

1 proposed 18-story condominium towers containing in excess of 405 units, but Yanke denies each
2 and every other allegation in said paragraph.

3 8. Answering the allegations in Paragraph 29 in the General Factual Allegations section
4 in Plaintiffs' First Amended Complaint, Yanke admits that Plaintiffs entered into one or more
5 written purchase agreements with Tower Homes and affirmatively states that the Plaintiffs' purchase
6 agreements with Tower Homes speak for themselves; to the extent that the remaining allegations
7 require a response, Yanke denies each and every other allegation in said Paragraph 29.

8 9. Yanke denies the allegations in Paragraphs 30, 36, 37, and 39 in the General Factual
9 Allegations section in Plaintiffs' First Amended Complaint.

10 10. Answering the allegations in Paragraph 31 in the General Factual Allegations section
11 in Plaintiffs' First Amended Complaint, Yanke admits that the first tower is has not been completed
12 and that it is not near substantial completion, but denies each and every other allegation in said
13 paragraph upon grounds that Yanke is without sufficient knowledge and/or information upon which
14 to form a belief as to the truth or falsity of those allegations.

15 11. Yanke denies the allegations in Paragraphs 32, 33, and 35 in the General Factual
16 Allegations section in Plaintiffs' First Amended Complaint upon grounds that Yanke is without
17 sufficient knowledge and/or information upon which to form a belief as to the truth or falsity of the
18 allegations in those paragraphs.

19 12. Answering the allegations in Paragraph 34 in the General Factual Allegations section
20 in Plaintiffs' First Amended Complaint, Yanke admits that mechanics' liens asserting claims of more
21 than twenty-five million dollars have been recorded against the real property that is the subject of
22 Plaintiffs' First Amended Complaint; however, Yanke affirmatively alleges that many of said liens
23 are duplicative and that the total amount allegedly due to the lien claimants does not exceed twenty-
24 five million dollars.

25 13. Answering the allegations in Paragraph 38 in the General Factual Allegations section
26 in Plaintiffs' First Amended Complaint, Yanke affirmatively states that the Plaintiffs' purchase
27 agreements with Tower Homes speak for themselves; to the extent that the allegations in said
28 Paragraph 38 require a response, Yanke admits that the Plaintiffs' purchase agreements with Tower

1 Homes contain clauses making time of the essence to said purchase agreements, but denies each and
2 every other allegation in said Paragraph 38.

3 14. Answering the allegations in Paragraph 40 of the General Factual Allegations section
4 of Plaintiffs' First Amended Complaint, Yanke admits that the first tower is has not been completed
5 and that it is not near substantial completion, but denies each and every other allegation in said
6 paragraph upon grounds that Yanke is without sufficient knowledge and/or information upon which
7 to form a belief as to the truth or falsity of those allegations.

8 15. Answering the allegations in Paragraph 41 in the First Cause of Action in Plaintiffs'
9 First Amended Complaint, Yanke repeats and realleges his answers and responses to the allegations
10 in the preceding paragraphs in Plaintiffs' First Amended Complaint, and incorporates those answers
11 and responses herein by reference as though set forth herein in full.

12 16. Answering the allegations in Paragraph 42 in the First Cause of Action in Plaintiffs'
13 First Amended Complaint, Yanke admits that Plaintiffs entered into one or more written purchase
14 agreements with Tower Homes to purchase a common interest ownership unit in the Spanish View
15 Project, but denies each and every other allegation in said Paragraph 42.

16 17. Answering the Allegations in Paragraphs 43, 46, and 47 in the First Cause of Action
17 in Plaintiffs' First Amended Complaint, Yanke affirmatively states that the Plaintiffs' purchase
18 agreements with Tower Homes speak for themselves; to the extent that the allegations in said
19 Paragraphs 43, 46, and 47 require a response, Yanke admits that the Plaintiffs' contracts with Tower
20 Homes contain clauses making time of the essence to the contracts, but denies each and every other
21 allegation in said Paragraphs 43, 46, and 47.

22 18. Yanke denies the allegations in Paragraphs 44, 48, 52, and 53 in the First Cause of
23 Action in the Plaintiffs' First Amended Complaint.

24 19. Yanke admits the allegations in Paragraph 45 in the First Cause of Action in the
25 Plaintiffs' First Amended Complaint.

26 20. Yanke denies the allegations in Paragraphs 49 and 50 in the First Cause of Action in
27 Plaintiffs' First Amended Complaint upon grounds that Yanke is without sufficient knowledge
28 ...

1 and/or information upon which to form a belief as to the truth or falsity of the allegations in those
2 paragraphs.

3 21. Yanke denies each and all of the allegations in Paragraph 51 in the First Cause of
4 Action in the Plaintiffs' First Amended Complaint to the extent those allegations are directed to
5 Yanke. To the extent that the allegations in said paragraphs are directed to defendants other than
6 Yanke, Yanke denies the allegations in those paragraphs upon grounds that Yanke is without
7 sufficient knowledge and/or information upon which to form a belief as to the truth or falsity of said
8 allegations.

9 22. Answering the allegations in Paragraph 54 in the Second Cause of Action in
10 Plaintiffs' First Amended Complaint, Yanke repeats and realleges his answers and responses to the
11 allegations in the preceding paragraphs in Plaintiffs' First Amended Complaint, and incorporates
12 those answers and responses herein by reference as though set forth herein in full.

13 23. Yanke affirmatively alleges that the allegations in Paragraph 55 in the Second Cause
14 of Action in Plaintiffs' First Amended Complaint constitute statements or conclusions of law to
15 which no answer is required. To the extent that an answer is required, Yanke denies the allegations
16 in said Paragraph 55.

17 24. Yanke denies the allegations in Paragraphs 56, 57 and 58 in the Second Cause of
18 Action in the Plaintiffs' First Amended Complaint.

19 25. Answering the allegations in Paragraph 59 in the Third Cause of Action in Plaintiffs'
20 First Amended Complaint, Yanke repeats and realleges his answers and responses to the allegations
21 in the preceding paragraphs in Plaintiffs' First Amended Complaint, and incorporates those answers
22 and responses herein by reference as though set forth herein in full.

23 26. Yanke denies the allegations in Paragraphs 60, 61, 63 and 64 in the Third Cause of
24 Action in the Plaintiffs' First Amended Complaint.

25 27. Yanke denies the allegations in Paragraph 62 in the Third Cause of Action in
26 Plaintiffs' First Amended Complaint upon grounds that Yanke is without sufficient knowledge
27 and/or information upon which to form a belief as to the truth or falsity of the allegations in those
28 paragraphs.

1 28. Answering the allegations in Paragraph 65 in the Fourth Cause of Action in Plaintiffs'
2 First Amended Complaint, Yanke repeats and realleges his answers and responses to the allegations
3 in the preceding paragraphs in Plaintiffs' First Amended Complaint, and incorporates those answers
4 and responses herein by reference as though set forth herein in full.

5 29. Yanke denies each and all of the allegations in Paragraphs 66, 67, 68 and 69 in the
6 Fourth Cause of Action in the Plaintiffs' First Amended Complaint to the extent those allegations
7 are directed to Yanke. To the extent that the allegations in said paragraphs are directed to defendants
8 other than Yanke, Yanke denies the allegations in those paragraphs upon grounds that Yanke is
9 without sufficient knowledge and/or information upon which to form a belief as to the truth or falsity
10 of said allegations.

11 30. Yanke denies the allegations in Paragraph 70 in the Fourth Cause of Action in the
12 Plaintiffs' First Amended Complaint.

13 31. Answering the allegations in Paragraph 71 in the Fifth Cause of Action in Plaintiffs'
14 First Amended Complaint, Yanke repeats and realleges his answers and responses to the allegations
15 in the preceding paragraphs in Plaintiffs' First Amended Complaint, and incorporates those answers
16 and responses herein by reference as though set forth herein in full.

17 32. Answering the allegations in Paragraph 72 in the Fifth Cause of Action in Plaintiffs'
18 First Amended Complaint, Yanke admits that he and Defendant Jeannine Cutter lived in the same
19 residence from time to time in or around February, 2005, but denies each and every other allegation
20 in the said Paragraph 72.

21 33. Yanke denies the allegations in Paragraphs 73, 86 and 87 in the Fifth Cause of Action
22 in the Plaintiffs' First Amended Complaint.

23 34. Answering the allegations in Paragraph 74 in the Fifth Cause of Action in the
24 Plaintiffs' First Amended Complaint, Yanke admits that Cutter and Berg received salaries from time
25 to time from Tower, but denies each and every other allegation in said paragraph.

26 35. Yanke denies the allegations in Paragraphs 75, 78, 79, 80, 82, 83 and 85 in the Fifth
27 Cause of Action in Plaintiffs' First Amended Complaint upon grounds that Yanke is without

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1 sufficient knowledge and/or information upon which to form a belief as to the truth or falsity of the
2 allegations in those paragraphs.

3 36. Yanke affirmatively alleges that the allegations in Paragraphs 76, 77 and 84 in the
4 Fifth Cause of Action in Plaintiffs' First Amended Complaint constitute statements or conclusions
5 of law to which no answer is required. To the extent that an answer is required, Yanke denies each
6 and all of the allegations in said paragraphs.

7 37. Yanke admits the allegations in Paragraph 81 in the Fifth Cause of Action in the
8 Plaintiffs' First Amended Complaint.

9 38. Answering the allegations in Paragraph 88 in the Sixth Cause of Action in Plaintiffs'
10 First Amended Complaint, Yanke repeats and realleges his answers and responses to the allegations
11 in the preceding paragraphs in Plaintiffs' First Amended Complaint, and incorporates those answers
12 and responses herein by reference as though set forth herein in full.

13 39. Yanke affirmatively alleges that the allegations in Paragraphs 89, 90, 91 and 92 in the
14 Sixth Cause of Action in Plaintiffs' First Amended Complaint constitute statements or conclusions
15 of law to which no answer is required. To the extent that an answer is required, Yanke denies each
16 and all of the allegations in said paragraphs.

17 40. Answering the allegations in Paragraph 93 in the Sixth Cause of Action in Plaintiffs'
18 First Amended Complaint, Yanke admits that he and Defendant Jeannine Cutter lived in the same
19 residence from time to time in or around February, 2005, but denies each and every other allegation
20 in the said Paragraph 93.

21 41. Answering the allegations in Paragraph 94 in the Sixth Cause of Action in the
22 Plaintiffs' First Amended Complaint, Yanke admits that Cutter and Berg received salaries from time
23 to time from Tower, but denies each and every other allegation in said paragraph.

24 42. Yanke denies each and all of the allegations in Paragraphs 95, 97 and 98 in the Sixth
25 Cause of Action in Plaintiffs' First Amended Complaint.

26 43. Yanke denies the allegations in Paragraph 96 in the Sixth Cause of Action in
27 Plaintiffs' First Amended Complaint, upon grounds that Yanke is without sufficient knowledge

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1 and/or information upon which to form a belief as to the truth or falsity of the allegations in said
2 paragraph.

3 44. Answering the allegations in Paragraph 99 in the Seventh Cause of Action in
4 Plaintiffs' First Amended Complaint, Yanke repeats and realleges his answers and responses to the
5 allegations in the preceding paragraphs in Plaintiffs' First Amended Complaint, and incorporates
6 those answers and responses herein by reference as though set forth herein in full.

7 45. Yanke affirmatively alleges that the allegations in Paragraphs 100, 101 and 108 in the
8 Seventh Cause of Action in Plaintiffs' First Amended Complaint constitute statements or
9 conclusions of law to which no answer is required. To the extent that an answer is required, Yanke
10 denies each and all of the allegations in said paragraphs.

11 46. Yanke denies the allegations in Paragraphs 102, 104 and 105 in the Seventh Cause
12 of Action in Plaintiffs' First Amended Complaint, upon grounds that Yanke is without sufficient
13 knowledge and/or information upon which to form a belief as to the truth or falsity of the allegations
14 in said paragraphs.

15 47. Answering the allegations in Paragraph 103 in the Seventh Cause of Action in
16 Plaintiffs' First Amended Complaint, Yanke admits that Plaintiffs delivered monies to Tower in
17 connection with execution of their respective contracts, but denies each and every other allegation
18 in said paragraph.

19 48. Yanke denies each and all of the allegations in Paragraphs 106, 107, 109, 110, 111
20 and 112 in the Seventh Cause of Action in Plaintiffs' First Amended Complaint

21 49. Answering the allegations in Paragraph 113 in the Eighth Cause of Action [re: Civil
22 RICO] in Plaintiffs' First Amended Complaint, Yanke repeats and realleges his answers and
23 responses to the allegations in the preceding paragraphs in Plaintiffs' First Amended Complaint, and
24 incorporates those answers and responses herein by reference as though set forth herein in full.

25 50. Yanke denies each and all of the allegations in Paragraphs 114, 115, 119, 120, 121,
26 122, 123, 124, 126 and 127 in the Eighth Cause of Action [re: Civil RICO] in Plaintiffs' First
27 Amended Complaint.

28 ...

1 51. Yanke denies each and all of the allegations in Paragraph 116 in the Eighth Cause of
2 Action [re: Civil RICO] in Plaintiffs' First Amended Complaint upon grounds that Yanke is without
3 sufficient knowledge and/or information upon which to form a belief as to the truth or falsity of the
4 allegations in said paragraph.

5 52. Answering the allegations in Paragraph 117 in the Eighth Cause of Action [re: Civil
6 RICO] in Plaintiffs' First Amended Complaint, Yanke admits that the cases referenced therein were
7 initiated after July 1, 1983, but Yanke denies each and every other allegation in said paragraph.

8 53. Yanke denies each and all of the allegations in Paragraphs 118 and 125 in the Eighth
9 Cause of Action [re: Civil RICO] in Plaintiffs' First Amended Complaint, and Yanke affirmatively
10 alleges that he has not engaged in any racketeering actions.

11 54. Answering the allegations in Paragraph 128 in the Eighth Cause of Action [re:
12 Conversion] in Plaintiffs' First Amended Complaint, Yanke repeats and realleges his answers and
13 responses to the allegations in the preceding paragraphs in Plaintiffs' First Amended Complaint, and
14 incorporates those answers and responses herein by reference as though set forth herein in full.

15 55. Yanke denies each and all of the allegations in Paragraphs 129, 130 and 131 in the
16 Eighth Cause of Action [re: Conversion] in Plaintiffs' First Amended Complaint.

17 56. Yanke denies each and every allegation in Plaintiffs' First Amended Complaint which
18 are not expressly admitted or denied hereinabove.

19 **AFFIRMATIVE DEFENSES**

20 **FIRST AFFIRMATIVE DEFENSE**

21 Plaintiffs' First Amended Complaint fails to state a claim as against Yanke upon which relief
22 can be granted.

23 **SECOND AFFIRMATIVE DEFENSE**

24 Plaintiffs, by their acts, deeds and conduct and/or the acts, deeds and conduct of Plaintiffs'
25 agents, employees and/or representatives, have released any and all claims that Plaintiffs might
26 otherwise have had to assert as against Yanke.

27 ...

28 ...

THIRD AFFIRMATIVE DEFENSE

Plaintiffs, by their acts, deeds and conduct and/or the acts, deeds and conduct of Plaintiffs' agents, employees and/or representatives, have waived any and all claims that Plaintiffs might otherwise have had to assert as against Yanke.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs, by their acts, deeds and conduct and/or the acts, deeds and conduct of Plaintiffs' agents, employees and/or representatives, are equitably estopped from recovery against Yanke upon the claims that are asserted in Plaintiffs' First Amended Complaint.

FIFTH AFFIRMATIVE DEFENSE

Any duty of performance that Yanke may have owed to Plaintiffs was excused by Plaintiffs' prior breach of the underlying contract with Tower Homes.

SIXTH AFFIRMATIVE DEFENSE

If Plaintiffs were in fact damaged as alleged in Plaintiffs' First Amended Complaint, said damages were actually and proximately caused by the Plaintiffs' own agents or representatives, or by the acts of third parties over whom Yanke has no control.

SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs come before the Court in bad faith and in violation of NRCP Rule 11, and are thereby precluded from obtaining the relief that they seek as against Yanke.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs have failed and refused to mitigate their damages, and as a result are precluded from recovery upon the claims that are asserted in Plaintiffs' First Amended Complaint.

NINTH AFFIRMATIVE DEFENSE

Plaintiffs come before the Court with unclean hands, and are thereby precluded from obtaining the relief of which they seek as against Yanke.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs would be unjustly enriched if they were granted the relief that they seek as against Yanke pursuant to the Causes of Action that are asserted in Plaintiffs' First Amended Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

The underlying purchase agreements upon which the claims and causes of action asserted in Plaintiffs' First Amended Complaint are based contain a mandatory arbitration clause, and Plaintiffs have failed to comply with said provision or to satisfy express existing conditions precedent to their right to bring the claims that are asserted in Plaintiffs' First Amended Complaint.

TWELFTH AFFIRMATIVE DEFENSE

Yanke believes that Plaintiffs, in filing Plaintiffs' First Amended Complaint and effecting service of process, may have engaged in conduct which gives rise to an action for abuse of process and/or malicious prosecution, and, to the extent that facts are confirmed during discovery which support such claims, Yanke expressly reserves the right to seek leave to assert counterclaims based on one or both of those causes of action.

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs expressly agreed in Paragraphs 25 and 26 of their purchase agreement with Tower Homes that they had not received any promises or been advised of any material facts upon which Plaintiffs were relying except as set forth in writing in said purchase agreement.

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs assumed the risk of any damages which Plaintiffs may have incurred.

FIFTEENTH AFFIRMATIVE DEFENSE

Yanke denies that he been guilty of any conduct which entitles Plaintiffs to punitive and/or treble damages.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs rely on statutes that are neither applicable nor provide a private right of action, and Plaintiffs lack standing to assert such claims against Yanke.

SEVENTEENTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to plead with specificity their claims for violation of codes, ordinances, statutes, regulations, or any other laws.

...

...

LAW OFFICES
NITZ, WALTON & HEATON, LTD.
601 SOUTH TENTH STREET, SUITE 201
LAS VEGAS, NEVADA 89101
TELEPHONE: (702) 474-4004
TELECOPIER: (702) 387-7897

EIGHTEENTH AFFIRMATIVE DEFENSE

The punitive damages which Plaintiffs seek to recover are limited by statute and/or case law.

NINETEENTH AFFIRMATIVE DEFENSE

Yanke is not a party to the purchase agreements that are the subject of Plaintiffs' First Amended Complaint, nor is Yanke the owner of the real property that is the subject of the Plaintiffs' First Amended Complaint, and therefore, Yanke is not a proper party with respect to Plaintiffs' claims arising under contract.

TWENTIETH AFFIRMATIVE DEFENSE

Yanke hereby incorporates by reference those affirmative defenses enumerated in Rule 8 of the Nevada Rules of Civil Procedure as though fully set forth herein.

TWENTY-FIRST AFFIRMATIVE DEFENSE

Yanke has been required to obtain the services of counsel to respond to Plaintiffs' First Amended Complaint, and Yanke is entitled to an award of reasonable attorney's fees.

TWENTY-SECOND AFFIRMATIVE DEFENSE

Pursuant to NRCP Rule 11, all affirmative defenses available to Yanke may not have been asserted herein, and Yanke reserves the right to amend his Answer to assert further and additional affirmative defenses as the availability of such become known in the course of further proceedings.

WHEREFORE, Yanke prays for relief as follows:

1. That Plaintiffs take nothing by way of Plaintiffs' First Amended Complaint on file herein;
2. For an award of reasonable attorney's fees and costs of court; and

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3. For such other and further relief as the Court determines to be just and proper in the premises.

DATED this 6 day of November 2007.

NITZ, WALTON & HEATON, LTD.

By: 

WILLIAM H. HEATON

Nevada Bar No. 1097

JAMES A. FONTANO

Nevada Bar No. 8456

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Las Vegas, Nevada 89101

(702) 474-4004

Attorneys for Defendant Rodney C. Yanke

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing DEFENDANT
RODNEY C. YANKE'S ANSWER TO PLAINTIFFS' FIRST AMENDED COMPLAINT, via U.S.
Mail, First-class postage prepaid, on the 6 day of November 2007, addressed as follows:

Terry A. Coffing, Esq.
Brian R. Hardy, Esq.
MARQUIS & AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiffs

Michael E. Stoberski, Esq.
OLSON, CANNON, GORMLEY
& DESRUISSEAU
9950 W. Cheyenne Ave.
Las Vegas, Nevada 89129
*Attorneys for Defendants Americana LLC
dba Americana Group, Jeannine Cutter,
Mark L. Stark, & David Berg*



An employee of Nitz, Walton & Heaton, Ltd.

EXHIBIT "D"

E-Filed: 4-2-2013

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Attorneys for the Tower Homes Purchasers

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In Re:

Case No.: BK-07-13208-BAM

Chapter: 11

TOWER HOMES, LLC, a Nevada limited

liability company, dba Spanish View Tower

Homes.

Hearing Date: April 1, 2013

Hearing Time: 9:00 AM

Courtroom 3

Debtor.

NOTICE OF ENTRY OF ORDER

TO: WHOM IT MAY CONCERN

NOTICE IS HEREBY GIVEN that on the 2nd day of April, 2013, an Order Granting Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, As Counsel for the Tower Home Purchasers, to Pursue Claims on Behalf of Debtor was entered in the above-entitled matter, a copy of which is attached hereto.

Dated this 2nd day of April, 2013.

MARQUIS AURBACH COFFING

By /s/ Zachariah Larson, Esq.

Zachariah Larson, Esq.

Nevada Bar No. 7787

10001 Park Run Drive

Las Vegas, Nevada 89145

Attorney(s) for the Tower Homes Purchasers

Bruce A. Markell

Honorable Bruce A. Markell
United States Bankruptcy Judge



Entered on Docket
April 02, 2013

MARQUIS AURBACH COFFING

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Attorneys for the Tower Homes Purchasers

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA

In Re:

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

Debtor.

Case No.: BK-07-13208-BAM
Chapter: 11

Hearing Date: April 1, 2013
Hearing Time: 9:00 AM
Courtroom 3

**ORDER GRANTING MOTION TO APPROVE AMENDED STIPULATION TO
RELEASE CLAIMS AND ALLOW MARQUIS AURBACH COFFING, AS COUNSEL
FOR THE TOWER HOMES PURCHASERS, TO PURSUE CLAIMS ON BEHALF OF
DEBTOR**

This matter having come before the Court for a hearing on April 1, 2013, on the Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing as Counsel for the Tower Homes Purchasers to Pursue Claims on Behalf of the Debtor, Tower Homes Purchasers appearing by and through their counsel of record, Brian Hardy, Esq. of Marquis Aurbach Coffing, the Court finding based upon the reasons stated on the record, the

1 papers and pleadings on file herein, the Motion, the oral arguments of counsel, and good cause
2 appearing;

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

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

15 **IT IS FURTHER ORDERED ADJUDGED AND DECREED** that this Court hereby
16 authorizes the law firm of Marquis Aurbach Coffing, and/or Prince & Keating LLP, or
17 successive counsel, retained on behalf of Tower Homes Purchasers to recover any and all earnest
18 money deposits, damages, attorneys fees and costs, and interest thereon on behalf of Debtor and
19 the Tower Homes Purchasers and that any such recoveries shall be for the benefit of the Tower
20 Homes Purchasers.

21 **IT IS SO ORDERED.**

22 Respectfully Submitted By:

23 MARQUIS AURBACH COFFING

24 By/s/ Brian Hardy, Esq.

25 Brian Hardy, Esq.
26 Nevada Bar No. 10068
27 10001 Park Run Drive
28 Las Vegas, Nevada 89145
Attorney(s) for Tower Homes Purchasers

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

☐ The court has waived the requirement set forth in LR 9021(b)(1).

☒ No party appeared at the hearing or filed an objection to the motion.

☐ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

--	--

☐ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

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

MARQUIS AURBACH COFFING

By: /s/ Brian Hardy, Esq.

Brian Hardy, Esq.
Nevada Bar No. 10068
10001 Park Run Drive
Las Vegas, NV 89145
Attorney(s) for Debtor and
Debtor-in-Possession

#

EXHIBIT "E"

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Electronically Filed: August 13, 2013

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

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

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

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

I.

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

18 **II.**

19 **AUTHORITY**

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

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

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

3 Id. at 261. In addition:

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

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

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

23 **III.**

24 **CONCLUSION**

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

27 Dated: August 13, 2013

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

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

EXHIBIT "F"

RESTATEMENT OF THE LAW THIRD

THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW

THE LAW

GOVERNING LAWYERS

As Adopted and Promulgated

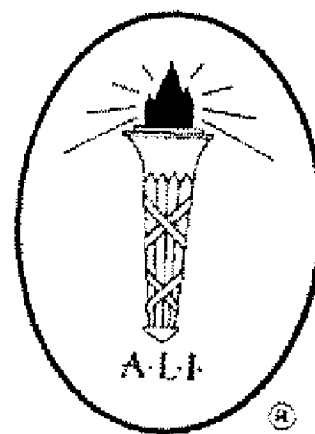
BY

THE AMERICAN LAW INSTITUTE
AT WASHINGTON, D.C.

May 12, 1998

Volume 1, §§ 1 – 93

Volume 2, §§ 94 – 135



ST. PAUL, MN
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L.Ed. 451 (1947) (discussing discovery of lawyer documents in civil action); In re January 1976 Grand Jury, 534 F.2d 719 (7th Cir.1976) (upholding contempt finding against lawyer who disobeyed subpoena for money received from clients); State v. Olwell, 394 P.2d 681 (Wash.1964) (vacating contempt finding, but upholding power to subpoena lawyer for weapon received from client). For a lawyer's obligation under a third party's lien, see, e.g., Unigard Ins. Co. v. Tremont, 430 A.2d 30 (Conn. Super. Ct.1981); In re Cassidy, 432 N.E.2d 274 (Ill.1982).

Comment f. Stolen goods. On the prohibition against a lawyer's keeping property entrusted to the lawyer by a client when the lawyer knows that it belongs to another, see United States v. Seruggs, 549 F.2d 1097 (6th Cir. 1977) (conviction for knowingly receiving stolen funds as fee); In re

Ryder, 263 F.Supp. 360 (E.D.Va.), aff'd, 381 F.2d 713 (4th Cir.1967) (discipline for knowingly taking possession of stolen money and thus helping conceal it); People v. Auld, 788 P.2d 1275 (Colo.1990) (discipline for knowingly accepting stolen gun as collateral for fee obligation); In re Prescott, 271 N.W.2d 822 (Minn.1978) (discipline for knowingly accepting stolen funds); see Rosenthal Toyota, Inc. v. Thorpe, 824 F.2d 897 (11th Cir.1987) (lawyer liable for depositing check to clients in lawyer's trust account and paying some of proceeds to clients with knowledge clients would not deliver to buyer goods for which check was payment). See also In re January 1976 Grand Jury, 534 F.2d 719 (7th Cir.1976) (lawyer subpoenaed to produce robbery proceeds received from client); State v. Dillon, 471 P.2d 553 (Idaho 1970) (similar).

§ 46. Documents Relating to a Representation

(1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.

(2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.

(3) Unless a client or former client consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

(4) Notwithstanding Subsections (2) and (3), a lawyer may decline to deliver to a client or former client an original or copy of any document under circumstances permitted by § 43(1).

Comment:

a. Scope and cross-references. For purposes of this Section, a document includes a writing, drawing, graph, chart, photograph, phonorecord, tape, disc, or other form of data compilation. The Section does not embrace writings that qualify as property under §§ 44 and 45 because of their value, for example cash, negotiable instruments, stock certificates and other writings constituting presumptive proof of title, and collectors' items such as literary manuscripts. With respect to a lawyer's duty to safeguard the contents of documents containing confidential client information, see generally Chapter 5.

b. A lawyer's duty to safeguard documents. The duty recognized by § 46(1) is similar to the duty to safeguard property recognized in § 44. Usually a lawyer must maintain an orderly filing system, with each client's documents separated and with reasonable measures to limit access to authorized firm personnel. With regard to a lawyer's duty to supervise firm employees, see § 11.

A lawyer's duty to safeguard client documents does not end with the representation (see § 33). It continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, declines to receive such copies and originals from the lawyer, or consents to disposal of the documents.

The lawyer need take only reasonable steps to preserve the documents. For example, a law firm is not required to preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence. Similarly, a lawyer who leaves a firm may leave with that firm the documents of clients the lawyer represented while with the firm, provided that the lawyer reasonably believes that the firm has appropriate safeguarding arrangements. So long as a lawyer has custody of documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them. If the jurisdiction allows a lawyer's practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale. If a firm dissolves, its members must take reasonable steps to safeguard documents continuing to require confidentiality, for example by entrusting them to a person or depository bound by appropriate restrictions.

c. A client's right to retrieve, inspect, and copy documents. As stated in Subsection (3), a client is entitled to retrieve documents in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer, subject to the right to retain property under a valid lien (see § 43) and to other justifiable grounds as discussed hereafter.

A client is ordinarily entitled to inspect and copy at reasonable times any document relating to the representation in the possession of the client's lawyer (see Restatement Second, Trusts § 173; cf. Restatement Second, Agency § 381). A client's failure to assert the right to inspect and copy files during the representation does not bar later enforcement of that right, so long as the lawyer has properly not disposed of the documents (see Comment b).

A lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another (see Restatement Second, Agency § 381). That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime (see § 21). Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Under conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report (see § 20, Comments c & d; § 24, Comment c). Ordinarily, however, what will be useful to the client is for the client to decide.

A lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide. The lawyer's duty to inform the client (see § 20) can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed.

d. Documents that a lawyer must furnish without request. Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies of such documents as a client reasonably needs in the circumstances. In complying with that standard, the lawyer should consider such matters as the client's expressed concerns, the client's possible needs, customary practice, the number of documents, the client's storage facilities, and whether the

TOPIC 1. CONFIDENTIALITY RESPONSIBILITIES OF LAWYERS

TITLE A. A LAWYER'S CONFIDENTIALITY DUTIES

Section

- 59. Definition of "Confidential Client Information"
- 60. A Lawyer's Duty to Safeguard Confidential Client Information

TITLE B. USING OR DISCLOSING CONFIDENTIAL CLIENT INFORMATION

- 61. Using or Disclosing Information to Advance Client Interests
- 62. Using or Disclosing Information with Client Consent
- 63. Using or Disclosing Information When Required by Law
- 64. Using or Disclosing Information in a Lawyer's Self-Defense
- 65. Using or Disclosing Information in a Compensation Dispute
- 66. Using or Disclosing Information to Prevent Death or Serious Bodily Harm
- 67. Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss

TITLE A. A LAWYER'S CONFIDENTIALITY DUTIES

Section

- 59. Definition of "Confidential Client Information"
- 60. A Lawyer's Duty to Safeguard Confidential Client Information

§ 59. Definition of "Confidential Client Information"

Confidential client information consists of information relating to representation of a client, other than information that is generally known.

Comment:

a. Scope and cross-references. This Section defines information concerning the representation of a client governed by the confidentiality rule stated in § 60 and for which exceptions are stated in other Sections in this Topic. For the most part, the definition of this Section is relevant to applications of the general duty of confidentiality (see § 60) owed to a current client and to former clients. On the relevance of the definition of confidential information to a determination whether

a former matter is "substantially related" to a current matter, see § 132, Comment *d(ii)*.

b. Kinds of confidential client information. A client's approach to a lawyer for legal assistance implies that the client trusts the lawyer to advance and protect the interests of the client (see § 16(1)). The resulting duty of loyalty is the predicate of the duty of confidentiality. The information that a lawyer is obliged to protect and safeguard is called *confidential client information* in this Restatement.

This definition covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms. It covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege (see § 70). It includes work product that the lawyer develops in representing the client, such as the lawyer's notes to a personal file, whether or not the information is immune from discovery as lawyer work product (see Topic 3). It includes information acquired by a lawyer in all client-lawyer relationships (see § 14), including functioning as inside or outside legal counsel, government or private-practice lawyer, counselor or litigator, advocate or intermediary. It applies whether or not the client paid a fee, and whether a lawyer learns the information personally or through an agent, for example information acquired by a lawyer's partners or associate lawyers or by an investigator, paralegal, or secretary. Information acquired by an agent is protected even if it was not thereafter communicated to the lawyer, such as material acquired by an investigator and kept in the investigator's files.

The definition includes information that becomes known by others, so long as the information does not become generally known. See Comment *d* hereto; compare § 71 (condition of attorney-client privilege that communication be made with reasonable expectation of confidentiality); § 79 (waiver of the attorney-client privilege by subsequent disclosure). The fact that information falls outside the attorney-client privilege or work-product immunity does not determine its confidentiality under this Section.

A lawyer may learn information relevant to representation of a client in the course of representing another client, from casual reading or in other accidental ways. On the use of information learned from representation of another client, see § 60, Comment *l*. In the course of representation, a lawyer may learn confidential information about the client that is not necessary for the representation but which is of a personal or proprietary nature or other character such that the client evidently would not wish it disclosed. Such information is confidential under this Section.

representations, is not inconsistent. Any such lawyer use would be impermissible on the broad ground (see ABA Model Rule 1.7) that a lawyer may not use even publicly known information to the detriment of a current client, whether to further a personal interest of the lawyer (§§ 60 & 125) or to further the interest of another client (Topic 3 hereto). Revealing client information adversely (see § 60(1)) in a way that is gratuitous or negligent would violate the duty to take all reasonably available steps to advance the client's lawful objectives (§ 16(1)).

Comment c. Information concerning law, legal institutions, and similar matters. No judicial decisions have been found that specifically address the issues raised here. The Section is based on the principles behind the concept of generally known information, the customary and accepted practices of lawyers, and the public interest in effective professional practice consistent with the general protection of confidential client information. On conflicts of interest in law-reform activities, see § 125, *Comment c.*

§ 60. A Lawyer's Duty to Safeguard Confidential Client Information

(1) Except as provided in §§ 61-67, during and after representation of a client:

(a) the lawyer may not use or disclose confidential client information as defined in § 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information;

(b) the lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.

(2) Except as stated in § 62, a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.

Comment:

a. Scope and cross-references. This Section states the principal duties of a lawyer with respect to confidential client information. The first duty is negative—not to use or disclose the information. The second is positive—to safeguard confidential client information in the client's interests. The third duty protects clients against lawyer use or disclosure of confidential information for self-profit (see *Comment j*

sent in the ABA Model Code, although probably only the result of a drafting lapse, are possibly open to the interpretation that client consent after full disclosure is effective as to any "revelation," but only with respect to those "uses" that do not operate to the disadvantage of the client. The consent provision of the ABA Model Rules avoids any such possible ambiguity. See ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation . . ."). See generally C. Wolfram, *Modern Legal Ethics* § 6.7.7, at 306 (1986). This Section, following the ABA Model Rules, takes the position that adverse use or disclosure is permissible with client consent. Under § 60(1), benign use or disclosure is permissible and does not require client consent.

No decision seems to have considered the question addressed by the Section outside the context of consent to a lawyer's use or disclosure in the circumstances described in § 61 (using or revealing client information to advance a client's interests), §§ 78-80 (waiver of the attorney-client privilege), or § 122 (client consent to conflict of interest). See the Reporter's Notes thereto.

Comment c. Adequately informed client consent. The different effects of omitting full disclosure can be seen by contrasting the provisions of the lawyer codes cited in the Reporter's Note to Comment *b* hereto with the attorney-client privilege doctrine of waiver by subsequent disclosure by act of the lawyer, where no authority requires client consultation. See § 78(3) (waiver by defectively asserting the privilege); § 79, Comment *c* (waiver by lawyer's act of making subsequent disclosure of privileged client communication).

§ 63. Using or Disclosing Information When Required by Law

A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.

Comment:

a. Scope and cross-references. A lawyer's general legal duty (see § 60) not to use or disclose confidential client information (see § 59) is superseded when the law specifically requires such use or disclosure. For example, a lawyer may be called as a witness and directed by the tribunal to testify to what the lawyer believes is confidential client information protected by the attorney-client privilege (see § 68), the work-product immunity (see § 87), or another evidentiary rule. The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise in pretrial discovery or in supplying evidence to a legislative committee, grand jury, or administrative agency. A lawyer may be directly required to file reports, such as

registering as the agent for a foreign government or reporting cash transactions. Other laws may require lawyers to turn over certain evidence and instrumentalities of crime to governmental agencies (see § 69). In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required.

On the extent of a lawyer's duty to disclose wrongdoing of another lawyer, see § 5(3). On a lawyer's liability for failure to exercise due care to protect a nonclient, see § 51 and following. The rule of the Section is important in addressing the duties of a lawyer to make disclosure to co-clients under §§ 51(4) and 56 (see also §§ 66-67). See also, e.g., § 98.

b. *A lawyer's obligation to invoke available protection.* A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information (see § 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see § 62), unless disclosure would serve the client's interest (see § 61). The duty follows from the general requirement that the lawyer safeguard such information (see § 60) and act competently in advancing the client's objectives (see § 16(1)). The duty to object arises when a nonfrivolous argument (see § 110) can be made that the law does not require the lawyer to disclose such information. Such an argument could rest on the attorney-client privilege (see § 86(1)(b)), the work-product immunity (see § 87), or a ground such as the irrelevance of the information or its character as hearsay. When the client is represented by successor counsel, a predecessor lawyer's decision whether to invoke the privilege is appropriately directed by successor counsel or the client.

Whether a lawyer has a duty to appeal from an order requiring disclosure is determined under the general duties of competence (see § 16(2)). A lawyer may be instructed by a client to appeal (see § 21(2)). If a lawyer may obtain precompliance appellate review of a trial-court order directing disclosure only by being held in contempt of court (see § 105), the lawyer may take that extraordinary step but is generally not required to do so by the duty of competent representation. In any event, under § 20 the lawyer should inform the client of an attempt to obtain the client's confidential information if it poses a significant risk to the material interests of the client and when circumstances reasonably permit opportunity to inform the client.

REPORTER'S NOTE

Comment a. Scope and cross-references. See ABA Model Code of Professional Responsibility, DR 4-101(C)(2) (1969) (lawyer "may reveal

Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir.), cert. denied, 521 U.S. 1105, 117 S.Ct. 2482, 138 L.Ed.2d 991 (1997) (similar).

Comment c. Invoking and waiving the privilege of a governmental client. Few decisions consider who may invoke the privilege. Cf., e.g., *Clavir v. United States*, 84 F.R.D. 612 (S.D.N.Y.1979) (employees of FBI could not raise work-product immunity as ground to suppress memorandum prepared by Department of Justice lawyer concerning their communications about illegal surveillance, when United States did not choose to assert immunity); see also *supra*, *Comment b* and *Reporter's Note* thereto. On waiving the privilege, see,

e.g., *Mead Data Central, Inc. v. Dep't of Air Force*, 566 F.2d 242, 253 (D.C.Cir.1977) (subsequent disclosure); *Zenith Radio Corp. v. United States*, 588 F.Supp. 1443, 1446 (Ct. Int'l Trade 1984) (putting legal advice in issue); *Brinton v. Dep't of State*, 476 F.Supp. 535, 540 (D.D.C.1979) (dicta), *aff'd*, 636 F.2d 600 (D.C.Cir. 1980), cert. denied, 452 U.S. 905, 101 S.Ct. 3030, 69 L.Ed.2d 405 (1981) (subsequent disclosure); *Haymes v. Smith*, 73 F.R.D. 572, 576-77 (W.D.N.Y.1976) (subsequent disclosure and putting legal advice in issue); *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975) (putting legal advice in issue).

§ 75. The Privilege of Co-Clients

(1) If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged as against third persons, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

(2) Unless the co-clients have agreed otherwise, a communication described in Subsection (1) is not privileged as between the co-clients in a subsequent adverse proceeding between them.

Comment:

a. Scope and cross-references. This Section states the attorney-client-privilege rules that apply when co-clients have communications with the same lawyer. The privilege applies only if the other conditions of §§ 68-72 are met, except that Subsection (1) qualifies the requirement of § 71 that the communication be in confidence and Subsection (2) qualifies the rule of § 79 concerning waiver. On invoking the privilege, see § 86. Subsection (2) modifies the normally applicable rules of waiver (see §§ 78-80) in the case of a subsequent proceeding in which the co-clients are adverse. On the duration of the privilege, see § 77. On representation of multiple clients with conflicts of interest, see §§ 121-122 and §§ 128-131. On confidentiality obligations when representing co-clients, see § 60, *Comment l*.

A communication subject to the privilege for co-clients may be made through a client's agents for communication and a lawyer's agents for communication and other agents (see § 70).

b. The co-client privilege. Under Subsection (1), communications by co-clients with their common lawyer retain confidential characteristics as against third persons. The rule recognizes that it may be desirable to have multiple clients represented by the same lawyer.

c. Delimiting co-client situations. Whether a client-lawyer relationship exists between each client and the common lawyer is determined under § 14, specifically whether they have expressly or impliedly agreed to common representation in which confidential information will be shared. A co-client representation can begin with a joint approach to a lawyer or by agreement after separate representations had begun. However, clients of the same lawyer who share a common interest are not necessarily co-clients. Whether individuals have jointly consulted a lawyer or have merely entered concurrent but separate representations is determined by the understanding of the parties and the lawyer in light of the circumstances (see § 14).

Co-client representations must also be distinguished from situations in which a lawyer represents a single client, but another person with allied interests cooperates with the client and the client's lawyer (see § 76).

The scope of the co-client relationship is determined by the extent of the legal matter of common interest. For example, a lawyer might also represent one co-client on other matters separate from the common one. On whether, following the end of a co-client relationship, the lawyer may continue to represent one former co-client adversely to the interests of another, see § 121, Comment *e*. On the confidentiality of communications during a co-client representation, see Comment *d* hereto.

d. The subsequent-proceeding exception to the co-client privilege. As stated in Subsection (2), in a subsequent proceeding in which former co-clients are adverse, one of them may not invoke the attorney-client privilege against the other with respect to communications involving either of them during the co-client relationship. That rule applies whether or not the co-client's communication had been disclosed to the other during the co-client representation, unless they had otherwise agreed.

Rules governing the co-client privilege are premised on an assumption that co-clients usually understand that all information is to be disclosed to all of them. Courts sometimes refer to this as a presumed intent that there should be no confidentiality between co-clients. Fairness and candor between the co-clients and with the

lawyer generally precludes the lawyer from keeping information secret from any one of them, unless they have agreed otherwise (see § 60, Comment *b*).

Illustration:

1. Client X and Client Y jointly consult Lawyer about establishing a business, without coming to any agreement about the confidentiality of their communications to Lawyer. X sends a confidential memorandum to Lawyer in which X outlines the proposed business arrangement as X understands it. The joint representation then terminates, and Y knows that X sent the memorandum but not its contents. Subsequently, Y files suit against X to recover damages arising out of the business venture. Although X's memorandum would be privileged against a third person, in the litigation between X and Y the memorandum is not privileged. That result follows although Y never knew the contents of the letter during the joint representation.

Whether communications between the lawyer and a client that occurred before formation of a joint representation are subject to examination depends on the understanding at the time that the new person was joined as a co-client.

Co-clients may agree that the lawyer will not disclose certain confidential communications of one co-client to other co-clients. If the co-clients have so agreed and the co-clients are subsequently involved in adverse proceedings, the communicating client can invoke the privilege with respect to such communications not in fact disclosed to the former co-client seeking to introduce it. In the absence of such an agreement, the lawyer ordinarily is required to convey communications to all interested co-clients (see § 60, Comment *b*). A co-client may also retain additional, separate counsel on the matter of the common representation; communications with such counsel are not subject to this Section.

e. Standing to assert the co-client privilege; waiver. If a third person attempts to gain access to or to introduce a co-client communication, each co-client has standing to assert the privilege. The objecting client need not have been the source of the communication or previously have known about it.

The normal rules of waiver (see §§ 78-80) apply to a co-client's own communications to the common lawyer. Thus, in the absence of an agreement with co-clients to the contrary, each co-client may waive the privilege with respect to that co-client's own communications with the

EXHIBIT "G"

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Business Entity Information

Entity Name:	Default	Entity Type:	4/30/2004
Entity Address:	Domestic Limited Liability Company	Entity Number:	LLC9288-2004
Qualifying State:	NV	List of Officers Due:	4/30/2013
Managed By:	Managers	Expiration Date:	4/30/2504
NV Business ID:	NV20041095256	Business License Exp:	4/30/2013

Registered Agent Information

Entity Name:	WILLIAM A. LEONARD, JR., POST CONFIRMATION CHAPTER 11 TRUSTEE C/O CHRISTINE A. ROBERTS, ESQ.	Entity Address:	228 S. FOURTH STREET
Entity Address:	FIRST FLOOR	Entity Address:	LAS VEGAS
Entity Address:	NV	Entity Address:	89101
Entity Address:		Entity Address:	
Entity Address:		Entity Address:	
Entity Address:		Entity Address:	NV
Entity Address:		Entity Address:	
Entity Address:	Noncommercial Registered Agent	Entity Address:	

[View all business entities under this registered agent](#)

Financial Information

No Par Share Count:	0	Capital Amount:	\$0
----------------------------	---	------------------------	-----

No stock records found for this company

Officers

☐ Include Inactive Officers

Managing Member - RODNEY C YANKE

Entity Address:	8337 W. SUNSET ROAD	Entity Address:	SUITE 300
Entity Address:	LAS VEGAS	Entity Address:	NV
Entity Address:	89113	Entity Address:	USA
Entity Address:	Active	Entity Address:	

Actions/Amendments

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EXHIBIT "D"

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4 ERIC N. TRAN
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10 Telephone: (702) 228-6800
11 Facsimile: (702) 228-0443
12 *E-Mail: DPrince@PrinceKeating.com*
13 *E-Mail: ETran@PrinceKeating.com*
14 Attorneys for Plaintiff
15 *Tower Homes, LLC*

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

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

15 Plaintiff,

16 vs.

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

21 Defendants.

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

**PLAINTIFF'S REPLY IN SUPPORT OF
MOTION TO COMPEL PRODUCTION
OF DOCUMENTS; AND PLAINTIFF'S
OPPOSITION TO DEFENDANTS'
COUNTERMOTION FOR
PROTECTIVE ORDER**

22 Plaintiff Tower Homes, LLC, by and through its attorneys of record, PRINCE &
23 KEATING, hereby submits this Reply in Support of Plaintiff's Motion to Compel Production
24 of Documents; and Plaintiff's Opposition to Defendants' Countermotion for Protective Order.
25

26 . . .

27 . . .

28 . . .

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Tower's Motion to Compel is extremely narrow. Tower is requesting that this Court compel NWH to produce documents that NWH has identified as potentially discoverable documents, namely NWH's file relating to Tower Homes, LLC (NWH000001-NWH042236) which NWH has identified as part of its initial NRCP 16.1. See Plaintiff's Exhibit 2 at page 3:23. Specifically, at this juncture, Tower is simply requesting that NWH voluntarily produced files relating to its representation of Tower Homes, LLC concerning the failed condominium project that was the subject of the underlying litigation, Tower's Motion to Compel does not specifically seek to have NWH produce its files relating to Yanke, or any other third party. In fact, at this juncture, based on NWH's vague description of "NWH's file relating to Tower Homes, LLC," it is unclear what category or types of documents are contained in the file.

However, because Tower is simply seeking its own file including, *inter alia*, documents pertaining NWH's representation of Tower in the underlying litigation, correspondences from NWH to Tower, and the Purchase Contracts drafted by NWH in the underlying litigation; and because Tower is the holder of the attorney-client privilege, Yanke's consent, whether in his capacity as the sole member of Tower or whether in his individual capacity, is irrelevant. In addition, no confidentiality agreement is necessary in order for NWH to disclose NWH's file relating to Tower because Tower can freely waive its attorney-client privilege.

In Opposition, NWH attempts to justify its withholding of the entire file relating to Tower Homes, LLC on the basis that NWH is required to protect the rights of Yanke

1 concerning the NWH's files relating to the underlying project from disclosed to adverse third
2 parties including the Tower Homes Purchasers.¹

3 First, this concern over the need to protect Yanke's interest against the Tower Homes
4 Purchasers is baseless. As was discussed in Plaintiff's Motion to Compel, on or about May 2,
5 2011, a Stipulation to Entry of Order Granting Judgment Against Rodney C. Yanke and
6 Dismissing Claims Against Rodney C. Yanke was entered in the underlying lawsuit of
7 Gaynor, et. al v. Tower Homes, LLC, et. al Case No. A541668. See Plaintiff's **Exhibit 5**.
8 Thus, there is no need to protect Yanke's interest from the Tower Homes Purchasers.
9

10 Second, assuming this concern was true, then all NWH had to do was produce the
11 documents pertaining to Tower Homes, LLC while providing a privilege log detailing the
12 documents pertaining to Yanke or any other documents that is being withheld. However,
13 NWH has completely refused to even produce any documents and has not even produce a
14 privilege log detailing which documents relating to Yanke are being withheld.
15

16 Instead, NWH has completely ignored its voluntary duties under NRCp 16.1 and has
17 arrogantly elected to withhold every document it has identified as being related to Tower
18 Homes, LLC. By refusing to disclose any part of Tower's file, NWH has impeded Tower's
19 ability to prosecute this case. This type of discovery abuse cannot be tolerated.
20

21 ...

22 ...

23 ...

24
25 ¹NWH's Opposition attempt to re-argue the issue of whether Tower has standing to bring forth this
26 lawsuit against NWH. NWH is making this standing argument from pages 9 line 9 through page 10
27 line 15 despite the fact that Judge Gloria Sturman has already considered NWH's argument and has
28 already denied NWH's Motion to Dismiss, and Renewed Motion to Dismiss ruling that any procedural
defect has been cured. Thus, it has already been judicially determined that Tower is the proper plaintiff
in this litigation. As such, this Court should strike page 9:9-10:15 of NWH's Opposition as being
completely inappropriate.

1 II. LEGAL ARGUMENT

2 A) PURSUANT TO NRCP 16.1 AND NRCP 26.1 NWH WAS AT THE VERY
3 LEAST, REQUIRED TO VOLUNTARILY PRODUCE ITS FILES
4 RELATING TO TOWER HOMES, LLC

5 As discussed in Tower's Motion to Compel, NWH has a duty pursuant to NRCP 16.1
6 and NRCP 26.1 to produce any documents that are discoverable. Here, NWH has indentified
7 in its Initial 16.1 disclosures NWH's file reating to Tower Homes, LLC (NWH000001-
8 NWH042236) as potentially discoverable. However, instead if voluntarily producing
9 documents pertaining to Tower's files, NWH has simply refused to produce any documents
10 asserting the frivolous position that Yanke's consent is necessary even to produce Tower's
11 files.

12 As discussed below, NWH's refusal to even produce its files pertaining to Tower,
13 ignores establish case law that Tower is the sole holder to the attorney-client privilege.
14 Likewise, even if any purported privilege applies to prevent NWH from producing documents
15 identified in NWH's initial 16.1 disclosures, NWH has not even prepared a privilege log
16 identifying which documents are being withheld from production based upon the purported
17 privilege.
18

19 NWH's Opposition does not dispute the fact that they have completely and utterly
20 failed to comply with its voluntary disclosure duties under NRCP 16.1 and NRCP 26.1. As
21 such, NWH has completely violated its duties under NRCP 16.1 and NRCP 26.1.
22

23 B) MR. YANKE'S CONSENT, IN HIS CAPACITY AS THE THE SOLE
24 MEMBER OF TOWER, IS NOT NECESSARY IN ORDER FOR NWH TO
25 PRODUCE TOWER'S FILE BECAUSE THE ATTORNEY-CLIENT
26 RELATIONSHIP WAS BETWEEN TOWER AND NWH, AND TOWER IS
27 THE SOLE HOLDER OF THE PRIVILEGE.

28 In NWH's Opposition, NWH argues that because Yanke is the sole manager of Tower,
and because Yanke only person who is authorized to act on behalf of Tower Homes, that

1 Yanke is the holder of the attorney-client privilege between Tower and NWH. This argument
2 is false and ignores established case law.

3 It is firmly established that the attorney-client privilege belongs to the "client," and
4 that only the "client" may assert or waive the privilege. Montgomery v. eTreppid
5 Technologies, LLC, 548 F.Supp.2d 1175, 1178 (D.Nev. 2008). The attorney-client privilege
6 attaches to both individuals and corporations. Upjohn Co. v. United States, 449 U.S. 383,
7 390, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). However, when the client is a corporation acting
8 through its agents, problems arise concerning who can properly invoke [or waive] the
9 protection of the attorney-client privilege. Commodity Futures Trading Commission v.
10 Weintraub, 471 U.S. 343, 348, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). Several courts have
11 concluded that when a corporate agent, acting in his or her official capacity, consults counsel,
12 **the privilege belongs to the corporation and not to the individual officer.** See Citibank,
13 N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981); In re Grand Jury Proceedings, 570 F.2d
14 562 (6th Cir.1978); United States v. Piccini, 412 F.2d 591, 593 (2nd Cir.1969), *cert.*
15 *denied*, 397 U.S. 917, 90 S.Ct. 923, 25 L.Ed.2d 98 (1970). In fact, Nevada Courts also hold
16 that the holder of the privilege belongs to the corporation and **the corporation is the sole**
17 **client for purposes of attorney-client privilege.** Montgomery, 548 F.Supp.2d at
18 1187 (D.Nev. 2008) (citing Milroy v. Hanson, 875 F.Supp. 646 (D.Neb.1995). While the
19 corporation can only communicate with its attorneys through human representatives, those
20 representatives are communicating on behalf of the corporation, not on behalf of themselves
21 as corporate managers or directors. Id.

22 In this case, while Yanke may be the sole member of Tower, the black letter law from
23 the cases cited above unequivocally state that Tower (the corporation), and not Yanke (the
24 member), is the holder of the attorney-client privilege. Notably, NWH's Opposition contains
25 no case law supporting its assertion that Yanke, as the sole member of Tower Homes, LLC, is

1 the holder of the privilege. See NWH's Opposition at pages 14-16. Instead, NWH simply
2 attempts to factually distinguish Montgomery and In re Grand Jury Subpoenas from the
3 present case. However, NWH's desperate attempt to distinguish the facts of Montgomery and
4 In re Grand Jury Subpoenas from the present case is irrelevant as Tower cited these cases for
5 the proposition that a corporation is the sole client for purposes of the attorney-client
6 privilege. Montgomery, 548 F.Supp.2d at 1187. In fact, the court in Montgomery states that
7 "[w]hile the corporation can only communicate with its attorneys through human
8 representatives, those representatives are communicating on behalf of the corporation, not on
9 behalf of themselves as corporate managers or directors." Id. Thus, the court held that the
10 holder of the privilege belongs to the corporation for purposes of attorney-client privilege.
11 Id. Similarly, the court in In re Grand Jury Proceedings stated that the holder of the
12 attorney-client privilege was the corporation. In re Grand Jury Proceedings, 570 F.2d at 563.
13

14
15 As such, because Tower is the holder of the privilege, Tower is entitled to waive such
16 privilege. By reason of this present legal malpractice action filed by Tower against NWH,
17 Tower has waived the attorney-client privilege. Thus, any argument that Yanke's consent, in
18 his capacity as the sole member of Tower, is necessary in order for NWH to produce the files
19 is legally false.
20

21 **C) MR. YANKE'S CONSENT, IN HIS INDIVIDUAL CAPACITY AS A JOINT**
22 **CLIENT OF NWH, IS NOT NECESSARY IN ORDER FOR NWH TO**
23 **PRODUCE TOWER'S FILE BECAUSE AT THIS JUNCTURE, TOWER IS**
24 **ONLY SEEKING NWH'S FILE RELATING TO TOWER HOMES, LLC**
25 **AS IDENTIFIED IN NWH'S INITIAL 16.1 DISCLOSURE.**

26 In NWH's Opposition, NWH goes to great lengths to convince this Court that it is
27 justified in its refusal to produce documents identified in its 16.1 disclosures due to its
28 obligation to safeguard the confidentiality of its files and to prevent disclosure to persons who
are not parties to the attorney-client relationship. Specifically, NWH attempts to convince
this Court that because Tower and Yanke are joint clients in the underlying action, and

1 because Yanke never gave consent to disclose NWH's files, Tower is not entitled to NWH's
2 files unless Yanke provides the requisite consent and unless Tower agrees to enter into a
3 Confidentiality Agreement.

4 NWH's arguments, however, misses the point of Tower's Motion to Compel. As
5 discussed above, in Tower's Motion to Compel, NWH's initial 16.1 disclosure identified the
6 following potentially discoverable documents:

- 7
8 1. NWH's file relating to Tower Homes, LLC (NWH000001-NWH042236).

9 See Plaintiff's **Exhibit 2** at page 3:23 (emphasis added).

10 Based on NWH's initial disclosures, NWH is stating that it has files relating to its
11 representation of Tower Homes, LLC concerning the failed condo project. Thus, Tower's
12 Motion to Compel seeks only disclosure of NWH's files relating to Tower. At this juncture,
13 Tower is not even seeking any documents relating to Mr. Yanke or any other third party
14 because Tower does not even know what types or categories of documents consist of "NWH's
15 file relating to Tower Homes, LLC." Thus, even if NWH also represented Yanke, in his
16 individual capacity in the underlying lawsuit, because Tower is not seeking any documents
17 pertaining to Yanke, and instead is only seeking documents as it relates to Tower as identified
18 in NWH's initial 16.1 disclosure, Yanke's consent, in his individual capacity, is unnecessary
19 in order for Tower to obtain its own file.
20

21
22 **D) NWH IS NOT ENTITLED TO A PROTECTIVE ORDER REQUIRING A**
23 **CONFIDENTIALITY AGREEMENT BECAUSE TOWER MAY FREELY**
24 **DISCLOSE ITS OWN FILE TO ANY THIRD PARTY.**

25 1) There is No Basis for a Confidentiality Order

26 As previously discussed, Tower is the holder of the attorney/client privilege. As holder
27 of the privilege, Tower may freely waive the attorney-client privilege any time it chooses. For
28 example, Tower may choose to waive the attorney-client privilege through disclosure of
documents or communications to a third party (Manley v. State, 115 Nev. 114, 120, 979 P.2d

1 703 (1999); Molina v. State, 120 Nev. 185, 193 n.22, 87 P.3d 533, 539 n.22 (2004)), or Tower
2 may choose to waive the attorney-client privilege through this present legal malpractice
3 lawsuit (Wardleigh v. Second Judicial Dist., 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995)).
4 Either way, Tower is free to waive the privilege if it so chooses. Because Tower can waive the
5 attorney-client privilege with regard to its own files, it can freely disclose its file to any third
6 party. Thus, there should not be any protective order is place restricting Tower's ability to
7 disclose its file as a prerequisite to NWH producing documents pertaining to Tower because
8 there is simply no basis for a Confidentiality Agreement.
9

10 **2) A Confidentiality Agreement Would Significantly Hinder and Increase the**
11 **Cost of This Litigation.**

12 In NWH's Opposition, NWH implies that the reason why Tower's counsel refuses to
13 enter into a Confidentiality Agreement is simply because Tower's Counsel doesn't want to.
14 This is false. Notwithstanding the fact that there is no basis for a Confidentiality Agreement,
15 imposing a Confidentiality Agreement into this litigation will significantly hinder the
16 prosecution of this case and significantly increase the cost of this litigation.
17

18 For example, NWH has identified 42,236 documents as part of "NWH's files relating
19 to Tower Homes, LLC." Clearly not all of those 42,236 documents will be confidential as it
20 more likely than not that most of these documents will only pertain to NWH's representation
21 of Tower in the underlying litigation, NWH's drafting of the contracts in the underlying
22 litigation, and communications between attorneys at NWH and Tower. However, NWH wants
23 Tower to essentially enter into a blanket Confidentiality Agreement which will render all
24 42,236 pages of documents as confidential. A consequence of designating all those documents
25 as Confidential is that it will hinder the discovery in this litigation. For example, if Tower is
26 seeking its own file, NWH may refuse to produce to documents or restrict access to the
27 documents on the basis that the documents are confidential.
28

1 Similarly, even if NWH produces the documents, in the event that Tower decides to
2 use the documents in the pleadings, Tower will have to go through the onerous process of
3 filing the documents under seal.

4 In addition, this litigation is a public proceeding where the public has a right to access
5 the pleadings. In fact, Confidentiality is the exception, not the rule. In accordance with Part
6 VII of the Supreme Court Rules, the Supreme Court has laid out specific guidelines in order
7 to seal documents. In part, Supreme Court Rule 3(4) states as follows:

9 4. **Grounds to seal or redact; written findings required.** The court may
10 order the court files and records, or any part thereof, in a civil action to be
11 sealed or redacted, provided the court makes and enters written findings that
12 the specific sealing or redaction is justified by identified compelling privacy
13 or safety interests that outweigh the public interest in access to the court
14 record. The parties' agreement alone does not constitute a sufficient basis
15 for the court to seal or redact court records. The public interest in privacy
16 or safety interests that outweigh the public interest in open court records
17 include findings that:

18 (a) The sealing or redaction is permitted or required by federal or state
19 law;

20 (b) The sealing or redaction furthers an order entered under NRCP 12(f)
21 or JCRCP 12(f) or a protective order entered under NRCP 26(c) or JCRCP
22 26(c);

23 (c) The sealing or redaction furthers an order entered in accordance with
24 federal or state laws that serve to protect the public health and safety;

25 (d) The redaction includes only restricted personal information contained
26 in the court record;

27 (e) The sealing or redaction is of the confidential terms of a settlement
28 agreement of the parties;

(f) The sealing or redaction includes medical, mental health, or tax
records;

(g) The sealing or redaction is necessary to protect intellectual proprietary
or property interests such as trade secrets as defined in NRS 600A.030(5); or

(h) The sealing or redaction is justified or required by another identified
compelling circumstance.

5. **Limitations on sealing or redacting.**

(a) **Public hazard.** In no event may the sealing or redaction have the
purpose or effect of concealing a public hazard.

(b) **Redaction preferred.** A court record shall not be sealed under these
rules when reasonable redaction will adequately resolve the issues before the
court under subsection 4 above.

(c) **Sealing of entire court file prohibited.** Under no circumstances
shall the court seal an entire court file. An order entered under these rules
must, at a minimum, require that the following information is available for

1 public viewing on court indices: (i) the case number(s) or docket code(s) or
2 number(s); (ii) the date that the action was commenced; (iii) the names of the
3 parties, counsel of record, and the assigned judge; (iv) the notation "case
4 sealed"; (v) the case type and cause(s) of action, which may be obtained from
5 the Civil Cover Sheet; (vi) the order to seal and written findings supporting the
6 order; and (vii) the identity of the party or other person who filed the motion to
7 seal.

8 Supreme Court Rule 3(4).

9 Thus, the Supreme Court Rules have specifically stated that confidentiality is only
10 justified by identified compelling privacy or safety interests that outweigh the public interest
11 in access to the court record. The parties' agreement alone does not constitute a sufficient
12 basis for the court to seal or redact court records.

13 Further, NRCP 16.1(a)(1)(b) requires that NWH disclose "a copy of, or a description
14 by category and location of, all documents, data compilations, and tangible things that are in
15 the possession, custody, or control of the party and which are discoverable under Rule 26(b)."
16 Thus, NRCP 16.1 requires NWH to specifically identify and describe the categories of
17 documents that it has in its possession that is discoverable. Here, NWH has simply provided a
18 vague statement that it has NWH's file relating to Tower Homes, LLC. This vague
19 description does not provide Tower with any indication of what categories or types of
20 documents are contained in this file. Thus, if Tower were to enter into a confidentiality
21 agreement and then NWH designates as confidentiality documents which Tower does not
22 believe to be confidential, this will lead to numerous motions filed before this Court to strike
23 such confidential designation. This anticipated dispute regarding which of the 42,236
24 documents are truly confidential will unnecessarily drive up the cost of the litigation.

25 **E) THIS COURT SHOULD AWARD ATTORNEY'S FEES TO PLAINTIFF**
26 **FOR THE COSTS OF FILING THIS MOTION**

27 NWH's argument that attorney's fees should not be granted because there was not a
28 good faith effort to obtain the documents without court intervention is baseless. As

1 demonstrated in Tower's Motion, Tower's counsel agreed to allow NWH's counsel additional
2 time to produce NWH's files concerning the representation of Tower. See Plaintiff's Exhibit

3 4. Tower's counsel also informed NWH's counsel that he agreed that any personal
4 representation of Mr. Yanke in a unrelated matter is not required to be disclosed on condition
5 that a privilege log be provided. Id.

6
7 In response, NWH simply provided additional excuses as to why it would not produce
8 its files relating to the representation of Tower. Notably, NWH abandoned its attorney work
9 product argument as a reason for not producing Tower's file. Tower did not even identify what
10 documents make up "NWH's file relating to Tower Homes, LLC." Tower never produced any
11 privilege log identifying which documents it was withholding. Even if documents NWH's
12 file relating to Tower Homes, LLC contained privileged information, NWH gave no time
13 frame as to when it would produce documents that were not privileged. Tower's counsel gave
14 NWH's counsel every opportunity to comply with its obligations under NRCP 16.1.
15 However, Tower was forced to file this Motion to Compel after it was clear that NWH would
16 not produce its file relating to Tower. Thus, there has indeed been an adequate meet and
17 confer.
18

19 In addition, any argument that NWH simply attempting to comply with the Nevada
20 Rules of Professional Conduct by refusing to at least produce Tower's own file is baseless.
21 As previously discussed, if NWH genuinely believed that it needed to preserved the
22 confidentiality and attorney-client privilege with regard to documents pertaining to Yanke,
23 then NWH could have simply produced documents pertaining to Tower while withholding
24 documents pertaining to Yanke and provide the necessary privilege log. Instead, NWH
25 elected to produce nothing which necessitated the filing of Tower's Motion to Compel. As
26 such, because NWH's failure to comply with NRCP 16.1 has completely impeded Tower's
27 ability to prosecute this case, attorney's fees should be award to Tower.
28

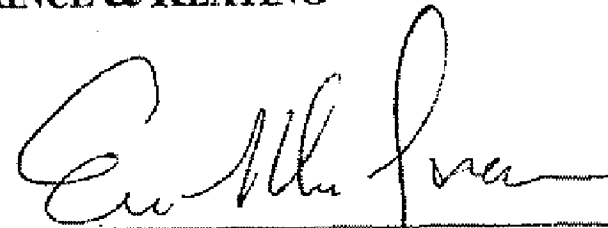
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III. CONCLUSION

Based on the foregoing, Tower requests that this Court grant Tower's Motion to Compel Production of Documents as identified in NWH's initial 16.1 disclosures and award attorney's fees to Tower's counsel as a result of NWH's obstructionist behavior. Further, Tower requests that this Court deny NWH's Motion for Protective Order requiring a confidentiality agreement to be in place.

DATED this 24 day of January, 2014.

PRINCE & KEATING



DENNIS M. PRINCE

Nevada Bar No. 5092

ERIC N. TRAN

Nevada Bar No. 11876

3230 South Buffalo Drive, Suite 108

Las Vegas, Nevada 89117

Attorneys for Plaintiff

Tower Homes, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of January, 2014, I caused service of the foregoing
**PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF
DOCUMENTS; AND PLAINTIFF'S OPPOSITION TO DEFENDANTS'
COUNTERMOTION FOR PROTECTIVE ORDER** to be made by facsimile and by
depositing a true and correct copy of same in the United States Mail, postage fully prepaid,
addressed to the following:

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

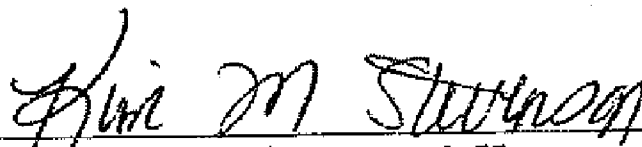


An employee of PRINCE & KEATING

EXHIBIT “5”


CLERK OF THE COURT

MARQUIS AURBACH COFFING
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DISTRICT COURT

CLARK COUNTY, NEVADA

ALLISON GAYNOR, an individual; BARBARA CHANDLER, individually and as TRUSTEE OF THE SARALEE M. BOWERS TRUST; MELVA NEVADA BROWN, an individual; RICHARD GOODALL, an individual; HAROLD & CAROL HERZLICH, individuals; ROBERT EMBLETON, an individual; DAHN MIDORA, an individual; ARTHUR WILLIAMS, an individual; LARRY & JUDY SHIFFMAN, individuals; EDWIN & GAIL EDEJER, individuals; JUDGE ANGEL COOLEY, an individual; DEBRA JONES, an individual; ABE SIEMENS, an individual; JOHN & JENNIFER KILPATRICK, individuals; CLIFFORD & CARMEN CHITA TEJADA, individuals; LISA WESTFIELD, an individual; ANN & ROBERT MUELLER, individuals; and PHILLIP & KATHERINE STROMER, individuals, and TIMUCIN KALMAN, an individual

Plaintiffs,

vs.

TOWER HOMES, LLC., a Nevada limited liability company; RODNEY C. YANKE, an individual; AMERICANA LLC dba AMERICANA GROUP; Nevada limited liability company; MARK L. STARK, an individual in his capacity as a broker; JEANNINE CUTTER, an individual in her capacity as an agent; DAVID BERG, an individual in his capacity as an agent; EQUITY TITLE OF NEVADA, LLC, a Nevada limited liability company; DOE REAL ESTATE AGENTS I through X, individually, DOE REAL ESTATE BROKERS I through X, individually, ROE REAL ESTATE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A541668
Dept. No. XI

**STIPULATION TO ENTRY OF ORDER
GRANTING JUDGMENT AGAINST
RODNEY C. YANKE AND DISMISSING
CLAIMS AGAINST RODNEY C. YANKE
AND ORDER**

MARQUIS AURBACH COFFING

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

1 STIPULATION TO ENTRY OF ORDER GRANTING JUDGMENT AGAINST RODNEY
2 C. YANKE AND DISMISSING CLAIMS AGAINST RODNEY C. YANKE. AND ORDER

3 This Stipulation to Entry of Order Granting Judgment Against Rodney C. Yanke, and
4 Dismissing Claims Against Rodney C. Yanke ("Stipulation") is made and entered into by and
5 between Plaintiffs, through their counsel, the law firm of Marquis Aurbach Coffing, and
6 Defendant, Rodney C. Yanke, an individual ("Yanke"), through his counsel, the law firm of Nitz,
7 Walton & Heaton, Ltd., based on the following acknowledged and approved facts and
8 circumstances:

9 RECITALS

10 A. On or about March 31, 2009, Plaintiff's caused their counsel to served a Second
11 Amended Complaint ("Complaint") in the above-captioned matter which alleges seven civil
12 causes of action/claims for relief against Yanke, those causes of action being: (i) First Cause of
13 Action alleging breach of contract; (ii) Second Cause of Action alleging breach of the covenant
14 of good faith and fair dealing; (iii) Third Cause of Action alleging an entitlement on the part of
15 Plaintiffs to declaratory relief; (iv) Fourth Cause of Action alleging unjust enrichment; (v)
16 Seventh Cause of Action alleging a violation of duties and obligations arising under NRS
17 Chapter 116; (vi) Eighth Cause of Action alleging a claim for civil RICO; and (vii) Ninth Cause
18 of Action alleging conversion.

19 B. Yanke served his Answer to Plaintiffs' Complaint on or about April 13, 2009. By
20 way of that Answer, Yanke steadfastly denied liability on the causes of action alleged in
21 Plaintiffs' Complaint, and asserted a number of affirmative defenses.

22 C. Trial of the above-captioned matter is set to commence on May 9, 2011.

23 D. Yanke has been and continues to be without financial resources necessary to
24 enable him to adequately prepare for trial.

25 E. Plaintiffs and Yanke have reached an agreement to settle and resolve the claims
26 that have been and/or could be hereinafter asserted by Plaintiffs against Yanke based upon the
27 facts alleged in Plaintiffs' Complaint and/or the circumstances and transactions from which the
28 Complaint arises, all on the terms set forth hereinbelow.

1 F. This Stipulation is entered into for the sole purpose of resolving disputed civil
2 claims, and nothing herein and/or in any order entered pursuant to this Stipulation shall be
3 deemed or construed as evidence of an admission by Yanke, or as creating a basis for
4 establishment, of any fact or circumstance that would support: (i) initiation or maintenance of a
5 criminal action against Yanke; (ii) imposition of criminal penalties or sanctions against Yanke;
6 (iii) imposition by the Commission for Common-Interest Communities and Condominium Hotels
7 of a fine or penalty against Yanke pursuant to NRS 116.785; (iv) imposition by any other
8 governmental agency of a fine or penalty of any kind or nature against Yanke; and/or (v) a
9 determination that the debt or obligation arising from any order entered pursuant to this
10 Stipulation is not dischargeable under 11 USC § 523 or any other applicable provision of the
11 United States Bankruptcy Code.

12 G. Nothing herein shall be deemed or construed as an admission that the acts and/or
13 omissions of Yanke of which Plaintiffs complain were made or undertaken willfully or
14 intentionally, and the parties acknowledge and agree that the treble damages remedy provided in
15 NRS 116.4117(3) is, therefore, inapplicable.

16 NOW, THEREFORE, in reliance on the foregoing Recitals, it is hereby stipulated by
17 and between Plaintiffs and Yanke as follows:

18 1. That an order may be entered in the above-captioned matter granting judgment in
19 favor of Plaintiffs (jointly and not severally) and against Yanke upon the causes of action and in
20 the amounts set forth below:

21 a. Judgment in the total amount of Eight Hundred Thousand Dollars
22 (\$800,000.00) shall be entered pursuant to the Second Cause of Action in Plaintiffs'
23 Complaint for breach of the implied covenant of good faith and fair dealing;

24 b. Judgment in the total amount of One Hundred Thousand Dollars
25 (\$100,000.00) shall be entered pursuant to the Fourth Cause of Action in Plaintiffs'
26 Complaint for unjust enrichment; and

27 c. Judgment in the total amount of One Hundred Thousand Dollars
28 (\$100,000.00) shall be entered pursuant to the Seventh Cause of Action in Plaintiff's

1 Complaint under authority of NRS 116.4117(1) for damages incurred emanating from the
2 violation of duties and obligations arising under NRS Chapter 116.

3 2. That said order shall implement a dismissal and/or release of each and all of the
4 other claims and causes of action that have been and/or could have been asserted in Plaintiffs'
5 Complaint against Yanke with prejudice, including, without limitation, all claims and/or causes
6 of action which Plaintiffs received by way of assignment from the Trustee in the Tower Homes,
7 LLC Bankruptcy and could have been asserted against Yanke, based on that assignment, in the
8 above-captioned matter or otherwise. Nothing herein shall be deemed or construed as a waiver
9 or release of any claim and/or cause of action which Plaintiffs now possess or could assert
10 against any person or entity, other than Yanke, by reason of the assignment from the Trustee in
11 the Tower Homes, LLC Bankruptcy.

12 3. That said order shall provide that Plaintiffs and Yanke each bear their own
13 attorney's fees and costs incurred in the above-captioned action.

14 4. That said order shall provide that nothing in this Stipulation or any order entered
15 pursuant hereto shall be deemed or construed as evidence of an admission by Yanke, or as
16 creating a basis for establishment of any fact or circumstance that would provide justification for:
17 (i) initiation or maintenance of a criminal action against Yanke; (ii) imposition of criminal
18 penalties or sanctions against Yanke; (iii) imposition of a fine or penalty against Yanke by the
19 Commission for Common-Interest Communities and Condominium Hotels pursuant to NRS
20 116.785; (iv) imposition by any other governmental agency of a fine or penalty of any kind or
21 nature against Yanke; and/or (v) a determination that the debt or obligation arising from any
22 order entered pursuant to this Stipulation is not dischargeable under 11 USC § 523 or any other
23 applicable provision of the United States Bankruptcy Code.

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5. Nothing herein shall be deemed or construed as an admission that the acts and/or omissions of Yanke of which Plaintiffs complain were made or undertaken willfully or intentionally, and the treble damages remedy provided in NRS 116.4117(3) is inapplicable.

DATED this 26th day of April, 2011.

MARQUIS AURBACH COFFING

DATED this 25th day of April, 2011.

NTTZ, WALTON & HEATON, LTD.

By: 

Terry A. Coffing, Esq.
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Brian Hardy, Esq.
Nevada Bar No. 10068
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Plaintiffs

By: 

William H. Heaton, Esq.
Nevada Bar No. 1097
601 S. 10th Street, #201
Las Vegas, Nevada 89101
Attorneys for Tower Homes, LLC
and Rodney Yanke

ORDER

The Court having read and reviewed the foregoing stipulation of the parties, and good cause appearing,

IT IS HEREBY ORDERED, that judgment is hereby entered in favor of Plaintiffs (jointly and not severally) and against Yanke upon the causes of action and in the amounts set forth below:

a. Judgment in the total amount of Eight Hundred Thousand Dollars (\$800,000.00) is hereby entered pursuant to the Second Cause of Action in Plaintiffs' Complaint for breach of the implied covenant of good faith and fair dealing;

b. Judgment in the total amount of One Hundred Thousand Dollars (\$100,000.00) is hereby entered pursuant to the Fourth Cause of Action in Plaintiffs' Complaint for unjust enrichment; and

c. Judgment in the total amount of One Hundred Thousand Dollars (\$100,000.00) is hereby entered pursuant to the Seventh Cause of Action in Plaintiff's Complaint under authority of NRS 116.4117(1) for damages incurred emanating from the violation of duties and obligations arising under NRS Chapter 116.

1 IT IS FURTHER ORDERED, that each and all of the other claims and causes of action
2 that have been and/or could have been asserted in Plaintiffs' Complaint against Yanke shall be
3 and are hereby dismissed with prejudice, including, without limitation, all claims and/or causes
4 of action which Plaintiffs received by way of assignment from the Trustee in the Tower Homes,
5 LLC Bankruptcy and could have been asserted against Yanke, based on that assignment, in the
6 above-captioned matter or otherwise; provided, however, nothing herein shall be deemed or
7 construed as a waiver or release of any claim and/or cause of action which Plaintiffs now possess
8 or could assert against any person or entity, other than Yanke, by reason of the assignment from
9 the Trustee in the Tower Homes, LLC Bankruptcy.

10 IT IS FURTHER ORDERED, that Plaintiffs and Yanke shall each bear their own
11 attorney's fees and costs incurred in the above-captioned action.

12 IT IS FURTHER ORDERED, that nothing in this Stipulation or any order entered
13 pursuant hereto shall be deemed or construed as evidence of an admission by Yanke, or as
14 creating a basis for establishment of any fact or circumstance, that would provide justification
15 for: (i) initiation or maintenance of a criminal action against Yanke; (ii) imposition of criminal
16 penalties or sanctions against Yanke; (iii) imposition of a fine or penalty against Yanke by the
17 Commission for Common-Interest Communities and Condominium Hotels pursuant to NRS
18 116.785; (iv) imposition by any other governmental agency of a fine or penalty of any kind or
19 nature against Yanke; and/or (v) a determination that the debt and obligation arising from this
20 order are not dischargeable under 11 USC § 523 or any other applicable provision of the United
21 States Bankruptcy Code.

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MARQUIS AURBACH COFFING

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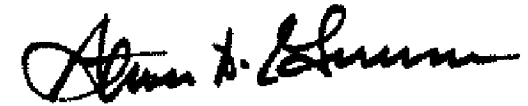
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IT IS FURTHER ORDERED, that nothing herein shall be deemed or construed as an admission that the acts and/or omissions of Yanke of which Plaintiffs complain were made or undertaken willfully or intentionally, and the treble damages remedy provided in NRS 116.4117(3) is inapplicable.

DATED this 27th day of April, 2011.


DISTRICT COURT JUDGE

EXHIBIT "E"



CLERK OF THE COURT

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7 WILLIAM H. HEATON and NITZ, WALTON &
HEATON, LTD.
8

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 TOWER HOMES, LLC, a Nevada limited
12 liability company;

13 Plaintiff,

14 vs.

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

18 Defendants.
19
20

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

DEFENDANTS' REPLY TO PLAINTIFF'S
OPPOSITION TO COUNTER-MOTION
FOR PROTECTIVE ORDER

Date: January 31, 2014
Time: 9:00 a.m.

(DISCOVERY COMMISSIONER)

21 Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. (collectively "NWH"), by
22 and through their attorneys, Lewis Brisbois Bisgaard & Smith, LLP, submit the following reply to
23 Plaintiff's Opposition (hereafter the "Opposition") to Defendants' Counter-Motion for Protective
24 Order (hereafter the "Counter-Motion").¹
25

26 ¹ Plaintiff's reply and opposition arguments are contained in one brief, as the issues raised in Plaintiff's
27 Motion to Compel and Defendants' Counter-Motion are inextricably intertwined. Plaintiff's brief is cited
28 hereafter as the "Opposition." *This Opposition was just received by NWH's counsel on January 28, 2014,*
as it was only served by mail.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. **REPLY ARGUMENT**

3 Plaintiff's alleged attorneys² would have the Discovery Commissioner believe that this is a
4 standard legal malpractice action, where the interests of a plaintiff client are genuinely represented
5 in order to secure compensation *for a client* who suffers damages as a result of alleged attorney
6 negligence. *It is not.* Instead, Plaintiff's alleged attorneys appear to be using the Tower Homes
7 corporate shell (or, more accurately, its limited liability company shell) *to represent the interests*
8 *of third-parties (i.e., the Tower Homes Purchasers).* Under these circumstances, NWH's
9 continuing ethical duties of confidentiality (which are broader than the attorney-client privilege)
10 owed to both Tower Homes and to Mr. Yanke, are implicated. These duties require that special
11 protections be put in place before *any* documents are produced to anyone. Moreover, if Plaintiff's
12 alleged attorneys are in fact representing the Tower Homes Purchasers, and not Tower Homes,
13 LLC (notwithstanding the caption), *then even Plaintiff's alleged attorneys are not entitled to*
14 *NWH's file.*

15 In their Opposition, Plaintiff's alleged attorneys largely ignore the factual, procedural and
16 legal (or, more accurately, illegal) complexities and oddities of this particularly unique case.
17 Specifically, they fail to even address, let alone refute, the critical ethical rules and legal
18 authorities cited in NWH's Counter-Motion relating to the scope and applicability of the duties of
19 confidentiality, and an attorney's magnified duties in joint representation situations (such as the
20 one that undisputedly exists in this case). In short, *the unique issues presented in this case*
21 *require unusual and special handling of the salient documents (i.e., the entirety of NWH's file),*
22 *including a protective order precluding any production of documents until the District Court*
23 *can clarify the lingering questions that have now been made apparent as a result of this*
24 *discovery dispute.*

25
26
27 ² As discussed below, it is questionable whether Plaintiff's attorneys of record actually represent the
28 interests of the named plaintiff, Tower Homes, LLC. Accordingly, it is more appropriate to reference
Plaintiff's alleged attorneys, as opposed to "Plaintiff" or "Tower Homes."

1 A. All indications are that Plaintiff's alleged attorneys represent the interests of
2 third-parties, not the interests of Tower Homes, LLC, which raises questions
3 as to whether Plaintiff's alleged attorneys are entitled to NWH's file, and
4 whether the file will be adequately protected against unauthorized
5 disclosure.

6 It is now becoming readily apparent that Plaintiff's alleged attorneys do not actually
7 represent the interests of the named Plaintiff in this action (Tower Homes, LLC). As discussed in
8 the Counter-Motion, the asserted authority for this action is an order from the Bankruptcy Court
9 purporting to authorize the Tower Homes Purchasers -- and notably *not* Tower Homes itself -- to
10 pursue this lawsuit. (See Counter-Motion at 9:2-17 and Exhibit D to the Counter-Motion at Page
11 2 of 3, lines 7-14). Any "recoveries" in this case "shall be for the benefit of the Tower Homes
12 Purchasers." (Ex. D to Counter-Motion at Page 2 of 3, lines 19-20). The Bankruptcy Court order
13 further authorizes the law firm of Prince & Keating, "retained on behalf of Tower Homes
14 Purchasers" to attempt to recover the Purchasers' lost deposits. (Ex. D at Page 2 of 3, line 17).
15 Thus, Plaintiff's alleged attorneys appear to be representing the interests of the Tower Homes
16 Purchasers (who appear to be the real parties in interest), not Tower Homes, LLC. This
17 questionable arrangement alone warrants, at the very least, the denial of the Motion to Compel and
18 the granting of the Counter-Motion for Protective Order. Additionally, *if Plaintiff's alleged*
19 *attorneys are in fact representing the Tower Homes Purchasers, then even they are not entitled*
20 *to NWH's file.*

21 The positions taken by Plaintiff's alleged attorneys with respect to the instant discovery
22 dispute demonstrate why this type of conflicting representation is untenable, and why "[e]very
23 action shall be prosecuted in the name of the real party in interest." N.R.C.P. 17(a). In a typical
24 legal malpractice case, when the client's attorney genuinely represents the interests of a client, the
25 attorney takes steps to ascertain and protect the interests of *the client* during litigation. Here,
26 Plaintiff's alleged attorneys implicitly concede that they have never even spoken with Mr. Yanke,
27
28

1 who is the only person who is authorized under Nevada law to act for Tower Homes. See NRS
2 86.071; NRS 86.291(1).³ Also, in a typical legal malpractice action, the client and the defendant
3 attorney usually share an interest in protecting the attorney's confidential files from the rest of the
4 world. Here, Plaintiff's alleged attorneys casually (and incorrectly) dismiss this concern as
5 frivolous.

6 The question that is ultimately begged is whether Plaintiff's alleged attorneys intend to use
7 NWH's files to further the interests of the Tower Homes Purchasers, or whether they intend to
8 share the file with the Tower Homes Purchasers or their other attorneys. Plaintiff's alleged
9 attorneys provide no authority in their Opposition that would permit such a disclosure under
10 circumstances that remotely resemble this case.

11 B. The assertion by Plaintiff's alleged attorneys that the NWH file must be freely
12 produced without adequate protection against disclosure to third-parties is
13 misplaced for numerous reasons, most of which are simply ignored in
14 the Opposition.

15 The crux of the position taken by Plaintiff's alleged attorneys is that Tower Homes, LLC is
16 the sole holder of the attorney-client privilege and, as such, can waive the attorney-client privilege
17 and authorize the unprotected disclosure of NWH's file. As a general proposition, it is of course
18 true that a corporate entity, and not its individual officers, holds the right to assert or waive the
19 attorney-client privilege. *The question here, however, is who is authorized to act on behalf of*
20 *the entity?* Given the unique facts and circumstances of this case, the general rule that a
21 corporation controls its own attorney-client privilege does not resolve the salient issues, primarily
22 because, as discussed above, it remains unclear who Plaintiff's alleged attorneys actually
23 represent. Additionally, an unrestricted disclosure of NWH's file to Plaintiff's alleged attorneys is
24 not permitted for numerous additional reasons, most of which are ignored or summarily dismissed
25

26 ³ The Tower Homes bankruptcy trustee also had the authority to act on behalf of Tower Homes during the
27 bankruptcy proceedings. As the Bankruptcy Court order (Ex. D) makes clear, however, the trustee has
28 relinquished his right to bring the instant lawsuit, the trustee is not a party to this lawsuit and this lawsuit is
no longer property of the bankruptcy estate.

1 by Plaintiff's alleged attorneys in the Opposition without any analysis or citation to applicable
2 legal authority.

- 3 1. **There is nothing in the record of this case demonstrating that Plaintiff's**
4 **alleged attorneys have the authority to act on behalf of Tower Homes**
5 **LLC, let alone authorize an unprotected disclosure of a confidential**
6 **attorney file.**

7 Other than "appearing" as purported attorneys of record for Tower Homes, LLC on the
8 caption in this case, there is not a single document in the record authorizing Plaintiff's alleged
9 attorneys to act *on behalf of Tower Homes, LLC*. Indeed, *Plaintiff's alleged attorneys do not*
10 *even affirm in their papers that they are representing the interests of Tower Homes, LLC*. There is
11 also not a single document or representation in the record showing that Tower Homes, LLC has
12 obtained the authorization of its sole member, Mr. Yanke, to permit an unrestricted disclosure of
13 NWH's file.

14 Plaintiff's alleged attorneys apparently maintain that the District Court's ruling on NWH's
15 Renewed Motion to Dismiss has resolved this issue. It has not. In the Renewed Motion to
16 Dismiss (a copy of which, without exhibits, is attached as **Exhibit H**), NWH argued, from a
17 purely procedural standpoint, that the language of the allegedly authorizing Bankruptcy Court
18 order only actually authorizes the Tower Homes Purchasers, and not Tower Homes, LLC itself, to
19 bring any legal action that otherwise belongs to the Tower Homes bankruptcy estate. (See
20 attached Exhibit H at 10:1-24). The District Court denied NWH's motion. Nevertheless, the
21 proceedings relating to NWH's Renewed Motion to Dismiss left open the questions of (1) whose
22 interests Plaintiff's alleged attorneys actually represent; (2) whether this action violates Nevada's
23 prohibition against the assignment of legal malpractice claims; and (3) whether this action violates
24 the mandate that "[e]very action shall be prosecuted in the name of the real party in interest"
25 pursuant to N.R.C.P. 17. At the very least, a protective order should be put in place until these
26 dispositive issues are decided by the District Court.

1 2. NWH's has an ongoing duty to safeguard the entirety of its file against
2 unauthorized disclosure to strangers to the attorney-client relationship.

3 In its Counter-Motion, NWH explained the basis for its withholding of the file given the
4 unique circumstances of this case. (Counter-Motion at 11-16). NWH has an ongoing duty to
5 safeguard the confidentiality of former clients' *information*, including *the entirety its file*
6 regarding its underlying representation of both Tower Homes and Mr. Yanke. See Nevada Rules of
7 Professional Conduct ("RPC") 1.6(a) and RPC 1.9(c); *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d
8 838 (2009) (recognizing attorney's duty of confidentiality based on RPC 1.6); Restatement (Third)
9 of The Law Governing Lawyers (hereafter the "Restatement") §§ 59 (including Comment b) and
10 60.⁴ Restatement § 59 provides that "[c]onfidential client information consists of information
11 relating to representation of a client, other than information that is generally known." (Ex. F).
12 Comment b to this section then provides: "This definition covers *all information relating to*
13 *representation of a client*, whether in oral, *documentary*, electronic, photographic, or other forms."
14 (*Id.* [emphasis added]).

15 In other words, the duty of confidentiality is broader than the attorney-client privilege.
16 See, e.g., *Dietz v. Meisenheimer & Herron*, 177 Cal.App.4th 771, 786, 99 Cal.Rptr.3d 464 (Cal.
17 App. 2009); *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003) (ethical duty of confidentiality is construed
18 broadly, while attorney-client privilege is construed narrowly); *In re Gonzalez*, 773 A.2d 1026,
19 1031 (D.C. App. 2001) (the ethical duty to protect client confidences "unlike the evidentiary
20 privilege, exists without regard to the nature or source of information or the fact that others share
21 the knowledge."). This duty of confidentiality survives the termination of the attorney's
22 representation. See, e.g., *Dietz, supra*, 177 Cal.App.4th at 786.

23 Accordingly, NWH's *entire file* is subject to and within the scope of the duty of
24 confidentiality, especially given the unusual circumstances of this case. NWH has an ethical
25 obligation to protect the entirety of its file against unauthorized disclosure to third-parties, and not
26

27 ⁴ The Nevada Supreme Court routinely cites to and relies upon the Restatements of law. It has done so in
28 hundreds of opinions.

1 just information that is subject to privilege.⁵

2 *Plaintiff's alleged attorneys entirely ignore the salient Rules of Professional Conduct*
3 *and Restatement provisions in their Opposition.*⁶

4 Additionally, the filing of a legal malpractice action does not, as Plaintiff's alleged
5 attorneys argue, change the fundamental fact that the attorney's file remains privileged and
6 confidential *as to strangers to the attorney-client relationship*. "[T]he mere institution of suit
7 against an attorney is insufficient to waive the attorney-client privilege as to third parties in a
8 separate action that concerns the same subject matter as the attorney malpractice action."
9 *Industrial Clearinghouse v. Browning Mfg.*, 953 F.2d 1004, 1007 (5th Cir. 1992) (emphasis in
10 original). This concern is obviously compounded here, as Plaintiff's alleged attorneys appear to
11 actually be representing the third-parties.

12 *Plaintiff's alleged attorneys do not address this issue in their Opposition, and they*
13 *provide no assurance that the NWH file will not be shared with the Tower Homes Purchasers,*
14 *or used for the benefit of the Tower Homes Purchasers.* Instead, they simply re-cite to
15 inapposite authorities -- *Montgomery v. Etreppid Techs., LLC*, 548 F. Supp. 2d 1175 (D. Nev.
16 2008) and *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990) -- which are readily
17 distinguishable. (Counter-Motion at 15:22 -- 16:22). Indeed, these two cases actually support
18 NWH's position. The *Montgomery* case recognized that privileged materials did not need to be
19 disclosed to a stranger to the attorney-client relationship. The *Grand Jury Subpoenas* case
20 recognized that "a joint defense privilege cannot be waived *without the consent of all parties who*
21 *share the privilege.*" *Id.* at 248 (emphasis added).

22 The "new" authorities cited in the Opposition do not even remotely confront the unique
23 and unprecedented circumstances of this case. Instead, they largely deal with situations where the
24

25 ⁵ In this regard, providing a privilege log does not avoid the parties' fundamental disputes as to who is
26 representing Tower Homes and whether the entirety of NWH's file should be protected so that it is not used
by third-parties.

27 ⁶ Again, for the Commissioner's convenience and reference, the cited Restatement provisions are attached
as Exhibit F to the Counter-Motion.

1 existence of a joint representation was at issue. Here, however, it is undisputed that NWH also
2 represented Mr. Yanke individually (and did not just represent Mr. Yanke in his capacity as the
3 sole member of Tower Homes, LLC). (See, e.g., Exhibit 5 to Opposition).

4 The only authority that remotely approaches the unique circumstances of the instant case is
5 *Citibank, N.A. v. Andros*, 666 F.2d 1192 (8th Cir. 1981). In *Citibank*, the court held that a
6 bankruptcy trustee had the authority to waive the attorney-client privilege on behalf of a corporate
7 debtor. *Citibank* is distinguishable on several critical grounds. First and foremost, this case did
8 not involve a situation, like we have here, where creditors were seeking to bring a post-bankruptcy
9 legal malpractice claim using the debtor's corporate shell. The questionable procedural and
10 substantive grounds for the instant action distinguishes this case from all of the authorities relied
11 upon by Plaintiff's alleged attorneys. Additionally, in *Citibank*, bankruptcy proceedings were
12 ongoing and the trustee had active control over the bankruptcy estate. Here, however, in contrast,
13 not only has the bankruptcy estate been fully administered (see Ex. E to Counter-Motion), but the
14 Tower Homes bankruptcy trustee expressly removed this lawsuit from the bankruptcy estate. (See
15 Ex. D to Counter-Motion at Page 2 of 3). As such, the Tower Homes bankruptcy trustee has no
16 authority to waive any privilege on behalf of Tower Homes, LLC, and, in any event, there is
17 nothing in the record indicating that the trustee has in fact waived any privilege.

18 **3. NWH has an ongoing duty to protect confidential information of a joint**
19 **client, Mr. Yanke.**

20 As detailed in the Counter-Motion, NWH also represented Mr. Yanke individually in
21 connection with the underlying proceedings. Again, this is undisputable. (See, e.g., Exhibit 5 to
22 the Opposition). As such, virtually all of the case law relied upon by Plaintiff's alleged attorneys
23 is readily distinguishable because the issue of whether there was actually joint representation was
24 disputed in the bulk of those authorities. Given that this case does in fact involve an actual joint
25 representation, additional duties and complications are implicated. As with all of the other unique
26 issues presented by this case and the instant discovery dispute, Plaintiff's alleged attorneys largely
27 ignore the salient ethical concerns and legal authorities.

1 Again, Nevada courts have recognized the fundamental black-letter principle that, when
2 there are joint clients, each client's communication with their attorney is **privileged as to**
3 **strangers to the attorney client relationship.** See *In re Hotels Nev., LLC*, 458 B.R. 560, 570-71
4 (D. Nev. 2011) (recognizing that "joint clients have a privilege *against third parties*") (emphasis
5 added); *Livingston v. Wagner*, 23 Nev. 53, 58, 42 P. 290 (1895) ("When a lawyer acts as the
6 common attorney of two parties their communications to him are privileged as far as concerns
7 strangers."). Thus, the attorney-client privilege that applies to communications between NWH
8 and Mr. Yanke continues to apply, and precludes disclosure of these communications to third-
9 parties (e.g., the Tower Homes Purchasers and/or their attorneys). *These communications are*
10 *largely and effectively inseparable from NWH's communications with "Tower Homes" because*
11 *Mr. Yanke is the only human being authorized to act on behalf of Tower Homes (another fact*
12 *that is persistently ignored in the Opposition).*⁷

13 Again, though a client (e.g., Tower Homes) has presumptive access to an attorney's file, an
14 attorney is not required to disclose documents when doing so may violate a duty of confidentiality
15 or non-disclosure that *may be owed to another client.* See *Sage Realty Corp. v. Proskauer Rose*
16 *Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 883 (N.Y. 1997); *Glade v. Superior Ct.*, 76
17 Cal.App.3d 738, 746-47, 143 Cal.Rptr. 119 (Cal. App. 1978). Additionally, in a joint
18 representation situation, one co-client does not have the authority to waive the privilege with
19 respect to another co-client's communications to their common lawyer." Restatement § 75,
20 Comment e (Ex. F). As such, it follows logically that "[a] lawyer may deny a client's request to
21 retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to
22 another." Restatement § 46, Comment c (emphasis added) (Ex. F). On this point, the
23 Restatement further provides:

24 If two or more persons are jointly represented by the same lawyer in
25 a matter, a communication of either co-client that otherwise

26 ⁷ Again, the bankruptcy estate has been fully administered, and the bankruptcy trustee has relinquished any
27 and all rights with respect to this lawsuit. This leaves Mr. Yanke as the only person who can act on behalf
28 of Tower Homes under Nevada law.

1 qualifies as privileged under §§ 68-72 and relates to matters of
2 common interest *is privileged as against third persons*, and *any co-*
3 *client may invoke the privilege*, unless it has been waived by the
4 client who made the communication.

5 Restatement § 75 (emphasis added) (Ex. F).

6 Plaintiff's alleged attorneys have no meaningful response to this dilemma, reasoning only
7 that Tower Homes, the entity, is the privilege holder. This circular contention, however, itself
8 ignores the facts that Plaintiff's alleged attorneys (1) provide no factual or legal authority
9 authorizing them to act on behalf of Tower Homes LLC; (2) provide no assurance that they will
10 not disclose the file to the Tower Homes Purchasers or use the file for the benefit of the Tower
11 Homes Purchasers; and (3) NWH owes independent ethical duties to Mr. Yanke in his individual
12 capacity.

13 The only contention by Plaintiff's alleged attorneys that even purports to address the
14 difficult issues presented is their assertion that the Tower Homes Purchasers' claims against Mr.
15 Yanke have been dismissed, so Mr. Yanke has nothing to worry about. (Opposition at 3:3-9.)
16 This argument is grossly misplaced, and, for several reasons, does not obviate NWH's duty of
17 confidentiality (owed to both Tower Homes, LLC and Mr. Yanke). First and foremost, legal
18 jeopardy is not a prerequisite for the application of the duty of confidentiality. The duty applies,
19 regardless of whether a disclosure of information may expose a client to legal liability.

20 Additionally, at least according to the caption in this case, Plaintiff's alleged attorneys
21 represent Tower Homes, LLC, not the Tower Homes Purchasers. As such, Plaintiff's alleged
22 attorneys are not in a position to provide any assurance as to what the Tower Homes Purchasers
23 may or may not do with any information contained in NWH's files. In this regard, Plaintiff's
24 alleged attorneys do not disclose to the Discovery Commissioner in the text of their Opposition
25 that the "dismissal" of the claims against Mr. Yanke in one of the underlying cases provides for
26 the entry of judgment in the total amount of \$1,000,000 against Mr. Yanke. (See Exhibit 5 to the
27 Opposition at 3:18 – 4:2). Plaintiff's alleged attorneys nowhere state, let alone provide evidence,
28 that this judgment against Mr. Yanke has been satisfied. Are Plaintiff's alleged attorneys now
29 providing an enforceable assurance that the Tower Homes Purchasers will never seek to collect

1 this judgment? Are Plaintiff's alleged attorneys willing to indemnify and defend Mr. Yanke (and
2 Tower Homes, LLC for that matter) if any further actions are ever taken as a consequence of
3 information contained in NWH's file?

4 These rhetorical questions demonstrate why it is obvious that the numerous ethical and
5 joint representation concerns discussed above and in the Counter-Motion preclude NWH from
6 disclosing its file without adequate protections in place.

7 II. CONCLUSION

8 The use by Plaintiff's alleged attorneys of the Tower Homes limited liability company
9 name and shell to pursue the interests of the Tower Homes Purchasers raises questions as to the
10 legality and legitimacy of this action. These questions will be directed to the District Court in
11 short order. For present purposes, the salient point is that, due to the apparently conflicting
12 interests of Plaintiff's alleged attorneys, NWH's file cannot be produced without adequate
13 measures in place to prevent the file from being disclosed to third-parties, including the Tower
14 Homes Purchasers and their counsel, who do not have the right to view documents that are
15 confidential, and are in significant part subject to the attorney-client privilege and the work
16 product doctrine. *And, if in fact Plaintiff's alleged attorneys in this case actually do represent the*
17 *Tower Homes Purchasers, then they are also not entitled to NWH's file.*

18 Based on the foregoing, as well as the Points and Authorities and evidence set forth in the
19 Counter-Motion, defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. respectfully
20 request that Tower Homes' Motion to Compel be denied, and that their Counter-Motion for
21 Protective Order be granted, subject to further direction from the District Court.

1 DATED this 21 day of January, 2014

2 LEWIS BRISBOIS BISGAARD & SMITH LLP

3
4 By

/s/

V. Andrew Cass

Nevada Bar No. 005246

Jeffrey D. Oister

Nevada Bar No. 008864

6385 S. Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorneys for Defendants

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

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard &
3 Smith LLP, and that on this 1 day of January, 2014, a true and correct copy of the foregoing
4 **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO COUNTER-MOTION FOR**
5 **PROTECTIVE ORDER** was sent via email and mailed US Mail to the address stated below.

6
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Attorneys for Plaintiff

12
13 By: Nicol Etienne
14 An Employee of LEWIS BRISBOIS
15 BISGAARD & SMITH LLP
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EXHIBIT "H"


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Ltd.

8
9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11
12 TOWER HOMES, LLC, a Nevada limited
liability company;

13 Plaintiff,

14 vs.

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

18 Defendants.
19
20

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

RENEWED MOTION TO DISMISS

21 Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd., by and through their
22 attorneys of record, Lewis Brisbois Bisgaard & Smith, LLP, hereby move to dismiss Plaintiff's
23 Complaint pursuant to N.R.C.P. 12(b)(1) (lack of jurisdiction over the subject matter); N.R.C.P.
24 12(b)(5) (failure to state a claim upon which relief can be granted) and N.R.C.P. 17 (lack of legal
25 capacity to sue).
26

27 ///

28 ///

1 This motion is based on the following memorandum of points and authorities, all pleadings
2 and records in this matter and any further argument and/or evidence that may be presented at the
3 hearing of this motion.

4 DATED this 26th day of July, 2013

5 LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7 By /s/ Jeffrey D. Olster
8 V. Andrew Cass
9 Nevada Bar No. 005246
10 Jeffrey D. Olster
11 Nevada Bar No. 008864
12 6385 S. Rainbow Boulevard, Suite 600
13 Las Vegas, Nevada 89118
14 Attorneys for Defendants
15 *William H. Heaton and Nitz, Walton & Heaton,*
16 *Ltd.*

17 **NOTICE OF MOTION**

18 PLEASE TAKE NOTICE that the undersigned will bring this motion to dismiss on for
19 hearing in Department 26 of this Court on the 28 day of AUGUST, 2013 at
20 9 : 0 0 AM, or as soon thereafter as counsel may be heard.

21 DATED this 26th day of July, 2013

22 LEWIS BRISBOIS BISGAARD & SMITH LLP

23 By /s/ Jeffrey D. Olster
24 V. Andrew Cass
25 Nevada Bar No. 005246
26 Jeffrey D. Olster
27 Nevada Bar No. 008864
28 6385 S. Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Attorneys for Defendants
William H. Heaton and Nitz, Walton & Heaton,
Ltd.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 This case arises out of a failed high-rise condominium development. Plaintiff Tower
4 Homes, LLC (hereafter “Tower”) started to develop such a project back in 2004, and sought the
5 assistance of defendant Nitz, Walton & Heaton, Ltd. (“NWH”) for legal representation, including
6 the preparation of the purchase contracts for the condominium units. NWH did so in accordance
7 with Nevada law and the applicable standard of care. When the development went south, largely
8 due to a lack of funding and Tower’s own misfeasance, Tower and its sole owner and principal,
9 Rodney Yanke (“Yanke”), were sued by purchasers (hereafter the “Tower Homes Purchasers”)
10 who had paid earnest money deposits for units that were never built. In this underlying cases,
11 Tower and Yanke were accused of, among other things, wrongfully misappropriating the
12 purchaser’s deposits – in direct contravention to the advice provided by NWH. Tower was
13 eventually forced into Chapter 11 bankruptcy proceedings by several of the contractors who had
14 worked on the project.

15 Once the bankruptcy was filed, all of Tower’s potential and theoretical rights of action
16 against other parties (including Mr. Heaton and NWH) became the property of the bankruptcy
17 estate, and fell within the exclusive control of the bankruptcy trustee. Thus, unless and until
18 Tower obtains the requisite trustee and Bankruptcy Court authority to bring a civil action, Tower
19 lacks the capacity and authority to bring the instant action as a well-settled matter of federal law.

20 As this Court is aware, NWH raised this issue in its initial Motion to Dismiss (filed on July
21 19, 2012 and heard by this Court on October 3, 2012). In its ruling on the original Motion to
22 Dismiss, this Court agreed with NWH that the Bankruptcy Court order on which Tower relied as
23 the authority for this action (referred to as the “Marquis Aurbach Order”) did not authorize this
24 action, but ruled that Tower could attempt to remedy this perceived “procedural defect” by
25 obtaining the requisite authority from Tower’s bankruptcy trustee and the Bankruptcy Court.

26 Tower has since obtained a new order purporting to authorize this action. *This new order,*
27 *however, also fails to authorize this action.* Moreover, there is no provision of law that permits
28 Tower to continue to maintain this action while at the same time attempt to cure any “procedural

1 defect.” This is a substantial *substantive*, not merely procedural, defect. Accordingly, this case
2 should be dismissed.

3 II. BACKGROUND

4 A. Factual Background

5 This action arises out of an alleged attorney-client relationship between NWH and Tower.
6 (Complaint ¶¶ 5-7.) In particular, NWH represented Tower with respect to a residential common
7 interest ownership development known as Spanish View Towers (hereafter the “Project”).
8 (Complaint ¶ 6.) As part of this representation, NWH prepared the purchase contracts for the
9 individual condominium units. (Complaint ¶ 9.)

10 The crux of the substantive dispute is whether the purchase contracts complied with
11 applicable Nevada law (NRS Chapter 116). Tower contends that NWH “should have advised
12 Tower pursuant to NRS 116.411 that the earnest money deposits were required to be held by a
13 third party and could only be released for very limited purposes as allowed by the statute,” and
14 that the purchase contracts did not comply with NRS 116.411. (Complaint ¶¶ 11-12.) NWH
15 maintains that it did so advise Tower (and Yanke) regarding NRS 116.411, that the purchase
16 contracts complied with NRS 116.411 and that it did not breach any duty or standard of care.
17 *Stated simply, the deposited funds were misappropriated, against NWH’s advice, contrary to the*
18 *terms of the purchase contract and without NWH’s knowledge.*

19 B. The Bankruptcy Proceedings and Trustee’s exclusive control of causes of 20 action belonging to Tower

21 Due to the delays and non-payment of various creditor claims relating to the Project,
22 Chapter 11 bankruptcy proceedings were initiated against Tower on May 31, 2007. (Complaint ¶
23 16.)¹ On or about December 8, 2008, the “Order Approving Disclosure Statement and Confirming
24 Plan of Reorganization” (hereafter the “Plan Confirmation Order”) was entered in the bankruptcy
25

26 ¹ The allegation in the Complaint that “Tower filed a Petition in the United States Bankruptcy Court”
27 (Complaint ¶ 16) is technically not true. The bankruptcy proceedings were actually initiated on an
28 involuntary basis by several of Tower’s creditors.

1 proceedings. (This Plan Confirmation Order is attached as **Exhibit A.**) Notably, in a section
2 entitled "Litigation," the Plan Confirmation Order provides, in relevant part, that:

3
4 *[T]he Trustee and the Estate shall retain all claims or Causes of*
5 *Action that they have or hold against any party . . . whether arising*
6 *pre- or post-petition, subject to applicable state law statutes of*
7 *limitation and related decisional law, whether sounding in tort,*
8 *contract or other theory or doctrine of law or equity. Confirmation*
9 *of the Plan effects no settlement, compromise, waiver or release of*
10 *any Cause of Action unless the Plan or Confirmation Order*
11 *specifically and unambiguously so provide. The nondisclosure or*
12 *nondiscussion of any particular Cause of Action is not and shall not*
13 *be construed as a settlement, compromise, waiver or release of such*
14 *Cause of Action. Upon the Effective Date, the Trustee will be*
15 *designated as representative of the Estate under section 1123(b)(3)*
16 *of the Bankruptcy code and shall, except as otherwise provided*
17 *herein, have the right to assert any or all of the above Causes of*
18 *Action post-confirmation in accordance with applicable law.*

19 (See Ex. A at 48:18 – 49:1 [emphasis added].)

20 **C. The first Marquis Aurbach Order**

21 Subsequent to the plan confirmation, notwithstanding his exclusive right to control all of
22 Tower's potential causes of action, the bankruptcy trustee, in a June 3, 2010 "Order Granting
23 Motion to Approve Stipulation to Release Claims and Allow Marquis & Aurbach, as Counsel for
24 the Tower Homes Purchasers, to Pursue Claims on Behalf of Debtor" (hereafter the "Marquis
25 Aurbach Order") agreed to relinquish certain alleged causes of action to certain enumerated parties
26 against certain enumerated individuals or entities:

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

(See Marquis Aurbach Order, attached as **Exhibit B**, at Page 5 of 6, lines 13-19 [emphasis
added].) In other words, notwithstanding his express retention of all causes of action belonging to
Tower, the bankruptcy trustee agreed to release *to the Tower Homes Purchasers* the right to

1 pursue claims relating to the earnest money deposits *through its attorneys, Marquis & Aurbach*
2 (now Marquis Aurbach Coffing).

3 **D. The instant action and NWH's first Motion to Dismiss**

4 Based on the Marquis Aurbach Order, Tower filed the instant action on June 12, 2012. On
5 July 19, 2012, NWH filed its Motion to Dismiss, or, Alternatively, Motion for Summary
6 Judgment" (hereafter the "MTD"). In the MTD, NWH demonstrated why Tower lacked the
7 capacity and authority to bring the instant action based on both federal law and the Plan
8 Confirmation Order, and why the Marquis Aurbach Order did not provide the requisite
9 authorization that would permit Tower to bring a civil action. (See MTD at 8:6 – 12:3.)² In ruling
10 on the MTD, this Court agreed with NWH that the Marquis Aurbach Order does not authorize
11 Tower to bring the instant action through the law firm of Prince & Keating against Mr. Heaton and
12 NWH. (See **Exhibit C**, Order Regarding Defendants' Motion to Dismiss, or, Alternatively,
13 Motion for Summary Judgment, at 2:11-13.)

14 This Court denied the MTD, however, reasoning that Tower's lack of capacity and
15 authority to bring the instant action "presents a procedural, not a fatal, defect." (*Id.* at 2:10-11.)
16 Accordingly, this Court ruled that Tower "may attempt to remedy this procedural defect by
17 obtaining the requisite authority from the Tower Homes, LLC bankruptcy trustee and order from
18 the Bankruptcy Court." (Ex. C at 2:14-15.) This Court further ordered "that this matter shall be
19 stayed until Plaintiff obtains the requisite authority for this action from the bankruptcy trustee and
20 order from the Bankruptcy Court." (*Id.* at 2:16-18 [emphasis added].) In other words, this action
21 is stayed unless and until Tower obtains a proper authorization from the Bankruptcy trustee and
22 Court to bring and maintain this action.³

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

27 ³ The parties also agreed to stay this action pending the Nevada Supreme Court's ruling on NWH's Writ
28 Petition. (See Order Granting Defendants' Motion to Stay Pending Completion of Writ Proceedings, filed
on June 21, 2013).

1 **E. The New Marquis Aurbach Order**

2 In an attempt to remedy the “procedural defect,” on or about April 8, 2013, Tower filed
3 with this Court an order from the Bankruptcy Court entitled “Order Granting Motion to Approve
4 Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing, as Counsel for the
5 Tower Homes Purchasers, to Pursue Claims on Behalf of Debtor (hereafter the “New Marquis
6 Aurbach Order”). (This New Marquis Aurbach Order is attached as **Exhibit D.**) The New
7 Marquis Aurbach Order:

- 8 • “[A]uthorizes the Trustee to permit *the Tower Homes Purchasers* to pursue
9 any and all claims on behalf of Tower Homes, LLC (the “Debtor”) against
10 any individual or entity which has or may have any liability or owed any
11 duty to Debtor or others for the loss of the earnest money deposits provided
12 by purchasers for units in the Spanish View Tower Homes condominium
13 project which shall specifically include, but may not be limited to, pursuing
14 the action currently filed in the Clark County District Court styled as Tower
15 Homes, LLC v. William H. Heaton et al. Case No. A-12-663341-C.”
16 • “[A]uthorizes the law firm of Marquis Aurbach Coffing and/or Prince &
17 Keating, LLP, or successive counsel, *retained on behalf of Tower Homes*
18 *Purchasers* to recover any and all earnest money deposits, damages,
19 attorneys fees and costs, and interest thereon on behalf of Debtor and the
20 Tower Homes Purchasers and that any such recoveries shall be for the
21 benefit of the Tower Homes Purchasers.”

22 (Ex. D at 2 of 3, lines 7-20.)

23 As discussed below, this New Marquis Aurbach Order still does not authorize Tower to
24 maintain the instant action. Accordingly, this action should be dismissed.

25 **III. ARGUMENT**

26 As discussed below, this New Marquis Aurbach Order does not remedy the perceived
27 “procedural defect,” as it, like the original Marquis Aurbach Order, only authorizes the Tower
28 Homes Purchasers, not Tower itself, to bring the instant action. The only plaintiff in this case is

1 Tower. Accordingly, the New Marquis Aurbach Order still does not authorize this action.
2 Furthermore, this is not merely a “procedural defect” – this is a *jurisdictional* defect. Under
3 federal law, Tower is simply not authorized to maintain an action that is otherwise within the
4 exclusive control of Tower’s bankruptcy trustee. This action therefore should be dismissed.

5 **A. Tower lacks the capacity to bring this action based on both federal law and the**
6 **orders entered in the bankruptcy proceedings.**

7 When a bankruptcy is filed, a bankruptcy estate is created pursuant to 11 U.S.C. § 541(a)
8 consisting of **all legal and equitable interests of the debtor, including all claims and causes of**
9 **action that belong to the debtor.** *See, e.g., Sierra Switchboard v. Westinghouse*, 789 F.2d 705,
10 707 (9th Cir. 1986); *Weitzel v. The Mirage*, 2009 U.S. Dist. Lexis 34621 at *7 (D. Nev. 2009);
11 *Suter v. Goedert*, 396 B.R. 535, 540-42 (D. Nev. 2008). “Thereafter, the property of the estate is
12 distinct from the property of the debtor.” *Suter, supra*, 396 B.R. at 541. The trustee (or debtor in
13 possession, which is not applicable here) is the representative of the estate with the authority to
14 sue on behalf of the estate pursuant to 11 U.S.C. §§ 323, 363 and 1107. *See Suter, supra*, 396
15 B.R. at 546 (“Because the legal malpractice action is property of the estate, the trustee had the
16 authority to sell, settle, or compromise non-exempt assets of the estate.”) In other words, the
17 trustee has the **exclusive** power to sue on behalf of the bankruptcy estate. *See Estate of Spirtos v.*
18 *One San Bernardino Cty. Sup. Ct.*, 443 F.3d 1172, 1175-76 (9th Cir. 2006) (numerous supporting
19 citations omitted); *see also Parker v. Wendy’s Int’l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004)
20 (“Thus, a trustee, as the representative of the bankruptcy estate, is the proper party in interest, and
21 is the only party with standing to prosecute causes of action belonging to the estate.”).

22 Here, in Tower’s Chapter 11 bankruptcy, a trustee was appointed on January 18, 2008, and
23 the trustee was the only person with the right to pursue claims on behalf of the debtor. *See* 11
24 U.S.C. § 1141(b) (“Except as otherwise provided in the plan or the order confirming the plan, the
25 confirmation of a plan vests all of the property of the estate in the debtor.”)

1 **1. The Plan Confirmation Order does not authorize Tower to bring this**
2 **action.**

3 In Tower's case, the Plan Confirmation Order did "otherwise provide" within the meaning
4 of 11 U.S.C. § 1141(b), and, pursuant to this order, it is *the trustee*, and not the debtor, that was
5 authorized, post-confirmation, to pursue or dispose of claims. In this regard, Article X(C) of the
6 Plan Confirmation Order provides that "...from and after the Confirmation Date, *the Trustee and*
7 *the Estate shall retain all claims or Causes of Action* that they may have or hold *against any*
8 *party . . . whether arising pre- or post-petition*, subject to applicable state law statutes of
9 limitation and related decisional law, whether sounding in tort, contract or other theory or doctrine
10 of law or equity." (See Ex. A at 48:17-22 [emphasis added].) Thus, title to the claims which are
11 the subject of this action never vested in the debtor (Tower) pursuant to 11 U.S.C. § 1141 and/or
12 the Plan Confirmation Order. Accordingly, Tower simply has no authority to sue and is without
13 legal capacity to maintain this action.

14 **2. As recognized by this Court, the first Marquis Aurbach Order did not**
15 **authorize Tower to bring this action.**

16 In an attempt to authorize this action, the trustee and the Tower Homes Purchasers
17 obtained the Bankruptcy Court approval of the Marquis Aurbach Order (Exhibit B.) In the MTD,
18 the parties disputed whether this first Marquis Aurbach Order authorized Tower to bring the
19 instant action. In its ruling on the MTD, this Court agreed with NWH that the first Marquis
20 Aurbach Order did not authorize this action because that first order only authorized the Tower
21 Homes Purchasers, not Tower itself, to bring any civil action. (Ex. B, Marquis Aurbach Order at
22 Page 5 of 6, lines 13-19.) Moreover, the first Marquis Aurbach Order only authorized legal action
23 against specifically enumerated parties, which did not include NWH or Mr. Heaton, and only
24 authorized litigation by the law firm of Marquis Aurbach. (*Id.* at Page 5 of 6, lines 13-26.)

25 Rather than dismissing the case outright, however, this Court provided Tower with leave to
26 attempt to remedy this perceived "procedural defect" by obtaining the requisite authority from the
27 bankruptcy trustee and order from the Bankruptcy Court. (Ex. C at 2:14-15.)

1 3. **The New Marquis Aurbach Order does not authorize Tower to bring**
2 **this action.**

3 Tower presumably maintains that the New Marquis Aurbach Order (Exhibit D) provides
4 the requisite Bankruptcy Court authority to maintain this action. However, the New Marquis
5 Aurbach Order still only authorizes *the Tower Homes Purchasers* to pursue an action, *not* Tower:

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

16 (Ex. D at 2:7-14 [emphasis added].) The Tower Homes Purchasers are obviously not parties to
17 this action.⁴

18 The New Marquis Aurbach Order further provides:

19 IT IS FURTHER ORDERED ADJUDGED AND DECREED that
20 [the Bankruptcy] Court authorizes the law firm of Marquis Aurbach
21 Coffing and/or Prince & Keating, LLP, or successive counsel,
22 *retained on behalf of Tower Homes Purchasers* to recover any and
23 all earnest money deposits, damages, attorneys fees and costs, and
24 interest thereon on behalf of Debtor and the Tower Homes
25 Purchasers and that any such recoveries shall be *for the benefit of*
26 *the Tower Homes Purchasers*.

27 (Ex. C at 2:8-14 [emphasis added].) This provision merely authorizes Marquis Aurbach or Prince
28 & Keating, *as counsel retained on behalf the Tower Homes Purchasers*, to bring the instant action
for the benefit of the Tower Homes Purchasers. It does *not* authorize Tower to bring this action
(for its own benefit or for anyone’s benefit). In other words, *the New Marquis Aurbach Order*
does nothing to alter the status quo, which is that Tower remains unauthorized to bring this
action. (See MTD at 8-12 and MTD Reply at 3-6).

29 ⁴ Even if the Tower Homes Purchasers were the named parties, this action still would be subject to
30 dismissal as a matter of Nevada law because legal malpractice claims cannot be assigned. *See, e.g.,*
31 *Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966 (1982).

1 **B. Because Tower lacks the requisite capacity and authority, the**
2 **proper remedy is dismissal of this action.**

3 Both federal and state courts, including the federal court sitting in Nevada, have
4 consistently recognized that when a bankruptcy debtor has failed to obtain the proper bankruptcy
5 court authorization to bring and maintain a civil action, **the appropriate remedy is a dismissal of**
6 **the civil action** (or summary judgment). *See Bruce v. Homefield Financial, Inc.*, 2011 U.S. Dist.
7 Lexis 110243 at *4-*5 (D. Nev. 2011) (bankruptcy debtor's claim dismissed because it was not
8 properly disclosed and authorized by the bankruptcy trustee);⁵ *see also Hamilton v. State Farm*
9 *Fire & Cas. Co.*, 270 F.3d 778, 783-86 (9th Cir. 2001) (summary judgment properly granted on
10 debtor's lawsuit because debtor did not disclose and obtain bankruptcy court authority for
11 lawsuit); *In re Strada Design Ass.*, 326 B.R. 229, 235-240 (S.D.N.Y. 2005) (determining that
12 bankruptcy debtor lacked capacity to maintain and control state court legal malpractice claim);
13 *Wright v. Meyers & Spencer, LLP*, 849 N.Y.S.2d 274, 275 (N.Y. App. 2007) (debtor's legal
14 malpractice claim was property of bankruptcy estate and was properly dismissed because debtor
15 lacked capacity to bring and maintain claim).

16 Conversely, *there is no provision of law that permits a debtor that lacks the requisite*
17 *capacity and Bankruptcy Court authorization to both maintain an improper civil action and*
18 *simultaneously attempt to "cure" the lack of authorization.* In other words, when a bankruptcy
19 debtor brings an unauthorized civil action – an action which belongs exclusively to the bankruptcy
20 estate – this is not merely a “procedural defect” that can be retroactively cured. This is a
21 substantive, jurisdictional defect. Yet, this is precisely what Tower is seeking to do in this case.
22 This violates federal and law and should not be permitted. Instead, this action should be
23 dismissed.

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27 ⁵ A copy of this unpublished federal opinion is attached as **Exhibit E**.

1 **IV. CONCLUSION**

2 Based on the foregoing, defendants William H. Heaton and Nitz, Walton & Heaton, Ltd.
3 respectfully request that the Complaint be dismissed in its entirety, with prejudice.
4

5 DATED this 26th day of July, 2013

6 LEWIS BRISBOIS BISGAARD & SMITH LLP
7

8 By /s/ Jeffrey D. Olster

9 V. Andrew Cass

10 Nevada Bar No. 005246

11 Jeffrey D. Olster

12 Nevada Bar No. 008864

13 6385 S. Rainbow Boulevard, Suite 600

14 Las Vegas, Nevada 89118

15 *Attorneys for Defendants*

16 *William H. Heaton and Nitz, Walton & Heaton,*
17 *Ltd.*
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1 I declare under penalty of perjury under the laws of Nevada that the foregoing is true and
2 correct.

3 DATED this 26th day of July, 2013

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/s/ Jeffrey D. Olster
Jeffrey D. Olster

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard &
3 Smith LLP, and that on this 26th day of July, 2013, a true and correct copy of the foregoing
4 **RENEWED MOTION TO DISMISS** was placed in an envelope, postage prepaid, addressed as
5 stated below.

6
7 Dennis M. Prince
8 Eric N. Tran
9 Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117
P: (702) 228-6800
F: (702) 228-0443
10 *Attorneys for Plaintiff*
11

12
13 By: /s/ Nicole Etienne
14 An Employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP
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EXHIBIT "F"

1 TRAN

COPY

DISTRICT COURT
CLARK COUNTY, NEVADA

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3
4 TOWER HOMES LLC,) CASE NO. A-12-663341-C
5)
6 Plaintiff,) DEPT. NO. XXVI
7 vs.)
8)
9 WILLIAM H. HEATON;)
10 NITZ WALTON & HEATON LTD.,)
11)
12 Defendants.)
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BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER

RECORDER'S TRANSCRIPT RE:
PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS;
DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL
AND COUNTERMOTION FOR PROTECTIVE ORDER

WEDNESDAY, FEBRUARY 26, 2014

APPEARANCES:

FOR THE PLAINTIFFS: DENNIS M. PRINCE, ESQ.
ERIC N. TRAN, ESQ.
Prince & Keating

FOR DEFENDANTS: JEFFREY D. OLSTER, ESQ.
Lewis Brisbois et al.

RECORDER/TRANSCRIBER: RICHARD KANGAS

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LAS VEGAS, CLARK COUNTY, NEVADA

WEDNESDAY, FEBRUARY 26, 2014, 12:15 P.M.

* * * * *

DISCOVERY COMMISSIONER BULLA: Tower homes.

MR. PRINCE: Your Honor, good afternoon.

DISCOVERY COMMISSIONER BULLA: Good afternoon.

MR. PRINCE: Dennis Prince and Eric Tran for the
plaintiff, Tower Homes LLC.

MR. OLSTER: Good afternoon, Your Honor, Jeff
Olster for defendants.

DISCOVERY COMMISSIONER BULLA: Good morning.

This is plaintiff's motion to compel production of
documents, and then I had an opposition and a countermotion
for a protective order. I have read through everything.

You know, this is a very interesting issue.
Occasionally I get I think what I would consider to be not
only interesting issues, but maybe some cutting edge issues
as well. Even though other states have spoken on some of
these issues, I found it somewhat interesting.

I do have a question, I guess for defense counsel.
Was - did Mr. Yanke hire - is it Yanke [YANK-ee], am I
saying that right?

MR. OLSTER: I believe it's Yanke [YANK], Your
Honor.

DISCOVERY COMMISSIONER BULLA: Mr. Yanke?

1 MR. OLSTER: Just Yanke, yeah, silent E.

2 DISCOVERY COMMISSIONER BULLA: Did he hire your
3 client's firm as an individual, or was his only dealings
4 with that firm in his representative capacity of the
5 corporate entity?

6 MR. OLSTER: Well, I don't - in all honesty, I
7 can't say how he was hired, but we know that the firm
8 represented him. When he was named as an individual
9 defendant in the underlying lawsuit by the purchasers, they
10 represented him in his individual capacity -

11 DISCOVERY COMMISSIONER BULLA: Okay.

12 MR. OLSTER: - in those lawsuits.

13 MR. PRINCE: Well, Your Honor, the thrust of our
14 case really isn't that the - the joint representation in
15 the litigation. What I really want the Court to be focused
16 on is the - this law firm, they were hired by Tower Homes
17 LLC, who was the developer of a high-rise condominium
18 project, they were hired to advise them and draft, assist
19 in drafting the purchase contracts. The thrust of the case
20 revolves around the drafting of the purchase contracts
21 which failed to require, as required by Nevada law, that
22 the purchase money - the earnest money deposits be held in
23 a secure trust, either in escrow or some other third party.

24 DISCOVERY COMMISSIONER BULLA: Well, I understand
25 that.

1 MR. PRINCE: And so when he talks about joint
2 representation, he's only talking about the litigation.
3 And the litigation was the Tower Homes purchasers filed
4 suits against, among others, Tower Homes LLC, Mr. Yanke
5 individually. And then there was an involuntary bankruptcy
6 of my client, Tower Homes LLC; and it's through the
7 Bankruptcy Court order that we are pursuing this action.

8 DISCOVERY COMMISSIONER BULLA: I understand.

9 MR. PRINCE: So the jointness - who's talking?

10 DISCOVERY COMMISSIONER BULLA: Go ahead.

11 MR. PRINCE: Is only related to the litigation,
12 not the transactional aspect of the representation, which
13 was the corporation.

14 DISCOVERY COMMISSIONER BULLA: The transactional
15 file has to be produced. The corporation holds the
16 privilege on that; they are waiving it. That - if Mr.
17 Yanke retained the law firm in any other capacity, that's
18 protected, any individual capacity is protected.

19 When the law firm represented all of them in the
20 underlying litigation, I don't think you need that file.

21 MR. PRINCE: Not - not right now, although I may
22 do a separate request for it because there may have been a
23 period of time when they were jointly representing them.

24 DISCOVERY COMMISSIONER BULLA: But -

25 MR. PRINCE: But shortly after the lawsuit was

1 filed Tower Homes went into bankruptcy, so there would've
2 been a very short window of joint representation in the
3 litigation. But right now I'm not after that.

4 DISCOVERY COMMISSIONER BULLA: Right. And I don't
5 think that's relevant, necessarily, to your claims in this
6 case, but we'll address that in the future, if need be.

7 MR. PRINCE: If necessary.

8 DISCOVERY COMMISSIONER BULLA: But the
9 transactional file must be produced.

10 MR. OLSTER: But the transactional file is not
11 separated from the litigation file. I mean, they're -
12 they're one and the same. I mean, the litigation file -

13 DISCOVERY COMMISSIONER BULLA: Well, then I guess -

14 MR. OLSTER: - was the transactional file.

15 DISCOVERY COMMISSIONER BULLA: I guess you'll have
16 to do some separation.

17 MR. PRINCE: Right. And -

18 DISCOVERY COMMISSIONER BULLA: Because all the
19 correspondence with the transactional before litigation
20 occurred, all the drafting, all the letters that went back
21 and forth, that would all be relevant.

22 MR. PRINCE: Well, that's true. And let's think
23 about what the litigation file may contain. Not every
24 aspect of these forty-two thousand pages is subject to any
25 type of a privilege. For example, if Mr. Yanke made

1 disclosures in the underlying litigation to third - to the
2 other parties, that's not subject to any privilege. The
3 only thing we're talking about is what internal - what
4 communications may have existed between Mr. Yanke and the
5 Nitz law firm, so.

6 DISCOVERY COMMISSIONER BULLA: But it still has to
7 be calculated to lead to the discovery of admissible
8 evidence. And your case, as I understand it, is legal
9 malpractice for the drafting of the agreement and where the
10 earnest money was supposed to be held.

11 MR. PRINCE: Well, that's true. But the
12 underlying litigation also related to the same topic,
13 meaning that the individual purchasers sued various real
14 estate professionals, including Mr. Yanke, about what
15 happened to their money. Mr. Yanke has already stipulated
16 to a judgment in favor of the Tower Homes purchasers he
17 can't satisfy; he's not satisfied any portion of it. But
18 there are documents in the underlying litigation file which
19 would still be discoverable in this case.

20 I think one of the positions they're taking is
21 that, hey, you know, people at Tower Homes, including Mr.
22 Yanke, they absconded with money, they misappropriated
23 funds, and that's not a cause of any damage. So I think it
24 is reasonably calculated.

25 The problem, Your Honor - and here we are, we're

1 four months into the - since the early case conference.
2 And it really isn't a - it's evidence of abusive litigation
3 conduct on the part of the defendants. They have not given
4 us a privilege log. We don't know what the forty-two
5 thousand pages of documents exist - what it is -

6 DISCOVERY COMMISSIONER BULLA: Right.

7 MR. PRINCE: - is comprised of.

8 DISCOVERY COMMISSIONER BULLA: Right. They do
9 need to give you a privilege log.

10 MR. PRINCE: So what - the thing is, we're four
11 months into this already. They've not done anything yet
12 because they're thinking, well, there's a privilege issue,
13 plus we want all - every document we've produced to be
14 subject to a confidentiality agreement. And I'm not
15 willing to do that for a number of reasons.

16 DISCOVERY COMMISSIONER BULLA: No, you don't have
17 to.

18 MR. PRINCE: You're right, I don't have to.

19 DISCOVERY COMMISSIONER BULLA: You don't have to.

20 MR. PRINCE: Correct, and that's exactly what I
21 told them. And -

22 DISCOVERY COMMISSIONER BULLA: You don't have to.

23 MR. OLSTER: He doesn't?

24 DISCOVERY COMMISSIONER BULLA: This is a legal
25 malpractice case. Listen up -

1 MR. OLSTER: But -

2 DISCOVERY COMMISSIONER BULLA: - listen up. It's
3 a legal malpractice case. The file that the client has
4 that pertains to the issues that the plaintiff has raised
5 is produced. Your - I don't buy the joint privilege,
6 holder-of-the-privilege argument in this case, because the
7 corporation holds the privilege. Mr. Yanke acted in his
8 capacity in relation to that corporation.

9 Now, if the client, the defendant client
10 represented Mr. Yanke in some other capacity for some other
11 purpose, that clearly is protected. The underlying
12 litigation - I don't think this is a case where the
13 plaintiff's counsel necessarily has to prove success on the
14 underlying litigation, because there's already a judgment.

15 So I'm not really certain, Mr. Prince, I
16 completely buy that the communications regarding the
17 underlying litigation with the homeowners, or the potential
18 homeowners, is relevant. But I'm going to leave that to
19 another day.

20 What's before me today is the file between the
21 plaintiff and the defendant law firm on the drafting of the
22 documents, and that has to be produced.

23 MR. OLSTER: We - Your Honor, if I may, you are
24 missing so many issues here. First of all, I don't know -
25 what I said is, I don't know if the law firm was also

1 representing Mr. Yanke individually in connection with the
2 transactional aspect of the case. Okay? We have nothing
3 in the record on that issue. And Mr. Yanke has been a -
4 individually, has been a long-time client of the firm, so I
5 don't think we can just wipe away and say, separate it
6 later.

7 There was a joint representation of both Mr. Yanke
8 and the LLC throughout the duration of this project. And I
9 think on that point, Your Honor, it's critical to under-
10 stand that Mr. Yanke is the sole and only member of the
11 LLC. He's the only mouthpiece, the only representative -

12 DISCOVERY COMMISSIONER BULLA: Right.

13 MR. OLSTER: - of the LLC.

14 DISCOVERY COMMISSIONER BULLA: And in his capacity
15 as that individual member, he gets the benefits of Nevada
16 corporate law and the protection of the LLC. But that
17 means, however, when they're in litigation they're on the
18 same side.

19 MR. PRINCE: Correct.

20 MR. OLSTER: But he was sued individually. He's
21 got a judgment against him individually, all arising out of
22 the same facts.

23 DISCOVERY COMMISSIONER BULLA: I understand that,
24 but that's not what this case - this case that you're
25 dealing with today is about the fact that the documents

1 were not prepared properly to ensure that the earnest money
2 of the purchasers was maintained in a separate confidential
3 account. His draft documents, correspondence that goes to
4 the drafting of those documents, discussion of issues, of
5 information that has to be in those documents, all needs to
6 be produced.

7 I really don't care if Mr. Yanke was part of those
8 discussions or not. The - the problem is that we're in a
9 legal malpractice case so that file is relevant; there is
10 no privilege there. There is no privilege by statute for
11 that.

12 MR. OLSTER: No, but there's something far more
13 important, Your Honor; it's called the duty of
14 confidentiality, and it's broader than the attorney-client
15 privilege, and we cited you the law in our papers. And
16 this is not a standard legal malpractice case.

17 DISCOVERY COMMISSIONER BULLA: It would be a
18 confidential statement between the defendant and the
19 plaintiff, but the plaintiff is the holder of the
20 privilege. That's the client; they've waived it.

21 MR. OLSTER: And who's the client in this case?
22 Tower Homes LLC, the entity suing.

23 DISCOVERY COMMISSIONER BULLA: I think it's Tower
24 Homes LLC.

25 MR. OLSTER: That's not what the bankruptcy order

1 says, Your Honor.

2 And did you get our supplement? Because we filed
3 a summary judgment motion on the grounds that this action -

4 DISCOVERY COMMISSIONER BULLA: I -

5 MR. OLSTER: - is unlawful under Nevada law.

6 DISCOVERY COMMISSIONER BULLA: - I received it.

7 MR. OLSTER: And it's set for March 21st, and so I
8 would respectfully request that the most logical ruling
9 here is to defer -

10 DISCOVERY COMMISSIONER BULLA: Well, what's -

11 MR. OLSTER: - until that motion is heard.

12 DISCOVERY COMMISSIONER BULLA: What's going to
13 happen when the Judge gives them 26(f) relief?

14 MR. PRINCE: And more importantly, Your Honor,
15 we've already - this action was filed in June of 2012.
16 There've already been three other attempts to dismiss this
17 complaint. They've all failed, every single one of them.
18 This is another argument -

19 DISCOVERY COMMISSIONER BULLA: Well, this is -

20 MR. PRINCE: - they've already made, so.

21 DISCOVERY COMMISSIONER BULLA: - this is what I'm
22 going to do.

23 MR. PRINCE: So I want to -

24 DISCOVERY COMMISSIONER BULLA: I'm sorry, I'm
25 going to have to cut this short. And I did read your

1 arguments; I saw the supplemental motion. I'm going to
2 give you 2.34(e) relief, so you will not have to produce
3 anything until the Judge makes it a Court order.

4 So the plaintiff's motion to compel is granted
5 within the following parameters. The file that pertain to
6 Tower Homes with the defense firm will be produced as it
7 relates to the claims in this case, specifically the
8 preparation of the documents, the key documents, the
9 contracts, the terms and agreements, any of the
10 correspondence between Tower Homes LLC and the defendant.
11 Even if that correspondence was by Mr. Yanke, it's
12 discoverable as it relates to this particular case. Any
13 representation of Mr. Yanke in his individual capacity not
14 related to this case is protected. But to the extent that
15 there is a file that exists between Tower Homes and the
16 defense firm, it must be produced as it relates to the
17 claims in this case.

18 I am deferring the issue on the litigation file to
19 another day.

20 MR. PRINCE: That's fine.

21 DISCOVERY COMMISSIONER BULLA: But the pre-
22 litigation file, if you will, the file that gives rise to
23 the claims of this lawsuit, that the documents were not
24 properly prepared, needs to be disclosed.

25 I am going to give the defendant 2.34(e) relief so

1 he can object to my report and recommendation, which I am
2 certain he will do. But the document, the file will then
3 need to be produced within three business days after the
4 report and recommendation is signed by the district court
5 judge.

6 MR. PRINCE: That's fine. So the 2.34(e) relief
7 is allowing the Court to rule on -

8 DISCOVERY COMMISSIONER BULLA: My report and
9 recommendation, prior to having the defendant have to
10 produce the file.

11 MR. PRINCE: Fair enough. I got it now.

12 DISCOVERY COMMISSIONER BULLA: So if -

13 MR. PRINCE: Understood.

14 DISCOVERY COMMISSIONER BULLA: - if the Court
15 affirms me, then the file will need to be produced in three
16 business days -

17 MR. PRINCE: Right.

18 DISCOVERY COMMISSIONER BULLA: - from that date.

19 MR. PRINCE: And I want to make sure that we're
20 clear, I don't know how this firm maintains their files.
21 They may have maintained general files which part Mr. Yanke
22 may have been involved in, but they're really doing the
23 work on behalf of Tower Homes LLC. So any documents,
24 communications, no matter whatever file - or however -
25 whatever arrangement that they had, that that's gonna be

1 produced as it relates to these transactions.

2 DISCOVERY COMMISSIONER BULLA: Right.

3 MR. PRINCE: Okay.

4 DISCOVERY COMMISSIONER BULLA: They can't use the
5 attorney-client privilege as a shield in this case against
6 the client.

7 MR. PRINCE: Right. And secondly -

8 DISCOVERY COMMISSIONER BULLA: Because it's a
9 legal malpractice case.

10 MR. PRINCE: That's what he's been doing. They
11 have been doing that.

12 DISCOVERY COMMISSIONER BULLA: Yeah, you can't -
13 yeah.

14 MR. PRINCE: And so the second issue is -

15 MR. OLSTER: We're not doing that. You're
16 misunderstanding our papers, Your Honor.

17 MR. PRINCE: Then the second issue -

18 DISCOVERY COMMISSIONER BULLA: Okay. Well, then
19 you're welcome to talk to the Judge about my lack of
20 understanding.

21 MR. PRINCE: Then the second - the second issue
22 is, with regard to the document that they said is the file,
23 I'd like for you at the same time to have a privilege log,
24 have them produce a privilege log so that we can at least
25 evaluate these forty-two-plus thousand-dollar - forty-two-

1 plus thousand pages of documents that they say comprised
2 the file so that we can make a determination of, is there a
3 privilege being claimed, is there something being
4 appropriately withheld, or -

5 DISCOVERY COMMISSIONER BULLA: I'm going to defer
6 ruling on that because if the file was all kept together,
7 then some of it may be litigation related, and I'm going to
8 just withhold ruling on the litigation aspect of the file
9 for now, and anything that goes forward. I'm just going to
10 require the file to be produced. If it is a matter of
11 having to separate the file physically because this law
12 firm did not handle it that way, then I may come up with
13 some alternative relief, like I review the file in camera
14 versus a privilege log being prepared.

15 MR. PRINCE: Right. And that would be the same
16 for not only their physical work file, but also their
17 billing file for Tower Homes LLC, right? That should be -

18 DISCOVERY COMMISSIONER BULLA: I think you're -

19 MR. PRINCE: - voluntarily produced.

20 DISCOVERY COMMISSIONER BULLA: I think you're
21 entitled to the billing file, what they billed.

22 MR. PRINCE: Right. Okay.

23 DISCOVERY COMMISSIONER BULLA: I mean, your client
24 should technically have those records as well. But I think
25 you're certainly entitled to the billing records as it

1 relates to the preparation of the documents at issue here.

2 MR. OLSTER: That's the point, he doesn't
3 represent Tower Homes; he represents the Tower Homes
4 purchasers. That's why he doesn't have these billing
5 records. He does not represent Tower Homes; he represents
6 the purchasers.

7 MR. PRINCE: Well, I represent Tower Homes LLC.

8 MR. OLSTER: You don't represent the purchasers
9 also?

10 MR. PRINCE: No, I don't.

11 MR. OLSTER: Well, that's what the bankruptcy
12 court order says though.

13 MR. PRINCE: Okay. Very well, Judge.

14 MR. OLSTER: That's the problem, Your Honor, he
15 represents the purchasers. He represents -

16 DISCOVERY COMMISSIONER BULLA: Did the bankruptcy -

17 MR. OLSTER: - the only entity that gets money in
18 this case is the purchasers; that's undisputed.

19 DISCOVERY COMMISSIONER BULLA: Deep breath.

20 MR. PRINCE: That's true.

21 DISCOVERY COMMISSIONER BULLA: Deep breath.

22 MR. PRINCE: That is true.

23 DISCOVERY COMMISSIONER BULLA: Deep breath. You
24 don't need to get all -

25 MR. OLSTER: I apologize, Judge.

1 DISCOVERY COMMISSIONER BULLA: - excited here.

2 This is not - in the big scheme of things, this is not the
3 end of the world.

4 MR. OLSTER: No, it's not.

5 DISCOVERY COMMISSIONER BULLA: And I gave you
6 26(e) relief.

7 Where is the bankruptcy document?

8 MR. OLSTER: Exhibit D -

9 DISCOVERY COMMISSIONER BULLA: Okay, understand -

10 MR. OLSTER: - to our -

11 DISCOVERY COMMISSIONER BULLA: - I did not receive
12 a courtesy copy.

13 MR. OLSTER: I was told you did.

14 DISCOVERY COMMISSIONER BULLA: When I don't
15 receive a courtesy copy, all we do is print out the motion
16 work. So do you - I didn't receive -

17 MR. OLSTER: I was assured -

18 DISCOVERY COMMISSIONER BULLA: - and I didn't
19 receive the reply either. I didn't receive the opposition;
20 I didn't receive the motion to compel. You all need to do
21 a better job of getting me the material.

22 MR. OLSTER: I apologize. I was assured you got
23 courtesy copies.

24 Well, maybe we should revisit this after getting -

25 DISCOVERY COMMISSIONER BULLA: I did get -

1 MR. OLSTER: - and re-looking at the exhibits.
2 DISCOVERY COMMISSIONER BULLA: - a courtesy copy
3 of the supplement.
4 No, I'm not going to revisit it. You're gonna - I
5 - Mr. Prince is an officer of the Court. He has
6 represented to me he represents Tower Homes LLC, that he
7 was designated to represent that corporation by the
8 bankruptcy court -
9 MR. OLSTER: He wasn't.
10 DISCOVERY COMMISSIONER BULLA: - in relation to
11 the purchases. He wasn't?
12 MR. OLSTER: No. He's authorized to represent -
13 DISCOVERY COMMISSIONER BULLA: Well, then I better
14 be calling -
15 MR. OLSTER: - the Tower Homes purchasers.
16 DISCOVERY COMMISSIONER BULLA: - the State Bar
17 right now.
18 MR. PRINCE: Thank you.
19 DISCOVERY COMMISSIONER BULLA: If that's the case,
20 I'll call the State Bar.
21 THE CLERK: We have -
22 MR. PRINCE: You can call 'em, if you need to.
23 THE CLERK: - two motions.
24 DISCOVERY COMMISSIONER BULLA: We have two?
25 THE CLERK: Countermotions.

1 DISCOVERY COMMISSIONER BULLA: What was the other
2 countermotion?

3 THE CLERK: It looks like -

4 MR. PRINCE: There's a countermotion for a
5 protective order, which I think you're denying, saying
6 there's no basis for a protective order.

7 DISCOVERY COMMISSIONER BULLA: Okay. So I
8 apologize. The motion is - the motion to compel is
9 granted. The opposition and the countermotion for a
10 protective order is denied. But the motion is granted
11 within the parameters we've discussed.

12 MR. PRINCE: Fair.

13 DISCOVERY COMMISSIONER BULLA: Actually, I
14 probably should say this: the countermotion is granted in
15 part and denied in part, because I'm not going to require
16 the defendants to turn over their entire file. The
17 litigation part of the file is protected for now; I'm going
18 to address that issue on another day. What I am going to
19 require to be turned over, which is set forth in your
20 motion to compel, within those parameters, are the
21 documents of the preparation - related to the preparation
22 of the documents leading to the lawsuit.

23 MR. PRINCE: Right. I guess it would be the
24 entire pre-litigation representation file relating to this
25 transaction, drafting of the contract -

1 DISCOVERY COMMISSIONER BULLA: Right.
2 MR. PRINCE: - communications, et cetera.
3 DISCOVERY COMMISSIONER BULLA: Right.
4 MR. PRINCE: Fair enough.
5 DISCOVERY COMMISSIONER BULLA: And, Mr. Prince,
6 you're going to prepare -
7 MR. PRINCE: I will.
8 DISCOVERY COMMISSIONER BULLA: - the report and
9 recommendation.
10 MR. PRINCE: I sure will.
11 DISCOVERY COMMISSIONER BULLA: Run it by defense
12 counsel. I am giving him - is that -
13 MR. OLSTER: Are you interested in the language?
14 DISCOVERY COMMISSIONER BULLA: I'll take a look at
15 it briefly.
16 MR. PRINCE: We've already - Judge, we've already
17 been down this path -
18 MR. OLSTER: No, we haven't.
19 MR. PRINCE: - with Judge Sturman. We've been
20 down this path three times. He's - they lost on writ
21 relief. We've already handled - we've already addressed
22 this issue three times.
23 MR. OLSTER: This is a different issue.
24 (Pause in the proceeding, Commissioner reading document)
25 DISCOVERY COMMISSIONER BULLA: Okay. Well, it

1 looks like to me there are a couple of different paragraphs
2 here. And it looks like the bankruptcy court allowed the
3 Tower Homes purchasers to step in the shoes of Tower Homes
4 LLC, so I'm going to leave it alone. You're welcome to
5 argue that to the district court judge.

6 I do believe that the ruling, my recommendation
7 from my perspective of reading through everything, is
8 appropriate. Because when you have a legal malpractice
9 action, the attorney-client privilege does not stand. And
10 whatever Mr. Yanke have done, even if he was the sole
11 shareholder of Elk Homes - or, I'm sorry, of Tower Homes
12 LLC, he clearly, clearly, had the benefit of the corporate
13 entity; and that's the - the corporate entity is what is at
14 issue here.

15 MR. PRINCE: Okay.

16 MR. OLSTER: And he was sued. But let me just -
17 let me ask my one clarification. So you're saying that the
18 law firm of Nitz Walton & Heaton and its principals, my
19 clients in this case, do not violate any duty of
20 confidentiality by producing documents to Mr. Prince in
21 this case, or any ethical duty.

22 DISCOVERY COMMISSIONER BULLA: I -

23 MR. OLSTER: Is that what your ruling is?

24 DISCOVERY COMMISSIONER BULLA: I want to say this
25 to you with all due respect. I know you're very hot right

1 now; I know you don't agree with my recommendation, and you
2 are absolutely welcome to object to it.

3 What I am saying is, that there is no attorney-
4 client privilege under the facts and circumstances of this
5 case in the preparation of the documents that are at issue
6 in legal malpractice. The duty of confidentiality is, I
7 believe, more of an ethical duty.

8 And I am not here to answer your questions, with
9 all due respect. If you feel -

10 MR. OLSTER: But that's the basis of our
11 opposition.

12 DISCOVERY COMMISSIONER BULLA: - if you feel -
13 well, then I'm not buying the basis for your opposition.

14 MR. OLSTER: Can he share the documents with the
15 purchasers?

16 DISCOVERY COMMISSIONER BULLA: You know what -

17 MR. OLSTER: Well, I'm trying to understand the
18 parameters of your ruling, Your Honor; that's all.

19 DISCOVERY COMMISSIONER BULLA: I've given you the
20 parameters of my ruling. And now -

21 MR. OLSTER: But that's the crux of it.

22 DISCOVERY COMMISSIONER BULLA: But you keep asking
23 for more, and I'm really done today.

24 Here's my issue. I am giving you 2.34(e) relief.
25 The documents do not have to be produced. If the holder of

1 the privilege, which I believe it is, is Tower Homes LLC,
2 the holder of the privilege can waive the attorney-client
3 privilege. And I believe it's waived by statute when
4 there's a legal malpractice claim, which there is here.

5 Now I understand that the purchasers are stepping
6 into the shoes of the entity Tower Homes LLC. But they're
7 the ones that - the corporate entity is the one that holds
8 the privilege. And I'm saying under the facts and
9 circumstances of this case the privilege is waived and the
10 file has to be turned over to be able to address the legal
11 malpractice issues.

12 I do not believe that a protective order is
13 necessary for those files, or anyone occasioned to show
14 those files to anyone because the holder of the privilege
15 has waived the privilege.

16 You are welcome to object to my report and
17 recommendation. Maybe you'll have more success in
18 explaining your position to the district court judge.

19 MR. OLSTER: All right. Thank you.

20 DISCOVERY COMMISSIONER BULLA: All right.

21 THE CLERK: Status check is March 28th at 11 a.m.

22 DISCOVERY COMMISSIONER BULLA: And I need the
23 report and recommendation in ten days. Make sure you run
24 it by defense counsel to approve as to form and content.

25 MR. PRINCE: I will.

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DISCOVERY COMMISSIONER BULLA: Thank you.

PROCEEDING CONCLUDED AT 12:37 P.M.

* * * * *

ATTEST: I do hereby certify that I have transcribed the audio-
video recording of this proceeding in the above-entitled case to
the best of my ability.

Richard L. Kangas
RICHARD L. KANGAS
Court Recorder/Transcriber

[Faint circular stamp]

EXHIBIT "G"

COURTESY
COPY

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15 *Tower Homes, LLC*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

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

15 Plaintiff,

16 vs.

17 WILLIAM H. HEATON, individually; NITZ,
18 WALTON & HEATON, LTD., a domestic
19 professional corporation; and DOES 1
20 through X, inclusive,

21 Defendants.

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

**DISCOVERY COMMISSIONER'S
REPORT AND RECOMMENDATIONS**

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

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 I. APPEARANCES

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

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

7 II. FINDINGS

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

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

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

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

10 **III. RECOMMENDATIONS**

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

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

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

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

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

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

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

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

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1 4. Defendant must produce a privilege log of all documents withheld from
2 production which were disclosed pursuant to NRCP 16.1. *Upon request, the*
3 *parties may request an in camera review by the Commissioner*
4 **IT IS ALSO HEREBY RECOMMENDED** a status check will be held on
5 March 28, 2014 at 10:00 a.m.

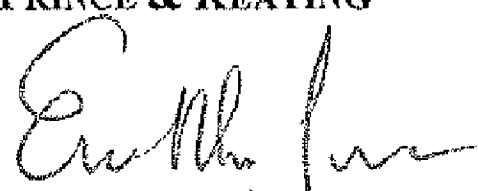
6 **IT IS FURTHER RECOMMENDED** that Plaintiff will prepare the Report and
7 Recommendations.

8 DATED this 19 day of March, 2014.

9
10 
11 DISCOVERY COMMISSIONER

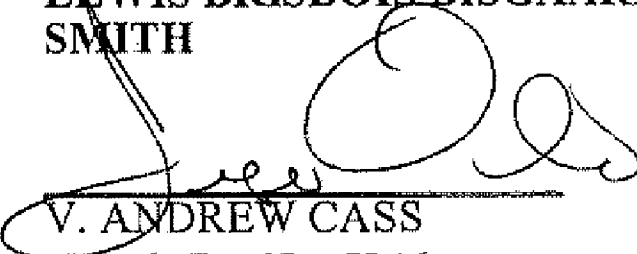
12 Respectfully submitted by:

13 **PRINCE & KEATING**

14 
15 DENNIS M. PRINCE
16 Nevada Bar No. 5092
17 ERIC N. TRAN
18 Nevada Bar No. 11876
19 3230 South Buffalo Drive, Suite 108
20 Las Vegas, Nevada 89117
21 Attorneys for Plaintiff

Approved as to Form and Content:

13 **LEWIS BRISBOIS BISGAARD &
SMITH**

14 
15 V. ANDREW CASS
16 Nevada Bar No. 5246
17 JEFFREY D. OLSTER
18 Nevada Bar No. 8864
19 6385 S. Rainbow Boulevard Suite 600
20 Las Vegas, Nevada 89118
21 Attorneys for Defendants

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

Mailed to Plaintiffs/Defendants at the following addresses on
the day of 2014.

By: JENNIFER LOTT
Deputy Clerk

CASE NAME: *Tower Homes, LLC v. William Heaton et. al.*
CASE NO.: A-12-663341-C

ORDER

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

The parties having waived the right to object thereto,

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

Having received the objections thereto and the written arguments in support of said
objections, and good cause appearing,

* * *

AND

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

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

IT IS HEREBY ORDERED that a hearing on the Discovery Commissioner's Report
and Recommendations is set for _____, 2014 at ____: _____.m.

DATED this ____ day of March, 2014.

DISTRICT COURT JUDGE

"1"

Skip to Main Content Logout My Account Search Menu New District Civil/Criminal Search Refine
Search Close

Location : District Court Civil/Criminal Help

REGISTER OF ACTIONS

CASE No. A-12-663341-C

**Tower Homes LLC, Plaintiff(s) vs. William Heaton,
Defendant(s)**

§
§
§
§
§
§

Case Type: **Negligence - Other**
Date Filed: **06/12/2012**
Location: **Department 26**
Cross-Reference Case **A663341**
Number:

PARTY INFORMATION

Defendant Heaton, William H

Lead Attorneys
Vincent A Cass
Retained
7028933383(W)

Defendant Nitz Walton and Heaton Ltd

Vincent A Cass
Retained
7028933383(W)

Plaintiff Tower Homes LLC

Dennis M Prince
Retained
7022286800(W)

EVENTS & ORDERS OF THE COURT

08/28/2013 **Motion to Dismiss** (9:00 AM) (Judicial Officer Sturman, Gloria)
Defendants' Renewed Motion to Dismiss

Minutes

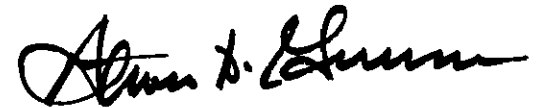
08/28/2013 9:00 AM

- Argument by counsel on DEFENDANTS' RENEWED MOTION TO DISMISS based on whether the bankruptcy trustee authorized Tower-Homes LLC or Tower Homes purchasers to maintain this action and whether this Court has jurisdiction. Court noted its original concern was whether the bankruptcy trustee had notice of this law suit or if it was a fugitive action and Mr. Prince referenced the trustee's hearing and Order acknowledging the case of Tower Homes LLC vs Heaton that shows notice of this litigation and assigned to the purchasers the right to pursue collections on behalf of the debtor. COURT STATED ITS FINDINGS that legal capacity of Prince and Keating and Tower-Homes LLC to bring this law suit is moot. COURT ORDERED Defendant's Renewed Motion to Dismiss DENIED. Mr. Prince then made an oral motion to have the Stay Order previously entered by this Court lifted. COURT ORDERED stay LIFTED; defendants have ten (10) days from notice of entry of Order to answer or otherwise respond.

[Parties Present](#)

[Return to Register of Actions](#)

"2"



CLERK OF THE COURT

V. Andrew Cass
Nevada Bar No. 005246
Drew.Cass@lewisbrisbois.com
Jeffrey D. Olster
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Fax: 702.893.3789
Attorneys for Defendants
WILLIAM H. HEATON and NITZ, WALTON & HEATON, LTD.

DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited liability company;

Plaintiff,

vs.

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

Defendants.

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

**DEFENDANTS' OBJECTIONS TO
DISCOVERY COMMISSIONER REPORT
AND RECOMMENDATIONS**

Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. (collectively "NWH"), by and through their attorneys, Lewis Brisbois Bisgaard & Smith, LLP, and pursuant to NRCP 16.1(d)(2) and EDCR 2.34(f),¹ hereby object to the Discovery Commissioner's Report and

¹ This Court is authorized under Nevada law to hear objections to a Discovery Commissioner's report and recommendations. See NRCP 16.1(d)(2) and EDCR 2.34(f). "Upon receipt of a discovery commissioner's report and any objections thereto, the court may affirm, reverse or modify the commissioner's ruling, set the matter for a hearing, or remand the matter to the commissioner for further action, if necessary." NRCP 16.1(d)(3).

1 Recommendations on (1) “Plaintiff’s” Motion to Compel Production of Documents; and (2)
2 Defendants’ Counter-Motion for Protective Order. These Objections are based on the following
3 memorandum of points and authorities and all pleadings and records in this matter.²

4 DATED this 26th day of March, 2014

5 LEWIS BRISBOIS BISGAARD & SMITH LLP

6
7 By /s/ Jeffrey D. Olster

8 V. Andrew Cass

9 Nevada Bar No. 005246

10 Jeffrey D. Olster

11 Nevada Bar No. 008864

12 6385 S. Rainbow Boulevard, Suite 600

13 Las Vegas, Nevada 89118

14 Attorneys for Defendants

15 *William H. Heaton and Nitz, Walton & Heaton,*
16 *Ltd.*

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27 ² The Court has granted Defendants’ Motion for Summary Judgment. Accordingly, the parties’ discovery
28 dispute is now moot. Defendants submit these objections merely to preserve the record and their right to
oppose the Discovery Commissioner’s ruling (e.g., in the event the Court’s ruling is reversed on appeal).

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The Discovery Commissioner has now ordered the production of NWH's transactional
4 files from its underlying joint representation of Tower Homes, LLC ("Tower Homes") and its sole
5 manager, Rodney Yanke. This would not be a problem if this were a legal malpractice case that
6 was actually authorized and brought by Tower Homes for the benefit of Tower Homes. As this
7 Court is well-aware, however, this is simply not the case. This action instead is brought by the
8 Tower Homes Purchasers, by and through attorneys who (according to the Bankruptcy Court)
9 have been "*retained on behalf of [the] Tower Homes Purchasers.*"³ In other words, *the*
10 *Discovery Commissioner has ordered that confidential attorney files be produced to persons*
11 *who have never had an attorney-client relationship with NWH*, and who are NWH's litigation
12 adversaries. This ruling violates black-letter rules of ethics and confidentiality, and is therefore
13 clearly erroneous.

14 **II. THE PARTIES' DISCOVERY DISPUTE**

15 On October 17, 2013, the parties held their early case conference. On multiple occasions
16 in November and December 2013, counsel discussed and corresponded regarding the production
17 of NWH's voluminous files from its underlying representation of Tower Homes and Mr. Yanke,
18 which are in excess of 42,000 pages. NWH's counsel explained NWH's joint representation of
19 Tower Homes and Mr. Yanke, and why appropriate protections (such as a confidentiality
20 stipulation) needed to be put in place before any documents could be produced. Plaintiff's alleged
21 attorneys (who we now know actually represent the Tower Homes Purchasers) refused to agree to
22 any confidentiality protection, despite the fact that their actual clients (the Tower Homes
23 Purchasers) have never had an attorney-client relationship with NWH, and are in an adverse
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25 ³ Prince & Keating's representation of the Tower Homes Purchasers, as this Court knows, is established by
26 the Second Marquis Aurbach Order, which is attached hereto for the Court's convenience as **Exhibit A** (at
27 page 2, lines 16-17). This Second Marquis Aurbach Order was attached as Exhibit D to NWH's opposition
28 during the discovery proceedings. It remains unclear if the Discovery Commissioner actually saw this
Order prior to the hearing, though it is clear that she disregarded it.

1 position to Tower Homes, Mr. Yanke and NWH.

2 On December 30, 2013, Plaintiff's alleged attorneys filed their "Motion to Compel
3 Production of Documents" (attached hereto as **Exhibit B**). On January 15, 2014, NWH filed its
4 "Opposition to Plaintiff's Motion to Compel Production of Documents and Counter-Motion for
5 Protective Order" (attached hereto as **Exhibit C**). On or about January 24, 2014, Plaintiff's
6 alleged attorneys filed their "Reply in Support of Motion to Compel Production of Documents;
7 and Plaintiff's Opposition to Defendants' Countermotion for Protective Order" (attached hereto as
8 **Exhibit D**). On January 30, 2014, NWH filed its "Reply to Plaintiff's Opposition to Counter-
9 Motion for Protective Order" (attached hereto as **Exhibit E**).

10 The parties' motions were heard by the Discovery Commissioner on February 26, 2014.
11 (A copy of the hearing transcript is attached as **Exhibit F**). At the conclusion of the hearing, the
12 Discovery Commissioner granted both motions in part and denied both motions in part.
13 Specifically, the Discovery Commissioner ruled, in salient part:

- 14 1. That NWH must produce its entire pre-litigation transaction file to the law firm
15 of Prince & Keating, notwithstanding the fact that Prince & Keating represents
16 the Tower Homes Purchasers; and
- 17 2. That NWH need not produce the litigation files for NWH's joint representation
18 of Tower Homes and Rodney Yanke relating to the two underlying lawsuits
19 (*McClelland v. Tower Homes, LCC*, Case No. A528584 and *Gaynor v. Tower*
20 *Homes, LLC*, Case No. A541668).

21 (See Discovery Commissioner's Report and Recommendations on the parties' motions, attached
22 hereto as **Exhibit G** at 3-4).

23 **III. DEFENDANTS' OBJECTIONS**

24 While it is true that a plaintiff-client in a legal malpractice case is generally entitled to most
25 of the attorney's file, *this case is very different* because the "real parties in interest" (the Tower
26 Homes Purchasers) have never had an attorney-client relationship with NWH, are adverse to both
27 the clients (Tower Homes and Mr. Yanke) and the attorneys (NWH), and are represented by
28 attorneys who represent the interests of the Tower Homes Purchasers, not Tower Homes or Mr.

1 Yanke. Neither Tower Homes nor Mr. Yanke have authorized this action as required by Nevada
2 law, nor have they waived any privilege with respect to their confidential and privileged
3 documents.

4 By ordering the production of documents to the attorneys retained on behalf of the Tower
5 Homes Purchasers, the Discovery Commissioner failed to recognize and appreciate the critical and
6 unique features of this case. This is perhaps attributable to the fact that the hearing on the parties'
7 discovery dispute was called at 12:15 p.m., at the tail end of a three-hour Discovery Commissioner
8 hearing session. (See Ex. F at 2:2). Moreover, the Discovery Commissioner even conceded
9 during the hearing that she was "going to have to cut this short." (*Id.* at 11:24-25).

10 More importantly, the Discovery Commissioner assumed (as one normally would by
11 looking at the case caption) that Plaintiff's alleged attorneys actually represent Tower Homes, and
12 not the Tower Homes Purchasers. As this Court well knows, however, this assumption was
13 erroneous, as *the Second Marquis Aurbach Order establishes unequivocally that Prince &*
14 *Keating has been retained "on behalf of [the] Tower Homes Purchasers."* (See Ex. A at 2:16-
15 17). Despite the fact that the Discovery Commissioner apparently didn't have the exhibits to
16 NWH's papers, including the Second Marquis Aurbach Order (Ex. F at 17:7-21), she relied on Mr.
17 Prince's inaccurate representation that he represents Tower Homes, LLC. (*Id.* at 18:4-9). This
18 erroneous assumption underlies the Discovery Commissioner's improper ruling that confidential
19 and privileged documents should be turned over to strangers to the attorney-client relationship,
20 who are now litigation adversaries.

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1 A. **NWH has a duty to safeguard its entire file, which is entirely confidential as a**
2 **matter of law.**

3 As fully set forth in NWH's Opposition (Ex. C), NWH has an ongoing duty to safeguard
4 the confidentiality of former clients' information. *See* Nevada Rules of Professional Conduct
5 ("RPC") 1.6(a);⁴ RPC 1.9(c);⁵ *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838 (2009)
6 (recognizing attorney's duty of confidentiality based on RPC 1.6); Restatement (Third) of The
7 Law Governing Lawyers (hereafter the "Restatement") § 60.

8 Confidential information consists of, among other things, the attorney's file. Specifically,
9 Restatement § 59 provides: "Confidential client information consists of information relating to
10 representation of a client, other than information that is generally known."⁶ Comment b to this
11 section then provides: "This definition covers *all information relating to representation of a*
12 *client*, whether in oral, documentary, electronic, photographic, or other forms." (Emphasis
13 added). In other words, the "confidential client information" that NWH must protect is broader
14 than just information that may be protected by the attorney-client privilege or work product
15 doctrine (though much of the underlying files do consist of such privileged materials); rather,
16 NWH is obligated to protect "all information relating to the representation of a client" -- i.e., the
17 entire underlying file.

18 B. **NWH cannot produce its confidential files to persons who were not parties to**
19 **the attorney-client relationship.**

20 The foregoing rules and duties regarding confidentiality are a fundamental aspect of the
21 attorney-client relationship. Nevada courts have recognized, for example, that attorney-client
22

23 ⁴ "A lawyer *shall not reveal information relating to representation of a client* unless the client gives
24 informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the
disclosure is permitted by paragraphs (b) and (c)." R.P.C. 1.6(a) (emphasis added). (Subsections (b) and
(c) are not applicable here).

25 ⁵ "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly
26 represented a client in a matter *shall not thereafter . . . Reveal information relating to the representation*
except as these Rules would permit or require with respect to a client." R.P.C. 1.9(c) (emphasis added).

27 ⁶ Copies of all Restatement provisions were attached as Exhibit F to NWH's Opposition (which is attached
28 hereto as Exhibit C).

1 communications are privileged as to strangers to the attorney-client relationship. *See In re Hotels*
2 *Nev., LLC*, 458 B.R. 560, 570-71 (D. Nev. 2011) (recognizing that “joint clients have a privilege
3 against third parties”); *Livingston v. Wagner*, 23 Nev. 53, 58, 42 P. 290 (1895) (“When a lawyer
4 acts as the common attorney of two parties their communications to him are privileged as far as
5 concerns strangers.”). Other courts have recognized that “the *mere institution of suit* against an
6 attorney is insufficient to waive the attorney-client privilege as to third parties in a separate action
7 that concerns the same subject matter as the attorney malpractice action.” *Industrial*
8 *Clearinghouse v. Browning Mfg.*, 953 F.2d 1004, 1007 (5th Cir. 1992) (emphasis in original).

9 In a normal legal malpractice case, where there is a client with actual authority to act and
10 who has an interest in the outcome of the legal malpractice case, and no third-parties with an
11 active and ongoing interest in the proceedings, these fundamental duties do not present a problem.
12 Moreover, even in this situation, typically the plaintiff-client does not want its confidential
13 documents (i.e., the files of its attorney) exposed to the entire world, which is why plaintiff-clients
14 and defendant attorneys *routinely stipulate to protect the confidentiality of the attorney’s file*.
15 Here, in contrast, there is not just a theoretical concern about unauthorized disclosure of the file to
16 strangers to the attorney-client relationship. The Second Marquis Aurbach Order makes it clear
17 that this action is somehow brought and maintained for the benefit of the Tower Homes
18 Purchasers, by attorneys retained on behalf of the Tower Homes Purchasers. (See Ex. A at 2:15-
19 20).

20 Notwithstanding the foregoing, the Discovery Commissioner concluded that “Tower
21 Homes” has somehow “waived” “the privilege.” (See Recorder’s Transcript, Ex. E at 4:15-16;
22 10:20). This ruling is erroneous for several reasons:

- 1 • There has never been any representation, let alone evidence, that anyone on
2 behalf of Tower Homes has “waived” any privilege. A limited liability
3 company can only act through its managers.⁷ Tower Homes’ only manager
4 is Mr. Yanke.⁸ Mr. Yanke has never waived any “privilege” on behalf of
5 Tower Homes. Though the Tower Homes bankruptcy trustee may have
6 been able to waive any protection that should be afforded to NWH’s files if
7 this action were brought by the trustee for the benefit of the bankruptcy
8 estate during ongoing bankruptcy proceedings, the Tower Homes trustee
9 has disclaimed any interest in this lawsuit, this lawsuit is no longer part of
10 the Tower Homes bankruptcy estate and the bankruptcy proceedings have
11 concluded. Moreover, there is no evidence in the record that the trustee
12 considered these privilege issues or somehow waived any privilege that
13 belongs to Tower Homes (and to Mr. Yanke individually).
- 14 • Despite the misleading caption, this action is not brought by Tower Homes
15 for the benefit of Tower Homes. It is brought by the Tower Homes
16 Purchasers for the benefit of the Tower Homes Purchasers. (See Ex. A.)
17 The Discovery Commissioner has now ordered that confidential and
18 privileged documents be produced to persons (the Purchasers and their
19 attorneys) who have never had an attorney-client relationship with NWH.
20 This ruling forces NWH to violate Nevada’s Rules of Professional Conduct.

23 ⁷ See NRS 86.071 (defining “Manager” as “a person, or one of several persons, designated in or selected
24 pursuant to the articles of organization or operating agreement of a limited-liability company to manage the
25 company.”); NRS 86.291(1) (“Except as otherwise provided in this section or in the articles of
26 organization or operating agreement, *management of a limited-liability company is vested in its members*
in proportion to their contribution to its capital, as adjusted from time to time to reflect properly any
additional contributions or withdrawals by the members.”). (Emphasis added).

27 ⁸ See Exhibit G to Defendants’ Opposition, which is a copy of the Nevada Secretary of State’s official
28 record for Tower Homes, LLC. This official record shows only one member – managing member Rodney
Yanke.

1 • The issue is not simply about “privilege” (presumably the Discovery
2 Commissioner means the attorney-client privilege when she say
3 “privilege”). Again, as detailed above and in NWH’s papers, *the entire file*
4 *is subject to a duty of confidentiality, which is broader than the attorney-*
5 *client privilege.*⁹ This means that, while authorized representatives of
6 Tower Homes are entitled to most portions of the files, persons such as the
7 Tower Homes Purchasers and their attorneys, who are not party to the
8 subject attorney-client relationship, have no right to confidential attorney
9 files (including materials that are subject to the attorney-client privilege and
10 those that are not).

11 In other words, the Discovery Commissioner simply disregarded the distinctive and complicating
12 issues in this unusual case.

13 C. **The situation is further complicated by NWH’s joint representation of both**
14 **Tower Homes and Mr. Yanke.**

15 Even if Tower Homes had actually brought this action for its own benefit, and had
16 knowingly “waived” any confidentiality or privilege that adheres to the underlying files, this
17 situation would still be complicated by the fact that NWH represented *both* Tower Homes and Mr.
18 Yanke (in his individual capacity) in connection with the underlying property development.

19 Though a client (e.g., Tower Homes) has presumptive access to most of an attorney’s file
20 when it files a legal malpractice action, an attorney is not required to disclose documents when
21 doing so may violate a duty of confidentiality or non-disclosure that may be owed to another
22 client. *See Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 883

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25 ⁹ *See, e.g., Dietz v. Meisenheimer & Herron*, 177 Cal.App.4th 771, 786, 99 Cal.Rptr.3d 464 (Cal. App.
26 2009); *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003) (ethical duty of confidentiality is construed broadly,
27 while attorney-client privilege is construed narrowly); *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. App.
28 2001) (the ethical duty to protect client confidences “unlike the evidentiary privilege, exists without regard
to the nature or source of information or the fact that others share the knowledge.”). This duty of
confidentiality survives the termination of the attorney’s representation. *See, e.g., Dietz, supra*, 177
Cal.App.4th at 786.

(N.Y. 1997); *Glade v. Superior Ct.*, 76 Cal.App.3d 738, 746-47, 143 Cal.Rptr. 119 (Cal. App. 1978). “One co-client does not have the authority to waive the privilege with respect to another co-client’s communications to their common lawyer.” Restatement § 75, Comment e (Ex. F). As such, it follows logically that “[a] lawyer may deny a client’s request to retrieve, inspect, or copy documents when compliance would violate the lawyer’s duty to another.” Restatement § 46, Comment c (emphasis added) (Ex. F).

On this point, the Restatement further provides:

If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest *is privileged as against third persons*, and *any co-client may invoke the privilege*, unless it has been waived by the client who made the communication.

Restatement § 75 (emphasis added).

Mr. Yanke, as an individual, was a long-standing client of NWH well before the Tower Homes property development. In fact, it was Mr. Yanke, as an individual, who requested NWH’s assistance on the development of the Tower Homes project from its outset, including the creation of Tower Homes, LLC itself. Thus, the Discovery Commissioner’s conclusion that Mr. Yanke, as an individual, has no individual rights whatsoever with respect to the disclosure of the transactional documents was also erroneous. Just like Tower Homes, Mr. Yanke has a right to prevent third-parties from obtaining confidential and privileged documents, especially when the Tower Homes Purchasers have an outstanding judgment against him.

IV. CONCLUSION

Based on the foregoing, NWH respectfully requests that this Court overrule the Discovery Commissioner’s Report and Recommendations to the extent that the Commissioner has ordered any production of documents to the Tower Homes Purchasers and their attorneys. NWH further requests an order establishing that the following are required before NWH can disclose its files pursuant to NRCP 16.1:

- Mr. Yanke, in his capacity as the sole member of Tower Homes, must consent to the disclosure of the files.

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- Mr. Yanke, in his individual capacity and as a joint client of NWH, must consent to the disclosure of the files.
- Plaintiff’s alleged attorneys must present evidence that they represent Tower Homes, LLC – and only Tower Homes, LLC. Given the Second Marquis Aurbach Order, *this would appear to be impossible*. Accordingly, *the law firm of Prince & Keating must be disqualified before any documents can be produced*.
- A confidentiality order mandating that any documents produced in this case be viewed only by lawful and authorized representatives *of Tower Homes, LLC*, and not by the Tower Homes Purchasers and/or attorneys representing the interests of the Tower Homes Purchasers.

DATED this 26th day of March, 2014

LEWIS BRISBOIS BISGAARD & SMITH LLP

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

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

3 DATED this 26th day of March, 2014

4

5 /s/ Jeffrey D. Olster
6 Jeffrey D. Olster

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EXHIBIT "A"

Bruce A. Markell

Honorable Bruce A. Markell
United States Bankruptcy Judge



Entered on Docket
April 02, 2013

Marquis Aurbach Coffing
TERRY A. COFFING, ESQ.
Nevada Bar No. 4949
ZACHARIAH LARSON, ESQ.
Nevada Bar No. 7787
BRIAN HARDY, ESQ.
Nevada Bar No. 10068
10001 Park Run Drive
Las Vegas, Nevada 89145
tcoffing@maclaw.com
zlarson@maclaw.com
bhardy@maclaw.com
(702) 382-0711
Attorneys for the Tower Homes Purchasers

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEVADA**

In Re:

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

Debtor.

Case No.: BK-07-13208-BAM
Chapter: 11

Hearing Date: April 1, 2013
Hearing Time: 9:00 AM
Courtroom 3

**ORDER GRANTING MOTION TO APPROVE AMENDED STIPULATION TO
RELEASE CLAIMS AND ALLOW MARQUIS AURBACH COFFING, AS COUNSEL
FOR THE TOWER HOMES PURCHASERS, TO PURSUE CLAIMS ON BEHALF OF
DEBTOR**

This matter having come before the Court for a hearing on April 1, 2013, on the Motion to Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach Coffing as Counsel for the Tower Homes Purchasers to Pursue Claims on Behalf of the Debtor, Tower Homes Purchasers appearing by and through their counsel of record, Brian Hardy, Esq. of Marquis Aurbach Coffing, the Court finding based upon the reasons stated on the record, the

1 papers and pleadings on file herein, the Motion, the oral arguments of counsel, and good cause
2 appearing;

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

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

15 **IT IS FURTHER ORDERED ADJUDGED AND DECREED** that this Court hereby
16 authorizes the law firm of Marquis Aurbach Coffing, and/or Prince & Keating LLP, or
17 successive counsel, retained on behalf of Tower Homes Purchasers to recover any and all earnest
18 money deposits, damages, attorneys fees and costs, and interest thereon on behalf of Debtor and
19 the Tower Homes Purchasers and that any such recoveries shall be for the benefit of the Tower
20 Homes Purchasers.

21 **IT IS SO ORDERED.**

22 Respectfully Submitted By:

23 MARQUIS AURBACH COFFING

24 By/s/ Brian Hardy, Esq.

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

LR 9021 CERTIFICATION

In accordance with LR 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (check one):

☐ The court has waived the requirement set forth in LR 9021(b)(1).

☒ No party appeared at the hearing or filed an objection to the motion.

☐ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and any unrepresented parties who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

--	--

☐ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with the motion pursuant to LR 9014(g), and that no party has objected to the form or content of the order.

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

MARQUIS AURBACH COFFING

By: /s/ Brian Hardy, Esq.

Brian Hardy, Esq.
Nevada Bar No. 10068
10001 Park Run Drive
Las Vegas, NV 89145
Attorney(s) for Debtor and
Debtor-in-Possession

###

EXHIBIT "B"

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

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

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

16 Plaintiff,

17 vs.

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

22 Defendants.

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

CERTIFICATE OF MAILING

23 I hereby certify that on the 30th day of December, 2013, I caused service of the
24 foregoing PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS to be
25 made by depositing a true and correct copy of same in the United States Mail, postage fully
26 prepaid, addressed to the following:
27
28

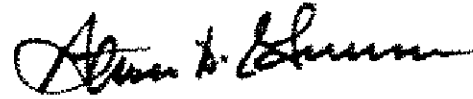
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Jeffrey Olster, Esq.
LEWIS BRISBOIS BISGAARD & SMITH, LLP
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118
Facsimile: (702) 893-3789
Attorneys for Defendants


An employee of PRINCE & KEATING

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CLERK OF THE COURT

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

10
11 DISTRICT COURT

12 CLARK COUNTY, NEVADA

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

15 Plaintiff,

16 vs.

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

21 Defendants.

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

PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS


(DISCOVERY COMMISSIONER)

22
23 Plaintiff Tower Homes LLC, by and through its attorneys of record, PRINCE &
24 KEATING, hereby submits this Motion to Compel Production of Documents.
25
26
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1 This Motion is made and based upon the papers and pleadings on file herein, the
2 Memorandum of Points and Authorities hereinafter set forth, and any oral argument of
3 counsel permitted or requested by this Court.

4 DATED this 24 day of December 2013.

5 PRINCE & KEATING

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

17 **NOTICE OF MOTION**

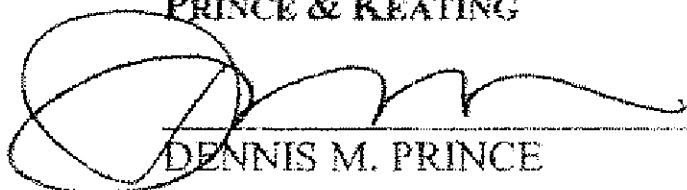
18 TO: ALL PARTIES; and

19 TO: THEIR ATTORNEYS OF RECORD:

20 PLEASE TAKE NOTICE that the undersigned counsel will bring the foregoing
21 PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS on the
22 31 day of January, 2014 at 9:00 a.m. in front of the Discovery
23 Commissioner.

24 DATED this 24 day of December, 2013.

25 PRINCE & KEATING

26 
27 DENNIS M. PRINCE
28 Nevada Bar No. 5092
ERIC N. TRAN
Nevada Bar No. 11876
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117
Attorneys for Plaintiff
Tower Homes, LLC

1 **AFFIDAVIT OF DENNIS PRINCE IN SUPPORT OF PLAINTIFF'S MOTION TO**
2 **COMPEL PRODUCTION OF DOCUMENTS PURSUANT TO EDCR 2.34**

3 STATE OF NEVADA)
4 COUNTY OF CLARK) ss.

5 I, Dennis M. Prince, counsel for Defendant Tower Homes, LLC ("Tower"), hereby
6 declare the following:

7 1. I am the managing partner at the law firm of Prince & Keating, counsel of record for
8 Plaintiff Tower Homes, LLC in the above entitled action. I make this declaration in support of
9 Plaintiff's Motion to Compel Production of the documents. I have personal knowledge of the
10 facts stated herein and if called upon to testify, I am competent to testify to the facts stated
11 herein.

12 2. On October 17, 2013, Plaintiff and Defendants held their Early Case Conference
13 pursuant to NRCP 16.1. See Plaintiff's **Exhibit 1**. Pursuant to NRCP 16.1(a)(1)(D),
14 Defendants' disclosures of witnesses were due within 14 days. After the Early Case
15 Conference, the parties circulated a proposed Joint Case Conference Report.

16 3. Defendants' counsel, Jeffrey Olster, requested that Defendants have up to December
17 2, 2013 to make the required disclosures. I then held a telephone conference to inquire why
18 Defendants needed additional time to produce the required disclosures. Mr. Olster advised
19 that he had his client's entire file in his possession concerning the representation of Tower
20 Homes, LLC but that he needed to go through the file to determine if there were any
21 potentially privileged documents. Mr. Olster and I agreed that documents would be available
22 after November 17, 2013. During the conference I advised Mr. Olster that the file was the
23 property of Tower Homes, and that nothing in the file would be privileged. I also informed
24 Mr. Olster that if any documents were going to be withheld, that I would expect a privilege
25 log.

1 4. On December 16, 2013, Plaintiff finally received Defendants' initial Rule 16.1
2 disclosures. See Plaintiff's **Exhibit 2**. While Defendants identified potentially discoverable
3 documents Bate Stamp NWH000001-NWH042236. Defendants did not attach the actual
4 documents nor make available the actual documents. That same day, my office sent Mr.
5 Olster another correspondence advising that my office did not receive the documents
6 production and requested that Defendants either download it to a disc or a flash drive and
7 produce it in electronic format. See Plaintiff's **Exhibit 3**. That same day, I also called and
8 left a message for Mr. Olster to discuss this discovery dispute.

10 5. On December 17, 2013, I conducted a telephone conference with Mr. Olster where
11 Mr. Olster indicated that Defendants would not be producing the documents for the following
12 reasons:

- 13
- 14 a. That the representation of Tower Homes, LLC was a "joint" representation with
15 Rod Yanke and thus, Defendants would need to obtain Mr. Yanke's consent.
 - 16 b. Defendants were demanding a confidentiality order as a condition of
17 production.
 - 18 c. That there may be a work product privilege (Mr. Olster never articulated the
19 basis for the work product privilege.
- 20

21 6. On December 17, 2013, I sent Mr. Olster correspondence memorializing our telephone
22 conference and also informing him that I would be filing a Motion to Compel compliance
23 with NRCP 16.1, and that I would be seeking attorneys fees for Defendants' abusive
24 discovery tactics. See Plaintiff's **Exhibit 4**.

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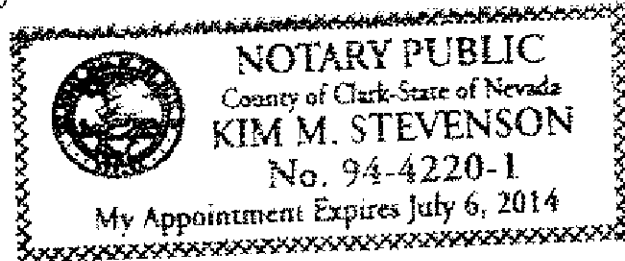
1 I declare under penalty of perjury under the laws of the state of Nevada that the
2 foregoing is true and correct.
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DENNIS M. PRINCE

Subscribed and sworn to before me
this 27 day of December, 2013.

Kim M. Stevenson
NOTARY PUBLIC in and for said
County and State



MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

A. Background

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

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

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

5
6 In addition to other legal services, Yanke requested that Heaton and NWH draft
7 Purchase Contracts for the sale of the individual condominium units. Prior to and during the
8 initial phases of construction, Tower marketed the individual units for sale to members of the
9 public prior to the completion of construction. Accordingly, Tower entered into written
10 Purchase Contracts with numerous individual investors (collectively referred to as the "Tower
11 Homes Purchasers") prior to the completion of construction. Each purchaser was to give
12 Tower a significant earnest money deposit. The agreement between Tower, and the Tower
13 Home Purchasers, called for the Project to be completed within two years of the date of the
14 Purchase Contract.
15

16 Unfortunately, there was insufficient financing available for the Project's completion
17 and thus, the Project failed. As a result of the Project's failure, there were over twenty five
18 million dollars in mechanic's lien filed for the work on the Project. In addition, many of the
19 Tower Homes Purchasers lost millions of dollars of their money deposits.
20

21 **B. Defendants Heaton and NWH's Duties to Tower**

22 Heaton and NWH were obligated to properly advise Tower of all applicable legal
23 requirements concerning the sale of the individual units, including the applicability of Chapter
24 116 of the Nevada Revised Statutes. Heaton and NWH knew that the Purchase Contracts they
25 drafted would be utilized by Tower for the sale of the individual units. Heaton and NWH also
26 knew that each pre-construction purchaser would be required to put up a substantial earnest
27 money deposit toward the purchase price of the individual unit.
28

1 Heaton and NWH knew that Tower had a legal obligation to each individual purchaser
2 to properly safeguard the earnest money deposits from mismanagement, theft, or unlawful use
3 as required by Chapter 116 of the Nevada Revised Statutes. However, despite Heaton and
4 NWH's legal obligations, Heaton and NWH failed to properly advise Tower pursuant to NRS
5 116.411 that the earnest money deposits were required to be held by a third party and could
6 only be released for very limited purposes as allowed by the statute. In addition, Heaton and
7 NWH drafted the Purchase Contracts in specific contravention of the strict requirements of
8 NRS 116.411 which is designed for the protection of purchasers of common interest units
9 such as the Project.
10

11 Based on the manner in which Heaton and NWH drafted the contracts, Tower was in
12 violation of NRS 116.411. In addition, by reason of the failure to properly advise Tower and
13 draft contracts in strict accordance with NRS 116.411, Heaton and NWH created the risk that
14 the earnest money deposits would be used for unlawful purposes to the detriment of Tower,
15 Yanke, and others affiliated with Tower and Yanke.
16

17 **C. The Underlying Litigation**

18 As a result of Heaton and NWH's failure to satisfy their legal obligations and duties to
19 Tower and Yanke, on or about May 23, 2007, certain Tower Homes Purchasers filed a
20 Complaint in the Eighth Judicial District Court, in Gaynor, et. al v. Tower Homes, LLC, et
21 al, Case No. A541668 against Tower, Yanke, and other Defendants seeking the return of their
22 earnest money deposits.
23

24 **D. The Settlement of the Underlying Litigation**

25 The trial in Gaynor, et. al v. Tower Homes, LLC, et. al was scheduled to commence on
26 May 9, 2011. In advance of the trial, a settlement agreement was reached between the Tower
27 Home Purchasers and Yanke, individually. . On or about May 2, 2011, a Stipulation to Entry
28

1 of Order Granting Judgment Against Rodney C. Yanke and Dismissing Claims Against
2 Rodney C. Yanke was entered in Case No. A541668.

3 **E. The Present Legal Malpractice Action**

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

6
7 On October 17, 2013, Plaintiff and Defendants held their Early Case Conference
8 pursuant to NRCp 16.1. See Plaintiffs' **Exhibit 1**. After the Early Case Conference, the
9 parties circulated a proposed Joint Case Conference Report.

10 Defendants' counsel, Jeffrey Olster, requested that Defendants have up to December
11 2, 2013 to make the required disclosures. Plaintiff's counsel then held a telephone conference
12 to inquire why Defendants needed additional time to produce the required disclosures. Mr.
13 Olster advised that he had his client's entire file in his possession concerning the
14 representation of Tower Homes, LLC but that Mr. Olster needed to go through the file to
15 determine if there was any potentially privileged documents. The parties agreed that
16 documents would be available after November 17, 2013.

17
18 On December 16, 2013, Plaintiff finally received Defendants' initial 16.1 disclosures.
19 See Plaintiff's **Exhibit 2**. While Defendants identified potentially discoverable documents
20 Bates Stamp NWH000001-NWH042236, Defendant did not produce any documents. See Id.
21 at 3:22-23. That same day, Plaintiff's counsel sent Mr. Olster another correspondence
22 advising that Plaintiff did not receive the document production and requested that Defendants
23 either download it to a disc or a flash drive and produce it in electronic format. On December
24 17, 2013, Plaintiff's counsel conducted a telephone conference with Mr. Olster where Mr.
25 Olster indicated that Defendants would not be producing the documents for the following
26 reasons:
27
28

- 1) That the representation of Tower Homes, LLC was a "joint" representation with Rod Yanke and thus, Defendants would need to obtain Mr. Yanke's consent.
- 2) Defendants were demanding a confidentiality prior to production.
- 3) That there may be a work product privilege (Mr. Olster never articulated the basis for the work product privilege.

See Plaintiff's Exhibit 4.

Because the reasons asserted for Defendants' non compliance with NRCP 16.1 are completely frivolous and designed simply to impede Plaintiff's ability to prosecute this case, Plaintiff submits this Motion to Compel Compliance with NRCP 16.1. In addition, Plaintiff seeks attorney's fees as a result of Defendants' abusive discovery tactic.

II. LEGAL ARGUMENT

A. DEFENDANTS HAVE VIOLATED NRCP 16.1 BY REFUSING TO DISCLOSE TOWER'S FILE

NRCP 16.1 and NRCP 26, which govern pre-trial disclosure, are intended to accomplish the full disclosure purpose of the discovery rules by requiring parties to make initial disclosures voluntarily without awaiting request.

1) NRCP 16.1 Requires that All Parties Disclose All Discoverable Documents Without Awaiting Request.

NRCP 16.1 creates an affirmative duty to disclose this basic information voluntarily without formal discovery requests. NRCP 16.1 provides:

(a) Required Disclosures.

(f) **Initial Disclosures.** Except in proceedings exempted or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

- (A) The name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subjects of the information;

(b) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b);

These disclosures must be made at or within 14 days after the Rule 16.1(b) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 16.1(c) case conference report. In ruling on the objection, the court must determine what disclosures--if any--are to be made, and set the time for disclosure. Any party first served or otherwise joined after the Rule 16.1(b) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

NRCP 16.1.

Thus, NRCP 16.1 creates an obligation on parties to fully disclose discoverable evidence at the outset of litigation. NRCP 16.1 is intended to promote and facilitate prompt investigation, preparation, prosecution, **and full disclosure**, so that cases can be resolved quickly – by settlement or otherwise – thereby minimizing litigation delay and needless expenses to all parties and the judicial system as a whole. Craig R. Delk, Nevada Civil Practice Manual, §16.02[1] (Jeffrey W. Stempel et al. eds., 5th ed. 2012).

The scope of this duty requires the disclosure of information that is discoverable under NRCP 26(b). NRCP 26(b) provides:

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any

1 discoverable matter. It is not ground for objection that the
2 information sought will be inadmissible at the trial if the
3 information sought appears reasonably calculated to lead to
4 the discovery of admissible evidence. All discovery is
subject to the limitations imposed by Rule 26(b)(2)(i), (ii),
and (iii).

5 The purpose of voluntary disclosure rules is to promote the timely prosecution of
6 litigation. Arnold v. Kip, 123 Nev. 410, 418, 168 P.3d 1050, 1055 (2007). Further, the rules
7 are intended to provide the parties an informed basis upon which to meaningfully approach
8 the litigation rather than only providing such a basis after a substantial expenditure of time
9 and resources in discovery and pretrial preparation. Craig R. Delk, Nevada Civil Practice
10 Manual, §16.02[1] (Jeffrey W. Stempel et al. eds., 5th ed. 2012). They are also intended to
11 compel cooperation among the parties to accomplish the full disclosure objectives of the
12 discovery rules with a minimum of time and expense consumed in procedural requirements,
13 thereby resulting in the most efficient use of professional and judicial time. Id.
14 Accomplishing these goals requires the cooperation of the parties along with firm and
15 consistent judicial action to encourage those refusing to cooperate or honor their NRCP 16.1
16 obligations to do so by the imposition of meaningful sanctions. Id.

17
18 In this case, pursuant to NRCP 16.1, Defendants were obligated to voluntarily produce
19 their initial disclosure of witness and documents within 14 days after the initial Early Case
20 Conference held on October 17, 2013. The parties then agreed to give Defendants until
21 November 17, 2013 to produce their disclosures. Defendants were advised by Plaintiff's
22 counsel that the files in Defendants' possession pertaining to their representation of Tower
23 was the property of Tower and that anything withheld must be documented in a privilege log.
24

25 On December 16, 2013, Defendants finally produced their Initial NRCP 16.1
26 disclosures. See Plaintiff's **Exhibit 2**. As part of their disclosure, Defendants listed
27 documents Bate Stamped NWH000001-NWH042236 as potentially being discoverable
28

documents. [d.] at 3:23-25. Defendants however, did not attach the actual documents as part of their initial NRCP 16.1 disclosure. Defendants are now taking the position that they will not produce documents Bate Stamped NWH000001-NWH042236 for the following reasons:

- 1) That the representation of Tower Homes,LLC was a "joint" representation with Rod Yanke and thus, Defendants would need to obtain Mr. Yanke's consent.
- 2) Defendants were demanding a confidentiality prior to production.
- 3) That there may be a work product privilege (Mr. Olster never articulated the basis for the work product privilege.

See Plaintiff's **Exhibit 4**.

Notably, at this point, Defendants have not even identified the categories of documents that make up the "file." Defendants have not prepared a privilege log identifying which documents are being withheld from production based upon the purported privilege.

In addition, for the reasons stated below, Defendants' position is completely without merit. As such, they have failed to comply with their duties under NRCP 16.1.

B. THE LEGAL STANDARD FOR ATTORNEY-CLIENT PRIVILEGE

NRS 49.095 which governs the general rule of privilege; states as follow:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
2. Between the client's lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

NRS 49.095.

NRS 49.105 governs who may claim privilege,

1. The privilege may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence.

2. The person who was the lawyer at the time of the communication may claim the privilege but only on behalf of the client. The person's authority to do so is presumed in the absence of evidence to the contrary.

NRS 49.105 (emphasis added).

NRS 49.115, which provides for exceptions, states as follows:

There is no privilege under NRS 49.095 or 49.105:

3. As to a communication relevant to an issue of breach of duty by the lawyer to his or her client or by the client to his or her lawyer.

5. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

NRS 49.115.

Similarly, NRPC 1.6 (b)(5), which governs confidentiality of information, states as follows:

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). It serves to protect confidential communications between a party and its attorney in order to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interest in the observance of law and administration of justice." Id. The privilege applies where legal advice of any kind is sought from a professional legal advisor in her capacity as such, and the communication relates to that purpose, and is made in confidence by or for the client. Id.

1 C. DEFENDANTS DO NOT NEED MR. YANKE'S CONSENT TO PRODUCE
2 TOWER'S FILE BECAUSE THE ATTORNEY CLIENT RELATIONSHIP
3 WAS BETWEEN TOWER AND DEFENDANTS.

4 Defendants first argue that because Defendants' representation of Tower was a "joint"
5 representation with Rodney Yanke, that Defendants would need Mr. Yanke's consent prior
6 disclosing the file. This argument is completely baseless.

7 It is well established that the attorney-client privilege attaches to both individuals and
8 corporations. Upjohn Co. v. United States, 449 U.S. 383, 390, 101 S.Ct. 677, 66 L.Ed.2d 584
9 (1981). However, "special problems" arise in the administration of the attorney-client
10 privilege to corporations. Commodity Futures Trading Commission v. Weintraub, 471 U.S.
11 343, 348, 105 S.Ct. 1986, 85 L.Ed.2d 372 (1985). With regard to this issue, the Supreme
12 Court has stated:

13
14 As an inanimate entity, a corporation must act through its agents. A
15 corporation cannot speak directly to its lawyers. Similarly, it cannot directly
16 waive the privilege when disclosure is in its best interest. Each of these actions
must necessarily be undertaken by individuals empowered to act on behalf of
the corporation....

17 ... [f]or solvent corporations, the power to waive the corporate attorney-client
18 privilege rests with the corporation's management and is normally exercised by
19 its officers and directors. The managers, of course, must exercise the privilege
20 in a manner consistent with their fiduciary duty to act in the best interests of
the corporation and not of themselves as individuals.

21 Id. at 348-49, 105 S.Ct. 1986 (internal citations omitted).

22 Some courts have held that the sole client is the corporate entity or organization.
23 Montgomery v. eTreppid Technologies, LLC, 548 F.Supp.2d 1175, 1184 (D.Nev. 2008)
24 (citing Milroy v. Hanson, 875 F.Supp. 646 (D.Neb.1995)). Other lines of cases have embraced
25 the joint client exception for corporations. Id. (Citing Gottlieb v. Wiles, 143 F.R.D. 241
26 (D.Colo.1992)). However, the Nevada federal court has stated that it makes sense that the
27 corporation is the sole client for purposes of attorney client privilege. Montgomery, 548
28 F.Supp.2d at 1187. While the corporation can only communicate with its attorneys through

1 human representatives, those representatives are communicating on behalf of the corporation,
2 not on behalf of themselves as corporate managers or directors. Id.

3 In this case, the attorney-client relationship was between Tower and Defendants.
4 Tower was the corporate entity that contracted with the individual Tower Homes Purchasers.
5 Tower was the entity responsible for holding the Tower Homes Purchasers' security deposits
6 in trust. The fact that Yanke may have been a member and/or managing member of Tower
7 does not change the legal relationship between Tower and Defendants. Simply put, Tower is
8 the client in this situation, not Yanke. As the client, Tower is the holder of the attorney-client
9 privilege. See NRS NRS 49.105. Because Tower is the holder of the privilege, Tower is the
10 entitle with the authority to waive the privilege. See FSP Stallion 1, LLC v. Luce, 2010 WL
11 3895914, 7 (D.Nev. 2010) (stating under Nevada law only the client-holder of the privilege
12 may waive it). Likewise, by reason of Tower's instant legal malpractice lawsuit against
13 Defendant, Tower has waived the attorney-client privilege. NRS 49.115 (3). Thus, because
14 Tower is the holder of the privilege, Defendants do not need Yanke's consent prior to
15 disclosing the file.

16
17
18 However, even if Defendants did have a joint representation with Tower and Yanke,
19 this Joint representation does not provide Defendants with a basis to withhold producing the
20 records until they receive consent from Yanke. It is firmly established that the joint defense
21 privilege is recognized as an exception to the general rule that **disclosure of privileged**
22 **information to a third party waives the privilege.** In re: Grand Jury Subpoenas, 902 F.2d
23 244, 248 (4th Cir.1990) (emphasis added) (citing Chahoon v. Commonwealth, 62 Va. (21
24 Gratt.) 822 (1871)). "The joint defense and common interest doctrines are not privileges in an
25 of themselves. Rather, they constitute exceptions to the rule on waiver where
26 communications are **disclosed to third parties.**" Nidec Corp. v. Victor Co. of Japan, 249
27 F.R.D. 575, 578 (N.D.Cal.2007).
28

1 Here, the joint representation or common interest exception does not apply because the
2 issue in this case does not pertain to any disclosure to a third party. Instead, at issue in the
3 case is Defendants' representation of Tower Homes in the drafting Purchase Contracts for the
4 sale of the individual condominium units. In addition, Plaintiff is the client and is seeking
5 disclosure of the file pursuant to a legal malpractice action being filed against Defendants.
6 Thus, the joint representation exception does not even apply.
7

8 **D. DEFENDANTS CANNOT REQUIRE A CONFIDENTIALITY**
9 **AGREEMENT AS A PREREQUISITE FOR PRODUCTION OF THE FILE**
10 **BECAUSE TOWER IS THE HOLDER OF THE PRIVILEGE.**

11 Defendants' next argument that they are demanding a confidentiality agreement in
12 place as a prerequisite for production of the file is equally baseless.

13 As previously discussed, Tower is the holder of the attorney/client privilege. As the
14 holder of the privilege, Tower is within its right to waive the privilege if it so chooses. In
15 fact, by reason of this legal malpractice lawsuit against Defendants, Tower has placed at issue
16 privileged and confidential communication between Tower and Defendants. See Wardleigh
17 v. Second Judicial Dist., 111 Nev. 345, 355, 891 P.2d 1180, 1186 (1995) (stating that at-issue
18 waiver occurs when the holder of the privilege pleads a claim or defense in such a way that
19 eventually he or she will be forced to draw upon the privileged communication at trial in
20 order to prevail, and such a waiver does not violate the policies underlying the privilege; see
21 also NRS 49.115 (3) (stating there is no privilege as to a communication relevant to an issue
22 of breach of duty by the lawyer to his or her client or by the client to his or her lawyer); see
23 also Great-West Life & Annuity Ins. Co. v. American Economy Ins. Co. 2013 WL 5332410,
24 15 (D.Nev. 2013) (stating that allegations of legal malpractice, waive confidential
25 communications).
26

27 Thus, Defendants' position that a confidentiality agreement is a pre-requisite for
28 Defendants' disclosure of the file is completely frivolous.

1 E. THE WORK PRODUCT DOCTRINE DOES NOT PREVENT
2 DEFENDANTS FROM DISCLOSING TOWER'S FILE

3 The work product doctrine provides a broader protection than the attorney-client
4 privilege and is designed to protect the right of an attorney to thoroughly prepare his case and
5 to preclude a less diligent adversary attorney from taking undue advantage of the former's
6 efforts. See Hickman v. Taylor, 329 U.S. 495, 511 (1947). It has been held, however, that the
7 work product doctrine protects materials prepared for any litigation or trial so long as they
8 were prepared by or for a party to the subsequent litigation. Federal Trade Comm'n v. Grolier
9 Inc., 462 U.S. 19, 25-26 (1983). "[T]he general policy against invading the privacy of an
10 attorney's course of preparation is so well recognized and so essential to an orderly working
11 of our system of legal procedure that a burden rests on the one who would invade that privacy
12 to establish adequate reasons to justify production[.]" Hickman, 329 U.S. at 512. However,
13 "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where
14 production of those facts is essential to the preparation of one's case, discovery may properly
15 be had. Id.

16
17 In fact, the "at-issue" waiver has also been discussed in the work product
18 context. Phillips v. C.R. Bard, Inc., 290 F.R.D. 615, 640 (D.Nev. 2013) (citing Walker v.
19 County of Contra Costa, 227 F.R.D. 529, 533 (N.D.Cal.2005) ("Several cases have held that
20 defendants also lose the work product and attorney-client privileges once they assert the
21 investigation as an affirmative defense."). Because the theory of implied waiver for placing
22 information "at-issue" is the same in the work product context, the court's conclusion on this
23 issue applies equally to Plaintiff's waiver argument as to work product. Phillips, 290 F.R.D. at
24 640.
25

26
27 It is unclear how the work product doctrine could even apply in this case as
28 Defendants did not even articulate how the work product is applicable to prevent defendants'

1 from disclosing the file. This is a legal malpractice action asserted by Tower, who is a former
2 client of Defendants. By reason of this legal malpractice action, Tower has placed the work of
3 the Defendants at issue. Thus, any privilege whether it be based upon attorney client privilege
4 or the attorney work product doctrine has been waived. See Great-West Life & Annuity Ins.
5 Co. v. American Economy Ins. Co., 2013 WL 5332410, 15 (D.Nev. 2013) (stating that ther
6 common-law waiver doctrines may result in a finding of waiver even when there is no
7 disclosure of privileged information or work product.” Such instances instance include
8 allegations of legal malpractice, which waive confidentiality under the circumstances).

10 Even if the work product doctrine could somehow be applicable, in this case, as
11 previously stated, Defendants’ Initial NRCP 16.1 disclosure only states that Defendants’ file
12 relating to Tower Bate Stamped NWH 0000001-NWH042236 is potentially discoverable. See
13 Exhibit 2 at 3:22-25. Because Defendants did not identify what documents are being withheld
14 from production based upon a purported privilege, it is almost impossible to determine which
15 document the attorney work product doctrine could be applicable to protect from disclosure.

17 **F. THIS COURT SHOULD AWARD ATTORNEY’S FEES TO PLAINTIFF**
18 **FOR THE COSTS OF FILING THIS MOTION**

19 Pursuant to NRCP 37(a), Plaintiff should be awarded attorney’s fees for having to
20 pursue the motion to compel. NRCP 37(a)(4) provides as follows:

21 (4) Award of Expenses of Motion. If the motion is granted, the court
22 shall, after opportunity for hearing, require the party or deponent whose
23 conduct necessitated the motion or the party or attorney advising such
24 conduct or both of them to pay to the moving party the reasonable
25 expenses incurred in obtaining the order, including attorney’s fees, unless
26 the court finds that the opposition to the motion was substantially
27 justified or that other circumstances make an award of expenses unjust

28 Here, Defendants’ refusal to produce the requisite file was an abuse of the discovery
process. Defendants’ basis for refusing to produce the file was frivolous and nothing more
than an excuse to not produce the file. Defendants know full well that this is a legal
malpractice action asserted by Plaintiff, who is a former client of Defendant. As such,

1 Plaintiff has place Defendants' representation at issue and has waived any attorney-client
2 privilege, work product privilege, or any confidentiality. Defendants' failure to comply with
3 NRCP 16.1 has completely impeded Plaintiff's ability to prosecute this case. Specifically,
4 Plaintiff cannot commence discovery, cannot retain an expert or decide which depositions to
5 take unless and until the file is produced.
6

7 III. CONCLUSION

8 Based on the foregoing, Plaintiff requests that this Court grant its Motion to Compel
9 Defendants' compliance with NRCP 16.1 and award attorney's fees in favor of Plaintiffs for
10 bringing forth this Motion.

11 DATED this 24 day of December, 2013.

12 PRINCE & KEATING

13
14
15 DENNIS M. PRINCE

16 Nevada Bar No. 5092

17 ERIC N. TRAN

18 Nevada Bar No. 11876

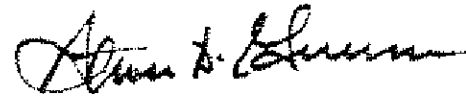
19 3230 South Buffalo Drive, Suite 108

20 Las Vegas, Nevada 89117

21 Attorneys for Plaintiff

22 Tower Homes, LLC
23
24
25
26
27
28

EXHIBIT “1”



CLERK OF THE COURT

JCCR
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Nevada Bar No. 5092
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Attorneys for Plaintiffs
Tower Homes, LLC



DISTRICT COURT

CLARK COUNTY, NEVADA

TOWER HOMES, LLC, a Nevada limited
liability company;

Plaintiff,

vs.

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

Defendants.

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

JOINT CASE CONFERENCE REPORT

**DISCOVERY PLANNING/DISPUTE
CONFERENCE REQUIRED**

YES ____ NO X.

SETTLEMENT CONFERENCE REQUIRED

YES ____ NO X.

.....

.....

.....

I.

PROCEEDINGS PRIOR TO CASE CONFERENCE REPORT

- A. Date of filing of Complaint: June 12, 2012
- B. Date of filing of Answer by Each Defendant: October 24, 2013
- C. Date that Early Case Conference was held and who attended: October 17, 2013

Eric N. Tran, Esq. of Prince & Keating on behalf of Plaintiff Tower Homes, LLC.

Jeffrey Olster, Esq. of Lewis Brisbois Bisgaard & Smith, LLP on behalf of Defendants William H. Heaton, Esq. and Nitz, Walton & Heaton, Ltd.

II.

A BRIEF DESCRIPTION OF THE NATURE OF THE ACTION AND EACH CLAIM FOR RELIEF OR DEFENSE: [16.1(c)(1)]

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

B. Claims for relief:

1. Breach of duty of care owed to Plaintiff.
2. Breach of Fiduciary Duty.

C. Defenses:

1. Plaintiff does not allege facts sufficient to constitute a cause of action against Defendants.
2. All causes of action asserted by Plaintiff are barred by the applicable statutes of limitations and/or by the doctrine of laches.
3. Plaintiff is estopped from asserting this action against Defendants.
4. Plaintiff's causes of action are barred by the attorney judgment rule.
5. Plaintiff's causes of action are barred by the doctrine of unclean hands.

- 1 6. Plaintiff has knowingly waived, by verbal expression and/or conduct
2 and/or writing, any rights or actions it may have had against
3 Defendants.
- 4 7. The damages allegedly sustained by Plaintiff, if any, were not caused
5 by any negligence, want of care, or breach of contract or duty by
6 Defendants, but rather upon the acts or omissions of Plaintiff itself or
7 its representatives, agents, managers and members, and/or by the acts
8 or omissions of third persons who were not acting on behalf of
9 Defendants, all of which were intervening or superseding causes of any
10 claim belonging to Plaintiff or any damages sustained by Plaintiff.
11 Plaintiffs causes of action are barred and/or limited accordingly.
- 12 8. Plaintiff has failed to mitigate its damages, if any.
- 13 9. Defendant is entitled to indemnification and/or contribution from any
14 party or person whose negligence or other acts or omissions caused or
15 contributed to Plaintiffs alleged damages.
- 16 10. It has been necessary for Defendants to employ the services of counsel
17 to defend this action, and a reasonable sum should be awarded to
18 Defendants as and for damages and/or attorneys' fees, together with
19 costs incurred in the defense of this action.
- 20 11. This Court lacks jurisdiction over this matter because Plaintiff has not
21 obtained the requisite authority and order from the Bankruptcy Trustee
22 and the United States Bankruptcy Court.
- 23 12. Plaintiff lacks the requisite authority and order from the Bankruptcy
24 Trustee and the United States Bankruptcy Court to bring and maintain
25 this action.
- 26 13. Plaintiff lacks standing to bring and maintain this action.
- 27 14. Plaintiff is not the real party in interest.
- 28 15. Plaintiff's claims are subject to Defendants' rights of setoff.
16. Defendants hereby incorporate by reference those affirmative defenses
enumerated in N.R.C.P. 8 as if fully set forth herein. Such defenses are
herein incorporated by reference for the specific purpose of not waiving
any such defense. Defendants reserve the right to amend this answer to
assert any and all additional defenses in the event further investigation
and/or discovery reveal the applicability of any such additional
defenses.

III.

**LIST OF ALL DOCUMENTS, DATA COMPILATIONS AND TANGIBLE THINGS
IN THE POSSESSION, CUSTODY OR CONTROL OF EACH PARTY WHICH
WERE IDENTIFIED OR PROVIDED AT THE EARLY CASE CONFERENCE OR AS
A RESULT THEREOF: [16.1(a)(1)(B) and 16.1(c)(4)]**

A. Plaintiff:

1. Tower Homes, LLC Purchase Contract form, dated November 15, 2004 @ 4:50 p.m. (TH00001 – TH00031);
2. October 11, 2011 correspondence from Terry Coffing, Esq. to William H. Heaton, Esq. re: *Gaylor, et al. v. Tower Homes, et al.* (TH00032 – TH00033);
3. All documents, including but not limited to pleadings, written discovery, deposition transcripts, hearing transcripts, written and/or electronic correspondence, memoranda, notes, regarding *Gaylor, et al. Tower Homes, et al.*, Eighth Judicial District Court, Clark County, Nevada Case No. A541668;
4. All documents, including but not limited to pleadings, written discovery, deposition transcripts, hearing transcripts, written and/or electronic correspondence, memoranda, notes, regarding *In Re: Tower Homes, LLC*, United States Bankruptcy Court for the District of Nevada, Chapter 11 Case No. BK-07-12308-BAM¹;
5. Any and all documents produced by any other party to this litigation.

Plaintiff reserves the right to identify and produce additional documents and other tangible exhibits as they become known to Plaintiff during the course of discovery.

B. Defendants: As of the date of this Joint Case Conference Report, Defendants have not produced their respective NRCP 16.1 Disclosure of Witnesses and Documents.

¹ Plaintiff will produce specific documents pursuant to the aforementioned cases at a later date.

IV.

LIST OF PERSONS IDENTIFIED BY EACH PARTY AS LIKELY TO HAVE
INFORMATION DISCOVERABLE UNDER RULE 26(b), INCLUDING
IMPEACHMENT OR REBUTTAL WITNESSES:

A. Plaintiff:

1. Rodney C. Yanke, Managing Member and/or
Person(s) Most Knowledgeable
Plaintiff Tower Homes, LLC
c/o Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117

Mr. Yanke and/or the Person(s) Most Knowledgeable of Plaintiff Tower Homes, LLC
is/are expected to testify regarding the facts and circumstances surrounding the allegations set
forth in Plaintiff's Complaint.

2. John Kilpatrick, individually
c/o Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117

Mr. Kilpatrick is expected to testify regarding the facts and circumstances surrounding
the allegations set forth in Plaintiff's Complaint.

3. Larry and Judy Shiffman, individually
c/o Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117

Mr. and Ms. Shiffman are expected to testify regarding the facts and circumstances
surrounding the allegations set forth in Plaintiff's Complaint.

4. Debra L. Jones, individually
c/o Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117

Ms. Jones is expected to testify regarding the facts and circumstances surrounding the
allegations set forth in Plaintiff's Complaint.

1 5. Timucin Kalman, individually
2 c/o Prince & Keating
3 3230 South Buffalo Drive, Suite 108
 Las Vegas, Nevada 89117

4 Mr. Kalman is expected to testify regarding the facts and circumstances surrounding
5 the allegations set forth in Plaintiff's Complaint.

6 6. Harold and Carol Hertzlich, individuals
7 c/o Prince & Keating
8 3230 South Buffalo Drive, Suite 108
 Las Vegas, Nevada 89117

9 Mr. and Ms. Hertzlich are expected to testify regarding the facts and circumstances
 surrounding the allegations set forth in Plaintiff's Complaint.

10 7. Arthur Williams, individually
11 c/o Prince & Keating
12 3230 South Buffalo Drive, Suite 108
 Las Vegas, Nevada 89117

13 Mr. Williams is expected to testify regarding the facts and circumstances surrounding
14 the allegations set forth in Plaintiff's Complaint.

15 8. Barbara Chandler, individually and as Trustee of The Saralee M. Bowles Trust
16 c/o Prince & Keating
17 3230 South Buffalo Drive, Suite 108
 Las Vegas, Nevada 89117

18 Ms. Chandler, individually and as the Trustee of The Saralee M. Bowles Trust is
19 expected to testify regarding the facts and circumstances surrounding the allegations set forth
 in Plaintiff's Complaint.

20 9. Phillip and Katherine Stromer, individually
21 c/o Prince & Keating
22 3230 South Buffalo Drive, Suite 108
 Las Vegas, Nevada 89117

23 Mr. and Ms. Stromer are expected to testify regarding the facts and circumstances
24 surrounding the allegations set forth in Plaintiff's Complaint.

25 10. Abe Siemens, individually
26 c/o Prince & Keating
27 3230 South Buffalo Drive, Suite 108
 Las Vegas, Nevada 89117

28 Mr. Siemens is expected to testify regarding the facts and circumstances surrounding
 the allegations set forth in Plaintiff's Complaint.

1 11. Richard and Sally Goodall, individually
2 c/o Prince & Keating
3 3230 South Buffalo Drive, Suite 108
4 Las Vegas, Nevada 89117

5 Mr. and Ms. Goodall are expected to testify regarding the facts and circumstances
6 surrounding the allegations set forth in Plaintiff's Complaint.

7 12. Dahn Midora, individually
8 c/o Prince & Keating
9 3230 South Buffalo Drive, Suite 108
10 Las Vegas, Nevada 89117

11 Ms. Midora is expected to testify regarding the facts and circumstances surrounding
12 the allegations set forth in Plaintiff's Complaint.

13 13. Dahn Midora, individually
14 c/o Prince & Keating
15 3230 South Buffalo Drive, Suite 108
16 Las Vegas, Nevada 89117

17 Ms. Midora is expected to testify regarding the facts and circumstances surrounding
18 the allegations set forth in Plaintiff's Complaint.

19 14. Karen Birkett, individually
20 c/o Prince & Keating
21 3230 South Buffalo Drive, Suite 108
22 Las Vegas, Nevada 89117

23 Ms. Birkett is expected to testify regarding the facts and circumstances surrounding
24 the allegations set forth in Plaintiff's Complaint.

25 15. Eileen Grande, individually
26 c/o Prince & Keating
27 3230 South Buffalo Drive, Suite 108
28 Las Vegas, Nevada 89117

Ms. Grande is expected to testify regarding the facts and circumstances surrounding
the allegations set forth in Plaintiff's Complaint.

16. Edwin and Gail Edejer, individually
c/o Prince & Keating
3230 South Buffalo Drive, Suite 108
Las Vegas, Nevada 89117

Mr. and Ms. Edejer is expected to testify regarding the facts and circumstances
surrounding the allegations set forth in Plaintiff's Complaint.

1 17. Robert Embleton, individually
2 c/o Prince & Keating
3 3230 South Buffalo Drive, Suite 108
4 Las Vegas, Nevada 89117

5 Mr. Embleton is expected to testify regarding the facts and circumstances surrounding
6 the allegations set forth in Plaintiff's Complaint.

7 18. Judge Angel Cooley, individually and/or
8 c/o Prince & Keating
9 3230 South Buffalo Drive, Suite 108
10 Las Vegas, Nevada 89117

11 Ms. Cooley is expected to testify regarding the facts and circumstances surrounding
12 the allegations set forth in Plaintiff's Complaint.

13 19. Defendant William H. Heaton, Esq.
14 c/o Lewis Brisbois Bisgaard & Smith, LLP
15 6385 South Rainbow Boulevard, Suite 600
16 Las Vegas, Nevada 89118

17 Defendant Heaton is expected to testify regarding the facts and circumstances
18 surrounding the allegations set forth in Plaintiff's Complaint.

19 20. Person(s) Most Knowledgeable and
20 Custodian(s) of Records
21 Defendant Nitz, Walton & Heaton, Ltd.
22 c/o Lewis Brisbois Bisgaard & Smith, LLP
23 6385 South Rainbow Boulevard, Suite 600
24 Las Vegas, Nevada 89118

25 Person(s) Most Knowledgeable of Defendant Nitz, Walton & Heaton, Ltd. is/are
26 expected to testify regarding the facts and circumstances surrounding the allegations set forth
27 in Plaintiff's Complaint. Additionally the Custodian(s) of Records is/are expected to testify as
28 to the authenticity of any and all documents, files, records, etc. associated with its representation
of Defendant in the case of *Gaynor, et al. Tower Homes, et al.*, Eighth Judicial District Court,
Clark County, Nevada Case No. 07A541668.

29 21. Terry A. Coffing, Esq.
30 Brian R. Hardy, Esq. and/or
31 Person(s) Most Knowledgeable and
32 Custodian(s) of Records
33 Marquis Aurbach Coffing
34 10001 Park Run Drive
35 Las Vegas, Nevada 89145

36 Mr. Coffing, Mr. Hardy and/or the Person(s) Most Knowledgeable of Marquis
37 Aurbach Coffing is/are expected to testify regarding the facts and circumstances regarding its
38 representation of Plaintiffs in the case of *Gaynor, et al. Tower Homes, et al.*, Eighth Judicial

1 District Court, Clark County, Nevada Case No. A541668, as well as its representation of the
2 Tower Homes Purchasers *In Re: Tower Homes, LLC*, United States Bankruptcy Court for the
3 District of Nevada, Chapter 11 Case No. BK-07-12308-BAM. Additionally the Custodian(s) of
4 Records is/are expected to testify as to the authenticity of any and all documents, files, records,
etc. associated with its representation of Plaintiffs and Tower Homes Purchasers in the
aforementioned cases.

5 22. William A. Leonard, Jr., Chapter 11 Trustee
6 c/o Christine A. Roberts, Esq.
7 228 South Fourth Street, 1st Floor
Las Vegas, Nevada 89101

8 Mr. Leonard is expected to testify regarding the facts and circumstances surrounding
9 the allegations set forth in Plaintiff's Complaint, as well as his appointment as Trustee in *In Re:*
10 *Tower Homes, LLC*, United States Bankruptcy Court for the District of Nevada, Chapter 11 Case
No. BK-07-12308-BAM.

11 23. Any and all witnesses identified by any party to this litigation.

12 Other witnesses are believed to exist with knowledge of the issues set out in the
13 Complaint on file herein, but are currently unidentified. Plaintiff reserves the right to identify
these additional witnesses, including expert witnesses, when their identities become known.

14 B. Defendants: See Section III(B). As of the date of this Joint Case Conference
15 Report, Defendants have not produced their respective NRCP 16.1 Disclosure of Witnesses
and Documents.

16 V.

17 **DISCOVERY PLAN [16.1(b)(2) and 16.1(c)(2)]**

18 A. What changes, if any, should be made in the timing, form or requirements for
19 disclosures under 16.1(a):

- 20 1. Plaintiff's view: None.
21 2. Defendant's view: None.

22 When disclosures under 16.1(a)(1) were made or will be made:

- 23 1. Plaintiff's disclosures: October 18, 2013
24 2. Defendant's disclosures: After November 17, 2013.

25 B. Subjects on which discovery may be needed:

- 26 1. Plaintiff's view: All discovery allowed pursuant to Nevada Rules
27 of Civil Procedure.
28

2. Defendant's view: All discovery allowed pursuant to Nevada Rules of Civil Procedure.

C. Should discovery be conducted in phases or limited to or focused upon particular issues?

1. Plaintiff's view: None.

2. Defendant's view: None.

D. What changes, if any, should be made in limitations on discovery imposed under these rules and what, if any, other limitations should be imposed?

1. Plaintiff's view: None.

2. Defendant's view: None.

E. What, if any, other orders should be entered by court under Rule 26(c) or Rule 16(b) and (c):

1. Plaintiff's view: None.

2. Defendant's view: None.

F. Estimated time for trial:

1. Plaintiff's view: 7 – 10 days

2. Defendant's view: 7 – 10 days

VI.

DISCOVERY AND MOTION DATES [16.1(c)(5)-(8)]

A. Dates agreed by the parties:

1. Close of discovery: October 17, 2014

2. Final date to file motions to amend pleadings or add parties (without further court order): July 21, 2014²

3. Final dates for expert disclosures:

i. initial disclosure: July 21, 2014

ii. rebuttal disclosures: August 18, 2014

² Ninety (90) days prior to the October 17, 2013 discovery deadline is July 19, 2014, a Saturday.

4. Final date to file dispositive motions: November 17, 2014³

B. In the event the parties do not agree on dates, the following section must be completed:

1. Plaintiff's suggested close of discovery: N/A

Defendant's suggested close of discovery: N/A

2. Final date to file motions to amend pleadings or add parties (without further court order):

Plaintiff's suggested: N/A

Defendant's suggested: N/A

3. Final dates for expert disclosure:

i. Plaintiff's suggested initial disclosures: N/A

Defendant's suggested initial disclosures: N/A

ii. Plaintiff's suggested rebuttal disclosures: N/A

Defendant's suggested rebuttal disclosures: N/A

4. Final date to file dispositive motions:

Plaintiff's suggested: N/A

Defendant's suggested: N/A

Failure to agree on the calendar dates in this subdivision shall result in a discovery planning conference.

VII.

JURY DEMAND [16.1(c)(10)]

A jury demand has been filed: Yes.

³ Thirty (30) days after the October 17, 2013 discovery deadline is November 16, 2014, a Sunday.

VIII.

INITIAL DISCLOSURES/OBJECTIONS [16.1(a)(1)]

If a party objects during the Early Case Conference that initial disclosures are not appropriate in the circumstances of this case, those objections must be stated herein. The Court shall determine what disclosures, if any, are to be made and shall set the time for such disclosures.

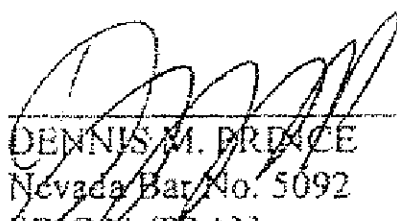
This report is signed in accordance with Rule 26(g)(1) of the Nevada Rules of Civil Procedure. Each signature constitutes a certification that to the best of the signer's knowledge, information and belief, formed after a reasonable inquiry, the disclosures made by the signer are complete and correct as of this time.

Dated this 21 day of November, 2013.

Dated this 27 day of November, 2013.

PRINCE & KEATING

LEWIS BRISBOIS BISGAARD & SMITH, LLP


DENNIS M. PRINCE

Nevada Bar No. 5092

ERICH N. TRAN

Nevada Bar No. 11376

3230 South Buffalo Drive, Suite 108

Las Vegas, Nevada 89117

Attorneys for Plaintiff

Tower Homes, LLC


JEFFREY OLSTER

Nevada Bar No. 8864

6385 South Rainbow Boulevard, Suite 600

Las Vegas, Nevada 89118

Attorney for Defendants

William H. Heaton and

Nitz, Walton & Heaton, Ltd.

EXHIBIT “2”

1 V. ANDREW CASS
Nevada Bar No. 005246
2 Drew.Cass@lewisbrisbois.com
JEFFREY D. OLSTER
3 Nevada Bar No. 008864
Jeff.Olster@lewisbrisbois.com
4 LEWIS BRISBOIS BISGAARD & SMITH LLP
6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
Tel: 702.893.3383
6 Fax: 702.893.3789
Attorneys for Defendants
7 *William H. Heaton and Nitz, Walton & Heaton,*
Ltd.

COPY

8
9 DISTRICT COURT
10 CLARK COUNTY, NEVADA
11

12 TOWER HOMES, LLC, a Nevada limited
liability company;

13 Plaintiff,

14 vs.

15 WILLIAM H. HEATON, individually; NITZ,
16 WALTON & HEATON, LTD., a domestic
professional corporation; and DOES 1 through
17 X, inclusive,

18 Defendants.
19

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

DEFENDANTS' INITIAL DISCLOSURE
OF WITNESSES AND DOCUMENTS

20
21 Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. (collectively "NWH"), by
22 and through their attorneys, Lewis Brisbois Bisgaard & Smith, LLP, disclose the following
23 witnesses and documents pursuant to N.R.C.P. 16.1.
24
25
26
27
28

1 A. INDIVIDUALS LIKELY TO HAVE DISCOVERABLE INFORMATION

- 2 1. William Heaton
3 c/o Lewis Brisbois Bisgaard & Smith LLP
4 6385 S. Rainbow Boulevard, Suite 600
5 Las Vegas, Nevada 89118
- 6 2. James Walton
7 c/o Lewis Brisbois Bisgaard & Smith LLP
8 6385 S. Rainbow Boulevard, Suite 600
9 Las Vegas, Nevada 89118
- 10 3. Owen Nitz
11 c/o Lewis Brisbois Bisgaard & Smith LLP
12 6385 Rainbow Boulevard, Suite 600
13 Las Vegas, Nevada 89118
- 14 4. Rodney Yanke
15 5125 Turnberry Lane
16 Las Vegas, Nevada 89113
- 17 5. Person Most Knowledgeable at Tower Homes, LLC
18 c/o Prince & Keating
19 3230 S. Buffalo Drive, Suite 108
20 Las Vegas, Nevada 89117
- 21 6. Matthew E. Watson
22 Lionel Sawyer & Collins
23 300 S. Fourth Street, Suite 1700
24 Las Vegas, Nevada 89101
- 25 7. Shirley Penzel
26 Projects Chief
27 Nevada Real Estate Division
28 788 Fairview Drive, Suite 200
Carson City, Nevada 89701
8. Person Most Knowledgeable and/or Custodian of Records
Nevada Real Estate Division
788 Fairview Drive, Suite 200
Carson City, Nevada 89701
9. Terry A. Coffing
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, Nevada 89145

- 1 10. Zachariah Larson
2 Marquis Aurbach Coffing
3 10001 Park Run Drive
4 Las Vegas, Nevada 89145
5
6 11. Brian R. Hardy
7 Marquis Aurbach Coffing
8 10001 Park Run Drive
9 Las Vegas, Nevada 89145
10
11 12. William A. Leonard, Jr.
12 c/o Christine A. Roberts
13 Sullivan Hill Lewin Rez & Engel
14 228 S. Fourth Street, First Floor
15 Las Vegas, Nevada 89101
16
17 13. Paul R. Connaghan
18 Connaghan Newberry
19 7854 W. Sahara Avenue
20 Las Vegas, Nevada 89117

21 These individuals likely have discoverable information regarding the subject legal
22 representation, the liability, causation and/or damages issues involved in this case, Defendants'
23 statute of limitations defense and/or Plaintiff's alleged authorization and/or standing to bring and
24 maintain this action.

25 Defendants reserve the right to supplement this list as their investigation and discovery
26 continue. Defendants also reserve the right to call or cross-examine at trial, or at any other
27 proceeding, any witness identified by any other party. Defendants also reserve the right to object
28 to the admissibility of any testimony offered by any other party at trial or at any other proceeding.

29 **B. DOCUMENTS**

30 Defendants identify the following potentially discoverable documents:

- 31 1. NWH's file relating to Tower Homes, LLC (NWH000001-NWH042236)

32 Defendants reserve the right to supplement this list as their investigation and discovery
33 continue. Defendants also reserve the right to utilize at trial or any other proceeding any
34 document identified by any other party. Defendants also reserve the right to object to the
35 admissibility or use of any document identified by any other party.

1 C. COMPUTATION OF DAMAGES

2 Defendants are not asserting a claim for damages at this time, but reserve the right to
3 recover attorneys' fees and costs as permitted by law.

4 D. INSURANCE

5 The insurance agreement under which any person carrying on an insurance business may
6 be liable to satisfy part or all of a judgment which may be entered in the action, or to indemnify or
7 reimburse for payments made to satisfy the judgment, will be produced. (Deductible and premium
8 information has been redacted).

9
10 DATED this 10th day of December, 2013

11 LEWIS BRISBOIS BISGAARD & SMITH LLP

12
13 By /s/ Jeff Olster

14 V. Andrew Cass

Nevada Bar No. 005246

15 Jeffrey D. Olster

Nevada Bar No. 008864

16 6385 S. Rainbow Boulevard, Suite 600

17 Las Vegas, Nevada 89118

Attorneys for Defendants

18 *William H. Heaton and Nitz, Walton & Heaton,*
19 *Ltd.*

1 CERTIFICATE OF SERVICE

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard &
3 Smith LLP, and that on this 10th day of December, 2013, a true and correct copy of the foregoing
4 **DEFENDANTS' INITIAL DISCLOSURE OF WITNESSES AND DOCUMENTS** was placed
5 in an envelope, postage prepaid, addressed as stated below.

6
7 Dennis M. Prince
8 Eric N. Tran
9 Prince & Keating
10 3230 South Buffalo Drive, Suite 108
11 Las Vegas, Nevada 89117
12 P: (702) 228-6800
13 F: (702) 228-0443
14 *Attorneys for Plaintiff*

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28
By: /s/ Nicole Blum
An Employee of LEWIS BRISBOIS
BISGAARD & SMITH LLP

RENEWAL DECLARATIONS FOR POLICY NO. ALPS3721-12

Item 1 - Named Insured: Nitz, Walton & Henton, Ltd
Address: 601 S. Tenth Street, Suite 201
Las Vegas, NV 89101

Item 2 - Name of Each Insured Attorney: Retroactive Date

See Attached

Item 3 - Policy Period:
Effective Date: 12/02/2010 12:01 AM at the address stated in Item 1
Expiration Date: 12/02/2011
Loss Inclusion Date: 09/12/1976

Item 4 - Limit of Liability: \$ 2,000,000 *Each Claim
\$ 4,000,000 Aggregate
*This means "all claims arising out of the same, related or continuing professional services"

Item 5 - Deductible:

Item 6 - Annual Premium:

Item 7 - Endorsements attached at inception of the policy form PLP002a(02/15/2007):

First Dollar Defense Endorsement

NOTICE: This is a Claims Made and Reported policy. Except to such extent as may otherwise be provided herein, the coverage afforded under this policy is limited generally to liability for only those claims that are first made against the Insured and first reported to the Company while this policy is in force. Please review the policy carefully and discuss the coverage there under with your insurance advisor.

This policy is issued by your Risk Retention Group. Your Risk Retention Group may not be subject to all of the insurance laws and regulations of your state. State insurance insolvency guaranty funds are not available for your Risk Retention Group.

All initial application forms and all renewal application forms submitted to the Company are made a part of the policy. The Named Insured may obtain a copy of all application forms by submitting a written request to the Company.

Countersigned by:


Authorized Representative

Date: December 01, 2010

ALPSDECREN (02/15/07)

Item 2 - Name of Each Insured Attorney: (continued)

<u>Name</u>	<u>Retroactive Coverage Date</u>
Fontano, James A	08/09/2004
Heaton, William H	11/02/1982
Nitz, Ashley E.	10/01/1989
Nitz, W. Owen	09/12/1976
Nitz-Albregts, Stacey	10/01/1989
Walton, James H.	09/26/1979

Policy No.: ALPS3721- 12
Named Insured: Nitz, Walton & Heston, Ltd
Effective Date: 12/02/2010

FIRST-DOLLAR-DEFENSE ENDORSEMENT

In consideration of an additional premium, Section 4.1.1 of the policy is deleted and replaced with the text set forth herein:

4.1.1 For each claim covered by this policy, the **Named Insured** shall pay all **damages** up to the deductible. Each **Insured** shall be jointly and severally liable for such **damages** in the event the **Named Insured** fails to make any required payment. The **Company** shall not have any obligation to pay **damages** until after the deductible is exhausted. If the **Company** pays any amount within the amount of a deductible, each **Insured** shall be jointly and severally liable to reimburse the **Company** for any and all such amounts and shall do so on demand.

ALL OTHER TERMS AND CONDITIONS OF THE POLICY REMAIN UNCHANGED.

Unless another effective date is shown below, this endorsement forms a part of the policy at inception, no countersignature is required.

END P1102 (02/15/07)

ATTORNEYS LIABILITY PROTECTION SOCIETY, INC.,
A Risk Retention Group

LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY
With Enhanced Defender Options

CLAIMS MADE AND REPORTED POLICY

This policy is a "Claims Made and Reported" policy. Therefore, the **Insured** must immediately report any **claim** to ALPS during the **policy period** or during any applicable **extended reporting period**. No coverage exists under this policy for a **claim** which is first made against the **Insured** or first reported to ALPS after the **policy period** or any applicable **extended reporting period**. If the **Insured** receives notice of a **claim**, or becomes aware of an act, error or omission or **personal injury** that could reasonably be expected to be the basis of a **claim**, the **Insured** must immediately deliver a written notice of the **claim** directly to ALPS. Please report any **claim** or circumstances which may give rise to a **claim** directly to ALPS at the following:

NOTICE OF CLAIM

ALPS
111 N. Higgins, Ste. 200
P.O. Box 9169
Missoula, MT 59807-9169

Facsimile: 406-728-7416
Claims Phone: 800-367-4366

CLAIM EXPENSE ALLOWANCE

This policy provides a **claim expense allowance**. ALPS payment of any **claim expenses** will first be applied against and reduce the **claim expense allowance**. Any **claim expenses** paid by ALPS will not be applied against or reduce the **limit of liability** until after the **claim expense allowance** has been exhausted, at which time any additional **claim expenses** paid by ALPS will be applied against and reduce the **limit of liability** available to pay **damages**.

RISK RETENTION GROUP

This policy is issued by your risk retention group. Your risk retention group may not be subject to all of the insurance laws and regulations of your State. State insurance insolvency guaranty funds are not available for your risk retention group.

ATTORNEYS LIABILITY PROTECTION SOCIETY, INC.,
A Risk Retention Group

LAWYERS PROFESSIONAL LIABILITY INSURANCE POLICY
With Enhanced Defender Options

Attorneys Liability Protection Society, Inc., a Risk Retention Group, an insurance company domiciled in the State of Montana (herein called "the Company"), agrees with the Named Insured, in consideration of the payment of the premium, and in reliance on all application documents submitted for this and any prior policies, as follows:

I. INSURING AGREEMENTS

I.1 COVERAGE

Subject to the limit of liability, exclusions, conditions and other terms of this policy, the Company agrees to pay on behalf of the Insured all sums (in excess of the deductible amount) that the Insured becomes legally obligated to pay as damages, arising from or in connection with A CLAIM FIRST MADE AGAINST THE INSURED AND FIRST REPORTED TO THE COMPANY DURING THE POLICY PERIOD, provided that the claim arises from an act, error, omission or personal injury that happened on or after the loss inclusion date and the retroactive coverage date set forth in Items 2 and 3 of the Declarations, and that the claim arises from or is in connection with:

I.1.1 an act, error or omission in professional services that were or should have been rendered by the Insured, or

I.1.2 a personal injury arising out of the professional services of the Insured,

and further provided that at the effective date of this policy, no Insured knew or reasonably should have known or foreseen that the act, error, omission or personal injury might be the basis of a claim.

I.2 DEFENSE AND CLAIM EXPENSES

I.2.1 For any claim covered under this policy, the Company shall have the right and the duty to defend such claim even if any or all of the allegations of the claim are groundless, false or fraudulent. The Company shall have the right to appoint counsel to provide the defense, after consultation with the Insured, when practicable (consultation with any one Insured, in the Company's sole discretion, being sufficient), and shall pay claim expenses in accordance with the terms of this policy. The Company shall not have a duty to defend or to pay such expenses as to any claim not covered under this policy, and shall have the right to seek reimbursement from any Insured, who shall promptly provide such reimbursement, for any amount paid by the Company in defending any such non-covered claim, including any amount paid in defending a non-covered claim that is asserted together with one or more covered claims.

I.2.2 The Company may make such investigations as it deems appropriate.

I.2.3 Where an Insured has a right to arbitrate a claim, or receives a demand for arbitration, the Company shall have sole discretion as to whether to seek, agree to or reject arbitration.

I.2.4 In the event a claim covered under this policy is made against an Insured, and in the same matter a claim is also made against a non-attorney who referred to the Insured the matter from which the claim arises, the Company shall provide the same defense to the referring party as to the Insured. The Company shall have no other obligation to the referring party, including any obligation to pay any damages or other claim expenses on the party's behalf. Any claim expenses associated with the defense of the referring party

shall be subject to the deductible, and shall be included within, and shall not increase, the claim expense allowance and the limit of liability.

1.3 SUPPLEMENTARY PAYMENTS

1.3.1 In the event the Company requests in writing that an Insured attorney attend a trial, hearing or arbitration proceeding concerning a covered claim, and if the Insured demonstrates that Insured attorney lost fees or other earnings as a result of such attendance, the Company shall pay up to \$500 for such loss of earnings for each Insured attorney and for each full or partial day of attendance. The maximum amount payable by the Company during the policy period and any extended reporting period, if applicable, shall be \$5,000, irrespective of the number of Insured attorneys. No deductible shall apply to any such payment, and any payment shall not affect the limit of liability. Any such payment shall reduce the remaining available claim expense allowance.

1.3.2 In the event an Insured attorney receives notice during the policy period of a proceeding before a state licensing board, peer review committee or governmental regulatory body, and promptly reports the notice to the Company during the policy period, and provided that the notice concerns an alleged act, error or omission or personal injury arising from professional services of the Insured that would otherwise fall within the coverage of this policy, the Company shall pay up to \$5,000 for attorneys' fees and expenses incurred in relation to such proceeding. The maximum amount payable by the Company in relation to any one such proceeding shall be \$5,000. The maximum amount payable by the Company during the policy period and any extended reporting period, if applicable, shall be \$5,000 per Insured attorney. No deductible shall apply to any such payment, and any payment shall not affect the limit of liability. Any such payment shall reduce the remaining available claim expense allowance.

1.4 SETTLEMENT AND CONSENT TO SETTLE

1.4.1 The Company may undertake such settlement negotiations and make such settlements as it deems appropriate and expedient; provided, however, that the Company shall consult with the Insured regarding the Company's decision to settle a claim (consultation with any one Insured, in the Company's sole discretion, being sufficient). If the Insured disagrees with the Company's decision to settle a claim, the Insured may appeal to peer review, as described below.

1.4.2 Upon receipt of notice of such an appeal, the Company in its sole discretion shall determine if there is adequate time to conduct the peer review, taking into consideration court calendars, settlement demand deadlines, discovery deadlines and the like. If the Company determines that peer review may go forward, the Company shall empanel a committee composed of not less than three attorneys. If time permits, the Company may, in its sole discretion, consult with the Insured regarding the composition of the panel. The committee shall then review the Company's decision to settle to determine whether it is reasonable under the circumstances. Upon completion of the review, the committee shall promptly advise the Company and the Insured of its decision. The decision of the peer review committee shall be final and binding on both the Insured and the Company. However, nothing in this section shall in any way impair the right of the Company to make any settlement that it deems, in its sole discretion, to be required pursuant to any statutory or other legal requirement concerning fair settlement practices of insurers.

1.5 EXHAUSTION OF LIMIT OF LIABILITY; TENDER OF REMAINING LIMIT

1.5.1 The Company's duty to defend shall be fully satisfied, and it shall not be obligated to continue to defend any claim or pay any claim expenses, nor obligated to pay any damages, or interest thereon.

1.5.1.1 after the applicable limit of liability has been exhausted by payments of damages and/or claim expenses; or

1.5.1.2 after the Company has deposited an amount equal to the applicable limit of liability, minus any damages paid on the claim and any claim expenses paid on the claim and chargeable against the limit of liability, with a court of competent jurisdiction, to be disbursed by the court's order.

In either such a case, the **Company** shall have the right to withdraw from further defense of the claim by tendering control of the defense to the **Insured**. The **Insured** agrees, as a condition to the issuance of this policy, to accept such tender.

1.6 POLICY TERRITORY

This policy applies to any act, error or omission occurring anywhere in the world, provided that a claim otherwise covered by this policy is made within the United States of America, its territories or possessions, or Canada.

2. DEFINITIONS

As used in this policy:

2.1 **Attorney** means an individual attorney or a professional business entity of which an individual attorney is the sole owner and employee.

2.2 **Bodily injury** means any injury to the body, any sickness or disease, or death resulting from any such injury, sickness or disease. **Bodily injury** also includes any mental, psychological, or emotional injury, anguish, tension, distress, pain, suffering, or shock, or death resulting therefrom, regardless of whether or not such condition results from any physical injury, sickness or disease, or from the death of any person.

2.3 **Claim** means a demand for money or services, including but not limited to the service of suit or institution of arbitration proceedings against the **Insured**.

2.4 **Claim expenses** means

2.4.1 fees charged by any attorney(s) designated by the **Company** to defend a claim or otherwise represent an **Insured**; and

2.4.2 all other fees, costs, and expenses resulting from the investigation, adjustment, defense, and appeal of a claim (including a suit or proceeding arising in connection therewith), if incurred by the **Company**, or by the **Insured** with prior written consent of the **Company**

Claim expenses does not include

2.4.3 salaries of regular employees or officials of the **Company** or the **Named Insured**;

2.4.4 payment or collateral for any attachment bond or appeal bond; or

2.4.5 any other expense not meeting the definitions in Sections 2.4.1 or 2.4.2.

2.5 **Claim expense allowance** means an amount equal to one half of the "each claim" limit of liability listed in Item 4 of the Declarations, or \$1,000,000, whichever is less. As described further in Section 4.2 of this policy, the claim expense allowance shall be the maximum aggregate amount the **Company** shall be obligated to pay for claim expenses during the policy period, without regard to the number of claims or claimants, or the number of **Insureds**, and includes the amount of any applicable deductible.

2.6 **Damages** means any monetary award by way of judgment or final arbitration, or any settlement, but does not include:

2.6.1 punitive, multiple, or exemplary damages, fines, sanctions, penalties or citations; or

2.6.2 awards deemed uninsurable by law; or

2.6.3 injunctive, declaratory, or other equitable relief, or costs or fees incident thereto; or

2.6.4 **restitution, reduction, disgorgement or set-off of any fees, costs, consideration or expenses paid to or charged by an Insured, or any other funds or property presently or formerly held by an Insured.**

2.7 **Deductible** means the deductible amount for each claim stated in Item 5 of the Declarations. The deductible is described further in Sections 4.1 and 4.2 of this policy.

2.8 **Effective date** means 12:01 a.m., at the address stated in Item 1 of the Declarations, on the effective date listed in Item 3 of the Declarations. The effective date of this policy shall also be the effective date of any extended reporting endorsement issued pursuant to Section 4.4 hereof.

2.9 **Exempt organization** means an organization exempt from taxation within the meaning of the following enumerated sections of 501(c) of the United States Internal Revenue Code: 501(c)(3), 501(c)(4), 501(c)(6), 501(c)(7), 501(c)(8) and 501(c)(10).

2.10 **Expiration date** means 12:01 a.m., at the address stated in Item 1 of the Declarations, on the expiration date listed in Item 3 of the Declarations.

2.11 **Extended reporting endorsement** means an endorsement issued by the Company providing for an extended reporting period as described in Section 4.4 of this policy.

2.12 **Extended reporting period** means the period of time set forth in an extended reporting endorsement that may be provided after the end of the policy period, as described in Section 4.4 of this policy, for reporting of claims that (a) would otherwise be covered by this policy, (b) arise from an act, error or omission or personal injury that occurred after the loss inclusion date and the retroactive coverage date and before the end of the policy period, and (c) are first made, and first reported to the Company, after the end of the policy period and during the extended reporting period.

2.13 **Formal mediation** means a voluntary process by which a qualified professional mediator is chosen by the parties to the claim, with agreement by the Company, and the mediator meets with and intercedes between the parties in an attempt to resolve the claim.

2.14 **Insured** means:

2.14.1 The Named Insured listed in Item 1 of the Declarations;

2.14.2 An attorney who is, at the time a claim is first made, or who was, at the effective date of the policy, a partner, stockholder or employee of the Named Insured, and who is or was identified in Item 2 of the Declarations, provided that the requirements of this policy concerning amendment of Item 2 have been complied with, and solely for claims arising from such attorney's professional services on behalf of the Named Insured or a predecessor firm, performed on or after the attorney's retroactive coverage date, and solely to the extent no other insurance or extension of insurance applies;

2.14.3 An attorney who was, before the effective date of the policy, a partner, stockholder or employee of the Named Insured or a predecessor firm, provided that information requested on the application concerning such persons has been provided to the Company, and solely for claims arising from such attorney's professional services on behalf of the Named Insured or a predecessor firm, performed on or after the attorney's retroactive coverage date, and solely to the extent no other insurance or extension of insurance applies;

2.14.4 An attorney acting as "of counsel" under formal contract with the Named Insured or a predecessor firm, and who is identified in Item 2 of the Declarations, provided that information requested on the application concerning such person has been provided and that the requirements of this policy concerning amendment of Item 2 have been complied with, and solely for claims arising from such attorney's professional services on the behalf of the Named Insured or predecessor firm, performed on or after the attorney's retroactive coverage date, and solely to the extent no other insurance or extension of insurance applies;

2.14.5 A non-attorney who is or was an employee of the Named Insured or a predecessor firm, solely for claims arising from actions within the scope of such person's duties as an employee of the Named Insured or a predecessor firm, and arising from the provision of professional services by the Named Insured or predecessor firm, and solely to the extent no other insurance or extension of insurance applies; and

2.14.6 The heirs, executors, administrators, assigns and legal representatives of an Insured, in the event of the Insured's death, incapacity or bankruptcy.

2.15 **Limit of liability** means, as applicable, the "each claim" limit of liability and the "aggregate" limit of liability as listed in the Item 4 of the Declarations. The limit of liability includes the amount of any applicable deductible and is described further in Section 4.2 of this policy.

2.16 **Loss inclusion date** means the loss inclusion date of this policy as listed in Item 3 of the Declarations, the effect of which is described in Sections 1.1 and 4.4 of this policy.

2.17 **Named Insured** means the firm or individual listed as the Named Insured in Item 1 of the Declarations.

2.18 **Organization** means any corporation, partnership, limited partnership, limited liability partnership or limited liability company; association; charitable organization; health or welfare benefit plan, program, fund or trust; pension, profit-sharing, 401(k) or other retirement benefit plan, program, fund or trust; mutual fund or investment trust, or any other business entity, enterprise or organization of any kind or nature whatsoever. Organization does not include a decedent's estate or a trust (other than an investment trust).

2.19 **Personal injury** means an injury other than a bodily injury that arises from:

2.19.1 false arrest, detention or imprisonment;

2.19.2 wrongful entry or eviction or other invasion of private occupancy;

2.19.3 malicious prosecution;

2.19.4 publication or utterance of libel, slander or other defamatory or disparaging material; or

2.19.5 invasion of privacy, or publication or utterance in violation of an individual's right of privacy.

2.20 **Policy Period** means the period of time between the effective date listed in Item 3 of the Declarations and the earlier to occur of (a) the expiration date listed in Item 3 of the Declarations, or (b) the date this policy is otherwise terminated or cancelled prior to the expiration date. Policy period does not include any extended reporting period provided pursuant to Section 4.4 of this policy.

2.21 **Predecessor firm** means any sole proprietorship, partnership, limited liability partnership, limited liability corporation, or professional corporation that was engaged in the private practice of law, the financial assets and liabilities of which the Named Insured acquired more than fifty percent, provided that such firm has been disclosed to the Company in the application.

2.22 **Professional services** means:

2.22.1 services or activities performed for others as an attorney in an attorney-client relationship on behalf of one or more clients;

2.22.2 services as mediator, arbitrator, or other facilitator in a dispute resolution process;

2.22.3 services as administrator, conservator, guardian, executor, personal representative or trustee, so long as the Insured (a) is not a beneficiary of such estate or trust, and (b) is not receiving compensation other than fees for such services paid directly from such estate or trust; or

2.22.4 services as an attorney in researching or certifying title to real estate, but excluding services as a title insurance agent acting on behalf of a title insurance company, unless such services are specifically included under this policy by a separate endorsement identified in Item 7 of the Declarations.

2.23 **Related professional services** means professional services that are connected temporally, logically or causally, by any common fact, circumstance, situation, transaction, event, advice or decision, including but not limited to work that is part of the same or continuing professional services.

2.24 **Retroactive coverage date or retroactive date** means the date for each Insured attorney set forth in Item 2 of the Declarations, the effect of which is described in Sections 1.1, 2.14, and 4.4 of this policy.

3. EXCLUSIONS

3.1 **THIS POLICY DOES NOT APPLY TO ANY CLAIM ARISING FROM OR IN CONNECTION WITH:**

3.1.1 Any dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error or omission committed by, at the direction of, or with the consent of an Insured, or any personal injury arising from such conduct, subject to Section 4.3 of this policy ("innocent insured coverage");

3.1.2 Any loss sustained by an Insured as the beneficiary or distributee of any trust or estate;

3.1.3 Any professional services that were or should have been rendered to any organization (including the ownership, maintenance or care of any property in connection with any such organization) of which, at the time such professional services were or should have been rendered:

3.1.3.1 An Insured was an officer, director, employee or other fiduciary;

3.1.3.2 An Insured was a partner, shareholder, member or other owner; provided, however, that this provision does not apply if, at the time such professional services were or should have been rendered, no Insured (or group of Insureds collectively) owned, possessed or controlled a total voting interest or beneficial interest of more than five percent (5%) of such organization;

3.1.3.3 An Insured served in any capacity to directly or indirectly control, operate or manage such organization.

This exclusion shall not apply to any claim arising from or in connection with (a) an Insured's position as an officer or director of an exempt organization, but only to the extent the Insured is not indemnified by the exempt organization, and only to the extent no other insurance applies, or (b) any professional services that were or should have been rendered to an organization listed on an endorsement identified in Item 7 of the Declarations;

3.1.4 Notary certification without the physical appearance of the person who is or who claims to be the person signing said instrument;

3.1.5 Any act, error, omission or personal injury that occurred prior to the effective date of this policy, if:

3.1.5.1 The act, error, omission or personal injury was in the course of professional services performed for a firm other than the Named Insured, and there is another policy of professional liability insurance that provides coverage for the claim, regardless of the amount, if any, of the available limits of liability of the other policy, and regardless of whether or not the deductible provisions or limits of liability of the other policy are different from those of this policy; or

3.1.5.2 There is an earlier-incepting policy of professional liability insurance that provides coverage for the claim, or would have provided coverage if the Insured's obligations under that policy had been complied with, regardless of the amount, if any, of the available limits of liability

of the prior policy, and regardless of whether or not the deductible provisions or limits of liability of the prior policy are different from those of this policy; or

3.1.5.3 Prior to the effective date of the policy, any Insured gave or should have given, to any insurer, notice of a claim or potential claim arising from the act, error, omission, or personal injury, or from any act, error, omission, or personal injury in related professional services;

3.1.6 An Insured's activities as an elected public official or as an employee of a governmental body, subdivision, or agency thereof; provided, however, that this exclusion shall not apply to any claim arising from an Insured's having provided professional services to any such body, subdivision or agency in the ordinary course of the Insured's practice, for which a fee for professional services was charged and collected, including any such claim to the extent the Insured is deemed a public employee solely by virtue of rendering professional services to such governmental body, subdivision or agency;

3.1.7 An Insured's activities or capacity as a fiduciary under the Employee Retirement Income Security Act of 1974, as amended, or any regulation or order issued pursuant thereto; provided, however, that this exclusion shall not apply to a claim arising from an Insured's having provided professional services in the ordinary course of the Insured's practice, for which a fee for professional services was charged and collected, including any claim seeking to hold the Insured responsible as a fiduciary solely by reason of professional services rendered with respect to any employee benefit plan;

3.1.8 Alleged discrimination by an Insured, including discrimination based on race, color, creed, age, sex, nationality, marital status or sexual orientation;

3.1.9 Alleged sexual harassment or misconduct by an Insured;

3.1.10 An Insured's rendering of investment advice to any person, including but not limited to advice concerning securities, real property, commodities or franchises;

3.1.11 An Insured's services or capacity as a broker, dealer, investment advisor, business manager, accountant, real estate broker or real estate agent;

3.1.12 Any nuclear reaction, radiation or contamination, regardless of cause;

3.1.13 Any conversion, misappropriation or improper commingling by any person of client or trust account funds or property, or funds or property of any other person held or controlled by an Insured in any capacity or under any authority, including any loss or reduction in value of such funds or property;

3.1.14 Any obligation assumed by contract, other than an obligation to perform professional services;

3.1.15 Any dispute over fees or costs, or any claim that seeks, whether directly or indirectly, the return, reimbursement or disgorgement of fees, costs, or other funds or property held by an Insured;

3.1.16 Any defect in title to real estate that was not disclosed in public records and that any Insured knew about when a title policy was issued; or

3.1.17 Any liability agreed to or assumed by an Insured under an agreement where the Insured has agreed to share in any loss payments or expenses due under a title policy,

3.1.18 Any bodily injury of any person; or

3.1.19 Any injury to or destruction of any property, including loss of use thereof.

3.2 THIS POLICY DOES NOT APPLY TO ANY CLAIM:

3.2.1 Made by an employer against an Insured who is or was an employee of the employer;

3.2.2 Made by an Insured;

3.2.3 Made by a family member or other relative of an Insured; provided however, that this exclusion shall not apply to a claim arising from an Insured's having provided professional services to any such family member or relative in the ordinary course of the Insured's practice, for which a fee for professional services was charged and collected by the Named Insured; or

3.2.4 Made by anyone who is or was a partner, officer, director, owner, stockholder or employee of any Insured; provided however, that this exclusion shall not apply to a claim arising from an Insured's having provided professional services to any such person in the ordinary course of the Insured's practice, for which a fee for professional services was charged and collected by the Named Insured.

4. CONDITIONS

4.1 DEDUCTIBLE

4.1.1 For each claim covered by this policy, the Named Insured shall pay all claim expenses and damages up to the deductible. Each Insured shall be jointly and severally liable for such claim expenses and damages in the event the Named Insured fails to make any required payment. The Company shall not have any obligation to pay claim expenses or damages until after the deductible is exhausted. If the Company pays any amount within the amount of a deductible, each Insured shall be jointly and severally liable to reimburse the Company for any and all such amounts and shall do so on demand.

4.1.2 The maximum aggregate deductible amount payable by the Named Insured for all claims first made and reported during a policy period, without regard to the number of claims or claimants, or the number of Insureds, shall be twice the deductible amount listed in Item 5 of the Declarations.

4.1.3 If a claim is resolved through the use of formal mediation or arbitration, the deductible payable by the Named Insured for that claim will be reduced by fifty percent, up to a maximum reduction of \$12,500.

4.2 LIMIT OF LIABILITY

4.2.1 The claim expense allowance shall be the maximum aggregate amount the Company shall be obligated to pay for claim expenses for all claims first made and reported during a policy period, without regard to the number of claims or claimants, or the number of Insureds, subject to Section 4.2.2 below. The claim expense allowance includes the deductible, and to the extent any Insured is required during the policy period to pay claim expenses as part of a deductible (see Section 4.1.1 above), the remaining available claim expense allowance for the policy period (and for any related claim described in Section 4.2.5 below) shall be reduced by the amount of such payments by the Insured.

4.2.2 In the event payment by the Named Insured or the Company (or both) of claim expenses exhausts the remaining available claim expense allowance under the policy, any further payment of claim expenses shall reduce the remaining available limit of liability, described further below. The Company shall have no further obligation to pay claim expenses once any limit of liability is reached.

4.2.3 Subject always to the remaining available "aggregate" limit of liability in the event more than one claim is first made and first reported during the policy period, the "each claim" limit of liability listed in Item 4 of the Declarations shall be the maximum amount the Company shall pay for each claim first made and first reported during a policy period, without regard to the number of claimants or the number of Insureds. The limit of liability includes the deductible, and to the extent any Insured is required during the policy period to pay damages as part of a deductible (see Section 4.1.1 above), the remaining available limit of liability for the claim (and for any related claim described in Section 4.2.5 below) shall be reduced by the amount of such payments by the Insured.

4.2.4 The "aggregate" limit of liability listed in Item 4 of the Declarations shall be the maximum amount the Company shall pay for all claims first made and reported during a policy period (and all claims that arise out of the same or related professional services, whenever made, see Section 4.2.5 below), without regard to the number of claims or claimants, or the number of Insureds.

4.2.5 Neither the making of one or more claims against more than one Insured, nor the making of one or more claims by more than one claimant, shall operate to increase the limit of liability. All claims that arise out of the same or related professional services, whenever made, and without regard to the number of claims or claimants, or the number of Insureds, shall be considered together as a single claim for purposes of this section, and shall be subject to the same single "each claim" limit of liability, aggregate limit of liability, and claim expense allowance.

4.2.6 The limit of liability in the event of an extended reporting endorsement is described in Section 4.4 below.

4.2.7 If the Company pays any amount in excess of the applicable limit of liability, or any other amount for which the Company has no obligation under this policy, the Insureds shall be jointly and severally liable to the Company for any and all such amounts and, on demand, shall promptly reimburse such amounts to the Company.

4.3 INNOCENT-INSURED COVERAGE

4.3.1 Whenever a claim otherwise covered by this policy would be excluded based on Section 3.1.1, coverage will be afforded to any individual Insured who did not personally commit, or personally participate in committing, any such act, error or omission, or in causing such personal injury, and who did not remain passive after learning of the act, error, omission, or personal injury, provided that each such individual Insured shall have immediately notified the Company and complied with all obligations under this policy once said Insured obtained knowledge of the act, error, omission or personal injury. Nothing in this section shall be interpreted to afford any coverage to a Named Insured that is an entity rather than an individual.

4.3.2 The Company's obligation to make any payment under this section shall be in the excess of any and all assets of any Insured who is not entitled to coverage under this section.

4.4 EXTENDED REPORTING ENDORSEMENT

4.4.1 In the event of expiration of this policy, or cancellation or non-renewal by the Named Insured or the Company, and except as otherwise provided herein, the Named Insured shall have the right, upon written request to the Company and upon payment of the additional premium specified herein not more than thirty days after termination of the policy, to have the Company issue an extended reporting endorsement.

4.4.2 The extended reporting endorsement shall provide coverage for claims that (a) would otherwise be covered by this policy, (b) arise from an act, error or omission or personal injury that occurred after the loss inclusion date and the retroactive coverage date and before the end of the policy period, and (c) are first made against the Insured, and first reported to the Company, after the end of the policy period and during the extended reporting period.

4.4.3 Where an Insured is an individual, and has been the Named Insured on policies issued by the Company for five or more consecutive policy periods, then in the event of retirement, death, or total permanent disability, the Insured shall, upon written request to the Company, be entitled to an extended reporting endorsement at no additional premium, but otherwise subject to all the terms and conditions hereof.

4.4.4 Once the Company issues an extended reporting endorsement, except as otherwise provided herein, the Insured may renew the extended reporting endorsement on an annual basis.

4.4.5 No extended reporting endorsement under this section, or any renewal thereof, shall be available to any Insured, and if issued shall be deemed automatically canceled, where:

4.4.5.1 The Company cancels or nonrenews any policy for failure to pay the premiums when due or for failure to pay any other amount due to the Company; or

4.4.5.2 The **Company** cancels, rescinds or nonrenews any policy for misrepresentation in any application or other submission to the **Company**; or

4.4.5.3 Any **Insured** fails to comply with the terms and conditions of any policy, including any **extended reporting endorsement** or any other endorsements; or

4.4.5.4 Any **Insured's** license or right to practice law has been revoked, suspended by or surrendered at the request of any regulatory authority

4.4.6 The premiums for an **extended reporting endorsement** (except as provided in Section 4.4.3) shall be computed as follows:

4.4.6.1 For the first year, 85% of the full annual premium;

4.4.6.2 For the second year, 65% of the full annual premium;

4.4.6.3 For the third year, 50% of the full annual premium;

4.4.6.4 For the fourth year, 37% of the full annual premium;

4.4.6.5 For the fifth year, 30% of the full annual premium;

4.4.6.6 For the sixth year, 25% of the full annual premium;

4.4.6.7 For the seventh and each subsequent year, 15% of the full annual premium.

These premiums shall be computed in accordance with the **Company's** rules, rating plans and premiums in effect at the time the **Company** issues the **extended reporting endorsement**.

4.4.7 The **extended reporting endorsement** simply extends the reporting period during which a claim may be first reported to the **Company** under this policy. Any claim reported to the **Company** during the **extended reporting period** shall be treated as if reported during the **policy period**. The **extended reporting endorsement** does not create or establish a new or separate limit of liability. Instead, the **Company's** limit of liability under an **extended reporting endorsement** is part of, and not in addition to, the **Company's** limit of liability during the **policy period**.

4.4.8 All other terms and conditions of this policy shall apply to any **extended reporting endorsement**.

4.5 OTHER INSURANCE

Except where coverage under this policy is excluded under Section 3.1.5.1 or 3.1.5.2, the insurance provided under this policy shall be excess over any other valid and collectible insurance, whether such insurance is stated to be primary, contributory, excess, contingent or otherwise, unless such other insurance is specifically written only as excess insurance over this policy.

4.6 INSURED'S OBLIGATIONS UPON NOTICE OF CLAIM OR POTENTIAL CLAIM

4.6.1 When an **Insured** becomes aware of an act, error or omission or **personal injury** that could reasonably be expected to be the basis of a claim, but no claim arising therefrom has yet been made, the **Insured** shall give written notice to the **Company** as soon as practicable. Such notice shall include the fullest information obtainable concerning the potential claim.

4.6.2 If, during the **policy period** or any **extended reporting period**, the **Company** is given written notice of a potential claim pursuant to Section 4.6.1, and a claim arising from the same act, error or omission or **personal injury** is subsequently made against an **Insured** no later than six years after the end of the **Insured's** last **policy period** with the **Company**, then any such claim shall be deemed to have been first reported during the **policy period** or **extended reporting period** in which the potential claim was reported.

4.6.3 When a claim is made against an **Insured**, the **Insured** shall immediately forward to the **Company** every demand, notice, summons or other process received by him or his representative. The **Company** shall have no obligation hereunder with respect to a claim unless and until so notified.

4.6.4 In the event an **Insured** fails to give written notice to the **Company** of a claim, prior to the end of the policy period in which the claim is made, or in the event an **Insured** fails to give written notice to the **Company** of a potential claim, as described in Section 4.6.1, prior to the end of the policy period in which the **Insured** first becomes aware of the act, error, omission, or personal injury, then no coverage for any such claim shall be afforded to the **Insured** under any future policy issued by the **Company**.

4.7 ASSISTANCE AND COOPERATION OF THE INSURED

4.7.1 Each **Insured** shall cooperate with the **Company** in its investigation of any claim, including, without limitation, by promptly complying with all requests for statements, reports, documents or other information, and by providing copies of all pertinent files upon request.

4.7.2 Each **Insured** shall cooperate and assist, as requested, in the defense of any claim, in making any settlements, and in enforcing any right of contribution or indemnity against any person. If requested by the **Company**, such assistance may include, without limitation, attendance at hearings and trials and assistance in securing and giving evidence and in obtaining the attendance of witnesses.

4.7.3 Each **Insured** shall notify the **Company** of any demand to arbitrate a claim against an **Insured**, and any right to demand arbitration of a claim, and in the event the **Company** elects to proceed with arbitration, shall cooperate in any such proceeding.

4.7.4 No **Insured** shall, except at the **Insured's** own expense, make any payments, admit any liability, stipulate to the entry of a judgment against the **Insured**, settle any claims, assume any obligation or incur any expense without the prior written consent of the **Company**.

4.8 ACTION AGAINST COMPANY

No action shall lie against the **Company** unless and until the **Insured** has fully complied with all terms and conditions of this policy, and unless and until the amount of the **Insured's** obligation to pay has been finally determined either by judgment against the **Insured** or by written agreement of the **Insured**, the claimant and the **Company**.

4.9 SUBROGATION

4.9.1 In the event of any payment under this policy, the **Company** shall be subrogated to all the **Insured's** rights of recovery against any person or organization. The **Insured** shall execute and deliver such instruments and papers as may be required by the **Company**, and shall do whatever else is necessary, to secure such rights. The **Insured** shall at no time do anything to prejudice such rights.

4.9.2 The **Company** shall not exercise any subrogation rights against another **Insured**, except with respect to any claim arising from, involving, or in connection with any dishonest, fraudulent, criminal, malicious, or intentionally wrongful or harmful act, error or omission of, or personal injury caused by, such **Insured**.

4.9.3 Any amounts recovered through subrogation shall be apportioned as follows: First, to the repayment of expenses incurred in enforcing subrogation; Second, to repayment of any loss and expense payments by the **Insured** in excess of any deductible; Third, to any loss and expense payments by an excess carrier on behalf of the **Insured**; Fourth, to any loss and expense payments by any primary carrier, including the **Company**, on behalf of the **Insured**; and Last, to repayment of the **Insured's** deductible.

4.10 CHANGES IN POLICY TERMS

Except where otherwise provided herein, no part of this policy may be waived or changed, except by written endorsement issued to form a part of this policy, and signed by an authorized representative of the **Company**. Neither notice to an agent nor knowledge possessed by an agent or by any other person shall effect any waiver or change in any part of this policy or estop the **Company** from asserting any right under this policy.

4.11 FIRM CHANGES

4.11.1 The **Named Insured** shall immediately notify the **Company** if, during the **policy period**, the **Named Insured** has (a) any increase or decrease by more than 25 attorneys or by more than 50% in the total number of attorneys listed in Item 2 of the Declarations, or (b) any acquisition, dissolution or merger by or of the **Named Insured**. Upon receipt of such notice, the **Company** reserves the right, in its sole discretion, to re-evaluate the risk insured under this policy and to take appropriate underwriting action.

4.11.2 In all instances other than those described in the immediately preceding section, the **Named Insured** shall notify the **Company** within a commercially reasonable period of time if, during the **policy period**, the **Named Insured** seeks to add or delete an attorney to or from the list of insured attorneys in Item 2 of the Declarations. Upon receipt of such notice, the **Company** reserves the right, in its sole discretion, to re-evaluate the risk insured under this policy and to take appropriate underwriting action.

4.12 ASSIGNMENT

No rights or interests hereunder of any **Insured** may be assigned.

4.13 CANCELLATION OR NONRENEWAL

4.13.1 The **Named Insured** may cancel the policy by surrendering the policy to the **Company** (or an authorized representative of the **Company**), or by written notice to the **Company** stating the date on which the **Named Insured** proposes that the cancellation will be effective. In the event the **Named Insured** cancels the policy, the **Company** shall be entitled to retain the customary "short rate" portion of the premium.

4.13.2 In the event the **Named Insured** has failed to pay when due a premium or deductible under this or any other policy, or any other money owed to the **Company**, the **Company** may cancel this or any other policy by written notice of cancellation to the **Named Insured**. The notice shall state the date on which the cancellation will be effective, which shall be no fewer than ten days following the date of the notice. Such notice shall be effective and conclusive as to all **Insureds** hereunder. Proof of mailing shall be sufficient proof of notice and the effective date of cancellation stated in the notice shall become the end date of the **policy period**.

4.13.3 For any reason other than nonpayment of premium or deductible as set forth in Section 4.13.2, including but not limited to (a) material misrepresentation, (b) substantial change in the risk assumed, or (c) substantial breach of contractual duties, conditions or warranties, the **Company** may cancel this policy by written notice of cancellation to the **Named Insured**. The notice shall state the date on which the cancellation will be effective, which shall be no fewer than forty-five days after the date of the notice. Such notice shall be effective and conclusive as to all **Insureds** hereunder. Proof of mailing is sufficient proof of notice and the effective cancellation date stated in the notice will become the end date of the **policy period**.

4.13.4 In the event the **Company** cancels this policy for any reason, it will compute earned premium on a *pro rata* basis. The **Company** may make any resultant premium adjustments at the time cancellation is effective, or as soon thereafter as is practicable. However, the payment or tender of unearned premium is not a condition of or a pre-requisite to cancellation of the policy.

4.13.5 The **Company** may decline to renew the policy for any reason.

4.14 STATEMENTS IN DECLARATIONS AND APPLICATION

4.14.1 By acceptance of this policy, each **Insured** agrees, understands and warrants that the statements in the Declarations, in the application for this policy, and in the applications for each prior policy issued by the **Company** to the **Insured**, are true and correct, that the Declarations and the application form a part of this policy, and that this policy is issued in reliance upon the truth of such representations and warranties.

4.15 ENTIRE CONTRACT

This policy, including the application documents incorporated herein by reference, embodies all agreements existing between the **Insured** and the **Company** relating to this insurance.

4.16 NONASSESSABLE POLICY

This policy is not assessable.

4.17 SPECIAL LAWS

Any and all provisions of this policy that are in conflict with applicable laws of the jurisdiction wherein this policy is issued are hereby amended to conform to such laws.

4.18 LIBERALIZATION

If the Company makes revisions to this policy form which take effect during the **policy period**, and such revisions would provide broader coverage than the prior form without an additional premium charge, then this policy shall be deemed to have incorporated those revisions as of their effective date.

4.19 NOTICES

All notices to be delivered to the **Named Insured** under this policy shall be mailed first class postage to the **Named Insured** at the address shown in Item 1 of the Declarations, unless **Company** is notified in writing of a change in the mailing address of the **Named Insured**. All notices to be delivered to the **Company** shall be mailed first class postage to the **Company** at the following address: ALPS, 111 North Higgins, Ste. 200, P.O. Box 9169, Missoula, MT 59807-9169.

In witness whereof, the **Company** has caused this policy to be issued and signed in Missoula, Montana by its President and Secretary and Countersigned on the Declaration page by a duly authorized representative of the **Company**

ATTORNEYS LIABILITY PROTECTION SOCIETY, INC., A Risk Retention Group

By: Robert W. Monte, Jr.
President

ATTEST:

By: Bradley D. Dantre
Secretary

EXHIBIT “3”

PRINCE & KEATING

ATTORNEYS AT LAW
3230 SOUTH BUFFALO DRIVE, SUITE 108
LAS VEGAS, NEVADA 89118
TELEPHONE (702) 228-6800
FACSIMILE (702) 228-0443
WWW.PRINCEKEATING.COM

Reply To: Dennis M. Prince
Email: DPrince@princekeating.com

December 16, 2013

Via Facsimile: (702) 893-3789

Jeffrey D. Olster, Esq.
Lewis Brisbois Bisgaard & Smith
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118

Re: *Tower Homes, LLC vs. William H. Heaton, et al.*

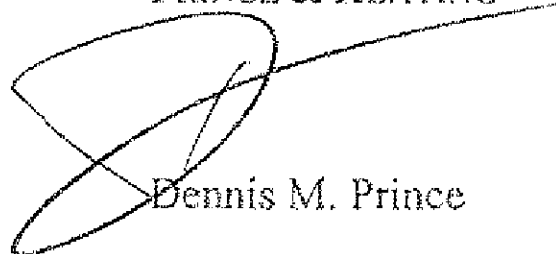
Dear Mr. Olster:

We are in receipt of Defendants' Initial Disclosure of Witnesses and Documents regarding the above-referenced matter. Regarding Defendants' disclosure of documents, we note that Defendants identify such disclosures as follows: NWH's file relating to Tower Homes, LLC (NWH000001-NWH042236). Said documents were not included in Defendants' Initial Disclosure. Please accept this correspondence as our request for a copy of Bates Numbers NWH000001 – NWH042236, on CD and/or on a flash drive. We will be happy to provide your office a flash drive to save a copy of the requested documents on. Further, should there be any documents claimed as privileged, please also provide a Privilege Log regarding such claimed privilege documents. You may contact my paralegal, Pamela Klausky, should you need our office to provide you with a flash drive to save the requested bates numbered documents.

Thank you for your attention to this matter. We look forward to hearing from you soon.

Sincerely,

PRINCE & KEATING



Dennis M. Prince

DMP:pmk
cc: Eric Tran, Esq.

TRANSMISSION VERIFICATION REPORT

TIME : 12/16/2013 14:49
NAME : PRINCE KEATING LLP
FAX : 7022280443
TEL : 7022286800
SER.# : BROA2J345580

DATE, TIME	12/16 14:49
FAX NO./NAME	8933789
DURATION	00:00:17
PAGE(S)	01
RESULT	OK
MODE	STANDARD ECM

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Reply To: Dennis M. Prince
Email: DPrince@princekeating.com

December 16, 2013

Via Facsimile: (702) 893-3789

Jeffrey D. Olster, Esq.
Lewis Brisbois Bisgaard & Smith
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118

Re: *Tower Homes, LLC vs. William H. Heaton, et al.*

Dear Mr. Olster:

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EXHIBIT “4”

PRINCE & KEATING

ATTORNEYS AT LAW

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Facsimile: (702) 399-1101
www.princekeating.com

Reply To: Dennis M. Prince
Email: DPrince@princekeating.com

December 17, 2013



Via Facsimile: (702) 893-3789

Jeffrey D. Olster, Esq.
Lewis Brisbois Bisgaard & Smith
6385 South Rainbow Boulevard, Suite 600
Las Vegas, Nevada 89118

Re: *Tower Homes, LLC vs. William H. Heaton, et al.*

Dear Mr. Olster:

This follows our conversation of December 17, 2013 concerning the Defendant's disclosures pursuant to NRCP 16.1 in the above referenced case. Our discussion was held pursuant to EDCR 2.34 in an effort to resolve a discovery dispute. As you know, on October 17, 2013, the parties held an Early Case Conference pursuant to NRCP 16.1. Pursuant to NRCP 16.1 (a)(1)(D), your client's disclosures of witnesses as well as documents was due within 14 days. After the Early Case Conference, we circulated a proposed Joint Case Conference Report. You requested on behalf of your clients up to and including December 2, 2013, in which to make the required disclosures. After I saw the request, I contacted you personally to discuss why the disclosures could not be made timely. You advised that you had your client's entire file in your possession concerning representation of Tower Homes, LLC but needed to go through the file to determine if there was any potentially privileged documents. To accommodate you, we agreed they would be made available after November 17, 2013.

During our initial conversation, I advised you that the file was the property of Tower Homes, LLC, and nothing contained in the file would be privileged. You advised that Mr. Heaton had represented Rodney Yanke in a personal injury matter. I agreed that personal representation of Mr. Yanke in an unrelated matter was not required to be disclosed. I further informed you that if any documents were going to be withheld that I would expect a privilege log.

On December 17, 2013, we finally received your client's disclosure pursuant to NRCP 16.1. No documents were produced. On December 16, 2013, we sent you a letter advising that we had not received the document production and requested that you either download it to a disc or a flash drive and produce it in electronic format. I then called your office on December 16, 2013, to have a discussion. You did return the call. This led to our discussion on December 17th.

During our conversation, you indicated that your clients will not be producing the documents for several reasons. First, you advised that the representation of Tower Homes, LLC was a "joint" representation with Rod Yanke and we would need to obtain Mr. Yanke's consent. As it relates to joint representation, Tower Homes, LLC has equal access to the files as it relates to the representation by your clients concerning the subject development project. We believe that trying to use Rod Yanke's consent as a condition to disclose is nothing more than an excuse to not produce documents. Second, you indicated that your clients were demanding a confidentiality agreement. As our client is the privilege holder, we will not agree to any confidentiality. Moreover, there is no basis for your client to maintain these documents are entitled to legal protection. Third, you also suggested there may be a work product privilege without articulating the basis for the same.

At this point, you have not even identified the categories of documents that make up the so-called file. You have not prepared a privilege log identifying what documents were being withheld from production based upon a purported privilege. As I explained to you, by reason of filing an action for legal malpractice is that the attorney/client privilege has been waived. Tower Homes, LLC was the entity that contracted with the individual purchasers and responsible to hold the security deposits in trust. The fact that Mr. Yanke may have been a member and/or managing member of Tower Homes, LLC does not change the legal relationship between Tower Homes, LLC and Nitz, Walton & Heaton. Tower Homes, LLC is the client in this situation, not Mr. Yanke. The fact that Mr. Yanke may be considered a client for the purposes of attorney/client privilege to avoid disclosure of information to others, does not change your client's obligation to produce all relevant documents in this case.

During our conversation, you gave me no time frame to which to resolve this issue. Moreover, your clients were insisting on these conditions being satisfied before producing any documents. Your client's failure to timely comply with NRCP 16.1 is impeding our ability to prosecute this case. We cannot do anything unless and until we have the file materials maintained by your clients. We cannot commence discovery, cannot retain an expert or decide which depositions to take. The discovery process has been halted by reason of your client's failure to comply with NRCP 16.1.

Accordingly, we will be moving forward with a Motion to Compel compliance with NRCP 16.1's voluntary disclosure requirements. We will be attaching this letter as an exhibit to our Motion and we will be seeking attorney's fees and costs. Based upon the motions that were previously filed, as well as the positions taken since the Early Case Conference, we believe that your client is engaged in the course of behavior that is designed to increase the time

Jeffrey D. Olster
December 17, 2013
Page 3

and expense of this litigation. We find this litigation practice to be abusive and will be seeking to hold your clients accountable for such conduct.

Sincerely,

PRINCE & KEATING

A large, stylized handwritten signature in black ink, appearing to be 'DMP', is written over the printed name 'Dennis M. Prince'.

Dennis M. Prince

DMP:kms
cc: Eric Tran, Esq.

EXHIBIT "C"



CLERK OF THE COURT

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HEATON, LTD.

8 **DISTRICT COURT**
9
10 **CLARK COUNTY, NEVADA**

11 TOWER HOMES, LLC, a Nevada limited
12 liability company;

13 Plaintiff,

14 vs.

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

17 Defendants.
18
19
20

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

**DEFENDANTS' OPPOSITION TO
PLAINTIFF'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS AND
COUNTER-MOTION FOR PROTECTIVE
ORDER**

Date: January 31, 2014
Time: 9:00 a.m.

(DISCOVERY COMMISSIONER)

21 Defendants William H. Heaton and Nitz, Walton & Heaton, Ltd. (collectively "NWH"), by
22 and through their attorneys, Lewis Brisbois Bisgaard & Smith, LLP, hereby oppose Plaintiff's
23 Motion to Compel Production of Documents. Defendants also counter-move for a protective
24 order pursuant to NRCP 26(c) and EDCR 2.20(f) establishing that NWH's file from the
25 underlying proceedings (1) can be viewed and used only by Tower Homes' counsel of record in
26 this case; and (2) can be used only connection with this litigation, and not for any other purpose.

27 This opposition and counter-motion are based on the following memorandum of points and
28 authorities, the pleadings and records in this matter and any further argument and/or evidence that

1 may be presented at the hearing.

2
3 DATED this 14th day of January, 2014

4 LEWIS BRISBOIS BISGAARD & SMITH LLP

5
6 By 

7 V. Andrew Cass

8 Nevada Bar No. 005246

9 Jeffrey D. Olster

10 Nevada Bar No. 008864

11 6385 S. Rainbow Boulevard, Suite 600

12 Las Vegas, Nevada 89118

13 Attorneys for Defendants

14 *William H. Heaton and Nitz, Walton & Heaton,*
15 *Ltd.*

1 **DECLARATION OF JEFF OLSTER IN SUPPORT OF OPPOSITION TO PLAINTIFF'S**
2 **MOTION TO COMPEL AND COUNTER-MOTION FOR PROTECTIVE ORDER**

3 I, Jeffrey D. Olster, declare as follows:

- 4 1. I am an attorney, duly licensed and authorized to practice law in the State of
5 Nevada. My office represents defendants William H. Heaton and Nitz, Walton &
6 Heaton, Ltd. (collectively "NWH") in this case. As the handling attorney on the
7 case, I have personal knowledge of the following.
- 8 2. This declaration is offered in support of the following opposition Plaintiff's Motion
9 to Compel and Defendants' Counter-motion for Protective Order.
- 10 3. Plaintiff's Motion to Compel is set for hearing on January 31, 2014 at 9:00 a.m.
11 before the Discovery Commissioner. Pursuant to EDCR 2.20(f), Defendants'
12 Counter-motion for Protective Order should be heard with Plaintiff's Motion
13 because the Counter-motion is related to the same subject matter and involves
14 identical factual and legal issues.
- 15 4. Defendants' Counter-motion for Protective Order is necessitated by the fact that
16 Tower Homes' counsel is demanding unrestricted production of NWH's underlying
17 files and will not agree to protect the confidentiality of the files from disclosure to
18 third-parties (i.e., to parties who are not parties to this case or to the subject
19 attorney-client relationship). Additionally, there is no indication that Tower
20 Homes' sole member, Rodney Yanke, has consented to an unrestricted disclosure
21 of NWH's files, either on behalf of Tower Homes, or on his own behalf.
- 22 5. On October 17, 2013, the parties held their early case conference. As a courtesy, I
23 agreed to this early case conference date even though it was premature. NWH's
24 answer was not due, and was not in fact filed, until October 24, 2013.
- 25 6. On November 8, 2013, Plaintiff's counsel contacted me by e-mail requesting the
26 status of Defendants' initial disclosures. In response, I apologized for the delay,
27 which was attributable to the fact that the files are quite voluminous. The files are
28 in excess of 42,000 pages.

1 7. I spoke with Plaintiff's counsel, Dennis Prince, on November 12, 2013. During
2 this call, I advised Mr. Prince that the file contains over 42,000 pages, and that we
3 needed more time to assess the confidentiality and privilege issues. Mr. Prince
4 agreed to accommodate our need for additional time to review the file. No specific
5 disclosure date was established.

6 8. In a letter to Plaintiff's counsel dated December 10, 2013, I outlined the issues that
7 needed to be resolved before any documents could be produced. (A copy of this
8 letter is attached as **Exhibit A**). Primarily, Defendants needed to secure the
9 approval of Rodney Yanke, who is Tower Homes' sole principal and manager, and
10 who was also represented in his individual capacity by Defendants in connection
11 with the underlying matters. Mr. Yanke is not a party to the instant action, but (as
12 detailed below), Defendants are still obligated to protect the confidentiality of Mr.
13 Yanke's information and file documents. Additionally, even though Tower Homes
14 is entitled to Defendants' files for purposes of this legal malpractice action (subject
15 to exceptions), third-parties (i.e., persons who are not parties to the subject
16 attorney-client relationship) are not entitled to access to the file documents. As
17 such, it was necessary to put standard protections in place, such as a confidentiality
18 stipulation or order.

19 9. I discussed these issues during a telephone call with Mr. Prince on December 17,
20 2013. Mr. Prince refused to enter into a confidentiality stipulation to protect the
21 file from disclosure to third-parties. The only basis that Mr. Prince provided for his
22 refusal to enter into a confidentiality stipulation was "I don't want to." Mr. Prince
23 also gave no indication that he had ever spoken with Mr. Yanke, or that Mr. Yanke
24 (either on behalf of Tower Homes or in his individual capacity) had agreed to
25 permit the public disclosure of NWH's files relating to the underlying development
26 or the underlying lawsuits.

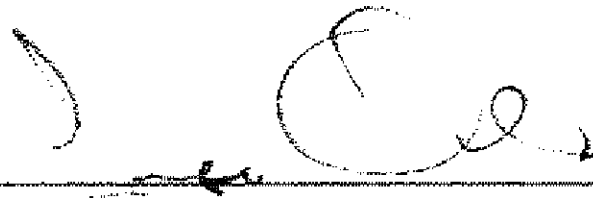
- 1 10. In a letter to me dated December 17, 2013 (but not received by me until December
2 19), Mr. Prince provided a chronology of the procedural history and threatened to
3 file a motion to compel. Mr. Prince's letter was largely unresponsive to our
4 concerns, stating that obtaining the consent of a joint client was merely an "excuse"
5 not to produce documents. Mr. Prince again failed to articulate any basis as to why
6 he would oppose a standard agreement to keep the files of the joint clients (Tower
7 Homes and Mr. Yanke) from falling into the hands of others who are not a party to
8 the subject attorney-client relationship.
- 9 11. In a letter to Mr. Prince dated December 27, 2013, I responded to Mr. Prince's
10 allegations and set forth extensive law supporting the concerns raised during our
11 December 17th telephone conference. (A copy of my December 27, 2013 letter is
12 attached as **Exhibit B**). Rather than responding to any of the law cited in my
13 December 27 letter, Plaintiff chose to file the instant Motion to Compel. Notably,
14 Plaintiff also fails to address any of the law cited in my December 27 letter in its
15 Motion to Compel.
- 16 12. Attached as **Exhibit C** is a true and correct copy of the answer filed by NWH on
17 behalf of Mr. Yanke in one of the underlying lawsuits, *Gaynor, et al. v. Tower*
18 *Homes, LLC, et al.*, Case No. A541668.
- 19 13. Attached as **Exhibit D** is a true and correct copy of the "Order Granting Motion to
20 Approve Amended Stipulation to Release Claims and Allow Marquis Aurbach
21 Coffing, as Counsel for the Tower Homes Purchasers, to Pursue Claims on Behalf
22 of Debtor" from the Tower Homes bankruptcy proceedings.
- 23 14. Attached as **Exhibit E** is a true and correct copy of the Tower Homes bankruptcy
24 trustee's Ex Parte Motion to Enter Final Decree.
- 25 15. Attached as **Exhibit F** are true and correct copies of cited provisions from the
26 Restatement (Third) of The Law Governing Lawyers.

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16. Attached as **Exhibit G** is a true and copy of the listing for Tower Homes, LLC on the website of the Nevada Secretary of State (as printed on January 9, 2014).

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

DATED this 14th day of January, 2014



Jeffrey D. Olster

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This very unusual legal malpractice case arises out of a failed high-rise condominium
4 project. Plaintiff Tower Homes, LLC (hereafter "Tower Homes") and its sole member, Rodney
5 Yanke, started to develop the project back in 2004, and sought the assistance of NWH for legal
6 representation. The project failed before it was completed, largely due to a lack of funding and
7 Tower Homes' own misfeasance. Tower Homes and Mr. Yanke were subsequently sued by
8 purchasers (hereafter the "Tower Homes Purchasers") who had paid earnest money deposits for
9 units that were never built.¹ NWH handled some transactional work relating to the project (e.g.,
10 NWH prepared the purchase contracts for the individual units) and also represented *both* Tower
11 Homes and Mr. Yanke in the lawsuits by the Tower Homes Purchasers.

12 The instant dispute giving rise to Tower Homes' motion to compel and NWH's counter-
13 motion for protective order concerns the protections that should be afforded to NWH's files
14 relating to the underlying project and the Tower Homes Purchaser lawsuits. Specifically, the
15 primary issues are (1) whether Tower Homes, a Nevada limited liability company, is permitted to
16 freely share the confidential and privileged contents of NWH's files with third parties (e.g., the
17 Tower Homes Purchasers) without the knowledge and consent of Tower Homes' sole member
18 (Mr. Yanke); and (2) if Tower Homes can somehow make this decision without the knowledge
19 and consent of its sole authorized decision-maker, whether Mr. Yanke, *who was also a client of*
20 *NWH in his individual capacity*, is entitled to assert any protection over the confidential and
21 privileged contents of the underlying files, which belong as much to Mr. Yanke as they do to
22 NWH. According to Tower Homes' counsel, he is free to share confidential files with the world,
23 despite the fact that the only person with legal authority to act for Tower Homes (Mr. Yanke) has
24 not consented to such an unrestricted document disclosure, and even thought Mr. Yanke himself
25

26
27 ¹ In these underlying lawsuits with the Tower Homes Purchasers, Tower Homes and Mr. Yanke were
28 accused of, among other things, wrongfully misappropriating the Purchasers' deposits – in direct
contravention to the advice provided by NWH.

1 has an independent right to protect the contents of the files.

2 Tower Homes provides no factual or legal support for its unwarranted positions in its
3 motion. As discussed below, it is questionable what authority Tower Homes' counsel has to
4 permit the unrestricted disclosure of confidential and privileged documents. Moreover, NWH
5 still owes duties to Mr. Yanke (and to Tower Homes for that matter) to protect confidential
6 information (i.e., NWH's files relating to the underlying representation), especially when there is
7 reason to believe that this confidential information will be provided to persons who are not parties
8 to either this lawsuit or the subject attorney-client relationship, and who are in an adverse position
9 as to both Tower Homes and Mr. Yanke. While Tower Homes is entitled to most of its file from
10 the underlying representation, *adverse third-parties are not*. Despite this clear confidentiality
11 problem, Tower Homes' counsel is inexplicably unwilling to enter into a standard confidentiality
12 stipulation to protect NWH's files from unauthorized disclosure to adverse third-parties.
13 Accordingly, Tower Homes' Motion to Compel should be denied, and NWH's Counter-Motion
14 for Protective Order should be granted.

15 II. BACKGROUND

16 A. The Project and Underlying Representation

17 This action arises out of an attorney-client relationship between NWH and Tower Homes.
18 (Complaint ¶¶ 5-7). In particular, NWH represented Tower Homes, as well as Mr. Yanke, with
19 respect to a residential common interest ownership development known as Spanish View Towers
20 (hereafter the "Project"). (Complaint ¶ 6). As part of this representation, NWH prepared the
21 purchase contracts for the individual condominium units for the Project. (Complaint ¶ 9).

22 Due to financing issues, the Project was not successful, and construction was never
23 completed. Many of the individuals who had paid earnest money deposits for units in the Project
24 (hereafter the "Tower Homes Purchasers") filed lawsuits against Tower Homes, Mr. Yanke and
25 others seeking the return of their earnest money deposits. (Complaint ¶ 15.) *NWH and Mr.*
26 *Heaton represented both Tower Homes and Mr. Yanke (in his individual capacity) in these*

1 *underlying lawsuits.*²

2 **B. The Tower Homes Bankruptcy**

3 On May 31, 2007, approximately one-week after one of the underlying lawsuits was filed,
4 various creditors initiated Chapter 11 bankruptcy proceedings against Tower Homes. (*In re Tower*
5 *Homes, LLC*, U.S. Bankruptcy Court, District of Nevada, Case No. BK-S-07-13208-BAM).
6 During the bankruptcy proceedings, the bankruptcy trustee determined that he did not intend to
7 pursue any claims on behalf of Tower Homes based on the loss the Tower Homes Purchasers'
8 earnest money deposits.

9 Ultimately, the Bankruptcy Court "authorize[d] the Trustee to permit the Tower Homes
10 Purchasers to pursue any and all claims on behalf of Tower Homes, LLC (the "Debtor") against
11 any individual or entity which has or may have any liability or owed any duty to Debtor or others
12 for the loss of the earnest money deposits provided by purchasers for units in the Spanish View
13 Tower Homes condominium project which shall specifically include, but may not be limited to,
14 pursuing the action currently filed in the Clark County District Court styled as Tower Homes,
15 LLC v William H. Heaton et al, Case No. A-12-663341-C." (See **Exhibit D** at 2:7-14).³ Also,
16 according to this order, "any such recoveries shall be for the benefit of the Tower Homes
17 Purchasers." (*Id.* at 2:19-20).

18 The Tower Homes bankruptcy estate has been fully administered, and all funds required to
19 be disbursed under the applicable Plan have been disbursed. (See **Exhibit E**).

20 **C. The Instant Case**

21 Tower Homes filed its complaint in the instant action on June 12, 2012. NWH filed a
22 motion to dismiss (or, alternatively, for summary judgment) on July 19, 2012. NWH's motion
23 was based on (1) Tower Homes' failure to obtain the requisite Bankruptcy Court authorization for
24

25 ² See, for example, attached **Exhibit C**, which is a copy of the answer that NWH filed on Mr. Yanke's
26 behalf.

27 ³ The notable and obvious fact that this order does *not* authorize *Tower Homes* to bring any action was the
28 basis for NWH's most recent motion to dismiss. Notwithstanding the district court's ruling denying the
motion to dismiss, NWH maintains that the instant action is not properly authorized under federal law,
which only further heightens NWH's concerns about the salient confidentiality issues.

1 this action; and (2) Tower Homes' failure to timely bring this action within the statute of
2 limitations. The district court agreed with NWH that Tower Homes did not have the requisite
3 authorization from the Bankruptcy Court, but concluded that this 'defect' could be cured. The
4 district court rejected NWH's statute of limitations argument.

5 On December 11, 2012, NWH initiated writ proceedings before the Nevada Supreme
6 Court based on the denial of its motion to dismiss on statute of limitations grounds. On June 14,
7 2013, the Court issued an order denying NWH's writ of mandamus. The Court did not hear oral
8 argument, and did not reach the merits of the statute of limitations dispute; rather, the Court merely
9 held that extraordinary relief was not warranted.

10 While NWH's writ was pending, on or about April 8, 2013, Tower Homes obtained
11 another order from the Bankruptcy Court that purported to authorize this action (attached Exhibit
12 D). Because this new order still did not authorize *Tower Homes* to bring and maintain this action,
13 NWH filed another motion to dismiss on July 26, 2013. The district court denied this renewed
14 motion to dismiss. On October 7, 2013, Tower Homes served notice of entry of this order. NWH
15 filed their answer to the complaint on October 24, 2013.

16 Thereafter, the parties held their early case conference, which has culminated in the instant
17 dispute regarding the unwillingness by Tower Homes' counsel to agree to limit the review and use
18 of NWH's files to the parties and counsel in this litigation only. The particulars of this discovery
19 dispute are set forth in the above Declaration of Jeff Olster, ¶¶ 5-11, and are further discussed
20 below.

21 **III. ARGUMENT**

22 Tower Homes' Motion consists largely of stock, generalized law that does not address the
23 concerning and unusual circumstances of this case. While it is true that a client in a legal
24 malpractice case is generally entitled to the attorney's file (subject to some exceptions), *this case*
25 *is very different*. NWH is obligated by its duties under the Nevada Rules of Professional Conduct
26 to assure that confidential information (i.e., its file from the underlying Project and lawsuits) is not
27 improperly disclosed. Here, Mr. Yanke has not been notified of, nor has he consented to, the
28 disclosure of NWH's files. This is critical, not only because NWH represented Mr. Yanke in his

1 individual capacity in connection with the underlying proceedings, but also because *Mr. Yanke is*
2 *the only person who is authorized to act on behalf of Tower Homes*. Additionally, because of its
3 ongoing duty to preserve confidential information, NWH is obligated to seek to protect its file
4 from disclosure to others who are not a party to the attorney-client relationship. Neither Mr.
5 Yanke nor Tower Homes have provided any consent to permit NWH's files to be disclosed to
6 adverse third-parties (such as the Tower Homes Purchasers) or to become public record.

7 A. **NWH has an ongoing duty to safeguard the confidentiality of its files to**
8 **prevent against disclosure to persons who are not parties to the attorney-client**
9 **relationship.**

10 NWH has an ongoing duty to safeguard the confidentiality of former clients' information.
11 See Nevada Rules of Professional Conduct ("RPC") 1.6(a);⁴ RPC 1.9(c);⁵ *Stalk v. Mushkin*, 125
12 Nev. 21, 28, 199 P.3d 838 (2009) (recognizing attorney's duty of confidentiality based on RPC
13 1.6); Restatement (Third) of The Law Governing Lawyers (hereafter the "Restatement") § 60
14 ("[T]he lawyer may not use or disclose confidential client information as defined in § 59 if there is
15 a reasonable prospect that doing so will adversely affect a material interest of the client.")⁶

16 Confidential information consists of, among other things, the attorney's file. Restatement
17 § 59 provides: "Confidential client information consists of information relating to representation
18 of a client, other than information that is generally known." (Ex. F). Comment b to this section
19 then provides: "This definition covers *all information relating to representation of a client*,
20 whether in oral, documentary, electronic, photographic, or other forms." (Emphasis added). (*Id.*)
21 In other words, the "confidential client information" that NWH must protect is broader than just
22

23 ⁴ "A lawyer *shall not reveal information relating to representation of a client* unless the client gives
24 informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the
25 disclosure is permitted by paragraphs (b) and (c)." R.P.C. 1.6(a) (emphasis added). (Subsections (b) and
26 (c) are not applicable here).

27 ⁵ "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly
28 represented a client in a matter *shall not thereafter . . . Reveal information relating to the representation*
 except as these Rules would permit or require with respect to a client." R.P.C. 1.9(c) (emphasis added).

⁶ Copies of the Restatement provisions cited herein are attached as **Exhibit F**.

1 information that may be protected by the attorney-client privilege or work product doctrine; rather,
2 NWH is obligated to protect "all information relating to the representation of a client" -- i.e., the
3 entire underlying file.

4 Though a client (e.g., Tower Homes) has presumptive access to an attorney's file,⁷ an
5 attorney is not required to disclose documents when doing so may violate a duty of confidentiality
6 or non-disclosure that may be owed to another client. *See Sage Realty Corp. v. Proskauer Rose*
7 *Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 883 (N.Y. 1997); *Glade v. Superior Ct.*, 76
8 Cal.App.3d 738, 746-47, 143 Cal.Rptr. 119 (Cal. App. 1978). Moreover, the filing of a legal
9 malpractice action does not change the fundamental fact that the attorney's file remains privileged
10 and confidential *as to strangers to the attorney-client relationship*. "[T]he mere institution of suit
11 against an attorney is insufficient to waive the attorney-client privilege as to third parties in a
12 separate action that concerns the same subject matter as the attorney malpractice action."
13 *Industrial Clearinghouse v. Browning Mfg.*, 953 F.2d 1004, 1007 (5th Cir. 1992) (emphasis in
14 original).

15 The scope of these duties of confidentiality is magnified in a joint representation, such as
16 the representation at issue in this case (again, NWH represented both Tower Homes and Mr.
17 Yanke). "One co-client does not have the authority to waive the privilege with respect to another
18 co-client's communications to their common lawyer." Restatement § 75, Comment e (Ex. F). As
19 such, it follows logically that "[a] lawyer may deny a client's request to retrieve, inspect, or copy
20 documents when compliance would violate the lawyer's duty to another." Restatement § 46,
21 Comment c (emphasis added) (Ex. F).

22

23

24 ⁷ There are some exceptions to this general rule. For example, as discussed with Tower Homes' counsel,
25 there are some communications in the NWH file between Mr. Yanke and his personal injury attorneys, and
26 some communications between NWH and other joint clients (other than Mr. Yanke). These documents are
27 irrelevant and privileged. Additionally, documents that are intended only for internal review by the firm
28 constitute non-discoverable work product. *See* Restatement § 46 and Comment c ("A lawyer may refuse to
disclose to the client certain law-firm documents reasonably intended only for internal review.") (attached
as Ex. F). NWH has agreed to provide a privilege log with respect to these non-discoverable materials.
The crux of the parties' dispute, however, is the general confidentiality of the otherwise "discoverable"
portions of the file.

28

1 On this point, the Restatement further provides:

2 If two or more persons are jointly represented by the same lawyer in
3 a matter, a communication of either co-client that otherwise
4 qualifies as privileged under §§ 68-72 and relates to matters of
5 common interest *is privileged as against third persons*, and *any co-*
client may invoke the privilege, unless it has been waived by the
client who made the communication.

6 Restatement § 75 (emphasis added) (Ex. F).

7 Nevada courts have recognized this fundamental principle that, when there are joint clients,
8 each client's communication with their attorney **is privileged as to strangers to the attorney**
9 **client relationship**. See *In re Hotels Nev., LLC*, 458 B.R. 560, 570-71 (D. Nev. 2011)
10 (recognizing that "joint clients have a privilege against third parties"); *Livingston v. Wagner*, 23
11 Nev. 53, 58, 42 P. 290 (1895) ("When a lawyer acts as the common attorney of two parties their
12 communications to him are privileged as far as concerns strangers.").

13 In a normal legal malpractice case, where there is one client with actual authority to act,
14 and no third-parties with an active and ongoing interest in the proceedings, these fundamental
15 duties do not present a problem. Moreover, even in this situation, typically the plaintiff client does
16 not want its confidential documents (i.e., the files of its attorney) exposed to the entire world,
17 which is why plaintiff clients and defendant attorneys *routinely stipulate to protect the*
18 *confidentiality of the attorney's file*. Here, in contrast, there is not just a theoretical concern about
19 unauthorized disclosure of the file. The bankruptcy papers (e.g., Ex. D) make it clear that this
20 action is somehow being (improperly) maintained for the benefit of the Tower Homes Purchasers.
21 Moreover, the unwillingness of Tower Homes' counsel to agree to a standard confidentiality
22 stipulation (without articulating any reason, no less) further elevates the concern that NWH's files
23 will end up in the hands of strangers.

24 Based on the foregoing black-letter principles and rules, the following are required before
25 NWH can disclose its files pursuant to N.R.C.P. 16.1:

- 26 • Mr. Yanke, in his capacity as the sole member of Tower Homes, must
27 consent to the disclosure of the files;

- Mr. Yanke, in his individual capacity and as a joint client of NWH, must consent to the disclosure of the files; and
- Reasonable protections must be put in place to assure the NWH's files are viewed and used only by parties to the attorney-client relationship, and that these documents are not disclosed to strangers to the attorney-client relationship. This can be accomplished with a standard confidentiality stipulation.

B. By seeking disclosure of NWH's files without any confidentiality protection, Tower Homes ignores the foregoing ethical duties, as well as the requirement that Mr. Yanke consent to any unrestricted disclosure.

It is unfortunate that Tower Homes chose to file the Motion to Compel instead of informally resolving these issues. Again, the solution – a standard confidentiality stipulation – is a simple one. Nowhere in the Motion does Tower Homes offer any viable factual or legal reason for not entering into a confidentiality stipulation. Instead, Tower Homes relies exclusively on the premise that it is the holder of the privilege, and that it may waive the privilege if it chooses. As detailed above, Tower Homes' position ignores the facts and law detailed above; namely (1) that Mr. Yanke is the only person authorized to waive the privilege for Tower Homes; (2) that Mr. Yanke is independently entitled to assert the privilege and protect the entirety of NWH's files on his own individual behalf; and, most importantly, (3) that no privilege or right of confidentiality is waived as to strangers to the attorney-client relationship.

Tower Homes' counsel argues that NWH does not need Mr. Yanke's consent to produce its file because the entity is the sole client for purposes of the attorney-client privilege. This argument is misplaced at several levels.

First, as discussed above, NWH also represented Mr. Yanke individually, not just Tower Homes, in the underlying lawsuits. (See, e.g., Ex. C). Accordingly, Mr. Yanke, separately and independently from whatever rights Tower Homes may or may not have, has a right to restrict disclosure of his attorney's files. As discussed above, Tower Homes does not have the authority to waive the attorney-client privilege with respect to Mr. Yanke's communications with NWH.

1 See Restatement § 75, Comment e (Ex. E). Mr. Yanke has a separate and independent right to
2 prevent the disclosure of confidential information to third-parties. *Id*; *In re Hotels Nev., supra*.
3 458 B.R. at 570-71; *Livingston, supra*, 23 Nev. at 58.

4 Second, even as to Plaintiff itself, Tower Homes, as an inanimate entity, can only act
5 through its agents. **Tower Homes notably concedes as much in its Motion**, as it quotes the
6 United States Supreme Court's *Weintraub* case for the propositions that (1) a corporation must act
7 through its agents because an inanimate entity cannot speak directly to its lawyers; and (2) the
8 power to waive the corporate attorney-client privilege rests with the corporation's management
9 and is exercised by its officers or directors; and (3) privilege issues must be exercised in the best
10 interests of the corporation. (Motion at 14:10-21).

11 Here, *the only authorized agent of Tower Homes is Mr. Yanke*, who is the sole manager of
12 Tower Homes.⁸ Under Nevada law, limited liability companies can only act through their
13 managers. See NRS 86.071 (defining "Manager" as "a person, or one of several persons,
14 designated in or selected pursuant to the articles of organization or operating agreement of a
15 limited-liability company to manage the company."); NRS 86.291(1) ("Except as otherwise
16 provided in this section or in the articles of organization or operating agreement, management of a
17 limited-liability company is vested in its members in proportion to their contribution to its capital,
18 as adjusted from time to time to reflect properly any additional contributions or withdrawals by the
19 members."). Accordingly, *even as to just Tower Homes*, only Mr. Yanke can authorize a waiver
20 of any privilege. Tower Homes' counsel provides no representation, let alone evidence, in the
21 Motion that any authorized consent from Tower Homes has been obtained.

22 The authorities cited in the Motion by Tower Homes' alleged counsel on these issues are
23 inapposite. Specifically, Tower Homes cites to *Montgomery v. Etreppeid Techs., LLC*, 548 F.
24 Supp. 2d 1175 (D. Nev. 2008) and *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990),
25 neither of which is a legal malpractice, and neither of which confront the unique circumstances
26

27 ⁸ See attached **Exhibit G**, which is a copy of the Nevada Secretary of State's official record for Tower
28 Homes, LLC. This official record shows only one member – managing member Rodney Yanke .

1 presented by the instant case.

2 In *Montgomery*, the issue was whether a former LLC member was actually a client of the
3 attorney. The instant case is fundamentally distinguishable on this point, as it is undisputable that
4 NWH also represented Mr. Yanke in his individual capacity – separate and apart from Mr.
5 Yanke’s role as sole manager of Tower Homes LLC. (See Ex. C). In any event, in *Montgomery*,
6 the court ultimately concluded that privileged materials did *not* need to be disclosed to a stranger
7 to the attorney-client relationship. Thus, even though the case is cited by Tower Homes,
8 *Montgomery* actually reinforces the fundamental salient point that NWH’s files in this case should
9 not be produced without an adequate confidentiality order because of the likelihood that the files
10 will end up in the hands of third-parties.⁹

11 The case of *In re Grand Jury Subpoenas* is similarly unhelpful for Tower Homes, which
12 cites the case for the proposition that “disclosure of privileged information to a third party waives
13 the privilege.” *Id.*, 902 F.2d at 248. As a general proposition, of course, this is true. Tower
14 Homes, however, identifies no waiver of any privilege here (i.e., the disclosure of privileged
15 information to someone who is not a party to the subject attorney-client relationship). Indeed, this
16 type of unauthorized and improper disclosure is precisely what NWH is seeking to prevent.
17 Finally, as with the *Montgomery* case, the court in *Grand Jury Subpoenas* actually reaffirms the
18 salient controlling legal principle: “[A] joint defense privilege cannot be waived *without the*
19 *consent of all parties who share the privilege.*” *Id.* at 248 (emphasis added).

20 Accordingly, the case law cited by Tower Homes actually supports NWH’s position that
21 Mr. Yanke’s consent and a confidentiality order are required before NWH’s file can be disclosed
22 in this case.

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27 ⁹ The *Montgomery* case also did not present the issue of whether the corporate entity was actually
28 authorized to act on its own behalf.

1 **C. The Motion to Compel and the request for attorneys' fees should be denied.**

2 As established by the foregoing, Tower Homes' Motion to Compel should be denied.
3 Tower Homes has failed to adequately meet and confer as required by N.R.C.P. 37(a)(2)(A),¹⁰ and
4 neither NWH nor Mr. Yanke – nor Tower Homes for that matter – are required to disclose
5 documents that are likely to end up in the hands of strangers to the attorney-client relationship.
6 There must be an assurance that NWH's files will be protected from unauthorized disclosure.

7 Even if Tower Homes' Motion were somehow and hypothetically to be granted, an award
8 of attorneys' fees is not warranted. N.R.C.P. 37(a)(4) provides that an award of expenses and fees
9 is not warranted if “the court finds that the motion was filed without the movant's first making a
10 good faith effort to obtain the disclosure or discovery without court action, or that the opposing
11 party's nondisclosure, response or objection was substantially justified, or that other circumstances
12 make an award of expenses unjust.”

13 As detailed above, Tower Homes did not make a good faith effort to obtain the documents
14 without court action. Tower Homes has completely ignored the authorities cited in defense
15 counsel's December 27, 2013 meet and confer letter (Exhibit B), even in its Motion. Additionally,
16 Tower Homes has effectively caused this dispute by refusing to enter into a standard
17 confidentiality stipulation. The only basis for this refusal offered by Tower Homes' counsel
18 during the meet and confer process was “I don't want to.” This is a patently insufficient
19 explanation given the unique privilege and confidentiality issues implicated in this case.

20 Moreover, any award of expenses and/or fees is also wholly inappropriate because NWH's
21 position, which is mandated by the Nevada Rules of Professional Conduct and general ethical
22 principles, was “substantially justified,” and an award of expenses would be “unjust.” See
23

24 ¹⁰ “The motion must include a certification that the movant has in good faith conferred or attempted to
25 confer with the party not making the disclosure in an effort to secure the disclosure without court action.”
26 N.R.C.P. 37(a)(2)(A). Though Tower Homes' counsel attempts to satisfy this requirement in the Motion,
27 counsel offered no legal support for his position prior to filing the Motion, and offered no explanation for
28 his refusal to stipulate to confidentiality. Furthermore, counsel does not address the authorities cited in
defense counsel's 12-27-13 letter (Ex. B) in the Motion. As such, Tower Homes did not make the requisite
good faith attempt to resolve the parties' dispute before filing the Motion.

1 N.R.C.P. 37(a)(4). The Restatement sets forth NWH's duties under the circumstances of this case
2 as follows:

3 *A lawyer generally is required to raise any reasonably tenable*
4 *objection to another's attempt to obtain confidential client*
5 *information* (see § 59) from the lawyer if revealing the information
6 would disadvantage the lawyer's client and the client has not
consented (see § 62), unless disclosure would serve the client's
interest (see § 61).

7 Restatement § 63, Comment b (emphasis added) (Ex. F). It would certainly be "unjust" to
8 sanction NWH for taking a position that the Rules of Professional Conduct require it to take.

9 **D. NWH is entitled to a protective order with respect to its files.**

10 The foregoing establishes not only that Tower Homes' Motion should be denied, but also
11 that NWH is entitled to a protective order.

12 Upon motion by a party or by the person from whom discovery is
13 sought, accompanied by a certification that the movant has in good
14 faith conferred or attempted to confer with the other affected parties
15 in an effort to resolve the dispute without court action, and for good
16 cause shown, the court in which the action is pending may make any
17 order which justice requires to protect a party or person from
annoyance, embarrassment, oppression, or undue burden or expense,
including one or more of the following . . . (2) that the discovery
may be had only on specified terms and conditions.

18 N.R.C.P. 26(c). The "specified terms and conditions" of the protective order should mandate that
19 NWH's file can be produced in this litigation, but that the documents in the file:

- 20 (1) Can be viewed and used only by Tower Homes' counsel of record in this case; and
21 (2) Can be used only connection with this litigation, and not for any other purpose.

22 These protections will ensure that Tower Homes has access to NWH's files for purposes of
23 prosecuting this alleged legal malpractice case, but also that confidential and privileged
24 information is not disclosed to strangers to the attorney-client relationship.

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1 **IV. CONCLUSION**

2 Based on the foregoing, defendants William H. Heaton and Nitz, Walton & Heaton, Ltd.
3 respectfully request that Tower Homes' Motion to Compel be denied, and that their Counter-
4 Motion for Protective Order mandating that the confidentiality of Defendants' file be maintained
5 be granted.

6 DATED this 14th day of January, 2014

7 LEWIS BRISBOIS BISGAARD & SMITH LLP

8
9 By 

10 V. Andrew Cass

11 Nevada Bar No. 005246

12 Jeffrey D. Olster

13 Nevada Bar No. 008864

14 6385 S. Rainbow Boulevard, Suite 600

15 Las Vegas, Nevada 89118

16 *Attorneys for Defendants*

17 *William H. Heaton and Nitz, Walton & Heaton,*
18 *Ltd.*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to N.R.C.P. 5(b), I certify that I am an employee of Lewis Brisbois Bisgaard &
3 Smith LLP, and that on this 15 day of January, 2014, a true and correct copy of the foregoing
4 **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL**
5 **PRODUCTION OF DOCUMENTS AND COUNTER-MOTION FOR PROTECTIVE**
6 **ORDER** was hand delivered at the address stated below.

7
8 Dennis M. Prince
9 Eric N. Tran
10 Prince & Keating
11 3230 South Buffalo Drive, Suite 108
12 Las Vegas, Nevada 89117
13 P: (702) 228-6800
14 F: (702) 228-0443
15 *Attorneys for Plaintiff*

16
17 By: Nicolas Etienne
18 An Employee of LEWIS BRISBOIS
19 BISGAARD & SMITH LLP
20
21
22
23
24
25
26
27
28

EXHIBIT "A"

**LEWIS
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ATTORNEYS AT LAW

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JEFF.OLSTER@LEWISBRISBOIS.COM

December 10, 2013

File No.
27039.13

VIA U.S. MAIL

Dennis M. Prince
Eric C. Tran
Prince & Keating
3230 S. Buffalo Drive, Suite 108
Henderson, Nevada 89117

Re: ***Tower Homes, LLC v. Heaton, et al.***
Clark County District Court, Case No. A-12-663341-C

Dear Counsel:

Defendants' initial disclosure statement is attached. With respect to the documents, there are several issues that need to be resolved before any documents can be produced:

1. **Approval by Rodney Yanke** -- As you are aware, Nitz, Walton & Heaton, Ltd. represented Mr. Yanke in addition to Tower Homes, LLC. Mr. Yanke, however, is not a party to these proceedings. We therefore need to obtain Mr. Yanke's consent before producing any communications between Mr. Yanke and the firm, as well as any other documents that may otherwise be privileged or protected from disclosure. We can attempt to obtain to procure this consent from Mr. Yanke, but do not want to contact Mr. Yanke directly without your consent, as he was the sole member of Tower Homes, LLC.
2. **Confidentiality Stipulation** -- Though Tower Homes, LLC is generally entitled to its files relating to the subject representation (subject to exceptions, for example, for certain types of work product), the documents are still protected as to third-parties, especially as to parties in an adversarial position to Tower Homes, LLC, Mr. Yanke and/or the firm. Accordingly, please advise if you are amenable to entering into a confidentiality stipulation which would preclude anyone but you (and your agents) from seeing any of the documents, and limiting use of the

Dennis M. Prince
December 10, 2013
Page 2

documents to this litigation only. If you are not agreeable to this stipulation, we will seek a protective order.

3. **Privileged Documents** -- As we have discussed, the firm's file contains over 42,000 pages. Some documents that happen to be contained in the file involve irrelevant and privileged communications (e.g., correspondence between Mr. Yanke and his personal injury attorney). Other documents constitute protected work product, even as to Tower Homes, LLC. We will provide a privilege log with respect to these documents once we have a final resolution on Issues 1 and 2 above.

Please let us know your thoughts on these issues. Thank you.

Sincerely,

Jeff Olster

Jeffrey D. Olster of
LEWIS BRISBOIS BISGAARD & SMITH LLP

cc: V. Andrew Cass (via e-mail)
William H. Heaton (via e-mail)

EXHIBIT "B"

**LEWIS
BRISBOIS
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DIRECT DIAL: 702.693.4319
JEFF.OLSTER@LEWISBRISBOIS.COM

December 27, 2013

File No.
27039.13

VIA E-MAIL AND U.S. MAIL
dprince@princekeating.com

Dennis M. Prince
Prince & Keating
3230 S. Buffalo Drive, Suite 108
Henderson, Nevada 89117

Re: *Tower Homes, LLC v. Heaton, et al.*
Clark County District Court, Case No. A-12-663341-C

Dear Mr. Prince:

This letter is provided in response to your letter, dated December 17, 2013 (which was faxed on December 18 and received by me on December 19). First, we provide some corrections to the chronology of events set forth in your letter. Second, we further address the substantive confidentiality and privilege issues, which were first raised in our December 10 letter and then discussed during our call on December 17.

Chronology

We agreed to your noticed date of October 17, 2013 for the early case conference, despite the fact that this date was technically premature, as Defendants' answer was not due until October 24, 2013.

On November 8, 2013, your office contacted me by e-mail requesting the status of our initial disclosures. In response, I apologized for the delay, which was attributable to the fact that the file, as you can imagine given the length, complexity and scope of the underlying representation, was quite voluminous. We then spoke on November 12, 2013. During this call, I advised you that the file contains over 42,000 pages, and that we needed more time to assess the confidentiality and privilege issues. You did agree to accommodate our need for additional time.

On November 27, 2013, I provided approval for your proposed Joint Case Conference Report (with one minor revision). I also advised that I would soon be providing you with a proposal for the handling of the documents.

We provided this proposal to you in my December 10, 2013 letter (which you do not mention in your December 17 letter). In this letter, we provided further clarification on the applicable confidentiality and privilege issues. First, we reminded you that Defendants also represented Rodney Yanke individually in connection with the underlying development and civil proceedings. As such, Mr. Yanke's consent was required before any documents could be produced, but that, given your representation of Tower Homes, we needed to discuss with you who would contact Mr. Yanke.¹

Second, we explained that, while Tower Homes, LLC is generally entitled to its files (subject to exceptions), the documents are still protected as to third-parties, especially as to parties in an adversarial position to Tower Homes, Mr. Yanke or Defendants. As such, we asked if you were amenable to entering into a confidentiality stipulation which would, among other things, permit you (and your agents) access to the documents, but not adversarial third-parties.

Finally, we reiterated that there are some materials in the file that are privileged even as to Tower Homes, and expressed our willingness to provide a privilege log for these documents.

We spoke on December 17, 2013.² During this call, we discussed our substantive position on the confidentiality and privilege issues in more detail. A further discussion on these issues is contained below.

Substantive Confidentiality and Privilege Issues

The first issue, as you note, is the firm's joint representation of both Tower Homes and Mr. Yanke. You state that Tower Homes, as a joint client, has equal access to the files, and that we are asserting this issue as an "excuse to not produce documents." As you know, Mr. Yanke is the sole member and manager of Tower Homes, LLC, so it is curious that you are dismissive of this issue.

¹ On this point, you indicated during our call that you did not have a problem with Defendants contacting Mr. Yanke to obtain this consent. If your position is otherwise, please advise as soon as possible.

² In your December 17 letter, you state that you sent us a letter on December 16 requesting the document production in electronic format. We have not received this letter.

More fundamentally, Defendants are not looking for an "excuse" not to produce documents. Rather, Defendants have an ongoing duty to safeguard the confidentiality of a former client's information. *See, e.g.*, RPC 1.6(a);³ RPC 1.9(c).⁴ The Restatement (Third) of The Law Governing Lawyers (hereafter the "Restatement") provides, in relevant part:

[D]uring *and after* representation of a client . . . the lawyer *may not* use or *disclose confidential client information* as defined in § 59 if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information.

Restatement § 60 (emphasis added).

Restatement Section 59 (which is referenced above in Section 60) provides: "Confidential client information consists of information relating to representation of a client, other than information that is generally known." Comment b to this section then provides: "This definition covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms." In other words, "confidential client information" is broader than the attorney-client privilege, and covers the entirety of the file (save for generally known materials such as filed pleadings, and you already have access to all such pleadings).

Given these principles, Defendants are obligated to seek the protections we are asking for in this case:

A lawyer generally is required to raise any reasonably tenable objection to another's attempt to obtain confidential client information (see § 59) from the lawyer if revealing the information would disadvantage the lawyer's client and the client has not consented (see § 62), unless disclosure would serve the client's interest (see § 61).

³ "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (c)." RPC 1.6(a).

⁴ "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . Reveal information relating to the representation except as these Rules would permit or require with respect to a client." R.P.C. 1.9(c).

Restatement § 63, Comment b.

The importance of this issue is magnified here given your unwillingness to enter into a standard confidentiality stipulation. Though a client (e.g., Tower Homes) has presumptive access to an attorney's file (subject to exceptions), an attorney is not required to disclose documents when doing so may violate a duty of confidentiality or non-disclosure *that may be owed to another client*. See *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP*, 689 N.E.2d 879, 883 (N.Y. 1997); *Glade v. Superior Ct.*, 76 Cal.App.3d 738, 746-47, 143 Cal.Rptr. 119 (Cal. App. 1978).

Moreover, "[o]ne co-client does not have the authority to waive the privilege with respect to another co-client's communications to their common lawyer." Restatement § 75, Comment e. As such, it follows logically that "[a] lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another." Restatement § 46, Comment c.

On this point, the Restatement further provides:

If two or more persons are jointly represented by the same lawyer in a matter, a communication of either co-client that otherwise qualifies as privileged under §§ 68-72 and relates to matters of common interest is privileged *as against third persons*, and any co-client may invoke the privilege, unless it has been waived by the client who made the communication.

Restatement § 75 (emphasis added).

You maintain that the privilege has been waived by virtue of Tower Homes' filing of the instant lawsuit. However, "the *mere institution of suit* against an attorney is insufficient to waive the attorney-client privilege as to third parties in a separate action that concerns the same subject matter as the attorney malpractice action." *Industrial Clearinghouse v. Browning Mfg.*, 953 F.2d 1004, 1007 (5th Cir. 1992) (emphasis in original).

In other words, Mr. Yanke has the right to invoke the attorney-client privilege as to documents that may end up in the hands of third persons. This privilege has not been waived by Mr. Yanke, or by Tower Homes for that matter. Accordingly, without any assurance that confidential information (e.g., the entire file) will not be provided to third-parties (e.g., the Purchasers), Defendants have a duty to maintain the confidentiality of their files.

The second, closely-related issue is our request for a standard confidentiality stipulation, which would limit access of the file to you (and your agents), and would provide that the documents can be used only in this case. You are curiously unwilling to enter into this stipulation. When I asked you why, the only basis you provided is "I don't want to."

Again, even as to Tower Homes (in addition to Mr. Yanke), Defendants have a duty to safeguard confidential information. *See* RPC 1.6(a), 1.9(c); Restatement, *supra*, §§ 59, 60, 63 and 70; *Sage Realty, supra*, 689 N.E.2d at 883; *Glade, supra*, 76 Cal.App.3d at 746-47. A client's mere filing of a legal malpractice lawsuit does not waive the confidential or privileged nature of the attorney's file as to adverse parties. *See Industrial Clearinghouse, supra*, 953 F.2d at 1007-1008.

Given the unique posture of this case, Defendants are simply requesting a reasonable assurance that their files will not be provided to adverse parties, such as the Purchasers. If you are in fact representing the interests of Tower Homes (as required by your duties under the law), then it is unclear why you would not agree to a stipulation that allows you to have access to the files, while at the same time protecting the files from adverse third-parties.

Finally, there are additional portions of the files that are privileged in this litigation. We discussed one example - the communications between Mr. Yanke and his personal injury attorneys. Other examples include Defendants' communications with other joint clients, as well as documents intended only for internal review by the firm. *See* Restatement § 46 and comments. We have agreed to provide a privilege log with respect to these non-discoverable materials.

The primary dispute, however, is your unwillingness to agree to protect the confidentiality of Defendants' files relating to the representation of Tower Homes and Mr. Yanke. Typically, former clients who sue their attorneys for malpractice readily agree to a confidentiality stipulation. While clients certainly have presumptive access to their files (again, subject to some exceptions) for their own use in a malpractice case, they generally don't want the files open to the world, and are willing to take reasonable measures to protect the files from disclosure, especially as to potentially adverse third-parties.

If you are not amenable to our proposed confidentiality stipulation, please provide us with authority establishing that Defendants have no duty to protect confidential and privileged client information from third-parties who may seek to use this information in an adverse manner. Absent any such authority, we will proceed with our motion for protective order.

Dennis M. Prince
December 27, 2013
Page 6

Again, we remain amenable to avoiding the time and expense of motion proceedings if you will merely stipulate to protect the confidentiality of the files. I will make myself available if you would like to further discuss these issues.

Sincerely,

Jeff Olster

Jeffrey D. Olster of
LEWIS BRISBOIS BISGAARD & SMITH LLP

cc: V. Andrew Cass (via e-mail)
William Heaton (via e-mail)

EXHIBIT "C"

ORIGINAL

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CLERK OF THE COURT

ANAC
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Nevada Bar No. 1097
JAMES A. FONTANO
Nevada Bar No. 8456
NITZ, WALTON & HEATON, LTD.
601 S. Tenth Street, Suite 201
Las Vegas, Nevada 89101
Telephone: (702) 474-4004
Attorneys for Defendant Rodney C. Yanke

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ALLISON GAYNOR, an individual;
BARBARA CHANDLER, individually and as
TRUSTEE OF THE SARALEE M. BOWERS
TRUST; MELVA NEVADA BROWN, an
individual; RICHARD GOODALL, an
individual; HAROLD & CAROL HERZLICH,
individuals; ROBERT EMBLETON, an
individual; DAHN MIDORA, an individual;
ARTHUR WILLIAMS, an individual;
LARRY & JUDY SHIFFMAN, individuals;
EDWIN & GAIL EDEJER, individuals;
JUDGE ANGEL COOLEY, an individual;
DEBRA JONES, an individual; and ABE
SIEMENS, an individual,

Plaintiffs,

vs.

TOWER HOMES, LLC., a Nevada limited
liability company; RODNEY C. YANKE, an
individual; AMERICANA LLC dba
AMERICANA GROUP, a Nevada limited
liability company; MARK L. STARK, an
individual in his capacity as a broker;
JEANNINE CUTTER, an individual in her
capacity as an agent; DAVID BERG, an
individual in his capacity as an agent; DOE
REAL ESTATE AGENTS I through X,
individually, DOE REAL ESTATE
BROKERS I through X, individually, ROE
REAL ESTATE CORPORATIONS I through
X, inclusive,

Defendants.

CASE NO.: A-541668
DEPT. NO.: XI

DEFENDANT RODNEY C. YANKE'S
ANSWER TO PLAINTIFFS' FIRST
AMENDED COMPLAINT

LAW OFFICES
NITZ, WALTON & HEATON, LTD.
601 SOUTH TENTH STREET, SUITE 201
LAS VEGAS, NEVADA 89101
TELEPHONE: (702) 474-4004
TELEFAX: (702) 387-7897

RECEIVED
NOV 6 2007
CLERK OF THE COURT

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**DEFENDANT RODNEY C. YANKE'S ANSWER
TO PLAINTIFFS' FIRST AMENDED COMPLAINT**

Comes now Defendant, RODNEY C. YANKE ("Yanke"), by and through his attorneys of record, William H. Heaton and James A. Fontano of the law firm NITZ, WALTON & HEATON, LTD., and in answer to the claims and causes of action that are asserted in the First Amended Complaint filed by the above-named Plaintiffs on or about October 24, 2007 ("Plaintiffs' First Amended Complaint"), admits, denies and alleges as follows:

1. Answering the allegations in Paragraph 1 in the Jurisdiction and Venue section in Plaintiffs' First Amended Complaint, Yanke admits that the Eighth Judicial District Court has jurisdiction to hear claims and causes of action that have been asserted by Plaintiffs, but denies each and every other allegation in said Paragraph 1.

2. Answering the allegations in Paragraph 2 in the Jurisdiction and Venue section in Plaintiffs' First Amended Complaint, Yanke admits that the Eighth Judicial District Court has personal jurisdiction over Yanke for purposes of the above-captioned litigation, but denies each and every other allegation in said Paragraph 2, including all discreet subparts.

3. Yanke admits the allegations in Paragraph 3 in the Jurisdiction and Venue section in Plaintiffs' First Amended Complaint.

4. Yanke denies the allegations in Paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25 and 26 in the Parties section in Plaintiffs' First Amended Complaint upon grounds that Yanke is without sufficient knowledge and/or information upon which to form a belief as to the truth or falsity of the allegations in those paragraphs.

5. Yanke admits the allegations in Paragraphs 19 and 20 in the Parties section in Plaintiffs' First Amended Complaint.

6. Yanke admits the allegations in Paragraph 27 in the General Factual Allegations section in Plaintiffs' First Amended Complaint.

7. Answering the allegations in Paragraph 28 in the General Factual Allegations section in Plaintiffs' First Amended Complaint, Yanke admits that the Spanish View Project includes three

1 IN THE SUPREME COURT OF THE STATE OF NEVADA

2 TOWER HOMES, LLC, A Nevada
3 Limited Liability Company,

4 Appellant,

5 vs.
6

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

9 Respondents,
10

Supreme Court No. 65755

Electronically Filed
Mar 18 2015 01:18 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

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13 **RESPONDENTS' APPENDIX**
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15

16
17 V. Andrew Cass
18 Nevada Bar No. 005246
19 Jeffrey D. Olster
20 Nevada Bar No. 008864
21 Lewis Brisbois Bisgaard & Smith LLP
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NITZ, WALTON & HEATON, LTD. and
WILLIAM H. HEATON
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CERTIFICATE OF SERVICE

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

Dennis Prince
Eric Tran
Prince Keating
9130 West Russell Road, Suite 200
Las Vegas, Nevada 89148
Attorneys for Appellant
Tower Homes, LLC

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