

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3       TOWER HOMES, LLC, a Nevada  
4       limited liability company;

5                                   Plaintiff,

6  
7       vs.

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

12                                   Defendants.  
13

CASE NO.: 65755  
Electronically Filed  
Feb 05 2015 10:46 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

14                                   **APPELLANT TOWER HOMES, LLC'S APPENDIX**

15                                   **VOLUME 6**

16  
17                   Appellant, Tower Homes, LLC, by and through its attorneys of record, PRINCE |  
18  
19   KEATING, hereby concurrently files this Appendix in supplement to its Opening Brief.  
20  
21   This Appendix contains true and accurate portions of the district court record and other  
22   sources that are essential to understand the matters set forth in the aforementioned  
23   Petition.  
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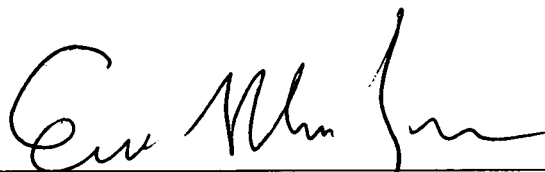
## **CHRONOLOGICAL APPENDIX OF DOCUMENTS**

<b>DOCUMENT</b>	<b>DATE</b>	<b>PAGE</b>
Complaint	06/12/2012	Vol. 1 AA1-10
Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Motion to Dismiss, or in the Alternative, Motion for Summary Judgment	07/19/2012	Vol. 1 AA11-173 Vol. 2 AA174-196
Plaintiff Tower Homes, LLC's Opposition to Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment	09/04/2012	Vol. 2 AA197-379 Vol. 3 AA380-424
Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Reply to Opposition to Motion to Dismiss, or in the Alternative, Motion for Summary Judgment	09/19/2012	Vol. 4 AA425-465
Order Regarding Defendants' Motion to Dismiss, or in the Alternative, Motion for Summary Judgment	11/01/2012	Vol. 4 AA466-468
Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Renewed Motion to Dismiss	07/26/2013	Vol. 4 AA469-600
Plaintiff Tower Homes, LLC's Opposition to Defendants' Renewed Motion to Dismiss	08/16/2013	Vol. 5 AA601-704
Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Reply to Plaintiff's Opposition to Renewed Motion to Dismiss	08/20/2013	Vol. 5 AA705-713
Order Denying Defendants' Renewed Motion to Dismiss	09/04/2013	Vol. 5 AA714-715
Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Motion for Summary Judgment	02/18/2014	Vol. 5 AA716-846
Plaintiff Tower Homes, LLC's Opposition to Defendants' Motion for Summary Judgment	03/07/2014	Vol. 6 AA847-868
Defendants William Heaton and the law firm of Nitz, Walton & Heaton, Ltd.'s Reply to Plaintiff's Opposition to Motion for Summary Judgment	03/14/2014	Vol. 6 AA869-891

1	Defendants William Heaton and the law	03/21/2014	Vol. 6 AA892-899
2	firm of Nitz, Walton & Heaton, Ltd.'s		
3	Supplemental Exhibit in Support of Motion		
4	for Summary Judgment		
5	Discovery Commissioner's Reports and	03/19/2014	Vol. 6 AA900-906
6	Recommendations on Plaintiff's Motion to		
7	Compel		
8	Minute Order Granting Defendants William	03/25/2014	Vol. 6 AA907-908
9	Heaton and the law firm of Nitz, Walton &		
10	Heaton, Ltd.'s Motion for Summary		
11	Judgment		
12	Order Granting Defendants' Motion for	05/15/2014	Vol. 6AA909-915
13	Summary Judgment		
14	Notice of Entry of Order	05/15/2014	Vol. 6 AA916-924
15	Notice of Appeal	05/28/2014	Vol. 6 AA925-926
16	Transcript of Proceedings on Defendants	12/02/2014	Vol. 6 AA927-948
17	William Heaton and the law firm of Nitz,		
18	Walton & Heaton, Ltd.'s Motion for		
19	Summary Judgment heard on March 21,		
20	2014		

DATED this 4<sup>th</sup> February, 2015.

**PRINCE | KEATING**



DENNIS M. PRINCE

Nevada Bar No. 5092

ERIC N. TRAN

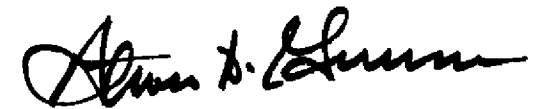
Nevada Bar No. 11876

9130 West Russell Road, Suite 200

Las Vegas, Nevada 89148

Attorneys for Appellant

*Tower Homes, LLC*



CLERK OF THE COURT

**OMSJ**  
DENNIS M. PRINCE  
Nevada Bar No. 5092  
ERIC N. TRAN  
Nevada Bar No. 11876  
**PRINCE & KEATING**  
3230 South Buffalo Drive  
Suite 108  
Las Vegas, Nevada 89117  
Telephone: (702) 228-6800  
Facsimile: (702) 228-0443  
*E-Mail: DPrince@PrinceKeating.com*  
*E-Mail: ETran@PrinceKeating.com*  
Attorneys for Plaintiff  
*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

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT**

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

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

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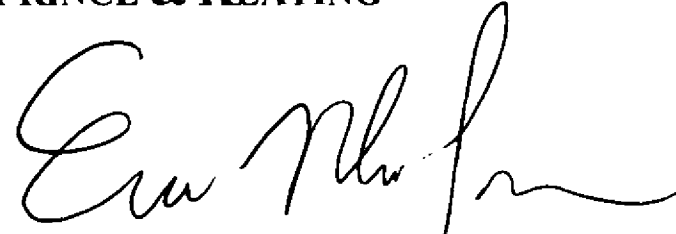


1 / / /

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

3 DATED this 7 day of March, 2014.

4 PRINCE & KEATING

5 

6 DENNIS M. PRINCE

7 Nevada Bar No. 5092

8 ERIC N. TRAN

9 Nevada Bar No. 11876

10 3230 South Buffalo Drive, Suite 108

11 Las Vegas, Nevada 89117

12 Attorneys for Plaintiff

13 *Tower Homes, LLC*

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 This is Defendants' William Heaton ("Heaton"), and the law firm of Nitz, Walton &  
17 Heaton, Ltd. ("NWH") (collectively referred to as "Defendants") fourth challenge to the  
18 validity of Plaintiff Tower Homes, LLC's ("Tower") lawsuit against Defendants. Even after  
19 two failed motions to dismiss, and after a failed writ of mandamus to the Nevada Supreme  
20 Court, Defendants are back once again filing a motion for summary judgment seeking to  
21 have Tower's legal malpractice lawsuit against Defendants dismissed on the grounds that  
22 Tower is not the proper party to this litigation. This time, Defendants attempt to convince this  
23 Court that Tower is not the proper plaintiff because this action is being prosecuted for the  
24 benefit of the Tower Homes Purchasers and as such, the Tower Homes Purchasers are the real  
25 parties in interest. Defendants' argument however, completely misunderstands the purpose of  
26 bankruptcy and the role of a bankruptcy trustee. As will be demonstrated below, Tower is the  
27 proper plaintiff in this litigation even if the Tower Homes Purchasers will be the ultimate  
28

1 beneficiaries to any recovery from this litigation. Notably, Defendants also argue that even if  
2 the Tower Homes Purchasers were named as plaintiffs, this lawsuit would still not be  
3 permitted because the Tower Homes Purchasers did not have an attorney-client relationship  
4 with Defendants. Defendants' circular argument is baseless. Under Defendants' theory, no  
5 one can bring forth this legal malpractice against Defendants. This is simply false.

6  
7 **A. Background**

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

13  
14 As discussed in detail in previous pleadings, Tower marketed the individual units of a  
15 condominium project for sale to members of the public. Accordingly, Tower entered into  
16 written Purchase Contracts with numerous individual investors (collectively referred to as the  
17 "Tower Homes Purchasers") prior to the completion of construction of the condominium  
18 project. Each purchaser gave Tower a significant earnest money deposit. Unfortunately, there  
19 was insufficient financing available for the Project's completion and thus, the Project failed.  
20 As a result of the Project's failure, many of the Tower Homes Purchasers lost millions of  
21 dollars of their money deposits.

22  
23 **B. The Underlying Litigation**

24 As a result of Heaton and NWH's failure to satisfy their legal obligations and duties to  
25 Tower and Yanke, on or about May 23, 2007, certain Tower Homes Purchasers filed a  
26 Complaint in the Eighth Judicial District Court, in Gaynor, et. al v. Tower Homes, LLC, et  
27 al., Case No. A541668 against Tower, Yanke, and other Defendants including Prudential Real  
28

1 Estates Affiliates, Inc., Mark L. Stark, Jeanine Cutter, and David Berg, seeking the return of  
2 their earnest money deposits.

3 **C. The Bankruptcy Proceeding**

4 On May 31, 2007, Bankruptcy proceedings in the United States Bankruptcy Court in  
5 the District of Nevada pursuant to Chapter 11 of the United States Bankruptcy Code were  
6 initiated against Tower. Among Tower's creditors were the individual Tower Homes  
7 Purchasers. The Tower Homes Purchasers collectively filed Proofs of Claim totaling  
8 \$3,560,000.00. On December 8, 2008, the Bankruptcy Court entered an "Order Approving  
9 Disclosure Statement and Confirming Plan of Reorganization." See Defendants' **Exhibit A**.

11 Pursuant to the Order, "the Trustee and the Debtor's (Tower's) bankruptcy estate shall  
12 retain all Claims or Causes of Action that they have or hold against any party . . . whether  
13 arising pre- or post-petition, subject to the applicable state law statutes of limitation and  
14 related decision law, whether sounding in tort, contract or other theory or doctrine of law or  
15 equity." See Id. at page 48:18-22. Simply put, the Trustee and the Estate retained all claims  
16 that Tower had against any parties, and the Trustee and the Estate have the right to assert any  
17 future potential causes of action including any future claims for legal malpractice. This was to  
18 protect and satisfy creditor's claims against the Estate.

20 **D. The First Marquis Aurbach Order**

21 During the bankruptcy proceeding, the Bankruptcy Court entered an "Order Granting  
22 Motion to Approve Stipulation to Release Claims and Allow Marquis & Aurbach, as Counsel  
23 for the Tower Homes Purchasers, To Pursue Claims on Behalf of Debtor" (hereinafter  
24 referred to as the "Marquis Aurbach Order" attached as Defendants' **Exhibit B**). Pursuant to  
25 the Marquis Aurbach Order, the Trustee, the law firm Marquis Aurbach Coffing, as well as  
26 the Tower Homes Purchasers stipulated to release and assign certain claims of the debtor  
27 (Tower) and to allow Marquis Aurbach Coffing, as counsel for the Tower Homes Purchasers,  
28

1 to pursue claims on behalf of the debtor for the benefit of the Tower Homes Purchasers. Id. at  
2 ¶ 3. In particular, pursuant to the Marquis Aurbach Order, Marquis Aurbach Coffing and the  
3 Trustee signed and agreed to allow Marquis Aurbach Coffing, as counsel for the Tower  
4 Purchasers to pursue any and all claims on behalf of the debtor against any individual or  
5 entity who may have any liability owed to the debtor or others for the loss of the earnest  
6 money deposits provided by the purchasers of the units at Spanish View and the Project. Id. at  
7 ¶s 4 and 5. The scope of the Marquis Aurbach Order includes any potential claim for legal  
8 malpractice.  
9

#### 10 **E. The Settlement of the Underlying Litigation**

11 The trial in Gaynor, et. al v. Tower Homes, LLC, et. al was scheduled to commence  
12 on May 9, 2011. In advance of the trial, a settlement agreement was reached between the  
13 Tower Home Purchasers and Yanke, individually. On or about May 2, 2011, a Stipulation to  
14 Entry of Order Granting Judgment Against Rodney C. Yanke and Dismissing Claims Against  
15 Rodney C. Yanke was entered in Case No. A541668.  
16

#### 17 **F. The Present Legal Malpractice Action**

18 On June 12, 2012, Plaintiff Tower filed this instant action against Defendants Heaton  
19 and NWH alleging claims for legal malpractice and breach of fiduciary duty.  
20

#### 21 **G. Defendants' First Motion to Dismiss**

22 On July 19, 2012, Defendants filed their Motion to Dismiss, or in the alternative,  
23 Motion for Summary Judgment arguing, *inter alia*, that Tower and the law firm of Prince &  
24 Keating do not have standing to pursue this cause of action based on federal law and the  
25 orders entered in the bankruptcy proceedings. See Defendants' Motion for Summary  
26 Judgment filed on July 19, 2012. Instead, Defendants argued that only the Tower Homes  
27 Purchasers had the right to pursue any claims through its attorneys, Marquis & Aurbach. Id.  
28 at 7:17-19.

1 Defendants' Motion to Dismiss, or in the alternative, Motion for Summary Judgment  
2 was heard on October 3, 2012. With regard to Tower and Prince & Keating's standing, this  
3 Court ruled that the "Marquis Aurbach Order" does not authorize Tower to bring this action  
4 through the law firm of Prince & Keating against Defendants but that Tower may attempt to  
5 remedy this procedural defect by obtaining the requisite authority from Tower's Bankruptcy  
6 Trustee and Order from the Bankruptcy Court. See Defendants' **Exhibit C** at 2:10-15. This  
7 Court also ruled that this was a procedural defect and not a fatal defect. Id. at 2:10-12. This  
8 Court then denied Defendants' Motion for Summary Judgment and stayed the matter until  
9 Tower obtains the requisite authority for this action from the bankruptcy trustee and order  
10 from the Bankruptcy Court. Id. at 2:16-18.

12 **H. Heaton and NWH's Petition for Writ of Mandamus to the Nevada Supreme**  
13 **Court**

14 On December 11, 2012, Defendants Heaton and NWH file a Petition for Writ of  
15 Mandamus to the Nevada Supreme Court. On February 20, 2013, the Nevada Supreme Court  
16 issued an Order Directing Supplemental Petition and Directing an Answer. See Plaintiff's  
17 **Exhibit 1**. Specifically, the Nevada Supreme Court stated that:

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

27 Id. (emphasis added).

28 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

1 matter so that the Nevada Supreme Court can determine whether it even needs to address the  
2 merits of Defendants' petition. On March 1, 2013, Defendants filed their Supplement to  
3 Petition for Writ of Mandamus. On April 12, 2013, Tower filed its Answering Brief.

4 **I. The Amended Marquis Aurbach Order allowing Prince & Keating to Pursue all**  
5 **Claims On Behalf of the Debtor**

6 Pursuant to this Court's instruction to obtain an order from the Bankruptcy Court  
7 authorizing Prince & Keating to bring this action against Defendants for the benefit of the  
8 Tower Homes Purchasers, on April 2, 2013, Tower obtained an "Order Granting Motion to  
9 Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, as  
10 Counsel for the Tower Homes Purchasers, To Pursue Claims on Behalf of Debtor"  
11 (hereinafter referred to as "Amended Marquis Aurbach Order") from the Bankruptcy Court.  
12 See Defendants' Exhibit D. According to the Amended Marquis Aurbach Order, the  
13 Bankruptcy Court "authorized the law firm of Marquis Aurbach Coffing, and/or Prince &  
14 Keating LLP, or successive counsel, retained on behalf of Tower Homes Purchasers to  
15 recover any and all earnest money deposits, damages, attorney's fees and costs, and interest  
16 thereon on behalf of the Debtor and the Tower Homes Purchasers and that any such  
17 recoveries shall be for the benefit of the Tower Homes Purchasers." Id. at 2: 15-20  
18 (emphasis added).

19 **J. The Nevada Supreme Court Denies Defendants' Petition for Writ of Mandamus**

20 On June 14, 2013, the Nevada Supreme Court issued an Order Denying Petition for  
21 Writ of Mandamus or Prohibition. See Plaintiff's Exhibit 2.

22 **K. Defendants' Renewed Motion to Dismiss**

23 On July 26, 2013, Defendants filed a Renewed Motion to Dismiss. In Defendants'  
24 Renewed Motion, Defendants again argued that Tower is not the proper party to this  
25  
26  
27  
28

1 litigation and that the only party with authorization to bring forth this legal malpractice claim  
2 against Defendants is the Tower Homes Purchasers.

3 On August 28, 2013, this Court denied Defendants' Renewed Motion to Dismiss and  
4 argued held that "any procedural defect at issue in the Court's October 3, 2012 Order  
5 Regarding Defendants' Motion to Dismiss, or in the alternative, Motion for Summary  
6 Judgment has been cured." See Defendants' **Exhibit E**.

7  
8 **L. Defendants' Present Motion for Summary Judgment**

9 Even after Defendants' argument that Tower is not the proper party to bring forth this  
10 legal malpractice action against Defendants was rejected twice by this Court and rejected by  
11 the Nevada Supreme Court, in Defendants' latest motion for summary judgment, Defendants  
12 argue that there is no factual dispute that the Tower Homes Purchasers are the real parties in  
13 interest because the Tower Homes Purchasers will benefit from any recovery in this litigation.  
14 Defendant concludes that because the Tower Homes Purchasers are not named as a party to  
15 this litigation, that summary judgment should be granted pursuant to NRCP 17. See  
16 Defendants' Motion at 3:15-19. Defendants also argue that even if the Tower Homes  
17 Purchasers were named as plaintiffs, they cannot pursue legal malpractice claims on behalf of  
18 Tower because legal malpractice claims are not assignable. See Defendants' Motion at 3:19-  
19 22; 8:21-9:2.

20  
21 The reality of the matter is that Defendants' arguments are nothing new. Defendants  
22 have always argued that the Tower Homes Purchasers are the real parties interest and the only  
23 party with standing to bring forth this legal malpractice action against Defendants. Notably,  
24 Defendants are now also arguing that even if the Tower Homes Purchasers were named as the  
25 plaintiffs, the Tower Homes Purchasers cannot even bring forth this legal malpractice action  
26 against Defendants because legal malpractice actions are not assignable. As such, according  
27 to Defendants, neither Tower nor the Tower Homes Purchasers can maintain this legal  
28

1 malpractice action against Defendants. Under Defendants' interpretation, no one can bring  
2 forth this legal malpractice claim against Defendants. This conclusion is legally false and  
3 absurd. Thus, Plaintiff once again submits this Opposition to Defendants' Motion for  
4 Summary Judgment.

## 5 **II. LEGAL ARGUMENT**

### 6 **A. THE LEGAL STANDARD FOR MOTIONS FOR SUMMARY JUDGMENT**

7  
8 Summary judgment is appropriate when the pleadings and other evidence in the record  
9 demonstrate that there is no genuine issue of material fact, and that the moving party is  
10 entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d  
11 1026, 1031 (2005); NRCp 56(c). Under NRCp 56, the burden of proving that there is no  
12 genuine issue of material fact lies with the moving party. Maine v. Stewart, 109 Nev. 721,  
13 726–27, 857 P.2d 755, 758 (1993). A factual dispute is genuine when the evidence is such  
14 that a rational trier of fact could return a verdict for the nonmoving party. Wood, 121 Nev. at  
15 729, 121 P.3d at 1029.

16  
17 Once the movant has properly supported the summary judgment motion, the  
18 nonmoving party may not rest upon general allegations and conclusions, but must instead set  
19 forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of  
20 material fact for trial. NRCp 56(e); Wood, 121 Nev. at 731, 121 P.3d at 1030–31. When  
21 reviewing a motion for summary judgment, “the evidence, and any reasonable inferences  
22 drawn from it, must be viewed in a light most favorable to the nonmoving party.” Id. at 729,  
23 121 P.3d at 1029.

### 24 **B. TOWER IS THE PROPER PARTY TO THIS LITIGATION DESPITE THE 25 FACT THAT THE TOWER HOMES PURCHASERS WILL ULTIMATELY 26 BENEFIT FROM ANY RECOVERY IN THIS LITIGATION**

27 Once again, the crux of Defendants' argument in their motion for summary judgment  
28 is that Tower is not the proper plaintiff to pursue this legal malpractice action. According to



1 Defendants, because the Tower Homes Purchasers will ultimately benefit and recover the  
2 proceeds from this litigation, the Tower Homes Purchasers are the real parties in interest and  
3 should be named as the proper plaintiff in this litigation. Defendants' entire premise is wrong.

4 **1) Pursuant to *In re AgriBioTech, Inc.*, The Mere Fact That The Tower Homes**  
5 **Purchasers Will Ultimately Benefit Does Not Mean That Tower is Not the**  
6 **Real Party In Interest.**

7 Defendants' argument is legally false as it fails to recognize the nature of bankruptcy  
8 and the role of a trustee in bankruptcy. It is firmly established that the commencement of a  
9 bankruptcy case creates an estate, and the bankruptcy trustee is required to marshal all of the  
10 estate's property for the estate's benefit. 11 U.S.C. §§ 541(a), 704. The bankruptcy trustee is  
11 required to marshal all of the estate's property for the estate's benefit. *In re Mwangi*, 473 B.R.  
12 802, 808 (D.Nev. 2012) (citing 11 U.S.C. § § 541(a)). Property of the bankruptcy estate  
13 includes "all legal or equitable interests of the debtor in property as of the commencement of  
14 the case." *Id.* The trustee becomes the representative of the estate, and the debtor has an  
15 obligation to surrender all property to the trustee. *Id.*

17 Nevada courts have even directly addressed the fallacy of Defendants' argument. In  
18 particular, Nevada Bankruptcy Courts have stated that a bankruptcy trustee has the right to  
19 bring any action in which the debtor has an interest because this is property of the estate, and  
20 thus, the trustee is acting to benefit the debtor's estate, even if the estate's creditors are  
21 ultimately benefiting upon distribution. *In re AgriBioTech, Inc.*, 319 B.R. 216, 221 -222  
22 (D.Nev. 2004) ("*AgribioTech II*") (citing *In re Schimmelpenninck*, 183 F.3d 347, 86-87 (5th  
23 Cir.1999)). Specifically, in *In re AgriBioTech, Inc.*, the court stated as follows:

25 That the creditors ultimately will benefit does not mean the estate is not the  
26 real party in interest:

27 [I]t is important to note a fallacy in the argument that the claims asserted  
28 "really" belong to the investors/creditors. This argument often comes from the  
mistaken notion that the creditors are the ones who will receive the money  
anyway, so why not let them pursue the wrongdoers themselves and do away

1 with the trustee. This argument misunderstands the nature of bankruptcy and  
2 the role of the trustee in bankruptcy. Bankruptcy is a collective debt collection  
3 device. Indeed, the trustee's job is to investigate the debtor's financial affairs,  
4 liquidate assets, pursue the debtor's causes of action, and acquire assets  
5 through the trustee's avoiding powers in order to make a distribution to  
6 creditors. "The concept of a trustee in bankruptcy is that of a creditor  
7 representative whose single effort will replace that of multiple and often  
8 wasteful and competitive efforts of individual creditors." 1 Daniel R. Cowans  
et al., Cowans Bankruptcy Law and Practice § 2.7, at 72 (1986 ed.). To find  
that the trustee has no standing to pursue causes of action belonging to the  
debtor because the recovery would only benefit the creditors is an absurd  
argument, given the fact that the trustee's goal is to make a distribution to  
creditors.

9 In re AgriBioTech, Inc., 319 B.R. 207, 214 (D.Nev. 2004) ("AgriBiotech I") (citation  
10 omitted).

11 Consistent with the reasoning set forth in AgriBioTech, just because the Tower Homes  
12 Purchasers will ultimately receive the benefits from this litigation does not mean that Tower is  
13 not the proper party. Bankruptcy is a collection effort, and the trustee and/or Tower's role in  
14 this litigation is to pursue all of Tower's causes of action in order to satisfy its debt to its  
15 creditors, (i.e. the Tower Homes Purchasers). The process of allowing a debtor (i.e. Tower) to  
16 pursue a single effort to pursue its causes of action against other entities (i.e. Defendants) is  
17 more efficient than having multiple efforts from multiple Tower Homes Purchasers pursue  
18 individual causes of action against the entities (i.e. Defendants). Thus, just because a creditor,  
19 such as the Tower Homes Purchasers, will ultimately benefit from a litigation does not mean  
20 that a debtor, such as Tower, is not the real party in interest. In fact, it is even immaterial who  
21 brings forth this action, as any recovery from this litigation will always be for the benefit for  
22 the Tower Homes Purchasers.

23  
24  
25 **2) This Legal Malpractice Action is Proper Because Tower Is the Only Entity**  
26 **That Can Bring this Action Against Defendants.**

27 In addition, it makes sense that Tower is the proper party to this litigation despite the  
28 fact that any recovery in this litigation will ultimately be for the benefit of the Tower Homes

1 Purchasers. As discussed in previous pleadings, in this case, the named plaintiff is Tower, not  
2 the Tower Homes Purchasers. Tower is pursuing this present legal malpractice action against  
3 Defendants not through an assignment of a legal malpractice claim, but rather, through  
4 Tower's direct and former attorney-client relationship with Defendants. There is no dispute  
5 that Defendants NWH and Heaton represented Tower in the drafting of purchase contracts for  
6 the sale of the condominiums. There is also no dispute that NWH and Heaton represented  
7 Tower in the Underlying Litigation. Stated differently, Tower was the client and NWH and  
8 Heaton were the attorneys. As such, Tower is the named plaintiff in this case. NWH and  
9 Heaton are the named Defendants. Thus, Tower's legal malpractice action against NWH is  
10 permitted by Nevada law as there was a direct attorney-client relationship between NWH and  
11 Tower in the Underlying Litigation.  
12

13  
14 **3) Defendants' Argument that Legal Malpractice Claims are Non Assignable is Inconsequential.**

15 Defendants also argue that even if the Tower Homes Purchasers are named as  
16 plaintiff, the Tower Homes Purchasers cannot even maintain this legal malpractice action  
17 against NWH because a legal malpractice action cannot be assigned.  
18

19 Not only is Defendants' argument circular, it is also inconsequential. According to the  
20 Amended Marquis Aurbach Order, the Bankruptcy Court "authorized the law firm of Marquis  
21 Aurbach Coffing, and/or Prince & Keating LLP, or successive counsel, retained on behalf of  
22 Tower Homes Purchasers to recover any and all earnest money deposits, damages, attorney's  
23 fees and costs, and interest thereon on behalf of the Debtor and the Tower Homes Purchasers  
24 and that any such recoveries shall be for the benefit of the Tower Homes Purchasers." See  
25 Defendants' Exhibit D at 2: 15-20 (emphasis added).  
26

27 Thus, the Amended Marquis Aurbach Order authorizes Tower through the law firm of  
28 Prince & Keating to bring forth this legal malpractice action with any recovery going to the

1 benefit of the Tower Homes Purchasers. In fact, case law firmly establishes that Tower can  
2 bring this legal malpractice action. As discussed above, a bankruptcy trustee has the right to  
3 bring any action in which the debtor has an interest because this is property of the estate, and  
4 thus, the trustee is acting to benefit the debtor's estate, even if the estate's creditors are  
5 ultimately benefiting upon distribution. In re AgriBioTech, Inc., 319 B.R. 216 at 221 -222  
6 (citing In re Schimmelpenninck, 183 F.3d 347, 86-87 (5th Cir.1999). However, the trustees  
7 may not assert personal claims on behalf of certain creditors where the estate has no interest  
8 in the claims. In re Folks, 211 B.R. at 386-87 (quotation omitted). The question in each case  
9 is whether the claim asserted by the trustee is one in which the estate has an interest, and is  
10 therefore property of the estate from which the estate, and derivatively the creditors as an  
11 undifferentiated whole, ultimately will benefit. In re AgriBioTech, Inc. 319 B.R. at 222.

12  
13  
14 Here, as described above, this action is being prosecuted by Tower. The legal  
15 malpractice claim belongs to Tower. There was no assignment of this legal malpractice action  
16 to Tower. Tower had an attorney-client relationship with Defendants. Tower is the named  
17 plaintiff and NWH and Heaton are the named defendants. Thus, because Tower is the proper  
18 party that is prosecuting this litigation, it is inconsequential that legal malpractice claims are  
19 not assignable because this legal malpractice action is being prosecuted by the real party in  
20 interest.

21  
22 NWH's citation to Baum v. Duckor, Spradling & Metzger 72 Cal.App.4th 54,  
23 61 (Cal.App.4th Dist.1999); Curtis v. Kellogg & Andelson, 73 Cal.App.4th 492, 86 Cal.Rptr.2d  
24 536 (Cal.App. 2 Dist. 1999) is misplaced. As recognized by NWH, in Baum, a creditor  
25 brought a legal malpractice action against two debtor corporations' legal counsel. Thus, the  
26 court in Baum dismissed the creditor's legal malpractice claim against the debtor's attorneys  
27 because the creditors did not have an attorney-client relationship with the attorneys. Similarly,  
28 in Curtis, an individual shareholder of a medical corporation, which had filed bankruptcy

1 petition, brought malpractice claims against accounting firms and law firms which had  
2 represented the medical corporation. There, the court held that the sole shareholder could not  
3 bring a legal malpractice action against the law firm and that the bankruptcy trustee could not  
4 assign the medical corporation's legal malpractice claim against the law firm to the sole  
5 shareholder.

6  
7 Baum and Curtis are clearly distinguishable to the present case. First, unlike the  
8 plaintiffs in Baum and Curtis who filed lawsuits against the law firm when they did not have  
9 an attorney-client relationship with the law firm, here Tower is the plaintiff in this legal  
10 malpractice action against Defendants Heaton and NWH. Tower did in fact have an attorney-  
11 client relationship with Defendants Heaton and NWH. Second, unlike the bankruptcy orders  
12 in Baum and Curtis which assigned a legal malpractice claim to a plaintiff that did not have an  
13 attorney-client relationship with the law firm and attorneys, here the Amended Marquis  
14 Aurbach Order specifically allowed Tower, the sole party with the attorney-client relationship  
15 with NWH and Heaton, to pursue this legal malpractice action against Defendants NWH and  
16 Heaton. Thus, the Amended Marquis Aurbach Order was simply confirming what Tower had  
17 all along, which is the ability to pursue this legal malpractice action against Defendants for  
18 the benefit of the Tower Homes Purchasers.


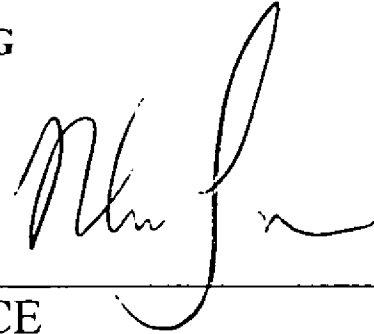
19  
20 In sum, the mere fact that this litigation is being prosecuted by Tower with the  
21 recovery of any proceeds going to the benefit of the Tower Homes Purchasers does not mean  
22 that Tower is not the proper party. In fact, Tower is the only entity with the standing to pursue  
23 this legal malpractice against Defendants as Tower was the only entity with the attorney-client  
24 relationship with Defendants. Because this legal malpractice action is being prosecuted by  
25 Tower, any argument that a legal malpractice claim is not assignable is inconsequential.  
26  
27  
28

1 **III. CONCLUSION**

2 Based on the foregoing, Plaintiff Tower requests that this Honorable Court deny  
3 Defendants' Motion for Summary Judgment.

4 DATED this 7 day of March, 2014.

5 **PRINCE & KEATING**

6  

7 DENNIS M. PRINCE

8 Nevada Bar No. 5092

9 ERIC N. TRAN

10 Nevada Bar No. 11876

11 3230 South Buffalo Drive, Suite 108

12 Las Vegas, Nevada 89117

13 Attorneys for Plaintiff

14 *Tower Homes, LLC*

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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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# EXHIBIT “1”

# EXHIBIT “1”



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

**FILED**

**FEB 20 2013**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *R. Malone*  
DEPUTY CLERK

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.

*[Signature]*, A.C.J.

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

# EXHIBIT “2”

# 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

**FILED**

JUN 14 2013

TRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Angela*  
DEPUTY CLERK

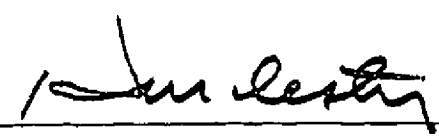
*ORDER DENYING PETITION FOR  
WRIT OF MANDAMUS OR PROHIBITION*

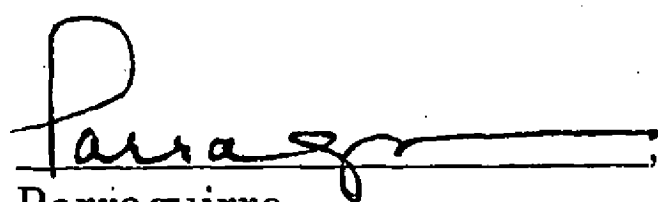
This original petition for a writ of mandamus, or alternatively, prohibition, challenges a district court order denying a motion to dismiss in a legal malpractice action.

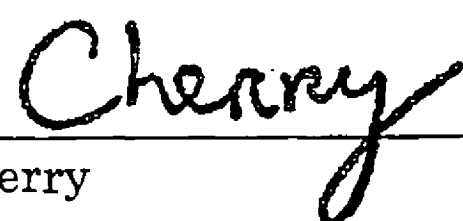
A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition may be warranted 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).

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

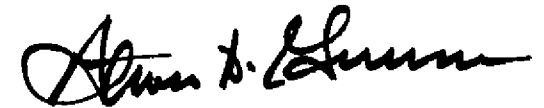
ORDER the petition DENIED.

  
\_\_\_\_\_, 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



CLERK OF THE COURT

V. ANDREW CASS  
Nevada Bar No. 005246  
[Drew.Cass@lewisbrisbois.com](mailto:Drew.Cass@lewisbrisbois.com)  
JEFFREY D. OLSTER  
Nevada Bar No. 008864  
[Jeff.Olster@lewisbrisbois.com](mailto:Jeff.Olster@lewisbrisbois.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

**DEFENDANTS' REPLY TO PLAINTIFF'S  
OPPOSITION TO MOTION FOR  
SUMMARY JUDGMENT**

**Hearing Date: March 21, 2014**  
**Hearing Time: 9:30 a.m.**

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, submit the following memorandum of points and authorities in reply to "Plaintiff's Opposition to Defendants' Motion for Summary Judgment" (hereafter the "Opposition"). NWH's Motion for Summary Judgment will be referred to hereafter as the "MSJ."

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In their Opposition, Plaintiff's alleged attorneys<sup>1</sup> gloss over two critical and entirely  
4 undisputed points:

- 5 1. *The only parties who stand to benefit from this action are the Tower Homes*  
6 *Purchasers*, who are not named as parties and who never had an attorney-client  
7 relationship with NWH. This means that the Tower Homes Purchasers are the real  
8 parties in interest and therefore must be treated as the plaintiffs in this action.
- 9 2. *This action is not brought by the Tower Homes bankruptcy trustee for the benefit of*  
10 *the Tower Homes bankruptcy estate*. This means that, contrary to the assertions in the  
11 Opposition, no federal bankruptcy law (or any state law) provides any authority for this  
12 rogue action. While federal law authorizes bankruptcy trustees, or other disinterested  
13 persons appointed by a trustee, to pursue actions *for the benefit of the bankruptcy estate*  
14 under certain circumstances, this is not such a case because any potential recovery in  
15 this case will go to the Tower Homes Purchasers, not to the Tower Homes bankruptcy  
16 estate.

17 What is happening in this case is now abundantly clear – the Tower Homes Purchasers are  
18 seeking to circumvent both federal and state law by prosecuting a legal malpractice action using  
19 an otherwise non-existent limited liability shell. No federal or state law permits this  
20 gamesmanship. The bottom line is that *the Tower Homes Purchasers are seeking to pursue an*  
21 *assigned legal malpractice claim for their own benefit*. Plaintiff's alleged attorneys do not dispute  
22 the well-established principle of law that legal malpractice claims are not assignable in Nevada.

23 \_\_\_\_\_

24 <sup>1</sup> Though Tower Homes, LLC is technically designated as the “plaintiff,” it is now clear that this action is  
25 brought by and for the exclusive benefit of the Tower Homes Purchasers. It is also clear that *the law firm*  
26 *of Prince & Keating represents the interests of the Tower Homes Purchasers*, not Tower Homes, LLC.  
27 (See MSJ, Ex. D at Page 2 of 3, lines 15-17 [“[T]his Court hereby authorizes the law firm of Marquis  
28 Aurbach Coffing, and/or Prince & Keating LLP, or successive counsel, *retained on behalf of Tower*  
*Homes Purchasers*. . . ”].) (Emphasis added.) Accordingly, despite the misleading caption, Prince &  
Keating does not actually represent the interest of Tower Homes, LLC, which is nothing more than a  
defunct corporate shell.

1 Accordingly, NWH is entitled to summary judgment.

2 **II. REPLY ARGUMENT**

3 **A. The Plaintiffs in this action – the real parties in interest – are the Tower Homes**  
4 **Purchasers, not Tower Homes, LLC or the Tower Homes, LLC Bankruptcy**  
5 **Estate.**

6 Nowhere in their Opposition do Plaintiff’s alleged attorneys dispute the single most critical  
7 fact relating to the MSJ, which is that only the Tower Homes Purchasers – not Tower Homes,  
8 LLC, and not the Tower Homes bankruptcy estate – stand to benefit in any way, shape or form  
9 from this action. This fact is indisputable, as the Bankruptcy Court order that Plaintiff’s alleged  
10 attorneys contend authorizes this action (the Second Marquis Aurbach Order) provides that “any  
11 such recoveries [in this case] *shall be for the benefit of the Tower Homes Purchasers.*” (Ex. D at  
12 Page 2 of 3, lines 19-20 [emphasis added].). Indeed, Plaintiff’s alleged attorneys readily concede  
13 in their Opposition that “the Tower Homes Purchasers will be the ultimate beneficiaries to any  
14 recovery from this litigation.” (Opposition at 2:28 – 3:1.)

15 Given this critical undisputed fact, there can also be no legal dispute that the Tower Homes  
16 Purchasers are the “real parties in interest” within the meaning of N.R.C.P. 17(a). Again,  
17 N.R.C.P. 17(a) provides: “Every action *shall* be prosecuted in the name of the real party in  
18 interest.” (Emphasis added.) In their Opposition, Plaintiff’s alleged attorneys make no attempt to  
19 argue that the Tower Homes Purchasers are not the “real parties in interest” pursuant to N.R.C.P.  
20 17(a). In other words, Plaintiff’s alleged attorneys have conceded that the Tower Homes  
21 Purchasers are the real parties in interest. *See* EDCR 2.20(e) (“Failure of the opposing party to  
22 serve and file written opposition may be construed as an admission that the motion and/or joinder  
23 is meritorious and a consent to granting the same.”)

24 Accordingly, the inescapable and incontrovertible conclusion is that the Tower Homes  
25 Purchasers are the real parties in interest. “The concept ‘real party in interest’ under NRCP 17(a)  
26 means that an action shall be brought by a party ‘who possesses the right to enforce the claim and  
27 who has a significant interest in the litigation.’” *Painter v. Anderson*, 96 Nev. 941, 943, 620 P.2d  
28 1254 (1980) (quoting *Virginia Electric & Power Co. v. Westinghouse Elect. Corp.*, 485 F.2d 78,



1 83 (4th Cir. 1973)). Pursuant to the Second Marquis Aurbach Order (Ex. D), the right to enforce  
2 the asserted legal malpractice claim belongs to the Tower Homes Purchasers. That is, the Second  
3 Marquis Aurbach Order “authorizes the Trustee to permit *the Tower Homes Purchasers to pursue*  
4 *any and all claims* on behalf of Tower Homes, LLC (the “Debtor”) . . . which shall specifically  
5 include, but may not be limited to, pursuing the action currently filed in the Clark County District  
6 Court styled as Tower Homes, LLC v. William H. Heaton et al. Case No. A-12-663341-C.” (See  
7 MSJ, Ex. D at 2:7-14 [emphasis added].) Also, as noted above (and as conceded by Plaintiff’s  
8 alleged attorneys), the Tower Homes Purchasers also have a “significant interest in the litigation.”  
9 Indeed, they are the only parties with *any* interest in this litigation. (*Id.*, Ex. D at 2:19-20.)

10 “The purpose of [N.R.C.P. 17(a)] is to enable the defendant to avail himself of evidence  
11 and defenses that the defendant has against the real party in interest, and to assure him finality of  
12 the judgment, and that he will be protected against another suit brought by the real party at interest  
13 on the same matter.” *Painter, supra*, 96 Nev. at 943. In other words, the purpose of N.R.C.P.  
14 17(a) is to enable NWH to assert defenses it would have if the Tower Homes Purchasers  
15 themselves were the plaintiffs.

16 Accordingly, the Tower Homes Purchasers are, factually and legally, the real parties in  
17 interest, and therefore must be treated as the plaintiffs in this action for purposes of the MSJ. The  
18 use of the “Tower Homes, LLC” limited liability shell by Plaintiff’s alleged attorneys is nothing  
19 more than a procedural sham designed to circumvent Nevada’s well-established prohibition  
20 against the assignment of legal malpractice claims.

21 **B. The case law cited by Plaintiff’s alleged attorneys is inapplicable because this**  
22 **action is not brought by the bankruptcy trustee for the benefit of all creditors, and**  
23 **because the bankruptcy estate is not the real party in interest.**

24 Plaintiff’s alleged attorneys argue in their Opposition that “Nevada courts have even  
25 directly addressed the fallacy of Defendants’ argument.” (Opposition at 10:17-18). This is  
26 patently false, as no Nevada court has confronted the unique circumstances presented by this case.  
27 That is, *Plaintiff’s alleged attorneys cite no case law (from Nevada or any jurisdiction) that*  
28 *somehow permits or authorizes strangers to an attorney-client relationship to use the limited*

1 *liability shell of a bankrupt “client” to sue the client’s attorneys for legal malpractice and retain*  
2 *the proceeds for their own benefit after the bankruptcy estate has been fully administered.*

3 Whether intentional or careless, Plaintiff’s alleged attorneys misrepresent the law to this Court.

4 In contrast, courts that have actually addressed the viability of legal malpractice claims  
5 brought by or for the benefit of creditors of a bankrupt “client” have disallowed such actions as a  
6 matter of law because legal malpractice claims cannot be assigned. (See MSJ at 10:26 – 12:10  
7 [citing *Baum v. Duckor, Spradling & Metzger*, 72 Cal. App. 4th 54, 84 Cal.Rptr.2d 703 (Cal. App.  
8 1999); *Curtis v. Kellogg & Andelson*, 73 Cal. App. 4th 492, 86 Cal.Rptr.2d 536 (Cal. App. 1999);  
9 *In re J.E. Marion*, 199 B.R. 635, 638 (S.D. Tex. 1996)].)

10 In an attempt to support their contention that Nevada courts would somehow condone or  
11 permit this unlawful action, Plaintiff’s alleged attorneys rely almost entirely on two cases, *In re*  
12 *Agribiotech*, 319 B.R. 207 (D. Nev. 2004) (“Agribiotech I”) and *In re Agribiotech*, 319 B.R. 216  
13 (D. Nev. 2004) (“Agribiotech II”), both of which arise out the same bankruptcy proceedings.  
14 *These cases, however, demonstrate precisely why the instant action is unlawful.*

15 In the *Agribiotech* cases, the applicable bankruptcy plan established a creditors’ trust and  
16 established a trustee of the creditors’ trust to bring actions on behalf of the estate. In *Agribiotech*  
17 *I*, the bankruptcy *trustee*, acting pursuant to the authority and on behalf of the creditors’ trust  
18 during ongoing bankruptcy proceedings, brought fraud claims against former officers and directors  
19 of the debtor. One of the defendant officers argued that the trustee lacked standing because fraud  
20 claims are not assignable. In *Agribiotech II*, the *trustee*, also acting for the creditors’ trust, sued  
21 the debtor’s accountants for malpractice. The accountants argued that the trustee lacked standing  
22 to sue.

23 The *Agribiotech* courts permitted both actions for the following reasons:

- 24 • The claims at issue were assigned *to* and brought *by the bankruptcy trustee*  
25 on behalf of an established creditors’ trust. (*Agribiotech I*, 319 B.R. at  
26 214).

- The claims at issue were the property of the debtor’s bankruptcy estate – “[The assignment of claims] cannot serve merely as a vehicle to allow the trustee to prosecute claims on behalf of a creditor.” (*Id.*; *Agribiotech II*, *supra*, 319 B.R. at 221-22).
- The proceeds recovered in the actions would become property of the bankruptcy estate, to be distributed to the debtor’s creditors “pro rata as set forth in the distribution priorities in the [bankruptcy] Plan.” (*Id.*)
- “*The [bankruptcy] estate thus is the real party in interest because it will receive the full benefit of any recovery.*” (*Id.*)

In other words, the *Agribiotech* cases support a bankruptcy trustee’s right to pursue claims assigned by the debtor (and/or by others) to the trustee when the claims are brought for the benefit of the bankruptcy estate. When this type of action is brought by a trustee during the pendency of bankruptcy proceedings, the bankruptcy estate is the real party in interest because the action inures to the benefit of all creditors and facilitates the orderly and equitable distribution of the debtor’s assets. See *Agribiotech II*, *supra*, 319 B.R. at 221-22; see also *Spirto v. Superior Court*, 443 F.3d 1172, 1176 (9<sup>th</sup> Cir. 2006) (“[T]he bankruptcy code endows the bankruptcy trustee with the exclusive right to sue on behalf of the [bankruptcy] estate.”).

Though a bankruptcy trustee may, under certain circumstances, delegate his/her right to sue on behalf of the estate to others (e.g., to a trust created for the benefit of all creditors), any such action still must be brought and maintained on behalf and for the benefit of the bankruptcy estate - not for the exclusive, personal benefit of any particular creditor or group of creditors. See, e.g., *In re Jennings*, 378 B.R. 678, 685 (M.D. Fla. 2006) (creditor was entitled to assert legal malpractice claim “solely on behalf of the bankruptcy estate, and not for his own personal benefit. The [authorizing] Order is replete with references to the interest of the bankruptcy estate as paramount.”) (emphasis added); *Parrett v. Nat’l Century Fin. Enterp.*, 2006 U.S. Dist. Lexis 16982 at \*16 fn. 1 (S.D. Ohio 2006) (“The Court’s decision should not be interpreted to allow bankruptcy trustees to sell or assign legal malpractice claims directly to creditors.”). The trustee may also employ professionals “that do not hold or represent an interest adverse to the

1 estate, and that are *disinterested* persons, to represent or assist the trustee in carrying out the  
2 trustee's duties." 11 U.S.C. § 327 (emphasis added).

3 **All of this starkly contrasts with and does not apply to the instant action.** Here, the  
4 action is not brought by a bankruptcy trustee acting on behalf of a creditors' trust. In fact, there is  
5 no creditors' trust, and the Tower Homes bankruptcy trustee, on behalf of the Tower Homes  
6 bankruptcy estate, has expressly disclaimed any interest in this action (or any action relating to the  
7 loss of the Tower Homes Purchasers' earnest money deposits). (See MSJ, Ex. B at Page 4 of 6 [at  
8 top of page], line 26 to Page 5 of 6, line 5.) Instead, the named plaintiff in this case is a limited  
9 liability shell that exists solely for purposes of this lawsuit, and solely to recover monies for the  
10 exclusive benefit of the Tower Homes Purchasers – not Tower Homes, LLC, not the Tower  
11 Homes, LLC bankruptcy estate and not the bankruptcy creditors as a whole.

12 The *Agribiotech* actions were also brought by the trustee while the bankruptcy proceedings  
13 were ongoing. This is important because, again, federal law authorizes trustees to pursue actions  
14 on behalf of the estate to further the trustee's duties to amass, distribute and/or liquidate the  
15 debtor's assets to facilitate an orderly and equitable administration and distribution of the  
16 bankruptcy estate. Here, the Tower Homes bankruptcy estate has now been fully administered,  
17 and all funds required to be disbursed under the applicable Plan have been disbursed. (See  
18 Trustee's Ex Parte Motion to Enter Final Decree, attached as **Exhibit F**, at 2:5-17.) In other  
19 words, unlike every other case in which a trustee (or a creditors' committee or trustee's  
20 representative) has been permitted to pursue a legal malpractice claim on behalf of a debtor's  
21 bankruptcy estate, *no bankruptcy purpose is served by the instant action because there is no*  
22 *longer any bankruptcy estate to be administered.*

23 Similarly, the critical premise of the *Agribiotech* courts was that the proceeds of any  
24 lawsuit brought by the trustee *would become property of the estate*. As such, the estate was the  
25 real party in interest. The *Agribiotech* courts permitted the actions by the trustee to proceed  
26 precisely *because the bankruptcy estate was the real party in interest*. Here, in contrast, it is  
27 undisputed that the Tower Homes Purchasers are the real parties in interest. (See MSJ, Ex. D at  
28 2:19-20 ["any such recoveries shall be for the benefit of the Tower Homes Purchasers."]). That is,

1 no part of any potential recovery in this case will go to the Tower Homes bankruptcy estate.

2 *Plaintiff's alleged attorneys avoid all of these critical and dispositive points of distinction*  
3 *in their Opposition as if they didn't exist.*

4 The question for this Court, then, is what happens if the undisputed facts and  
5 circumstances presented are the virtual reverse of what took place in the *Agribiotech* cases? That  
6 is, what happens when a trustee assigns claims *to* a creditor, to be brought *by* the creditor using the  
7 debtor's corporate shell, *for the sole benefit of the creditor* -- and notably not the bankruptcy estate  
8 -- *after* the bankruptcy proceedings have concluded? The closest case law we have governing this  
9 situation is the California Court of Appeals' decisions in *Baum v. Duckor, Spradling & Metzger*,  
10 72 Cal. App. 4th 54, 84 Cal.Rptr.2d 703 (Cal. App. 1999) and *Curtis v. Kellogg & Andelson*, 73  
11 Cal. App. 4th 492, 86 Cal.Rptr.2d 536 (Cal. App. 1999). (See MSJ at 10:24 – 12:10).

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

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

1 In their Opposition, Plaintiff's alleged attorneys argue that *Baum* and *Curtis* are  
2 distinguishable because, in those cases, the malpractice actions were brought by creditors, in the  
3 names of the creditors, and not by the clients. With respect to the *Curtis* case, **this argument is**  
4 **simply incorrect**. Specifically, in *Curtis*, the plaintiff creditor amended his complaint to add the  
5 debtor corporation as a plaintiff (just as the Tower Homes Purchasers here have sued using the  
6 debtor's defunct limited liability company shell as the 'plaintiff'). See *Curtis*, 73 Cal.App.4<sup>th</sup> 492,  
7 498 ("Rather than opposing the demurrers and motions to strike the original complaint, appellants  
8 filed a first amended complaint . . . adding the Corporation [the bankruptcy debtor that was the  
9 client of the defendant law firm] as a named plaintiff."). The court in *Curtis* rejected the argument  
10 that the bankruptcy court purporting to authorize the action somehow avoided the unlawful  
11 assignment of the legal malpractice lawsuit, reasoning as follows: "The trustee was apparently  
12 attempting to give [the individual] permission *to proceed against [the law firm] in the name of*  
13 *the [client/debtor]*. The difficulty here is we are aware of no Bankruptcy Code provision--and  
14 appellants cite us to none--that would permit the trustee to proceed in this fashion." *Id.* at 546  
15 (emphasis added). So, again, Plaintiff's alleged attorneys, either purposefully or carelessly,  
16 misrepresent the law to this Court.

17 More fundamentally, as detailed in the MSJ and above, the asserted basis for  
18 distinguishing *Baum* (again, *Curtis* is not distinguishable in any meaningful way) is unavailing  
19 because the real parties in interest here are the Tower Homes Purchasers. The use of the Tower  
20 Homes, LLC is merely a procedural sham. As such, the Tower Homes Purchasers must be treated  
21 as the named plaintiffs in this action. See N.R.C.P. 17(a). Again, Plaintiff's alleged attorneys do  
22 not dispute this conclusion, factually or legally. Given this reality, the entire basis for  
23 "distinguishing" *Baum* disappears.

24 Given that the Tower Homes Purchasers – who are not and have never been clients of  
25 NWH – are the only parties who have any interest in this litigation, Nevada's prohibition against  
26 the assignment of legal malpractice claims is squarely implicated. Plaintiff's alleged attorneys do  
27 not dispute the well-established legal principle that legal malpractice claims are not assignable  
28 under Nevada law. Accordingly, this action, in its entirety, violates Nevada law and public policy.

1           **C. Neither this Court nor the Nevada Supreme Court has ruled on the issues raised**  
2           **in the MSJ.**

3           Perhaps in an effort to distract from the facts that the Tower Homes Purchasers are the real  
4 parties in interest and that this action is not brought for the benefit of the Tower Homes  
5 bankruptcy estate, Plaintiff's alleged attorneys suggest that the Nevada Supreme Court has  
6 somehow resolved the "proper plaintiff" issue during the prior writ proceedings, during which  
7 NWH sought relief based *solely on the statute of limitations issue*. This argument by Plaintiff's  
8 alleged attorneys, first of all, continues the misleading narrative regarding the scope and substance  
9 of NWH's position. The issue is not, and has never been, who the "proper plaintiff" is in and of  
10 itself – the overriding substantive issue in the MSJ is whether this action, given the *undisputed* fact  
11 that only the Tower Homes Purchasers stand to benefit from the action – violates Nevada's  
12 prohibition against the assignment of legal malpractice claims.

13           In any event, the Nevada Supreme Court has not resolved or ruled on the salient issues  
14 raised in the MSJ. In the Order cited by Plaintiff's alleged attorneys (Exhibit 1 to the Opposition),  
15 the Nevada Supreme Court merely requested a supplement "addressing whether the proper party  
16 issue has been resolved in the district court and, if not, whether petition has renewed its motion to  
17 dismiss the underlying action on this basis." (Ex. 1 at 1.) In its Supplement, NWH advised the  
18 Supreme Court that the issue of Tower Homes' authority to bring this action had not been  
19 resolved, and that there had been no further proceedings in the district court. (See attached  
20 **Exhibit G** at 2:8-11.) NWH also provided further clarification as to what had been argued before  
21 this Court on NWH's initial Motion to Dismiss – which was that the plain language of the first  
22 Marquis Aurbach order simply did not authorize this action. (Ex. G at 3.) NWH then clarified  
23 that is was only seeking writ relief on the statute of limitations issue by explaining that, regardless  
24 of who has or who may attempt to bring this action, it is still time-barred. (Ex. G at 4:8-10.)  
25 *None of the issues raised in the pending MSJ have ever been briefed or decided by the Nevada*  
26 *Supreme Court.*

1 Plaintiff's alleged attorneys also suggest that the "proper party" issue has already been  
2 decided by this Court. This is incorrect. Again, the only issues decided by this Court are (1) that  
3 the language of the original Marquis Aurbach Order did not authorize this action (Ex. C); and (2)  
4 that the language of the Second Marquis Aurbach Order purportedly does authorize this action  
5 (Ex. E). This Court has never decided who the "real party in interest" within the meaning of  
6 N.R.C.P. 17 is in this case, and it has never decided whether this action violates Nevada's long-  
7 standing prohibition against the assignment of legal malpractice claims.<sup>2</sup>

### 8 III. CONCLUSION

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

12 DATED this 14<sup>th</sup> day of March, 2014

13 LEWIS BRISBOIS BISGAARD & SMITH LLP

14  
15 By /s/ Jeff Olster  
16 V. Andrew Cass  
17 Nevada Bar No. 005246  
18 Jeffrey D. Olster  
19 Nevada Bar No. 008864  
20 6385 S. Rainbow Boulevard, Suite 600  
21 Las Vegas, Nevada 89118  
22 Attorneys for Defendants  
*William H. Heaton and Nitz, Walton & Heaton,*  
*Ltd.*

23 <sup>2</sup> Even if, hypothetically, this Court had ruled on the salient issues, it is well-established that this Court  
24 always has the inherent authority to reconsider its prior orders. *See, e.g., Harvey's Wagon Wheel, Inc. v.*  
25 *MacSween*, 96 Nev. 215, 217-18, 606 P.2d 1095, 1097 (1980) (previously denied summary judgment  
26 motion granted because, "[a]lthough the facts and the law were unchanged, the judge was more familiar  
27 with case by the time the second motion was heard, and he was persuaded by the rationale of the newly  
28 cited authority."); *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975) ("[A] court may, for  
sufficient cause shown, amend, correct, resettle, modify, or vacate, as the case may be, an order previously  
made and entered on motion in the progress of the cause or proceeding.") "Unless and until an order is  
appealed, the district court retains jurisdiction to reconsider the matter." *Gibbs v. Giles*, 96 Nev. 243, 245,  
607 P.2d 118, 119 (1980).



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**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 F** is a true and correct copy of the Trustee’s Ex Parte Motion to Enter Final Decree from the Tower Homes Bankruptcy Proceedings.
- 3. Attached as **Exhibit G** is a true and correct copy of NWH’s Supplement to Petition for Writ of Mandamus, or Alternatively, for Writ of Prohibition.

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 14<sup>th</sup> day of March, 2014.

/s/ Jeffrey D. Olster  
Jeffrey D. Olster

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**CERTIFICATE OF SERVICE**

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard & Smith LLP, and that on this 14<sup>th</sup> day of March, 2014, a true and correct copy of the foregoing **DEFENDANTS’ REPLY TO PLAINTIFF’S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** was placed in an envelope, postage prepaid, addressed as stated below.

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

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

# EXHIBIT "F"

SULLIVAN, HILL, LEWIN, REZ & ENGEL  
A Professional Law Corporation  
James P. Hill, CA SBN 90478  
Christine A. Roberts, NV SBN 6472  
Elizabeth E. Stephens, NV SBN 5788  
228 South Fourth Street, First Floor  
Las Vegas, NV 89101  
Telephone: (702) 382-6440  
Fax Number: (702) 384-9102  
Email: hill@shlaw.com

Electronically Filed: August 13, 2013

Attorneys for William A. Leonard, Jr.,  
Post-Confirmation Chapter 11 Trustee

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re	)	CASE NO. BK-S-07-13208-BAM
	)	Chapter 11 (Involuntary)
TOWER HOMES, LLC, a Nevada limited	)	
liability company, dba Spanish View	)	TRUSTEE'S EX PARTE MOTION TO
Tower Homes,	)	ENTER FINAL DECREE; MEMORANDUM
	)	OF POINTS AND AUTHORITIES
Debtor,	)	
	)	
	)	Ctrm.: BAM - Courtroom 3
	)	Foley Federal Building
	)	300 Las Vegas Blvd. South
	)	Las Vegas, NV 89101
	)	Judge: Hon. Bruce A. Markell

William A. Leonard, Jr. ("Trustee"), the Court- appointed Chapter 11 trustee of the Tower Homes, LLC bankruptcy estate, hereby submits his Motion for Final Decree and Closing of Case ("Motion") with respect to the above entitled matter pursuant to Bankruptcy Rule 3022. In support of the Motion, the Trustee represents the following:

I.

INTRODUCTION

1. On May 31, 2007, certain petitioning creditors filed an involuntary petition for relief under section 303 of the Bankruptcy Code (11 U.S.C. § 101 et seq.) against the Debtor. On August 21, 2007, upon consent of the Debtor, the Court entered its order for relief. On January 18, 2008, the

1 Court entered its order approving the United States Trustee's appointment of the Trustee as the  
2 Chapter 11 trustee of the Debtor's bankruptcy estate.

3 2. On December 8, 2008, the Court entered its order confirming the Trustee's plan of  
4 reorganization ("Confirmed Plan"). See Docket No. 307.

5 3. Pursuant to section X(G) of the Confirmed Plan:

6 "When the Plan is fully administered in all material respects, the Trustee shall file an  
7 application for a final decree. The effect of a final decree entered by the Bankruptcy  
8 Court will be to close the Bankruptcy Case, and to re-vest all remaining Estate assets,  
9 if any, in the Debtor. After such closure, a party seeking any type of relief relating to  
10 a Plan provision can seek such relief in a state court of general jurisdiction or can  
11 petition the Bankruptcy Court to re-open the Bankruptcy Case."

12 4. All funds required to be disbursed under the Plan have been disbursed.

13 5. The Trustee has paid to the United States Trustee all post-confirmation quarterly fees  
14 through June 2013, as invoiced by the United States Trustee pursuant to 28 U.S.C. § 1930.

15 6. All pending motions and contested matters in this case have been resolved. All  
16 approved professional fees have been paid.

17 7. No adversary proceedings are pending in the Chapter 11 Case.

18 8. Pursuant to Rule 3022, the Debtor's chapter 11 estate has been "fully administered"  
19 and the Court may enter its Final Decree.

## 20 II.

### 21 AUTHORITY

22 Federal Rule of Bankruptcy Procedure 3022 provides that "[a]fter an estate is fully  
23 administered in a Chapter 11 reorganization case, the court, on its own motion or on motion of a  
24 party in interest, shall enter a final decree closing the case." Fed. R. Bankr. P. 3022. Plan payments  
25 do not have to be completed in order for a Chapter 11 case to be "fully administered." Wells Fargo  
26 Bank v. D & L Nicolaysen (In re D & L Nicolaysen), 228 B.R. 252, 261 (Bankr. E.D. Cal. 1998)  
27 (citing In re Ground Systems, Inc., 213 B.R. 1016, 1019 (Bankr. 9th Cir. 1997)). As the court noted  
28 in Wells Fargo:

If payments under the plan have commenced and there are no  
contested matters or adversary proceedings pending or are likely to be  
filed, the case may be closed. If it is necessary to invoke the

1 bankruptcy court's jurisdiction after the case is closed, the case may be  
2 reopened.

3 Id. at 261. In addition:

4 Entry of a final decree closing a chapter 11 case should not be delayed  
5 solely because the payments required by the plan have not been  
6 completed. Factors that the court should consider in determining  
7 whether the estate has been fully administered include (1) whether the  
8 order confirming the plan has become final, (2) whether deposits  
9 required by the plan have been distributed, (3) whether the property  
10 proposed by the plan to be transferred has been transferred, (4)  
11 whether the debtor or the successor of the debtor under the plan has  
12 assumed the business or the management of the property dealt with by  
13 the plan, (5) whether payments under the plan have commenced, and  
14 (6) whether all motions, contested matters, and adversary proceedings  
15 have been finally resolved.

16 The court should not keep the case open only because of the possibility  
17 that the court's jurisdiction may be invoked in the future. A final  
18 decree closing the case after the estate is fully administered does not  
19 deprive the court of jurisdiction to enforce or interpret its own orders  
20 and does not prevent the court from reopening the case for cause  
21 pursuant to § 350(b) of the Code...

22 Ground Systems, 213 B.R. at 1019 (citing Advisory Committee note to Fed. R. Bankr. P. 3022).

23 **III.**

24 **CONCLUSION**

25 WHEREFORE, the Trustee respectfully requests this Court enter a Final Decree and close  
26 this case.

27 Dated: August 13, 2013

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

By: /s/ James P. Hill  
James P. Hill  
Christine A. Roberts  
Elizabeth E. Stephens  
Attorneys for William A. Leonard, Jr.,  
Post-Confirmation Chapter 11 Trustee

# EXHIBIT "G"

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2  
3 NITZ, WALTON & HEATON, LTD.;  
4 WILLIAM H. HEATON,

5 Petitioners,

6 vs.

7 EIGHTH JUDICIAL DISTRICT  
8 COURT FOR THE STATE OF  
9 NEVADA IN AND FOR THE  
10 COUNTY OF CLARK; THE  
11 HONORABLE GLORIA STURMAN,  
12 DISTRICT COURT JUDGE,

13 Respondents,

14 and

15 TOWER HOMES, LLC,

16 Real Party in Interest.

Supreme Court No. 62252

Electronically Filed

District Court No. 4-1206332-56 p.m.

Department No. Trade K. Lindeman

Clerk of Supreme Court

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

19 V. Andrew Cass

20 Nevada Bar No. 005246

21 [cass@lbbslaw.com](mailto:cass@lbbslaw.com)

22 Jeffrey D. Olster

23 Nevada Bar No. 008864

24 [olster@lbbslaw.com](mailto:olster@lbbslaw.com)

25 Lewis Brisbois Bisgaard & Smith LLP

26 6385 S. Rainbow Boulevard, Suite 600

27 Las Vegas, Nevada 89118

28 Tel: 702.893.3383

Fax: 702.893.3789

*Attorneys for Petitioners*

*NITZ, WALTON & HEATON, LTD. and WILLIAM H. HEATON*



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

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

1 brought by the bankruptcy Trustee.

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

17 In its order on the motion to dismiss, the district court agreed with Petitioners  
18 "that the 'Marquis Aurbach Order' does not authorize [Tower Homes] to bring this  
19 action through the law firm of Prince & Keating against Mr. Heaton and Nitz,  
20 Walton & Heaton, Ltd." (App. at 532, lines 11-13.) Nevertheless, the district court  
21 viewed this defect as procedural, and concluded that "[Tower Homes] may attempt  
22 to remedy this procedural defect by obtaining the requisite authority from the Tower  
23 Homes, LLC bankruptcy trustee and order from the Bankruptcy Court." (App. at  
24 532, lines 14-15.)

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

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

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

11  
12 Dated this 1<sup>st</sup> day of March, 2013.

13 LEWIS BRISBOIS BISGAARD & SMITH LLP  
14

15  
16 By /s/ Jeffrey D. Olster

17 V. Andrew Cass

18 Nevada Bar No. 005246

19 Jeffrey D. Olster

20 Nevada Bar No. 008864

21 6385 S. Rainbow Boulevard, Suite 600

22 Las Vegas, Nevada 89118

23 Attorneys for Petitioners

24 NITZ, WALTON & HEATON, LTD. and

25 WILLIAM H. HEATON  
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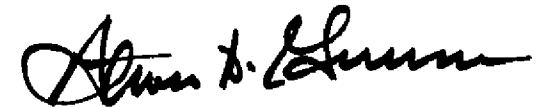
CERTIFICATE OF SERVICE

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 1<sup>st</sup> 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  
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



CLERK OF THE COURT

V. ANDREW CASS  
Nevada Bar No. 005246  
[Drew.Cass@lewisbrisbois.com](mailto:Drew.Cass@lewisbrisbois.com)  
JEFFREY D. OLSTER  
Nevada Bar No. 008864  
[Jeff.Olster@lewisbrisbois.com](mailto:Jeff.Olster@lewisbrisbois.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

**DEFENDANTS' SUPPLEMENTAL  
EXHIBIT IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

**Hearing Date: March 21, 2014**  
**Hearing Time: 9:30 a.m.**

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, respectfully submit the following supplemental exhibit in support of their Motion for Summary Judgment.

Attached as **Exhibit H** is a true and correct copy of the "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." This is the Stipulation that was approved in the Second Marquis Aurbach Order, which is attached as Exhibit D to the Motion for Summary

1 Judgment. This Stipulation provides that “[t]he Trustee hereby stipulates and agrees *to release to*  
2 *the Tower Homes Purchasers* any and all claims on behalf of the Debtor ...” (Ex H, page 2 of 3  
3 at lines 13-14 [emphasis added]). In this context, the word “release” cannot mean anything other  
4 than “assign.” Thus, contrary to the argument by Plaintiff’s alleged counsel, the Bankruptcy  
5 Trustee did in fact assign any malpractice claim to the Tower Homes Purchasers.

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DATED this 21<sup>st</sup> day of March, 2014

LEWIS BRISBOIS BISGAARD & SMITH LLP

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

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**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 H** is a true and correct copy of the “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” from the Tower Homes, LLC bankruptcy proceedings.

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 21<sup>st</sup> day of March, 2014.

/s/ Jeffrey D. Olster  
Jeffrey D. Olster

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# EXHIBIT "H"

**MARQUIS AURBACH COFFING**

TERRY A. COFFING, ESQ.

Nevada Bar No. 4949

ZACHARIAH LARSON, ESQ.

Nevada Bar No. 7787

BRIAN HARDY, ESQ.

Nevada Bar No. 10068

10001 Park Run Drive

Las Vegas, Nevada 89145

zlarson@maclaw.com

(702) 382-0711

Attorneys for the Tower Homes Purchasers

**UNITED STATES BANKRUPTCY COURT**

**FOR THE DISTRICT OF NEVADA**

In Re:

Case No.: BK-07-13208-BAM

Chapter: 11

TOWER HOMES, LLC, a Nevada limited  
liability company, dba Spanish View Tower  
Homes.

Debtor.

**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 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, Brian Hardy, Esq. of Marquis Aurbach Coffing, 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

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

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

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

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

27 5) The trustee hereby stipulates and agrees to permit the Tower Home Purchasers, to  
28 pursue any and all claims on behalf of 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.

6) The trustee hereby stipulates and agrees to allow 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, attorney fees and costs, and interest thereon on behalf of Debtor and the Tower Home Purchasers and that any such recoveries shall be for the benefit of the Tower Home Purchasers.


Dated, this 21<sup>st</sup> day of ~~December~~ <sup>February</sup>, ~~2012~~ <sup>2013</sup>.

MARQUIS AURBACH COFFING

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

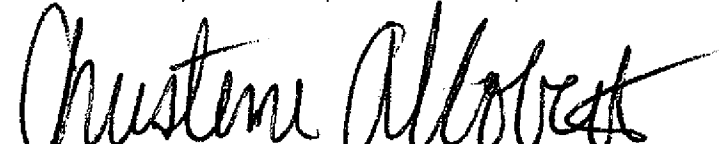
MARQUIS AURBACH COFFING

By:

  
Zachariah Larson, Esq.  
Nevada Bar No. 10068  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Attorneys for the Tower  
Homes Purchasers

SULLIVAN, HILL, LEWIN, REZ & ENGEL

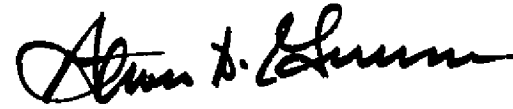
By:

  
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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CLERK OF THE COURT

1 **DCRR**  
2 DENNIS M. PRINCE  
3 Nevada Bar No. 5092  
4 ERIC N. TRAN  
5 Nevada Bar No. 11876  
6 **PRINCE & KEATING**  
7 3230 South Buffalo Drive  
8 Suite 108  
9 Las Vegas, Nevada 89117  
10 Telephone: (702) 228-6800  
11 Facsimile: (702) 228-0443  
12 *E-Mail: DPrince@PrinceKeating.com*  
13 *E-Mail: ETran@PrinceKeating.com*  
14 Attorneys for Plaintiffs  
15 *Tower Homes, LLC*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 TOWER HOMES, LLC, a Nevada limited  
14 liability company;

15 Plaintiff,

16 vs.

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

21 Defendants.

CASE NO.: A-12-663341-C  
DEPT. NO.: XXVI

**DISCOVERY COMMISSIONER'S  
REPORT AND RECOMMENDATIONS**

22 **HEARING DATE:** February 26, 2014 at 10:00 a.m.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **I. APPEARANCES**

2 • Dennis M. Prince and Eric N. Tran of Prince & Keating on behalf of Plaintiff  
3 Tower Homes, LLC;

4 • Jeffrey D. Olster of Lewis Brisbois, Bisgaard & Smith LLP on behalf of  
5 Defendants William Heaton; and Nitz, Walton & Heaton, Ltd.  
6

7 **II. FINDINGS**

8 This is a legal malpractice action filed by Plaintiff Tower Homes, LLC against  
9 Defendants William Heaton and the law firm of Nitz, Walton & Heaton Ltd. (collectively  
10 referred to as "Defendants"). Tower Homes, LLC is a former client of Defendants. On  
11 December 30, 2013, Tower Homes, LLC filed its Motion to Compel Production of  
12 Documents pursuant to NRCP 16.1 seeking to have Defendants produce documents disclosed  
13 in Defendants' initial 16.1 disclosures Bates Stamped NWH000001-NWH042236. On  
14 January 15, 2014, Defendants filed their Opposition to Tower Homes, LLC's Motion to  
15 Compel and Countermotion for Protective Order arguing that the documents contained in  
16 Bates Stamp NWH000001-NWH042236 are, in their entirety, subject to the duty of  
17 confidentiality are, in part, are protected by the attorney-client and attorney work-product  
18 privileges. As such, Defendants argue that their files should not be produced (1) without the  
19 consent of an authorized representative for Tower Homes, LLC and by joint client, Rodney  
20 Yanke; and (2) without adequate protections (such as a confidentiality agreement or order) to  
21 assure that confidentiality and/or privileged documents are not disclosed to strangers to the  
22 attorney-client relationship.  
23  
24

25 On January 24, 2014, Tower Homes, LLC filed its Reply in Support of its Motion  
26 to Compel Production of Documents and Opposition to Defendants' Motion for Protective  
27 Order. On January 30, 2014, Defendants filed their Reply in Support of their Countermotion  
28

1 for Protective Order. On February 20, 2014, Defendants submitted their Supplement to  
2 Records for Countermotion for Protective Order (enclosing Defendants' Motion for Summary  
3 Judgment, which is set to be heard on March 21, 2014).

4 Towers Homes, LLC's Motion to Compel and Defendants' Countermotion for  
5 Protective Order came before the Discovery Commissioner on February 26, 2014. The  
6 Discovery Commissioner, having met with counsel for the parties, having discussed the issues  
7 noted above and having reviewed any material proposed in support or opposition thereof,  
8 hereby submits the following recommendations:  
9

### 10 **III. RECOMMENDATIONS**

11 **IT IS HEREBY RECOMMENDED** that Plaintiff's Motion to Compel is  
12 Granted in part and Denied in part as follows:

13 1. Tower Homes, LLC, is the client and sole holder of the attorney-client privilege  
14 for the purposes of this action. Rodney Yanke is not the holder of the privilege.

15 2. Pursuant to NRCP 16.1, Defendants are required to produce the entire pre-  
16 litigation transaction file pertaining to Defendants' representation of Tower Homes, LLC  
17 prior to the commencement of the litigation in McClelland v. Tower Homes, LLC et al., Case  
18 No. A528584 and Gaynor, et. al v. Tower Homes, LLC, et al., Case No. A541668. The entire  
19 transaction file pertaining to Defendants' representation of Tower Homes, LLC includes, but  
20 are not limited to, all documents, drafts, papers, agreements, contracts, written  
21 communication, electronic communication, billing files, correspondences, memoranda,  
22 discussion of issues, between Tower Homes, LLC, and its managers/members in any way  
23 relating to the formation, development, and sale of the condominiums.  
24

25 3. Defendants must produce the documents described above within three business  
26 days of the entry of an Order by the District Court approving this report and  
27 recommendation.  
28

**IT IS ALSO HEREBY RECOMMENDED** that Defendants' Motion for Protective Order is Granted in part and Denied in part as follows:

1. Defendants will be granted E.D.C.R. 2.34(e) relief, and will not have to produce any documents until their objections are heard by the District Court .

2. At this time, the post-litigation files pertaining to Defendants' joint representation of Tower Homes, LLC and Rodney Yanke, in connection with the underlying lawsuits (McClelland v. Tower Homes, LLC, et. al., Case No. A528584 and Gaynor, et. al. v. Tower Homes, LLC, et. al., Case No. A541668) need not be produced. The ruling on this issue is deferred.

3. Any documents pertaining to Defendants' representation of Rodney Yanke solely in his individual capacity that are unrelated to Plaintiff's present case against Defendants also need not be produced.

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4. Defendant must produce a privilege log of all documents withheld from production which were disclosed pursuant to NRCp 16.1. *Upon request, the parties may request an in camera review by the Commissioner.*  
**IT IS ALSO HEREBY RECOMMENDED** a status check will be held on

March 28, 2014 at 10:00 a.m.

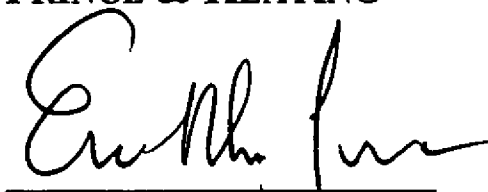
**IT IS FURTHER RECOMMENDED** that Plaintiff will prepare the Report and Recommendations.

DATED this 19 day of March, 2014.

  
DISCOVERY COMMISSIONER

Respectfully submitted by:

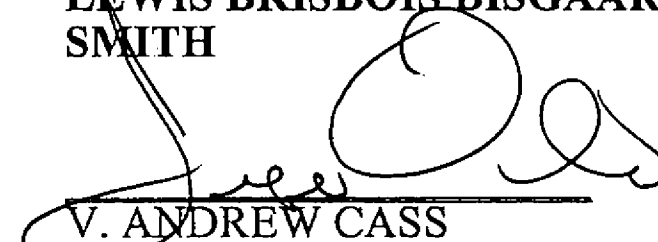
**PRINCE & KEATING**



DENNIS M. PRINCE  
Nevada Bar No. 5092  
ERIC N. TRAN  
Nevada Bar No. 11876  
3230 South Buffalo Drive, Suite 108  
Las Vegas, Nevada 89117  
Attorneys for Plaintiff

Approved as to Form and Content:

**LEWIS BRISBOIS BISGAARD & SMITH**



V. ANDREW CASS  
Nevada Bar No. 5246  
JEFFREY D. OLSTER  
Nevada Bar No. 8864  
6385 S. Rainbow Boulevard Suite 600  
Las Vegas, Nevada 89118  
Attorneys for Defendants

1 **NOTICE**

2 Pursuant to NRCP 16.1(d)(2), you are hereby notified you have five (5) days from the  
3 date you receive this document within which to file written objections.

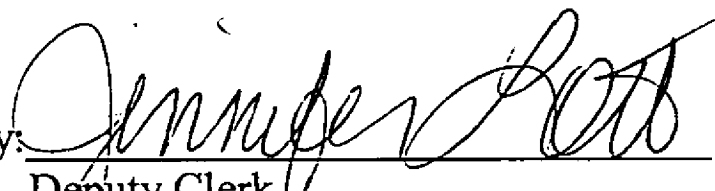
4 [Pursuant to E.D.C.R. 2.34(f) an objection must be filed and served no more than five  
5 (5) days after receipt of the Discovery Commissioner's Report. The Commissioner's Report is  
6 deemed received when signed and dated by a party, his attorney or his attorney's employee, or  
7 three (3) days after mailing to a party or his attorney, or three (3) days after the clerk of the  
8 court deposits a copy of the Report in a folder of a party's lawyer in the Clerk's office. See  
9 E.D.C.R. 2.34(f)].

10 A copy of the foregoing Discovery Commissioner's Report was:

11 \_\_\_\_\_ Mailed to Plaintiffs/Defendants at the following addresses on  
12 the \_\_\_\_ day of \_\_\_\_\_ 2014.

13  
14 X Placed in the folder of Plaintiffs' and Defendants' counsel in the  
15 Clerk's office on the 25 day of March 2014.

16  
17 **STEVEN D. GRIERSON**

18 By:   
19 Deputy Clerk  
20  
21  
22  
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26  
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28

ORDER

The Court, having reviewed the above Report and Recommendations prepared by the  
Discovery Commissioner and,

\_\_\_\_\_ The parties having waived the right to object thereto,

\_\_\_\_\_ No timely objection having been received in the office of the Discovery  
Commissioner pursuant to E.D.C.R. 2.34(f),

<sup>mm</sup>  
☒ Having received the objections thereto and the written arguments in support of said  
objections, and good cause appearing,

\* \* \*

AND

\_\_\_\_\_ IT IS HEREBY ORDERED the Discovery Commissioner's Report and  
Recommendations are affirmed and adopted.

\_\_\_\_\_ IT IS HEREBY ORDERED the Discovery Commissioner's Report and  
Recommendations are affirmed and adopted as modified in the following manner.  
(Attached hereto.)

☒ IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report  
and Recommendations is set for May 21<sup>st</sup>, 2014 at 9:00 am.

DATED this 8 day of April, 2014.

  
DISTRICT COURT JUDGE  
FAN

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Negligence - Other

COURT MINUTES

March 25, 2014

A-12-663341-C      Tower Homes LLC, Plaintiff(s)  
vs.  
William Heaton, Defendant(s)

March 25, 2014      3:00 AM      Minute Order

HEARD BY: Sturman, Gloria

COURTROOM: Chambers

COURT CLERK: Linda Denman

**JOURNAL ENTRIES**

- **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** came before the Court for oral argument on March 21, 2014. The Court having taken this matter under advisement to review the US Bankruptcy Court orders in the context of two California opinions relied upon by Defendant, finds as follows: As a general rule, legal malpractice claims may not be assigned. *Chaffee v Smith*, 98 Nev. 222 (1982). Defendant contends the real party in interest in this lawsuit is the Tower Home Purchasers. NRCP 17. The Bankruptcy Orders at issue herein do not assign the alleged malpractice claims to the Tower Homes Purchasers. Rather the Plan approved by the Bankruptcy Court recognized that the Trustee lacked funds to pursue various claims related to the loss of earnest money deposits (Plan dated 12/08/08, Section X Miscellaneous Provisions, Paragraph C, Litigation) which the Trustee had the right to pursue upon the effective date of the Plan. Subsequently by Order of June 2, 2010 the Trustee "releases" to Tower Homes Purchasers the right to pursue any person or entity who "may have any liability or owed any duty" to Tower Homes for loss of the earnest money deposits made by Purchasers. The Order dated April 2, 2013 clarified that the Court authorized 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 instant action, with any recovery being for the benefit of the Tower Homes Purchasers. The Trustee specifically authorized the Purchasers to pursue the claim in the name of Tower Homes, LLC.

The California Supreme Court has addressed the prohibition against assignment of malpractice claims from a Bankruptcy estate. A legal malpractice claim obtained by assignment in bankruptcy was dismissed when filed in the name of the third party assignee. *Baum v. Duckur, Spradling & Metzger* 72 cal. App. 4th 84 Cal.Rptr.2d 702 (1999). Plaintiff argues that the instant case is distinguishable as it is brought in the name of Tower Homes LLC. A similar attempt to sue in the name of the Debtor was disallowed in *Curtis v Kellogg & Andelson* 73 Cal.App. 4th 492, 86 Cal.Rptr. 2d 536 (1999), as the Debtor was not pursuing the claim on behalf of the trustee for the benefit of the estate; instead any proceeds recovered would go directly to Dr. Curtis. In the instant claim, any

PRINT DATE: 03/25/2014

Page 1 of 2

Minutes Date: March 25, 2014

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recovery is expressly for the benefit of the Purchasers.

Plaintiff also relies on *In re AgriBioTech, Inc*, 319 BR 216 (D.Nev. 2004) for the holding that a Trustee can pursue a claim which would ultimately benefit creditors, as doing so is for the benefit of the estate. Here the Trustee is not pursuing the claim; he did not retain counsel to bring the claim in the name of the Estate for the benefit of all creditors as allowed in the Plan. The Order approving the agreement between the Trustee and the Purchasers purports to release the claim to the Purchasers instead of assigning the rights, which is a distinction without a difference.

Recently the California Supreme Court has recognized a narrow exception to the prohibition against assignment of malpractice claims, see *White Mountains Reinsurance Company v Borton Petrini, LLP* 221 Cal. App. 4th 890 (2013), wherein the Court allowed the assignment as a small incidental part of a larger commercial transfer; the transfer was for all assets, rights, obligations and liabilities and did not treat the malpractice claim as a distinct commodity; the transfer was not to a former adversary; the malpractice claim arose from the insurance carrier's retention of defense counsel for an insured; and all communication between the carrier and counsel had been conducted through a third party claims administrator. None of the factors giving rise to the exception is present here.

Based on a review of the Bankruptcy Orders it cannot be said that the Purchasers are pursuing the legal malpractice claim in the name of the Debtor and for the benefit of the Bankruptcy estate, rather the sole benefit appears to be for the Purchasers. The assignment/release was not incidental to a larger transfer of assets and liabilities; therefore, the exception does not apply. The Nevada Supreme Court has stated the assignment of legal malpractice claims is against public policy. The release at issue herein violates the general principal articulated in *Chaffee v Smith*, 98 Nev. 222 (1982). Defendant's Motion for Summary Judgment is therefore GRANTED.

Counsel for defendant is directed to submit a proposed Order consistent with the foregoing and which sets forth the factual and legal underpinnings of same in accordance herewith and with counsel's briefing and argument.

CLERK'S NOTE: A copy of this minute order was placed in the attorney folder(s) of: Jeffrey D. Olster, Esq. (LEWIS BRISBOIS BISGAARD & SMITH) and Dennis M. Prince, Esq. (PRINCE & KEATING)./ld 3/25/14

*Tower Homes, LLC*

**CLARK COUNTY, NEVADA**

Defendants.

DEPT. NO.: XXVI

## ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd.'s Motion for Summary Judgment came on for hearing before the Hon. Gloria Sturman on March 21, 2014. D. Olster of Lewis Brisbois Bisgaard & Smith, LLP appeared on behalf of Defendants. Prince appeared on behalf of plaintiff Tower Homes, LLC.

<input type="checkbox"/> Voluntary Dis	<input type="checkbox"/> Site Dis	<input checked="" type="checkbox"/> Jury Jdgmt	18
<input type="checkbox"/> Involuntary (stat) Dis	<input type="checkbox"/> Site Jdgmt	<input type="checkbox"/> Non-Jury Trial	19
<input type="checkbox"/> Jdgmt on Airt Aware	<input type="checkbox"/> Default Jdgmt	<input type="checkbox"/> Jury Trial	20
<input type="checkbox"/> Min to Dis (by def)	<input type="checkbox"/> Transferred		21
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1       **I. FACTS**

2           1. This case arises out of an attorney-client relationship between Defendants and  
3 Plaintiff Tower Homes, LLC ("Tower Homes") in connection with a residential common  
4 interest ownership development known as Spanish View Tower Homes (the "Development").  
5 Defendants handled transactional and litigation matters on behalf of Tower Homes in  
6 connection with the Development.

7           2. Many of the individuals and entities that agreed to purchase units in the  
8 Development (the "Tower Homes Purchasers") paid earnest money deposits. The  
9 Development was not successful, and construction was never completed. The earnest money  
10 deposits were not returned to the Tower Homes Purchasers. Consequently, many of the  
11 Tower Homes Purchasers filed lawsuits in Clark County District Court against Tower Homes,  
12 Rodney Yanke (Tower Homes' sole owner and manager) and other individuals and entities  
13 involved in the sale of the units.  
14

15           3. On May 31, 2007, various creditors of Tower Homes initiated involuntary Chapter  
16 11 bankruptcy proceedings against Tower Homes in the United States Bankruptcy Court,  
17 District of Nevada (Case No. BK-S-07-13208-BAM).  
18

19           4. On December 8, 2008, the Bankruptcy Court entered an "Order Approving  
20 Disclosure Statement and Confirming Plan of Reorganization." See Defendants' **Exhibit A** to  
21 MSJ. Pursuant to the Order, "the Trustee and the Debtor's (Tower's) bankruptcy estate shall  
22 retain all Claims or Causes of Action that they have or hold against any party . . . whether  
23 arising pre- or post-petition, subject to the applicable state law statutes of limitation and  
24 related decision law, whether sounding in tort, contract or other theory or doctrine of law or  
25 equity."  
26

27           5. On June 3, 2010, during the bankruptcy proceeding, the Bankruptcy Court  
28 entered an "Order Granting Motion to Approve Stipulation to Release Claims and Allow

1 Marquis & Aurbach, as Counsel for the Tower Homes Purchasers, To Pursue Claims on  
2 Behalf of Debtor" (hereinafter referred to as the "Marquis Aurbach Order" attached as  
3 Defendants' **Exhibit B** to MSJ).

4 6. Pursuant to the Marquis Aurbach Order,

- 5
- 6 a. The "Trustee has determine that he does not intend, and in any event, does  
7 not have sufficient funds in the Estate to pursue claims on behalf of the  
8 Debtor against . . . any other individual or entity later identified through  
9 discovery which has or may have liability to Debtor or others for the loss  
10 of earnest money deposits provided by purchasers for units in the Spanish  
11 View Tower Homes condominium project."
- 12 b. The "Trustee has determine that the claims against . . . any other individual  
13 or entity later identified through discovery which has or may have liability  
14 to Debtor other others for the loss of the earnest money deposits provided  
15 by purchasers for units in the Spanish View Tower Homes condominium  
16 projects are or may be direct claims held by the Tower Homes Purchasers,  
17 and therefore, are not claims held solely and exclusively by the Estate."
- 18 c. The "Trustee hereby stipulates and agrees to release to the Tower Homes  
19 Purchasers any and all claims on behalf of the Debtor against . . . any other  
20 individual or entity later identified through discovery which has or may  
21 have liability or owed any duty to Debtor or others for the loss of the  
22 Tower Homes Purchasers earnest money deposits and all claims to any and  
23 all earnest money deposits provided by purchasers for units in the Spanish  
24 View Tower Homes Condominium projects."
- 25 d. The "Trustee hereby stipulates and agrees to allow Marquis & Aurbach, as  
26 counsel for the Tower Homes Purchasers, to pursue any and all claims on  
27  
28



1           behalf of the Debt against . . . any other individual or entity later identified  
2           though discovery which has or may have any liability or owed any duty to  
3           Debtor or others for the loss earnest money deposits provided by  
4           purchasers for units in the Spanish View Tower Homes condominium  
5           project.”

6  
7           e. The “Trustee hereby stipulates and agrees to allow Marquis & Aurbach, as  
8           counsel for the Tower Homes Purchasers, to recovery any and all earnest  
9           monies deposits, damages, attorney’s fees and costs, and interest thereon  
10          on behalf of Debtor and the Tower Homes Purchasers with respect to those  
11          claims release to the Tower Homes Purchasers herein.”

12  
13          7. On April 2, 2013, the Bankruptcy Court issued an “Order Granting Motion to  
14          Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, as  
15          Counsel for the Tower Homes Purchasers, To Pursue Claims on Behalf of Debtor”  
16          (hereinafter referred to as “Amended Marquis Aurbach Order”) . See Defendants’ Exhibit D  
17          to MSJ.

18          8. Pursuant to the Amended Marquis Aurbach Order:

19               a. The Order “authorizes the Trustee to permit the Tower Homes Purchasers  
20               to pursue any and all claim on behalf of Tower Homes, LLC (the “Debtor”)  
21               against any individual or entity which has or may have liability or owed  
22               any duty to Debtor or others for the loss of the earnest money deposits  
23               provided by purchasers for units in the Spanish View Tower Homes  
24               condominium project which shall specifically include, but may not be  
25               limited to, pursuing the action currently filed in the Clark County District  
26               Court styled as Tower Homes, LLC v. William H. Heaton et. al. Case No.  
27               A-12-663341-C.”  
28

1           b. "[T]his Court hereby authorizes the law firm of Marquis Aurbach Coffing,  
2           and/or Prince & Keating, LLP or successive counsel, retained on behalf of  
3           Tower Homes Purchasers to recover any and all earnest money deposits,  
4           damages, attorney's fees and costs and interest thereon on behalf of Debtor  
5           and the Tower Homes Purchasers and that any such recoveries shall be for  
6           the benefit of the Tower Homes Purchasers."

8           **II. LEGAL CONCLUSIONS**

9           9. As a general rule legal malpractice claims may not be assigned. Chaffee v Smith,  
10          98 Nev. 222 (1982).

11          10. The Bankruptcy Orders at issue herein did not assign the alleged malpractice  
12          claims to the Tower Homes Purchasers. Rather, the Plan approved by the Bankruptcy Court  
13          recognized that the Trustee lacked funds to pursue various claims related to the loss of earnest  
14          money deposits which the Trustee had the right to pursue upon the effective date of the Plan.  
15          See Bankruptcy Plan dated 12/08/08, Section X Miscellaneous Provisions, Paragraph C,  
16          Litigation.

17          11. Subsequently, pursuant to the June 2, 2010 Marquis Aurbach Order, the Trustee  
18          "releases" to the Tower Homes Purchasers the right to pursue any person or entity who "may  
19          have any liability or owed any duty" to Tower Homes for loss of the earnest money deposits  
20          made by the Tower Homes Purchasers.

21          12. The Amended Marquis Aurbach Order dated April 2, 2013 clarified that the  
22          Bankruptcy Court authorized the Trustee to "permit the Tower Homes Purchasers, to pursue  
23          any and all claims on behalf of Tower Homes, LLC (the "Debtor") . . . which shall  
24          specifically include, but may not be limited to, pursuing" the instant action, with any recovery  
25          being for the benefit of the Tower Homes Purchasers. The Trustee specifically authorized the  
26          Tower Homes Purchasers to pursue the claim in the name of Tower Homes, LLC.  
27  
28

1           13. The California Supreme Court has addressed the prohibition against assignment of  
2 malpractice claims from a Bankruptcy estate. A legal malpractice claim obtained by  
3 assignment in bankruptcy was dismissed when filed in the name of the third party assignee.  
4 Baum v. Duckur, Spradling & Metzger, 72 Cal. App. 4<sup>th</sup> 54,69, 84 Cal.Rptr.2d 703,712  
5 (1999).

6  
7           14. Plaintiff argues that the instant case is distinguishable as it is brought in the name  
8 of Tower Homes, LLC. A similar attempt to sue in the name of the Debtor was disallowed in  
9 Curtis v Kellogg & Andelson, 73 Cal.App. 4th 492, 86 Cal.Rptr. 2d 536 (1999), as the Debtor  
10 was not pursuing the claim on behalf of the trustee for the benefit of the estate; instead any  
11 proceeds recovered would go directly to Dr. Curtis. In the instant claim, any recovery is  
12 expressly for the benefit of the Purchasers.

13  
14           15. Plaintiff also relies on In re AgriBioTech, Inc, 319 BR 216 (D.Nev. 2004) for the  
15 holding that a Trustee can pursue a claim which would ultimately benefit creditors, as doing  
16 so is for the benefit of the estate. Here, the Trustee is not pursuing the claim. The Trustee did  
17 not retain counsel to bring the claim in the name of the Estate for the benefit of all creditors as  
18 allowed in the Plan. The Marquis Aurbach Orders approving the agreement between the  
19 Trustee and the Towers Homes Purchasers purports to release the claim to the Tower Homes  
20 Purchasers instead of assigning the rights, which is a distinction without a difference.

21  
22           16. Recently the California Supreme Court has recognized a narrow exception to the  
23 prohibition against assignment of malpractice claims, see White Mountains Reinsurance  
24 Company v. Borton Petrini, LLP, 221 Cal. App. 4th 890 (2013), wherein the Court allowed  
25 the assignment as a small incidental part of a larger commercial transfer; the transfer was for  
26 all assets, rights, obligations and liabilities and did not treat the malpractice claim as a distinct  
27 commodity; the transfer was not to a former adversary; the malpractice claim arose from the  
28 insurance carrier's retention of defense counsel for an insured; and all communication

1 between the carrier and counsel had been conducted through a third party claims  
2 administrator. None of the factors giving rise to the exception are present here.

3 17. Based on a review of the Bankruptcy Orders, it cannot be said that the Tower  
4 Homes Purchasers are pursuing the legal malpractice claim in the name of the Debtor and for  
5 the benefit of the Bankruptcy estate. Rather the sole benefit appears to be for the Purchasers.  
6 The assignment/release was not incidental to a larger transfer of assets and liabilities,  
7 therefore, the exception does not apply. The Nevada Supreme Court has stated the assignment  
8 of legal malpractice claims is against public policy. The release at issue herein violates the  
9 general principal articulated in Chaffee v Smith, 98 Nev. 222 (1982).  
10

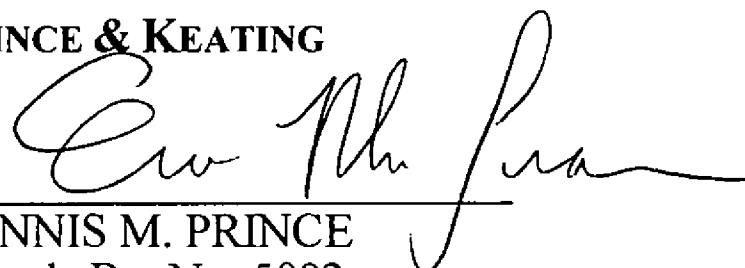
11 18. Defendant's Motion for Summary Judgment is, therefore, GRANTED.

12 DATED this 12<sup>th</sup> day of May, 2014.

13  
14   
15 DISTRICT COURT JUDGE  
16 

16 Respectfully submitted by:

17 **PRINCE & KEATING**

18 

19 DENNIS M. PRINCE

20 Nevada Bar No. 5092

21 ERIC N. TRAN

22 Nevada Bar No. 11876

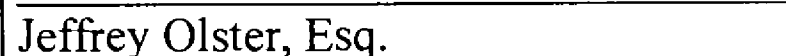
23 3230 South Buffalo Drive, Suite 108

24 Las Vegas, Nevada 89117

25 Attorneys for Plaintiff

26 *Tower Homes, LLC*

27 Approved as to Form and Content by:

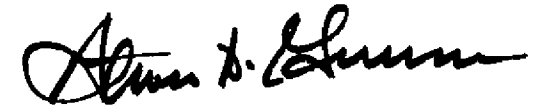
28   
Jeffrey Olster, Esq.

LEWIS BRISBOIS BISGAARD & SMITH, LLP

6385 South Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

*Attorneys for Defendants*



CLERK OF THE COURT

1 **NEOJ**  
DENNIS M. PRINCE  
2 Nevada Bar No. 5092  
ERIC N. TRAN  
3 Nevada Bar No. 11876  
4 **PRINCE & KEATING**  
3230 South Buffalo Drive  
5 Suite 108  
Las Vegas, Nevada 89117  
6 Telephone: (702) 228-6800  
7 Facsimile: (702) 228-0443  
*E-Mail: DPrince@PrinceKeating.com*  
8 *E-Mail: ETran@PrinceKeating.com*  
Attorneys for Plaintiffs  
9 *Tower Homes, LLC*

10  
11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13  
14 TOWER HOMES, LLC, a Nevada limited  
liability company;

15 Plaintiff,

16  
17 vs.

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

20 Defendants.  
21

CASE NO.: A-12-663341-C  
DEPT. NO.: XXVI

**NOTICE OF ENTRY OF ORDER**

22 TO: WILLIAM H. HEATON individually and NITZ, WALTON & HEATON, Defendants;  
and

23 TO: JEFFREY OLSTER ESQ., attorney for Defendants:  
24

25 / / /

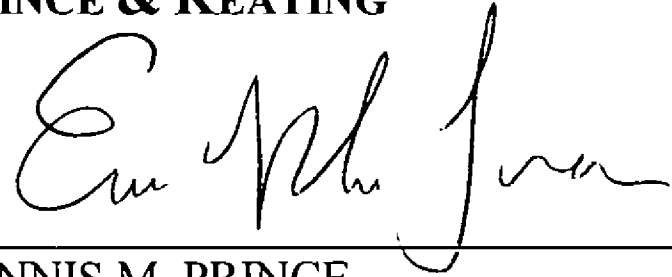
26 / / /

27 / / /  
28

1 PLEASE TAKE NOTICE that the attached Order Granting Defendants' Motion for  
2 Summary Judgment was entered on May 12, 2014, a copy of which is attached hereto.

3 DATED this 15 day of May, 2014.

4 PRINCE & KEATING

5 

6 DENNIS M. PRINCE  
7 Nevada Bar No. 5092  
8 ERIC N. TRAN  
9 Nevada Bar No. 11876  
10 3230 South Buffalo Drive, Suite 108  
11 Las Vegas, Nevada 89117  
12 Attorneys for Plaintiff  
13 *Tower Homes, LLC*

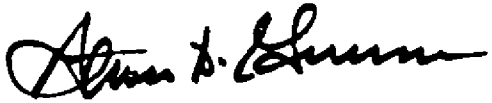
14 **CERTIFICATE OF MAILING**

15 I hereby certify that on the 15<sup>th</sup> day of May, 2014, I caused service of the foregoing  
16 ***NOTICE OF ENTRY OF ORDER*** to be made by depositing a true and correct copy of same  
17 in the United States Mail, postage fully prepaid, addressed to the following:

18 Jeffrey Olster, Esq.  
19 LEWIS BRISBOIS BISGAARD & SMITH, LLP  
20 6385 South Rainbow Boulevard, Suite 600  
21 Las Vegas, Nevada 89118  
22 Facsimile: (702) 893-3789  
23 *Attorneys for Defendants*

24 

25 An employee of PRINCE & KEATING



CLERK OF THE COURT

1 **ORDR**

2 DENNIS M. PRINCE

3 Nevada Bar No. 5092

4 ERIC N. TRAN

5 Nevada Bar No. 11876

6 **PRINCE & KEATING**

7 3230 South Buffalo Drive

8 Suite 108

9 Las Vegas, Nevada 89117

10 Telephone: (702) 228-6800

11 Facsimile: (702) 228-0443

12 *E-Mail: DPrince@PrinceKeating.com*

13 *E-Mail: ETran@PrinceKeating.com*

14 Attorneys for Plaintiffs

15 *Tower Homes, LLC*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 TOWER HOMES, LLC, a Nevada limited  
14 liability company;

15 Plaintiff,

16 vs.

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

21 Defendants.

CASE NO.: A-12-663341-C

DEPT. NO.: XXVI

**ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

22 Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd.'s Motion for  
23 Summary Judgment came on for hearing before the Hon. Gloria Sturman on March 21, 2014.  
24 Jeffrey D. Olster of Lewis Brisbois Bisgaard & Smith, LLP appeared on behalf of Defendants.  
25 Dennis Prince appeared on behalf of plaintiff Tower Homes, LLC.

<input checked="" type="checkbox"/> Jury Jdgmt	18
<input type="checkbox"/> Non-Jury Trial	19
<input type="checkbox"/> Jury Trial	20
<input type="checkbox"/> Stip Ois	21
<input type="checkbox"/> Stip Jdgmt	22
<input type="checkbox"/> Default Jdgmt	23
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<input type="checkbox"/> Voluntary Dis	25
<input type="checkbox"/> Involuntary (stat) Dis	26
<input type="checkbox"/> Jdgmt on Aris Award	27
<input type="checkbox"/> Min to Dis (by def)	28

1       **I. FACTS**

2           1. This case arises out of an attorney-client relationship between Defendants and  
3 Plaintiff Tower Homes, LLC ("Tower Homes") in connection with a residential common  
4 interest ownership development known as Spanish View Tower Homes (the "Development").  
5 Defendants handled transactional and litigation matters on behalf of Tower Homes in  
6 connection with the Development.

7           2. Many of the individuals and entities that agreed to purchase units in the  
8 Development (the "Tower Homes Purchasers") paid earnest money deposits. The  
9 Development was not successful, and construction was never completed. The earnest money  
10 deposits were not returned to the Tower Homes Purchasers. Consequently, many of the  
11 Tower Homes Purchasers filed lawsuits in Clark County District Court against Tower Homes,  
12 Rodney Yanke (Tower Homes' sole owner and manager) and other individuals and entities  
13 involved in the sale of the units.  
14

15           3. On May 31, 2007, various creditors of Tower Homes initiated involuntary Chapter  
16 11 bankruptcy proceedings against Tower Homes in the United States Bankruptcy Court,  
17 District of Nevada (Case No. BK-S-07-13208-BAM).  
18

19           4. On December 8, 2008, the Bankruptcy Court entered an "Order Approving  
20 Disclosure Statement and Confirming Plan of Reorganization." See Defendants' **Exhibit A** to  
21 MSJ. Pursuant to the Order, "the Trustee and the Debtor's (Tower's) bankruptcy estate shall  
22 retain all Claims or Causes of Action that they have or hold against any party . . . whether  
23 arising pre- or post-petition, subject to the applicable state law statutes of limitation and  
24 related decision law, whether sounding in tort, contract or other theory or doctrine of law or  
25 equity."  
26

27           5. On June 3, 2010, during the bankruptcy proceeding, the Bankruptcy Court  
28 entered an "Order Granting Motion to Approve Stipulation to Release Claims and Allow



1 Marquis & Aurbach, as Counsel for the Tower Homes Purchasers, To Pursue Claims on  
2 Behalf of Debtor" (hereinafter referred to as the "Marquis Aurbach Order" attached as  
3 Defendants' **Exhibit B** to MSJ).

4 6. Pursuant to the Marquis Aurbach Order,

- 5
- 6 a. The "Trustee has determine that he does not intend, and in any event, does  
7 not have sufficient funds in the Estate to pursue claims on behalf of the  
8 Debtor against . . . any other individual or entity later identified through  
9 discovery which has or may have liability to Debtor or others for the loss  
10 of earnest money deposits provided by purchasers for units in the Spanish  
11 View Tower Homes condominium project."
- 12 b. The "Trustee has determine that the claims against . . . any other individual  
13 or entity later identified through discovery which has or may have liability  
14 to Debtor other others for the loss of the earnest money deposits provided  
15 by purchasers for units in the Spanish View Tower Homes condominium  
16 projects are or may be direct claims held by the Tower Homes Purchasers,  
17 and therefore, are not claims held solely and exclusively by the Estate."
- 18 c. The "Trustee hereby stipulates and agrees to release to the Tower Homes  
19 Purchasers any and all claims on behalf of the Debtor against . . . any other  
20 individual or entity later identified through discovery which has or may  
21 have liability or owed any duty to Debtor or others for the loss of the  
22 Tower Homes Purchasers earnest money deposits and all claims to any and  
23 all earnest money deposits provided by purchasers for units in the Spanish  
24 View Tower Homes Condominium projects."
- 25 d. The "Trustee hereby stipulates and agrees to allow Marquis & Aurbach, as  
26 counsel for the Tower Homes Purchasers, to pursue any and all claims on  
27  
28

1           behalf of the Debt against . . . any other individual or entity later identified  
2           though discovery which has or may have any liability or owed any duty to  
3           Debtor or others for the loss earnest money deposits provided by  
4           purchasers for units in the Spanish View Tower Homes condominium  
5           project.”

6  
7           e. The “Trustee hereby stipulates and agrees to allow Marquis & Aurbach, as  
8           counsel for the Tower Homes Purchasers, to recovery any and all earnest  
9           monies deposits, damages, attorney’s fees and costs, and interest thereon  
10          on behalf of Debtor and the Tower Homes Purchasers with respect to those  
11          claims release to the Tower Homes Purchasers herein.”

12           7. On April 2, 2013, the Bankruptcy Court issued an “Order Granting Motion to  
13          Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, as  
14          Counsel for the Tower Homes Purchasers, To Pursue Claims on Behalf of Debtor”  
15          (hereinafter referred to as “Amended Marquis Aurbach Order”) . See Defendants’ Exhibit D  
16          to MSJ.

17  
18           8. Pursuant to the Amended Marquis Aurbach Order:

19           a. The Order “authorizes the Trustee to permit the Tower Homes Purchasers  
20           to pursue any and all claim on behalf of Tower Homes, LLC (the “Debtor”)  
21           against any individual or entity which has or may have liability or owed  
22           any duty to Debtor or others for the loss of the earnest money deposits  
23           provided by purchasers for units in the Spanish View Tower Homes  
24           condominium project which shall specifically include, but may not be  
25           limited to, pursuing the action currently filed in the Clark County District  
26           Court styled as Tower Homes, LLC v. William H. Heaton et. al. Case No.  
27           A-12-663341-C.”  
28

1           b. "[T]his Court hereby authorizes the law firm of Marquis Aurbach Coffing,  
2           and/or Prince & Keating, LLP or successive counsel, retained on behalf of  
3           Tower Homes Purchasers to recover any and all earnest money deposits,  
4           damages, attorney's fees and costs and interest thereon on behalf of Debtor  
5           and the Tower Homes Purchasers and that any such recoveries shall be for  
6           the benefit of the Tower Homes Purchasers."  
7

8           **II. LEGAL CONCLUSIONS**

9           9. As a general rule legal malpractice claims may not be assigned. Chaffee v Smith,  
10          98 Nev. 222 (1982).

11          10. The Bankruptcy Orders at issue herein did not assign the alleged malpractice  
12          claims to the Tower Homes Purchasers. Rather, the Plan approved by the Bankruptcy Court  
13          recognized that the Trustee lacked funds to pursue various claims related to the loss of earnest  
14          money deposits which the Trustee had the right to pursue upon the effective date of the Plan.  
15          See Bankruptcy Plan dated 12/08/08, Section X Miscellaneous Provisions, Paragraph C,  
16          Litigation.  
17

18          11. Subsequently, pursuant to the June 2, 2010 Marquis Aurbach Order, the Trustee  
19          "releases" to the Tower Homes Purchasers the right to pursue any person or entity who "may  
20          have any liability or owed any duty" to Tower Homes for loss of the earnest money deposits  
21          made by the Tower Homes Purchasers.  
22

23          12. The Amended Marquis Aurbach Order dated April 2, 2013 clarified that the  
24          Bankruptcy Court authorized the Trustee to "permit the Tower Homes Purchasers, to pursue  
25          any and all claims on behalf of Tower Homes, LLC (the "Debtor") . . . which shall  
26          specifically include, but may not be limited to, pursuing" the instant action, with any recovery  
27          being for the benefit of the Tower Homes Purchasers. The Trustee specifically authorized the  
28          Tower Homes Purchasers to pursue the claim in the name of Tower Homes, LLC.

1           13. The California Supreme Court has addressed the prohibition against assignment of  
2 malpractice claims from a Bankruptcy estate. A legal malpractice claim obtained by  
3 assignment in bankruptcy was dismissed when filed in the name of the third party assignee.  
4 Baum v. Duckur, Spradling & Metzger, 72 Cal. App. 4<sup>th</sup> 54,69, 84 Cal.Rptr.2d 703,712  
5 (1999).

6  
7           14. Plaintiff argues that the instant case is distinguishable as it is brought in the name  
8 of Tower Homes, LLC. A similar attempt to sue in the name of the Debtor was disallowed in  
9 Curtis v Kellogg & Andelson, 73 Cal.App. 4th 492, 86 Cal.Rptr. 2d 536 (1999), as the Debtor  
10 was not pursuing the claim on behalf of the trustee for the benefit of the estate; instead any  
11 proceeds recovered would go directly to Dr. Curtis. In the instant claim, any recovery is  
12 expressly for the benefit of the Purchasers.

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15 holding that a Trustee can pursue a claim which would ultimately benefit creditors, as doing  
16 so is for the benefit of the estate. Here, the Trustee is not pursuing the claim. The Trustee did  
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25 the assignment as a small incidental part of a larger commercial transfer; the transfer was for  
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28 insurance carrier's retention of defense counsel for an insured; and all communication

1 between the carrier and counsel had been conducted through a third party claims  
2 administrator. None of the factors giving rise to the exception are present here.

3 17. Based on a review of the Bankruptcy Orders, it cannot be said that the Tower  
4 Homes Purchasers are pursuing the legal malpractice claim in the name of the Debtor and for  
5 the benefit of the Bankruptcy estate. Rather the sole benefit appears to be for the Purchasers.  
6 The assignment/release was not incidental to a larger transfer of assets and liabilities,  
7 therefore, the exception does not apply. The Nevada Supreme Court has stated the assignment  
8 of legal malpractice claims is against public policy. The release at issue herein violates the  
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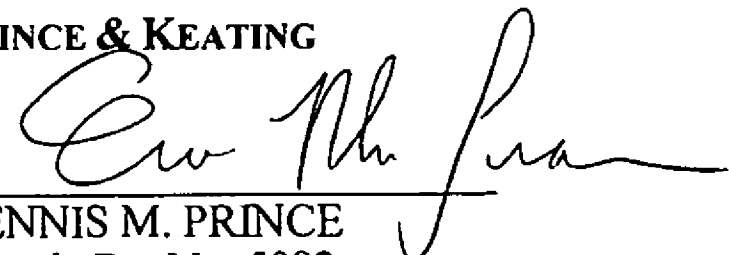
11 18. Defendant's Motion for Summary Judgment is, therefore, GRANTED.

12 DATED this 17th day of May, 2014.

13  
14   
15 DISTRICT COURT JUDGE  
16 

17 Respectfully submitted by:

18 PRINCE & KEATING

19   
20 DENNIS M. PRINCE  
21 Nevada Bar No. 5092  
22 ERIC N. TRAN  
23 Nevada Bar No. 11876  
24 3230 South Buffalo Drive, Suite 108  
25 Las Vegas, Nevada 89117  
26 Attorneys for Plaintiff  
27 Tower Homes, LLC

28 Approved as to Form and Content by:

26 Jeffrey Olster, Esq.  
27 LEWIS BRISBOIS BISGAARD & SMITH, LLP  
28 6385 South Rainbow Boulevard, Suite 600  
Las Vegas, Nevada 89118  
Attorneys for Defendants

No. \_\_\_\_

Dept. No. XXVI

**IN THE EIGHTH JUDICIAL DISTRICT COURT OF  
THE STATE OF NEVADA IN AND FOR THE COUNTY OF CLARK**

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

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**NOTICE OF APPEAL**

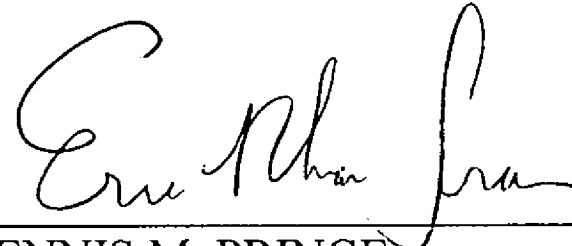
  
CLERK OF THE COURT

Notice is hereby given that Plaintiff, Tower Homes, LLC, hereby appeals to the  
Supreme Court of Nevada from the following:

1. The Order Granting Defendants' Motion for Summary Judgment entered on May 15,  
2014.

DATED this 28 day of May, 2014.

**PRINCE & KEATING**



DENNIS M. PRINCE

Nevada Bar No. 5092

ERIC N. TRAN

Nevada Bar No. 11876

3230 South Buffalo Drive

Suite 108

Las Vegas, Nevada 89117

Attorneys for Defendant

*Tower Homes, LLC*

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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*

*Kim M. Stevenson*  
An employee of PRINCE & KEATING

DISTRICT COURT  
CLARK COUNTY, NEVADA

Defendants.

DEPT. XXVI

**RECORDER'S TRANSCRIPT OF PROCEEDING:  
MOTION FOR SUMMARY JUDGMENT**

## 1



1 FRIDAY, MARCH 21, 2014 AT 9:25 A.M.

2  
3 THE COURT: Do we have everybody here for 9:30, Tower Homes?

4 MR. PRINCE: Yes, we're here. These are my two favorite legal  
5 malpractice defense lawyers are in the courtroom. It's usually Mr. -- Mr. Garin  
6 and I always have about five to ten cases a year together, so.

7 THE COURT: But in the meantime --

8 MR. KEATING: -- they always love to --

9 THE COURT: -- like old home week here.

10 MR. KEATING: -- they love to file their motions --

11 THE COURT: We have two very --

12 MR. KEATING: -- I love it.

13 THE COURT: -- similar -- two very similar cases. So we'll make sure the  
14 record's clear as to who's on this case --

15 MR. KEATING: We will.

16 THE COURT: -- which is Tower Homes versus Will Heaton, A-12-  
17 663341. Counsel state your appearances for the record.

18 MR. OLSTER: Good morning, Your Honor, Jeff Olster on behalf of  
19 Defendants.

20 MR. KEATING: Your Honor, good morning, Dennis Prince, on behalf of  
21 the Plaintiff, Tower Homes, LLC.

22 THE COURT: Okay.

23 MR. OLSTER: Good morning, Your Honor, this is our Motion for Summary  
24 Judgment. I thought my clients were going to be here but I don't want to hold  
25 anybody up. I know we've asked you to make some difficult rulings in this

1 case out of the box, I – I appreciate that. But I think this – this Motion for  
2 Summary Judgment really boils down to one simple dispositive, and most  
3 importantly, undisputed fact, and that's that any potential recovery in this case  
4 – and we're a ways away from that, but any potential recovery in this case  
5 goes to the Tower Homes purchasers who are now parties to this case,  
6 technically.

7           It's not going to go to Tower Homes, LLC, which is the nominally  
8 denominated Plaintiff when, which is nothing more than a defunct corporate  
9 shell. And it's not – even more importantly, going to go to the bankruptcy  
10 estate which has been fully administered, there's nothing left to do in the  
11 bankruptcy. So, this undisputed fact that the recovery goes to the purchasers,  
12 is critical and dispositive for two reasons: Number one, it means that the  
13 Tower Homes purchasers are the real parties in interest under NRCP 17.  
14 They're the only party that stands to benefit from this case.

15           And two, this means, if we look at substance, not form -- if we look  
16 at the reality of what's going on here, the purchasers are pursuing an unlaw –  
17 an assigned legal malpractice claim, which violates Nevada Law and Nevada  
18 Public Policy. So the question becomes: What are you, a State Court Judge, to  
19 do, when the purchasers are pursuing an assigned legal malpractice claim under  
20 the auspices of a Bankruptcy Court order? Presents a dilemma for you, I can  
21 appreciate that, but what do we do? Well, we have to look at the law. We  
22 have to look at what the law tells us to do in this situation and about how  
23 bankruptcies can authorize actions by or on behalf of bankruptcy debtors.

24           Now, no Nevada Court that's been cited to you or that I found or  
25 that the purchasers have found, has confronted anything remotely similar to this



1 situation. So we're confronted with the situation that I know you see a lot,  
2 which is that, we don't have a clear answer under Nevada law. Although, I  
3 would certainly submit that general principles, the prohibition against  
4 assignment, the fact that assigned legal malpractice claims undisputedly  
5 violate Nevada public policy. And that, generally, applicable Bankruptcy Law  
6 principles about when Trustees can sue and can authorize others to sue, so on  
7 and so forth, all militate in favor of granting this motion.

8 But, if we want to find cases that have confronted this situation we  
9 need to go to California. And as you well know, you've been practicing for a  
10 long time in Nevada, when we have a void in Nevada Law, our Supreme Court  
11 has told us: Well, let's see what California has to say. And two California  
12 opinions, two California cases have confronted this identical situation. They're  
13 in the briefs, they're discussed at length. It's the *Baum* case and it's the *Curtis*  
14 case. These cases establish, beyond any question, that creditors cannot pursue  
15 a debtor's legal malpractice claim for their own benefit.

16 Whether they use the corporate shell or not, it doesn't matter. In  
17 the *Curtis* case the debtor – the creditors – just like the purchasers here, were  
18 attempting to use the debtor's corporate shell as the Plaintiff. In a legal  
19 malpractice case and just – it's on all fours, Your Honor. And the California  
20 Court of Appeals said: No, there's nothing in Federal Law that allows this. And  
21 California Law prohibits the assignment of legal malpractice claims. And so,  
22 why should you follow the *Baum* and *Curtis* cases?

23 Because just like California, Nevada unequivocally, undisputedly,  
24 prohibits the assignment of legal malpractice claims; and Federal Law doesn't  
25 somehow override that. And the *Curtis* Court made that clear, and the *Baum*

1 Court made that clear. And even more importantly, in contrast, what do you  
2 have before you on this Summary Judgment record that authorizes this action?  
3 Not one single case. You have not been cited one single case from any  
4 jurisdiction that authorizes this lawsuit. The purchasers rely on the *Agro*  
5 *Biotech* case almost exclusively in their opposition. All that case says – it's  
6 actually two different cases, but all it says is that a Trustee has standing to sue  
7 on behalf of the bankruptcy estate for the benefit of the bankruptcy estate.

8           So in that sense, yes, Nevada Law has spoken to the salient issue,  
9 Trustees can sue on behalf of the bankruptcy estate. But we don't have a  
10 bankruptcy estate in this case, it's administered, it's over. This action is  
11 undisputedly not brought for the bankruptcy estate, it's brought for the benefit  
12 of a single creditor. It's unlawful, it's an attempt to make an end around  
13 Nevada's clear prohibition against the assignment of legal malpractice claims, it  
14 violates Nevada public policy. You have not been cited a single case to the  
15 contrary.

16           This is clear, there are no disputed facts and, Your Honor, if you  
17 have any misgivings about this, I urge you and I welcome your questions. I  
18 know this is not something you see every day but – but really, the outcome  
19 here is –

20           THE COURT: Oh, no, I have an *Agro Biotech* case myself. I represented  
21 a –

22           MR. OLSTER: Uh-huh.

23           THE COURT: -- legal malpractice Defendant – an antitrust lawyer.

24           MR. OLSTER: Okay, so then you're familiar with it --

25           THE COURT: Sure.



1 MR. OLSTER: -- and you're familiar with the principles at play here. This  
2 is the reverse of that situation. This is not a Trustee suing on behalf of the  
3 bankruptcy estate, it's the precise opposite. And to the extent Nevada Law  
4 addresses the question, it tells us they can't do this. California has spoken  
5 clearly, Your Honor. *Curtis* is squarely on point. *Baum* is squarely on point.  
6 Doesn't matter if they're using the corporate shell.

7 This is a useless corporate shell, a defunct corporate shell that is  
8 the alleged Plaintiff in this case -- gets nothing out of this. The bankruptcy  
9 estate gets nothing out of this; it is solely for the benefit of the purchasers,  
10 that's undisputed, that's black and white in the language of the second Marquis  
11 and Aurbach order, which you have held has authorized this case. Given that,  
12 this action violates Nevada Law and Public Policy; there's simply no way around  
13 it.

14 And again, I welcome any questions you have. Thank you.

15 THE COURT: Okay.

16 MR. PRINCE: Your Honor, the -- one thing's happened from the beginning  
17 of this case is that this law firm refuses not only to accept any level of  
18 responsibility for what happened to the Tower Homes purchasers losses, but  
19 they refused to acknowledge their obligation to their client, Tower Homes, LLC,  
20 for the preservation of these earnest money deposits, which have been lost.  
21 What is completely lost and misguided about the motion is, these are not  
22 assigned claims that are being pursued. This is a direct action by the client or  
23 former client of this law firm.

24 THE COURT: Tower Homes.

25 MR. PRINCE: Tower Homes, LLC, right.

1 THE COURT: Uh-huh.

2 MR. PRINCE: That fact is not in dispute, so you don't have a creditor  
3 pursuing a direct --

4 THE COURT: So the fact that -- the fact that the money may not  
5 ultimately go to a bankruptcy estate isn't the significant factor?

6 MR. PRINCE: Absolutely not, correct. The client, Tower Homes, LLC,  
7 has been damaged by reason of the malpractice committed by these  
8 Defendants. And the damage, at least as it relates to the sole -- the function of  
9 this action, relates to the Tower Homes purchasers loss earnest money deposits  
10 because of the negligence of the lawyers involved, by not preserving those  
11 funds as required by Nevada Law.

12 And the *Agro Biotech* case is directly on point. Whether you want  
13 to call it the debtor or you want to call it the Trustee, their argument would be  
14 the same. Well, this action would be for the sole benefit of either one or more  
15 creditors or classification of creditors of the estate, so therefore, really it's an  
16 assigned claim, it's really not part of the debtor's claim. This is the same  
17 argument that any professional entity, such as a law firm, or any other entity  
18 that may be have liability to a -- a particular Defendant could make if a Trustee  
19 was pursuing it or the debtor themselves was pursuing it.

20 The sole -- you do not need to look any further than the order from  
21 the bankruptcy estate where the Trustee made the determination, this is the  
22 June 3<sup>rd</sup>, 2010 order. The day -- there were others who had a liability to the  
23 debtor for the loss of the earnest money deposits, and that's in paragraph two  
24 of the June 3<sup>rd</sup>, 2010 order. And the Bankruptcy Court authorized, specifically  
25 authorized this action to recover the value of the loss earnest money deposits,



1 because the debtor has been damaged by that amount.

2       There is no assignment of any kind, either express or implied or  
3 otherwise, and it's not for you to determine whether that was an appropriate  
4 order by the Bankruptcy Court. If they wanted to seek relief from that order  
5 then they should go and challenge that order in the Bankruptcy Court. And  
6 what's notable is that, when the issue first came up, because they – this is the  
7 third challenge they've made to this order. They first made it that, number  
8 one, Tower Homes would have authority to proceed, you ruled against them.

9       They then said that the Prince & Keating law firm didn't have  
10 authority to proceed, we resolved that issue. The Nevada Supreme Court also  
11 wanted to determine whether or not Tower Homes was the appropriate Plaintiff  
12 here. They, as part of their acceptance of the Petition for Writ, they asked the  
13 parties to brief that, they made – then they sent the thing back, said there was  
14 no extraordinary relief warranted, because that would have been a very simple  
15 resolution for the Court to say: Hey, Tower Homes, LLC doesn't have the legal  
16 standing to pursue the action.

17       Now we're back in front of you with a repackaged argument, it's  
18 the same argument they've made over and over. Now they're trying to guise,  
19 under Rule 17, that somehow if – since there's going to be a recovery it would  
20 go for the benefit of creditors of the debtor than, therefore, the debtor is not  
21 the real party in interest, but that's false. Think about it, they created this  
22 fallacy in a way that: Well, you Tower Homes, LLC, even though you've been  
23 damaged by us, you're in bankruptcy and the Bankruptcy Court has resolved  
24 the claims of these creditors, you can't sue us because these monies will go for  
25 the benefit of those creditors.

1 Well, even if Tower – even if Tower Homes wasn't in bankruptcy,  
2 the likelihood of the money would go right back to the purchasers, right? I  
3 mean, think about it, if there's no bankruptcy case – I mean, the purchasers  
4 would still claim an interest in any recovery –

5 THE COURT: Right.

6 MR. PRINCE: -- because they've still been -- the corporation's still been  
7 damaged.

8 THE COURT: Okay. How – and that is distinguishable from *Baum* and  
9 *Curtis* because if *Baum* and *Curtis*, what you had directly was, a creditor who  
10 doesn't otherwise have a claim against these – that arises out of these actions  
11 of these attorneys, just acquires an assignment.

12 MR. PRINCE: Correct.

13 THE COURT: Assign me.

14 MR. PRINCE: Yes.

15 THE COURT: I need – I need something to satisfy my debt, assign me  
16 your cause of action and I'll go collect on it. And the Court in California said:  
17 Oh no, you can't – you can't do that.

18 MR. PRINCE: Absolutely, that's correct. You have –

19 THE COURT: So that's different here because –

20 MR. PRINCE: -- because of the bankruptcy proceeding and you don't  
21 have the creditor pursuing the action, you actually have the client. Now think  
22 about this, if the purchasers were pursuing the action, right, then we'd have no  
23 attorney/client relationship. You can't have an assignment under Nevada Law,  
24 we agree with that. That's the simple issue. That's a non-issue here, but here  
25 you actually have the – unlike *Baum* and *Curtis* you have the actual – the client



1 pursuing the law firm. And the question, -- they're trying to collaterally attack  
2 what happens to the proceeds in the event there's a recovery?

3 THE COURT: Right.

4 MR. PRINCE: That's really not for their -- that's really not an issue for  
5 them?

6 THE COURT: Well, what Mr. Olster says: This is a fiction because your  
7 client -- the actual creditor here, just like in *Baum* and *Curtis*, the actual ultimate  
8 creditor here is using this corporate shell to get around what they said you  
9 couldn't do in *Baum* and *Curtis*. That is, the creditor can't -- can't get an  
10 assignment and pursue this cause of action, so instead, what you're doing is  
11 taking a defunct corporate shell and using that corporate shell to pursue the  
12 claim.

13 So, essentially you're trying to end run around this no assignment  
14 of a legal malpractice claim.

15 MR. PRINCE: Well, number one, there's been no assignment -- unlike  
16 *Baum* and *Curtis* where there was a direct assignment --

17 THE COURT: Right.

18 MR. PRINCE: -- that's not present here so those are, on their face,  
19 inapplicable. You actually have the client not the -- not the creditor, pursuing  
20 the claim, and so, there's no question that Tower Homes, LLC -- they have the  
21 legal authority to pursue a legal malpractice claim. So the only issue is, under  
22 the Court's -- the bankruptcy order, is this action authorized? And the answer  
23 to that question is: Yes. You don't have to rethink the validity of that order.  
24 The Bankruptcy Court specifically authorized this action, that this debtor could  
25 pursue a claim in its own name and then it -- the Bankruptcy Court is part of the

1 resolution under the plan of reorganization, and as part of the resolution of the  
2 bankruptcy said: Any proceeds will go to this, that's part of the bankruptcy. If  
3 they want to attack that, then they should go back to the Bankruptcy Court.

4 And what I was getting to – when we have the – we have the prior  
5 issues come up concerning the standing of Tower Homes to pursue this action  
6 or the Prince & Keating law firm pursue the action, we went back to the  
7 Bankruptcy Court, there was an order entered on April 2<sup>nd</sup>, 2013. They made  
8 no appearance. They did not challenge that order in any way. The time period  
9 for appealing that order is now gone, and now they want you to essentially  
10 rewrite the order and – but to say something that it actually doesn't.

11 Because you'd have to take the June 2010 order and the April  
12 2013 order and read them together. The only change was that, other than  
13 Marquis and Aurbach wasn't the only firm authorized to pursue the action. And  
14 the Court further indicated that the – that this claim could be pursued on –  
15 through the debtor, against any individual who may have liability or any duty to  
16 the debtor, or others, for loss of earnest money deposits; and that was an asset  
17 of the estate.

18 And the Court approved the resolution of the purchasers claims  
19 there and authorized the debtor to take the action and any potential recovery  
20 which is going to go to the purchasers. That has nothing to do with legal  
21 standing. The Court's are – there's already a valid and approved claims of more  
22 than three million dollars in the bankruptcy estate. This debtor has been  
23 damaged as a result of these earnest money deposit losses.

24 We're trying – now we're pursuing, on behalf of the debtor, the  
25 former client of the Nitz Law Firm, are we entitled to recover those monies?



1 And that's it. So the standing issue has been long resolved. It – they can't  
2 argue that it's not the client, it is the client; they can't even argue that. They –  
3 it's been authorized by the Bankruptcy Court -- and the difference between  
4 *Baum and Curtis* is, you have a Bankruptcy Court who has now took custody.  
5 The estate took ownership of all of the apps, which would include any claims  
6 against the firm, authorizes the Trustee to pursue those claims.

7 It also authorizes the Trustee to resolve certain creditor's claims  
8 subject to approval by the Bankruptcy Court, which was done in this case;  
9 that's how they did resolve the claims. The Trustee elected: Hey, we're not  
10 going to put assets of the estate at risk and spend the money, but Tower  
11 Homes, LLC, if you want to do that for the benefit of the purchasers, we're  
12 going to agree to that and that's how they resolved the claims. That has  
13 nothing to do with an assignment. In fact, there is no assignment, it's just  
14 what happens to the proceeds in the event of any settlement or any payment of  
15 a judgment.

16 THE COURT: Yeah, the claim itself has been assigned, it's simply defunct  
17 corporate entity debtor. You go out and you have an asset, which is a possible  
18 claim, go out and see if you can collect it. If you collect it you don't get a  
19 benefit you have to give it to these creditors, but that's different from assigning  
20 –

21 MR. PRINCE: Correct.

22 THE COURT: -- the cause of action to the creditors.

23 MR. PRINCE: Why I think that isn't that – isn't that a benefit of – it's a  
24 benefit of the debtor, right? It remains a benefit of the debtor because the  
25 debtor then gets to satisfy its creditor's claims, that's what this is; that's what

1 this case is all about. I mean, all – any time – any time a Bankruptcy Trustee or  
2 if the Trustee authorizes the debtor to go pursue State Law claims and get a  
3 recovery, the money's going to go to others –

4 THE COURT: Uh-huh.

5 MR. PRINCE: -- that's how it's going to work. They're going to go to  
6 satisfy and pay unsecured claims, whether it be admitted – any type of claim.  
7 Whether it be materialment [phonetic], contractors, purchasers or otherwise,  
8 the monies going to go to others. But the unique feature of this case, other  
9 than *Baum* and *Curtis*, is the fact that there was a bankruptcy and other people  
10 took ownership – another entity other than Tower Homes, LLC, took ownership  
11 of the claim, and they have to pursue claims on behalf of debtors all the time,  
12 and that's exactly what's been done here.

13 And Tower's doing it in its own name for the benefit of its  
14 bankruptcy estate, and the Court has already predetermined that if there's a  
15 recovery for this bankruptcy estate then those monies are going to go directly  
16 to the purchasers. That has been approved, that hasn't been -- the time period  
17 for appealing of that issue is long gone. And that is one of the unique functions  
18 of the Bankruptcy Court is to allow exactly that, but without going to an  
19 assignment altering anybody else's rights.

20 THE COURT: Thank you, thank you, Mr. Prince. Okay, Mr. Olster.

21 MR. OLSTER: So if, if I'm – I'm trying to hone in on what your concern  
22 is, because I don't want to waste your time making arguments that aren't in  
23 dispute, so I don't – I don't want to go into what the Nevada Supreme Court  
24 decided or didn't decide unless that's concerning to you.

25 THE COURT: No.



1 MR. OLSTER: Okay. I'm getting the sense that you don't think this is an  
2 assignment of claims.

3 THE COURT: I think if there's a question that it's as distinguishable from  
4 *Baum* and *Curtis* because we have a bankruptcy plan. A bankruptcy plan was,  
5 Tower Homes, you have an asset, it may amount to nothing but you have an  
6 asset and an asset is a claim. You need to go pursue your claim and if you  
7 recover on the claim you can't keep it you have to give it to some creditors to  
8 satisfy them, because otherwise there's no money to satisfy them.

9 So it's not -- I understand your argument that that's not really what  
10 this is, what this is is, some creditors who go in and say: Let's take this  
11 corporate shell and pursue this claim, essentially getting around if you can't sign  
12 it -- I -- a malpractice claim, so --

13 MR. OLSTER: Under either characterization. You could characterize it  
14 either of those ways, it doesn't matter; *Curtis* is not distinguishable.

15 THE COURT: Okay.

16 MR. OLSTER: In the *Curtis* case, a creditor wanted money from the  
17 bankruptcy estate. The Bankruptcy Trustee in the Bankruptcy Court gave the  
18 creditor the right to pursue the legal malpractice claim, whether they called it an  
19 assignment or not, frankly didn't matter to the Court; I don't know that they  
20 did. I don't know that the word "assign" appeared. The word "assign" here  
21 doesn't appear in the Marquis Aurbach order, it does appear in the Complaint.

22 They've conceded in the Complaint that it's an assignment but --  
23 and then what the creditor did in the *Curtis* case is, he sued in his own name  
24 and then there was a demurrer --

25 THE COURT: Uh-huh.

1 MR. OLSTER: -- and before that was decided they amended the  
2 Complaint and they added the debtor's name to the Complaint, so *Curtis* is  
3 indistinguishable from this case.

4 In *Curtis*, under the auspices of the Bankruptcy Court, the defunct  
5 entity sued the law firm for the benefit of the creditor. *Curtis* is not  
6 distinguishable from this case. Now in *Baum*, it was brought in the name of the  
7 creditor but it didn't matter. The critical point, which Mr. Prince continues to  
8 completely ignore, as if it doesn't exist -- the single most critical point is that  
9 this action is for the benefit of the purchasers. He didn't dispute that in his  
10 papers, he doesn't dispute that here, he doesn't even mention it.

11 Again, that means two critical things: It mean -- number one, the  
12 Tower Homes purchasers are the real parties in interest under NRCP 17. Under  
13 NRCP 17 actions shall -- shall -- it's mandatory -- be prosecuted in the real party  
14 in interest. That means the Tower Homes purchasers need to be treated as the  
15 Plaintiff in this case. Why? It's so that the law firm can raise defenses that it  
16 would have against the purchasers. Well, here's our defense: Their -- the real  
17 -- as the real parties in interest as the only parties that stand to benefit from this  
18 case, they are using a corporate shell to pursue a legal malpractice claim. That  
19 is an assigned legal malpractice claim even though the word "assigned" isn't  
20 attached to it.

21 And if we're going to ignore that reality then we're elevating  
22 substance. I mean, we're elevating form over substance and that's the critical  
23 part of what the California Court of Appeals recognized. It doesn't matter who  
24 the named Plaintiff is. Yes, Nitz, Walton & Heaton had an attorney/client  
25 relationship with Tower Homes, LLC. Tower Homes, LLC has been through

1 bankruptcy, it's no longer in business, it doesn't –

2 THE COURT: Well, let me ask you something.

3 MR. OLSTER: Yeah.

4 THE COURT: If the – if Tower Homes, LLC – if the bankruptcy  
5 proceeding said: Going to assign Tower Homes, LLC to you creditors and with  
6 the assignment of Tower Homes you take over all their rights and claims  
7 [computer logging on], and any causes of action that they might have, it's  
8 yours. Tower Homes is yours, go pursue whatever you want to do, you own  
9 Tower Homes.

10 MR. OLSTER: They couldn't pursue tort claims. They couldn't pursue  
11 tort claims because tort claims are not assignable, and they couldn't pursue a  
12 legal malpractice claim. Could they collect on existing judgments?

13 THE COURT: No, I'm not – I'm not saying they're assigning it. I'm  
14 saying – I'm selling you [computer logging on]. I will sell you – Tower Homes is  
15 your – I'm giving you – selling you, assigning you, it doesn't matter what you  
16 call it. Tower Homes is – you own Tower Homes, whatever Tower Homes  
17 needs. And with Tower Homes you – you receive all of Tower Homes  
18 interests, claims. I – I wash my hands of Tower Homes. I want nothing further  
19 as a Bankruptcy Trustee –

20 MR. OLSTER: Uh-huh, uh-huh.

21 THE COURT: -- for Tower Homes. Tower Homes is yours, go and make  
22 with it what you can, you now own Tower Homes.

23 MR. OLSTER: Then the creditors who acquire Tower Homes, LLC could –  
24 would acquire the property of Tower Homes, the buildings, the hard assets, the  
25 computers, the bank accounts. They would acquire the assets of Tower



1 Homes, LLC, and they would acquire certain causes of action. The *Achrem*  
2 case tells us that under Nevada law you can assign the proceeds of an action,  
3 so if there was an uncollected judgment, if there was an uncollected settlement,  
4 purchasers go to town. You go pursue and attach whatever property you want  
5 to pursue, liquidated judgments and payments.

6 But Tower Homes purchasers, under Nevada law, just as under –  
7 just as it is under California Law, you can't pursue a tort claim, you certainly  
8 can't pursue a legal malpractice claim because of all the public policy reasons  
9 against – that underlie the prohibition of assignment of legal malpractice claims.

10 We don't want that commercialized. We don't want the Courts  
11 burdened with legal malpractice claims. There's a confidential relationship  
12 between attorneys and clients –

13 THE COURT: Uh-huh.

14 MR. OLSTER: -- that makes it very unique. The client has to make that  
15 decision not aggrieved – not others, not strangers to the attorney/client  
16 relationship who are aggrieved by the client. They can't hop on the corporate  
17 shell bandwagon and then sue attorneys, that's a quintessential assignment of a  
18 claim whether you use the word "assignment" or not. And I think again --

19 [Unidentified person speaks to Counsel Olster]

20 MR. OLSTER: I mean we're talking about the Marquis Aurbach orders,  
21 okay. The first Marquis Aurbach order that Mr. Prince spent time discussing  
22 releases to the Tower Home purchasers; that's a synonym for "assign." The  
23 author – the second Marquis Aurbach order, which is Exhibit D and I've got  
24 another copy right here if you want to follow along with me.

25 THE COURT: Right, uh-huh.



1 MR. OLSTER: Do you want – do you have it?

2 THE COURT: I have it.

3 MR. OLSTER: Okay. This is the order that you've held authorizes this  
4 case, lines 7 and 8. It is further ordered, adjudged, et cetera, that this order  
5 authorizes the Trustee to permit the Tower Homes purchasers to pursue any  
6 and all claims. Yes, they didn't use the word "assignment" because they knew  
7 that they would be running against – running afoul of Nevada's prohibition  
8 against the assignment of legal. They deftly worded it to sidestep the  
9 prohibition and that's why in – in *Curtis* and *Baum* the Court said: Wait a  
10 minute, I don't care if you use the word "assignment" or not. I don't care if  
11 you use the corporate shell or not, because the purchasers are the sole  
12 beneficiaries of this action, they're pursuing an assigned claim; that's the  
13 substance of what we're talking about here.

14 If you look at lines 15 and 16 of the – the second Marquis Aurbach  
15 order, this Court hereby authorizes the law firm of Marquis and Aurbach and/or  
16 Prince & Keating, or successive counsel retained on behalf of Tower Homes  
17 purchasers. Prince & Keating represents the Tower Homes purchasers, that's  
18 what this says. That's not my argument, that's not my opinion, that's what  
19 the authorizing order for this case says. And then finally, on lines 19 and 20,  
20 any such recoveries shall be for the benefit of the Tower Homes purchasers.

21 Now I give them credit for the way they did this, but they're trying  
22 to sidestep the prohibition against assignment of legal malpractice claims.  
23 *Baum* and *Curtis* are indistinguishable. *Curtis* is beyond any reasonable logical  
24 doubt, indistinguishable. They did the same exact thing. You have to look at  
25 the substance of what's going on here. You have to look at the real party in

1 interest under NRCP 17, that has not been addressed, they don't dispute that.  
2 They don't dispute that the purchasers are the sole beneficiaries of this action.

3 Yes, if you had ongoing bankruptcy proceedings, the Trustee could  
4 sue or he could appoint a disinterested person, under 11 U.S.C. 527, to pursue  
5 claims for the benefit of all creditors. We don't have – that's not this case,  
6 that's a hypothetical that doesn't exist. The bankruptcy proceedings are over.  
7 What – whether Tower Homes, LLC ever sees another cent in its existence,  
8 doesn't matter, that's over; that ship has sailed, the bankruptcy is over.

9 This is an assigned legal malpractice claim, it violates Nevada law, it  
10 violates Nevada Public Policy. There's simply no way around it.

11 THE COURT: Okay, thanks. Well, I'll take another look at *Curtis* and  
12 *Baum* because, to me, it seems like they weren't doing quite the exact same  
13 thing.

14 MR. OLSTER: Take another look, please.

15 THE COURT: But we – I –

16 MR. OLSTER: Would you like additional briefing?

17 THE COURT: No.

18 MR. OLSTER: Okay.

19 THE COURT: I don't have any interest in any additional briefing --

20 MR. OLSTER: Okay, very well.

21 THE COURT: -- thank you very much. But I will take another look at  
22 *Curtis* to see if I think that it is indistinguishable from this situation which, I  
23 don't know, to me the facts that it's part of an approved bankruptcy plan,  
24 Bankruptcy Court said: I'm giving – I'm telling you that at – you have – you  
25 have a claim in the bankruptcy. Tower Homes has a potential asset, Tower



1 Homes, LLC has a potential asset. Tower Homes needs to go and see if they  
2 can collect that claim for you so you can be compensated, otherwise the  
3 Bankruptcy Court itself can't --

4 MR. PRINCE: Right, and then that's -- I think that's a very valid point,  
5 Your Honor. If you look at Exhibit A to their motion, it's paragraph 15 of the  
6 confirmed plan.

7 THE COURT: Right.

8 MR. PRINCE: So when Mr. Olster says: Oh, the bankruptcy's over, it's  
9 fully administrative, there's nothing left to do, he knows that's false and let me  
10 say exactly why and how he -- he said: The Trustee and the debtor's  
11 bankruptcy estate shall retain all claims or causes of action that have -- they  
12 hold against any party including any insiders, whether arising pre or post  
13 petition, subject to State law, related issues.

14 So they talk about the potential for pursuing additional claims which  
15 would benefit the bankruptcy estate.

16 THE COURT: Right.

17 MR. PRINCE: Take it one step further, you go to the order and it's not  
18 just the one order, it's multiple orders of the bankruptcy stay. It said: The  
19 Trustee has determined that there's certain claims against Mr. Yanke and others  
20 that may have liability to the debtor for the loss of the earnest money deposits,  
21 and then authorized an action on behalf of the debtor. That's the key issue,  
22 underscore, that's when Mr. Olster reads the applicable orders he always omits  
23 the critical language to pursue any and all claims on behalf of the debtor.  
24 That's in paragraph 4 of the June 3<sup>rd</sup>, 2010 order from the Bankruptcy Court.

25 So, it's always been authorized in the name of the debtor, not

1 authorizing anything in the name of a creditor and they could have, for that  
2 matter, the Bankruptcy Court could have authorized that: Hey, any recoveries  
3 will go to a certain classification of creditors. If a creditor had an objection they  
4 could have timely filed that with the Bankruptcy Courts if I thought that was an  
5 unfair order, there wasn't – there was no challenge. There was no challenge by  
6 this law firm.

7           So, then you have to take the June 3<sup>rd</sup>, 2010 order and read it in  
8 connection with the April 2<sup>nd</sup>, 2013 order where it's not just, we deftly did this  
9 just recently to get around it, that language was in there from June of 2010,  
10 well before the inception of this case. And it's talking about authorizing the  
11 actions to be pursued on behalf of Tower Homes, LLC who is the client who  
12 was damaged by reason of this law firm's malfeasance –

13       THE COURT: Correct.

14       MR. PRINCE: -- and malpractice.

15       THE COURT: And that's why I said: I want to take another look at *Curtis*

16 --

17       MR. PRINCE: Go ahead.

18       THE COURT: -- because I didn't seem *Baum* as being necessarily  
19 dispositive of the issue. I'll look at *Curtis* and see if I think it is. I – I have a  
20 question as to whether this was the same thing that the Court in *Curtis* – this'll  
21 –

22       MR. OLSTER: And I would just ask this, Your Honor, just indulge me for  
23 one last point.

24       THE COURT: Uh-huh.

25       MR. OLSTER: As you revisit *Curtis*, revisit *Baum* as well, because it's not

1 distinguishable in any meaningful way because, again, it's about who benefits  
2 from the action. And even though in *Baum*, it was brought in the name of the  
3 creditors themselves, the third parties; that didn't matter, as long as the action  
4 is for the benefit of the purchasers. And again, you don't hear anything about  
5 that. Then it violates the rule against assignment, that's the substance of what  
6 we're dealing with. And I just urge you to keep that critical, overriding,  
7 undisputed fact in mind as you read this other case law.

8 THE COURT: Thank you.

9 MR. PRINCE: Okay. Thank you, Judge.

10 THE COURT: Okay.

11  
12 [Proceedings concluded at 9:59 a.m.]  
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the  
22 audio/visual recording in the above entitled case to the best of my ability.

23 

24 Kerry Esparza, Court Recorder/Transcriber  
25 District Court, Department XXVI