

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

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

5                                   Appellant,

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  
13                                   Respondents.

CASE NO.: 65755

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15                   **APPELLANT TOWER HOMES, LLC'S OPENING BRIEF**

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18          PRINCE | KEATING

19                   

20  
21          DENNIS M. PRINCE

Nevada Bar No. 5092

22          ERIC N. TRAN

23          Nevada Bar No. 11876

**PRINCE | KEATING**

24          9130 West Russell Road, Suite 200

25          Las Vegas, Nevada 89148

26          Attorney for Appellant

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## I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to NRAP 3A(b)(1) because the District Court issued a final Order Granting Defendant William Heaton (“Heaton”), and the law firm of Nitz, Walton & Heaton, Ltd.’s (“NWH”) (collectively referred to as “Defendants”) Motion for Summary judgment which was entered on May 15, 2014. 6 AA 916. Appellant filed their Notice of Appeal on May 28, 2014. 6 AA 925. Thus, this appeal is timely and this Court has jurisdiction to hear this matter on appeal.

## II. STATEMENT OF THE ISSUE

The issue presented on this appeal is as follows:

*Whether Tower Homes is the real party in interest with standing to bring this legal malpractice action against Defendants.*

## III. STATEMENT OF THE CASE<sup>1</sup>

This appeal arises out of a legal malpractice action. Defendant William Heaton (“Heaton”), and the law firm of Nitz, Walton & Heaton, Ltd. (“NWH”) (collectively referred to as “Defendant”) failed to properly provide legal services to their clients

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1 In this case, Defendants refused to produce documents as part of their initial NRCP 16.1 disclosures. This forced Tower Homes to file a Motion to Compel Production of Documents before the Discovery Commissioner. 6 AA 901:10-14. On March 19, 2014, the Discovery Commissioner issued a Reports and Recommendation ordering Defendants to produce the entire pre-transaction and transaction file pertaining to Defendants’ representation of Tower Homes including all documents, papers, agreement, contract, correspondences, and memoranda. 6 AA 900. However, on March 25, 2014, the District Court granted Defendants’ Motion for Summary Judgment. 6 AA 907. Thus, Defendants never produced any documents in this litigation. As such, Tower Homes is citing to its Briefs and the documents contained therein to supports its assertions.

1 Rodney C. Yanke (hereinafter “Yanke”) and Tower Homes, LLC (“Tower Homes”) in  
2 the drafting of Purchase Contracts for the sale of condominium units in compliance  
3 with Nevada law. 2 AA 224. Defendants also failed to properly advise Yanke and Tower  
4 Homes pursuant to NRS 116.411 regarding their (Yanke and Tower Homes) duty to  
5 safeguard earnest money deposits. 1 AA 4: 8-18. Tower Homes marketed the sale of  
6 the condominium units to numerous individual investors (“Tower Homes Purchaser”).  
7 2 AA 291:21-26. The Tower Homes Purchasers deposited earnest money deposit pre-  
8 construction in order to reserve their purchase of the individual condominium units. Id.  
9 However, the condominium units were never completed and the Tower Homes  
10 Purchasers lost their earnest money deposits as a result of Yanke and Tower Homes’  
11 failure to preserve the funds as required under Nevada law. 2 AA 292:9-11.

12 On June 12, 2012, Tower Homes filed a Complaint naming Heaton and NWH as  
13 defendants asserting (1) negligence; and (2) breach of fiduciary duties. 1 AA 2. On  
14 February 18, 2014, Defendants Heaton and NWH filed their Motion for Summary  
15 Judgment. 5 AA 716. Defendants argued that because the Tower Homes Purchasers  
16 will ultimately benefit from any recovery in this legal malpractice action, the Tower  
17 Homes Purchasers are the real parties in interest. 5 AA 718:15-22. Defendants also  
18 argued that even if the Tower Homes Purchasers were actually the named plaintiffs in  
19 this action, under Nevada law, this would constitute an impermissible assignment of a  
20 legal malpractice action. Id.

21 On March 7, 2014, Plaintiff Tower Homes, LLC filed its Opposition to  
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1 Defendants' Motion for Summary Judgment. 6 AA 847. Tower Homes argued that it is  
2 indeed the proper plaintiff to this lawsuit because Tower Homes is the only party that  
3 had an attorney client relationship with Defendants. 6 AA 848:27-849:6. In addition,  
4 under Defendants' theory, if neither Tower Homes nor the Tower Homes Purchasers  
5 can be named as plaintiffs in this lawsuit, then essentially no one can be named as a  
6 plaintiff in this legal malpractice lawsuit. Id. Defendants filed their Reply on March 14,  
7 2014. 6 AA 869.

10 On May 15, 2014, the District Court Granting Defendants' Motion for Summary  
11 Judgment concluding that Tower Homes was not the real party in interest. 6 AA 909.  
12 Notice of Entry of Order Granting Defendants' Motion for Summary Judgment was  
13 entered on May 15, 2014. 6 AA 916. On May 28, 2014, Plaintiff filed its Notice of  
14 Appeal. 6 AA 925.

#### 17 IV. STATEMENT OF FACTS

##### 18 A. Yanke Retains Defendants to Provide Legal Services Necessary to Form 19 Tower Homes and Construct a Condominium Project.

20 Yanke is a licensed contractor in the State of Nevada who invested and  
21 developed real property in and around Clark County, Nevada. 1 AA 3:19-22. On or  
22 about April 3, 2004, Yanke retained Heaton and NWH to provide legal services and  
23 assist with the formation of Tower Homes, LLC ("Tower Homes"). 1 AA 3:23-27.  
24 Yanke was the managing member of Tower Homes. 1 AA 3:28-4. At that time, Yanke  
25 informed Heaton and NWH of his intent to construct a residential common interest  
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1 ownership project known as Spanish View Towers Project (hereinafter referred to as  
2 the "Project"). Id. Yanke, in his capacity as the manager of Tower Homes, informed  
3 Heaton and NWH that the Project was to consist of three (3) 18-story condominium  
4 towers combining for a total of 405 units located generally at the southwest corner of  
5 Interstate 215 and South Buffalo Drive in Las Vegas, Nevada. Id. Tower Homes  
6 marketed the individual units of a condominium project for sale to members of the  
7 public. 2 AA 258:1-7.

10 In addition to other legal services, Yanke requested that Heaton and NWH draft  
11 Purchase Contracts for the sale of the individual condominium units. 1 AA 4:7-17.  
12 Prior to and during the initial phases of construction, Tower marketed the individual  
13 units for sale to members of the public. Id. Heaton and NWH were obligated to  
14 properly advise Tower Homes of all applicable legal requirements concerning the sale  
15 of the individual units, including the applicability of Chapter 116 of the Nevada  
16 Revised Statutes concerning the safeguarding of earnest money deposit. Id.

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

22 Tower Homes then entered into written Purchase Contracts with numerous  
23 individual investors (collectively referred to as the "Tower Homes Purchasers") prior  
24 to the completion of construction. 2 AA 258:1-6; 2 AA 259:14-16. Each purchaser  
25 was to give Tower Homes a significant earnest money deposit in order to reserve their  
26 purchase of the individual condominium unit pending completion of construction. 2  
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1 AA 260. However, there were insufficient financing available for the Project's  
2 completion and thus, the Project failed. 2 AA 260:18-20. As a result of the Project's  
3 failure, many of the Tower Homes Purchasers lost millions of dollars of their money  
4 deposits. 2 AA 261:2-7; 2 AA 332:19-21. As a result of the Project's failure, there were  
5 over \$28,000,000.00 in mechanic's lien filed for the work on the Project. 2 AA 332:19-  
6 21.  
7  
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### 9 C. The Underlying Litigation

10 As a result of Heaton and NWH's failure to satisfy their legal obligations and  
11 duties to Tower Homes and Yanke, on or about May 23, 2007, certain Tower Homes  
12 Purchasers filed a Complaint in the Eighth Judicial District Court, in Gaynor, et. al v.  
13 Tower Homes, LLC, et al., Case No. A541668 against Tower Homes, Yanke, and  
14 other Defendants seeking the return of their earnest money deposits. 2 AA 256.  
15  
16

### 17 D. The Bankruptcy Proceeding and the Confirmation Order

18 On May 31, 2007, Bankruptcy proceedings in the United States Bankruptcy  
19 Court in the District of Nevada pursuant to Chapter 11 of the United States Bankruptcy  
20 Code were initiated against Tower Homes. 2 AA 333:10-13. Among Tower Homes'  
21 creditors were the individual Tower Homes Purchasers. 2 AA 332:27-333:3.  
22  
23

24 During the Bankruptcy proceedings, the Bankruptcy Court issued an "Order  
25 Approving Disclosure Statement and Confirming Plan of Reorganization" (the  
26 "Confirmation Order"). 2 AA 306. **Notably, the main purpose of the Confirmation**  
27 **Order was to provide solutions for the satisfaction of Creditor's Claims and**  
28

1 **payment on account of Creditor's Claim.** 2 AA 323:7-14. The Confirmation Order  
2 was also designed to allow for greater recovery by Creditors. 2 AA 323:24-324:11. In  
3  
4 Order to fulfil this purpose of paying Creditor's Claims, the Confirmation Order states  
5 in pertinent part as follows:

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

10 15. **The Trustee and the Debtor's bankruptcy estate shall retain all**  
11 **Claims and Causes of Action that they have or hold against any**  
12 **party**, including against "insiders" of the Debtor as that term is defined in  
13 Bankruptcy Code section 1010(31)), whether arising pre- or post-petition,  
14 subject to applicable state law statutes of limitation and related decisional  
laws, whether sounding in tort, contract or other theory or doctrine of law  
or equity . . . .

15 2 AA 311:3-18.

16 The Confirmation Plan further states that,  
17

18 The Trustee has lacked funds or other resources in the Estate to finance  
19 an investigation as to claims of Causes of Action that he, the Estate or the  
20 Debtor may hold. Accordingly, from and after the Confirmation Date, **the**  
21 **Trustee and the Estate shall retain all claims** or Causes of Action that  
22 they have or hold against any party, including the "insiders" the of Debtor  
23 . . . whether arising pre- or post-petition, subject to applicable state law  
statutes of limitations and related decisional law, whether sounding in tort,  
contract or other theory or doctrine of law or equity.

24 2 AA 370:16-22.

25 Thus, the Confirmation Order states that while the Trustee lack funds to  
26  
27 investigate all claims or causes of action that he may hold, the Trustee and the Estate  
28 retained all claims that Tower Homes had against any parties, and **the Trustee and the**

1 **Estate** has the authority to bring actions on behalf of Tower Homes asserting any  
2 future causes of actions including any future claims of legal malpractice. The purpose  
3 of bringing any action on behalf of Tower Homes was to protect and satisfy Creditors'  
4 Claims against the Estate.  
5

6 **E. The First Marquis Aurbach Order**  
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8 On June 3 2010, the Bankruptcy Court issued its Order Granting Motion to  
9 Approve Stipulation to Release Claims and Allow Marquis & Aurbach, as special  
10 counsel for the Tower Homes Purchasers to pursue claims on behalf of Debtor (Tower  
11 Homes) (hereon after referred to as the "First Marquis Aurbach" Order). *1 AA 405*.  
12

13 The First Marquis Aurbach Order states in pertinent part as follows:  
14

- 15 1) The "Trustee has determine that he does not intend, and in  
16 any event, does not have sufficient funds in the Estate to  
17 pursue claims on behalf of the Debtor against . . . any other  
18 individual or entity later identified through discovery which  
19 has or may have liability to Debtor or others for the loss of  
earnest money deposits provided by purchasers for units in  
the Spanish View Tower Homes condominium project."

20 *3 AA 408:26-409:5*.

21 The First Marquis Aurbach Order then states that,  
22

- 23 4) The "Trustee hereby stipulates and agrees to allow  
24 **Marquis & Aurbach**, as counsel for the Tower Homes  
25 Purchasers, **to pursue any and all claims on behalf of the**  
26 **[Tower Homes] against . . . any other individual or entity**  
27 **later identified though discovery which has or may have**  
28 **any liability or owed any duty to [Tower Homes] or**  
**others for the loss earnest money deposits provided by**  
**purchasers for units in the Spanish View Tower Homes**  
**condominium project.**"

1  
2 5) The "Trustee hereby stipulates and agrees to allow  
3 Marquis & Aurbach, as counsel for the Tower Homes  
4 Purchasers, to recovery any and all earnest monies deposits,  
5 damages, attorney's fees and costs, **and interest thereon on**  
6 **behalf of [Tower Homes] and the Tower Homes**  
**Purchasers with respect to those claims release to the**  
**Tower Homes Purchasers herein.**"

7 3 AA 409:20-410:2 (emphasis added).

8  
9 Thus, the First Marquis Aurbach Order allowed Marquis Aurbach to pursue any  
10 legal malpractice action **on behalf** of Tower Homes. The Bankruptcy Court approved  
11 this Order which allowed Tower Homes, as the Debtor, to pursue this legal malpractice  
12 claim. However, regardless of who brought the action on behalf of Tower Homes, it  
13 was Tower Homes' claim to file.

14  
15 In sum, the First Marquis Aurbach Order does not operate as an assignment of  
16 the legal malpractice claim. Tower Homes remained the claim holder. At best, the  
17 First Marquis Aurbach Order gave the Tower Homes Purchasers a right to receive any  
18 proceeds recovered from the legal malpractice action.  
19

#### 20 21 **F. The Present Legal Malpractice Action**

22 On June 12, 2012, Tower Homes, as a former client, filed this instant action  
23 against Defendants Heaton and NWH alleging claims for legal malpractice and breach  
24 of fiduciary duty. 1 AA 2.

#### 25 26 **G. Defendants' First Motion to Dismiss**

27 On July 19, 2012, Defendants filed their Motion to Dismiss, or in the  
28

1 alternative, Motion for Summary Judgment arguing. *1 AA 11*. Defendants argued, *inter*  
2 *alia*, that Tower Homes and the law firm of Prince | Keating do not have standing to  
3 pursue this cause of action based on federal law and the orders entered in the  
4 bankruptcy proceedings. *1 AA 17:24-18:5*. Instead, Defendants argued that only the  
5 Tower Homes Purchasers had the right to pursue any claims through its attorneys,  
6 Marquis & Aurbach. *1 AA 18: 17-19*.

9 Defendants' Motion to Dismiss, or in the alternative, Motion for Summary  
10 Judgment was heard on October 3, 2012. *4 AA 466*. With regard to Tower Homes and  
11 Prince | Keating's standing, the District Court ruled that the "Marquis Aurbach Order"  
12 does not authorize Tower Homes to bring this action through the law firm of Prince |  
13 Keating against Defendants but that Tower Homes may attempt to remedy this  
14 procedural defect by obtaining the requisite authority from Tower Homes' Bankruptcy  
15 Trustee and Order from the Bankruptcy Court. *4 AA 467:10-15*. The District Court  
16 also ruled that this was a procedural defect and not a fatal defect. *Id.* at 10-12. The  
17 District Court then denied Defendants' Motion for Summary Judgment and stayed the  
18 matter until Tower Homes obtained the requisite authority for this action from the  
19 Bankruptcy Trustee and Order from the Bankruptcy Court.<sup>2</sup> *Id.* 16-18.

24 ///

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1       **H. The Second Marquis Aurbach Order Permitted Tower Homes to Pursue**  
2       **This Action Against Defendants for The Benefit of The Tower Homes**  
3       **Purchasers.**

4       Pursuant to the District Court's October 3, 2012 Order, on April 2, 2013, Tower  
5       Homes obtained an "Order Granting Motion to Approve Amended Stipulation to  
6       Release Claims and Allow Marquis Aurbach Coffing, as Counsel for the Tower Homes  
7       Purchasers, To Pursue Claims on Behalf of Debtor" (hereon after referred to as the  
8       "Second Marquis Aurbach Order"). 4 AA 594.

10       The Second Marquis Aurbach Order stated in pertinent part as follows:

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

21       4 AA 595:7-14 (emphasis added).

22       As emphasized above, the Second Marquis Aurbach Order specifically  
23       permitted Tower Homes to bring this current lawsuit against Defendants. Thus, the  
24       Trustee was permitting Tower Homes to bring forth a legal malpractice action against  
25       Defendants on behalf of itself.

26       The Second Marquis Aurbach Order further states:

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2       This Appeal does not challenge the District Court's October 3, 2012 Order.



1                   **IT IS FURTHER ORDERED ADJUDGED AND DECREED**  
2                   that this Court hereby authorizes the law firm of Marquis Aurbach  
3                   Coffing, and/ or Prince & Keating, or successive counsel, retained on  
4                   behalf of Tower Homes Purchasers to recover any and all earnest  
5                   money deposits, damages, attorney's fees and costs, and interest  
6                   **thereon on behalf of [Tower Homes] and the Tower Homes**  
7                   **Purchasers and that any such recoveries shall be for the benefit of**  
8                   **the Tower Homes Purchasers.**

9                   4 AA 595:15-20 (emphasis added).

10                  Thus, the Second Marquis Aurbach Order allowed Prince | Keating to bring  
11                  forth this action on behalf of Tower Homes but the proceeds of any recovery would be  
12                  for the benefit of the Tower Homes Purchasers. The Second Marques Aurbach Order  
13                  clarified that the Trustee was not "assigning" the legal malpractice claim to the Tower  
14                  Homes Purchasers. Instead, the Second Marques Aurbach Order permitted the Trustee,  
15                  the estate of Tower Homes, and Tower Homes to pursue any action on behalf of Tower  
16                  Homes only, but that the Tower Homes Purchasers had the right to receive proceeds  
17                  from any recovery.

18                  Notably, because the Tower Homes Purchasers were Creditors, and because the  
19                  purpose of the Confirmation Order and the subsequent Marquis Aurbach Orders were  
20                  to pay Creditors' Claims, the Tower Homes Purchasers, along with other creditors,  
21                  were always going to be the beneficiaries of any lawsuit filed by the Trustee or Tower  
22                  Homes against Defendants. 2 AA 332:27-333:3; 2 AA 323:7-14.

23                  **I. Defendants' Renewed Motion to Dismiss**

24                  On July 26, 2013, NWH filed a Renewed Motion to Dismiss again arguing that  
25

1 Tower Homes is not the proper party to this litigation, and that the only party with  
2 authorization to bring forth this legal malpractice claim against Defendants is the  
3 Tower Homes Purchasers. 4 AA 469.

5 On August 28, 2013, the District Court denied Defendants' Renewed Motion to  
6 Dismiss and held that "any procedural defect at issue in the Court's October 3, 2012  
7 Order Regarding Defendants' Motion to Dismiss, or in the alternative, Motion for  
8 Summary Judgment has been cured."<sup>3</sup> 5 AA 715:1-5.

10 **J. The District Court Grants Heaton and NWH' Motion for Summary**  
11 **Judgment.**

12 Even after Defendants' argument that Tower Homes is not the proper party to  
13 bring forth this legal malpractice action against Heaton and NWH was rejected twice  
14 by the District Court, on February 18, 2014, Defendants filed their Motion for  
15 Summary Judgment. 5 AA 716. Defendants once again argued that because the Tower  
16 Homes Purchasers will ultimately benefit from this lawsuit, the Tower Homes  
17 Purchaser are the real party in interest. 5 AA 718:15-22. Defendants also argued that  
18 even if the Tower Homes Purchasers were named as plaintiffs, this would constitute an  
19 impermissible assignment of a legal malpractice claim pursuant to Chafee v. Smith, 98  
20 Nev. 222 (1982). Id.

21 On March 7, 2014, Tower Homes filed its Opposition. 6 AA 847. Tower Homes  
22 argued that Tower Homes is the proper party to this litigation because Tower Homes is  
23  
24

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25 3 This Appeal does not Challenge the District Court's August 28, 2013 Order.

1 the only party with the attorney client relationship with Heaton and NWH. 6 AA  
2 855:25-858:13. Tower Homes also argued that under Defendants' argument, if neither  
3 Tower Homes nor the Tower Homes Purchaser can bring this legal malpractice action,  
4 then essentially no one can bring forth this legal malpractice action. 6 AA 849:1-6.  
5

6 On May 15, 2014, the District Court granted Heaton and NWH's Motion for  
7 Summary Judgment concluding that Tower Homes is not the real party in interest. 6  
8 AA 915:3-10. The District Court found that the First and Second Marquis Aurbach  
9 Orders did not "assign" the legal malpractice claims to the Tower Homes Purchasers.  
10 6 AA 913:11-12. However, the District Court then held that because Tower Homes is  
11 bringing this legal malpractice action for the sole benefit of the Tower Homes  
12 Purchasers, "then it cannot be said that the Tower Homes Purchasers are pursuing the  
13 legal malpractice claim in the name of the Debtor for the benefit of the Bankruptcy  
14 Estate." 6 AA 915:3-6. The District Court then concluded that the language in the First  
15 and Second Marques Aurbach Orders amounts to an invalid assignment of a legal  
16 malpractice claim under Chaffee v. Smith, 98 Nev. 222 (1982). 6 AA 915:6-11.  
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## 21 **V. SUMMARY OF ARGUMENT**

22 The District Court erred by granting Defendants' Motion for Summary  
23 Judgment as the District Court ignored the fact that the Tower Homes is the only party  
24 with an attorney client relationship with Heaton and NWH. As such, Tower Homes is  
25 the real party in interest with standing to pursue this legal malpractice action against  
26 Heaton and NWH.  
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1 In addition, while the District Court recognized that the First and Second  
2 Marquis Aurbach Orders did not “assign” the legal malpractice claim to the Tower  
3 Homes Purchasers, the District Court failed to recognize that the assignment of  
4 proceeds of the Tower Homes’ malpractice claim to the Tower Homes Purchasers is  
5 permissible under Nevada law. Achrem v. Expressway Plaza Ltd. Partnership, 112  
6 Nev. 738, 917 P.2d 447 (1996).  
7

8  
9 Similarly, the District Court overlooked the fact that under any circumstance,  
10 whether this legal malpractice action was brought by the Trustee himself or the Estate,  
11 pursuant to the Confirmation Order, the purpose of the lawsuit and any recovery would  
12 have been used by the Estate and the Trustee to pay and satisfy Creditors’ Claims. 2  
13 AA 323:7-14; 2 AA 323:24-324:11. Consequently, because the Tower Homes  
14 Purchasers are Creditors under the Confirmation Order, they will always be the  
15 ultimate beneficiaries of any legal malpractice brought against Defendants under any  
16 circumstance.  
17  
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19  
20 Further, the Trustee has inherent powers to permit Tower Homes to bring forth  
21 this legal malpractice action as outline in the Second Marquis Aurbach Order.  
22

23 Even if there was an assignment of the legal malpractice claim, Chaffee v. Smith  
24 does not prohibit the Trustee from assigning the legal malpractice to the Tower Homes  
25 Purchaser on behalf of Tower Homes. Instead, Chaffee narrowly prohibited a legal  
26 malpractice action which has been transferred by assignment or by levy and execution  
27 sale, but which was never pursued by the original client. Chaffee v. Smith, 98 Nev.  
28

222, 224, 645 P.2d 966, 966 (1982).

Thus, this Court should reverse the District Court's Order granting Heaton and NWH's Motion for Summary Judgment and rule that Tower Homes is the real party in interest with standing to pursue this legal malpractice action against Defendants.

## VI. STANDARD OF REVIEW

On appeal, this Court review orders of summary judgment de novo and consider the record in the light most favorable to the non-prevailing party. Auckenthaler v. Grundmeyer, 110 Nev. 682, 684, 877 P.2d 1039, 1040 (1994). Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, indicates there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. NRCP 56(c); see Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985). If a reasonable jury could find for the non-moving party, summary judgment is inappropriate. Oehler v. Humana, Inc., 105 Nev. 348, 350, 775 P.2d 1271, 1272 (1989).

## VII. LEGAL ARGUMENT

### A. TOWER HOMES IS THE PROPER PARTY TO THIS LITIGATION BECAUSE TOWER HOMES IS THE ONLY PARTY WITH THE ATTORNEY CLIENT RELATIONSHIP WITH DEFENDANTS

As an initial matter, NRCP 17(a) provides in relevant part as follows:

Every action shall be prosecuted in the name of the real party in interest ....  
[A] party with whom or in whose name a contract has been made for  
the benefit of another ... may sue in his own name without joining with him  
the party for whose benefit the action is brought ....

1 A “real party in interest” under NRCP 17(a) is one who possesses the right to  
2 enforce the claim and has a significant interest in the litigation. Szilagyi v. Testa, 99  
3 Nev. 834, 838, 673 P.2d 495, 498 (1983).

4  
5 Under Nevada law, in order for a plaintiff to assert a cause of action for legal  
6 malpractice, a plaintiff must prove the following five elements: (1) an **attorney-client**  
7 **relationship**; (2) a duty owed to the client by the attorney to use such skill, prudence,  
8 and diligence as lawyers of ordinary skill and capacity possess in exercising and  
9 performing the tasks which they undertake; (3) a breach of that duty; (4) the breach  
10 being the proximate cause of the client's damages; and (5) actual loss or damage  
11 resulting from the negligence. Day v. Zubel, 112 Nev. 972, 976, 922 P.2d 536, 538  
12 (1996) (emphasis added).

13  
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15  
16 An attorney-client relationship exists when (1) a person seeks advice or  
17 assistance from an attorney, (2) the advice or assistance sought pertains to matters  
18 within the attorney’s professional competence, and (3) the attorney expressly or  
19 impliedly agrees to give or actually gives the desired advice or assistance. Todd v.  
20 State, 113 Nev. 18, 24, 931 P.2d 721, 725 (1997).

21  
22  
23 In this case, an attorney client relationship existed solely between Tower Homes  
24 and Heaton and NWH. *6 AA 902:13-14; 1 AA 4:8-17*. The Tower Homes Purchasers  
25 did not have an attorney-client relationship with Heaton and the NWH. Tower Homes  
26 retained Heaton and NWH to assist in the formation of Tower Homes, LLC and to  
27 draft Purchase Contract for the individual units. *1 AA 3:23-AA 4:17*. Heaton and NWH  
28

1 owed fiduciary duties to Tower Homes. Tower Homes was harmed by Heaton and  
2 NWH's legal malpractice. Thus, because Tower Homes is the only entity with an  
3 attorney client relationship with Heaton and NWH, Tower Homes is the real party in  
4 interest with standing in this legal malpractice action against Heaton and NWH.  
5

6 **B. THE ASSIGNMENT OF THE PROCEEDS OF TOWER HOMES'  
7 LEGAL MALPRACTICE ACTION AGAINST DEFENDANTS IS  
8 PERMITTED UNDER NEVADA LAW AND DOES NOT AFFECT  
9 TOWER HOMES' STANDING TO PURSUE THIS LEGAL  
10 MALPRACTICE ACTION AGAINST DEFENDANTS.**

11 Here, the District Court erred when it essentially ruled that Tower Homes is not  
12 the real party in interest because any recovery of proceeds from this litigation will be  
13 for the benefit of the Tower Homes Purchasers. *4 AA 915:3-10*. This ruling conflated  
14 the issue regarding an assignment of a claim itself versus and an assignment of  
15 proceeds of a claim. The District Court failed to recognize that assignment of proceeds  
16 to a claim is permissible under established Nevada law.  
17

18 **1) Achrem v. Expressway Plaza Allows For Assignment of Proceeds In a**  
19 **Lawsuit to a Third Party.**

20 This Court has already ruled that assignment of proceeds in a litigation is  
21 permitted. Achrem v. Expressway Plaza Ltd. Partnership, 112 Nev. 738, 917 P.2d  
22 447 (1996). For example, in Achrem v. Expressway Plaza Ltd. Partnership, the  
23 plaintiffs filed a personal injury lawsuit against the school after sustaining injuries at  
24 school. Id. at 738, 917 P.2d at 447. The plaintiffs eventually settled with the school for  
25 \$45,000.00. Id. However, prior to the injuries, the plaintiffs lease part of a building  
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1 from a third party and failed to pay rent. Id. The plaintiffs then assigned part of the  
2 plaintiffs' proceeds from the lawsuit against the school to the third party. When the  
3 plaintiffs' lawyer failed to pay the third party its share of the settlement pursuant to the  
4 assignment, the third party sued the plaintiffs' lawyer. Id. There, this Court held that an  
5 assignment of the proceeds of a tort action is allowed under Nevada law. Id. at 742-  
6 743, 917 P.2d at 450.  
7

8  
9 In reaching its ruling, this Court recognized that "some states draw a distinction  
10 between the assignment of an action itself and the assignment of the proceeds of that  
11 action." Id. at 740, 917 P.2d at 448 (citation omitted). This Court recognized that the  
12 policy considerations underlying the prohibition against assignments of tort actions are  
13 not present in the assignment of the proceeds of an action. Id. Specifically, when a tort  
14 action is assigned, the assignor loses the right to pursue the action. Id. (citing In re  
15 Musser, 24 B.R. 913, 920–21 (W.D.Va.1982)). However, when the proceeds of an  
16 action are assigned, the assignor retains control of the action, and the assignee cannot  
17 pursue the action independently. Id. Based on this reasoning, this Court in Achrem  
18 recognized that many courts allow assignment agreements that assign the proceeds of a  
19 tort action. Id. (citing In re Duty, 78 B.R. 111, 114–16 (Bankr.E.D.Va.1987); Bernstein  
20 v. Allstate Ins. Co., 56 Misc.2d 341, 288 N.Y.S.2d 646, 648–49 (New York  
21 1968); Neilson Rlty. Corp. v. Motor Vehicle Acc. Indem. Corp., 47 Misc.2d 260, 262  
22 N.Y.S.2d 652, 657–58 (App.Div.1965).  
23  
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28 In Achrem, the plaintiffs retained control of their lawsuit against the school



1 district without any interference from the third party. Id. at 741, 917 P.2d at 449. Thus,  
2 this Court concluded that the public policy against assigning tort actions was not  
3 present in Achrem. Id.  
4

5 In this case, the Second Marquis Order permitted Tower Homes to bring forth  
6 this legal malpractice action against Defendants with any recovery being for the benefit  
7 of the Tower Homes Purchasers. Pursuant to Achrem, this is a valid and permissible  
8 assignment of proceeds of a claim. In addition, the mere fact that there has been an  
9 assignment of proceeds to the Tower Homes Purchaser does not affect Tower Homes'  
10 standing to pursue this legal malpractice action. Applying the logic in Achrem, Tower  
11 Homes is still in control of its lawsuit against Heaton and NWH. The Tower Homes  
12 Purchasers are not interfering with Tower Homes' legal malpractice lawsuit in any  
13 way. Thus, Tower Homes still has standing to pursue this legal malpractice action.  
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17 **2) Other Jurisdictions Also Permit Assignment of Proceeds in a Legal**  
18 **Malpractice Action to a Third Party.**

19 Other jurisdictions also permit assignment of proceeds in a legal malpractice  
20 action. For example, in Weston v. Dowty, 163 Mich. App. 238, 414 N.W.2d 165  
21 (1987), Ella Sharpe was injured as a result of a slip and fall at a home owned by  
22 plaintiffs. Id. at 239, 414 N.W.2d at 166. Sharpe brought suit against plaintiffs and  
23 plaintiffs retained defendants (law firm) to defend them in that action. Id. The law firm  
24 failed to comply with discovery orders and allowed a default judgment to be entered  
25 against plaintiffs. Id. Sharpe and plaintiffs then entered into a consent judgment where  
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1 plaintiffs agreed to file a legal malpractice action against defendants and assign any  
2 monies received as damages in that suit to Sharpe. Id. Plaintiffs then instituted a legal  
3 malpractice action against defendants. Id. The defendants (law firm) filed a motion for  
4 summary judgment arguing that plaintiff's assignment of the proceeds of the  
5 malpractice action to Sharpe constituted an assignment of the action to Sharpe in  
6 violation of Michigan law, and therefore, the legal malpractice suit should be  
7 dismissed. Id. Defendants also argued that was the real party in interest since only she  
8 stood to gain if plaintiffs' were successful in their suit against defendants. Id. at 242,  
9 414 N.W.2d at 167. The trial court granted the law firms' Motion for Summary  
10 Judgment. On appeal, the Michigan Court of Appeals reversed the trial court's decision  
11 and held that,  
12  
13  
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16 In the instant case, plaintiffs, not Sharpe, are the real parties in interest.  
17 Plaintiffs contracted for defendants' services, and suffered the loss. Any  
18 duty owed by defendants was to plaintiffs. **It is irrelevant to the**  
19 **determination of the real party in interest that plaintiffs attempted to**  
20 **reduce their damages through entering a consent judgment with**  
21 **Sharpe.** Plaintiffs were the real party in interest although, under the terms  
22 of the consent judgment, Sharpe obtained a beneficial interest in the  
23 lawsuit.

24 Id. at 242-243, 414 N.W.2d at 167 (emphasis added).

25 Notably, the court ruled that "even if there had been an invalid assignment, this  
26 would not warrant dismissal of the lawsuit. Instead, the assignment would be void, but  
27 the underlying action would survive." Id. at 243, 414 N.W.2d at 167.

28 Applying the reasoning in Weston to this case, as stated above, Tower Homes is

1 the real party in interest. It was Tower Homes who contracted for Defendants' services  
2 and Defendants owed duties to Tower Homes. The fact that the proceeds of Tower  
3 Homes' legal malpractice action against Heaton and NWH has been assigned to the  
4 Tower Homes Purchasers is simply irrelevant to the determination of who are the real  
5 parties in interest.  
6

7  
8 Likewise, applying the reasoning in Weston, even assuming the Second Marquis  
9 Aurbach Order assigning Tower Homes' legal malpractice claim to the Tower Homes  
10 Purchasers violates Nevada law, this violation is does not warrant dismissal of Tower  
11 Homes' legal malpractice action against Defendant. The validity of the assignment of  
12 proceeds is immaterial to the question of who is the real party in interest with standing  
13 to sue Defendants.  
14  
15

16 **3) The Tower Homes Purchasers, as a Creditors of the Bankruptcy**  
17 **Estate, Will Always Be the Beneficiaries Of Any Proceeds From This**  
18 **Litigation.**

19 Further the District Court's ruling that,

20 [I]t cannot be said that the Tower Homes Purchasers are pursuing the  
21 legal malpractice claim in the name of the Debtor and for the benefit of  
22 the Bankruptcy estate. Rather the sole benefit appears to be for the  
23 Purchasers. 6 AA 915:3-7.

24 completely ignores the fact that the Tower Homes Purchasers are Creditors of the  
25 Tower Homes Bankruptcy Estate and as such, the Tower Homes Purchaser will always  
26 be the beneficiaries of any lawsuit brought forth by the Trustee or Tower Homes  
27 against Defendants. 2 AA 323:7-14; 2 AA 332:27-333:3.  
28

1 For example, it is undisputed that the Trustee could have brought forth this legal  
2 malpractice action against Defendants. If the Trustee was successful in his legal  
3 malpractice lawsuit against Defendants, then the proceeds of the recovery will be for  
4 the Bankruptcy Estate. However, pursuant to the Confirmation Plan, the proceeds of  
5 the Bankruptcy Estate will ultimately be used to pay Creditors' Claims. 2 AA 323:7-14;  
6 2 AA 323:24-324:11. Because the Tower Homes Purchasers are among the Creditors,  
7 the Trustee's legal malpractice action will still be for the benefit of the Tower Homes  
8 Purchaser as well as for other Creditors. 2 AA 332:27-333:3.

9 In sum, irrespective of whether the Trustee or Tower Homes is bringing a legal  
10 malpractice action on behalf of Tower Homes, under both scenarios, the Tower Homes  
11 Purchasers as Creditors, will always be beneficiaries of any recovery. However, the  
12 mere fact that the Tower Homes Purchasers will ultimately benefit from any recovery  
13 in this legal malpractice action does not affect Tower Homes' standing to bring forth  
14 the legal malpractice action against Defendants. Stated differently, the assignment of  
15 proceeds is simply immaterial to the analysis of whether Tower Homes is the real party  
16 in interest with standing to pursue this litigation against Defendants.

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23 **C. THE TRUSTEE HAS INHERENT POWERS TO PERMIT TOWER**  
24 **HOMES TO PURSUE THIS LEGAL MALPRACTICE ACTION**  
25 **AGAINST DEFENDANTS.**

26 **1) The Trustee Had Inherent Powers Under Federal Law to Permit**  
27 **Tower Homes (Debtor) to Pursue a Legal Malpractice Lawsuit on**  
28 **Behalf of Tower Homes Against Defendants.**

When a bankruptcy petition is filed, an "estate" is created, consisting of all of

1 the debtor's interests, both legal and equitable, in all property, both tangible and  
2 intangible. 11 U.S.C. § 541; Suter v. Goedert, 396 B.R. 535, 541 (D.Nev. 2008)  
3 (citations omitted). It follows that even claims that are not assignable under state law  
4 transfer to the bankruptcy estate. Baum v. Duckor, Spradling & Metzger, 72  
5 Cal.App.4th 54, 69, 84 Cal.Rptr.2d 703. Once the claim becomes part of the  
6 bankruptcy estate, the trustee is authorized to prosecute it and to hire agents to do so on  
7 the trustee's behalf. Id.

10 Federal law permits a Chapter 11 bankruptcy plan to provide for the transfer of a  
11 claim by operation of law from a trustee to a representative of the bankruptcy estate.  
12 Office of Statewide Health Planning and Development v. Musick, Peeler & Garrett, 76  
13 Cal.App.4th 830, 834, 90 Cal.Rptr.2d 705, 708 (Cal.App. 2 Dist. 1999). Under 11  
14 U.S.C. § 1123(b)(3), a Chapter 11 bankruptcy plan may provide for “the retention and  
15 enforcement *by the debtor, by the trustee, or by a representative of the estate* appointed  
16 for such purpose, of any such claim or interest[.]” (Emphasis added.). Under the  
17 statute, the party enforcing the claim does so on behalf of the estate. Appletree Square I  
18 Limited Partnership v. O'Connor & Hannan, 575 N.W.2d 102 (Minn.1998).  
19 “Acquisitions of this nature, where the entity [special representative] bringing the  
20 action merely is representing the original holder, do not come within the traditional  
21 definition of an assignment.” Id. at 105. A representative is “invest[ed]” with the  
22 ability to pursue a claim without an assignment. Id. at p. 106.

1           Regardless of who prosecutes a claim under 11 USC § 1123(b)(3), the claim  
2 remains part of the bankruptcy estate. Office of Statewide Health Planning and  
3 Development, 76 Cal.App.4th at 834, 90 Cal.Rptr.2d at 708. On the other hand, if a  
4 party seeks to prosecute the action on its own behalf, it must do so as an assignee, not  
5 as a special representative. Jackson Nat. Life Ins. v. Greycliff Partners Ltd., 960  
6 F.Supp. 186 (E.D.Wis.1997).  
7

8  
9           In this case, the Second Marques Aurbach Order, (consistent with the Trustee's  
10 inherent powers in Chapter 11 bankruptcy), shows that the Trustee was permitting  
11 Tower Homes (Debtor) to pursue the legal malpractice action against Heaton and  
12 NWH on behalf of the estate (i.e. Tower Homes). 4 AA 595:7-14. Specifically, the  
13 Second Marques Aurbach Order states as follows:  
14  
15

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

26 Id.

27           As emphasized above, the Second Marques Aurbach Order states that the  
28 Trustee is permitting the current action entitled **Tower Homes, LLC v. William**  
**Heaton et. al. Case No. A-12-663341-C.** This clearly implies that the Trustee was

1 aware of the current lawsuit filed by Tower Homes, LLC in the Eighth Judicial District  
2 Court against Defendants. Thus, because the Trustee permitted Tower Homes to bring  
3 forth this legal malpractice action, there is no question that Tower Homes has standing  
4 to pursue this legal malpractice action against Defendants.  
5

6  
7 **2) Even if The Assignment of Proceeds of Tower Homes' Legal**  
8 **Malpractice Action to the Tower Homes Purchasers Violated Federal**  
9 **or State Law, Then the Proceeds Should Simply Revert Back to the**  
10 **Bankruptcy Estate.**

11 However, even assuming *arguendo* that it is against federal or state law to  
12 assign the proceeds of Tower Homes' legal malpractice lawsuit to the Tower Homes  
13 Purchasers, this does not somehow strip Tower Homes of standing to pursue this legal  
14 action nor does it warrant dismissal of Tower Homes' lawsuit. See 11 USC §  
15 1123(b)(3) (stating a Chapter 11 bankruptcy plan may provide for "the retention and  
16 enforcement *by the debtor, by the trustee, or by a representative of the estate* appointed  
17 for such purpose, of any such claim or interest[.]"). At best, even if the assignment of  
18 proceeds to the Towers Homes Purchasers constituted a violation of federal law or an  
19 improper assignment of a legal malpractice action pursuant to state law, then that  
20 specific part of the order should be void and the benefits of the legal malpractice action  
21 should revert back to the Bankruptcy Estate. See Office of Statewide Health Planning  
22 and Development, 76 Cal.App.4th at 834, 90 Cal.Rptr.2d at 708 (stating regardless of  
23 who prosecutes a claim under 11 United States Code section 1123(b)(3), the claim  
24 remains part of the bankruptcy estate.); Weston, 163 Mich. App. 238, 414 N.W. 2d at  
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1 167 (stating even if there had been an invalid assignment, this would not warrant  
2 dismissal of the lawsuit. Instead, the assignment would be void, but the underlying  
3 action would survive.”). Pursuant to the inherent powers of the Trustee and  
4 Confirmation Order, Tower Homes is still authorized to bring forth this legal  
5 malpractice action against Defendants with the proceeds simply reverting back to the  
6 Estate.  
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8  
9 Notably, as previously discussed, even if the proceeds of Tower Homes’ legal  
10 malpractice action against Defendants revert back to the Bankruptcy Estate, pursuant to  
11 the Confirmation Order, the proceeds of the Bankruptcy Estate will then ultimately be  
12 used to pay Creditors’ Claims. 2 AA 323:7-14; 2 AA 323:24-324:11. However,  
13 Defendants need not concern itself with who will ultimately obtain the proceeds of any  
14 recovery from Tower Homes’ legal malpractice action. Instead the issue of who will  
15 benefit from any recovery from the legal malpractice action is between Bankruptcy  
16 Estate and its Creditors.  
17  
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19

20 For example, in Arguello v. Sunset Station, Inc., 252 P.3d 206 (Nev. 2011),  
21 Arguello parked his car at Sunset Station Casino’s valet parking lot. Id. at 208.  
22 Thereafter, when Arguello attempted to retrieve his vehicle, he was informed by  
23 Sunset Station that his car was stolen. Id. Arguello then submitted a claim to his insurer  
24 Farmers’ Insurance. Id. Farmers’ tendered the amount of \$20,434.98 which represented  
25 Farmers’ valuation of Arguello’s vehicle less his \$500 deductible. Id. Arguello then  
26 filed suit against Sunset Station seeking damages for the amount he paid for the  
27  
28



1 customization of his vehicle. Id. at 209. Sunset Station moved for summary judgment  
2 arguing that Arguello did not have standing to sue because Farmers became subrogated  
3 to the rights of Arguello when it issued a check for his insurance claim. Id.  
4

5 In holding that Arguello was indeed a real party in interest with standing to sue  
6 Sunset Station for the entire loss of his vehicle, this Court reasoned,  
7

8 Arguello was only partially compensated by Farmer's, and therefore, he  
9 retains the right to pursue an action against Sunset Station for the full  
10 amount of his recoverable losses. If Arguello receives a damages award  
11 that fully compensates him for such losses, then Farmer's may be entitled  
12 to reimbursement of its payments to him, but his right to first sue Sunset  
13 Station for those losses is unaffected.

14 Id. (quoting Bryan v. Southern Pac. Co., 79 Ariz. 253, 262, 286 P.2d 761, 766-67  
15 (1955) (“The general rule is that where the loss exceeds the amount of insurance paid,  
16 **the insured may sue in his own name and recover the full amount of the loss, the**  
17 **question of the distribution [of the proceeds] being a matter between the insured**  
18 **and the insurer only.”). (Emphasis added).**

19 **D. THE HOLDING IN *CHAFFEE V. SMITH* IS NARROW AND DOES NOT**  
20 **PROHIBIT TOWER HOMES FROM BRINGING FORTH THIS LEGAL**  
21 **MALPRACTICE ACTION AGAINST DEFENDANTS**

22 Further, the District Court erred in relying on Chaffee to hold that Tower  
23 Homes’ lawsuit against Heaton and NWH is against public policy as Chaffee is not  
24 applicable to the present case.

25 In Chaffee, the plaintiff, Kyoko Chaffee, obtained a judgment in a wrongful  
26 death action against Airline Training Academy (ATA), in which attorney Smith  
27 represented ATA. Chaffee v. Smith, 98 Nev. 222, 223, 645 P.2d 966, 966 (1982). The  
28 plaintiff then acquired ATA’s legal malpractice cause of action against Smith through a

1 levy and execution sale of ATA's property. Id. The plaintiff then sued Smith for legal  
2 malpractice in his representation of ATA during the wrongful death action. Id. The  
3 trial court granted Smith's motion for summary judgment and this Court affirmed. Id.  
4 This Court held that as a matter of public policy, previously unasserted legal  
5 malpractice actions may not be enforced by an assignee or transferee. Id. This Court  
6 then held that “[a]s a matter of public policy, we cannot permit enforcement of a legal  
7 malpractice action which has been transferred by assignment or by levy and execution  
8 sale, **but which was never pursued by the original client.**” Id. (emphasis added).  
9 This Court noted that the “decision as to whether to bring a malpractice action against  
10 an attorney is one particularly vested in the client.” Id. This Court however,  
11 specifically reserved opinion on “whether previously asserted legal malpractice actions  
12 are transferable.” Id.

13 The facts of this case is completely different from the facts in Chaffee. First,  
14 unlike in Chaffee, in this case, the District Court has already ruled that the First and  
15 Second Marque Aurbach Orders did not “assign” the legal malpractice claim to the  
16 Tower Homes Purchasers. *6 AA 913: 11-13.*

17 In addition, unlike in Chaffee where the legal malpractice claim was not pursued  
18 by the original client, in this case, the legal malpractice lawsuit is being pursued by the  
19 original client (Tower Homes). *1 AA 3:23-27.* Tower Homes in bringing forth this  
20 legal malpractice action on its own behalf. *1 AA 2.* The fact that the Tower Homes  
21 Purchasers will benefit from Tower Homes’ legal malpractice action is irrelevant as  
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1 Chaffee does not prohibit a legal malpractice action by a former client where there has  
2 been an assignment of the proceeds to a third party. In fact, allowing Tower Homes to  
3 bring forth this legal malpractice action for the benefit of the Tower Homes  
4 Purchasers is consistent with the Court's holding in Chaffee as Chaffee held that  
5 "[t]he decision as to whether to bring a malpractice action against an attorney is one  
6 peculiarly vested in the client." Chaffee, 98 Nev. at 224, 645 P.2d at 966. Because  
7 Tower Homes is the client, Tower Homes is the real party in interest with standing to  
8 pursue this legal malpractice action against Defendants.

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12 **E. THIS COURT SHOULD NOT ADOPT A PER SE BAR ON ALL**  
13 **ASSIGNMENT OF LEGAL MALPRACTICE CLAIMS.**

14 Even if the Trustee assigned its legal malpractice claims to the Tower Homes  
15 Purchasers, this Court should not impose a per se rule barring all assignment of legal  
16 malpractice claims.

17  
18 Jurisdiction that have concluded that legal malpractice claims are not assignable  
19 have based their conclusion on several overlapping public policy considerations. See  
20 Goodley v. Wank & Wank, Inc., 62 Cal.App.3d 389, 395-96, 133 Cal.Rptr. 83 (1976).  
21 Many of those courts discuss the unique and personal nature of the relationship  
22 between attorney and client and the need to preserve the sanctity of that relationship as  
23 a reason for prohibiting the assignment. Id. at 397, 133 Cal.Rptr. 83 (1976) (citing  
24 "unique quality of legal services, the personal nature of the attorney's duty to the client  
25 and the confidentiality of the attorney-client relationship that invoke public policy  
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1 considerations in our conclusion that malpractice claims should not be subject to  
2 assignment.).

3  
4 Those courts also have cautioned that permitting the assignment of legal  
5 malpractice claims would encourage the commercialization of such claims and in turn  
6 spawn increased and unwarranted malpractice actions. Id. at 397.

7  
8 However, as discussed above, Nevada rejects a per se bar on all assignments of  
9 legal malpractice claims in favor of a case-by-case determination when meritorious  
10 public policy concerns actually are implicated. Chaffee, 98 Nev. 222, 223-24, 645 P.2d  
11 966 (1982) (assignment of previously unasserted claim barred because decision  
12 whether to bring such action is one “peculiarly vested” in client, but leaving open  
13 question of whether assignment is permitted if malpractice action already has been  
14 initiated); See Gallegos v. Malco Enterprises of Nevada, Inc., 255 P.3d 1287,  
15 1288 (Nev. 2011) (stating that a right of action held by a judgment debtor is property  
16 that can be judicially assigned in a proceeding supplementary to the execution of a  
17 judgment).

18  
19 Even California recognizes an exception to the blanket rule barring assignment  
20 of legal malpractice claims. See White Mountains Reinsurance Company of America v.  
21 Borton Petrini, LLP, 221 Cal.App.4th 890, 892, 164 Cal.Rptr.3d 912, 913 (Cal.App. 3  
22 Dist.2013) (stating although the general rule in California bars the assignment of a  
23 cause of action for legal malpractice, a cause of action for legal malpractice *is*  
24 transferable when (as here): (1) the assignment of the legal malpractice claim is only a  
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1 small, incidental part of a larger commercial transfer between insurance companies; (2)  
2 the larger transfer is of assets, rights, obligations, and liabilities and does not treat the  
3 legal malpractice claim as a distinct commodity; (3) the transfer is not to a former  
4 adversary; (4) the legal malpractice claim arose under circumstances where the original  
5 client insurance company retained the attorney to represent and defend an insured; and  
6 (5) the communications between the attorney and the original client insurance company  
7 were conducted via a third party claims administrator.).

8  
9  
10 This rejection of a per se bar on all assignment has been echoed in other  
11 jurisdictions. See Richter v. Analex Corp., 940 F.Supp. 353, 356-58 (D.D.C. 1996)  
12 (concluding that assignment not barred under facts of case when successor company  
13 asserted malpractice as counterclaim against predecessor company's counsel); Thurston  
14 v. Continental Casualty Co., 567 A.2d 922, 923 (Me.1989) (An assignment was  
15 permitted under the specific facts of the case wherein the defendant in the underlying  
16 action assigned to the plaintiff a claim against the defendant's insurer and the insurer's  
17 attorney for failure to defend or settle; the court reasoned that the policy concern about  
18 creating a commercial market for claims was inapplicable because "this assignee has an  
19 intimate connection with the underlying lawsuit" and rejecting as unpersuasive other  
20 policy concerns: "A legal malpractice claim is not for personal injury, but for economic  
21 harm.... The argument that legal services are personal and involve confidential  
22 attorney-client relationships does not justify preventing a client ... from realizing the  
23 value of its malpractice claim in what may be the most efficient way possible, namely,  
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1 its assignment to someone else with a clear interest in the claim who also has the time,  
2 energy and resources to bring the suit.” [Citations omitted.]); New Hampshire Ins. Co.  
3 v. McCann, 429 Mass. 202, 209-12, 707 N.E.2d 332 (1999) (stating that some  
4 concerns cited are “farfetched”; rejecting, inter alia, concern about disclosure of  
5 confidential information on ground that client assignor knowingly waives  
6 confidentiality by making assignment and concern about increased litigation on ground  
7 that there is no evidence of such increases); Hedlund Mfg. Co. v. Weiser, Stapler &  
8 Spivak, 517 Pa. 522, 525-26, 539 A.2d 357 (1988) (The court concluded that legal  
9 malpractice action involves a pecuniary interest and, thus, was not barred under the  
10 rule precluding the assignment of a personal injury claim, and rejected the public  
11 policy argument that the attorney-client relationship must be protected: “We will not  
12 allow the concept of the attorney-client relationship to be used as a shield by an  
13 attorney to protect him or her from the consequences of legal malpractice. Where the  
14 attorney has caused harm to his or her client, there is no relationship that remains to be  
15 protected.”); Cerberus Partners, L.P. v. Gadsby & Hannah, 728 A.2d 1057, 1059-61  
16 (R.I.1999) (questioning policy concerns generally and concluding that assignment was  
17 not barred under specific facts of case, where commercial loan agreement was assigned  
18 and assignee brought malpractice action against attorney who represented original  
19 lender in commercial loan transaction; contrasting majority of cases barring assignment  
20 wherein legal malpractice claim is transferred to person without any other rights or  
21 obligations being transferred along with it); Kommavongsa v. Haskell, 149 Wash.2d

1 288, 291, 67 P.3d 1068 (2003) (questioning validity of policy arguments barring all  
2 assignments but finding persuasive policy arguments regarding assignment to party in  
3 underlying action).  
4

5 In this case, even if the Trustee assigned his legal malpractice claim to the  
6 Tower Homes Purchasers, public policy would not be served by imposing a blanket  
7 rule prohibiting the assignment of this legal malpractice claim. Instead, this case is an  
8 example of a situation where public policy is served by allowing the Trustee to assign  
9 his legal malpractice claim.  
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12 Here, the Tower Homes Purchasers and other creditors were harmed by  
13 Defendants' legal malpractice. The Project was originally envisioned to cost over  
14 \$600,000.00. 2 AA 332:19-20. Approximately \$90,0000.000 was invested into the  
15 Project. 2 AA 332:19-21. In fact, the Tower Homes Purchasers, Yanke and other  
16 affiliates collectively invested approximately \$28,000,000.00. Id. A loan servicer  
17 invested approximately \$36,000,000.00. As a result of Defendants' failure to properly  
18 counsel and advise Yanke and Tower Homes of all applicable legal requirements  
19 concerning the sale of the individual units, including the applicability of Chapter 116  
20 of the Nevada Revised Statutes, this created the risk that the earnest money deposits  
21 would be used for unlawful purposes to the detriment of Tower Homes and Yanke. /  
22 AA 5:8-15. This ultimately led to the Tower Homes Purchasers losing their earnest  
23 deposit money. 2 AA 275:13-16. Other various mechanical lien claimants also asserted  
24 that they are owed in excess of \$30,000,000. Id. at 24-26. Thus, Defendants' legal  
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1 malpractice not only harmed Tower Homes, it also harmed the Tower Homes  
2 Purchaser and various other creditors.

3  
4 Further, while the Bankruptcy Trustee unequivocally can bring this legal  
5 malpractice action against Defendants, in this case, the Trustee stated that he does not  
6 have the funds to pursue a legal malpractice action on behalf of Tower Homes. Thus, if  
7 this Court were to impose a rule that only the Trustee can bring forth this legal  
8 malpractice action, then this will result in absurd and unintended consequences as  
9 Defendants will escape scot-free despite their legal malpractice. This cannot be the law  
10 in Nevada. Instead, in this specific circumstance, the better rule is to allow the Trustee  
11 to assign the legal malpractice claims against Defendants to the Tower Homes  
12 Purchasers as the Tower Homes Purchasers were also harmed by Defendants' legal  
13 malpractice.  
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## 17 **VIII. CONCLUSION**

18  
19 Tower Homes is the real party in interest as Tower Homes is the only party with  
20 the attorney client relationship with Defendants. The mere fact that there has been an  
21 assignment of proceeds of the legal malpractice action to the Tower Homes Purchasers  
22 is immaterial to the issue of whether Tower Homes is the real party in interest with  
23 standing to pursue this legal malpractice action. An assignment of proceeds in a tort  
24 action is permitted under Nevada law. In fact, whether this legal malpractice action is  
25 brought by the Trustee or Tower Homes, pursuant to the Confirmation Order, the  
26 Tower Homes Purchasers, as Creditors of the Bankruptcy Estate will always benefit  
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28



1 from any legal malpractice action against Defendants.

2 Further, the Trustee had inherent powers to permit Tower Homes to pursue this  
3 legal malpractice action against Defendants. Even if the Trustee violated federal law  
4 or state law by permitted the assignment of proceeds of the legal malpractice action to  
5 the Tower Homes Purchasers, this does not strip Tower Homes of standing to pursue  
6 this legal malpractice action. Instead, any violation of federal law or state law in the  
7 Marquis Aurbach Orders would simply mean that the benefits of the legal malpractice  
8 action should revert back to the Bankruptcy Estate.  
9

10 Finally, this Court should not adopt a blanket rule prohibiting the assignment of  
11 all legal malpractice claims and instead, allow such assignments on a case by case  
12 basis. Here, public policy would be served by allowing the Trustee to assign his legal  
13 malpractice claims the Tower Homes Purchasers.  
14

15 As such, Tower Homes request that this Court reverse the District Court's May  
16 15, 2014 Order granting Defendants' Motion for Summary Judgment.  
17

18 Dated this 5 day of February, 2015.  
19

20 PRINCE | KEATING  
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22   
23

24 DENNIS M. PRINCE, Nevada Bar No. 5092

25 ERIC N. TRAN, Nevada Bar No. 11876

26 9130 West Russell Road, Suite 200

27 Las Vegas, Nevada 89148

28 Attorney for Appellant

*Tower Homes, LLC*

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## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Appellant's Opening Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirement of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this Opening Brief has been prepared in proportionally spaced typeface using 14 -point Times New Roman type style.

2. I further certify that this Opening Brief complies with the page or type volume limitations of NRAP 40(b)(3) because it contains 8,920 words.

DATED this 5 day of 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  
Attorney for Appellant  
*Tower Homes, LLC*

1 **NRAP 26.1 DISCLOSURE**

2 The undersigned counsel of record certifies that the following are person and  
3 entities described in NRAP 26.1(a) and must be disclosed. These representations re  
4 made in order that the Justices of this Court may evaluate possible recusal or  
5 disqualification.  
6

7  
8 Tower Homes, LLC is a privately held corporation, incorporated in the State of  
9 Nevada. However, Tower Homes, LLC's license has been revoked and is no longer  
10 conducting business in the State of Nevada.  
11

12 Tower Homes, LLC is represented in this litigation by Dennis M. Prince and  
13 Eric N. Tran of the law firm of PRINCE | KEATING.

14 DATED this 5 day of February, 2015.  
15

16 PRINCE | KEATING

17  
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19

20 DENNIS M. PRINCE  
21 Nevada Bar No. 5092  
22 ERIC N. TRAN  
23 Nevada Bar No. 11876  
24 9130 West Russell Road, Suite 200  
25 Las Vegas, Nevada 89148  
26 Attorney for Appellant  
27  
28

1 CERTIFICATE OF SERVICE

2 Pursuant to NRCP 5(b) and Administrative Order 14-2 of the Eighth Judicial  
3 District Court, I hereby certify that I am an employee of PRINCE | KEATING and that on  
4 the 5<sup>th</sup> day of February, 2015, I served the above and foregoing APPELLANT  
5 TOWER HOMES, LLC'S OPENING BRIEF and APPENDIX on the following  
6 parties in compliance with the Nevada Electronic Filing and Conversion Rules:  
7

8 Jeffrey Olster, Esq.  
9 Lewis Brisbois Bisgaard & Smith  
10 6385 South Rainbow Boulevard  
11 Suite 600  
12 Las Vegas, NV 89118  
13 Attorneys for Defendants

14 /s/ Kim M. Stevenson  
15 An employee of PRINCE | KEATING  
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