IN THE SUPREME COURT OF THE STATE OF NEVADA

TOWER HOMES, LLC, A Nevada Limited Liability Company,

Appellant,

vs.

WILLIAM H. HEATON, individually; NITZ WALTON & HEATON, LTD., a domestic professional corporation,

Respondents,

Supreme Court No. 65755

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RESPONDENTS' ANSWERING BRIEF

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I.

STATEMENT OF THE ISSUES

Section 1123(b)(3) of the United States bankruptcy code allows a designated representative to be appointed in a bankruptcy plan of reorganization to pursue claims on behalf of the bankruptcy estate. *See* 11 U.S.C. §1123(b)(3). In the bankruptcy proceedings of debtor Tower Homes, LLC, the plan of reorganization appointed the bankruptcy trustee as the designated representative. Thereafter, the bankruptcy trustee purported to assign his right to bring a legal malpractice claim against the debtor's former attorneys (respondents Nitz, Walton & Heaton, Ltd. and William H. Heaton) to a particular group of bankruptcy creditors, so that such action could then be pursued by the creditors, by and through the creditors' own attorneys, for the exclusive benefit of this group of creditors (i.e., not for the benefit of the debtor, the debtor's bankruptcy estate or the numerous other bankruptcy creditors). The case involved in this appeal is the "legal malpractice" action brought by this particular group of creditors, who are denominated the Tower Homes Purchasers.[1]

The first issue is whether, under these circumstances, the Tower Homes Purchasers are the "real parties in interest" under Nevada law. Because it is *undisputed* that only the Tower Homes Purchasers have the bankruptcy court's approval to bring this action (by and through attorneys retained on behalf of the Tower Homes Purchasers), and because it is *undisputed* that only the Tower Homes

[1] As detailed below, this is not a genuine legal malpractice action. The Opening Brief is littered with malpractice allegations disguised as "facts." (E.g., Opening Brief at 1:17 – 2:7.) As "support" for these facts, Appellants cite the Purchase Contract (which was properly drafted in compliance with Nevada law) and the *allegations* of their Complaint. Not only are these merely allegations, they are allegations *by the Tower Homes Purchasers' attorneys* (who have no idea what advice Respondents rendered to Tower Homes), *not by Respondents' client, Tower Homes* (which has not brought a malpractice claim, and has no legal or equitable interest in this action). Though not material to this appeal, NWH strenuously denies the meritless allegations by the Purchasers' attorneys.

Purchasers will benefit from any potential recovery in this action, the Tower Homes Purchasers have to be the "real parties in interest" under NRCP 17. In other words, ***the Tower Homes Purchasers (sometimes referred to as the "Purchasers") are the actual Appellants***.

The second issue is whether, under these circumstances, this action violates this Court's well-established public policy prohibition of the assignment of legal malpractice claims. The district court, properly following the lead of other courts that have confronted this precise scenario, pierced the fiction that is this action and concluded that, even though the Tower Homes Purchasers are using the "Tower Homes, LLC" corporate shell as the nominally denominated "plaintiff," the Purchasers are nevertheless seeking to pursue an unlawfully assigned legal malpractice claim. Appellants do not cite a single case that authorizes this rogue, unlawful action.

II.

STATEMENT OF THE CASE

This is an appeal from a final order granting Respondents' motion for summary judgment on the grounds that this action violates Nevada's longstanding rule that the assignment of a legal malpractice claim is unlawful and violates public policy. (Eighth Judicial District Court, Clark County; Hon. Gloria Sturman, District Court Judge).

III.

STATEMENT OF FACTS

A. Factual Background

This action purports to be based on an attorney-client relationship between respondents William H. Heaton and the law firm of Nitz, Walton & Heaton, Ltd. (collectively hereafter "**NWH**") and the bankruptcy debtor, Tower Homes, LLC

("**Tower Homes**"). (AA3-4.)[2] (In fact, this case is really just an extension of prior litigation between the Tower Homes Purchasers and Tower Homes).

NWH represented Tower Homes with respect to a luxury residential common interest ownership development known as the Spanish View Towers (hereafter the "**Project**"). (AA3.) As part of this representation, NWH prepared the purchase contracts for the individual condominium units. (AA4.) Many of the individuals and entities that agreed to purchase units in the Project (the "**Tower Homes Purchasers**" or the "**Purchasers**") paid earnest money deposits towards their units. (AA5.) Due to financing and market issues, the Project was not successful and construction was never completed. Due to misfeasance by Tower Homes' manager, the earnest money deposits were never returned to the Tower Homes Purchasers. (AA5, 33-44.)

B. <u>The Underlying Lawsuits</u>

As a result of the lost earnest money deposits, the Tower Homes Purchasers filed lawsuits in Clark County District Court against Tower Homes, Tower Homes' sole owner and manager, Rodney Yanke (hereafter "**Yanke"**) and other individuals and entities involved in the sale of the Project units (hereafter the "**Underlying Lawsuits**").[3] In these Underlying Lawsuits, the Tower Homes Purchasers alleged, among other things, that Tower Homes breached the terms of the purchase contracts and wrongfully misappropriated the earnest money deposits. (AA33-44.)

C. <u>The Bankruptcy</u>

On or about May 31, 2007 (shortly after the second Underlying Lawsuit was filed), Chapter 11 bankruptcy proceedings were initiated by various construction

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[2] Citations to Appellant's Appendix are indicated as "**AA**." Citations to Respondent's Appendix are indicated as "**RA**." Appellants' counsel did not confer with Respondents' counsel regarding a possible joint appendix as required by NRAP 30(a).

[3] The two lawsuits were styled as *McClelland v. Tower Homes, LCC*, Case No. A528584 and *Gaynor v. Tower Homes, LLC*, Case No. A541668. Both of these lawsuits are closed.

creditors against Tower Homes. (AA883:25.) The Tower Homes Purchasers' claims against Tower Homes were pursued and adjudicated as the Class 13 Claims in the bankruptcy. (AA780, 825-26.) Under federal law (11 U.S.C. §541(1)(a)), once the bankruptcy was filed, all of Tower Homes' potential rights of action against other parties became the property of the bankruptcy estate and fell within the exclusive control of the Tower Homes bankruptcy trustee (the "**Trustee**"). (AA18:6 – 19:5, 719:20 – 720:7 and 796:16 – 797:1.)

Upon the confirmation of the plan of reorganization, the Trustee became the only designated representative authorized to pursue claims on behalf of the bankruptcy estate pursuant to 11 U.S.C. §1123(b)(3). (*Id*.) This fundamental point was confirmed in the December 8, 2008 "Order Approving Disclosure Statement and Confirming Plan of Reorganization" (hereafter the "**Bankruptcy Plan**"). (*Id*.) In a section entitled "Litigation," the Bankruptcy Plan provides, in relevant part, that:

> ***[T]he Trustee and the Estate shall retain all claims or Causes of Action*** that they have or hold against any party . . . whether arising pre- or post-petition, subject to applicable state law statutes of limitation and related decisional law, whether sounding in tort, contract or other theory or doctrine of law or equity. . . . Upon the Effective Date, ***the Trustee will be designated as representative of the Estate under section 1123(b)(3)*** of the Bankruptcy code and shall, except as otherwise provided herein, ***have the right to assert any or all of the above Causes of Action post-confirmation in accordance with applicable law***.

(AA796:16 – 797:1 [emphasis added].)

Pursuant to a June 3, 2010 "Order Granting Motion to Approve Stipulation to Release Claims and Allow Marquis & Aurbach, as Counsel for the Tower Homes Purchasers, to Pursue Claims on Behalf of Debtor" (hereafter the "**Original Marquis Aurbach Order**"), the Trustee agreed to assign to certain enumerated parties certain alleged causes of action against certain enumerated individuals or entities:

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

(AA585:13-19, 832:13-19 [emphasis added].) In other words, notwithstanding the Bankruptcy Plan's express retention by the Trustee of all causes of action belonging to Tower Homes, the Trustee agreed "to release and ***assign*** certain claims of [Tower Homes] and allow Marquis Aurbach Coffing as counsel for the Tower Homes Purchasers to pursue claims on behalf of the debtor." (AA6:5-9 [emphasis added].).

On April 2, 2013, the bankruptcy court entered an "Order Granting Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, as Counsel for the Tower Homes Purchasers, to Pursue Claims on Behalf of Debtor" (hereafter the "**Second Marquis Aurbach Order,**" which together with the Original Marquis Aurbach Order, shall be referenced collectively as the "**Marquis Aurbach Orders**"). (AA839.)[4] The Second Marquis Aurbach Order:

> (1) "[A]uthorizes the Trustee to permit ***the Tower Homes Purchasers*** to pursue any and all claims on behalf of Tower Homes, LLC (the "Debtor") . . . which shall specifically include, but may not be limited to, pursuing the action currently filed in the Clark County District Court styled as Tower Homes, LLC v. William H. Heaton et al. Case No. A-12-663341-C;" and
>
> (2) "[A]uthorizes the law firm of Marquis Aurbach Coffing and/or ***Prince & Keating, LLP***, or successive counsel, ***retained on behalf of Tower Homes Purchasers*** to recover any and all earnest money deposits, damages, attorneys fees and costs, and interest thereon on behalf of Debtor and the Tower Homes Purchasers ***and that any such recoveries shall be for the benefit of the Tower Homes***

[4] This Second Marquis Aurbach Order was an attempt to remedy the Original Marquis Aurbach Order, which the district court found to be defective in the instant proceedings. (See Section III.D.1, *infra*).

Purchasers."

(AA840:7-20 [emphasis added].)

Notably, the stipulation approved by this Second Marquis Aurbach Order – 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 Debtor" -- provides, in relevant part: "The Trustee hereby stipulates and agrees to ***release to the Tower Homes Purchasers*** any and all claims on behalf of the Debtor . . ."[5] (AA898:13-19 [emphasis added].) This language is identical to the language contained in the Stipulation underlying the Original Marquis Aurbach Order. (AA585:13-19, 832:13-19.)

The Tower Homes bankruptcy estate has now been fully administered, and all funds have been disbursed pursuant to the Bankruptcy Plan. (AA884:10-17.)

D. The Instant Action

Based on the Original Marquis Aurbach Order, the Tower Homes Purchasers (using the name "Tower Homes, LLC" as the nominally designated "plaintiff") filed the instant action on June 12, 2012. (AA2.) The Complaint contains two causes of action, one for legal malpractice and one for breach of fiduciary duty. Both causes of action arise out of the attorney-client relationship between NWH and Tower Homes. As such, both causes of action constitute legal malpractice claims.[6]

In their Complaint, the Tower Homes Purchasers notably allege that, "[d]uring the bankruptcy proceeding, the Trustee, the law firm of Marquis Aurbach Coffing as well as the Tower Purchasers entered into a stipulation *to release and*

[5] The same stipulation also provided: "The Trustee hereby stipulates and agrees to ***permit the Tower Homes Purchasers, to pursue*** any and all claims on behalf of Debtor …" (AA898:27-28 [emphasis added].)

[6] *See Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d 838 (2009) ("A cause of action for legal malpractice encompasses breaches of contractual as well as fiduciary duties because both concern the representation of a client and involve the fundamental aspects of an attorney-client relationship.").

assign certain claims of [Tower Homes] and allow Marquis Aurbach Coffing ***as counsel for the Tower Homes Purchasers*** to pursue claims on behalf of [Tower Homes]." (AA6:5-15 [emphasis added].).

The crux of the substantive legal malpractice dispute is whether the purchase contracts complied with applicable Nevada law (NRS Chapter 116). Appellants contend that NWH "should have advised Tower pursuant to NRS 116.411 that the earnest money deposits were required to be held by a third party and could only be released for very limited purposes as allowed by the statute," and that the purchase contracts did not comply with NRS 116.411. (AA4:22 – 5:6.)

NWH vehemently denies Appellants' substantive allegations. Specifically, NWH maintains that it properly advised Tower Homes (and Yanke) regarding NRS 116.411, that the purchase contracts complied with NRS 116.411 and that it did not breach any duty or standard of care. Rather, the Tower Homes Purchasers' deposits were misappropriated by Yanke, without NWH's knowledge or consent, and contrary to NWH's advice and the terms of the purchase contract. Notwithstanding these meritorious defenses to the substantive allegations, the instant action is untimely, unauthorized and unlawful. NWH accordingly attacked the Complaint in three different dispositive motions.

1. The First Motion to Dismiss

On July 19, 2012, NWH filed a Motion to Dismiss, or, alternatively, Motion for Summary Judgment (hereafter the "First MTD"). (AA11.) In the first MTD, NWH argued that Tower Homes lacked the capacity and authority to bring the instant action based on both federal law and the language of the Bankruptcy Plan, and that the Original Marquis Aurbach Order, while purporting to assign or "release" claims to the Purchasers, did not provide the requisite authorization that would permit *Tower Homes* to bring a civil action against NWH. (AA18:6 – 22:3.) The argument was based on the basic, well-established principle of federal bankruptcy law that all of a bankruptcy debtor's causes of action belong to the

bankruptcy estate (11 U.S.C. §541(a)), and only the bankruptcy trustee has the lawful right to bring claims by or on behalf of the debtor. (AA18:8-21.) As stated above, the Bankruptcy Plan further confirmed that the Trustee retained all of Tower Homes' potential causes of action. (AA18:22 – 19:5.) Accordingly, Tower Homes did not (and does not) have the authority to bring and maintain the instant action. (*Id*.)

Appellants maintained that the Original Marquis Aurbach Order authorizes this action. By its own terms, however, the Original Marquis Aurbach Order does not authorize *Tower Homes* to bring this action. (AA19:6 – 22:3.) Rather, under the Marquis Aurbach Order, "[t]he Trustee hereby stipulates and agrees to ***release to the Tower Homes Purchasers*** any and all claims on behalf of [Tower Homes]." (AA146:13-14[emphasis added].) The Trustee further authorized certain attorneys, as counsel for the Tower Homes Purchasers, to bring such claims against certain designated individuals/entities. (AA146:20-26.) NWH maintained in its First MTD that, because this action is brought (1) by Tower Homes itself (and not by the Tower Homes Purchasers); (2) against individuals and entities (NWH and Mr. Heaton) not provided for in the Original Marquis Aurbach Order; and (3) by attorneys not authorized in the Original Marquis Aurbach Order (i.e., Prince Keating and not Marquis Aurbach, the Marquis Aurbach Order cannot authorize this action as a matter of law. (AA18:6 – 22:3.)

NWH also argued in its First MTD that, even if this action were hypothetically permissible under federal law, it is still barred by the statute of limitations, NRS 11.207. (AA22:4 – 26:8.) NWH presented evidence that this action was brought well beyond two years after Tower Homes discovered, or should have discovered, the material facts constituting its cause of action. (AA22:23 – 23:12.) NWH also demonstrated that this action is also time-barred pursuant to the NRS 11.207's four-year measure, as Tower Homes "sustain[ed] damage" within the meaning of Nevada law when the underlying *Gaynor* lawsuit was filed on May 23,

2007. (AA23:13 – 25:15.)[7]

The district court denied the First MTD. (AA466.) With respect to the statute of limitations issue, the district court concluded that the Trustee "could not have known what the claims against Tower Homes, LLC were until the underlying state court litigation was resolved," and that the stipulation and order dismissing the underlying state court litigation was filed on July 5, 2011. (AA467:6-9.)[8] With respect to the bankruptcy court authorization issues, the district court agreed with NWH that the Original Marquis Aurbach Order did not authorize Tower Homes to bring this action through the law firm of Prince Keating against NWH. (AA467:11-13.) The district court concluded, however, that this defect was "procedural," and that Tower Homes could attempt to remedy the procedural defect by obtaining the requisite authority from the Trustee and the Bankruptcy Court. (AA467:10-11, 14-15.)

2. <u>The Second Motion to Dismiss</u>

Appellants attempted to cure the defects in the Original Marquis Aurbach Order by obtaining another order from the Bankruptcy Court. The result was the Second Marquis Aurbach Order (detailed in Section III.C, *supra*). (AA594.) The Second Marquis Aurbach Order "authorizes the Trustee *to permit the Tower Homes*

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[7] As this Court is aware, a well-established distinction exists between alleged transactional legal malpractice and alleged litigation malpractice for statute of limitations purposes. When transaction malpractice is alleged, the client/plaintiff "sustains damage" when a lawsuit caused by the allegedly negligent transactional work is filed. *See Gonzales v. Stewart Title*, 111 Nev. 1350, 1354-55, 905 P.2d 176 (1995); *see also Kopicko v. Young*, 114 Nev. 1333, 1337 n. 3, 971 P.2d 789, 791 (1998) (reaffirming distinction between transactional and litigation malpractice for determining commencement of statute of limitations).

[8] Based on this statute of limitations ruling, NWH filed a writ petition with this Court on December 11, 2012 (No. 62252). After ordering full briefing, this Court ultimately denied the writ on June 14, 2013, stating only that NWH had not demonstrated that this Court's intervention by way of extraordinary writ was warranted. NWH still maintains that this action is time-barred as a matter of law. NWH reserves its right to continue to assert this defense if the judgment should be reversed.

Purchasers to pursue any and all claims on behalf of Tower Homes, LLC," including the instant action. (AA595:7-14 [emphasis added].) The Second Marquis Aurbach Order also authorized "the law firm of Marquis Aurbach Coffing and/or Prince & Keating, LLP,[9] or successive counsel, ***retained on behalf of Tower Homes Purchasers*** to recover any and all earnest money deposits, damages, attorneys fees and costs, and interest thereon on behalf of Debtor and the Tower Homes Purchasers ***and that any such recoveries shall be for the benefit of the Tower Homes Purchasers***." (AA595:15-20 [emphasis added].)

Because this Second Marquis Aurbach Order still did not (and does not) authorize Tower Homes to bring this action, NWH brought its Renewed Motion to Dismiss (the "Second MTD") on July 26, 2013. (AA469.) Specifically, the Second Marquis Aurbach Order only purports to authorize the Tower Homes Purchasers, and not Tower Homes itself, to bring the instant action. (AA476-78.) This was not, and is not, as the district court opined, a "procedural" defect. This is a substantive defect that precludes the maintenance of this action as a matter of law. (AA479.) The Second Marquis Aurbach Order simply did not cure the Original Marquis Aurbach Order's primary defect, which was that the order authorized the Tower Homes Purchasers to sue, not Tower Homes itself, and the Tower Homes Purchasers are not the named plaintiffs in the instant lawsuit. (AA476-79.)

The district court concluded that the Second Marquis Aurbach Order "cured" the defects of the Original Marquis Aurbach Order and denied the Second MTD. (AA715:1-5.) The district court indicated that its concern was whether the Trustee had notice of this lawsuit, and the Second Marquis Aurbach Order showed that the Trustee had such notice. (RA2.) The district court also notably concluded that the Trustee had "*assigned to the purchasers* the right to pursue collections on behalf of the debtor." (*Id*.)

[9] The name of this firm is now apparently "Prince Keating."

3. The Motion for Summary Judgment

The district court's ruling on NWH's Second MTD effectively meant that the Tower Homes Purchasers, represented by the law firm of Prince Keating, were using the defunct Tower Homes corporate shell to pursue a legal malpractice for the sole benefit of the Tower Homes Purchasers (and not for the benefit of the Tower Homes bankruptcy estate). It was therefore clear that the Tower Homes Purchasers were (and are) the "real parties in interest" under NRCP 17, and that the Tower Homes Purchasers were seeking to bring and prosecute a legal malpractice claim using the Tower Homes name, which violates Nevada's prohibition against the assignment of legal malpractice claims. *See Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982). NWH raised these issues in its Motion for Summary Judgment (the "MSJ"), filed on February 18, 2014. (AA716-28.)

The district court agreed with NWH that this action is unlawful. (AA907-915.) In its Order Granting the MSJ, the district court rejected Appellants' argument that they were not pursuing an assigned legal malpractice claim because the Trustee used the word "released" instead of "assigned" in the Second Marquis Aurbach Order and underlying Stipulation. The district court reasoned that Appellants' semantic argument ("released" versus "assigned") was "a distinction without a difference." (AA908, 914:16-21.) Accordingly, the district court concluded: "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)." (AA908, 915.) "Defendant[s'] Motion for Summary Judgment is, therefore, GRANTED." (*Id.*)

IV.

SUMMARY OF RESPONDENTS' ARGUMENT

The district court properly granted NWH's MSJ because this rogue action is prohibited by both federal and state law. At the time the Complaint was filed,

Tower Homes was in bankruptcy. Pursuant to the Bankruptcy Plan, only the Trustee could bring this action. The Trustee decided not to pursue a legal malpractice claim against NWH on behalf of the Tower Homes bankruptcy estate, and instead "released" the claim to the Tower Homes Purchasers. The Tower Homes Purchasers now seek to circumvent Nevada's prohibition against the assignment of legal malpractice claims by using the purported auspices of the bankruptcy court to pursue this action using the defunct Tower Homes corporate shell as the nominally denominated "plaintiff."

This Court has recognized the well-established majority rule that legal malpractice claims are not assignable. *See Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966 (1982). The attorney-client relationship is unique, personal and confidential. It is accordingly inappropriate and against public policy to allow these claims to be sold, bartered and, inevitably, abused. Courts in other states that have confronted this precise situation recognize that the tactic employed by the Tower Homes Purchasers in this case is nothing more than a fiction that does not avoid the rule prohibiting assignments of legal malpractice claims. *See Baum v. Duckor, Spradling & Metzger*, 72 Cal. App. 4th 54, 84 Cal.Rptr.2d 703 (Cal. App. 1999); *Curtis v. Kellogg & Andelson*, 73 Cal. App. 4th 492, 86 Cal.Rptr.2d 536 (Cal. App. 1999).[10] Notwithstanding the Purchaser's use of the defunct Tower Homes corporate name as the technical "plaintiff" in this action, and the deftly worded stipulation with the Trustee, the documents that authorize this action show, undisputedly, that it is brought and controlled by the Tower Homes Purchasers, through their own attorneys, and for their exclusive benefit. This Court should accordingly affirm the properly granted summary judgment.[11]

[10] The district court relied on these two cases in its ruling. (AA907-908, 914:1-13.)

[11] This Court reviews *de novo* whether the district court properly granted summary judgment. *See, e.g., Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026 (2005).

V.

ARGUMENT

A. The Tower Homes Purchasers are the Real Parties in Interest.

Under Nevada law, "[e]very action ***shall*** be prosecuted in the name of the real party in interest." NRCP 17(a) (emphasis added).[12] "The concept 'real party in interest' under NRCP 17(a) means that an action shall be brought by a party 'who possesses the right to enforce the claim and who has a significant interest in the litigation.'" *Painter v. Anderson*, 96 Nev. 941, 943, 620 P.2d 1254 (1980); *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983). The purpose of this rule is "to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter." *Painter, supra*, 96 Nev. at 943. In other words, the purpose of NRCP 17(a) is to enable NWH to assert defenses it would have if the Tower Homes Purchasers themselves were actually the named plaintiffs.

Here, though the "plaintiff" in this case is nominally designated as "Tower Homes, LLC," the *actual* plaintiffs – the "real parties in interest" – are the Tower Homes Purchasers. There is no dispute that the purported authority for this action is the Second Marquis Aurbach Order. The stipulation approved by the Second Marquis Aurbach Order provides, in relevant part: "The Trustee hereby stipulates and agrees ***to release to the Tower Homes Purchasers*** any and all claims on behalf of the Debtor . . ." (AA898:13-19 [emphasis added].) The Second Marquis

[12] This Rule also provides that "a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought." NRCP 17(a). This language of the rule does not apply here (and Appellants do not argue otherwise), as there is no contract between Tower Homes and the Purchasers purporting to authorize this action, and there is no statute permitting the Purchasers to use the defunct Tower Homes limited liability shell for litigation purposes. Indeed, as fully detailed below, this practice is specifically disallowed.

Aurbach Order also "authorizes the Trustee ***to permit the Tower Homes Purchasers*** to pursue any and all claims on behalf of Tower Homes, LLC (the "Debtor") . . . which shall specifically include, but may not be limited to, pursuing the instant action. (AA840:7-14 [emphasis added].) Thus, the *only* party with the purported 'right' to enforce the subject claim is the Tower Homes Purchasers, *not* "Tower Homes, LLC" itself. Even though it was Tower Homes that had the attorney-client relationship with NWH, once the bankruptcy proceedings were initiated, only the Trustee had the right to bring this action under federal law, and this right continued post-plan confirmation pursuant to the "Litigation" provisions of the Bankruptcy Plan. (AA796:16 – 797:1.)

Equally important is the undisputed fact that the Second Marquis Aurbach Order provides that "any such recoveries [in this action] ***shall be for the benefit of the Tower Homes Purchasers***." (AA840:19-20 [emphasis added].) In other words, the only parties with *any* interest whatsoever in the outcome of this action are the Tower Homes Purchasers. As this Court has explained, "[t]he concept 'real party in interest' under NRCP 17(a) means that an action shall be brought by a party 'who possesses the right to enforce the claim *and* who has a *significant interest in the litigation*.'" *Painter, supra*, 96 Nev. at 943 (emphasis added). Tower Homes has no authority to pursue, and *no interest* in the instant action (let alone a significant interest).

Accordingly, there is no genuine factual or legal dispute that the "real parties in interest" under NRCP 17 are the Tower Homes Purchasers. In their Opposition in the proceedings below, Appellants made no attempt to argue that the Tower Homes Purchasers are not the real parties in interest. Thus, Appellants conceded that the Tower Homes Purchasers are the real parties in interest. *See* EDCR 2.20(e) ("Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.")

In their Opening Brief, Appellants conflate the concepts of "real party in interest," "proper party" and "standing." Specifically, they assert that, "because Tower Homes is the only entity with an attorney client relationship with Heaton and NWH, Tower Homes is the real party in interest with standing in this legal malpractice action." (Opening Brief at 17:2-5.) This argument ignores the real party in interest analysis (as discussed in *Painter*) and replaces it with a self-serving and immaterial conclusion. Nowhere do Appellants address how Tower Homes could possibly be the "real party in interest" when any recovery in this action undisputedly "shall be for the benefit of the Tower Homes Purchasers." (AA840:19-20.) Moreover, Appellants' argument that Tower Homes is the "real party in interest" because it is the only party with the right to bring a malpractice claim undermines the legal basis for this lawsuit. Again, under federal law, this lawsuit could only by brought by the Trustee. (AA18:6 – 19:3.) Even if the Trustee could assign to the Tower Homes Purchasers his right as the designated representative under 11 U.S.C. §1123(b)(3) to pursue an alleged malpractice claim (which NWH denies[13]), the authorizing order (the Second Marquis Aurbach Order) *only (attempts to) authorize the Tower Homes Purchasers to sue*. (AA839-840.) If and to the extent Appellant's argument as to the "real party in interest" is accepted, then, again, this action simply is not permissible under federal law because ***any action brought by Tower Homes for the benefit of Tower Homes has not been authorized by the Trustee and bankruptcy court***.

Appellants' fictional characterization that Tower Homes is the "real party in interest" is further undermined by the fact that *Tower Homes never pursued a legal malpractice against NWH*, even though it undisputedly has been aware *since 2006* (prior to the bankruptcy) that the Tower Homes Purchasers were contending that Tower Homes mishandled the earnest money deposits in violation of Nevada law.

[13] *See Baum, supra, Curtis, supra,* and *In re J.E. Marion,* 199 B.R. 635 (S.D. Tex. 1996), which are discussed in detail below.

(AA22:23 – 23:12.) *If Tower Homes believed that NWH had rendered improper or insufficient advice on this issue, it had ample knowledge, notice and opportunity, before the bankruptcy proceedings were initiated, to file a legal malpractice claim*. There is no evidence in the record showing that Tower Homes ever desired to or authorized the filing of this legal malpractice action.

In sum, pursuant to NRCP 17 and *Painter*, the Tower Homes Purchasers are the real parties in interest and therefore must be treated as the plaintiffs and appellants in this action for purposes of these proceedings.

B. Summary judgment was properly granted because the Tower Homes Purchasers are seeking to pursue an assigned legal malpractice claim, which violates Nevada law and public policy.

Once the Tower Homes Purchasers are treated as the named plaintiffs as required by NRCP 17 and the Second Marquis Aurbach Order, the question becomes whether they can pursue a legal malpractice claim against Tower Homes' former attorneys based on the Trustee's stipulation to "release" Tower Homes' claim to the Purchasers. As detailed below, legal malpractice claims cannot be assigned, and this prohibition cannot be circumvented by deftly worded stipulations made under the auspices of a bankruptcy court.

1. Nevada follows majority law in prohibiting the assignment of legal malpractice claims based on numerous public policy concerns and the potential for abuse.

Legal malpractice claims are not assignable under Nevada law. *See Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982).[14] In *Chaffee*, a non-client third-party attempted to assert a legal malpractice claim after acquiring the former client's assets after the third-party obtained a default judgment against the client in a

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

wrongful death action. The Nevada Supreme Court rejected this attempt to bring an assigned legal malpractice claim: "As a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment or by levy and execution sale, *but which was never pursued by the original client*." *Chaffee*, 98 Nev. at 223-24 (emphasis added). "The decision as to whether to bring a malpractice action against an attorney is one *peculiarly vested in the client*." *Id*. at 224 (emphasis added).

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

In the seminal *Goodley* case, the California Court of Appeal articulated the policy reasons why legal malpractice claims are not assignable:

> It is the ***unique quality of legal services***, the ***personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship*** that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment. ***The assignment of such claims could relegate the legal malpractice action to the market place*** and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights. The commercial aspect of assignability of choses in action arising out of legal malpractice ***is rife with probabilities that could only debase the legal profession***. The almost certain end result of merchandizing such causes of action is the lucrative business of factoring malpractice claims which would encourage unjustified lawsuits against members of the legal profession, generate an increase in legal malpractice litigation, promote champerty ***and force attorneys to defend themselves against strangers***. ***The endless complications and litigious intricacies arising out of such commercial activities would place an undue burden on not only the legal profession but the***

> ***already overburdened judicial system***, restrict the availability of competent legal services, embarrass the attorney-client relationship and ***imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client***.

Goodley, supra, 133 Cal. Rptr. at 87 (emphasis added). Accordingly, the assignment of a legal malpractice cause of action is "contrary to sound public policy." *Id*.; *see also White v. Auto Club Inter-Ins. Exch*., 984 S.W.2d 156, 160 (Mo. App. 1998) (*Goodley*'s public policy concerns are persuasive. It is the majority position."); *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson*, 827 P.2d 758, 764 (Kan. 1992) ("A majority of courts considering the assignability issue have agreed with the policy considerations underlying the *Goodley* decision and have held that legal malpractice claims are not assignable.")

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

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

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

This Court's reliance on these two leading decisions demonstrates that Nevada is squarely aligned with this majority law – legal malpractice claims simply cannot be assigned as matter of law. Permitting the assignment of such claims debases the legal profession, violates the confidential relationship between the attorney and client and commoditizes claims, which will inevitably lead to the bringing of unjustified claims and force attorneys to defend themselves against

strangers to the attorney-client relationship.

Additional concerns arise when a malpractice claim is assigned to the client's litigation adversary. In this circumstance, the public policy concerns and potential for abuse are heightened because of the opportunity and incentive for collusion between the client and the adversary, and because permitting such assignments would discourage attorneys from representing judgment-proof defendants for fear that the litigation adversary would take an assignment and focus efforts on the more solvent party (i.e., the attorney). *See, e.g., Kommavongsa v. Haskell*, 67 P.3d 1068, 1078 (Wash. 2003);[15] *see also Taylor v. Babin*, 13 So.3d 633, 641 (La. App. 2009) ("Having thoroughly reviewed the cases from other jurisdictions, we are persuaded by the reasoning of the federal courts and the majority of our sister states and hold that legal malpractice claims may not be assigned. The mere threat of a malpractice claim being assigned would be detrimental to an attorney's duty of loyalty and confidentiality to his client, would promote collusion, and would increase a lawyer's reluctance to represent an underinsured or insolvent client."); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313, 317 (Tex. App. 1994) (explaining that the assignment between litigation adversaries "is a transparent device to replace a judgment-proof, uninsured defendant with a solvent defendant.").

In the instant case, the little discovery that has taken place in the underlying proceedings *precisely illustrates* the concerns recognized by these courts that have disallowed assignments.[16] Immediately after the parties held their early case conference, a dispute arose as to the protection that should be afforded to NWH's

[15] This *Kommavongsa* case is notable because Washington falls within the minority of jurisdictions that permit assignments of legal malpractice claims under some circumstances. Yet, even in a minority jurisdiction state, assignments of legal malpractice claims to a client's litigation adversary are prohibited.

[16] Appellants reference this dispute in Footnote 1 of the Opening Brief, but do not attempt to provide any details of the complicating factors that arise when strangers to the attorney-client relationship are attempting to obtain privileged documents. They also do not include any of the briefing in their Appendix.

voluminous files (consisting of over 42,000 pages). Because NWH has ongoing duties under the Rules of Professional Conduct to protect the confidentiality of its files (e.g., RPC 1.6(a) and RPC 1.9(c)), it requested that Appellants' counsel agree to enter a standard confidentiality stipulation. Appellants' counsel curiously refused. In a typical legal malpractice case, plaintiff-clients routinely agree with defendant-attorneys to keep the client's files protected from *disclosure to third-parties*, as the attorney's file frequently contains private, sensitive or confidential information. Here, however, because Appellants' attorneys represent the interests of the Purchasers, not Tower Homes (AA840:15-17), Appellants' counsel insisted on a completely unrestricted disclosure of NWH's files, even though these documents contain privileged and confidential information (i.e., information that Tower Homes or its own attorney could see, but not information that third-parties are free to see).

This placed NWH in an untenable position, as NWH still owes duties to its former joint clients, Tower Homes and Yanke, to preserve and maintain the confidentiality of these files. *See* RPC 1.6(a) and RPC 1.9(c). (RA9:1-17, 98:7 – 99:3, 114, 186:1 – 187:3.) Third-party strangers to the attorney client relationship are not entitled to these files. (RA9:18 – 12:12, 99:4-14, 115-116, 187:4-21.) Thus, before NWH can lawfully disclose any documents in this case, Yanke (on behalf of Tower Homes) must consent to the disclosure, Yanke (individually) must consent to the disclosure and reasonable protections must be put in place to assure that NWH's files are viewed only by parties to the attorney-client relationship (i.e., not the Purchasers, or the Purchasers' attorneys). (RA12:13 – 13:20, 99:15 – 101:7, 115-116.)

The discovery commissioner ultimately ordered NWH to produce a portion of its files. (AA900.) NWH filed Objections to the discovery commissioner ruling, which effectively requires NWH to breach its professional obligations to its former clients by disclosing privileged and confidential information to third-parties who not only have no attorney-client relationship with NWH, but who are also litigation

adversaries. (RA4-17.) While these Objections were pending, the district court granted NWH's MSJ.

This discovery dispute provides just one tangible, practical example as to why legal malpractice claims are not assignable, as defendant attorneys cannot, consistent with their ethical obligations, simply produce their files to strangers to the attorney-client relationship. This is precisely the problem contemplated by the California Court of Appeal in *Goodley*, *supra*, which explained that permitting the assignment of legal malpractice claims would "force attorneys to defend themselves against strangers." *Goodley*, *supra*, 133 Cal. Rptr. at 87. This would then create "endless complications and litigious intricacies" that "imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id*.; *see also Wagener v. McDonald*, 509 N.W.2d 188, 191 (Minn. App. 1993) (allowing assignment of malpractice claim "would be incompatible with the attorney's duty to maintain confidentiality.")

Thus, if this Court were to reverse the summary judgment, it remains *hopelessly unclear and unsettled* as to how NWH could comply with the discovery commissioner's order to produce some of its files to the Purchasers' counsel and yet still comply with its professional obligations to its former clients to preserve confidential and privileged information.

2. <u>Appellants are attempting to bring and maintain an assigned legal malpractice claim.</u>

As they did with the district court, Appellants – the Tower Homes Purchasers -- ask this Court to adhere to the fiction that they are somehow not pursuing an assigned legal malpractice claim. Instead, Appellants maintain that, because Tower Homes is the named plaintiff, and because the word "assign" does not appear in the bankruptcy documents, there is no assignment issue. For numerous reasons, and as the district court agreed, this spurious fiction should be rejected.

First and foremost, ***Appellants admit in their Complaint that they are pursuing an assigned claim.*** Specifically, they allege: "During the bankruptcy proceeding, the Trustee, the law firm of Marquis Aurbach Coffing as well as the Tower Purchasers entered into a stipulation ***to release and assign*** certain claims of [Tower Homes] and allow Marquis Aurbach Coffing as counsel for the Tower Homes Purchasers to pursue claims on behalf of [Tower Homes]." (AA6:5-9 [emphasis added].). Appellants are bound by this judicial admission. *See, e.g., Scalf v. D.B. Log Homes*, 128 Cal.App.4th 1510, 1522, 27 Cal.Rptr.3d 826, 833 (Cal. App. 2005) (concessions in pleadings are incontrovertible judicial admissions); *Reyburn Lawn & Landscape Designers v. Plaster Dev. Co*., 255 P.3d 268, 277, 127 Nev. Adv. Rep. 26 (2011) (citing *Scalf, supra*, for proposition that concessions in pleadings are judicial admissions); *see also American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (explaining that admissions in pleadings are generally binding on the parties, the trial court and on appeal).

Even if this dispositive judicial admission is overlooked, it is still clear under Nevada law that the Trustee assigned Tower Homes' legal malpractice claim to the Purchasers. "In the absence of statute or a contract provision to the contrary, there are no prescribed formalities that must be observed to make an effective assignment." *Easton Business Opportunities v. Town Executive Suites*, 230 P.3d 827, 832, 126 Nev. Adv. Rep. 13 (2010). The assignor must manifest *a present intention to transfer* its contract right to the assignee. *Id*. (emphasis added). "It is essential to an assignment of a right that the obligee manifest an intention to transfer the right to another person without further action or manifestation of intention by the obligee." *Id*.; *see also Gasser v. Jet Craft Ltd*., 87 Nev. 376, 382, 487 P.2d 346 (1971) ("An 'assignment' has been defined as: 'A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.'")

Based on these standards, the net effect of the Marquis Aurbach Orders and underlying stipulations cannot reasonably be characterized as anything other than an assignment. Pursuant to the Original Marquis Aurbach Order, the Trustee stipulated "to ***release* to the Tower Homes Purchasers any and all claims***." (AA585:13-19, 832:13-19 [emphasis added].) This same "release to" language is contained the Amended Stipulation underlying the Second Marquis Aurbach Order. (AA898:13-19.) The Second Marquis Aurbach Order itself then "authorizes the Trustee to ***permit the Tower Homes Purchasers*** to pursue any and all claims on behalf of Tower Homes, LLC." (AA840:7-20 [emphasis added].) These claims are to be pursued by counsel "***retained on behalf of Tower Homes Purchasers***," and any recovery in the action "shall be ***for the benefit of the Tower Homes Purchasers***." (*Id*. [emphasis added].) All of these documents manifest a present intent by the Trustee to immediately and fully transfer Tower Homes' right to sue NWH to the Purchasers. No further action, obligation or involvement is required by Tower Homes under the orders and stipulations (nor is any such action, obligation or involvement permitted).

Accordingly, the transfer of the right to sue from Tower Homes to the Tower Homes Purchasers was an assignment as a matter of law. Appellants admit as much in their Complaint. Moreover, as the district court correctly recognized, the use of the phrase "release to" instead of "assign" is a "distinction without a difference." (AA908, 914:16-21.) In other words, substance controls over form, and parties cannot somehow avoid the rule prohibiting assignments by using synonyms or semantic gamesmanship.

3. Bankruptcy courts cannot circumvent state law prohibitions against the assignment of legal malpractice claims.

The critical wrinkle in this case, of course, is that Second Marquis Aurbach Order, which was approved by the Trustee and bankruptcy court, purports to assign Tower Homes' theoretical legal malpractice claim against NWH to the Tower

Homes Purchasers. Though no court in Nevada has confronted this precise situation (at least not in any published opinion), courts in other jurisdictions have consistently rejected attempts by bankruptcy trustees and creditors to collusively avoid the well-established prohibition of the assignment of legal malpractice claims, even when the assignment, transfer or "release" of the claim is done with the purported approval of a federal bankruptcy court. *See, e.g., Baum v. Duckor, Spradling & Metzger*, 72 Cal. App. 4th 54, 84 Cal.Rptr.2d 703 (Cal. App. 1999); *Curtis v. Kellogg & Andelson*, 73 Cal. App. 4th 492, 86 Cal.Rptr.2d 536 (Cal. App. 1999); *see also In re J.E. Marion*, 199 B.R. 635, 638 (S.D. Tex. 1996) (explaining that policy considerations underlying the rule prohibiting assignment of legal malpractice claims "must be extrapolated into the federal bankruptcy context when determining the prudence of assigning legal malpractice claims."). As the district court correctly recognized, ***these cases squarely demonstrate that NWH is entitled to judgment as a matter of law***. (It is therefore not surprising that Appellants virtually ignore these cases in their Opening Brief).

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

Similarly, in *Curtis, supra*, an individual who had purchased the assets of a corporation that was in bankruptcy (including the corporation's "causes of action") brought a legal malpractice claim against the corporation's attorneys. The

bankruptcy court had entered an order purporting to authorize the individual to bring the professional malpractice claim **in the name of the debtor**. *See Curtis, supra*, 86 Cal.Rptr.2d at 540. The claims were ultimately brought using the names of both the individual and the corporation. Recognizing the well-established rule that legal malpractice claims are not assignable, the court held that neither the individual nor the debtor corporation had standing to sue the defendant law firm. *Id*. at 544-45.

Just as in *Baum*, the court in *Curtis* rejected the argument that the bankruptcy court purporting to authorize the action somehow avoided the unlawful assignment of the legal malpractice lawsuit, reasoning as follows: "The trustee was apparently attempting to give [the individual] permission to proceed against [the law firm] ***in the name of the [client/debtor]***. The difficulty here is ***we are aware of no Bankruptcy Code provision--and appellants cite us to none--that would permit the trustee to proceed in this fashion***." *Id*. at 546 (emphasis added).

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

The United States District Court sitting in Nevada, while not confronting the precise situation presented here, has issued guidance consistent with *Baum* and *Curtis*. *See In re Agribiotech*, 319 B.R. 207 (D. Nev. 2004) ("Agribiotech I") and *In re Agribiotech*, 319 B.R. 216 (D. Nev. 2004) ("Agribiotech II"), both of which arise out the same bankruptcy proceedings. In the *Agribiotech* cases, the applicable bankruptcy plan established a creditors' trust and established a trustee of the creditors' trust to bring actions on behalf of the estate. In *Agribiotech I*, the bankruptcy trustee, acting pursuant to the authority and on behalf of the creditors'

trust during ongoing bankruptcy proceedings, brought fraud claims against former officers and directors of the debtor. One of the defendant officers argued that the trustee lacked standing because fraud claims are not assignable. In *Agribiotech II*, the trustee, also acting for the creditors' trust, sued the debtor's accountants for malpractice. The accountants argued that the trustee lacked standing to sue.

The federal court in both *Agribiotech* case permitted both actions for the following reasons:

- The claims at issue were assigned to and *brought by the bankruptcy trustee* on behalf of an established creditors' trust. (*Agribiotech I*, 319 B.R. at 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*.) In other words, the claims were brought for the benefit of the bankruptcy estate.
- "The [bankruptcy] estate thus is the real party in interest because it will receive the full benefit of any recovery." (*Id*.)

All of this starkly contrasts with and does not apply to the instant action. Here, the action is not brought by a bankruptcy trustee acting on behalf of a creditors' trust.[17] In fact, there is no creditors' trust, and the Trustee, on behalf of the Tower Homes bankruptcy estate, has expressly disclaimed any interest in this action (or any action relating to the loss of the Tower Homes Purchasers' earnest

[17] As noted above, the Bankruptcy Plan only named the Trustee as the designated representative under 11 U.S.C. §1123(b)(3).

money deposits). (AA584:26 – 585:5.) Instead, the named plaintiff in this case is a limited liability shell that exists solely as a vehicle to attempt to recover monies for the exclusive benefit of the Tower Homes Purchasers – not Tower Homes, LLC, not the Tower Homes bankruptcy estate and not the bankruptcy creditors as a whole. Stated simply, under *Agribiotech*, this type of action is permissible if, and only if, the bankruptcy estate is the real party in interest.

The *Agribiotech* actions were also notably brought by the trustee *while the bankruptcy proceedings were ongoing*. This is important because, again, federal law authorizes trustees to pursue actions on behalf of the estate to further the trustee's duties to amass, distribute and/or liquidate the debtor's assets to facilitate an orderly and equitable administration and distribution of the bankruptcy estate. Here, the Tower Homes bankruptcy estate has now been fully administered, and all funds required to be disbursed under the applicable Plan have been disbursed. (AA884:10-17.) In other words, unlike every other case in which a trustee (or a creditors' committee) has been permitted to pursue a legal malpractice claim on behalf of a debtor's bankruptcy estate, *no bankruptcy purpose is served by the instant action* because there is no longer any bankruptcy estate to be administered.

Appellants ***ignore*** all of these critical principles in their Opening Brief. Instead, as detailed below, Appellants raise a series of new arguments, none of which provide any support for the viability of the instant action.

C. Most of the Purchasers' contentions on appeal are new, and, in any event, are misplaced fictions that are contrary to the bankruptcy documents purporting to authorize this action.

In both the proceedings below and in this appeal, Appellants *fail to cite a single case,* from any jurisdiction, that somehow permits or authorizes strangers to an attorney-client relationship to use the limited liability shell of a bankrupt "client" to sue the client's attorneys for legal malpractice and retain the proceeds for their own benefit (and, at the same time, they ignore the cases that have expressly

disallowed this practice). Instead, the Purchasers rely largely on the fiction that, because "Tower Homes, LLC" is the name used to denominate the plaintiff, this action is really not an unlawfully assigned legal malpractice claim, even though the Trustee has given the right to sue exclusively to the Purchasers, through the Purchasers' own attorneys, with the hypothetical proceeds to go solely to the Purchasers. As detailed above, this fiction is completely belied by the language of both Marquis Aurbach Orders, the stipulations underlying these orders, case law and common sense.

Recognizing their predicament, the Purchasers assert a litany of *new* arguments in their Opening Brief (which will be addressed below) that they did not raise during the district court proceedings. This is impermissible, as this Court has repeatedly explained that parties may not assert new arguments or theories on appeal. *See, e.g., Schuck v. Signature Flight Support of Nevada*, 245 P.3d 542, 544, 126 Nev. Adv. Rep. 42 (2010) (even on an appeal from an order granting summary judgment, where a *de novo* review standard applies, points may not be raised for the first time on appeal); *Dermody v. City of Reno*, 113 Nev. 207, 931 P.2d 1354 (1997); *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91 (1989); *Montesano v. Donrey Media Group*, 99 Nev. 644, 650 n. 5, 668 P.2d 1081 (1983). This well-established rule "maintains the efficiency, fairness, and integrity of the judicial system for all parties." *Schuck, supra*, 245 P.3d at 544.

Nevertheless, even if considered by this Court, the Purchasers' new arguments on appeal do nothing to alter the factual and legal realities that (1) the Purchasers are the real parties in interest in this action, notwithstanding the case caption; and (2) the Purchasers are unlawfully pursing an assigned claim for their own benefit – they are not merely the potential recipient of "proceeds" of the claim, and they are not pursuing the claim as a representative of the Tower Homes bankruptcy estate.

1. This action involves an assignment of a previously unasserted legal malpractice claim that Tower Homes never chose or decided to bring for itself, not merely an assignment of "proceeds."

The first *new* argument is the Purchasers' contention that this action involves the assignment of proceeds of litigation, as opposed to an assignment of the legal malpractice claim itself. (Opening Brief at 17:6 – 19:16.) To support this argument, Appellants rely primarily on *Achrem v. Expressway Plaza Ltd. Partnership*, 112 Nev. 737, 917 P.2d 447 (1996).

In *Achrem*, the plaintiffs agreed to pay a portion of the proceeds of their personal injury lawsuit to a creditor after the lawsuit was over. After the lawsuit settled, plaintiffs' attorney did not honor the assignment agreement, and the creditor sued the plaintiffs' attorney. The attorney argued that the assignment violated public policy. This Court rejected the attorney's argument, primarily because "a meaningful legal distinction exists between assigning the rights to a tort action and assigning the proceeds from such an action." *Achrem, supra*, 112 Nev. at 741. The situation presented in *Achrem* did not violate the prohibition against the assignment of tort claims because the plaintiff assignors *retained control of and pursued their lawsuit without any interference from the creditor/assignee*. *Id*. ("Thus, we conclude that the public policy against assigning tort actions was not present in this case.")

The Purchasers argue, based on *Achrem*, that the instant case involves only a permissible assignment of "proceeds" of Tower Homes' legal malpractice claim, and not an unlawful assignment of the claim itself, because "Tower Homes is still in control of its lawsuit against Heaton and NWH," and "[t]he Tower Homes Purchasers are not interfering with Tower Homes' legal malpractice lawsuit in any way." (Opening Brief at 19:12-16.)

This argument, first of all, over-reads *Achrem*, which arose out of a personal injury lawsuit, not a legal malpractice lawsuit. It therefore did not involve the

concerns associated with assigning legal malpractice claims, such as the unique and individualized quality of legal services, the personal nature of an attorney's duty to a client and the confidentiality of the attorney-client relationship, which invoke special public policy concerns. *See Goodley, supra*, 133 Cal. Rptr. at 87. Given the public policy concerns articulated by *Goodley* (and adopted by this Court in *Chaffee*), it is doubtful that an assignment of even just the "proceeds" of a legal malpractice claim is permissible in Nevada.

Nevertheless, even if the *proceeds* of a legal malpractice were assignable under Nevada law, that hypothetical is simply not present in the instant case. The Purchasers' suggestion that "Tower Homes, LLC" is bringing and "controlling" this lawsuit is, first of all, directly at odds with the Marquis Aurbach Orders and underlying stipulations, which give this claim to the Purchasers, to be pursued by the Purchasers' counsel, for the sole benefit of the Purchasers. (AA585:13-19, 832:13-19, 840:7-20 and 898:13-19.) There could not be a more clear and complete ceding of control of this legal malpractice lawsuit to the Purchasers.

In contrast, there is not one shred of evidence in the record supporting Appellants' contention that "Tower Homes, LLC" is some somehow "controlling" this lawsuit. There are only two people who could possibly "control" this lawsuit on behalf of "Tower Homes, LLC." The first is the Trustee, who has disclaimed any interest. (AA584:26 – 585:5.) The second is Rod Yanke, who was the sole manager of Tower Homes. (RA135.) Under Nevada law, limited liability companies such as Tower Homes can only act through their managers. *See, e.g.*, NRS 86.071; NRS 86.291(1). Appellants have never argued (let alone produced evidence) that Yanke approved, consented to or desired to bring the instant lawsuit. Moreover, as noted above, Yanke never chose to pursue a legal malpractice claim against NWH, despite having actual knowledge since 2006 (prior to the bankruptcy) that the Purchasers were contending that Tower Homes mishandled the earnest money deposits in violation of Nevada law. (AA23:1-12.)

Moreover, the cases cited by the Purchasers illustrate precisely why the instant case involves *the assignment of the claim*, and not merely the 'proceeds' of the claim. For example, in *Weston v. Dowty*, 414 N.W.2d 165 (Mich. App. 1987), the court permitted clients to promise to pay the proceeds of a legal malpractice lawsuit to the party who had originally brought the claim against the clients, but only because the individual clients themselves, and not third-party strangers to the attorney-client relationship, were *actually* bringing and maintaining the legal malpractice action. *See Weston, supra*, 414 N.W.2d 165, 167. The court explained that "[a]n assignment is defined as '[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.'" *Id*. (quoting Black's Law Dictionary). "To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee *a present right* in the thing assigned." *Id*. (emphasis added).[18] Because there was no present transfer of anything to the assignee in *Weston*, there was no "assignment"; rather, the plaintiff client (like the client in *Achrem*) merely made a *future promise to pay* over any proceeds from the lawsuit. *Id*. As detailed above, the situation here bears no resemblance to *Weston*. *See also Kim v. O'Sullivan*, 137 P.3d 61, 64 (Wash. App. 2006) (rejecting argument that assignee was merely assigned proceeds of legal malpractice lawsuit because "the client must be the real party in interest when the malpractice suit is litigated," and concluding that client was not the real party in interest because the adverse party/assignee, and not the client, had complete control over the malpractice lawsuit and the adverse party was the only party that would benefit from the lawsuit.)[19]

[18] As discussed above, an "assignment" is defined in a substantively identical manner under Nevada law. *See Easton Business, supra*, 230 P.3d at 832.

[19] As detailed above, the instant action involves the same situation. The Purchasers, who were the adverse parties in the underlying lawsuits (see Footnote 3, *supra*) had total control over the malpractice lawsuit and are the only parties who stand to benefit from it.

The Purchasers also argue, based on *Weston*, that, "even assuming that the Second Marquis Aurbach Order assigning Tower Homes' legal malpractice claim to the Tower Homes Purchasers violates Nevada law, this violation does not warrant dismissal of Tower Homes' legal malpractice action." (Opening Brief at 21:8-12.) Even if this *dicta* from *Weston* did represent persuasive authority as to the remedy for an unlawful assignment under normal circumstances, the situation presented in the instant case is clearly distinguishable. Again, given that Tower Homes was a bankruptcy debtor at the time this action was filed, and all of its assets and rights (including causes of action) belonged to the bankruptcy estate, *the only way* that Tower Homes (genuinely or otherwise) could have brought this action was to have been named in the Bankruptcy Plan as a designated representative pursuant to 11 U.S.C. §1123(b)(3), which it was not. (AA796:16 – 797:1.) In addition, Tower Homes (as opposed to the Tower Homes Purchasers) was not even purportedly given authority to bring this action in the Second Marquis Aurbach Order. (*Id*.) Thus, summary judgment was properly granted.

2. <u>The Purchasers are pursuing this malpractice action for their own benefit, not as representatives for all creditors of the Tower Homes bankruptcy estate.</u>

In another *new* argument on appeal, the Purchasers next take issue with the district court's ruling that they are pursuing this malpractice claim for their own benefit, and not for the benefit of the bankruptcy estate. (Opening Br. at 21:18-27.) This conclusion by the district court is not reasonably disputable, factually or legally. Again, pursuant to both Marquis Aurbach Orders and related stipulations (i.e., the documents that purport to authorize this action), the Trustee fully relinquished the bankruptcy estate's right to pursue this action, and the bankruptcy estate's right to recover in this action. (AA585:13-19, 832:13-19, 840:7-20 and 898:13-19.) Thus, neither the bankruptcy estate nor the other creditors of Tower Homes have any interest whatsoever in this action. This fact, which is not genuinely

disputed by the evidence, is precisely one reason why this action is unlawful.

The cases cited by the Purchasers, which arise out of *representative* actions demonstrate the distinction. (Opening Br. at 23:10 – 24:8 [citing *Office of Statewide Health Planning and Dev. v. Musick, Peeler & Garrett*, 76 Cal.App.4th 830, 90 Cal.Rptr.2d 705 (Cal. App. 1999) and *Appletree Square I Ltd. P'ship v. O'Connor & Hannan*, 575 N.W.2d 102 (Minn. 1998)].) These cases merely stand for the proposition, discussed above in the context of the *Agribiotech* case, that a bankruptcy estate may appoint a representative to pursue a legal malpractice claim *on behalf of a bankruptcy estate*, and that this type of representative action does not constitute an unlawful assignment because "[r]egardless of who prosecutes a claim under 11 United States Code section 1123(b)(3), the claim remains part of the bankruptcy estate." *Office of Statewide, supra*, 76 Cal.App.4th at 834. "On the other hand, *if a party seeks to prosecute the action on its own behalf, it must do so as an assignee*, not as a special representative." *Id.* (emphasis added). In other words, if the party bringing the bankruptcy debtor's malpractice claim is entitled to the recovery from the action (as opposed to the bankruptcy estate), then there has been an unlawful assignment. *Id.*; *Appletree, supra*, 575 N.W.2d at 106 (explaining that proper estate representative was not entitled to any recovery from the malpractice action, other than costs and fees).

The situations presented in these cited cases are qualitatively different from the situation in the instant case. Here, there has been an assignment (i.e., a relinquishment of and the present transfer of that right to sue) to a single group of creditors. This group of creditors (the Purchasers) is not suing NWH for or on behalf of the bankruptcy estate, with the proceeds to be distributed to all estate creditors – it is suing solely and exclusively for itself, with the proceeds going solely to the Purchasers. (AA840:7-20.) This is an assignment, pure and simple. It is not a representative action pursuant to 11 U.S.C. section 1123(b) under federal bankruptcy law. *See Jackson Nat'l Life Ins. Co. v. Greycliff Partners*, 960 F.Supp.

186, 188 (E.D. Wis. 1997) (concluding that a party bringing claim was an assignee when the party has complete control over the claim and retains everything it recovers).

Ultimately recognizing that this action, as provided for by the Second Marquis Aurbach Order, cannot pass muster because the Purchasers are suing for themselves, and not for the bankruptcy estate, the Purchasers make a final pitch to save this action by arguing that, if this Court finds that the Purchasers are unlawfully pursuing an assigned claim, the proceeds of this action should instead revert back to the bankruptcy estate as a whole. (Opening Br. at 25:18-25.) This, again, is a *new* argument on appeal, and therefore should not be considered. *See, e.g.*, *Schuck, supra*, 245 P.3d at 544. Again, however, even if considered, this contention lacks merit.

With this argument, the Purchasers are essentially asking this Court to revise the Second Marquis Aurbach Order. Because this Court is not a United States bankruptcy court, it is not empowered to make this revision. Rather, this is the type of fundamental change to this action that requires the involvement of the Trustee, the bankruptcy court and *all* of the Tower Homes creditors. Representative actions brought on behalf of a debtor's estate are carefully crafted and negotiated as part of a plan of reorganization, and are developed with notice to and input from all creditors. This is precisely why representative actions brought on behalf of a bankruptcy estate are fundamentally different than the instant action, which is nothing more than an unlawfully assigned legal malpractice claim.[20]

[20] The case upon which the Purchasers primarily rely in this section, *Arguello v. Sunset Station*, 252 P.3d 206, 127 Nev. Adv. Rep. 29 (2011), is inapposite. That case involves a property loss and an insurer's subrogation rights. It has nothing to do with bankruptcy law or attempted assignments of legal malpractice claims that belong to a bankruptcy estate.

3. The Purchasers argue that *Chaffee* should be overturned, and that Nevada should not continue to bar the assignment of legal malpractice claims.

For their final *new* argument on appeal, the Purchasers argue that Nevada should follow effectively overrule *Chaffee* and establish a new rule permitting the assignment of some malpractice claims. Again, *this brand new argument should not be considered on appeal*. *See, e.g., Schuck, supra*, 245 P.3d at 544. It was neither briefed nor argued in the proceedings below. Not only is this argument new, but it is directly contrary to what Appellants' counsel asserted during the hearing on the NWH's MSJ. (AA935:23-24 ["You can't have an assignment under Nevada law, we agree with that. That's the simple issue."].)

As purported support for this new and inconsistent argument, Appellants cite to select cases from minority jurisdictions that permit the assignment of legal malpractice claims under some circumstances, but Nevada does not follow this minority law. Rather, Nevada follows majority law, which squarely prohibits the assignment of legal malpractice claims for all the reasons discussed in Section V.B.1, *supra*.[21] Moreover, the cases cited by Appellants that have permitted an assignment of legal malpractice claims are readily distinguishable.

In *New Hampshire Ins. Co. v. McCann*, 707 N.E.2d 332 (Mass. 1999), a minority jurisdiction, the court permitted an assignment of a legal malpractice claim because "[t]he duty of confidentiality is . . . not threatened in this case." *Id*. at 337. The claim was voluntarily assigned by an insurance company with the full awareness that it was waiving its attorney-client privilege. *Id*. In contrast, here, Tower Homes did not "voluntarily" assign the claim, and neither Tower Homes nor

[21] Appellants' citation to *Gallegos v. Malco Enterprises*, 255 P.3d 1287, 127 Nev. Adv. Rep. 51 (2011) is also unavailing. This case involved a judicial assignment of a debtor's potential action against a rental car company and insurers. It did not involve assignment of a legal malpractice claim.

NWH's joint client, Yanke, have ever waived any privilege with respect to the documents or their communications with NWH.

Most of the other cases relied upon by Appellants involve assigned malpractice claims acquired through a larger purchase of assets – not merely the assignment of the legal malpractice claim itself. They also do not involve assignments to the client's litigation adversary.[22] *See White Mountains Reinsurance Co. v. Borton Petrini, LLP*, 221 Cal.App.4th 890, 164 Cal.Rptr.3d 912 (Cal. App. 2013);[23] *Cerberus Partners v. Gadsby & Hannah*, 728 A.2d 1057 (R.I. 1999); *See Richter v. Analex Corp.*, 940 F.Supp. 353, 356-58 (D.D.C. 1996); *Hedlund Mfg. Co. v. Weiser, Stapler & Spivak*, 539 A.2d 357 (Pa. 1988).

Given this Court's *Chaffee* opinion (which involved a levy and execution of the client's assets), it is doubtful that the exception to the general rule against assignability carved out by these cases for larger commercial transactions would apply in Nevada. Nevertheless, even if Nevada did recognize this exception, it would not, in any event, apply here, where the Trustee specifically assigned *only* the malpractice claim to the Purchasers, and no other claims or assets. Additionally, unlike the cases cited by Appellants, the Purchasers and Tower Homes were litigation adversaries, thereby implicating additional concerns regarding collusion. *See, e.g., Kommavongsa, supra*, 67 P.3d at 1078.

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[22] One exception is *Thurston v. Cont'l Cas. Co.*, 567 A.2d 922 (Me. 1989). Even this case, however, is distinguishable, as it involved an assignment of not only a legal malpractice claim, but a 'bad faith' claim against the defendant's insurer as well. In any event, *Thurston* is an outlier in a minority jurisdiction, and the court's summary rejection of the policies underlying the prohibition against assignments is contained in one paragraph, with little reasoning or analysis. *Thurston* has been roundly criticized by courts in other jurisdictions, and it does not represent Nevada law.

[23] The district court examined the *White Mountains* case *sua sponte*. It was not raised by Appellants in the proceedings below. The district court, in any event, correctly concluded that the "narrow exception" carved out by the *White Mountains* court for large commercial transactions does not apply here.

In sum, *Chaffee* represents established Nevada law. It is also majority law. Appellants never argued in the proceedings below that *Chaffee* should be overruled or limited, and Appellants provide no support for the application of any "exception" to the majority rule. This case does not involve a large commercial asset purchase. Rather, it involves an assignment of a legal malpractice claim between litigation adversaries – which is the type of assignment that is prohibited in virtually every jurisdiction. None of the authorities cited by Appellants would support the assignment in *this* case. There is no legitimate reason why *Chaffee* should be overturned.

VI.

CONCLUSION

Based on the foregoing, as well as points, authorities and evidence in the appendices, respondents William H. Heaton and the law firm of Nitz, Walton & Heaton, Ltd. respectfully request that the district court's order granting Respondents' Motion for Summary Judgment be affirmed.

Dated this 18th day of March, 2015.

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ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains **12,075** words.

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

Dated this 18th day of March, 2015.

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NRAP 26.1 DISCLOSURE[24]

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent William H. Heaton is an individual.

Respondent Nitz, Walton & Heaton, Ltd. is a Nevada professional corporation. There are no parent corporations or publicly held corporations owning 10% of the corporation's stock.

Respondents have been represented in these proceedings by Drew Cass and Jeff Olster of the law firm of Lewis Brisbois Bisgaard & Smith LLP.

Dated this 18th day of March, 2015.

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[24] In their NRAP 26.1 Disclosure, Appellants state that "Tower Homes, LLC is a privately held corporation, incorporated in the State of Nevada." In fact, according to the online records for the Nevada Secretary of State, Tower Homes, LLC is Nevada limited-liability company with "default" status. (RA135.) The only listed member is managing member Rodney C. Yanke. (*Id.*)

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, and that on this 18th day of March, 2015, I did cause a true copy of the foregoing **RESPONDENTS' ANSWERING BRIEF** to be placed in the United States Mail, with first class postage prepaid thereon, and addressed as follows:

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