Case No. 71759

IN THE SUPREME COURT OF THE STATE OF NEVADA

X'ZAVION HAWKINS, an Individual,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, THE HONORABLE Joanna Kishner, DISTRICT JUDGE,

Respondent,

-and-

GGP MEADOWS MALL, a Delaware Limited Liability Company; MYDATT SERVICES, INC. D/B/A VALOR SECURITY SERVICES, an Ohio Corporation; and MARK WARNER, an Individual.

Real Parties in Interest.

District Court Case No. A-15-717577-C

PETITIONER'S REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY WRIT RELIEF

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I. THE ENTIRETY OF THE OCTOBER 18, 2016, ORDER SHOULD BE STRICKEN.

Petitioner's Writ Petition revolves around the prejudice caused to Petitioner by the work performed by the conflicted law firm of Lewis Brisbois Bisgaard & Smith ("LBBS").[1] 1) LBBS knew it had an actual conflict with Petitioner even before it accepted the assignment to defend Real Parties Real Parties Mydatt Services, Inc. d/b/a Valor Security Services ("Mydatt") and Mark Warner ("Warner");[2] 2) LBBS never took any action to give notice to Petitioner of the very real conflict;[3] 3) All of the work LBBS performed in this matter was directly adverse to Petitioner; 4) LBBS brought the motion to dismiss against Petitioner;[4] 5) the October 18, 2016, order that forms the basis of the Writ Petition revolves around LBBS' motion to dismiss against Petitioner;[5] and 6) Allowing LBBS' work to stand against Petitioner would wrongfully benefit Real Parties Mydatt and Warner to the prejudice of Petitioner.

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[1] *See* Doc., No. 16-71759, Petition for Extraordinary Writ Relief, Nov. 22, 2016 ["Writ Petition"].)

[2] *See,* 3PA, Ex. 19 at 581:4-18.

Hereinafter, citations to Petitioner's Appendix will immediately be preceded by the volume number, followed by an Exhibit number, followed by a pincite to the Appendix pagination (e.g., "2PA, Ex. 14, at 198").

[3] 4PA, Ex. 25 at 826:20-22; 827:1-3, 10-21; 828:1-9, 15-18; 3PA, Ex. 19 at 581:4-18.

[4] *See generally*, 1PA, Ex. 11.

[5] *See* Doc., No. 16-71759, Petition for Extraordinary Writ Relief, Nov. 22, 2016 ["Writ Petition"].)

Real Parties' Answer goes to great length to outline the basis of the motion to dismiss.[6] What Real Parties fail to acknowledge is that the motion to dismiss and its ensuing October 18, 2016, order are founded on the adverse work performed by LBBS.[7] This was not a case where LBBS' conflict arose from an unrelated matter. LBBS actively worked against Petitioner while knowing an actual conflict existed relating to this very matter.

The order relating to the motion to dismiss was entered on October 17, 2016.[8] The notice of entry of order was entered on October 18, 2016.[9] While different issues are presented in Petitioner's Writ Petition, the entirety of Petitioner's Writ Petition is based upon the October 18, 2016, order.[10] At the time LBBS performed the underlying work it was fully aware that it had a direct conflict with Petitioner and it knew it was acting against Petitioner whom was never notified of the very real conflict.[11] Josh Cole Aicklen, Esq. of LBBS stated in his affidavit opposing Petitioner's motion to disqualify LBBS that he was aware of the conflict between LBBS and Petitioner even before he accepted the assignment to defend Real Parties

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6 *See* Doc., No. 16-71759, Respondents/Real Parties in Interest's Answer to Petition for Extraordinary Writ Relief, Jan. 24, 2017 [Answer to Petition] at pp. 2-13.

7 *See* generally, 2PA, Ex. 11; 4PA, Ex. 35.

8 *See* 4PA, Ex. 34.

9 4PA, Ex. 35.

10 *See generally*, Writ Petition, Nov. 22, 2016.

11 4PA, Ex. 25 at 826:20-22; 827:1-3, 10-21; 828:1-9, 15-18; 3PA, Ex. 19 at 581:4-18.

Mydatt and Warner.[12] Yet, neither he nor anyone at LBBS did anything to give notice to Petitioner of the very real conflict.[13] Instead, LBBS accepted the assignment to defend Real Parties Mydatt and Warner, kept quiet about the conflict and actively set to work against Petitioner.

A. LBBS' Direct Violation of Petitioner's Attorney-Client Privilege and Improper Use of Confidential Information Wrongfully Benefitted Mydatt and Warner Via the Motion to Dismiss and the Subsequent Order of October 18, 2016.

The directly adverse work LBBS performed against Petitioner violates public policy holding the attorney-client privilege inviolate in all but a small number of instances. While knowing LBBS had a direct conflict with Petitioner that was unbeknownst to Petitioner, Mr. Aicklen of LBBS took Petitioner's deposition.[14] While knowing LBBS had a direct conflict with Petitioner that was unbeknownst to Petitioner, LBBS filed the motion to dismiss Petitioner's complaint in favor of Real Parties Mydatt and Warner.[15] Later, during open court Mr. Aicklen essentially told the district court that he was privy to Petitioner's state of mind at the time of his

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12 3PA, Ex. 19 at 581:4-18.
13 4PA, Ex. 25 at 826: 20-22; 827:1-3, 10-21; 828:1-9, 15-18.
14 1PA, Ex. 11 at 118-132.
15 *See generally,* 1PA, Ex. 11.

deposition when during the evidentiary hearing on May 3, 2016, Mr. Aicklen argued against Petitioner as follows:

> . . .We find this out and I take his deposition and based upon his written discovery responses, **I think he's going to lie to me**. And, based on 26 years of practicing law, **I think he's going to lie in his depo**, but I had no idea how much he was going to lie. Other than his name, I don't believe the man spoke the truth throughout the entire time of his reported deposition.[16]

Mr. Aicklen was very passionate against Petitioner and did not accurately reflect the entirety of the facts on at least one occasion during the hearing as follows:

> And I apologize. That is a mistake. He did not identify anybody in the first one. In the second one, he did, and I apologize. I was wrong. First one, he did not. Second one, he did.[17]

What Mr. Aicklen did not say during the evidentiary hearing was that he knew there was an ongoing conflict between LBBS and Petitioner. What Mr. Aicklen did not say during the hearing was that he knew he and LBBS were actively working against Petitioner to the benefit of Real Parties Mydatt and Warner. LBBS actively chose to violate Petitioner's almost inviolate attorney-client privilege. LBBS never gave Petitioner the opportunity to decide if it was proper for LBBS to actively work against him to the benefit of Real Parties Mydatt and Warner. LBBS' decision to actively benefit Real Parties Mydatt and Warner to Petitioner's detriment formed the

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[16] 5PA, Ex. 37, at 994.
[17] 5PA, Ex. 37 at 994.

foundation of the work LBBS performed in this matter, including the motion to dismiss and the October 18, 2016, order based upon that work.

B. The Work LBBS Performed Against Petitioner Should Not Be Allowed to Stand Against Him to the Benefit of the Real Parties.

Mr. Aicklen's argument to the court on May 3, 2016, suggests he had inside knowledge as to the workings of Petitioner's mind.[18] NRPC 1.6 governs the confidentiality of information known by an attorney. Specifically, NRPC 1.6(a) states as follows:

> (a) 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).

Mr. Aicklen's affidavit admits he knew of the very real conflict between LBBS and Petitioner before he accepted the assignment to defend Mydatt and Warner against Petitioner.[19] Knowing of the conflict, LBBS went ahead and accepted the defense of Real Parties Mydatt and Warner against Petitioner. At no time did LBBS make any effort to advise Petitioner of the conflict.[20] Mr. Aicklen's affidavit was silent about having any right to reveal any confidential information relating to Petitioner. Mr. Aicklen's possession of confidential information was not rightfully

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[18] *Id.*
[19] 3PA, Ex. 19 at 581:4-11.
[20] 4PA, Ex. 25 at 826: 20-22; 827:1-3, 10-21; 828:1-9, 15-18.

gained. The fact that LBBS had such information while Petitioner never consented to the dissemination of such information is improper.

LBBS owed a duty to Petitioner based upon Paul A. Shpirt, Esq.'s former representation of Petitioner. Given that LBBS knew it had a conflict with Petitioner before it accepted the assignment to defend Real Parties Mydatt and Warner, LBBS chose to put Real Parties Mydatt and Warner's interest ahead of Petitioner's interests. The very intent of NRPC 1.9 and 1.10 is to prevent attorneys and law firms from benefitting and prejudicing clients who are more or less favored on a given case. Now, based on the October 18, 2016, order, Petitioner's complaint is in jeopardy of being dismissed.[21]

LBBS' actions in this matter are akin to an attorney obtaining information by wrongfully communicating with a party who is represented by counsel. NRPC 4.2 provides as follows:

> **Rule 4.2 Communication With Person Represented by Counsel.** In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

When an attorney violates NRPC 4.2 by wrongfully obtaining information from a represented party, sanctions may be to exclude the information obtained by the

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[21] *See generally*, 4PA, Ex. 36.

ex parte contact and/or to prohibit use of the information at trial.[22] While Petitioner's attorney client privilege and right to confidential communication with Mr. Shpirt has been violated, no remedy relating to the adverse work performed by LBBS has been afforded him. LBBS' actions of favoring Real Parties Mydatt and Warner to the prejudice of Petitioner are so egregious as to possibly lead to the dismissal of his complaint.[23] Yet, other than the fact that LBBS is no longer actively working against Petitioner, the adverse work it performed against Petitioner remains to prejudice him to the benefit of Real Parties Mydatt and Warner.

All work performed by LBBS which is done knowingly adverse to Petitioner should be stricken as a matter of public policy. Clearly, public trust demands that the attorney-client privilege remain inviolate. And, the public trust of the profession is shaken when Mr. Shpirt personally undertook to represent Petitioner for several months, becomes a partner in the firm that is adverse to Petitioner and fails to inform Petitioner of the conflict. While disqualification is proper, the remedy also demands striking all of the work performed done by LBBS while the conflict persisted. To hold otherwise, would encourage attorneys to be unscrupulous and reward their unethical behavior.

Granted, our courts have an interest in ascertaining the truth. However, courts have also recognized striking improperly obtained information is a proper remedy

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[22] *Palmer v. Pioneer Inn Assoc., Ltd.* 59 P.3d 1237, 1240 (Nev. 2002).

which does not conflict with the quest for ascertaining the truth. For example, in *Cooke v. Superior Court,* [24] California Second District Court of Appeals was faced with a similar situation. There, in a divorce proceeding, the husband, Mr. Cooke, was accused of hiding marital assets contrary to Mrs. Cooke's interests.[25] Mr. Cooke employed a butler who overheard Mr. Cooke's conversations with his attorney and copied a document allegedly regarding Mr. Cooke's business assets.[26] The butler then mailed a copy of the documents to Mrs. Cooke.[27] Mr. Cooke sought to have the documents stricken pursuant to the attorney client privilege.[28] The trial court struck the documents in question and prevented their use by Mrs. Cooke and her attorneys.[29] California's Second District Court of Appeals upheld the trial court's order with only slight modification.[30] The appellate court ordered the documents to be sealed and delivered to clerk of the court rather than returning the documents to Mr. Cooke.[31]

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23 *See generally,* 4PA, Ex. 36.)

24 147 Cal.Rptr. 915, 83 Cal.App.3d 582 (Cal. App. 2nd Dist. 1978)(Court stated, "As we have pointed out above, it is possible (albeit improbable) that the trial court may, at some future date in the course of the dissolution proceeding, permit access to and use of some of those documents.")

25 *Id.* at 919.

26 *Id.* at 917.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* at 919. Court stated, "As we have pointed out above, it is possible (albeit improbable) that the trial court may, at some future date in the course of the dissolution proceeding, permit access to and use of some of those documents."

Similarly, all work which was performed by LBBS should be stricken. The public trust of holding Petitioner's privileged communications inviolate demands a remedy beyond mere disqualification and beyond mere disgorgement of attorney fees. Real Parties must not be allowed to benefit from any work performed by the conflicted and disqualified law firm.

C. The Order of October 18, 2016, Ignores the Fact Petitioner Voluntarily Corrected his Deposition Testimony.

Contrary to any suggestion in the Answer to the Petition, Petitioner voluntarily produced an errata sheet clarifying his deposition testimony.[32] Petitioner told Defendants at the outset of his deposition that he takes a number of pain medications (morphine, hydrocodone, bacopin and gabapentin.)[33] He also testified that he probably would not be able to give his best testimony because "I forget sometimes."[34] Petitioner testified repeatedly that he did not know the answer to specific questions relating to the shooters.[35]

Petitioner was never compelled to clarify his deposition testimony. Real Parties never moved to compel Petitioner to participate in discovery, and Petitioner

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[32] 2PA, Ex. 14 at 335-338.
[33] 1PA, Ex. 11, at 119.
[34] *Id.*
[35] *Id., generally.*

never refused to do so. [36] Accordingly, it was proper for the district court to deny Real Parties' motion to dismiss Petitioner's complaint pursuant to NRCP 37, which relates to compelling disclosure or discovery. However, the entry of the October 18, 2016, order based upon the work performed by LBBS to the benefit of Real Parties Mydatt and Warner and the prejudice of Petitioner is improper, especially given that Petitioner is potentially facing dismissal of his complaint based upon the work performed by LBBS.[37]

D. The Order of October 18, 2016, Violates the Jury's Duty to Determine the Credibility or Believability of Witnesses.

Petitioner acknowledges that the judiciary always has an interest in credibility, and Petitioner satisfied his obligation to produce an errata to his deposition testimony without being compelled to do so. [38] Real Parties could certainly cross examine Petitioner at trial about the errata to his deposition testimony pursuant to NRS 50.115. The October 18, 2016, order removes the jury's duty to determine the credibility and/or believability of Petitioner.

The District Court's role is to determine the proper application of the law, not the weight of witness testimony. The District Court cannot invade the province of the jury to determine credibility while remaining impartial. The District Court

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[36] 4PA, Ex. 24 at 819.
[37] *See generally*, 4PA, Ex. 36.
[38] See generally, 2PA, Ex. 14 at 335-338.

specifically advises the jury regarding its impartiality in Nevada Jury Instruction No. 1.08 as follows:

> If, during this trial, I have said or done anything which has suggested to you that I am inclined to favor the claims or position of any party, you will not be influenced by any such suggestion.
> **I have not expressed, nor intended to express, nor have I intended to intimate, any opinion as to which witnesses are or are not worthy of belief,** what facts are or are not established, or what inferences should be drawn from the evidence. **If any expression of mine has seemed to indicate an opinon relating to any of these matters, I instruct you to disregard it.** [Emphasis added.]

The determination of whether Petitioner is or is not being honest, and the weight his testimony should be given is an issue that should be left for the jury. Any benefit from allowing the district court to craft a jury instruction relating to Petitioner's credibility would be "substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035. Neither the District Court nor counsel should be permitted to express an opinion concerning the credibility of parties per NRPC 3.4(e).[39] Allowing the District Court to craft a jury instruction relating to Petitioner's credibility would be contrary to Nev. J.I. 1.08 and would obviate Nev. J.I. 2.07. Stepping outside the bounds of determining the proper law to apply to the facts and assuming determining witness credibility would be appealable error.

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[39] *See also Lioce v. Cohen,* 124 Nev. 1, 174 P.3d 970 (2008).

II. REAL PARTIES CANNOT SUPPORT THE PROPOSITION THAT A CONFLICTED LAW FIRM MAY OR SHOULD BE AWARDED ATTORNEYS' FEES FROM THE AGGRIEVED PARTY.

First, Real Parties essentially argue the law firms are not seeking attorneys' fees from Petitioner because the law firms did not generate an invoice and forward it to Petitioner.[40] However, the sanction issued by the District Court does in fact require Petitioner to pay attorneys' fees to the law firms arising from work initiated and performed by the disqualified law firm of LBBS.[41] All law firms, including the disqualified firm of LBBS, provided a memorandum of attorneys' fees and costs that was attached to Real Parties' motion for attorneys' fees and costs against Petitioner.[42] Mr. Aicklen was the person who signed the memorandum for attorneys' fees and costs against Petitioner on behalf of LBBS.[43] Mr. Aicklen is also the person who stated in his affidavit in opposition to Petitioner's motion to disqualify that he knew there was a direct conflict with Petitioner when he was first assigned the defense of Real Parties Mydatt and Warner, even before he asked LBBS' office manager to perform a conflicts check.[44] Despite having this knowledge, neither Mr. Aicklen nor

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40 *See* Doc., Respondents/Real Parties in Interest's Answer to Petition for Extraordinary Writ Relief, filed January 24, 2017, at pp. 20-26 [Answer to Petition].

41 *See generally*, 4PA, Ex. 35.

42 4PA, Ex. 23 at pp. 721-814.

43 *Id.* at 721-749.

44 3PA, Ex. 19 at 581:4-18.

anyone at LBBS did anything to give notice to Petitioner of the conflict.[45] Instead, Mr. Aicklen and LBBS quietly and actively set to work against Petitioner.

Second, Real Parties argue that because the law firms that were awarded attorneys' fees against Petitioner are not suing Petitioner for the attorneys' fees, this matter is distinguishable from cases prohibiting disqualified law firms from receiving compensation during the period of the conflict.[46] The Real Parties' argument is form over substance when one considers the remedy that Real Parties are seeking against Petitioner. Hypothetically, if Real Parties were suing Petitioner for attorneys' fees and costs, they could receive a judgment which could then be enforced and/or potentially discharged in bankruptcy. Instead, for failure to pay the ordered attorneys' fees and costs, Real Parties are seeking one of the harshest remedies available, complete dismissal of Petitioner's underlying cause of action.[47]

Third, Real Parties argue there is case law allowing an award of attorney's fees to a conflicted law firm for work performed before the disqualification. This is simply inaccurate. Petitioner will specifically address the cases cited by Real Parties herein below.

At this time, there is no case law on point in Nevada specifically addressing the issue of whether it is unethical for a conflicted law firm to receive attorneys' fees

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[45] 4PA, Ex. 25 at 826: 20-22; 827:1-3, 10-21; 828:1-9, 15-18.
[46] *See* Answer to Petition at pp. 21-22.

from the aggrieved client. However, there is decades of case law in California prohibiting a conflicted attorney from receiving compensation. *See Goldstein v. Lees,* 120 Cal.Rptr. 253 (Cal. App. 1975)(holding conflicted attorney must be denied attorney's fees when the attorney possessed corporate secrets that were material); *Jeffry v. Pounds*, 136 Cal.Rptr. 373 (Cal. App. 1977)(holding that **attorney must be denied any fees for work performed after a conflict arose even though the representations involved unrelated matters**)[Emphasis Added.]. While the case is under review, California's Fourth Court of Appeals has even gone so far as to require **disgorgement** of attorneys fees by the conflicted attorney. *Sheppard Mullin Richter & Hampton LLP v. J-M Mfg. Co., Inc.,* 198 Cal.Rptr.3d 253 (Cal. App. 4th 2016)(holding that applying Cal. RPC 3-310 prohibiting attorney-client conflicts without written consent **requires disgorgement of attorneys' fees** by conflicted law firm consistent with the purpose of the statute even when the conflict relates to completely different matters)[Emphasis Added).

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[47] *See generally*, 4PA, Ex. 36.

A. Real Parties' Answering Brief is Silent About the Most Important Fact in the Case of *Weigel v. Shapiro*, which Makes the Case Totally Irrelevant.

Real Parties cite the Seventh Circuit Court of Appeals case of *Weigel v. Shapiro*[48] to support their claim that a trial court may order an aggrieved client to pay attorneys' fees to a conflicted law firm. This argument is not well founded because neither the underlying court nor the Seventh Circuit Court of Appeals ever addressed the disqualification of the law firm.[49] Rather, the Seventh Circuit Court of Appeals determined that "it is plain that the district court did not decide the merits of the question presented by the motion [to disqualify]."[50] Accordingly, there was no appealable decision for the Seventh Circuit Court of Appeals to consider.[51]

In *Weigel*, the underlying court denied the party's motion to disqualify counsel "without prejudice as moot" because the judge had already dismissed the original complaint.[52] The judge did not discuss any of the arguments advanced by the parties relating to the motion, and, thus, the appellate court determined the district court had not decided the motion on the merits.[53] The appellate court also reasoned that a decision on the merits "would have been required for the district court's decision to

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48 608 F.2d 268 (7th Cir., 1979).
49 *Id.* at 272.
50 *Id.* at 272.
51 *Id.* at 272.
52 *Id.*

be an appealable 'final decision' under 28 U.S.C. § 1291 . . . especially given the exceptional status of appeals from denials of disqualification motions."[54]

Because the underlying facts of *Weigel* are somewhat complicated, the appellate court addressed them as follows:

> Even assuming [the judge's] order was a final decision, plaintiff failed to take his appeal within the 30 days allowed by Rule 4 of the Rules of Appellate Procedure. As noted, plaintiff did not renew his disqualification motion after the trial court on November 6, 1978, granted him leave to amend his original complaint. Since the 30-day period runs from this November 6 order . . .his December 8 appeal was clearly too late to contest the October 2 order in which the denial of the disqualification motion appears. Nor is it tenable to argue, as plaintiff does in his reply brief, that the filing of the amended complaint automatically revived the disqualification motion and that the final judgment on that issue occurred only with the November 17, 1978, dismissal of the amended complaint. That argument is tantamount to asserting that although the disqualification motion was moot on October 2 when the district court explicitly denied it, yet it became final on November 17 when the court did not even mention it![55]
> Finally, the motion to disqualify is a live issue only if the cause of action itself survives. As a substantive matter, the motion depends on some adverse relationship between defendants and the Corporation, and the dismissal of each complaint eliminates any evidence of such a relationship. In simple procedural terms, moreover, the dismissal of the amended complaint would render any opinion on the merits of the disqualification motion merely advisory. Since we are affirming the district court's final judgment order dismissing this case, the motion to disqualify counsel remains moot at this time.[56]

Simply put, the Seventh Circuit Court of Appeals never addressed disqualification of the law firm because the underlying court never addressed

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53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*

disqualification of the law firm. Real Parties cannot cite to *Weigel* to support the proposition that a disqualified law firm is entitled to attorneys' fees from the aggrieved party because the judge in the underlying case dismissed both the complaint and the amended complaint before a ruling was made on the motion to disqualify. The law firm was never disqualified as the motion was deemed moot. Thus, it is inappropriate for Real Parties to suggest that *Wiegel* supports any argument that the disqualified law firm of LBBS is entitled to attorneys' fees from its aggrieved client, the Petitioner.

B. The Case of *In re TMA Associates, Ltd.* is Significantly Distinguishable.

The disqualification of LBBS and the subsequent award of attorneys' fees in this matter is entirely distinguishable from the bankruptcy case cited by Real Parties, *In re TMA Associates, Ltd.*[57] In *TMA*, the bankruptcy court *sua sponte* considered the debtor counsel's potential conflict upon the filing of the voluntary petition for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code along with the notice pursuant to Rule 23 of the application to employ attorneys filed at the same time.[58] The purpose of the *TMA* Court immediately considering the potential conflict *sua sponte* was "...to avoid the denial of fees after considerable time and effort has been

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[57] 129 B.R. 643 (Bkrtcy. D.Colo., 1991).

[58] *Id.*at 644.

expended by counsel and significant benefit derived by the clients, this issue should be addressed upon the filing of the initial application for employment pursuant to § 327."[59]

The *TMA* court determined that debtor counsel's relationship with the general partners the limited partnership created a potential impermissible conflict noting "...Counsel's ill-defined sense of the entangled relationships and numerous conflicts, actual and/or potential, and the Firm's readiness to simply overlook or ignore the problems and pervasive appearances of impropriety with which this Court is bound to deal head on."[60] The *TMA* Court further reasoned as follows:

> Section 327 is intended to address the appearance of impropriety as much as its substance, to remove the temptation and opportunity to do less than duty demands. It is intended to prevent even the appearance of conflict, irrespective of the integrity of the person or firm under consideration.[61]

The *TMA* court also cited *In re Sixth Avenue Car Care Ctr.*[62] supporting the proposition that an appearance of impropriety may undermine the public's confidence in the fairness of bankruptcy proceedings. Likewise, the appearance of impropriety may undermine the public's confidence in civil proceedings or the judicial system as a whole.

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[59] *Id.* at 645.
[60] *Id.* at 647.
[61] *Id.*
[62] 81 B.R. 628, 630 (Bankr. D. Colo., 1988).

Even though debtor's counsel in the *TMA* matter had obtained written conflict waivers from the general partners, the *TMA* court determined that the waivers were insufficient given the nature of the facts.[63] The TMA court cited to *In re Matter of King Resources Co.,*[64] in reasoning that "[t]here are certain factual situations where the conflicts of interests between parties are so critically adverse to one another so as to not permit the representation of multiple parties by an attorney, even with the consent of all parties made after full disclosure."[65] The *TMA* court further supported its decision to find the conflict waivers insufficient by citing the case of *In re Vanderbilt Assoc. Ltd.*,[66] as follows:

> [i]f the people who actually make the decision to consent are the same individuals whose interest are in conflict, that consent is suspect...it is problematic that effective consent could be given by the limited partnership. Such consent would of necessity be given by the general partner....**This situation creates a circumstance much like the fox in the hen house.**[67]

The *TMA* matter is distinguishable from the instant matter for several reasons. First, in *TMA*, the attorney's conflict immediately came to the court's attention upon the filing of the bankruptcy petition along with the application to employ counsel. Here, LBBS kept quiet about the conflict and went about performing significant work against Petitioner. Second, the *TMA* attorney was compensated for the minimal work

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63 *Id.* at 647.
64 20 B.R. 191, 204 (D. Colo., 1982).
65 *TMA*, 129 B.R. 643 at 647.
66 111 B.R. 347, 353 (Bankr. D. Utah, 1990).

performed before the court *sua sponte* determined the conflict was impermissible.[68] Here, LBBS did not perform minimal work against Petitioner. Rather, LBBS performed work so adverse to Petitioner's interests that his matter is potentially in jeopardy of being dismissed.[69] Third, while the *TMA* court reasoned that the conflict waivers were insufficient, at least the *TMA* attorney had put the clients on notice of the conflict and attempted to obtain meaningful conflict waivers. Here, there is absolutely no evidence suggesting that LBBS ever put Petitioner on notice of the actual conflict much less tried to obtain consent after full disclosure.[70] Theoretically, if LBBS had attempted to obtain a conflict waiver, the district court may have determined that that any waiver obtained was insufficient. Given the opportunity, the district court may have determined that allowing LBBS to proceed directly against Petitioner's best interests would have been the exact definition of putting the fox in the hen house. No one knows the answers to these questions because LBBS kept quiet about its known, directly-adverse conflict with Petitioner.

III. CONCLUSION

To allow the order of October 18, 2016, to stand would be against public policy as it is arises from work performed by a conflicted law using confidential information to act contrary to the aggrieved client's interests to the point of potential dismissal of

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67 *Id.*
68 *TMA*, 129 B.R. 643 at 649.
69 *See generally*, 4PA, Ex. 36.

his complaint. The order of October 18, 2016, further violates public policy as it forces the aggrieved client to pay for the conflicted law firm's work performed to prejudice him and benefit adverse parties. Accordingly, Petitioner respectfully requests that the Court issue a writ of mandamus vacating the District Court's order of October 18, 2016, and directing the District Court to enter an order denying Respondents' motion for attorney fees and costs and an adverse jury instruction.

DATED this 14th day of February, 2017.

INJURY LAWYERS OF NEVADA

/s/ Jolene J. Manke

By:_____

DAVID J. CHURCHILL (SBN: 7031)
JOLENE J. MANKE (SBN: 7436)
Attorneys for Petitioner

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[70] 4PA, Ex. 25 at 826: 20-22; 827:1-3, 10-21; 828:1-9, 15-18.

CERTIFICATION PURSUANT TO NRAP 28.2 AND NRAP 21(5)

I, Jolene J. Manke, attorney for Petitioner in the above-matter, do hereby certify pursuant to NRAP 28.2 the following:

(1) I have read Petitioner's Reply in Support of Petition for Extraordinary Writ Relief;

(2) To the best of my knowledge, information and belief, the Reply is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(3) I believe that the Reply complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the briefs regarding matters in the record be supported by a reference to a page and volume number, if any, of the appendix where the matter relied on is to be found; and

(4) I represent that the Reply complies with the formatting requirements of Rule 32 (a)(4)-(6), and either the page- or type-volume limitations stated in Rule 32(a)(7).

(5) Pursuant to NRAP 12(5), I verify that the facts set forth herein are true and correct to the best of my knowledge.

I declare the foregoing is true under penalty of perjury.

DATED this 14th day of February, 2017.

/s/Jolene J. Manke
JOLENE J. MANKE, ESQ.

CERTIFICATE OF SERVICE

I certify that I am an employee of and that on the 14th day of February, 2017, service of the foregoing Petitioner's Reply in Support of Petition for Extraordinary Writ of Relief was made by electronic service through the Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known address:

HON. JOANNA KISHNER DEPARTMENT XXXI Eighth Judicial District Court Regional Justice Center 200 Lewis Avenue Las Vegas, NV 89155	*Respondent*
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