IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPELLANT TOWER HOMES, LLC'S REPLY BRIEF

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I. INTRODUCTION

The analysis of this case must be viewed in light of the purpose of a bankruptcy proceeding: to allow for the greatest recovery to creditors. In this case, Chapter 11 bankruptcy proceedings were initiated against Appellant Tower Homes, LLC ("Tower Homes"). *2 AA 333:10-13*. Among Tower Homes' creditors were the individual Tower Homes Purchasers ("Purchasers"). *2 AA 332:27-333:3.* The Bankruptcy Court issued an "Order Approving Disclosure Statement and Confirming Plan of Reorganization" (the "Confirmation Order"). *2 AA 306*. The main purpose of the Confirmation Order was to provide solutions for the satisfaction of creditors' claims and payment on account of the same. *2 AA 323:7-14*. **The Confirmation Order was also designed to allow for greater recovery by creditors**. *2 AA 323:24-324:11*. Thus, the Second Marquis Aurbach Order from the Bankruptcy Court was entered in order to allow Tower Homes to pursue its claims against Respondents William H. Heaton and Nitz Walton & Heaton, Ltd. (collectively "NWH") so that it can recover damages owed to it and ultimately satisfy the Bankruptcy Estate's creditor, the Purchasers. The Bankruptcy Court and Trustee validly authorized Tower Homes to initiate the underlying lawsuit. Thus, Tower Homes has standing in the underlying lawsuit and the District Court erred in granting NWH's Motion for Summary Judgment.

NWH argues that the Second Marquis Aurbach Order is an improper

assignment of a legal malpractice claim and, therefore, Tower Homes does not have standing to pursue NWH. In reality, this case is a direct legal malpractice case by a client – not its creditor – against its former law firm. It is a proper case that was fully authorized by the Bankruptcy Court. The Second Marquis Aurbach Order specifically authorized the underlying action by exact name and exact case number. *4 AA 595:7-14*. As part of the resolution of the bankruptcy proceedings, the Bankruptcy Court allowed the Tower Homes Purchasers to pursue this claim on behalf of Tower Homes with the proceeds going to the Purchasers. That is part of the inherent power of the Bankruptcy Court and the Trustee.

At its core, NWH's Answering Brief is asking this Court to find that a law firm that is alleged to have committed malpractice should be allowed to avoid liability when the former client asserting the malpractice claim has entered into bankruptcy because any proceeds from the legal malpractice suit would go to a creditor of the bankrupt former client rather than the client. In other words, the fortuity of the client entering into bankruptcy should provide the law firm with a shield against liability. This interpretation of the law is absurd and should be rejected.

II. STANDARD OF REVIEW

On appeal, this Court reviews orders of summary judgment de novo and considers the record in the light most favorable to the non-prevailing party.

Auckenthaler v. Grundmeyer, 110 Nev. 682, 684, 877 P.2d 1039, 1040 (1994). Summary judgment is appropriate when the record, viewed in the light most favorable to the non-moving party, indicates there is no genuine issue of material fact and the party is entitled to judgment as a matter of law. NRCP 56(c); see Butler v. Bogdanovich, 101 Nev. 449, 451, 705 P.2d 662, 663 (1985). If a reasonable jury could find for the non-moving party, summary judgment is inappropriate. Oehler v. Humana, Inc., 105 Nev. 348, 350, 775 P.2d 1271, 1272 (1989). Upon de novo review, this Court must find that summary judgment in favor of NWH should not have been granted.

III. SUMMARY OF LEGAL ARGUMENT

NWH's argument boils down to two fundamental assertions: (1) the Purchasers are the real parties in interest in this action and, therefore, (2) the Purchasers are pursuing an assigned legal malpractice claim in contravention of Nevada law. NWH's entire argument fails because the Purchasers are not – and simply cannot be – the real parties in interest because they have no right to enforce any claims against NWH. Additionally, even if this Court finds that the Purchasers are the real parties in interest, they are not asserting an assigned malpractice claim.

This is a direct action by Tower Homes; there has been no assignment. The Trustee, as approved by the Bankruptcy Court, authorized Tower Homes to make the claim directly on its own behalf with proceeds to go to the Purchasers. Notably,

the flaw in NWH's argument is that it is heavily based on public policy concerns that are not present in this case. Because Tower Homes is pursuing this case directly, there is no risk of strangers to the attorney-client relationship commercializing legal malpractice claims. NWH is not defending itself against an unknown party. This is simply a direct malpractice claim by a client against its former attorney. The District Court erred and its Order Granting Summary Judgment should be reversed.

IV. LEGAL ARGUMENT

NWH's Answering Brief's first flaw is that it mistakenly argues that the Purchasers are the real parties in interest, not Tower Homes. In reality, it is impossible for the Purchasers to be the real party in interest in this case because they have no basis upon which to ever assert a malpractice claim against NWH. Therefore, Tower Homes, not the Purchasers, is the real party in interest in this case.

A. TOWER HOMES, LLC IS THE REAL PARTY IN INTEREST

Tower Homes is the party that has been damaged by NWH's malpractice. Thus, Tower Homes is the party suing NWH to recover monetary damages. A "real party in interest" under NRCP 17(a) is one who possesses the right to enforce the claim and has a significant interest in the litigation. Szilagyi v. Testa, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983). Here, the only party who possesses a right to pursue a claim against NWH is Tower Homes because it is the only party with an attorney-client relationship with NWH.

Under Nevada law, in order for a plaintiff to assert a cause of action for legal malpractice, a plaintiff must prove that an attorney-client relationship exists. Day v. Zubel, 112 Nev. 972, 976, 922 P.2d 536, 538 (1996) (emphasis added). An attorney-client relationship exists when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. Todd v. State, 113 Nev. 18, 24, 931 P.2d 721, 725 (1997).

Here, the Purchasers did not seek any legal advice from NWH nor did NWH agree to give or actually give any advice or assistance to the Purchasers. Thus, there was no attorney-client relationship between the Purchasers and NWH. Without an attorney client relationship, the Purchasers could not assert a legal malpractice claim against NWH. Thus, the Purchasers had no rights to enforce against NWH and could not possibly be the real party in interest in the underlying action.

Moreover, as NWH acknowledges in its Answering Brief, the purpose of the real party in interest rule is "to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party of interest on the same matter." Answering Brief, at 13:9-13 (citing Painter v. Anderson, 96 Nev. 941, 943, 620 P.2d 1254 (1980)). Here, the evidence

against NWH pertaining to its alleged malpractice would come from the client, Tower Homes, not the Purchasers. Similarly, NWH would defend itself against the claims that it damaged Tower Homes, not the Tower Homes Purchasers. Clearly, the interests being litigated in the underlying suit are those of the law firm and the client. The Purchasers are completely foreign to the relationship between Tower Homes and NWH and, thus, the Purchasers are not the real party in interest.

B. THIS CASE IS A DIRECT ACTION, NOT AN ASSIGNED ACTION. THERE WAS NO ASSIGNMENT OF A LEGAL MALPRACTICE CLAIM

NWH argues that, as the real party in interest, the Purchasers are actually creditors attempting to pursue a legal malpractice claim through an improper assignment of a legal malpractice claim. See generally Answering Brief, at pp.16-26. NWH argues that the Second Marquis Aurbach Order is simply a "deftly worded stipulation" that is, in reality, an assignment of a legal malpractice claim. They argue that it is an assignment of a claim disguised as a "release" of a claim.

1. The Second Marquis Aurbach Order is Not an Assignment of a Legal Malpractice Claim

NWH's argument is based on a gross mischaracterization of the Second Marquis Aurbach Order. By focusing on this argument and by presenting numerous pages of analysis as to whether or not the assignment was proper, NWH appears to be attempting to distract this Court from one simple fact: there was no assignment. The Second Marquis Aurbach Order does not assign the legal malpractice claim to

the Purchasers. Rather, the Order is very specific and only assigns the proceeds of the legal malpractice action to the Purchasers. The claim itself always remained with Tower Homes. In other words, this is simply not a case about an improper assignment of a malpractice claim.

Under the plain language of the Second Marquis Order, there was no assignment of any kind, either express or implied. The Second Marquis Aurbach Order stated in pertinent part:

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

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

As emphasized above, the Second Marquis Aurbach Order specifically permitted Tower Homes to bring *this* current lawsuit against Defendants – it referred to this very lawsuit by name and case number. Thus, the Trustee permitted Tower Homes to bring forth a legal malpractice action against NWH on behalf of itself.

The Second Marquis Aurbach Order further stated:

> **IT IS FURTHER ORDERED ADJUDGED AND DECREED** that this Court hereby authorizes the law firm of Marquis

> Aurbach Coffing, and/ or Prince & Keating, or successive counsel, retained on behalf of Tower Homes Purchasers to recover any and all earnest money deposits, damages, attorney's fees and costs, and interest **thereon on behalf of [Tower Homes] and the Tower Homes Purchasers and that any such recoveries shall be for the benefit of the Tower Homes Purchasers**.

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

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

a. The Baum and Curtis Cases Relied on by NWH are Inapplicable Here Because there was No Assignment of a Malpractice Claim in this Case

NWH concedes that "no court in Nevada has confronted this precise situation." However, in support of its argument, NWH cites to California cases that are distinguishable from this case, Baum and Curtis. These cases are not persuasive authority here due to one striking difference: this case does not involve an assignment of a malpractice claim to a creditor.

In Baum v. Duckor, Spradling & Metzger, 72 Cal. App. 4th 54, 84 Cal.Rptr.2d 703 (Cal. App. 1999), a creditor of two bankrupt corporations sought to bring a malpractice claim against the corporations' attorneys. The creditor had acquired the legal malpractice cause of action from the bankruptcy trustee **through an assignment**, and the bankruptcy court had approved the assignment. The California Court of Appeal found that the legal malpractice claim belonged to the bankruptcy estate of the corporation and was not assignable as such assignments are against public policy.

In Curtis v. Kellogg & Andelson, 73 Cal. App. 4th 492, 86 Cal.Rptr.2d 536 (Cal. App. 1999), an individual who had **purchased** the assets of a corporation that was in bankruptcy (including the corporation's "causes of action") brought a legal malpractice claim against the corporations attorneys. The bankruptcy court had entered an order purporting to authorize the individual to bring the malpractice claim in the name of the debtor. The Curtis court ruled that the legal malpractice claims were not assignable and that neither the individual nor the corporation had standing to bring the claims.

Here, this case is easily distinguishable from both Baum and Curtis due to the simple fact that there was no assignment in this case. Unlike in Baum, the Trustee here did not assign the legal malpractice claim, it only assigned the proceeds. Unlike in Curtis, Tower Homes did not purchase the claim from the Trustee. Thus, all of

the public policy reasons for barring the assignment of a legal malpractice claim do not come into play in this case. As the California Court of Appeal articulated in the Goodley, legal malpractice claims generally cannot be assigned because:

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

Goodley v. Wank & Wank, Inc., 62 Cal. App. 3d 389, 397, 133 Cal. Rptr. 83, 87 (Ct. App. 1976)

Absolutely none of the concerns described by the Goodley court are present in this case. Tower Homes *is* the party that had the personal confidential relationship

with NWH; Tower Homes was the party that received the unique legal services. Thus, NWH is not defending itself against its former client, not a stranger. Moreover, Tower Homes did not obtain the claim from some sort of marketplace for malpractice claims – there was no bidding war for this claim. Rather, Tower Homes was the bankrupt client and the Trustee, as was within its power, authorized Tower Homes to pursue its own claim against NWH so that the proceeds of the claim can resolve Tower Homes' debt to the Purchasers. The reason that none of the public policy concerns are present is clear: there was no assignment of the malpractice claim. Thus, the fact that there was no assignment or purchase of the claim in this case makes this case drastically different from Baum and Curtis.

2. The Second Marquis Aurbach Order was a Proper Assignment of Proceeds, not an Assignment of a Claim

By continuously mischaracterizing the Second Marquis Aurbach Order as an assignment of the malpractice claim, NWH either ignores or overlooks the fact that an assignment of *proceeds* to a claim is *permissible* under established Nevada law.

a. Achrem v. Expressway Plaza Allows For Assignment of Proceeds In a Lawsuit to a Third Party.

This Court has already ruled that assignment of proceeds in a litigation is permitted. Achrem v. Expressway Plaza Ltd. Partnership, 112 Nev. 738, 917 P.2d 447 (1996). In Achrem, this Court has recognized that "some states draw a distinction between the assignment of an action itself and the assignment of the

proceeds of that action." Id. at 740, 917 P.2d at 448 (citation omitted). Further, the policy considerations underlying the prohibition against assignments of tort actions are not present in the assignment of the proceeds of an action. Id. Specifically, when a tort action is assigned, the assignor loses the right to pursue the action. Id. (citing In re Musser, 24 B.R. 913, 920–21 (W.D.Va.1982)). However, when the proceeds of an action are assigned, the assignor retains control of the action, and the assignee cannot pursue the action independently. Id. Based on this reasoning, this Court in Achrem recognized that many courts allow assignment agreements that assign the proceeds of a tort action. Id. (citing In re Duty, 78 B.R. 111, 114–16 (Bankr.E.D.Va.1987); Bernstein v. Allstate Ins. Co., 56 Misc.2d 341, 288 N.Y.S.2d 646, 648–49 (New York 1968); Neilson Rlty. Corp. v. Motor Vehicle Acc. Indem. Corp., 47 Misc.2d 260, 262 N.Y.S.2d 652, 657–58 (App.Div.1965).

Here, the Second Marquis Aurbach Order permits Tower Homes to pursue its malpractice claim against NWH but requires that any recovery from the case go to the Purchasers. Just as in Achrem, Tower Homes retains control of the lawsuit against NWH without any interference from any third party. Thus, there is no public policy reason against allowing the proceeds to be assigned to the Purchasers in this case. Tower Homes is in full control of the case and, therefore, Tower Homes has standing to pursue the underlying action.

C. THIS DIRECT ACTION WAS VALIDLY AUTHORIZED BY THE BANKRUPTCY COURT

Moreover, the underlying action here is part of an approved bankruptcy plan. The Second Marquis Aurbach Order was approved by the Trustee and the Bankruptcy Court. The Trustee had the inherent power to decide how to resolve the claims of the creditors. In so doing, the Trustee authorized Tower Homes to try to attempt to recover from an asset in the bankruptcy estate, its claim against NWH.

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

In this case, the Second Marques Aurbach Order, (consistent with the Trustee's inherent powers in Chapter 11 bankruptcy), shows that the Trustee was permitting Tower Homes (Debtor) to pursue the legal malpractice action against Heaton and NWH on behalf of the estate (i.e. Tower Homes). *4 AA 595:7-14*. The Trustee elected not to put the estate's assets at risk and elected not to spend the money on a malpractice claim, but as it was authorized to do, the Trustee elected to

resolve a creditors claims by allowing Tower Homes to pursue NWH and determined that the proceeds of any lawsuit would go to the Purchasers. There was no assignment of the legal malpractice claim to the Purchasers. The Trustee, as part of the bankruptcy plan, chose to resolve the Purchasers' claim by authorizing Tower Homes to attempt to recover from NWH.

D. EVEN IF THIS COURT FINDS THAT THERE WAS AN ASSIGNMENT OF A MALPRACTICE CLAIM, DISMISSAL WAS IMPROPER.

NWH's Answering Brief ignores one very important portion of Tower Homes' Opening Brief, the argument that even if this Court finds that there was an improper assignment of a legal malpractice claims, the case should not have been dismissed[1]. It is undisputed that regardless of who prosecutes a claim under 11 United States Code section 1123(b)(3), the claim remains part of the bankruptcy estate. See Office of Statewide Health Planning and Development, 76 Cal.App.4th at 834, 90 Cal.Rptr.2d at 708. Further, even if there was an improper assignment, then the assignment is void but the underlying action survives. Weston v. Dowty, 163 Mich. App. 238, 414 N.W.2d 165 (1987). In other words, even if this Court finds that there was an improper assignment of a malpractice claim, it was improper for the District Court to completely dismiss the case. Rather, under the District Court should have allowed the case to go forward and any recovery by Tower Homes

[1] Rather than address the merits of this argument, NWH only argues that this a new argument that this Court should just ignore. Answering Brief, at 34.

would have reverted back to the bankruptcy estate. Any other ruling would result in a severe injustice and an absolute windfall in favor of the alleged tortfeasor, NWH, because NWH would be allowed to completely escape liability due to Tower Homes' bankruptcy.

E. THE FACT THAT THE PROCEEDS OF THE ACTION WOULD GO TO THE PURCHASERS DOES NOT AFFECT TOWER HOMES' STANDING

NWH also argues that this case should have been dismissed because the main beneficiary of the case would be the Purchasers, not the Bankruptcy Estate. The fact that the Purchasers are going to receive the proceeds of the action, if any, should have no practical effect on whether or not the case can proceed. The issue of who receives any proceeds is of no consequence to NWH and has no bearing on the case.

To illustrate: the Trustee could have brought the malpractice action against NWH. If the Trustee was successful, the proceeds of the recovery would have been for the Bankruptcy Estate. However, pursuant to the Confirmation Plan, the assets of the Bankruptcy Estate would have ultimately been used to pay creditors' claims. *2 AA 323:7-14; 2 AA 323:24-324:11*. The Purchasers were one such creditor. *2 AA 332:27-333:3*. Thus, whether the Second Marquis Aurbach Order existed or not, the proceeds of the malpractice claim would have been for the benefit of the estate because it would have been used to pay the estate's creditors.

Thus, irrespective of whether the Trustee or Tower Homes is bringing a legal malpractice action on behalf of Tower Homes, under both scenarios, the Tower

Homes Purchasers as Creditors, will always be beneficiaries of any recovery.

F. JUSTICE REQUIRES THAT THIS COURT REVERSE THE DISTRICT COURT'S ORDER GRANTING NWH'S MOTION FOR SUMMARY JUDGMENT

NWH acknowledges that this Court has not yet decided a case with these unique set of facts. That is the exact reason why this Court should not simply liken this case to cases like Baum, Curtis, and Chaffee. Doing so would lead to an unjust result. In this case, the Trustee stated that he does not have the funds to pursue a legal malpractice action on behalf of Tower Homes. Thus, if this Court were to impose a rule that only the Trustee can bring forth this legal malpractice action, then this will result in absurd scenario in which a tortfeasor will not have to even defend the merits of a case. NWH will be allowed to escape not only liability, but the entire litigation process despite Tower Homes' valid claim for legal malpractice. Rather, this Court should look to the purpose of the bankruptcy proceedings and find that the Trustee and Bankruptcy Court properly authorized this case.

V. CONCLUSION

Tower Homes is the real party in interest as Tower Homes is the only party with the attorney client relationship with Defendants. The mere fact that there has been an assignment of proceeds of the legal malpractice action to the Tower Homes Purchasers is immaterial to the issue of whether Tower Homes is the real party in interest with standing to pursue this legal malpractice action. An assignment of

proceeds in a tort action is permitted under Nevada law. In fact, whether this legal malpractice action is brought by the Trustee or Tower Homes, pursuant to the Confirmation Order, the Tower Homes Purchasers, as Creditors of the Bankruptcy Estate will always benefit from any legal malpractice action against Defendants.

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

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

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

Respectfully submitted this 26th day of June, 2015.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the type face requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), at 4,310 words, it does not exceed 7,000 words.

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

Respectfully submitted this 26th day of June, 2015.

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