trustee or against any of the Debtor's or the Trustee's professionals relating to any actions or inactions in regard to the Bankruptcy Case must pursue such Claim or cause of action by the commencement of an adversary proceeding in the

Bankruptcy Case within sixty (60) days after the Effective Date of the Plan, or such Claim or cause of action shall be forever barred and released. Nothing in this section shall be construed to modify, extend or otherwise affect the Bar Date for filing pre-petition Claims against the Debtor, which Bar Date was January 1, 2008. This section shall not apply to the Bank of George Claim, which shall be an Allowed Claim without further proceeding or order.

I. Post-Confirmation Compensation of Professional Persons

Compensation for services rendered and for reimbursement of expenses incurred by the Trustee or a Professional Person after the Confirmation Date need not be approved by the Bankruptcy Court. Professional Persons may invoice the Trustee directly, providing a copy of the invoice to the United States Trustee and any other person requesting such a copy in writing after the Confirmation Date. The Trustee shall follow the same procedure with respect to his own fees. If ten days pass without objection, all objections are deemed waived, and the Trustee may pay such invoices without further Order of the Bankruptcy Court; provided, however, that in the event of a dispute regarding such compensation or reimbursement, the Trustee or Professional Person may submit an application to the Bankruptcy Court for review of the request for compensation and reimbursement, and the Bankruptcy Court retains jurisdiction to hear and approve such application and compel payment thereon. Such post-Confirmation Date compensation for services rendered and reimbursement of expenses shall be considered an ordinary expense of the Estate.

J. Compensation of the Trustee

The Trustee's Fee for all services rendered in the Bankruptcy Case, both pre- and post-confirmation, shall be calculated as follows:

/ / /

1. In the event the Property is sold for a gross purchase price of $45,000,000 or less, or is refinanced in a fashion which yields the Estate gross proceeds of $45,000,000 or less, then the Trustee shall be allowed a Trustee's Fee of $250,000 plus his actual hourly rate, capped at 1 percent of the gross sales price or gross refinancing amount.

2. In the event the Property is sold for a gross purchase price of between

$45,000,000.01 and $55,000,000, or is refinanced in a fashion which yields the Estate gross proceeds of between $45,000,000.01 and $55,000,000, then the Trustee shall be allowed a Trustee's Fee (a) as described in paragraph 1 above, plus (b) an additional amount equal to 2 percent of the difference between (i) the gross sale price or gross refinance amount, as applicable, and (ii) $45,000,000.

3. In the event the Property is sold for a gross purchase price of greater than $55,000,000, or is refinanced in a fashion which yields the Estate gross proceeds of greater than $55,000,000, then the Trustee shall be allowed a Trustee's Fee (a) as described in paragraph 2 above, plus (b) an additional amount equal to 3 percent of the difference between (i) the sale price or refinance amount, as applicable, and (ii) $55,000,000.

The Trustee's Fee was negotiated with certain key Creditors, and is expected to result in a fee ultimately paid to the Trustee in an amount less than the fee provided under Bankruptcy Code section 326.

K. Net Operating Reserve

Notwithstanding any other provision herein, until final Distributions are made to Creditors in accordance with this Plan, the Trustee shall maintain at all times a net operating reserve in the Estate in an amount of his discretion, but in no event less than $100,000.

L. Re-vesting of Assets in the Debtor

In the event that both (i) the Debtor achieves a Timely Refinancing, and (ii) all Claims against the Estate are fully satisfied, then the Trustee will seek a final decree from the Bankruptcy Court providing for, among other things, the re-vesting of all Estate assets in the Debtor.

/ / /

M. Cancellation of the Debtor's Stock

In the event that the assets of the Estate are exhausted before all Allowed Claims against the Estate are fully satisfied, the Trustee will seek a final decree from the Bankruptcy Court providing for, among other things, the cancellation of all Equity Interests in the Debtor.

IX.

LIQUIDATION ANALYSIS

A. In General

For Creditors to make an informed decision about whether to accept or reject the Plan, the Trustee provides the following liquidation analysis. The data contained in the Financial Projections accompanying this document are estimates only, based upon the best information currently available. The Trustee reserves the right to revise the data as more accurate information becomes available.

If any Creditor votes to reject the Plan, the Bankruptcy Court must determine that each such Creditor will receive or retain under the Plan property of a value, as of the Effective Date of the Plan, that is not less than the amount that such Creditor would receive or retain if the Debtor were liquidated in a case under Chapter 7 of the Bankruptcy Code. This is commonly referred to as the "best interest of Creditors test." The Trustee believes that the Plan complies with the test.

B. The Plan Priorities Follow the Chapter 7 Priorities

The Trustee believes that the "best interest of creditors" test is satisfied by the Plan for a variety of reasons, the most important of which may be this: The priorities set forth in the Plan precisely follow those set forth in Chapter 7 of the Bankruptcy Code. Thus, essentially by definition, under the Plan, Creditors will receive no less than they would under a Chapter 7 liquidation. For the reasons discussed below, the Trustee believes that Creditors will ultimately receive more under the Plan than they would under a Chapter 7 liquidation.

C. Timing of Distributions

Under a Chapter 7 liquidation of the Debtor's non-exempt assets, most Classes of Creditors would probably be forced to wait longer for payment on account of Claims than they would under the Trustee's proposed Plan. Absent approval of the Plan, significant litigation would likely ensue, including litigation with Yanke, OneCap, the Mechanics' Lien Creditor, the Pre-Purchaser Claimants, and others. Such litigation could easily last a year or two, possibly longer, considering appeals. Under the Plan, this litigation is avoided, and Distributions to Creditors can begin as soon as Claims in a given Class are fixed and sufficient assets exist to pay them.

D. Amount of Distributions

The timing of the Distributions will affect the amounts ultimately paid to Creditors here. The longer Creditors wait for the liquidation of the Property, the more interest continues to accrue on senior Secured Claims, thus eroding the ultimate Distributions to junior Creditors. Because the Plan avoids the litigation described above, it avoids the delay inherent therein, thus preserving more value for Creditors. The Plan also avoids the significant expense that would be involved with such litigation, again preserving more value for Creditors.

In the event of a Timely Refinancing under the Plan, all Allowed Claims will be satisfied in full -- a result not probable in a liquidation under either Chapter 7 or the Plan.

The Trustee believes that one key to a successful outcome in this Bankruptcy Case lies in realizing maximum value for the Property. Absent confirmation of the Plan, the Trustee believes that senior Secured Creditors would likely foreclose on the Property, and that a foreclosure sale would not realize maximum value for the Property. The Plan embodies the results of extensive arms length negotiations between the Trustee, Yanke, OneCap and the Mechanics' Lien Claimants, and the votes of these creditors and parties in interest on the Plan represent their respective consents and agreements to the treatment afforded each of them and one another under the Plan. As such, the Plan avoids a hurried "fire sale" of the Property, and instead provides for a fully-advertised sale of the Property over a reasonable time period with the help of seasoned professionals -- all of which should help realize maximum value for the Property. The Trustee believes that the Sale Procedure established in the Plan will accomplish this goal.

The Trustee believes that a second key to a successful outcome in this Bankruptcy Case lies in the following: Were this case administered under Chapter 7, the Trustee could do nothing other than liquidate the Debtor's assets, object to and fix Claims, and distribute the proceeds of the non-exempt assets in strict conformity with the priorities established by the Bankruptcy Code. Under Chapter 7, the Trustee believes that relief from the automatic stay would likely be granted to all senior priority creditors (e.g., OneCap, the Mechanics' Lien Creditors, etc.), and that those Creditors would likely foreclose on their secured interests in the Property outside of the jurisdiction of the Bankruptcy Court, with no opportunity for orderly marketing and

overbidding in accordance with the Sales Procedures provided under this Plan. Section 1123(b) of the Bankruptcy Code, by contrast, allows the Trustee (through the Plan) much greater flexibility, including the ability to impair certain Classes of Claims; to assume certain contracts; to provide for the settlement of certain Claims; to permit the retention by various parties of their interests in assets of the Debtor; and to modify the rights of holders of Secured Claims. The Trustee's Plan does all of these things. In utilizing the greater flexibility provided under Chapter 11, the Plan achieves a more favorable resolution of key Claims than would be possible under Chapter 7, thus reducing the amount of Claims that will ultimately have to be paid. This resolution is achieved through a more efficient procedure than would be possible in a Chapter 7 liquidation -- meaning administrative expenses are likely to be less. These factors allow Creditors a greater chance at a better recovery than could be achieved in a Chapter 7 liquidation, if at all.

Additionally, the Plan allows the Estate to take advantage of provisions of the Bankruptcy Code which may avoid millions of dollars in default interest, late charges, and accelerated debt owed to OneCap, and instead "cure" that debt at a much lower amount than would be possible outside Chapter 11. And the Plan allows for a reasonable amount of time to adequately market the Property, thus avoiding the risk of a forced sale which is likely to yield a lower price.

Based on all of the foregoing factors, the Trustee believes that the Plan will realize a higher net return for Creditors than would a Chapter 7 liquidation, and thus satisfies the best interest test.

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E. <u>The Trustee's Financial Projections</u>

1. <u>Overview</u>

The Trustee's Financial Projections are attached as Exhibit "1" hereto. The Financial Projections show various possible outcomes for Creditors in the Bankruptcy Case. Each model provides the following information:

(1) The amount for which the Property is sold or refinanced under a given scenario.

This figure is at the top of each model.

(2) The aggregate dollar amount of Claims that the Trustee estimates may be Allowed in each Class under a given scenario. These figures are found in the column titled "Amount Tentatively Allowed."

(3) The aggregate dollar amount that the Trustee estimates the estate may be able to pay each Class under a given scenario. These figures are found in the column titled "Proposed Payment." This column also illustrates at what priority level Estate assets would be fully depleted under a given scenario.

(4) The percentage distributions that the Trustee estimates will be paid on account of Allowed Claims in each Class. These figures are found in the "Distribution %" column.

2. The Different Possible Outcomes

Model "A" illustrates a worst-case scenario, with the Property selling for $30 million. Model "F" illustrates the opposite end of the spectrum -- a best-case scenario, with the Property selling for $90 million, and the Trustee conducting a comprehensive round of claim objections, thereby reducing the total Allowed Amount of Class 14 Claims which share in the sale proceeds. The models in between "A" and "F" illustrate various middle grounds. Model "G" illustrates Yanke or the Debtor achieving a Timely Refinancing, with net refinancing proceeds of $80 million, and Yanke or the Debtor having negotiated substantial reductions to Class 14 Claims.

The models make clear that in order for Class 14 Unsecured Claims to receive any distribution, (i) Yanke must achieve a Timely Refinancing (including the required negotiation of discounted Claim amounts), or (ii) the Property must sell for $90 million or more, and the Trustee must achieve success with Claim objections.

3. The Models Are Liquidation Analyses

Other than Model "G," each model provides a liquidation analysis at various sale prices, because, as described above, the priorities set forth in the Plan precisely follow those set forth in Chapter 7 of the Bankruptcy Code. Thus, essentially by definition, under the Plan, Creditors will receive no less than they would under a Chapter 7 liquidation.

4. Disclaimer

The projections contained in the models represent the Trustee's predictions of future events based upon various assumptions. Those anticipated or expected future events may or may not occur, and the projections may not be relied upon as either a guarantee or as other assurance that the projected results will actually occur. Thus, while the Trustee believes that such projections are reasonable, there is no assurance that they will prove to be accurate. Because of all the uncertainties inherent in any predictions of future events, all Creditors and other interested parties should be aware of the risk associated with these projections and the possibility that the actual experience in the future may differ in material or adverse ways.

X.

MISCELLANEOUS PROVISIONS OF THE PLAN

A. All section 1129(a)(4) Payments Subject to Bankruptcy Court Review

As required by Bankruptcy Code section 1129(a)(4), all payments made or to be made by the Trustee for services or for costs and expenses in or in connection with the Bankruptcy Case, or in connection with the Plan and incident to the Bankruptcy Case, are subject to approval of the Bankruptcy Court as reasonable. To the extent that any such payment is not subject to the procedures and provisions of Bankruptcy Code sections 326 through 330, then such Bankruptcy Court approval shall be deemed to have been given through entry of the Confirmation Order unless, within ninety (90) days of such payment or request for such payment, the Bankruptcy Court, the United States Trustee, the party making the payment, or the party receiving the payment challenges or seeks approval of the reasonableness of such payment. No other parties or entities shall have standing to make such a challenge or application for approval. Nothing in this provision shall affect the duties, obligations and responsibilities of any entity under Bankruptcy Code Sections 326 through 330.

B. Default

1. Events of Default

The following shall be events of default under the Plan:

(a) The failure of the Trustee to make any payment required under the Plan when

due; provided, however, that, except as otherwise provided in this Plan or the SPF Loan Documents, no default shall be deemed to have occurred if such missed payment is made within thirty (30) days of its due date.

(b) Failure to comply with any provision of this Plan.

2. Consequences of Default

Except as otherwise provided in this Plan, an order of the Bankruptcy Court issued upon application by a party in interest, or the SPF Loan Documents, if an event of default under this Plan occurs and is not cured within thirty (30) days after service of written notice of default on the Trustee, any holder of an Allowed Claim may seek relief from the Bankruptcy Court, including but not limited to filing motions to enforce the Plan, to revoke the Confirmation Order, to convert the Bankruptcy Case to one under Chapter 7, or to dismiss the Bankruptcy Case. Any party requesting such relief shall bear the burden of proof with respect thereto. Such notice or relief is not required to be sought by Bank of George prior to enforcing its rights under the SPF Loan Documents.

C. Litigation

The Trustee has lacked funds or other resources in the Estate to finance an investigation as to claims or Causes of Action that he, the Estate or the Debtor may hold. Accordingly, from and after the Confirmation Date, the Trustee and the Estate shall retain all claims or Causes of Action that they have or hold against any party, including against "insiders" of the Debtor (as that term is defined in section 101(31) of the Bankruptcy Code), 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. Confirmation of the Plan effects no settlement, compromise, waiver or release of any Cause of Action unless the Plan or Confirmation Order specifically and unambiguously so provide. The nondisclosure or nondiscussion of any particular Cause of Action is not and shall not be construed as a settlement, compromise, waiver or release of such Cause of Action. Upon the Effective Date, the Trustee will be designated as representative of the Estate under section 1123(b)(3) of the Bankruptcy Code and shall, except as otherwise provided herein, have the right to assert any or all of the

above Causes of Action post-confirmation in accordance with applicable law. Notwithstanding the foregoing, neither the Trustee, the Debtor, nor the Estate have, or shall assert, any claims or Causes of Action against Bank of George, or with respect to the SPF Financing.

D. Modification/Amendment of Plan

1. Amendments Prior to Confirmation

The Trustee may propose any number of amendments to or modifications of the Plan, or may rescind and withdraw the Plan in its entirety (with or without substitution of a replacement plan), at any time prior to confirmation. If the Trustee revokes or withdraws the Plan, or if either confirmation or the Effective Date does not occur, then the Plan shall be deemed null and void, and in any such event, nothing contained herein shall be deemed to constitute an omission or a waiver or release of any Claims or interests by or against the Trustee, the Debtor or any other Person, or to prejudice in any manner the rights of the Trustee, the Debtor or any other Person in any further proceedings involving the Debtor.

2. Amendments After Confirmation

The Plan may be modified by the Trustee at any time after the Confirmation Date, provided that such modification meets the requirements of the Bankruptcy Code. The Trustee may, with the approval of the Bankruptcy Court, and so long as it does not materially or adversely affect the interests of Creditors, remedy any defect or omission, or reconcile any inconsistencies in the Plan or in the Confirmation Order, in such manner as may be necessary to carry out the purposes and intent of the Plan.

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3. Effect on Claims

A Creditor that has previously accepted or rejected this Plan shall be deemed to have accepted or rejected, as the case may be, this Plan, as modified, unless, within the time fixed by the Bankruptcy Court, such Creditor elects in writing to change its previous acceptance or rejection.

E. Reservation of Section 1129(b) Rights (Cramdown)

If any Class of Creditors holding Claims against the Debtor rejects the Plan, the Trustee, pursuant to Bankruptcy Code section 1129(b), will seek confirmation of the Plan if all of the applicable requirements of Bankruptcy Code section 1129(a), other than those of section 1129(a)(8), have been met.

F. Exemption from Transfer Taxes

Pursuant to section 1146(a) of the Bankruptcy Code, (a) the transfer of the Property or any other property under this Plan; (b) the creation, modification, consolidation or recording of any deed of trust or other security interest under this Plan, and the securing of additional indebtedness by such means or by other means under this Plan; (c) the making, delivery or recording of a deed or other instrument of transfer under this Plan; and (d) any transaction contemplated above, or any transactions arising out of, contemplated by or in any way related to the foregoing (including any Trustee's Deed upon sale in connection with the SPF Loan Documents), shall not be subject to any document recording tax, stamp tax, conveyance fee, intangible or similar tax, mortgage tax, stamp act or real estate transfer tax, mortgage recording tax or other similar tax or governmental assessment. All applicable state and local governments and their officials and agents shall be directed to forego the collection of any such tax or assessment, and to accept for filing or recordation any of the foregoing instruments or other documents without the payment of any such tax or assessment.

G. Post-Confirmation Status Reports and Final Decree

The Trustee shall file status reports with the Bankruptcy Court on a quarterly basis after entry of the Confirmation Order, describing the progress toward consummation of the Plan. The status reports shall be served on the United States Trustee and any other party in interest which has requested in writing after the Confirmation Date that the Trustee provide it with a copy of any such status reports. The status reports shall include a disclosure of the Debtor's Cash position and the extent of any prepayments of the Debtor's obligations during the reported quarter.

When the Plan is fully administered in all material respects, the Trustee shall file an

application for a final decree. The effect of a final decree entered by the Bankruptcy Court will be to close the Bankruptcy Case, and to re-vest all remaining Estate assets, if any, in the Debtor. After such closure, a party seeking any type of relief relating to a Plan provision can seek such relief in a state court of general jurisdiction or can petition the Bankruptcy Court to re-open the Bankruptcy Case.

H. Post-Confirmation United States Trustee Fees

The Trustee shall pay post-confirmation fees pursuant to section 1930 of Title 28 of the United States Code to the extent required by law. The amount of fees due shall be calculated and paid based on disbursements made pursuant to this Plan. Non-plan disbursements shall not be counted for purposes of the calculation.

I. Post-Confirmation Jurisdiction

1. Purposes

Except as otherwise provided in this Plan, the Bankruptcy Court shall retain jurisdiction over the Bankruptcy Case subsequent to the Confirmation Date to the fullest extent permitted under section 1334 of Title 28 of the United States Code, including, without limitation, for the following purposes:

(a) To allow, disallow, determine, liquidate, classify, estimate, subordinate or establish the priority or secured or unsecured status of any Claim, including the resolution of any request for payment of any Administrative Expense Claim and the resolution of any and all objections to the allowance or priority of Claims;

(b) To determine any and all fee applications of the Trustee or Professional Persons and any other fees and expenses authorized to be paid or reimbursed in accordance with the Bankruptcy Code or the Plan;

(c) To resolve any matters related to the assumption, assignment or rejection of any executory contract or unexpired lease, and to hear, to determine and, if necessary, to liquidate, any Claims arising

therefrom or cure amounts related thereto;

(d) To ensure that payments to holders of Allowed Claims and Distributions to Equity Interest holders are accomplished pursuant to the provisions of this Plan;

(e) To decide or resolve any motions, adversary proceedings, contested or litigated matters and any other matters that may be pending on the Effective Date;

(f) To hear and determine any and all actions initiated by the Trustee to collect, realize upon, reduce to judgment or otherwise liquidate any Causes of Action;

(g) To enter such orders as may be necessary or appropriate to implement or consummate the provisions of this Plan and all contracts, instruments, releases and other agreements or documents created in connection with this Plan and/or confirmation, including actions to enjoin enforcement of Claims inconsistent with the terms of the Plan, except as otherwise provided herein;

(h) To decide or resolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation or enforcement of any Final Order entered in this Case, this Plan, confirmation or any party's obligations incurred in connection with this Case;

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(i) To hear and determine any dispute or Claim involving or against the Trustee, or involving or against any Professional Person employed by the Trustee;

(j) To modify this Plan pursuant to section 1127 of the Bankruptcy Code, or to modify any contract, instrument, release or other

agreement or document created in connection with this Plan; or to remedy any defect or omission or reconcile any inconsistency in any Bankruptcy Court order or any contract, instrument, release or other agreement or document created in connection with this Plan in such manner as may be necessary or appropriate to consummate this Plan, to the extent authorized by the Bankruptcy Code;

(k) To issue injunctions, enter and implement other orders or to take such other actions as may be necessary or appropriate to carry out the intent of this Plan or to restrain interference by any party with consummation, implementation or enforcement of any order or this Plan, except as otherwise provided herein;

(l) To determine disputes regarding title of the property claimed to be property of the Debtor or its Estate;

(m) To decide or resolve any matter over which the Bankruptcy Court has jurisdiction pursuant to section 505 of the Bankruptcy Code;

(n) To hear and determine disputes concerning any event of default or alleged event of default under this Plan, as well as disputes concerning remedies upon any event of default;

(o) To determine any other matters that may arise in connection with or relate to this Plan, any order entered in this Bankruptcy Case, or any contract, instrument, release or other agreement or document created in connection with this Plan, except as otherwise provided herein;

(p) To hear any other matters not inconsistent with the Bankruptcy Code; and

(q) To enter a final decree closing the Case.

2. <u>Abstention</u>

If the Bankruptcy Court abstains from exercising or declines to exercise jurisdiction, or is

otherwise without jurisdiction, over any matter arising out of the Bankruptcy Case, this post-confirmation jurisdiction section shall have no effect upon and shall not control, prohibit, or limit the exercise of jurisdiction by any other court having competent jurisdiction with respect to such matter.

J. General Provisions

1. Unclaimed Funds

Any Distribution by check to any holder of an Allowed Claim, if unclaimed or uncashed by the payee thereof within 120 days after issuance and delivery by regular United States Postal Service mail shall become property of the Estate, and all liabilities and obligations of the Trustee to such payee and any holder of such check shall thereupon cease. Any check distributed to a holder of an Allowed Claim shall bear a legend that the check shall be void if not cashed or presented for payment within 120 days of the date of issuance.

2. Notice

Notices provided pursuant to the Plan shall be served as follows:

If to the Debtor:

Tower Homes, LLC
Attn: Rodney Yanke
8337 West Sunset Road, #300
Las Vegas, NV 89113-2201

With a copy to:

Tower Homes, LLC
c/o William L. McGimsey, Esq.
516 S. Sixth Street, Suite 300
Las Vegas, NV 89101

If to the Trustee:

William A. Leonard, Jr.
5030 Paradise Road
Suite B-216
Las Vegas, NV 89119

With a copy to:

Sullivan, Hill, Lewin, Rez & Engel
Attn: James P. Hill, Esq.
228 South Fourth Street, First Floor
Las Vegas, NV 89101

Additional copies to:

OneCap Mortgage Corporation:
c/o James MacRobbie, Esq.
Jeffrey R. Sylvester, Esq.
Sylvester & Polednak, Ltd.
7371 Prairie Falcon, Suite 120
Las Vegas, NV 89128

William Noall, Esq.
c/o Gordon & Silver
3960 Howard Hughes Pkwy., 9th Floor
Las Vegas, NV 89109

Laurel E. Davis, Esq.
Fennemore Craig, P.C.
300 S. Fourth Street, Suite 1400
Las Vegas, NV 89101

Donna M. Osborn, Esq.
Terry A. Coffing, Esq.
Marquis & Aurbach
10001 Park Run Drive
Las Vegas, NV 89145

Bank of George
c/o Candace C. Carlyon, Esq.
Shea & Carlyon, Ltd.
701 Bridger Avenue, Suite 850
Las Vegas, NV 89101

3. Headings

The article and section headings used herein are for convenience and reference only, and do not constitute a part of the Plan or in any manner affect the terms, provisions, or interpretations of the Plan.

4. Severability

If any provision of this Plan is determined by the Bankruptcy Court to be invalid, illegal or unenforceable or this Plan is determined to be not confirmable pursuant to section 1129 of the Bankruptcy Code, the Bankruptcy Court shall have the power to alter and interpret the Plan or any provision thereof to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration or interpretation, the remainder of the terms and provisions of this Plan shall remain in full force and effect and will in no way be affected, impaired or invalidated by such holding, alteration or interpretation. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of this

Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms.

5. Governing Law

Except to the extent that the Bankruptcy Code or other federal law is applicable or as provided in any contract, instrument, release or other agreement entered into in connection with this Plan or in any document which remains unaltered by this Plan, the rights, duties and obligations of the Debtor and any other Person arising under this Plan shall be governed by, and construed and enforced in accordance with, the internal laws of the State of Nevada without giving effect to Nevada's choice of law provisions.

6. Successors and Assigns

The rights and obligations of any entity named or referred to in the Plan shall be binding upon, and shall inure to the benefit of, the successors and assigns of such entity.

7. Plan Is Self Executing

The terms and provisions of this Plan are self-executing on the Effective Date.

XI.

EFFECT OF CONFIRMATION

A. Binding Effect

Confirmation of the Plan will not terminate the Estate nor re-vest Estate assets in the Debtor. To the contrary, from and after the Effective Date, the provisions of the Plan, the Confirmation Order, and any associated findings of fact or conclusions of law shall bind the Trustee, the Estate, the Reorganized Debtor, any entity acquiring property under the Plan, and any Creditor of the Debtor, whether or not the Claim of such Creditor is impaired under the Plan and whether or not such Creditor has accepted the Plan.

B. Possible Discharge of the Debtor

In the event of a Timely Refinancing, the Reorganized Debtor may apply to the Bankruptcy Court for a discharge.[6] Any discharge will have no effect on the Bank of George

[6] A discharge may have little to no actual effect, because in the event of a Timely Refinancing, all claims will be paid in full, thus leaving no claims to discharge. The Trustee has included this provision, however, at the request of

Claim. Otherwise, the Reorganized Debtor is not entitled to receive a discharge, pursuant to section 1141(d)(3)(A) or (B) of the Bankruptcy Code.

C. Post-Confirmation Conversion or Dismissal

A Creditor or party in interest may bring a motion to convert or dismiss the Bankruptcy Case under Bankruptcy Code section 1112(b)(7) after the Plan is confirmed if there is a default in performing the Plan. If the Bankruptcy Court orders the case converted after the Plan is confirmed, property of the Estate that has not been disbursed pursuant to the Plan will revest in the Chapter 7 estate and the automatic stay will be reimposed upon the revested property to the extent that relief from the automatic stay was not previously authorized by the Bankruptcy Court during the case.

The order confirming the Plan may also be revoked under very limited circumstances. The Bankruptcy Court may revoke the order if and only if the order of confirmation was procured by fraud and if a party in interest brings a motion to revoke confirmation within 180 days after entry of the order of confirmation.

D. Tax Consequences

ANY PERSON CONCERNED WITH THE TAX CONSEQUENCES OF THE PLAN SHOULD CONSULT WITH HIS/HER/ITS OWN ACCOUNTANTS, ATTORNEYS, AND/OR ADVISORS TO DETERMINE HOW THE PLAN MAY AFFECT HIS/HER/ITS TAX LIABILITY. The following disclosure of possible tax consequences is intended solely for the purpose of alerting readers about possible tax issues the Plan may present to THE DEBTOR'S ESTATE. The Trustee CANNOT and DOES NOT represent that the tax consequences contained below are the only tax consequences of the Plan, because the Internal Revenue Code embodies many complicated rules which make it difficult to completely and accurately state all of the tax implications of any action or transaction.

The Trustee is unaware of any adverse tax consequences of the Plan as to the Estate. The Trustee expects to minimize the tax liability upon the Estate and, to the extent permitted by the

——————————— (continued)

the Debtor, which has informed the Trustee that the Debtor's potential lending sources may insist on a discharge as a type of "clean up" order.

Internal Revenue Code, will seek to expense from current income the amounts paid under the Plan. Notwithstanding the foregoing, the feasibility of the Plan does not depend on the deductibility of amounts paid.

To the extent that funds of the Estate (as opposed to third party funds) are used to pay back taxes or tax penalties of the Estate, those expenditures may not represent payments that can be deducted as expenses for federal or state income tax purposes, potentially resulting in increased tax liability to the Estate.

The Trustee is unaware of any adverse tax consequences of the Plan to Creditors generally. It is not necessary or practicable to present a detailed explanation of the federal income tax aspects of the Plan or the related bankruptcy tax matters involved in the Bankruptcy Case. The Trustee is unaware of any tax consequences resulting from the Plan to each individual Creditor which would vary significantly from the past tax consequences realized by each individual Creditor upon receipt of payment from the Debtor. EACH CREDITOR IS URGED TO SEEK ADVICE FROM HIS/HER/ITS OWN COUNSEL OR TAX ADVISOR WITH RESPECT TO THE TAX CONSEQUENCES RESULTING FROM CONFIRMATION OF THE PLAN.

E. Exculpation

From and after the Effective Date, neither the Trustee nor any of his respective present or former members, officers, directors, managers, employees, advisors, accountants, brokers, attorneys or agents, shall have or incur any liability to any holder of a Claim or Equity Interest or any other party in interest, or any of their respective agents, employees, representatives, financial advisors, accountant, brokers or attorneys, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of the Bankruptcy Case, the pursuit of confirmation or the consummation of this Plan, except for willful misconduct, and in all respects shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities under this Plan or in the context of the Bankruptcy Case. No holder of a Claim or Equity Security, nor any other party in interest, including their respective agents, employees, representatives, financial advisors, attorneys or Affiliates, shall have any right of action against

the Trustee nor any of his respective present or former members, officers, directors, managers, employees, advisors, accountants, brokers, attorneys or agents, for any act or omission in connection with, relating to, or arising out of, the Bankruptcy Case, the pursuit of confirmation of the Plan, the consummation of this Plan or the administration of this Plan, except for (a) such parties' willful misconduct; and (b) matters specifically contemplated by this Plan.

F. Injunction/Further Actions

From and after the Effective Date, the assets of the Debtor dealt with under the Plan shall be free and clear from any and all Claims or the holders of Claims, except as specifically provided otherwise in the Plan or the Confirmation Order, and all entities that have held, currently hold or may hold a Claim or other debt or liability or an Equity Interest are permanently enjoined from taking any of the following actions on account of any such Claims, debts, liabilities or terminated Equity Interests or rights: (1) commencing or continuing in any manner any action or other proceeding against the Trustee, the Reorganized Debtor or property of the Estate; (2) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order against the Trustee, the Reorganized Debtor or property of the Estate; (3) creating, perfecting or enforcing any Lien or encumbrance against the Trustee, the Reorganized Debtor or property of the Estate; (4) asserting a setoff, right of subrogation or recoupment of any kind against any debt, liability or obligation due to the Trustee, the Reorganized Debtor or the Estate; and (5) commencing or continuing any action, in any manner or any place, that does not comply with or is inconsistent with the provisions of this Plan or the Bankruptcy Code, including, without limitation, the assertion of any claim or defense against Bank of George or with respect to the SPF Loan Documents. By accepting Distributions pursuant to this Plan, each holder of an Allowed Claim receiving Distributions pursuant to this Plan will be deemed to have specifically consented to the injunction set forth in this section.

From and after the Effective Date, the Trustee shall be entitled to control the financial affairs of the Estate without further order of the Bankruptcy Court and to use, acquire and distribute assets of the Estate free of any restrictions of the Bankruptcy Code or the Bankruptcy Court, except as specifically provided otherwise in the Plan or the Confirmation Order. The

Trustee shall be authorized to take such actions and to execute, deliver, file or record such contracts, instruments, releases and other agreements or documents and to take such actions as may be necessary or appropriate to effectuate, implement and further evidence the terms and conditions of this Plan and any securities issued, transferred or canceled pursuant to this Plan.

XII.

CONCLUSION AND RECOMMENDATION

The Trustee believes that this combined Plan and Disclosure Statement and its exhibits demonstrate that the Trustee's Plan will provide the greatest amount of funds for the payment of the legitimate Claims of Creditors. The Trustee strongly urges all Creditors to vote to accept the Plan. You are urged to complete the enclosed ballot and return it immediately in accordance with the instructions in section III(C) above.

XIII.

GLOSSARY OF DEFINED TERMS

As used in this Plan, the following terms shall have the respective meanings specified below:

1. Administrative Claimant: Any Person entitled to payment of an Administrative Expense Claim.

2. Administrative Expense Claim: Any cost or expense of administration of the Bankruptcy Case that is entitled to priority in accordance with Bankruptcy Code sections 503(b) and 507(a)(1), including, without limitation: any actual and necessary expenses of preserving the Estate incurred from and after the Petition Date through and including the Confirmation Date; all allowances of compensation and reimbursement of costs and expenses to Professional Persons, as approved by a Final Order of the Bankruptcy Court; and any fees or charges assessed against the Estate under Chapter 123 of Title 28 of the United States Code.

3. Allowed: With respect to a Claim of any nature, a Claim is "Allowed" if it meets either of the following two requirements:

a. proof of such Claim was filed on or before the Bar Date, or, if no proof of claim is filed, the Claim has been or hereafter is listed by the Debtor in its

schedules as liquidated in amount and not disputed or contingent as to liability, and, in either case, no objection to the allowance of such Claim has been filed on or before the Claims Objection Date; or

b. a Claim as to which any objection has been filed and such Claim has been allowed in whole or in part by a Final Order of the Bankruptcy Court.

4. Bank of George Claim: All amounts due to Bank of George pursuant to the SPF Loan Documents, including, without limitation, all principal, interest, default rate interest, late charges, attorneys' fees, appraisal fees, reconveyance fees, and other fees and costs.

5. Bankruptcy Case: The instant bankruptcy case.

6. Bankruptcy Code: The United States Bankruptcy Code, Title 11 of the United States Code, sections 101, et seq., as amended.

7. Bankruptcy Court: The unit of the United States District Court for the District of Nevada, constituted pursuant to section 1515 of Title 28 of the United States Code, having jurisdiction over the Bankruptcy Case to the extent of any reference made pursuant to section 157(a) of Title 28 of the United States Code, or in the event such court ceases to exercise jurisdiction over the Bankruptcy Case, such court or adjunct thereof that has jurisdiction over the Bankruptcy Case.

8. Bankruptcy Rules: The Federal Rules of Bankruptcy Procedure, as amended.

9. Bar Date: January 1, 2008, as established by the Bankruptcy Court order entered August 27, 2007, pursuant to Federal Rule of Bankruptcy Procedure 3003(c)(3), after which any proof of claim or interest filed will not be allowed and will have no effect upon the Plan and the holder of such filed proof of claim or interest shall have no right to vote upon or participate in any Distributions under the Plan.

10. Benchmark: Benchmark Enterprises, LLC, a Nevada limited liability company.

11. Business Day: Any day that is not a Saturday, Sunday or legal holiday as identified in Federal Rule of Bankruptcy Procedure 9006.

12. Cash: Cash and cash equivalents, including, but not limited to, bank deposits, checks and other similar items.

13. Causes of Action: All causes of action, claims for relief, Claims, debts, defenses, offsets, or other rights of any kind at law or in equity, held at any time by the Trustee, the Debtor or the Estate, whether or not such rights are the subject of presently pending lawsuits, adversary proceedings or appeals, including, without limitation, (i) causes of action belonging to the Debtor or the Trustee as of the Petition Date, (ii) causes of action belonging to the Debtor, the Trustee or the Estate that arose after the Petition Date, and (iii) rights exercisable by the Debtor as a Debtor In Possession or by the Trustee pursuant to Bankruptcy Code sections 506, 510, 544, 545, 547, 548, 549, 550 or 553.

14. Claim: Any right to payment from the Debtor, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured, or any right to an equitable remedy for breach of performance if such breach gives rise to a right to payment from the Debtor, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

15. Claims Objection Date: With respect to each Class, the date initial distributions are made to Creditors in such Class, or such other date(s) as the Court may order.

16. Class: A group of Claims classified together in a Class designated in section VII of this Plan.

17. Confirmation Date: (i) If no appeal of the Confirmation Order is filed, the first Business Day after the expiration of time for an appeal of the Confirmation Order; or (ii) if an appeal of the Confirmation Order has been filed, the first Business Day after the expiration of time for an appeal of the Confirmation Order provided that no stay of the Confirmation Order pending appeal has been granted; or (iii) if an appeal of the Confirmation Order has been filed and a stay of the Confirmation Order has been granted, the first Business Day after the expiration or termination of such stay.

18. Confirmation Order: The order entered by the Bankruptcy Court confirming the Plan in accordance with the provisions of Chapter 11 of the Bankruptcy Code.

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19. Creditor: Any Person who has a Claim against the Debtor that arose on or before the Petition Date, or a Claim against the Debtor of any kind specified in section 502(g), 502(h) or 502(i) of the Bankruptcy Code.

20. Debtor: Tower Homes, LLC, a Nevada limited liability company.

21. Debtor In Possession: The Debtor, during the time in which it was acting as a Debtor In Possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

22. Disclosure Statement: The Trustee's disclosure statement filed pursuant to Bankruptcy Code section 1125, as embodied in this document.

23. Distribution: The property required by the Plan to be distributed to the holders of Allowed Claims.

24. Effective Date: The Confirmation Date or such other date as the Bankruptcy Court may order.

25. Equity Interest: The interest, whether or not asserted, of any holder of an "equity security," as that term is defined in Bankruptcy Code section 101(17). The Trustee is informed and believes that Yanke holds all Equity Interests in the Debtor.

26. Estate: The Debtor's Estate, arising under Bankruptcy Code section 541.

27. Final Order: An order or a judgment of a court which has not been reversed, stayed, modified or amended, and as to which (i) the time to appeal or to seek review by certiorari or rehearing has expired and no appeal, review, certiorari or rehearing petition has been filed, or (ii) any appeal, review, certiorari or rehearing proceeding that has been filed has been finally determined or dismissed, and the time to further appeal or to seek further review by certiorari or rehearing has expired and no further appeal, review, certiorari or rehearing petition has been filed.

28. Financial Projections: The Trustee's financial projections attached as Exhibit "1" hereto.

29. Mechanics' Lien Creditors: All Claims of all Creditors asserting mechanics' lien Claims under applicable state law.

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30. Net Recoveries: Proceeds of Causes of Action pursued by the Debtor or the Trustee, less costs of prosecution of such Claims, including attorneys' fees, expert witness fees, filing fees, and related costs of litigation.

31. OneCap: OneCap Mortgage Corporation, a Nevada corporation.

32. Person: An individual, governmental entity, partnership, corporation, or other form of business entity.

33. Petition Date: May 30, 2007, the date the Petitioning Creditors filed their involuntary petition for relief, commencing the Bankruptcy Case.

34. Plan: The Trustee's Plan of Reorganization, as embodied in the instant document, either in its present form or as it may be altered, amended or modified from time to time.

35. Post-Trustee Administrative Expense Claims: (i) Administrative Expense Claims incurred between the Trustee's appointment date of January 18, 2008 and the Confirmation Date; and (ii) Administrative Expense Claims incurred by the Trustee and his professionals on or after the Confirmation Date.

36. Pre-Purchaser Claimants: Persons who made pre-purchase deposit payments toward the purchase of condominium units in the Property, irrespective of which Bankruptcy Code section under which they assert Claims, Priority Non-Tax Claims, or otherwise. A list of Pre-Purchaser Claimants known to the Trustee is attached as Exhibit "2" hereto.

37. Pre-Trustee Administrative Expense Claims: Administrative Expense Claims incurred before the Trustee's appointment date of January 18, 2008.

38. Priority Non-Tax Claim: Any Claim entitled to priority and payment under section 507 of the Bankruptcy Code other than Administrative Expense Claims and Priority Tax Claims.

39. Priority Tax Claim: Any Claim entitled to priority and payment under section 507(a)(8) of the Bankruptcy Code.

40. Professional Person: Any attorney, accountant, or other professional: (i) engaged by the Debtor or the Trustee and approved by order of the Bankruptcy Court in the Bankruptcy Case; or (ii) engaged by the Trustee after the Effective Date.

41. Pro Rata: Proportionately, so that the ratio of the amount of a particular Claim to the total amount of Allowed Claims of the Class in which a particular Claim is included is the same as the ratio of the amount of consideration distributed on account of such particular Claim to the consideration distributed on account of the Allowed Claims of the Class as a whole in which the particular Claim is included.

42. Property. The Debtor's real estate development project comprising approximately 15 acres of partially developed real property located in the Southwest Las Vegas Valley along the I-215 Beltway at Buffalo, commonly referred to as the Spanish View Tower Homes.

43. Purchase Contracts: All executory contracts with the Debtor under which Pre-Purchaser Claimants agreed to purchase one or more condominium units within the Property.

44. Ratable Share of Administrative Expenses: The amount of Administrative Expense Claims to be assessed against each respective Class of Secured Claims on a Pro Rata basis, based on Distribution amounts paid and to be paid to each such Class from proceeds of a sale or refinancing of the Property, as a surcharge pursuant to Bankruptcy Code section 506(c).

45. Refinance Period: The period of time described in section V(B)(1) above, during which the Debtor will be afforded an opportunity to deliver to the Trustee a binding financing commitment, satisfactory to the Trustee, under which the Estate would receive funds sufficient to provide for the payment in full of all Allowed Claims against the Estate. If the Debtor timely delivers a binding financing commitment satisfactory to the Trustee, then the Debtor will have an additional 30 days of Refinance Period to close such financing and have the funds on deposit with the Estate in an account under the Trustee's control.

46. Reorganized Debtor: The Debtor, to the extent that (i) a Timely Refinancing is achieved, and (ii) a final decree is entered by the Bankruptcy Court providing that the Debtor is to emerge from bankruptcy protection as a Reorganized Debtor.

47. Sale Procedure: The procedure set forth in section V(C)(2) above, under which the Trustee will market and sell the Property (absent a Timely Refinancing), pursuant to Bankruptcy Code section 1123(b)(4), with the Property to transfer free and clear of all liens, claims and interests, pursuant to Bankruptcy Code section 1123(b)(1) and (5), and with such

liens, claims and interests attaching to sale proceeds, pursuant to Bankruptcy Code section 1129(b)(2)(A).

48. Sale Motion: A motion filed by the Trustee in the Bankruptcy Case seeking Bankruptcy Court approval of a sale of the Property in accordance with Bankruptcy Code section 1123(b)(4) and the terms of this Plan.

49. Secured Claim: A Claim to the extent such Claim is secured as defined in Bankruptcy Code section 506, inclusive of a Creditor's right of setoff or recoupment under Bankruptcy Code section 553.

50. Secured Creditor: Any Creditor that is the holder of a Secured Claim, to the extent of such Secured Claim.

51. SPF Financing: The post-petition financing provided to the Estate by Bank of George, as approved by the Bankruptcy Court's order entered May 7, 2008.

52. Timely Refinancing: A refinancing of the Property on the terms and conditions set forth in section V(B) above.

53. Trustee's Fee: The fee payable to the Trustee in accordance with the agreement described in section VIII(J) of this Plan.

54. Unsecured Claim: Any Claim other than an Administrative Expense Claim, a Priority Tax Claim, a Priority Non-Tax Claim, or a Secured Claim, and all Claims of Secured Creditors to the extent such Claims are valued as unsecured pursuant to section 506(a) of the Bankruptcy Code.

55. Unsecured Creditor: Any Creditor holding an Unsecured Claim.

56. Yanke: Rodney Yanke, the Debtor's principal.

The words "herein" and "hereunder" and other words of similar import refer to this Plan as a whole and not to any particular section, subsection or clause contained in this Plan, unless the context requires otherwise. Whenever from the context it appears appropriate, each term stated in either the singular or the plural includes the singular and the plural, and pronouns stated in the masculine, feminine or neuter gender include the masculine, feminine and the neuter. The

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section headings contained in the Plan are for reference purposes only and shall not affect in any way the meaning or interpretation of the Plan.

A term used in this Plan and not defined herein but that is defined in the Bankruptcy Code has the meaning assigned to the term in the Bankruptcy Code. A term used in this Plan and not defined herein or in the Bankruptcy Code, but which is defined in the Bankruptcy Rules, has the meaning assigned to the term in the Bankruptcy Rules.

Dated: November __, 2008

SULLIVAN, HILL, LEWIN, REZ & ENGEL
A Professional Law Corporation

By: */s/ James P. Hill*
James P. Hill
Christine A. Roberts
Attorneys for William A. Leonard, Jr.,
Chapter 11 Trustee

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EXHIBIT 1

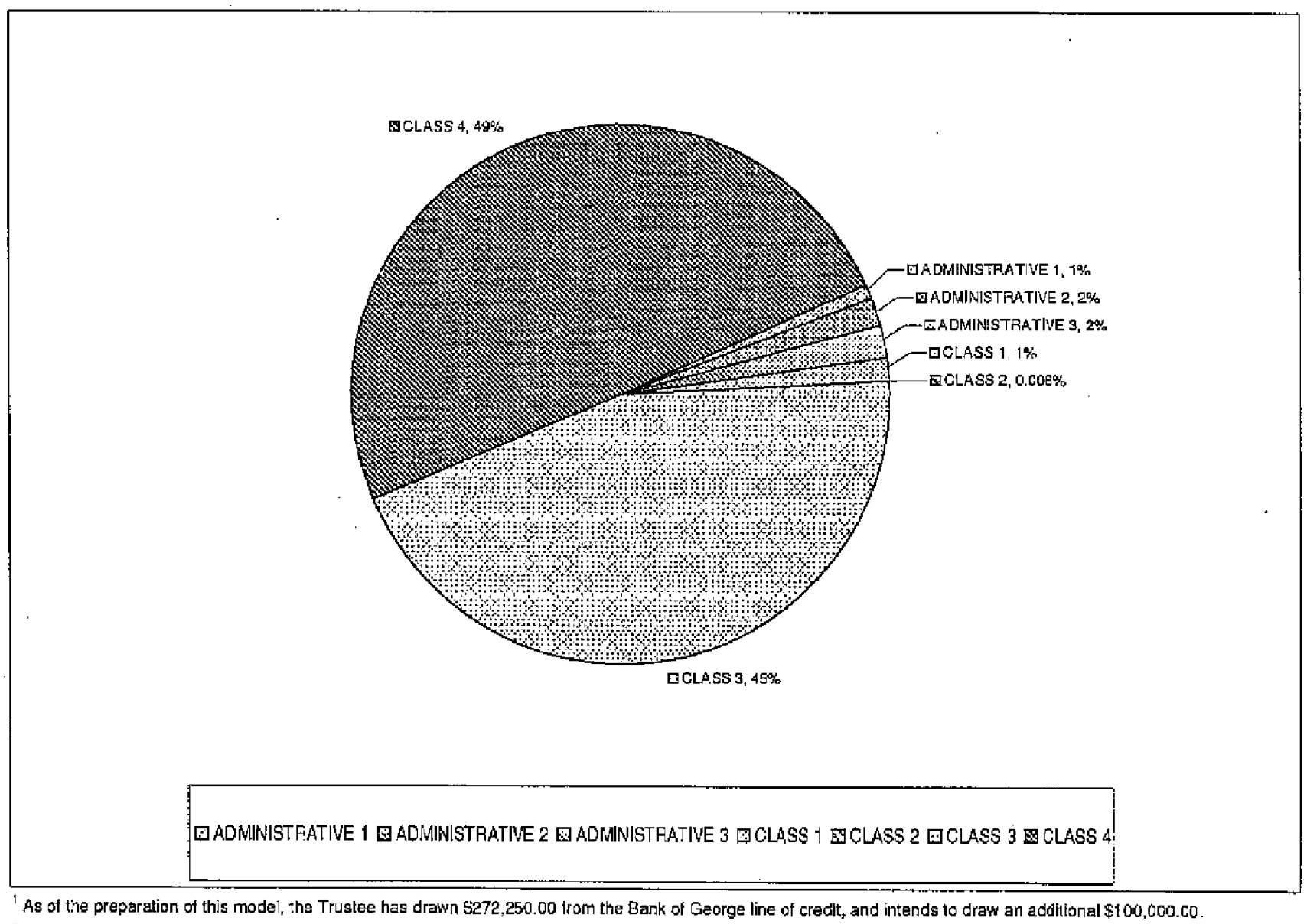
Tower Homes, LLC - Case No. 07-13208
Proposed Distribution at $30 Million

A

Bank Balances 8/1/08	$0
Proposed Sale Price	$30,000,000
Funds Available for Distribution	$30,000,000

CREDITOR CLASS	DESCRIPTION	Amount Ratified/ Allowed	Proposed Payment	$30,000,000	Distribution %
ADMINISTRATIVE 1	TRUSTEE	$250,000	($250,000)	$29,750,000	100.00%
ADMINISTRATIVE 2	SHLRE	$500,000	($500,000)	$29,250,000	100.00%
ADMINISTRATIVE 3	BROKER	$600,000	($600,000)	$28,650,000	100.00%
CLASS 1	BANK OF GEORGE[1]	$375,000	($375,000)	$28,275,000	100.00%
CLASS 2	PRIORITY TAX CLAIMS	$2,260	($2,260)	$28,272,740	100.00%
CLASS 3	ONECAP CLAIM 44 - $9.5M	$13,369,288[2]	($13,369,288)	$14,903,452	100.00%
CLASS 4	ONECAP CLAIM 42 - $13M	$16,031,671	($14,903,452)	$0	92.96%
CLASS 5	MECHANICS LIEN CLAIMS	$28,139,544	$0	$0	0.00%
CLASS 6	ONECAP CLAIM 43 - $5.2M	$7,307,923	$0	$0	0.00%
CLASS 7	BENCHMARK	$4,300,000	$0	$0	0.00%
CLASS 8	ONECAP MOP	$0	$0	$0	0.00%
CLASS 9	SECURED	$502,500	$0	$0	0.00%
CLASS 10	LEXUS/TOYOTA	$0	$0	$0	0.00%
CLASS 11	GMAC	$0	$0	$0	0.00%
CLASS 12	PRIORITY NON-TAX	$0.00	$0	$0	0.00%
CLASS 13	PRIORITY NON TAX (PRE-PURCHASERS)	$84,875	$0	$0	0.00%
CLASS 14	GENERAL UNSECURED	$21,865,114[3]	$0	$0	0.00%
CLASS 15	SUBORDINATED	$0	$0	$0	0.00%
CLASS 16	EQUITY INTERESTS	$0	$0	$0	0.00%
TOTAL		$93,328,175	($30,000,000)	$0	40.76%

FUNDS REMAINING IN ESTATE	$0.00



[1] As of the preparation of this model, the Trustee has drawn $272,250.00 from the Bank of George line of credit, and intends to draw an additional $100,000.00.

[2] The three OneCap figures represent the principal loan balances, with accrued interest, through August 14, 2008.

[3] This figure represents the total value of all claims in this class at the amounts asserted in each proof of claim, or, if no proof of claim was filed, at the amounts scheduled by the Debtor in its bankruptcy filing. In the event that the estate has sufficient funds to pay claims in this class after satisfaction of all senior claims, the Trustee will consider conducting a comprehensive round of claims objections. The Trustee believes that the claim objection process would dramatically reduce this figure.

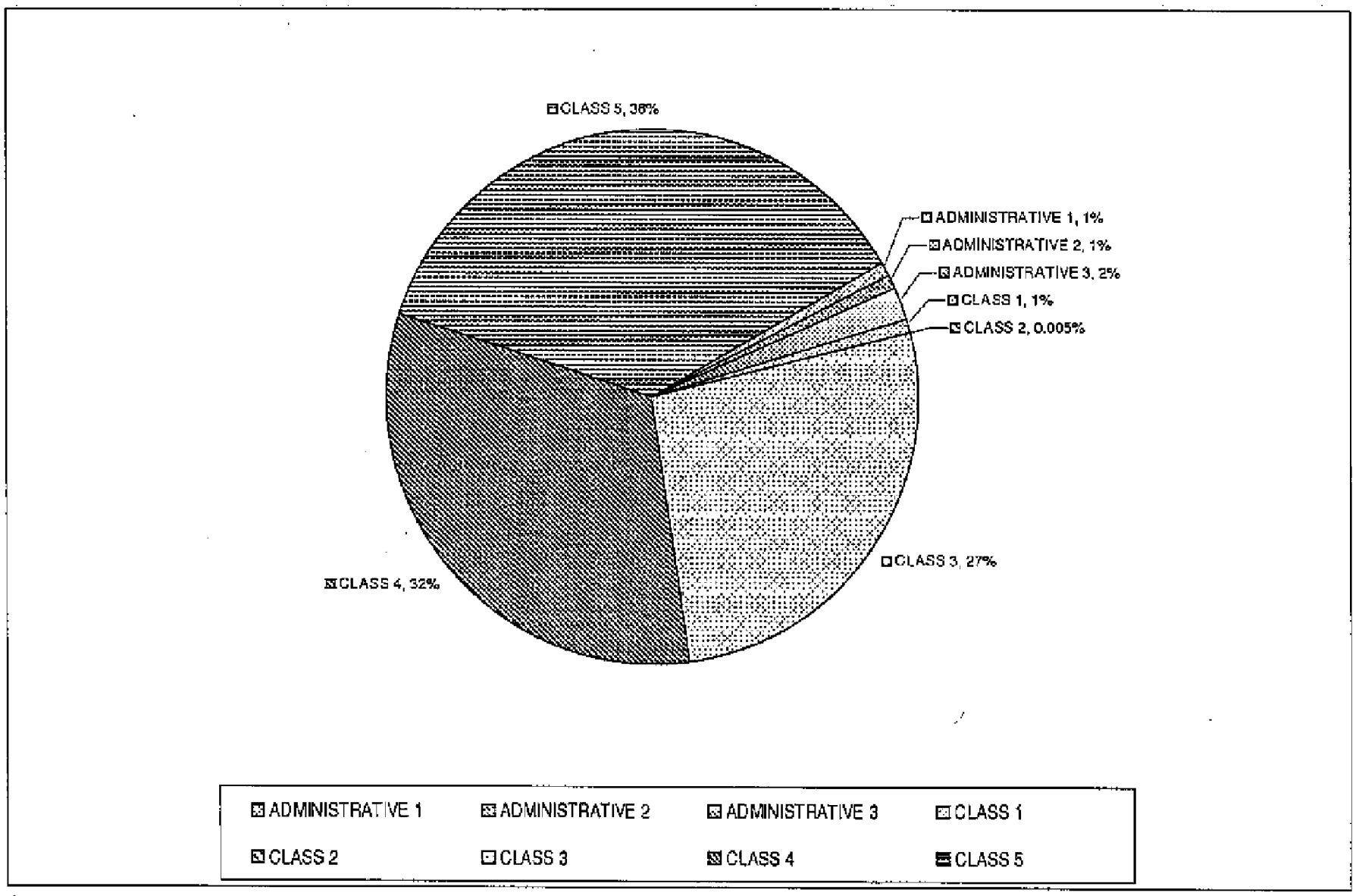
B

Tower Homes, LLC - Case No. 07-13208
Proposed Distribution at $50 Million

Bank Balances 8/1/08	$0
Proposed Sale Price	$50,000,000
Funds Available for Distribution	$50,000,000

CREDITOR CLASS	DESCRIPTION	Amount Treated/Allowed	Proposed Payment	$50,000,000	Distribution %
ADMINISTRATIVE 1	TRUSTEE	$350,000	($350,000)	$49,650,000	100.00%
ADMINISTRATIVE 2	SHLRE	$500,000	($500,000)	$49,150,000	100.00%
ADMINISTRATIVE 3	BROKER	$1,000,000	($1,000,000)	$48,150,000	100.00%
CLASS 1	BANK OF GEORGE[1]	$375,000	($375,000)	$47,775,000	100.00%
CLASS 2	PRIORITY TAX CLAIMS	$2,260	($2,260)	$47,772,740	100.00%
CLASS 3	ONECAP CLAIM 44 - $9.5M	$13,369,288[2]	($13,369,288)	$34,403,452	100.00%
CLASS 4	ONECAP CLAIM 42 - $13M	$16,031,671	($16,031,671)	$18,371,781	100.00%
CLASS 5	MECHANICS LIEN CLAIMS	$28,139,544	($18,371,781)	$0	65.29%
CLASS 6	ONECAP CLAIM 43 - $5.2M	$7,307,923	$0	$0	0.00%
CLASS 7	BENCHMARK	$4,300,000	$0	$0	0.00%
CLASS 8	ONECAP MOP	$0	$0	$0	0.00%
CLASS 9	SECURED	$502,500	$0	$0	0.00%
CLASS 10	LEXUS/TOYOTA	$0	$0	$0	0.00%
CLASS 11	GMAC	$0	$0	$0	0.00%
CLASS 12	PRIORITY NON-TAX	$0	$0	$0	0.00%
CLASS 13	PRIORITY NON TAX (PRE-PURCHASERS)	$84,875	$0	$0	0.00%
CLASS 14	GENERAL UNSECURED	$21,865,114[3]	$0	$0	0.00%
CLASS 15	SUBORDINATED	$0	$0	$0	0.00%
CLASS 16	EQUITY INTERESTS	$0	$0	$0	0.00%
TOTAL		$94,828,175	($50,000,000)	$0	58.87%

FUNDS REMAINING IN ESTATE	$0.00



[1] As of the preparation of this model, the Trustee has drawn $272,250.00 from the Bank of George line of credit, and intends to draw an additional $100,000.00.

[2] The three OneCap figures represent the principal loan balances, with accrued interest, through August 14, 2008.

[3] This figure represents the total value of all claims in this class at the amounts asserted in each proof of claim, or, if no proof of claim was filed, at the amounts scheduled by the Debtor in its bankruptcy filing. In the event that the estate has sufficient funds to pay claims in this class after satisfaction of all senior claims, the Trustee will consider conducting a comprehensive round of claims objections. The Trustee believes that the claim objection process would dramatically reduce this figure.

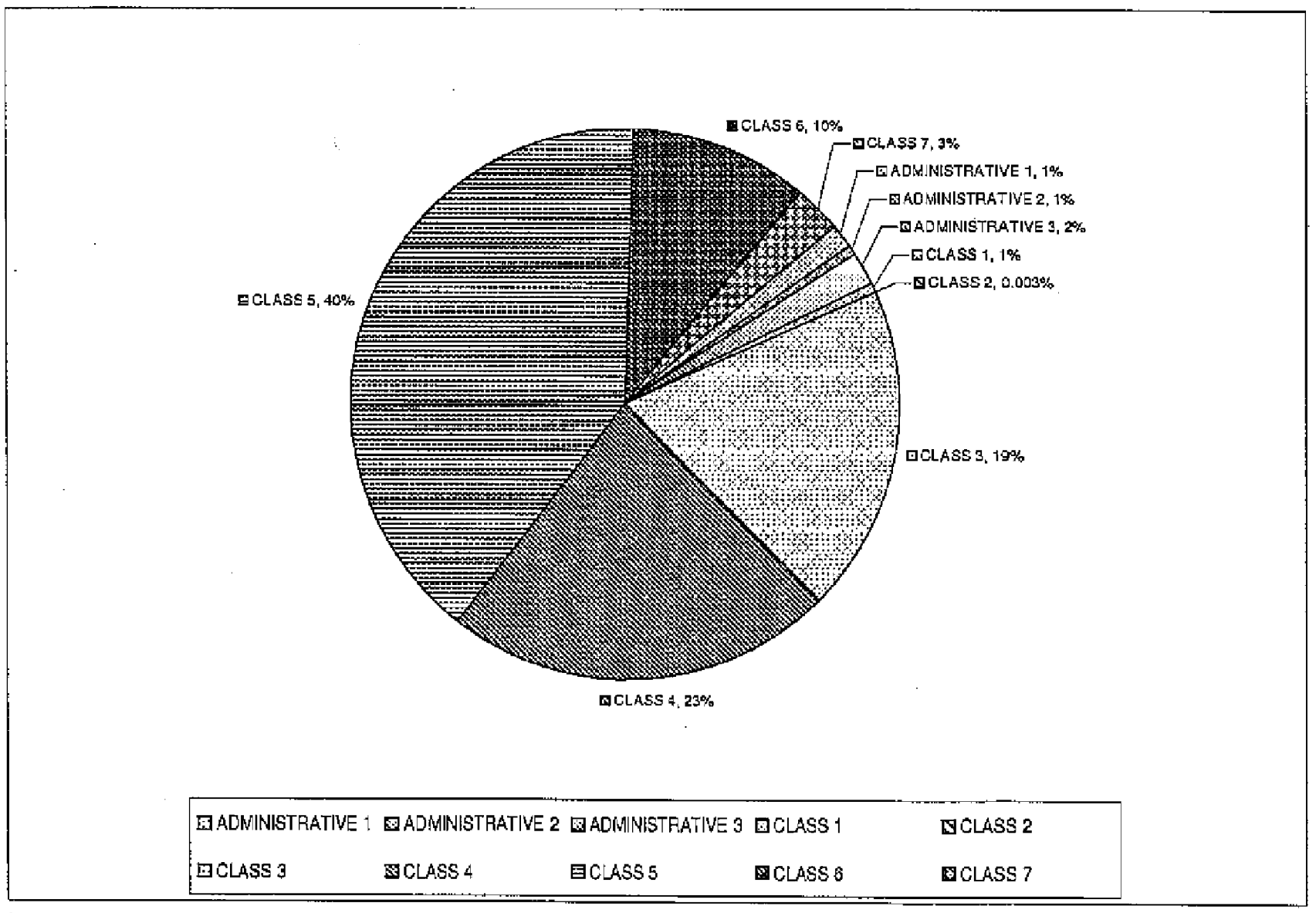
C

Tower Homes, LLC - Case No. 07-13208
Proposed Distribution at $70 Million

Bank Balances 8/1/08	$0
Proposed Sale Price	$70,000,000
Funds Available for Distribution	$70,000,000

CREDITOR CLASS	DESCRIPTION	Amount Tentatively Allowed	Proposed Payment	$70,000,000	Distribution %
ADMINISTRATIVE 1	TRUSTEE	$900,000	($900,000)	$69,100,000	100.00%
ADMINISTRATIVE 2	SHLRE	$500,000	($500,000)	$68,600,000	100.00%
ADMINISTRATIVE 3	BROKER	$1,400,000	($1,400,000)	$67,200,000	100.00%
CLASS 1	BANK OF GEORGE[1]	$375,000	($375,000)	$66,825,000	100.00%
CLASS 2	PRIORITY TAX CLAIMS	$2,260	($2,260)	$66,822,740	100.00%
CLASS 3	ONECAP CLAIM 44 - $9.5M	$13,369,288[2]	($13,369,288)	$53,453,452	100.00%
CLASS 4	ONECAP CLAIM 42 - $13M	$16,031,671	($16,031,671)	$37,421,781	100.00%
CLASS 5	MECHANICS LIEN CLAIMS	$28,139,544	($28,139,544)	$9,282,237	100.00%
CLASS 6	ONECAP CLAIM 43 - $5.2M	$7,307,923	($7,307,923)	$1,974,314	100.00%
CLASS 7	BENCHMARK	$4,300,000	($1,974,314)	$0	45.91%
CLASS 8	ONECAP MOP	$0	$0	$0	0.00%
CLASS 9	SECURED	$502,500	$0	$0	0.00%
CLASS 10	LEXUS/TOYOTA	$0	$0	$0	0.00%
CLASS 11	GMAC	$0	$0	$0	0.00%
CLASS 12	PRIORITY NON TAX	$0	$0	$0	0.00%
CLASS 13	PRIORITY NON TAX (PRE-PURCHASERS)	$84,875	$0	$0	0.00%
CLASS 14	GENERAL UNSECURED	$21,865,114[3]	$0	$0	0.00%
CLASS 15	SUBORDINATED	$0	$0	$0	0.00%
CLASS 16	EQUITY INTERESTS	$0	$0	$0	0.00%
TOTAL		$96,778,175	($70,000,000)	$0	72.36%

FUNDS REMAINING IN ESTATE	$0.00



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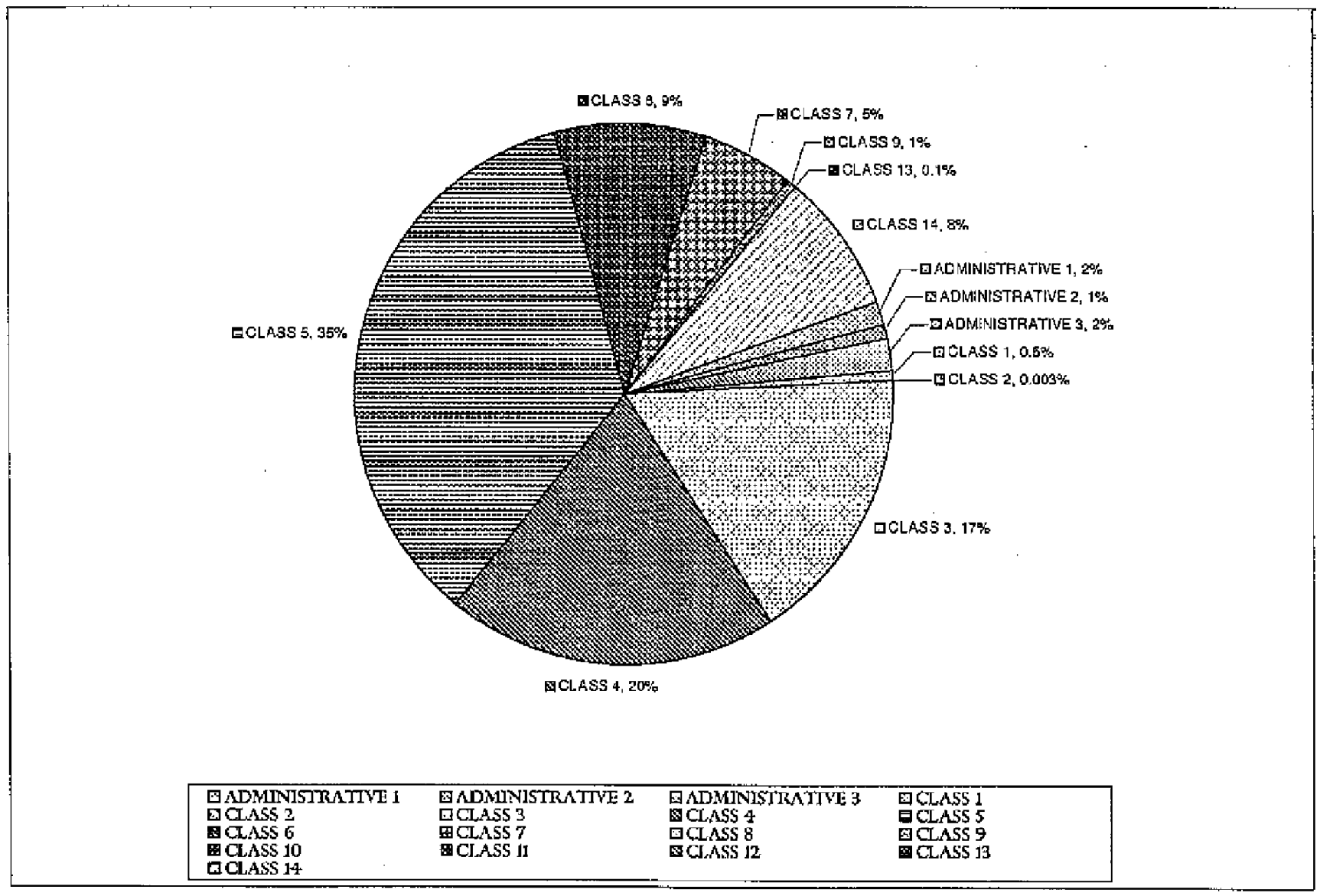
[3] This figure represents the total value of all claims in this class at the amounts asserted in each proof of claim, or, if no proof of claim was filed, at the amounts scheduled by the Debtor in its bankruptcy filing. In the event that the estate has sufficient funds to pay claims in this class after satisfaction of all senior claims, the Trustee will consider conducting a comprehensive round of claims objections. The Trustee believes that the claim objection process would dramatically reduce this figure.

D

Tower Homes, LLC - Case No. 07-13208
Proposed Distribution at $80 Million

Bank Balances 8/1/08	$0
Proposed Sale Price	$80,000,000
Funds Available for Distribution	$80,000,000

CREDITOR CLASS	DESCRIPTION	Amount Tentatively Allowed	Proposed Payment	$80,000,000	Distribution %
ADMINISTRATIVE 1	TRUSTEE	$1,200,000	($1,200,000)	$78,800,000	100.00%
ADMINISTRATIVE 2	SHLRE	$500,000	($500,000)	$78,300,000	100.00%
ADMINISTRATIVE 3	BROKER	$1,600,000	($1,600,000)	$76,700,000	100.00%
CLASS 1	BANK OF GEORGE[1]	$375,000	($375,000)	$76,325,000	100.00%
CLASS 2	PRIORITY TAX CLAIMS	$2,260	($2,260)	$76,322,740	100.00%
CLASS 3	ONECAP CLAIM 44 - $9.5M	$13,369,288[2]	($13,369,288)	$62,953,452	100.00%
CLASS 4	ONECAP CLAIM 42 - $13M	$16,031,671	($16,031,671)	$46,921,781	100.00%
CLASS 5	MECHANICS LIEN CLAIMS	$28,139,544	($28,139,544)	$18,782,237	100.00%
CLASS 6	ONECAP CLAIM 43 - $5.2M	$7,307,923	($7,307,923)	$11,474,314	100.00%
CLASS 7	BENCHMARK	$4,300,000	($4,300,000)	$7,174,314	100.00%
CLASS 8	ONECAP MOP	$0	$0	$7,174,314	0.00%
CLASS 9	SECURED	$502,500	($502,500)	$6,671,814	100.00%
CLASS 10	LEXUS/TOYOTA	$0	$0	$6,671,814	0.00%
CLASS 11	GMAC	$0	$0	$6,671,814	0.00%
CLASS 12	PRIORITY NON-TAX	$0	$0	$6,671,814	0.00%
CLASS 13	PRIORITY NON TAX (PRE-PURCHASERS)	$84,875	($84,875)	$6,586,939	100.00%
CLASS 14	GENERAL UNSECURED	$21,865,114[3]	($6,586,939)	$0	30.13%
CLASS 15	SUBORDINATED	$0	$0	$0	0.00%
CLASS 16	EQUITY INTERESTS	$0	$0	$0	0.00%
TOTAL		$95,278,175	($80,000,000)	$0	84.63%



[1] As of the preparation of this model, the Trustee has drawn $272,250.00 from the Bank of George line of credit, and intends to draw an additional $100,000.00.

[2] The three OneCap figures represent the principal loan balances, with accrued interest, through August 14, 2008.

[3] This figure represents the total value of all claims in this class at the amounts asserted in each proof of claim, or, if no proof of claim was filed, at the amounts scheduled by the Debtor in its bankruptcy filing. In the event that the estate has sufficient funds to pay claims in this class after satisfaction of all senior claims, the Trustee will consider conducting a comprehensive round of claims objections. The Trustee believes that the claim objection process would dramatically reduce this figure.

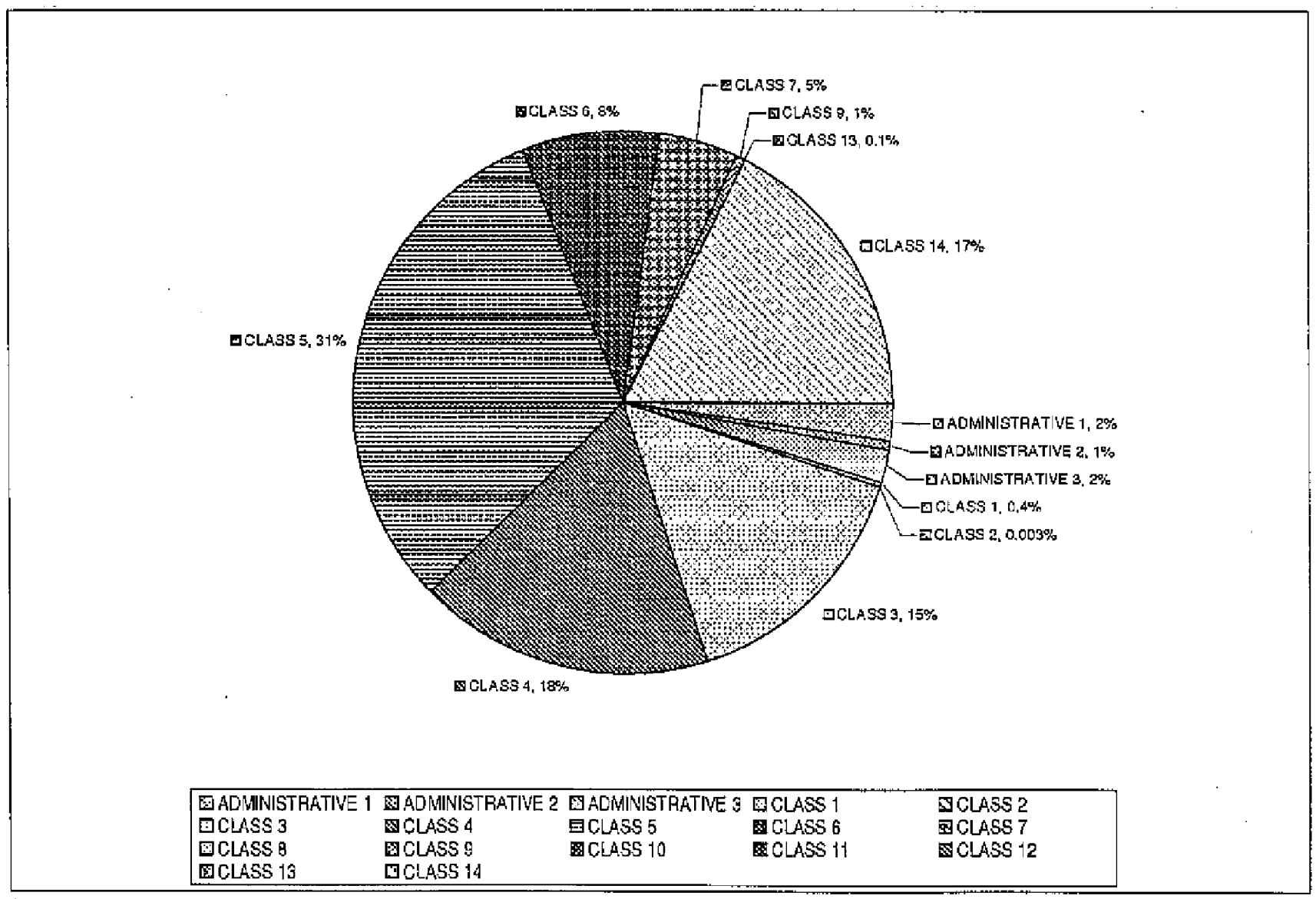
E

Tower Homes, LLC - Case No. 07-13208
Proposed Distribution at $90 Million

Bank Balances 8/1/08	$0
Proposed Sale Price	$90,000,000
Funds Available for Distribution	$90,000,000

CREDITOR CLASS	DESCRIPTION	Amount Ratably Allowed	Proposed Payment	$90,000,000	Distribution %
ADMINISTRATIVE 1	TRUSTEE	$1,900,000	($1,900,000)	$88,100,000	100.00%
ADMINISTRATIVE 2	SHLRE	$500,000	($500,000)	$87,600,000	100.00%
ADMINISTRATIVE 3	BROKER	$1,800,000	($1,800,000)	$85,800,000	100.00%
CLASS 1	BANK OF GEORGE[1]	$375,000	($375,000)	$85,425,000	100.00%
CLASS 2	PRIORITY TAX CLAIMS	$2,260	($2,260)	$85,422,740	100.00%
CLASS 3	ONECAP CLAIM 44 - $9.5M	$13,369,288[2]	($13,369,288)	$72,053,452	100.00%
CLASS 4	ONECAP CLAIM 42 - $13M	$16,031,671	($16,031,671)	$56,021,781	100.00%
CLASS 5	MECHANICS LIEN CLAIMS	$28,139,544	($28,139,544)	$27,882,237	100.00%
CLASS 6	ONECAP CLAIM 43 - $5.2M	$7,307,923	($7,307,923)	$20,574,314	100.00%
CLASS 7	BENCHMARK	$4,300,000	($4,300,000)	$16,274,314	100.00%
CLASS 8	ONECAP MOP	$0	$0	$16,274,314	0.00%
CLASS 9	SECURED	$502,500	($502,500)	$15,771,814	100.00%
CLASS 10	LEXUS/TOYOTA	$0	$0	$15,771,814	0.00%
CLASS 11	GMAC	$0	$0	$15,771,814	0.00%
CLASS 12	PRIORITY NON-TAX	$0	$0	$15,771,814	0.00%
CLASS 13	PRIORITY NON TAX (PRE-PURCHASERS)	$84,875	($84,875)	$15,686,939	100.00%
CLASS 14	GENERAL UNSECURED	$21,865,114[3]	($15,686,939)	$0	71.74%
CLASS 15	SUBORDINATED	$0	$0	$0	0.00%
CLASS 16	EQUITY INTERESTS	$0	$0	$0	0.00%
TOTAL		$96,118,173	($90,000,000)	$0	97.8%

FUNDS REMAINING IN ESTATE	$0.00



[1] As of the preparation of this model, the Trustee has drawn $272,250.00 from the Bank of George line of credit, and intends to draw an additional $100,000.00.

[2] The three OneCap figures represent the principal loan balances, with accrued interest, through August 14, 2008.

[3] This figure represents the total value of all claims in this class at the amounts asserted in each proof of claim, or, if no proof of claim was filed, at the amounts scheduled by the Debtor in its bankruptcy filing. In the event that the estate has sufficient funds to pay claims in this class after satisfaction of all senior claims, the Trustee will consider conducting a comprehensive round of claims objections. The Trustee believes that the claim objection process would dramatically reduce this figure.

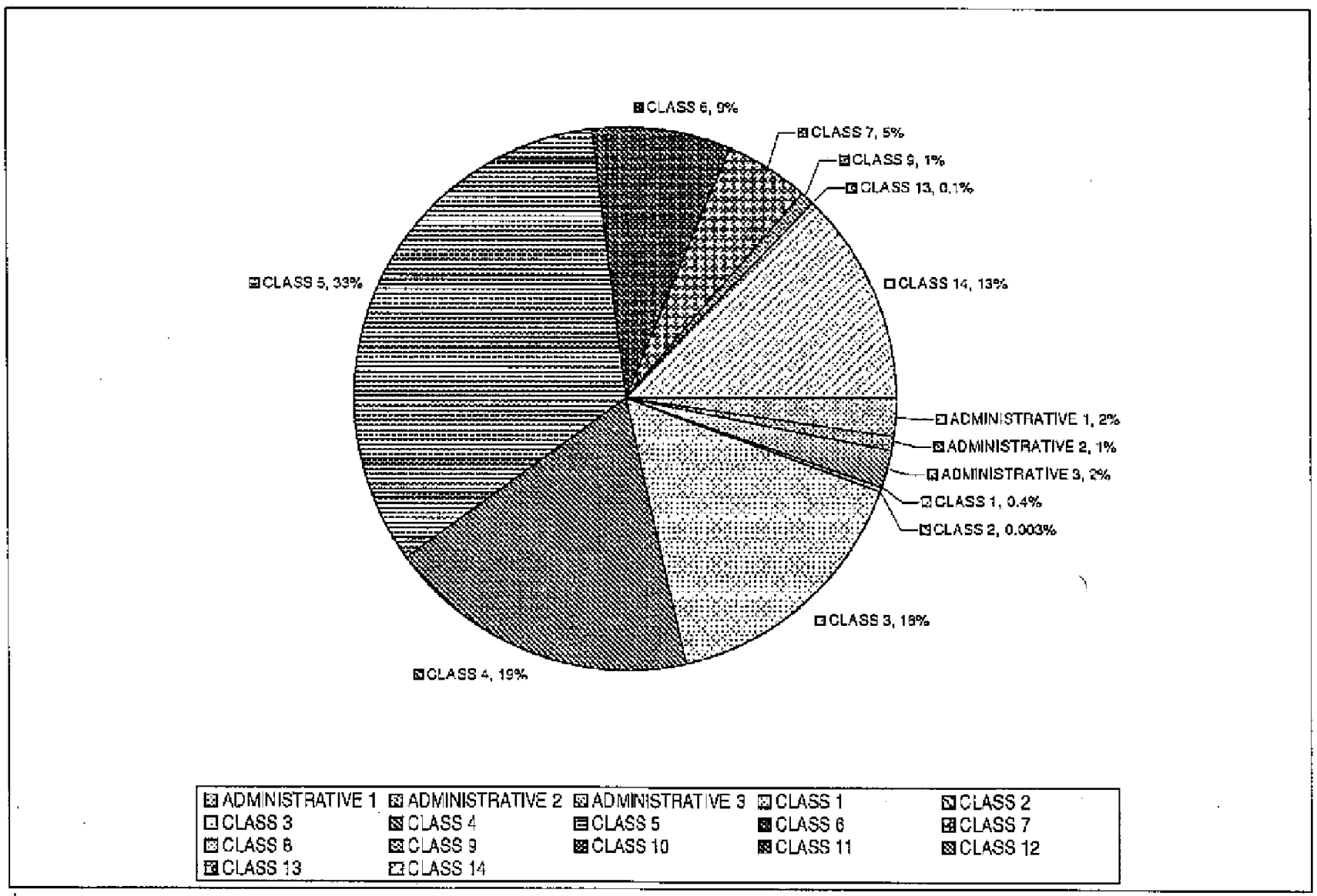
F

Tower Homes, LLC - Case No. 07-13208
Proposed Distribution at $90 Million
Version 2

Bank Balances 8/1/08	$0
Proposed Sale Price	$90,000,000
Funds Available for Distribution	$90,000,000

CREDITOR CLASS	DESCRIPTION	Amount Tentatively Allowed	Proposed Payment	$90,000,000	Distribution %
ADMINISTRATIVE 1	TRUSTEE	$1,900,000	($1,900,000)	$88,100,000	100.00%
ADMINISTRATIVE 2	SHLRE	$750,000	($750,000)	$87,350,000	100.00%
ADMINISTRATIVE 3	BROKER	$1,800,000	($1,800,000)	$85,550,000	100.00%
CLASS 1	BANK OF GEORGE[1]	$375,000	($375,000)	$85,175,000	100.00%
CLASS 2	PRIORITY TAX CLAIMS	$2,260	($2,260)	$85,172,740	100.00%
CLASS 3	ONECAP CLAIM 44 - $8.5M	$13,369,288[2]	($13,369,288)	$71,803,452	100.00%
CLASS 4	ONECAP CLAIM 42 - $13M	$16,031,671	($16,031,671)	$55,771,781	100.00%
CLASS 5	MECHANICS LIEN CLAIMS	$28,139,544	($28,139,544)	$27,632,237	100.00%
CLASS 6	ONECAP CLAIM 43 - $5.2M	$7,307,923	($7,307,923)	$20,324,314	100.00%
CLASS 7	BENCHMARK	$4,300,000	($4,300,000)	$16,024,314	100.00%
CLASS 8	ONECAP MOP	$0	$0	$16,024,314	0.00%
CLASS 9	SECURED	$502,500	($502,500)	$15,521,814	100.00%
CLASS 10	LEXUS/TOYOTA	$0	$0	$15,521,814	0.00%
CLASS 11	GMAC	$0	$0	$15,521,814	0.00%
CLASS 12	PRIORITY NON-TAX	$0	$0	$15,521,814	0.00%
CLASS 13	PRIORITY NON TAX (PRE-PURCHASERS)	$84,875	($84,875)	$15,436,939	100.00%
CLASS 14	GENERAL UNSECURED	$10,932,557[3]	($10,932,557)	$4,504,382	100.00%
CLASS 15	SUBORDINATED	$0	$0	$0	0.00%
CLASS 16	EQUITY INTERESTS	$0	$0	$0	0.00%
TOTAL		$85,495,618	($85,495,618)	$4,504,382	100.00%

FUNDS REMAINING IN ESTATE	$4,504,381.94



[1] As of the preparation of this model, the Trustee has drawn $272,250.00 from the Bank of George line of credit, and intends to draw an additional $100,000.00.

[2] The three OneCap figures represent the principal loan balances, with accrued interest, through August 14, 2008.

[3] This figure represents the value of all claims in this class at the amounts asserted in each proof of claim, or, if no proof of claim was filed, at the amounts scheduled by the Debtor in its bankruptcy filing, discounted by 50 percent. In the event that the estate has sufficient funds to pay claims in this class after satisfaction of all senior claims, the Trustee will consider conducting a comprehensive round of claims objections. The Trustee believes that such a process would dramatically reduce the aggregate allowed amount of claims from that presently asserted.

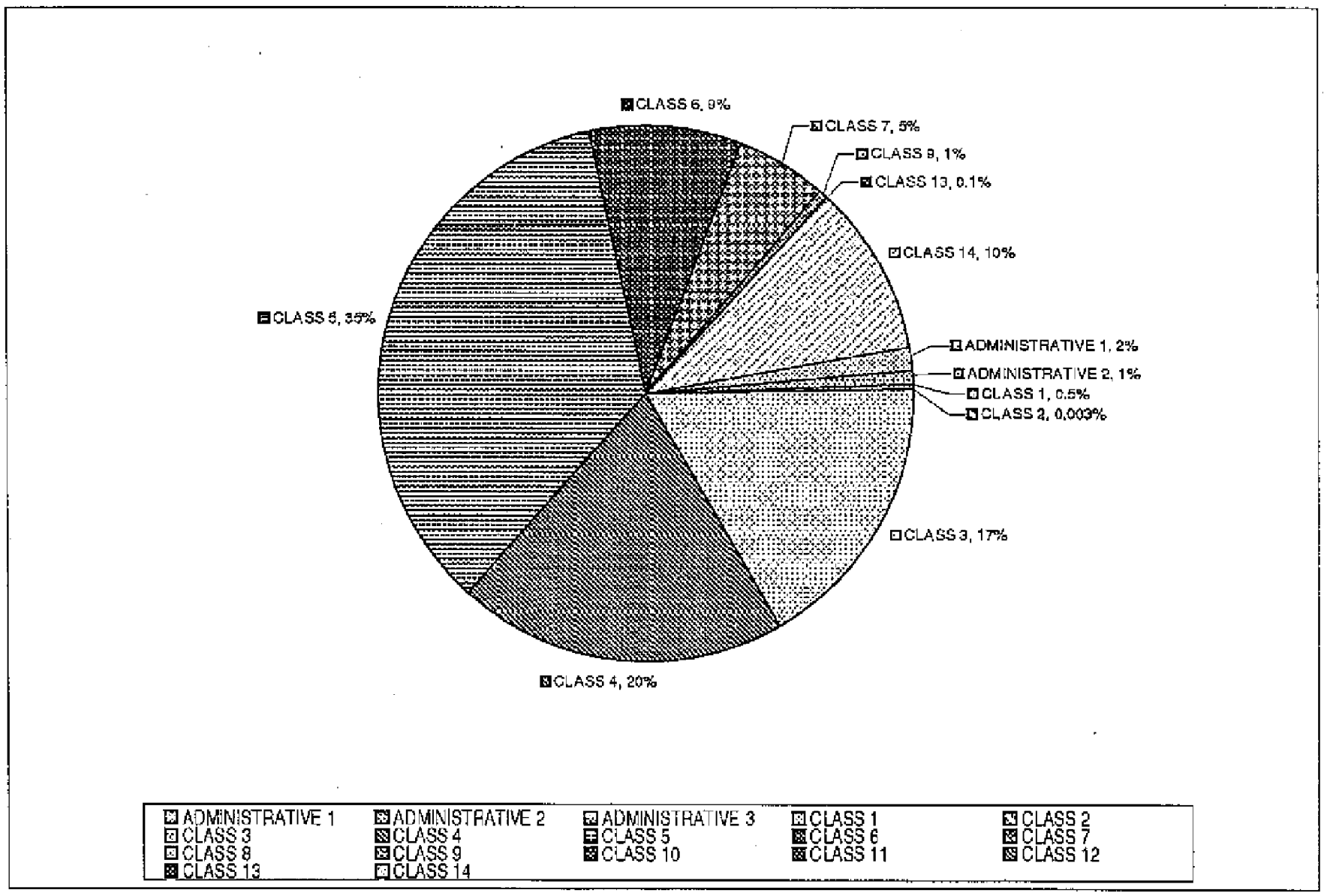
Tower Homes, LLC - Case No. 07-13208
Refinanced at $80 Million

G

Bank Balances 8/1/08	$0
Refinance Price	$80,000,000
Funds Available for Distribution	$80,000,000

CREDITOR CLASS	DESCRIPTION	Amount Tentatively Allowed	Proposed Payment	$80,000,000	Distribution %
ADMINISTRATIVE 1	TRUSTEE	$1,200,000	($1,200,000)	$78,800,000	100.00%
ADMINISTRATIVE 2	SHLRE	$500,000	($500,000)	$78,300,000	100.00%
ADMINISTRATIVE 3	BROKER	$0	$0	$78,300,000	0.00%
CLASS 1	BANK OF GEORGE [1]	$375,000	($375,000)	$77,925,000	100.00%
CLASS 2	PRIORITY TAX CLAIMS	$2,260	($2,260)	$77,922,740	100.00%
CLASS 3	ONECAP CLAIM 44 - $9.5M	$13,369,288 [2]	($13,369,288)	$64,553,452	100.00%
CLASS 4	ONECAP CLAIM 42 - $13M	$16,031,671	($16,031,671)	$48,521,781	100.00%
CLASS 5	MECHANICS LIEN CLAIMS	$28,139,544	($28,139,544)	$20,382,237	100.00%
CLASS 6	ONECAP CLAIM 43 - $5.2M	$7,307,923	($7,307,923)	$13,074,314	100.00%
CLASS 7	BENCHMARK	$4,300,000	($4,300,000)	$8,774,314	100.00%
CLASS 8	ONECAP MOP	$0	$0	$8,774,314	0.00%
CLASS 9	SECURED	$502,500	($502,500)	$8,271,814	100.00%
CLASS 10	LEXUS/TOYOTA	$0	$0	$8,271,814	0.00%
CLASS 11	GMAC	$0	$0	$8,271,814	0.00%
CLASS 12	PRIORITY NON-TAX	$0	$0	$8,271,814	0.00%
CLASS 13	PRIORITY NON-TAX (PRE-PURCHASERS)	$84,875	($84,875)	$8,186,939	100.00%
CLASS 14	GENERAL UNSECURED	$8,186,939 [3]	($8,186,939)	$0	100.00%
CLASS 15	SUBORDINATED	$0	$0	$0	0.00%
CLASS 16	EQUITY INTERESTS	$0	$0	$0	0.00%
TOTAL		$80,000,003	($80,000,000)	$0	100.00%

FUNDS REMAINING IN ESTATE	$0.00



[1] As of the preparation of this model, the Trustee has drawn $272,250.00 from the Bank of George line of credit, and intends to draw an additional $100,000.00.

[2] The three OneCap figures represent the principal loan balances, with accrued interest, through August 14, 2008.

[3] This figure represents the value of all claims allowed against the estate ($21,872,389) after discounts negotiated by Yanke with various creditors ($13,680,600), as required under the Trustee's plan.

EXHIBIT 2

TOWER HOMES
PLAN AND DISCLOSURE STATEMENT

PRE-PURCHASER CLAIMANTS

1	BERG, DAVID
2	BIRKETT, KAREN & BORJA, WENDY
3	BROWN, MELVA
4	CHANDLER, BARBARA L.
5	CHANDLER, BARBARA L. as Trustee of the SARA LEE M. BOWERS TRUST
6	CLARK, EDWARD & SANDRA
7	COOLEY, JUDGE W.
8	DEMORALES, DAN
9	DK IV LIMITED PARTNERSHIP JOHN & JENNIFER KILPATRICK
10	EDEJER, EDWIN & GAIL M.
11	EMBLETON, ROBERT
12	GAYNOR, ALLISON G.
13	GLANTZ, LARRY & MORALES, MAYRA
14	GOODALL, RICHARD
15	GRANDE, EILEEN
16	HARRIS, ANDREA
17	HERZLICH, HAROLD J. AND CAROL P.
18	JONES, DEBRA
19	KALMAN, TIMUCIN
20	KOMAN, CHRISTOPHER
21	MERZANIS, DAVID & ROBERTA
22	MIDORA, DAHN
23	MUELLER, ANN & ROBERT
24	MUSTAPHA, ASSI
25	NEVADA BROWN, LLC.
26	ORION STAR TRUST
27	RCY LEASING
28	SHIFFMAN, IRVING & JUDITH
29	SIEMANS, ABE
30	STROMER, PHILLIP & KATHERINE
31	TEJADA, CLIFFORD & CARMENCHITA
32	TOUMAIAN, MARTIN
33	WESTFIELD, LISA
34	WILLIAMS, ARTHUR
35	WOODCOCK, JACK

EXHIBIT 2
1 OF 1

EXHIBIT "B"

Entered on Docket
June 03, 2010

Hon. Bruce A. Markell
United States Bankruptcy Judge

Marquis & Aurbach
TERRY A. COFFING, ESQ.
Nevada Bar No. 4949
DAVID A. COLVIN, ESQ.
Nevada Bar No. 4096
BRIAN HARDY, ESQ.
Nevada Bar No. 10068
10001 Park Run Drive
Las Vegas, Nevada 89145
bhardy@marquisaurbach.com
(702) 382-0711
Attorneys for the Tower Homes Purchasers

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In Re: TOWER HOMES, LLC, a Nevada limited liability company, dba Spanish View Tower Homes. Debtor.	Case No.: BK-07-13208-BAM Chapter:11 Hearing Date: June 1, 2010 Hearing Time: 10:00 a.m.

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

This matter having come before the Court for a hearing on June 1, 2010, on the Motion to Approve Stipulation to Release Claims and Allow Marquis & Aurbach as Counsel for the Tower Homes Purchasers to Pursue Claims on Behalf of the Debtor, Tower Homes Purchasers appearing by and through their counsel of record, Brian Hardy, Esq. of Marquis & Aurbach, the Court finding based upon the reasons stated on the record, the papers and pleadings on file

MARQUIS & AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

herein, the Motion, the oral arguments of counsel, and good cause appearing;

IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Motion to Approve the Stipulation to Release Claims and Allow Marquis & Aurbach as Counsel for the Tower Homes Purchasers to Pursue Claims on Behalf of the Debtor, attached hereto as Exhibit 1, is hereby granted;

IT IS SO ORDERED.

Respectfully Submitted By:

MARQUIS & AURBACH

By _____
Brian Hardy, Esq.
Nevada Bar No. 10068
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney(s) for Tower Homes Purchasers

MARQUIS & AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

ALTERNATIVE METHOD RE: RULE 9021

In accordance with LR 9021, counsel submitting this document certifies as follows (check one):

___ The court has waived the requirement of approval under LR 9021.

___ This is a chapter 7 or 13 case, and either with the motion, or at the hearing, I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

___ This is a chapter 9, 11, or 15 case, and I have delivered a copy of this proposed order to all counsel who appeared at the hearing, any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below [list each party and whether the party has approved, disapproved, or failed to respond to the document]:

_X_ I certify that I have served a copy of this order with the motion, and no parties appeared or filed written objections.

###

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EXHIBIT 1

EXHIBIT 1

EXHIBIT 1

MARQUIS & AURBACH
TERRY A. COFFING, ESQ.
Nevada Bar No. 4949
DAVID A. COLVIN, ESQ.
Nevada Bar No. 4096
BRIAN HARDY, ESQ.
Nevada Bar No. 10068
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Las Vegas, Nevada 89145
dcolvin@marquisaurbach.com
(702) 382-0711
Attorneys for the Tower Homes Purchasers

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In Re: TOWER HOMES, LLC, a Nevada limited liability company, dba Spanish View Tower Homes. Debtor.	Case No.: BK-07-13208-BAM Chapter:11

STIPULATION TO RELEASE CLAIMS AND ALLOW MARQUIS & AURBACH, AS COUNSEL FOR THE TOWER HOMES PURCHASERS, TO PURSUE CLAIMS ON BEHALF OF DEBTOR

Creditors, Allison Gaynor, Barbara Chandler individually and as trustee of the Saralee M. Bowers Trust, Melva Nevada Brown, Richard Goodall, Harold & Carol Herzlich, Robert Embleton, Dahn Midora, Arthur Williams, Larry & Judy Shiffman, Edwin & Gail Edejer, Judge Angel Cooley, Debra Jones, Abe Siemens; John & Jennifer Kilpatrick, Clifford & Carmen Chita Tejada, Lisa Westfield, Ann & Robert Mueller, Phillip & Katherine Stromer, Karen Birkett, Wendy Borja, Eileen Grande, and Edward Goldin (collectively the "Tower Homes Purchasers"), by and through their counsel, David A. Colvin, Esq. of Marquis & Aurbach, and William A. Leonard, Jr., Post-Confirmation Chapter 11 Trustee (the "Trustee") by and through his counsel Christine A. Roberts, Esq. of Sullivan, Hill, Lewin, Rez & Engel, hereby stipulate and agree as follows:

1) The Trustee has determined that he does not intend and, in any event, does not have sufficient funds in the Estate to pursue claims on behalf of the Debtor against Rodney

MARQUIS & AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

C. Yanke, Americana LLC dba Americana Group, Mark L. Stark, Jeannine Cutter, David Berg, Equity Title of Nevada, LLC or any other individual or entity later identified through discovery which has or may have liability to Debtor or others for the loss of the earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project.

2) The Trustee has determined that the claims against Rodney C. Yanke, Americana LLC dba Americana Group, Mark L. Stark, Jeannine Cutter, David Berg, Equity Title of Nevada, LLC or any other individual or entity later identified through discovery which has or may have liability to Debtor or others for the loss of the earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project are or may be direct claims held by the Tower Homes Purchasers and, therefore, are not claims held soley and exclusively by the Estate.

3) The Trustee hereby stipulates and agrees to release to the Tower Homes Purchasers any and all claims on behalf of the Debtor against Rodney C. Yanke, Americana LLC dba Americana Group, Mark L. Stark, Jeannine Cutter, David Berg, Equity Title of Nevada, LLC or any other individual or entity later identified through discovery which has or may have any liability or owed any duty to Debtor or others for the loss of the Tower Homes Purchasers earnest money deposits and all claims to any and all earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project.

4) The Trustee hereby stipulates and agrees to allow Marquis & Aurbach, as counsel for the Tower Homes Purchasers, to pursue any and all claims on behalf of the Debtor against Rodney C. Yanke, Americana LLC dba Americana Group, Mark L. Stark, Jeannine Cutter, David Berg, Equity Title of Nevada, LLC or any other individual or entity later identified through discovery which has or may have any liability or owed any duty to Debtor or others for the loss earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project.

5) The Trustee hereby stipulates and agrees to allow Marquis & Aurbach, as counsel for the Tower Homes Purchasers, to recover any and all earnest monies deposits, damages,

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

attorneys fees and costs, and interest thereon on behalf of Debtor and the Tower Homes Purchasers with respect to those claims released to the Tower Homes Purchasers herein.

Dated, this ____ day of April, 2010.

MARQUIS & AURBACH

By: _____
Terry A. Coffing, Esq.
Nevada Bar No. 4949
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for the Tower
Homes Purchasers

SULLIVAN, HILL, LEWIN, REZ & ENGEL

By: _____
Christine A. Roberts, Esq.
Nevada Bar No. 6472
228 South Fourth Street, First Floor
Las Vegas, NV 89101
Attorneys for William A. Leonard, Jr.,
Post-Confirmation Chapter 11 Trustee

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Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

EXHIBIT "C"

V. ANDREW CASS
Nevada Bar No. 005246
cass@lbbslaw.com
JEFFREY D. OLSTER
Nevada Bar No. 008864
olster@lbbslaw.com
LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Tel: 702.893.3383
Fax: 702.893.3789
Attorneys for Defendants
William H. Heaton and
Nitz, Walton & Heaton, Ltd.

DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company;

Plaintiff,

vs.

WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive,

Defendants.

Case No.: A-12-663341-C
Dept. No.: 26

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

Date of Hearing: October 3, 2012
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

Submitted by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

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.

EXHIBIT "D"

Honorable Bruce A. Markell
United States Bankruptcy Judge

Entered on Docket
April 02, 2013

Marquis Aurbach Coffing
TERRY A. COFFING, ESQ.
Nevada Bar No. 4949
ZACHARIAH LARSON, ESQ.
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Attorneys for the Tower Homes Purchasers

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In Re: TOWER HOMES, LLC, a Nevada limited liability company, dba Spanish View Tower Homes. Debtor.	Case No.: BK-07-13208-BAM Chapter: 11 Hearing Date: April 1, 2013 Hearing Time: 9:00 AM Courtroom 3

ORDER GRANTING MOTION TO APPROVE AMENDED STIPULATION TO RELEASE CLAIMS AND ALLOW MARQUIS AURBACH COFFING, AS COUNSEL FOR THE TOWER HOMES PURCHASERS, TO PURSUE CLAIMS ON BEHALF OF DEBTOR

This matter having come before the Court for a hearing on April 1, 2013, on the Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing as Counsel for the Tower Homes Purchasers to Pursue Claims on Behalf of the Debtor, Tower Homes Purchasers appearing by and through their counsel of record, Brian Hardy, Esq. of Marquis Aurbach Coffing, the Court finding based upon the reasons stated on the record, the

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MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
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papers and pleadings on file herein, the Motion, the oral arguments of counsel, and good cause appearing;

IT IS HEREBY ORDERED ADJUDGED AND DECREED that the Motion to Approve the Stipulation to Release Claims and Allow Marquis Aurbach Coffing as Counsel for the Tower Homes Purchasers to Pursue Claims on Behalf of the Debtor, attached hereto as Exhibit 1, is hereby granted;

IT IS FURTHER ORDERED ADJUDGED AND DECREED that this Order authorizes the Trustee to permit the Tower Homes Purchasers, to pursue any and all claims on behalf of Tower Homes, LLC (the "Debtor") against any individual or entity which has or may have any liability or owed any duty to Debtor or others for the loss of the earnest money deposits provided by purchasers for units in the Spanish View Tower Homes condominium project which shall specifically include, but may not be limited to, pursuing the action currently filed in the Clark County District Court styled as Tower Homes, LLC v William H. Heaton et. al. Case No. A-12-663341-C.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that this Court hereby authorizes the law firm of Marquis Aurbach Coffing, 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 Debtor and the Tower Homes Purchasers and that any such recoveries shall be for the benefit of the Tower Homes Purchasers.

IT IS SO ORDERED.

Respectfully Submitted By:

MARQUIS AURBACH COFFING

By/s/ Brian Hardy, Esq.
Brian Hardy, Esq.
Nevada Bar No. 10068
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney(s) for Tower Homes Purchasers

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LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

☐ The court has waived the requirement set forth in LR 9021(b)(1).

☒ No party appeared at the hearing or filed an objection to the motion.

☐ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

☐ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

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

MARQUIS AURBACH COFFING

By: /s/ Brian Hardy, Esq.
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Attorney(s) for Debtor and
Debtor-in-Possession

# # #

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EXHIBIT "E"

NEO
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Attorneys for Plaintiffs
Tower Homes, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company;

Plaintiff,

vs.

WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive,

Defendants.

CASE NO.: A-12-663341-C
DEPT. NO.: XXVI

NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' RENEWED MOTION TO DISMISS

TO: ALL INTERESTED PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

. . .

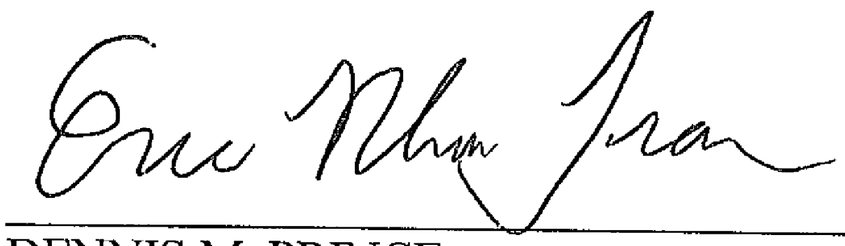
. . .

. . .

PLEASE TAKE NOTICE that the attached Order Denying Defendants' Renewed Motion to Dismiss was entered on September 4, 2013, a copy of which is attached hereto.

DATED this 7th day of October, 2013.

PRINCE & KEATING



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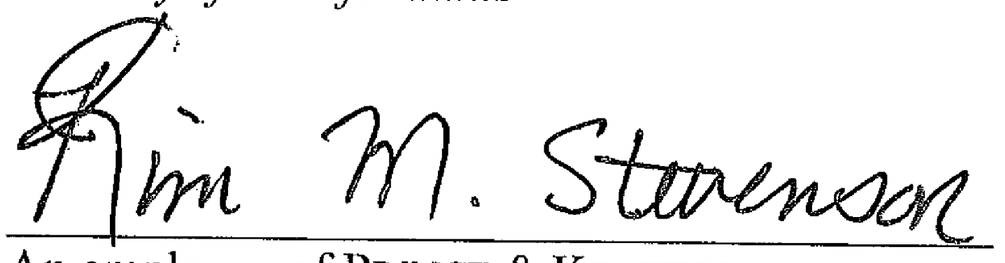
CERTIFICATE OF MAILING

I hereby certify that on the 7th day of October, 2013, I caused service of the foregoing **NOTICE OF ENTRY OF ORDER DENYING DEFENDANTS' RENEWED MOTION TO DISMISS** to be made by depositing a true and correct copy of same in the United States Mail, postage fully prepaid, addressed to the following:

Jeffrey Olster, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Facsimile: (702) 893-3789
Attorneys for Defendants



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DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company; Plaintiff, vs. WILLIAM H. HEATON, individually; NITZ, WALTON & HEATON, LTD., a domestic professional corporation; and DOES I through X, inclusive, Defendants.	CASE NO.: A-12-663341-C DEPT. NO.: XXVI **ORDER DENYING DEFENDANTS' RENEWED MOTION TO DISMISS**

Defendants' Renewed Motion to Dismiss having regularly come on for hearing on August 28, 2013 at 9:00 a.m., Dennis M. Prince and Eric N. Tran of Prince & Keating appearing on behalf of Plaintiff; and Jeffrey D. Olster of Lewis Brisbois Bisgaard & Smith, appearing on behalf of Defendants. The Court having considered the papers and pleadings filed by the parties, and good cause appearing therefore,

. . .

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IT IS HEREBY ORDERED that Defendants' Renewed Motion to Dismiss is DENIED. The Court finds that any procedural defect at issue in the Court's October 3, 2012 Order Regarding Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment has been cured.

IT IS FURTHER ORDERED that this litigation is no longer stayed. Defendants shall file their Answer to Plaintiff's Complaint within ten (10) days of the filing of the Notice of Entry of this Order Denying Defendants' Renewed Motion to Dismiss.

DATED this 3rd day of ~~August~~ September, 2013.

DISTRICT COURT JUDGE

Respectfully submitted by:

PRINCE & KEATING

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Approved as to Form and Content by:

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