

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

CHRISTOPHER BEAVOR, AN
INDIVIDUAL,
Appellant,
vs.
JOSHUA L. TOMSHECK, AN INDIVIDUAL,
Respondent

No. 81964

Electronically Filed
Nov 06 2020 06:15 p.m.

DOCKETING Elizabeth A. Brown
CIVIL APPEALS Clerk of Supreme Court

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department XXIV
County Clark Judge Crockett
District Ct. Case No. A-19-793405-C

2. Attorney filing this docketing statement:

Attorney H. Stan Johnson, Esq. Telephone 702-823-3500
Firm Cohen Johnson
Address 375 E. Warm Springs Rd. #104
Las Vegas, NV 89119

Client(s) Christopher Beavor

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Max E. Corrick II, Esq. Telephone 702-384-4012
Firm Olson Cannon Gormley & Stoberski
Address 9950 West Cheyenne Ave.
Las Vegas, NV 89129

Client(s) Joshua L. Tomsheck

Attorney _____ Telephone _____

Firm _____

Address _____

Client(s) _____

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|---|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input checked="" type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input type="checkbox"/> Other disposition (specify): _____ |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

None. Although this matter involves legal malpractice in another case which was appealed in the following cases:

70327- Hefetz v. Beavor

68843 (c/w) 68438- Hefetz vs. Beavor

65656- Beavor vs. Dist. Ct. (Hefetz)

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None. Although this matter involves allegations of malpractice in Hefetz v. Beavor, A-11-645353-C.

8. Nature of the action. Briefly describe the nature of the action and the result below:

This case centers around malpractice committed by Defendant Joshua Tomsheck while representing Christopher Beavor in case A-11-645353-C. Tomsheck failed to effectively oppose a motion for a new trial after a verdict in Beavor's favor, leading to that verdict being set aside. Eventually, as part of a settlement of that underlying matter, the proceeds of this malpractice matter were assigned to Plaintiff in case A-11-645353-C. Thereafter, Beavor filed this action for malpractice against his former counsel. Tomsheck filed a Motion for Summary Judgment alledging that the asignment was not just an assignment of the proceeds, but an assignment of the entire matter which is impermissible. Further, Beavor argued that this assignment eliminates the underlying cuase of action. The Court granted this Motion for Summary Judgment.

9. Issues on appeal. State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether or not proceeds from a malpractice case are assignable.

Whether or not the assignment in question was a defacto assignment of the entire case.

Whether or not an assignment, if found to be improper, ends the underlying cause of action.

The effect which a serverence clause in an agreement acts to sever an assignment in the same agreement if that asignment is later found to be invalid.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

None.

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☒ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: The Supreme Court has not considered the assignability of the proceeds of a legal malpractice case. In addition, the Court has not considered if language in a contract where not explicit, can create a de facto assignment of a cause of action. Finally, the Court has not ruled on whether an assignment if found to be improper destroys the original cause of action.

13. Assignment to the Court of Appeals or retention in the Supreme Court. Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This matter should be retained by the Supreme Court under NRAP 17(11) as it presents a question of first impression under Nevada's common law.

14. Trial. If this action proceeded to trial, how many days did the trial last? N/A

Was it a bench or jury trial? N/A

15. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

No.

TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from 7/10/2020

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served July 10th, 2020

Was service by:

☐ Delivery

☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☒ NRCP 52(b) Date of filing August 7, 2020

☒ NRCP 59 Date of filing August 7, 2020

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ____, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion September 17, 2020

(c) Date written notice of entry of order resolving tolling motion was served 9/17/2020

Was service by:

☐ Delivery

☒ Mail

19. Date notice of appeal filed 10/16/2020

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

N/A

20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

☒ NRAP 3A(b)(1)

☐ NRS 38.205

☐ NRAP 3A(b)(2)

☐ NRS 233B.150

☐ NRAP 3A(b)(3)

☐ NRS 703.376

☐ Other (specify) _____

(b) Explain how each authority provides a basis for appeal from the judgment or order:

This was a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.

22. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Christopher Beavor, Joshua L. Tomsheck, Marc Saggese

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Marc Saggese, as a third party Defendant, the claims against him became moot when the Court granted summary judgment.

23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

Beavor's claims against Tomsheck- Professional Negligence, Breach of Fiduciary Duty/Duty of Loyalty

Tomsheck's third party claims against Saggese- Contribution

24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☒ Yes

☐ No

25. If you answered "No" to question 24, complete the following:

(a) Specify the claims remaining pending below:

N/A

(b) Specify the parties remaining below:

N/A

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

Order independently appealable under NRAP 3A(b)

27. Attach file-stamped copies of the following documents:

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Christopher Beavor

Name of appellant

11/6/2020

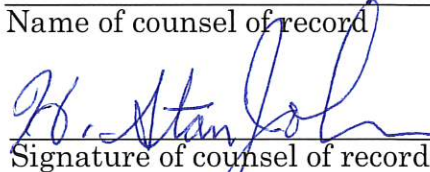
Date

Clark County, Nevada

State and county where signed

H. Stan Johnson

Name of counsel of record


Signature of counsel of record

CERTIFICATE OF SERVICE

I certify that on the 6th day of November, 2020, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

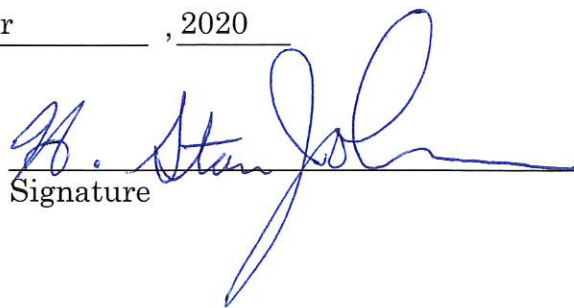
☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

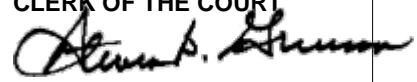
Max E. Corrick, II, Esq.

9950 West Cheyenne Avenue

Las Vegas, NV 89129

Dated this 6th day of November, 2020


Signature



COHEN|JOHNSON|PARKER|EDWARDS
H. STAN JOHNSON, ESQ.
 Nevada Bar No. 00265
 375 East Warm Springs Road, Ste. 104
 Las Vegas, Nevada 89119
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 Facsimile: (702) 823-3400

CASE NO: A-19-793405-C
 Department 8

THE BARNABI LAW FIRM, PLLC
CHARLES ("CJ") E. BARNABI JR., ESQ.
 Nevada Bar No. 14477
 8981 W. Sahara Ave., Ste. 120
 Las Vegas, Nevada 89117
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 Facsimile: (702) 966-3718

Attorneys for Plaintiff

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual;

 Plaintiff,

Case No.:
 Dept. No.:

vs.

JOSHUA TOMSHECK, an individual; DOES I-
 X; ROE ENTITIES, I-X;

 Defendants.

**(Exempt from Arbitration: Damages in
 Excess of \$50,00)**

COMPLAINT

Plaintiff Christopher Beavor ("Beavor"), by and through his counsel, hereby complains
 and alleges against defendant Joshua Tomscheck ("Tomscheck") as follows:

I.

THE PARTIES, JURISDICTION AND VENUE

- At all material times herein, Defendant Tomscheck was and remains an individual

1 residing in the County of Clark in the State of Nevada doing business as a local attorney.

2 2. At all material times herein, Plaintiff Beavor was and remains an individual
3 residing in the County of Clark in the State of Nevada.

4 3. Plaintiff does not know the true names of the individuals, corporations,
5 partnerships and entities sued and identified in fictitious names as DOES I through X and ROE
6 CORPORATIONS I through X, inclusive. Plaintiff allege that such Defendants are responsible
7 for damages suffered by Plaintiff as more fully discussed under the claims set forth below.
8 Plaintiff will request leave of this Honorable Court to amend this Complaint to show the true
9 names and capacities of each such fictitious Defendants at such time Plaintiff discovers such
10 information.

11 4. Jurisdiction and venue of this Court is proper because the injuries, events, harm
12 and damages incurred occurred in Clark County, Nevada and Tomsheck resides in Clark County,
13 Nevada.

14 II.

15 PERTINENT FACTS AND ALLEGATIONS

16 5. On July 21, 2011, Yacov Hefetz ("Hefetz") commenced an action against Beavor
17 by filing a complaint with a single claim for breach of guaranty.

18 6. Hefetz's claim was tried to a jury from February 25, 2013 through March 1, 2013.

19 7. Ultimately, Hefetz's breach of guaranty claim was submitted to the jury and the
20 jury returned a verdict in favor of Beavor.

21 8. On May 21, 2013, the District Court entered a judgment on the jury verdict.

22 9. On June 10, 2013, Hefetz filed a Motion for New Trial (the "New Trial Motion").

23 10. The New Trial Motion was based on two grounds: (1) *Lioce* challenges based on
24 alleged remarks concerning Hefetz; and (2) that the jury misunderstood the issues in Bankruptcy
25 Court and therefore ignored the Jury Instructions.
26
27
28

18. Tomsheck then compounded his error by filing a Petition for Writ of Mandamus (the "Petition") on or about May 13, 2014, rather than taking a direct appeal from the Court's order on the New Trial Motion.

1 19. On or about September 16, 2014, the Nevada Supreme Court entered an order
2 denying Tomsheck' s Petition, noting that writ relief was unavailable because a direct appeal was
3 the proper course of action to challenge the trial court's ruling on the New Trial Motion.

4 20. However, by that time the Petition was filed more than thirty days after entry of
5 the District Court order granting the New Trial Motion, the Petition could not be converted into
6 an appeal.

7 21. Additionally, Tomsheck made no attempt to convert the Petition into an appeal or
8 to concurrently file an appeal contesting the Court's order granting the New Trial Motion .

9 22. As a result of Tomsheck' s errors, the judgment on the jury verdict in Beavor's
10 favor was vacated and Hefetz's action against Beavor continued.

11 23. Tomsheck withdrew as counsel for Beavor on November 5, 2014.

12 24. On January 21, 2015, Gordon Silver filed a Notice of Appearance on behalf of
13 Beavor, which representation was later continued by Dickinson Wright..

14 25. Over the following several years, Beavor incurred legal fees in defending against
15 Hefetz's breach of guaranty claim.

16 26. In the meantime, on or about September 16, 2015, Tomsheck was expressly
17 placed on notice that Beavor intended to pursue his claims of malpractice. In March 2016 the
18 parties further agreed to toll the statute of limitations for the claims of malpractice until the
19 expiration of 180 days following an appeal or final resolution.

20 27. Hefetz's claim against Beavor was recently resolved on or about March 13, 2019
21 with the filing of a stipulation to dismiss with prejudice being filed.

22 28. Beavor now brings these claims against Tomsheck, which is timely per the
23 written agreement of Beavor and Tomsheck to toll the applicable statute of limitations.

III.**CLAIMS FOR RELIEF****FIRST CLAIM FOR RELIEF****(Professional Negligence)**

29. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

30. Beavor and Tomsheck entered into an attorney-client relationship.

31. As part of that relationship, Tomsheck owed a duty to Beavor to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity possess in exercising and performing the tasks which they undertake.

32. Tomsheck breached his duty to Beavor, at least in part, by failing to substantively oppose the New Trial Motion, but instead relying solely on a clearly erroneous procedural argument, by failing to file a direct appeal of the Court's order on the New Trial Motion, by instead filing the Petition, by filing the Petition outside the thirty day appeal window such that it could not be converted to an appeal, and/or by failing to even attempt to convert the Petition into an appeal.

33. The District Court has expressly stated that, but for Tomsheck's failure to substantively oppose the New Trial Motion, the New Trial Motion would have been denied.

34. Rather, despite a jury finding in favor of Beavor initially and the dismissal of the action being achieved, Beavor was compelled to defend the action for several years, which was eventually resolved in March 2019.

35. The legal fees, efforts, costs and other damages would not have been incurred but for the actions of Tomsheck.

36. As a result of Tomsheck's breach of his duty to Beavor, Beavor has had to incur additional legal fees and damages in excess of \$50,000 in defending against Hefetz's claim.

37. It has been necessary for Beavor to retain counsel, and Beavor is entitled to an award of attorney's fees and costs incurred in the litigation of this claim.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

38. Beavor repeats and realleges and every allegation contained in the foregoing paragraphs as though fully set forth herein.

39. Beavor's attorney, Tomsheck, attorney, owed a continuing fiduciary duty and duty of loyalty to him.

40. A fiduciary relationship exists when one has a right to expect trust and confidence in the integrity and fidelity of another.

41. Attorneys owe a fiduciary duty to their clients and a duty of loyalty

42. As Beavor's attorney, Tomsheck breached these duties as described herein.

43. That these breaches of duties caused Beavor significant damages in excess of \$50,000.

WHEREFORE, Beavor prays for relief as follows:

1. For an award against Tomsheck, in favor of Beavor, in an amount in excess of \$50,000.00;
2. For pre-judgment interest at the applicable legal rate;
3. For an award to Beavor of his costs;
4. For an award to Beavor of his reasonable attorneys' fees; and

///

///

5. For such other and further relief that the Court deems just and proper.

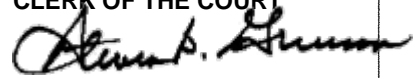
Dated this 23rd day of April 2019.

THE BARNABI LAW FIRM, PLLC

By: /s/ CJ Barnabi

Charles ("CJ") E. Barnabi Jr., Esq.
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H. Stan Johnson, Esq.
COHEN|JOHNSON|PARKER|EDWARDS
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375 East Warm Springs Road, Ste. 104
Las Vegas, Nevada 89119
Attorneys for Plaintiff



1 **ANS**
2 MAX E. CORRICK, II
3 Nevada Bar No. 6609
4 OLSON, CANNON, GORMLEY
5 ANGULO & STOBERSKI
6 9950 West Cheyenne Avenue
7 Las Vegas, NV 89129
8 702-384-4012
9 702-383-0701 fax
10 mcorrick@ocgas.com
11 Attorneys for JOSHUA TOMSHECK

7 DISTRICT COURT

8 CLARK COUNTY, NEVADA

9 CHRISTOPHER BEAVOR, an individual,
10
11 Plaintiff,

12 v.

13 JOSHUA TOMSHECK, an individual;
14 DOES I-X, inclusive,
15 Defendants.

CASE NO. A-19-793405-C
DEPT. NO. VIII

**JOSHUA TOMSHECK'S ANSWER AND
THIRD-PARTY COMPLAINT**

16
17 JOSHUA TOMSHECK, an individual,
18 Third-Party Plaintiff,

19 v.

20 MARC SAGGESE, ESQ., an individual,
21 Third-Party Defendant.

22
23 COMES NOW Defendant JOSHUA TOMSHECK, (hereinafter referred to as
24 "Defendant"), by and through their attorneys of record, OLSON, CANNON, GORMLEY,
25 ANGULO & STOBERSKI, and hereby answer Plaintiff's Complaint and admits, denies and
26 alleges as follows:
27
28

I.

THE PARTIES, JURISDICTION AND VENUE

1. Answering Paragraph 1, this answering Defendant admits the allegations contained therein.

2. Answering Paragraphs 2, 3, and 4, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

II.

PERTINENT FACTS AND ALLEGATIONS

3. Answering Paragraphs 12, 13, 14, 26, and 28, this answering Defendant denies the allegations contained therein.

4. Answering Paragraphs 5, 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 27, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

III.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(Professional Negligence)

5. Answering Paragraph 29 of Plaintiff's Complaint, this answering Defendant repeats and realleges each and every answer in above as if fully set forth at length herein.

6. Answering Paragraphs 30, 31, 32, 34, 35, 36, and 37, this answering Defendant denies the allegations contained therein.

7. Answering Paragraph 33, this answering Defendant is without sufficient information or knowledge to form a belief as to the truth or falsity of the allegations contained in said paragraphs, and upon said ground, denies each and every allegation contained therein.

SECOND CLAIM FOR RELIEF

(Breach of Fiduciary Duty / Breach of Duty of Loyalty)

8. Answering Paragraph 38 of Plaintiff's Complaint, this answering Defendant repeats and realleges each and every answer in above as if fully set forth at length herein.

9. Answering Paragraphs 40 and 41, this answering Defendant admits the allegations contained therein.

10. Answering Paragraphs 39, 42 and 43, this answering Defendant denies the allegations contained therein.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim against this answering Defendant upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred by application of the relevant statute of limitations.

THIRD AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not caused by any negligence or want of care on the part of this answering Defendant, but rather through the design, negligence or want of care, or failure of an unknown third person or persons over whom this answering Defendant had no control or responsibility in law or fact.

FOURTH AFFIRMATIVE DEFENSE

Any injury that Plaintiff may have sustained, if any, was not directly and proximately caused and/or contributed to by the negligence, carelessness or fault of other parties, and therefore this answering Defendant is entitled to contribution in proportion to the percentage of fault attributed to other parties.

FIFTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *in pari delicto*.

SIXTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *laches*.

SEVENTH AFFIRMATIVE DEFENSE

Any claim by Plaintiff against this answering Defendant is barred by the equitable doctrine of *unclean hands*.

EIGHTH AFFIRMATIVE DEFENSE

If Plaintiff sustained any injuries, economic or otherwise, said injuries were proximately caused by his failure to mitigate his damages, if any, and/or take corrective action. Accordingly, any and all recovery is barred or should be limited to the extent or degree of Plaintiff's failure to mitigate his damages, if any.

NINTH AFFIRMATIVE DEFENSE

All services provided by this answering Defendant during the relevant times were provided within the standard of care for similar attorneys providing similar services in the community at the time and place the legal services were provided.

TENTH AFFIRMATIVE DEFENSE

Plaintiff's claims against this answering Defendant are barred because the Plaintiff's alleged damages were the result of the intervening, superseding conduct of others.

ELEVENTH AFFIRMATIVE DEFENSE

No attorney-client relationship existed between Plaintiff and this answering Defendant which obligated this answering Defendant to provide the services described in the Complaint.

TWELFTH AFFIRMATIVE DEFENSE

Each and all of Plaintiff's rights, claims, and obligations as set forth in the Complaint, has, or have, by conduct, agreement or otherwise been waived.

THIRTEENTH AFFIRMATIVE DEFENSE

The loss, injuries and damages which Plaintiff alleges, if any, were directly and proximately caused and/or contributed to by the negligence, carelessness or fault of Plaintiff, which is greater

1 than the alleged negligence, carelessness or fault, if any, of this answering Defendant, and therefore
2 Plaintiff's claims against this answering Defendant is barred.

3 **FOURTEENTH AFFIRMATIVE DEFENSE**

4 The loss, injuries and damages, if any, which Plaintiff alleges in the Complaint were
5 directly and proximately caused and/or contributed to by the negligence, carelessness or fault of
6 Plaintiff, and therefore this answering Defendant are entitled to contribution in proportion to the
7 percentage of negligence attributed to the Plaintiff.

8 **FIFTEENTH AFFIRMATIVE DEFENSE**

9 Plaintiff's claim is barred for failure to name an indispensable party as a defendant to this
10 litigation.

11 **SIXTEENTH AFFIRMATIVE DEFENSE**

12 That pursuant to NRCP 11, as amended, all possible affirmative defenses may not have
13 been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the
14 filing of these Defendant's Answer. This answering Defendant reserves the right to amend his
15 Answer to allege additional affirmative defenses if subsequent investigation warrants.

16 WHEREFORE, this answering Defendant prays as follows:

- 17 1. That Plaintiff take nothing by reason of the Complaint on file herein:
18 2. For reasonable attorney's fees;
19 3. For costs of suit incurred and to be incurred herein; and
20 4. For such other and further relief as to the Court may deem just and proper in the
21 premises.

1 DATED this _____ day of May, 2019.

2 OLSON, CANNON, GORMLEY
3 ANGULO & STOBERSKI

4
5 MAX E. CORRICK, II
6 Nevada Bar No. 6609
7 9950 West Cheyenne Avenue
8 Las Vegas, NV 89129
9 Attorneys for JOSHUA TOMSHECK

10 **THIRD-PARTY COMPLAINT**

11 COMES NOW Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomsheck"), by
12 and through his attorneys of record, OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI,
13 and for its Third-Party Complaint against MARC SAGGESE, ESQ., complains, alleges and states
14 as follows:

15 1. Tomsheck was and is a resident of Clark County, Nevada for all relevant times
16 stated herein.

17 2. MARC SAGGESE, ESQ. was and is a resident of Clark County, Nevada for all
18 relevant times stated herein, and provided legal services to Plaintiff Christopher Beavor.

19 3. On or about April 23, 2019, Plaintiff Christopher Beavor filed his Complaint
20 naming Tomsheck as a defendant. That Complaint alleges, *inter alia*, professional negligence and
21 breach of fiduciary duty against Tomsheck.

22 4. Tomsheck has denied such allegations and alleged in his Answer pertinent
23 Affirmative Defenses.

24 **FIRST CAUSE OF ACTION**

25 **Contribution (against MARC SAGGESE, ESQ.)**

26 5. Tomsheck repeats and realleges each and every allegation contained in Paragraphs 1
27 through 4, inclusive, as though fully set forth herein.

28 6. Tomsheck alleges that in the event he is found to be liable to Plaintiff or to
any party for damages or payment is made to Plaintiff or to any other party as a result of the

1 incidents or occurrences described in the Complaint, then Tomsheck's liability or payment is based
2 on the acts and/or omissions including, without limitation, the negligence and/or fault of MARC
3 SAGGESE, ESQ., individually, and therefore Tomsheck is entitled to Contribution from MARC
4 SAGGESE, ESQ. for his proportionate share of all such loss or damage pursuant to NRS 17.225.

5 7. Tomsheck has been forced to retain an attorney to bring this Third-Party Complaint,
6 and therefore Tomsheck is entitled to recover his reasonable attorney's fees and costs for the
7 necessity of instituting this action.

8 WHEREFORE, Tomsheck prays for relief as follows:

- 9 1. For Contribution from MARC SAGGESE, ESQ.;
- 10 2. For an award of reasonable attorneys fees and costs; and
- 11 3. For all other such relief as the Court deems just and proper.

12 DATED this 16 day of May, 2019.

13 OLSON, CANNON, GORMLEY
14 ANGULO & STOBERSKI

15
16 

17 MAX E. CORRICK, II
18 Nevada Bar No. 6609
19 9950 West Cheyenne Avenue
20 Las Vegas, NV 89129
21 Attorneys for JOSHUA TOMSHECK
22
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CERTIFICATE OF SERVICE

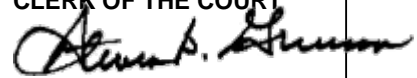
I HEREBY CERTIFY that on this 16th day of May, 2019, I sent via e-mail a true and correct copy of the above and foregoing **ANSWER AND THIRD-PARTY COMPLAINT** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

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An Employee of OLSON, CANNON, GORMLEY,
ANGULO & STOBERSKI



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Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,
Plaintiff,

CASE NO. A-19-793405-C
DEPT. NO. XXIV

v.

JOSHUA TOMSHECK, an individual; DOES
I-X, inclusive,
Defendants.

JOSHUA TOMSHECK, an individual,
Third-Party Plaintiff,

v.

MARC SAGGESE, ESQ., an individual,
Third-Party Defendant.

NOTICE OF ENTRY OF ORDER

///

///

1 PLEASE TAKE NOTICE that an Order has been entered in the above-entitled Court on
2
3 the 9th day of July, 2020, a copy of which is attached hereto.

4 DATED 10th day of July, 2020.

5 OLSON CANNON GORMLEY & STOBERSKI

6 */s/Max E. Corrick*

7
8 MAX E. CORRICK, II
9 Nevada Bar No. 006609
10 9950 West Cheyenne Avenue
11 Las Vegas, NV 89129
12 Attorneys for Defendant/Third-Party Plaintiff
13 JOSHUA TOMSHECK
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of July, 2020, I sent via e-mail a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

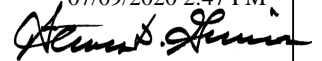
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CLERK OF THE COURT

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Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,
Plaintiff,

v.

JOSHUA TOMSHECK, an individual;
DOES I-X, inclusive,
Defendants.

CASE NO. A-19-793405-C
DEPT. NO. XXIV

**ORDER AND FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON:**

- 1. JOSHUA TOMSHECK'S
MOTION FOR SUMMARY
JUDGMENT;**
- 2. THIRD-PARTY DEFENDANT
MARC SAGGESE'S MOTION TO
DISMISS, OR
ALTERNATIVELY, MOTION
FOR SUMMARY JUDGMENT;
and**
- 3. THIRD-PARTY DEFENDANT
MARC SAGGESE'S MOTION TO
STRIKE SUPPLEMENTAL
OPPOSITION OF THIRD-
PARTY PLAINTIFF JOSHUA
TOMSHECK ON ORDER
SHORTENING TIME**

JOSHUA TOMSHECK, an individual,
Third-Party Plaintiff,

Date of Hearing: June 25, 2020

Time of Hearing: 9:00 a.m.

v.

MARC SAGGESE, ESQ., an individual,
Third-Party Defendant.

These matters having come on for hearing on the 25th day of June, 2020, before the Honorable Judge Jim Crockett, on JOSHUA TOMSHECK's Motion for Summary Judgment, Third-Party Defendant MARC SAGGESE's Motion to Dismiss, or alternatively, Motion for Summary Judgment, and Third-Party Defendant MARC SAGGESE's Motion to Strike Supplemental Opposition of Third-Party Plaintiff JOSHUA TOMSHECK on Order Shortening Time.

Plaintiff CHRISTOPHER BEAVOR, appearing by and through his counsel of record, H. Stan Johnson, Esq.; Defendant/Third-Party Plaintiff JOSHUA TOMSHECK, appearing by and through his counsel of record, Max E. Corrick, II, and; Third-Party Defendant MARC SAGGESE, Esq., appearing by and through his counsel of record, Joseph P. Garin, Esq. The Court having reviewed the papers and pleadings on file, having heard the representations and arguments of counsel, and good cause appearing therefore, makes the following Findings of Fact and Conclusions of Law, and issues its Order on the motions pending before the Court.

FINDINGS OF FACT

The Court makes the following Findings of Fact:

1. On April 23, 2019, Plaintiff CHRISTOPHER BEAVOR ("Plaintiff Beavor") filed a legal malpractice lawsuit against Defendant/Third-Party Plaintiff JOSHUA TOMSHECK ("Tomsheck") arising out of alleged legal malpractice committed by Tomsheck. Tomsheck filed an Answer and Third-Party Complaint against Third-Party Defendant Marc Saggese, Esq. on May 16, 2019, seeking Contribution.
2. On March 9, 2020, Tomsheck filed his Motion for Summary Judgment. Tomsheck filed an Errata to his Motion for Summary Judgment on March 11, 2020 which corrected

certain representations regarding relevant dates in the Tomsheck Motion for Summary Judgment. Plaintiff Beavor filed an Opposition to the Tomsheck Motion for Summary Judgment on March 27, 2020. Tomsheck filed his Reply on April 30, 2020.

3. On March 11, 2020, Third-Party Defendant Marc Saggese, Esq. (“Saggese”) filed his Motion to Dismiss, or alternatively, Motion for Summary Judgment. Tomsheck filed an Opposition to the Saggese Motion to Dismiss, or alternatively, Motion for Summary Judgment, and Request for NRCP 56(d) Relief, on April 3, 2020. Saggese filed his Reply on April 30, 2020. That same day, April 30, 2020, Tomsheck filed a Supplement to his Opposition to Saggese’s Motion to Dismiss, or alternatively, Motion for Summary Judgment, and Request for NRCP 56(d) Relief.
4. On May 5, 2020, Saggese filed his Motion to Strike Supplemental Opposition of Third-Party Plaintiff Tomsheck on Order Shortening Time. Tomsheck filed an Opposition to the Saggese Motion to Strike on June 8, 2020, along with a Countermotion to Allow Supplementation. Saggese filed his Reply and Opposition to the Countermotion on June 18, 2020. Tomsheck did not file a Reply to the Saggese Opposition.
5. The Court recognizes that the Tomsheck Motion for Summary Judgment may be dispositive of the entire case. Therefore, while the Court reviewed each of the motions pending before it, for the reasons set forth below the Court declines to rule upon the Saggese Motions or the Tomsheck Countermotion.
6. In Tomsheck’s Motion for Summary Judgment he raises the following arguments: *First*, Tomsheck argues he is entitled to summary judgment because Plaintiff Beavor impermissibly assigned his legal malpractice claim against Tomsheck to Beavor’s adversary in the underlying matter of *Hefetz v. Beavor* (Case No. A645353), Yacov Hefetz (“Hefetz”). Tomsheck argues this is evidenced by the settlement agreement reached between Hefetz and Plaintiff Beavor on February 15, 2019. The Court notes Tomsheck never represented Hefetz, nor does Plaintiff Beavor contend that he did. The relevant terms of the Hefetz/Beavor settlement agreement, which the Court has reviewed in its entirety, include the following:

Section 4 Beavor’s Malpractice Claims

Beavor agrees to prosecute any malpractice and/or any other claims he may have against his former counsel, but Beavor will not prosecute any malpractice and/or any other claims he may have against the law firm of Dickinson Wright PLLC or any attorneys at that firm who provided legal representation to him related to the Pending Case.

H. Stan Johnson will serve as counsel for Beavor in his prosecution of said claims.

In order to permit H. Stan Johnson to serve as counsel, Beavor and H. Stan Johnson will execute any required conflict waivers.

1 *Beavor represents and warrants that he will fully pursue and cooperate in the*
2 *prosecution of the above referenced claims;*

3 *that he will take any and all reasonable actions as reasonably requested by*
4 *counsel to prosecute the above actions;*

5 *and that he will do nothing intentional to limit or harm the value of any recovery*
6 *related to the above referenced cases.*

7 *Within thirty (30) days from the Effective Date of this Settlement Agreement, Beavor*
8 *shall provide Hefetz, through his attorney H. Stan Johnson, copies of any documents or*
9 *correspondence that Beavor believes relate to the above referenced malpractice actions.*

10 *Beavor shall fully cooperate with Hefetz and his counsel regarding any claims initiated*
11 *on behalf of Beavor for the above referenced actions.*

12 *Hefetz agrees to indemnify and hold harmless Beavor from any attorney fees or costs*
13 *that may be incurred in pursuing the above referenced claims and any and all invoices*
14 *for attorneys' fees or costs shall be issued directly to Hefetz with Hefetz bearing sole*
15 *responsibility for payment thereof.*

16 *Beavor further irrevocably assigns any recovery or proceeds to Hefetz from the above*
17 *referenced actions and agrees to take any actions necessary to ensure that any recovery*
18 *or damages are paid to Hefetz pursuant to the Agreement.*

- 19 7. Tomsheck argues that, based upon the explicit terms of the Hefetz/Beavor settlement
20 agreement, Plaintiff Beavor impermissibly assigned his legal malpractice claim to
21 Hefetz – whether characterized as an express assignment or as a *de facto* assignment.
- 22 8. Tomsheck argues that “in Nevada, legal malpractice claims are absolutely unassignable
23 and subject to summary judgment if assigned.” Tomsheck cites, *inter alia*, the Nevada
24 Supreme Court decisions of *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982), and
25 *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016), for this general
26 proposition, as well as cases from several other jurisdictions, including the case of
27 *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976), which has
28 been directly relied upon and quoted by the Nevada Supreme Court.
9. *Second*, Tomsheck argues Plaintiff Beavor filed this legal malpractice lawsuit after the
statute of limitation period elapsed for Plaintiff Beavor to file the lawsuit. Specifically,
Tomsheck notes he and Plaintiff Beavor negotiated and entered into a binding contract,
namely a tolling agreement, which affixed the time in which Plaintiff Beavor would be
required to file a legal malpractice lawsuit to within two (2) years of the Nevada
Supreme Court resolving Supreme Court Appeal No. 68838 (c/w 68843). Although it is
not entirely clear to the Court, based upon the Errata filed by Tomsheck it appears
Tomsheck is alleging the latest date Plaintiff Beavor had to file his legal malpractice

lawsuit against Tomsheck was September 26, 2018, but that the lawsuit was not filed until April 23, 2019.

10. For the reasons set forth below, the Court declines to rule upon Tomsheck's statute of limitations argument. Instead, the Court chooses to focus upon Tomsheck's impermissible assignment of a legal malpractice claim argument.
11. With respect to that impermissible assignment argument, Tomsheck's Motion for Summary Judgment argues Plaintiff Beavor is prosecuting an impermissibly assigned legal malpractice claim which violates public policy and which is subject to summary judgment. To that end, Tomsheck states that "Nevada follows the overwhelming majority rule in this regard, especially when a legal malpractice claim has been assigned to an adversary in the underlying litigation." See *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976); *Tate v. Goins, Underkoffer, Crawford & Langdon*, 24 S.W.3d 627 (Tex. App. 2000); *Zuniga v. Groce, Locke & Hebdon*, 878 S.W.2d 313 (Tex. App. 1994); *Kommavongsa v. Haskell*, 149 Wash.2d 288 (2003); *Edens Technologies, LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F.Supp.2d (D.D.C. 2009); *Revolutionary Concepts, Inc. v. Clements Walker PLLC*, 227 N.C. App. 102, 744 S.E.2d 130 (2013); *Trinity Mortgage Companies, Inc. v. Dreyer*, 2011 WL 61680 (N.D. Okla. 2011); *Community First State Bank v. Olsen*, 255 Neb. 617, 587 N.W.2d 364 (1998); *Freeman v. Basso*, 128 S.W.3d 138 (Mo. Ct. App. 2004); *Davis v. Scott*, 320 S.W.3d 87 (Ky. 2010); *Alcman Servs. Corp. v. Samuel H. Bullock, P.C.*, 925 F.Supp. 252 (D.N.J. 1996); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); *Schroeder v. Hudgins*, 142 Ariz. 395, 690 P.2d 114 (Ariz. Ct. App. 1984); *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. Ct. App. 1993); *Christison v. Jones*, 83 Ill.App.3d 334, 405 N.E.2d 8 (1980); *Delaware CWC Liquidation Corp. v. Martin*, 213 W.Va. 617, 584 S.E.2d 473 (2003); *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. App. 1993); cf. *Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005) (collecting cases as of that date and concluding a legal malpractice claim which is assigned to an adversary in the underlying matter is impermissible and subject to judgment as a matter of law).
12. Tomsheck further argues that in *Tower Homes*, "the Nevada Supreme Court extensively quoted and adopted the longstanding approach taken by the California Court of Appeals in *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976), which detailed the policy considerations underlying the nonassignability of legal malpractice claims. The Court noted: 'As the court in *Goodley* stated, '[i]t is the unique quality of legal services, the personal nature of the attorney's duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment.' 133 Cal.Rptr. at 87. Allowing such assignments would 'embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.' *Id.*' *Tower Homes*, 132 Nev. at 635, 377 P.3d at 123."
13. Summarizing Tomsheck's argument in his Motion for Summary Judgment, the depth and breadth of control over this litigation which Hefetz (Plaintiff Beavor's adversary in

the underlying matter) has been given pursuant to the settlement agreement, along with the assignment of all of the proceeds which Plaintiff Beavor might receive from this lawsuit, equates to an impermissible assignment of the legal malpractice claim itself. As Tomsheck puts it, “Plaintiff commoditized and sold his legal malpractice claim to Hefetz, giving Hefetz all authority over the case while Plaintiff stands to gain (and lose) absolutely nothing by continuing to prosecute the claim as Hefetz’s figurehead.”

14. In Opposition, Plaintiff Beavor concedes he assigned all of the proceeds from his then-unfiled legal malpractice lawsuit against Tomsheck to his former adversary. Plaintiff Beavor argues that Nevada law, as stated in *Edward J. Achrem, Chtd. v. Expressway Plaza Pshp.*, 112 Nev. 737, 917 P.2d 447 (1996), allows a party to assign proceeds from a tort action to a third party. In that regard, Plaintiff Beavor argues the *Tower Homes, LLC* decision does not prohibit the assignment of the recovery in a legal malpractice claim.
15. Plaintiff Beavor also argues *Tower Homes, LLC* is distinguishable upon its facts, and that while Plaintiff Beavor did assign all of the proceeds of this legal malpractice lawsuit to Hefetz, Plaintiff Beavor contends he “still maintains complete control of his case.” In this respect, Plaintiff relies upon his Declaration dated March 27, 2020 for this proposition and insists that “[t]he only thing that has been assigned in this matter is the recovery.”
16. Plaintiff Beavor further argues that even if this Court finds the assignment of proceeds to be invalid, or that the settlement agreement constitutes a *de facto* assignment of Plaintiff Beavor’s legal malpractice lawsuit to Hefetz, Plaintiff Beavor should still be permitted “to pursue the matter directly against the Defendant” and that “any of the assigned rights must revert back to Plaintiff Beavor.”
17. Tomsheck’s Reply argues that the terms of the Hefetz/Beavor settlement agreement make clear that Plaintiff Beavor “assigned all of the proceeds and potential recovery from his then-unfiled legal malpractice lawsuit against [] Tomsheck...in order to circumvent Nevada’s strong public policy barring assignment of legal malpractice claims.” In fact, Tomsheck argues Plaintiff Beavor *irrevocably* assigned them and therefore has nothing to assert against Tomsheck on his own. Moreover, Tomsheck argues Plaintiff Beavor’s March 27, 2020 Declaration is inadmissible parol evidence and constitutes Plaintiff Beavor’s attempt to violate Nevada’s prohibition upon “fabricating issues of fact for purposes of avoiding summary judgment” because the representations in the Declaration are contrary to the terms of the Hefetz/Beavor settlement agreement which Plaintiff Beavor signed under oath. *See Aldabe v. Adams*, 81 Nev. 280, 284–85, 402 P.2d 34, 36–37 (1965) (refusing to credit a sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998).
18. Tomsheck further argues in his Reply that, contrary to Plaintiff’s assertions, “[a]side from the multitude of jurisdictions cited in [] Tomsheck’s motion, other jurisdictions

have noted that the *de facto* assignment of a legal malpractice claim violates public policy and compels dismissal. *E.g. Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261 (Wash. Ct. App. 2013); *Paonia Res., LLC v. Bingham Greenebaum Doll, LLP*, 2015 WL 7431041 (W.D. Ky. Nov. 20, 2015); *Trinity Mortg.. Cos v. Dreyer*, 2011 WL 61680 (N.D. Okla. Jan 7, 2011). ‘It is the mere opportunity for collusion and the transformation of legal malpractice to a commodity that is problematic.’ *Kenco*, 291 P.3d at 263. ‘This reasoning applies whether or not the collusion is real.’ *Id.* The rule prohibiting either express or *de facto* assignment of legal malpractice claims cannot ‘be obfuscated by clever lawyers and legal subtleties.’ *Id.* at 265.”

19. Tomsheck further argues in his Reply that *Tower Homes, LLC* rejected Plaintiff Beavor’s position that *Achrem* applies to assignment of proceeds from legal malpractice actions, citing *Tower Homes, LLC*’s assertion that “[w]e are not convinced that *Achrem*’s reasoning applies to legal malpractice claims...” *Tower Homes, LLC* at 635, 377 P.3d at 122. Indeed, Tomsheck argues this conclusion is consistent with rulings from other jurisdictions which have held that there is a “meaningless distinction between an assignment of a cause of action and an assignment of recovery from such an action, which distinction is made merely to circumvent the public policy barring assignments. *Town & Country Bank of Springfield v. Country Mutual Ins. Co.*, 121 Ill.App.3d 216, 218, 76 Ill.Dec. 724, 459 N.E.2d 639 (1984). We will not engage in such a nullity.” *Gurski*, 276 Conn. 257, 285, 885 A.2d 163, 178 (2005); and see *Botma v. Huser*, 202 Ariz. 14, 19, 39 P.3d 538, 543 (Ariz. Ct. Ap. 2002) (finding an assignment agreement was impermissible and subject to summary judgment because it “allow[ed] Plaintiff Himes to recover any and all monies which might be owing to Plaintiff Botma’ and that ‘Plaintiff Himes will be the ultimate beneficiary of Plaintiff Botma’s claims herein.’ To allow the present lawsuit, which was born out of that assignment agreement, to proceed in Botma’s name would be to wink at the rule against assignment of legal malpractice claims.”).

20. Tomsheck’s Reply further distinguishes the cases relied upon by Plaintiff Beavor in his Opposition, noting, *inter alia*, that those cases either do not support Plaintiff Beavor’s arguments, rely upon facts far different from those found in this case, or represent a “severely discredited” view of the assignability of legal malpractice claims.

21. Finally, Tomsheck’s Reply argues no Nevada court has permitted an assignor to “claw back” and assert for himself a previously assigned legal malpractice claim, particularly where 100% of the proceeds have been assigned. Tomsheck further notes that Plaintiff Beavor’s irrevocable assignment of those proceeds prevents him from pursuing the matter against Tomsheck now, and that no Nevada case law, whether published or unpublished, supports Plaintiff Beavor’s “do over” arguments.

22. In their totality, Tomsheck’s arguments regarding the impermissible assignment of this legal malpractice lawsuit by Plaintiff Beavor’s to Hefetz are persuasive, if not compelling, and they are sufficient to justify summary judgment in his favor. While Plaintiff Beavor appears to rely upon rhetoric and arguments related to whether Tomsheck committed legal malpractice in his representation of Plaintiff Beavor, that is

not the legal issue before the Court. In fact, the Court believes each of Plaintiff Beavor's arguments in Opposition, in the briefs and at oral argument, is effectively defeated by the case law and arguments advanced in Tomsheck's Reply Brief and oral argument.

23. As a result, the Court need not reach the issues raised in Tomsheck's Motion for Summary Judgment concerning the statute of limitations acting as a bar to Plaintiff Beavor's lawsuit.

24. When questioned by the court, counsel for the parties each represented to the Court that they believe the net effect of the Court's decision on Tomsheck's Motion for Summary Judgment allows the Court to decline to address the merits of both Saggese Motions or any Countermotion thereto. The Court shares this belief.

CONCLUSIONS OF LAW

Based upon the Findings of Fact itemized herein, controlling Nevada precedent, the persuasive rationale from other jurisdictions which have ruled upon the issue, as well as the arguments contained in the parties' briefing on Tomsheck's Motion for Summary Judgment, the Court makes these Conclusions of Law as follows:

1. The terms of the settlement agreement between Plaintiff Beavor and his former adversary in the underlying case *Hefetz v. Beavor* (Case No. A645353), Yacov Hefetz, are admissible evidence of Plaintiff Beavor's assignment of his then-unfiled legal malpractice lawsuit against Tomsheck to Hefetz. Such assignment is impermissible under Nevada law. *See Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982); *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016).
2. Plaintiff Beavor irrevocably assigned 100% of the proceeds from his then-unfiled legal malpractice lawsuit against Tomsheck to Hefetz. He also assigned substantial, if not complete, control over the current litigation to Hefetz. Nevada law, consistent with other jurisdictions, forbids this.
3. Even assuming Plaintiff Beavor had only assigned the proceeds from the current litigation to Hefetz, Nevada law does not allow a party to simply assign the proceeds from a legal malpractice lawsuit in order to avoid the appearance of an impermissible assignment of the legal malpractice lawsuit itself. *See Tower Homes, LLC*, 132 Nev. at 635, 377 P.3d at 122. In fact, the *Tower Homes, LLC* Court rejected this very approach.
4. Indeed, other jurisdictions have specifically held that the assignment of proceeds from a legal malpractice claim, rather than the assignment of the claim itself, is a meaningless distinction which is made to circumvent the public policy barring assignment of legal malpractice claims. *E.g., Gurski v. Rosenblum and Filan, LLC*, 276 Conn. 257 (2005); *Botma v. Huser*, 202 Ariz. 14, 39 P.3d 538 (Ariz. Ct. Ap. 2002) *Town & Country Bank*

1 of *Springfield v. Country Mutual Ins. Co.*, 121 Ill.App.3d 216, 76 Ill.Dec. 724, 459
2 N.E.2d 639 (1984). Such conclusion is both compelling and consistent with Nevada law
3 and the rationale underpinning Nevada's prohibition of the assignment of legal
4 malpractice claims. *See, e.g., Chaffee v. Smith, supra; Tower Homes, LLC, supra;*
5 *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 133 Cal.Rptr. 83 (1976).

- 6
- 7 5. Whether characterized as an express or *de facto* assignment of his legal malpractice
8 lawsuit, Plaintiff Beavor's assignment bars him from prosecuting this legal malpractice
9 lawsuit now, and Plaintiff Beavor cannot claw back for himself that which he assigned
10 to Hefetz. Nor is Plaintiff Beavor entitled to a "do over". Plaintiff Beavor irrevocably
11 assigned his legal malpractice claim to Hefetz and therefore has nothing to prosecute for
12 himself. But more importantly, allowing Plaintiff Beavor to do so, under the facts of this
13 case, would be contrary to controlling, longstanding Nevada precedent and would defeat
14 the strong public policy reasons behind Nevada law's prohibition of assignment of legal
15 malpractice claims entirely.
- 16 6. As such, Tomscheck is entitled to summary judgment based upon Plaintiff Beavor's
17 impermissible assignment of his legal malpractice claim to Hefetz.
- 18 7. By granting Tomscheck's Motion for Summary Judgment on that basis, the Court need
19 not consider, and therefore declines to rule upon, Tomscheck's separate statute of
20 limitations argument as well as Saggese's pending Motions and any Countermotion
21 thereto.

22 ORDER

23 Based upon the above Findings of Fact and Conclusions of Law,

24 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- 25 1. Defendant Tomscheck's Motion for Summary Judgment is granted;
- 26 2. The Court declines to rule upon Third-Party Defendant Saggese's pending Motions,
27 and any Countermotion thereto; and,
- 28 3. Counsel for Tomscheck shall prepare the Order, which should be an abridged version
of the arguments made by the parties in their respective briefs and at oral argument,
and should submit that Order to the Court in compliance with EDCR 7.21, but no
later than 14 days from the date of the hearing unless additional time is requested
and granted by this Court.

1 **IT IS SO ORDERED.**

Dated this 9th day of July, 2020

2 DATED this ____ day of July, 2020.

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JUDGE JIM CROCKETT

Approved as to Form and Content:

COHEN JOHNSON PARKER EDWARDS

OLSON CANNON GORMLEY &

STOBERSKI
9F8-023-9AFF 25ED

Jim Crockett

/s/ H. Stan Johnson, Esq. (Form Only)

/s/ Max E. Corrick, II

H. STAN JOHNSON, ESQ.

MAX E. CORRICK, II

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Attorneys for Defendant/Third-Party Plaintiff

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JOSHUA TOMSHECK

LIPSON NEILSON P.C.

/s/ Joseph P. Garin, Esq.

JOSEPH P. GARIN, ESQ.

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MARC SAGGESE, ESQ.

From: H. Stan Johnson <sjohnson@cohenjohnson.com>
Sent: Thursday, July 9, 2020 11:36 AM
To: Max Corrick; CJ Barnabi (cj@barnabilaw.com); Joe Garin
Cc: Jane Hollingsworth
Subject: RE: Beavor adv. Tomsheck -- FFCL and Order on Motions

Max I will approve the order as to form but not content; can you make that change and use my e-signature.

Thanks
Stan

H. Stan Johnson, Esq.
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From: Max Corrick <mcorrick@ocgas.com>
Sent: Wednesday, July 1, 2020 3:04 PM
To: H. Stan Johnson <sjohnson@cohenjohnson.com>; CJ Barnabi (cj@barnabilaw.com) <cj@barnabilaw.com>; Joe Garin <JGarin@lipsonneilson.com>
Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>
Subject: Beavor adv. Tomsheck -- FFCL and Order on Motions

All: Please see the attached proposed FFCL and Order on the motions hearing on June 25. I have tried to follow Judge Crockett's request for it to be an "abridged" version of the briefs and therefore rely heavily upon what has been written in the briefs, rather than the colloquy at oral argument – except where necessary. Given the fulsome briefing on all sides I think this is as abridged as I can get and still be faithful to the positions of the parties and the comments from the Court.

If you have any proposed edits please offer them. July 9 is the due date for the Order.

Once we have mutually agreed upon language I will request a separate email from you authorizing me to include your e-signature so that this can be transmitted to Dept. 24 per its protocols.

Thanks.

Max Corrick
OLSON CANNON GORMLEY & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129

Phone No.: 702-384-4012

From: Joe Garin <JGarin@lipsonneilson.com>
Sent: Thursday, July 9, 2020 10:21 AM
To: Max Corrick
Cc: sjohnson@cohenjohnson.com; CJ Barnabi (cj@barnabilaw.com); Jane Hollingsworth
Subject: Re: Beavor adv. Tomscheck proposed Order

I approved and you can sign for me

Sent from my iPhone

On Jul 9, 2020, at 10:53 AM, Max Corrick <mcorrick@ocgas.com> wrote:

Gentlemen: I have not received any comments or requested edits from Beavor's camp on my draft Order which I sent on July 1. I have received approval from Mr. Garin to insert his esignature as the proposed Order now stands.

Unless I receive some communication back by 1 pm today I will indicate that Beavor has not responded as to form and content.

Please let me know how you intend to proceed. Thanks.

Max Corrick
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Phone No.: 702-384-4012

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Christopher Beavor, Plaintiff(s) CASE NO: A-19-793405-C
7 vs. DEPT. NO. Department 24
8 Joshua Tomsheck, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 7/9/2020

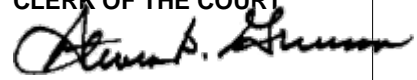
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,

Plaintiff,

vs.

JOSHUA TOMSHECK, an individual;
DOES I-X; ROE ENTITIES I-X,

Defendants.

ALL RELATED MATTERS.

Case No.: A-19-793405-C

Dept. No.: XXIV

**PLAINTIFF'S MOTION TO ALTER OR
AMEND PURSUANT TO NRCP
52(b) and 59(e)**

HEARING REQUESTED

COMES NOW, Plaintiff Christopher Beavor ("Beavor"), by and through his undersigned counsel of record, submits this Motion to Alter or Amend Pursuant to NRCP 59(e) and 59(e). This Motion is supported by the accompanying memorandum of points and authorities, the papers and pleadings on file herein, and any oral argument the Court may allow.

Dated this 7th day of August, 2020.**COHEN JOHNSON PARKER EDWARDS**/s/ H. Stan Johnson

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Court's decision to grant summary judgment in this matter is not based upon the law or facts of this case but was instead crafted by Defendant and fails in a number of ways. The Court does not make findings that are required in this matter and so the Court's order is impermissibly vague. Moreover, the Court's Order fails as a matter of law and is not properly based on Nevada law. For these reasons, the Court should alter or amend its order and deny the Defendant's Motion for Summary Judgment.

II.

RELEVANT FACTS AND PROCDURAL HISTORY

This matter began in a previous case in the District Court, (A-11-645353-C, *Hefetz v. Beavor*). This matter proceeded to a jury trial, in which Mr. Beavor prevailed. At that point, Hefetz retained new counsel and filed a motion for a new trial. Counsel for Mr. Beavor, Mr. Tomsheck, (Hereinafter "Defendant"), filed an opposition that failed so completely to oppose the motion for a new trial that the Judge hearing the matter stated that he considered the matter unopposed and that he had no choice but to grant it. The Judge further stated that had any opposition been brought, the Motion would have been denied.

Accordingly, due to the Defendants Malpractice, Mr. Beavor (hereinafter "Plaintiff") had to endure additional years of litigation, including an appeal to the Supreme Court of Nevada. This cost Plaintiff in excess of \$120,000.00 in legal fees and the stress of continued litigation. While the case was on appeal to the Supreme Court the parties participated in the Supreme Court settlement program during 2017. The Supreme Court settlement judge contacted Mr. Tomsheck's insurance carrier and involved them in the settlement discussion since the malpractice was quite

1 evident and they had already been put on notice of the claim of Mr. Beavor. As Mr. Beavor and
2 Mr. Hefetz approached the second jury trial in this matter, the parties participated in another
3 settlement conference in this matter on April 2nd, 2018.

4 Mr. Tomsheck's legal malpractice insurance was present through their counsel. The matter
5 did not settle at this settlement conference and continued towards a second trial. On the eve of that
6 trial, the parties reached a settlement. As part of the settlement, Plaintiff assigned the proceeds of
7 his malpractice suit to Mr. Hefetz. Thereafter, this matter was filed. The Motion for Summary
8 Judgment was fully briefed by April 30th, 2020. However, due to the parties' decision to attend a
9 settlement conference, which was later canceled, this matter was not heard until June 25th, 2020.
10 The Court granted this Motion and now Plaintiff files this Motion to Alter or Amend pursuant to
11 NRCP 59(e) and 52(b).
12

13 III.

14 LEGAL STANDARD

15 NRCP 59(e). A motion to alter or amend a judgment must be filed "no later than 28 days
16 after service of written notice of entry of judgment..." NRCP 59(e). As NRCP 59(e) echoes its
17 federal counterpart, Nevada courts should "consult federal law interpreting" Rule 59(e). *AA Primo*
18 *Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1192-93 (2010). A motion to
19 amend or alter under NRCP 59(e) should be granted to correct a clear error, whether of law or of
20 fact, and to prevent a manifest injustice. *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir.
21 1996) So long as the Rule 59(e) motion is timely filed, the courts have considerable discretion.
22 *Lockheed Martin Corp.*, 116 F.3d at 112. Although the courts are not required to consider new
23 legal arguments

24 or mere restatements of old facts or arguments, the court can and should correct clear errors in
25 order to "preserve the integrity of the final judgment." *Turkmani v. Republic of Bolivia*, 273 F.
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1 Supp. 2d 45, 50 (D.D.C. 2002). See, also *Dist. Of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir.
2 2010); *State of New York v. United States*, 880 F. Supp. 37,38 (D.D.C. 1995)

3 There are four “basic grounds available to support a Rule 59(e) motion: (1) where the
4 motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2)
5 where the motion is necessary to present newly discovered or previously unavailable evidence; (3)
6 where the motion is necessary to prevent manifest injustice; and (4) where the amendment is
7 justified by an intervening change in controlling law. *Allstate Insurance Co. v. Herron*, 634 F.3d
8 1101, 1111 (9th Cir. 2011). A district court is afforded “considerable discretion in granting or
9 denying” a Rule 59(e) motion. *Id.*

11 **NRCP 52(b).** The purpose of the Rule is to allow for supplementing the court’s findings,
12 correcting manifest errors of law or fact or, in limited circumstances, presenting newly discovered
13 evidence. See, *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986). Except in
14 the instance of bona fide newly discovered evidence, the district court is limited to amending its
15 findings based on evidence contained in the record; to do otherwise would defeat the compelling
16 interest in finality of judgments. *Id.* 1. The basis for a motion to add or amend findings includes
17 incomplete findings. See, *Glaverbel Societe Anonyme v. Northlake Mktg. & Supply*, 45 F.3d 1550,
18 1555-56 (Fed. Cir. 1995); *United States v. Tosca*, 18 F.3d 1352, 1355 (6th Cir. 1994). Manifest
19 error of fact or law. See, *Fontenot*, 791 F.2d at 1219; see also *Nat’l Metal Finishing Co. v. Barclays*
20 *American/ Commercial, Inc.*, 899 F.2d 119, 123 (1st Cir. 1990) and newly discovered evidence.
21 See, *Fontenot*, 791 F.2d at 1219.
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IV.

LEGAL ARGUMENT

A. THE COURT'S ORDER DOES NOT CLARIFY WHAT, IF ANY, EFFECT IT HAS ON THE PARTIES' SETTLEMENT AGREEMENT AND THEIR RIGHT TO CONTRACT.

A court should not interpret a contract so as to make its provisions meaningless. *Phillips v. Mercer*, 94 Nev. 279, 579 P.2d 174 (1978). If logically and legally permissible, a contract should be construed give effect to valid contractual relations rather than rendering an agreement invalid or rendering performance impossible or illegal. *Mohr*, 83 Nev. at 112, 424 P.2d 104.

Severance is preferred to rendering the entire agreements unenforceable, as it preserves the intent of the agreements and complies with the policies favoring arbitration. See *Cox v. Station Casinos, LLC*, (Slip Copy) No. 2:14-CV-638-JCM-VCF, 2014 WL 3747605, *4 (D. Nev. June 25, 2014) (citing *Vincent v. Santa Cruz*, 647 P.2d 379, 381 (Nev. 1982). Severability preserves the contracting parties' intent by maintaining the existence of a contract but striking illegal provisions that are unenforceable. See *Linebarger v. Devine*, 214 P. at 534 (1923); see also 8 *Williston on Contracts* § 19:70 (4th ed. 2014) (citing *Restatement Second, Contracts* § 183, comment a) ("An illegal portion of an agreement that relates to the remedy is more readily separable.") ("[T]he strong legislative and judicial preference is to sever the offending term and enforce the balance of the agreement.").

The Settlement Agreement between Beavor and Hefetz contained the following severance clause:

16. **Severability.** If any provision of this Settlement Agreement is held to be illegal, invalid or unenforceable under present or future laws effective during the term hereof, such provision shall be fully severable, and the remaining provisions thereof shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance therefrom.

See, Exhibit 1 to Tomscheck's Motion for Summary Judgment.

Therefore, the court should have severed any unenforceable provisions of the Settlement Agreement and allowed the rest of the contract to survive. In apparently finding the entire agreement unenforceable the court creates additional legal issues. For example: Are the parties back at the status quo before they signed the agreement and settled the case? Are they now required to go back and hold the trial on the original case between Beavor and Hefetz? Does Hefetz have to repay the money paid by Beavor of \$250,000.00? Are the mutual releases in the settlement agreement valid? And many other issues that will arise if the court invalidates the entire settlement agreement.

The Court, in its Findings of Fact and Conclusions of Law fails to address if the entire contract is unenforceable and therefore void. The Court should pursuant to NRCP 59(e) and 52(b) clarify if it is striking paragraph 4 in its entirety; certain parts of paragraph 4, and whether or not it is applying the Settlement Agreement's clear severability clause.

Further, Plaintiff in this matter, and Mr. Hefetz, have a constitutionally protected right to contract as they see fit. Accordingly, the Court is prohibited from interpreting a contract in such a way that it is rendered meaningless. Likewise, the Court must give effect to valid contractual provisions wherever possible. Accordingly, the specific actions which the Court is taking regarding the parties' contract must be spelled out in clear detail.

Accordingly, the Court's decision should be altered or amended to clarify what if anything it is striking from the settlement agreement and reasons for doing so. It is an error of fact and law to ignore the severance provision contained in the agreement that the Court is analyzing.

B. IT IS AN ERROR OF LAW FOR THE COURT TO BASE ITS DECISION ON THE GOODLEY CASE OUT OF CALIFORNIA.

The sole question at issue in the *Goodley* case, a California case, is whether Plaintiff had standing to bring the malpractice case assigned to them. The Court states as follows, "The sole issue was whether by virtue of the assignment plaintiff has standing to bring this action for legal

malpractice.” *Goodley v. Wank & Wank*, 62 Cal. App. 3d 389, 392, 133 Cal. Rptr. 83, 83-84 (1976). The *Goodley* Court further states: “On the state of the record it is clear that no factual issues were tendered by the declarations. The contention merely was that plaintiff has no standing to sue.” This Court should have applied the same standard as *Goodley*. Namely, does Plaintiff, the actual client have standing to bring a malpractice action against his former lawyer Tomscheck. The answer can only be yes. Regardless of certain terms that maybe unenforceable in the Settlement Agreement or even if the entire agreement is void, Beavor as the former client and Plaintiff, has standing to sue. The order granting summary judgment must be amended and/or new findings added to correct this error of law.

The Nevada Supreme Court’s decision in *Tower Homes*, also deals with the explicit assignment from one party to another and that party’s standing to pursue it. *Tower Homes* reads as follows:

Notwithstanding the rule set forth in *Chaffee*, the purchasers argue that they were named representatives of the estate and under federal law a Chapter 11 bankruptcy plan may permit such representatives to bring a legal malpractice claim on behalf of the estate without an assignment, or, alternatively, that there was no assignment of the legal malpractice claim, only an assignment of proceeds. Heaton argues that the 2013 bankruptcy stipulation and order did not appoint the purchasers to represent the bankruptcy estate in a legal malpractice claim on behalf of the estate as permitted under 11 U.S.C. § 1123(b)(3)(B) (2012), **but instead purported to authorize the purchasers to prosecute a legal malpractice action on their own behalf and benefit in 'Tower Homes' name, thus constituting an unlawful assignment of a legal malpractice claim.** Supreme Court.

Tower Homes, LLC v. Heaton, 132 Nev. 628, 633, 377 P.3d 118, 121 (2016). Emphasis added.

The Court’s order cites these cases for the proposition that:

“As the court in *Goodley* stated, ‘[i]t is the unique quality of legal services, the personal nature of the attorney’s duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment.’ 133 Cal.Rptr. at 87. Allowing such assignments would ‘embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.’ *Id.*”

1 This is in direct conflict with the actual words of *Goodley*, which plainly state that the only
2 issue before the court is that of standing which is implicated in both of these matters when a case
3 is assigned from one party to another to pursue.

4 Here, there can be no question of standing as Plaintiff brought his own case in his own
5 name. The Court's order does not address how these cases which invalidate an assignment on the
6 basis of standing can be applied to this matter when standing cannot be at issue. Further, the Court
7 does not address the question of standing at all. If in fact, standing is the basis of the Court's ruling,
8 (per its reliance on a case in which the express issue was standing) it must make express findings
9 which explain how Plaintiff Beaver does not have standing to pursue his own case. The Court's
10 order should be altered or amended to include these express findings.

11
12 **C. THE COURTS ORDER DOES NOT STATE WHETHER IT CONSIDERED THE**
13 **ALLEGED ASIGNMENT OF THE CASE AN EXPRESS OR DE FACTO**
14 **ASSIGNMENT.**

15 To support the Court's award, the Court must make findings that there was an express
16 assignment of the cause of action or a de facto assignment. Without making such a determination,
17 it is unclear what the Court's actual findings were. The Court made the following findings:

- 18 1. The terms of the settlement agreement between Plaintiff Beavor and his former
19 adversary in the underlying case Hefetz v. Beavor (Case No. A645353), Yakov
20 Hefetz, **are admissible evidence of Plaintiff Beavor's assignment of his then-**
21 **unfiled legal malpractice lawsuit against Tomsheck to Hefetz. Such assignment**
is impermissible under Nevada law. See *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d
22 966 (1982); *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 377 P.3d 118 (2016).
- 23 2. **Plaintiff Beavor irrevocably assigned 100% of the proceeds from his then-**
24 **unfiled legal malpractice lawsuit against Tomsheck to Hefetz. He also assigned**
substantial, if not complete, control over the current litigation to Hefetz.
Nevada law, consistent with other jurisdictions, forbids this.
- 25 3. **Even assuming Plaintiff Beavor had only assigned the proceeds from the**
26 **current litigation to Hefetz**, Nevada law does not allow a party to simply assign
27 the proceeds from a legal malpractice lawsuit in order to avoid the appearance of
28 an impermissible assignment of the legal malpractice lawsuit itself. See *Tower*
Homes, LLC, 132 Nev. at 635, 377 P.3d at 122. In fact, the *Tower Homes, LLC*
Court rejected this very approach. See *Paragraphs 1-3 of the Court's Conclusions*

1 *of Law.*

2 Is it an express assignment of the cause of action or is it a de facto assignment of the cause
3 of action? The Court should alter or amend its order to give Plaintiff the clarity they are entitled
4 to under the law.

5 This confusion is even more pronounced when the facts of this case are considered. On the
6 face of the settlement agreement, this is an assignment of the proceeds of this matter only. The
7 agreement reads:
8

9 Beavor further irrevocably assigns any recovery or proceeds to Hefetz from the
10 above referenced actions and agrees to take any actions necessary to ensure that
any recovery or damages are paid to Hefetz pursuant to the Agreement.

11 This fact that this is not an express assignment is indisputable. Despite this undisputed fact,
12 Defendant argued that the language in the Settlement Agreement was an assignment of the entire
13 cause of action. It is unclear if the Court is adopting this reasoning or ruling that it was an express
14 assignment of the cause of action despite the plain meaning of these words or if it were a de facto
15 assignment. In which case the court failed to make the necessary finding to support that factual
16 and legal finding. While the Court does quote from the settlement agreement, it is left unsaid what
17 factors led the Court to determine that a de facto assignment had occurred. Without this analysis,
18 finding a de facto assignment is clear error. Accordingly, the Court should alter or amend its ruling
19 to provide Plaintiff with the clarity they are entitled to regarding the question of assignment.
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22 **D. THE COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT.**

23 **1. THE COURT'S DECISION IS NOT SUPPORTED BY NEVADA LAW.**

24 Nevada has two principle cases which deal with the assignment issues, the *Achrem* and the
25 *Tower Homes*. Neither supports the Court's ruling. In *Achrem*, the Court recognized that personal
26 injury claims were not, as a matter of law, assignable. *Edward J. Achrem, Chtd. v. Expressway
27 Plaza Ltd. Pshp.*, 112 Nev. 737, 741, 917 P.2d 447, 449 (1996). However, the Court found a
28

1 meaningful distinction between assigning the cause of action itself and the proceeds from the cause
2 of action. *Id.* The Court held that:

3 The district court also considered Expressway's assignment to be allowable because it
4 assigned a portion of Shawn's proceeds from his action against the school district, not
5 Shawn's tort action itself. ***We conclude that the district court was correct in ruling that a***
6 ***meaningful legal distinction exists between assigning the rights to a tort action and***
7 ***assigning the proceeds from such an action.*** See *In re Musser*, 24 Bankr. at 920-21. When
8 the proceeds of a settlement are assigned, the injured party retains control of their lawsuit
9 and the assignee cannot pursue the action independently. See *Charlotte Hosp. Auth.*, 455
10 S.E.2d at 657. Also, the ability to assign portions of the proceeds of the suit allows an
11 injured plaintiff to obtain an attorney through a contingency fee arrangement and allows
12 the plaintiff to pursue the action without being burdened by medical bills associated with
13 the accident. *Id.* at 741. *Emphasis added.*

14 Here, the facts are substantially similar to those in *Achrem*. A legal malpractice case cannot
15 be assigned. However, assigning the proceeds from a malpractice case is fundamentally different
16 just as it was in *Achrem*. Beavor still remains in control of his case. He was simply required to
17 bring the case. The settlement agreement says nothing about any actions he must take in the
18 litigation neither does it give Mr. Hefetz any control over the case.

19 Defendant does not specify what, if any, control Mr. Hefetz is given. The entire clause in
20 question, does not contain a single mention of any control which Mr. Hefetz has. Beavor only
21 agrees to 1) actually bring the case and cooperate in its prosecution, 2) use H. Stan Johnson as
22 counsel and execute any conflict waiver necessary, and 3) assign the proceeds of this case to
23 Hefetz. The Court did not specify how this constitutes a de facto assignment as a matter of law. It
24 is unclear how there can be a de facto assignment when the Settlement Agreement does not give
25 Hefetz actual control and the only declaration in this matter of the Plaintiff states just the contrary.
26 See, argument of statements from Beavor's declaration above.

27 The second case on point, *Tower Homes*, dealt with a bankruptcy court order "authorizing
28 the bankruptcy trustee to permit a group of creditors to pursue a debtor's legal malpractice claim
in the debtor's name." *Tower Homes, LLC v. Heaton*, 132 Nev. 628, 630, 377 P.3d 118, 119 (2016).

1 In *Tower Homes*, the Court sidestepped the issue of assigning the proceeds from a malpractice
2 claim. Holding, “even if an assignment of the claim is distinguished from a right to proceeds in
3 the legal malpractice context, the 2013 bankruptcy stipulation and order constituted an assignment
4 of **the entire claim**.” *Id.* The Court specifically declined to evaluate the *Achrem* case in this matter,
5 simply stating that “we are not convinced that *Achrem*’s reasoning applies to legal malpractice
6 claim.” Notwithstanding this statement, the Court continues to say this about *Archem*:

8 In *Achrem*, this court determined that the difference between an assignment of an
9 entire case and an assignment of proceeds was the retention of control. When only
10 the proceeds are assigned, the original party maintains control over the case. When
11 an entire claim is assigned, a new party gains control over the case. Here, the
12 bankruptcy court gave the purchasers the right to "pursue any and all claims on
13 behalf of . . . [d]ebtor . . . which shall specifically include . . . pursuing the action
14 currently filed in the Clark County District Court styled as *Tower Homes, LLC v.[.]*
15 *William H. Heaton, et al.*" No limit was placed on the purchasers' control of the
16 case, and the purchasers were entitled to any recovery. *Tower Homes*, 132 Nev. at
17 635, 377 P.3d at 122-23. *Internal citations omitted.*

18 As these cases do not support the Court’s findings, and there is no Nevada case law on
19 point, the Court’s decision impermissibly relies on dozens of out of state decisions. While such
20 decisions can be persuasive in certain circumstances, they are not here. First and foremost, they
21 cannot fill a void in Nevada law. Rather, the Court should have denied this Motion for Summary
22 Judgment and allowed this matter to be taken up on appeal by the Defendant. This squares with
23 Nevada’s mandate that matters be heard on their merits. Moreover, many all of these cases are
24 completely distinguishable from these facts. Without delving into these facts, the Court’s reliance
25 on these cases is misplaced. Accordingly, the Court’s decision is clearly erroneous and should be
26 altered or amended.

2. THERE ARE CLEAR ISSUES OF FACT WHICH THE COURT IGNORED

27 In *Brandon Apparel Group v. Kirkland & Ellis*, 382 Ill. App. 3rd 271 (2008) the Illinois
28 appellate court reversed the lower court’s order granting summary judgment since whether a de
facto assignment occurred of the legal malpractice claim was a fact question not properly decided

on summary judgment. The *Brandon* Court went on to state: “Neither our research nor that of either of the parties has disclosed a case addressing the precise question before us: when is de facto assignment of a legal malpractice claim established as a matter of law”?

The only declaration before the court was of the Plaintiff Beavor. In the declaration Beavor stated the following:

2. As partial consideration part for of a settlement agreement with a third party in another case, I agreed to assign the proceeds from any recovery in this matter, and only any proceeds from any recovery to that third party.

3. I have not assigned any cause of action to any third party for any action against Joshua Tomsheck, his firm, or any other attorney.

3. I am pursuing this matter as the Plaintiff and have been an active participate and in frequent contact with my counsel since the beginning of this matter by phone and email. I have met in person with my counsel as well.

4. I also agreed to use H. Stan Johnson, Esq. as counsel, and Charles “CJ” Barnabi, Esq. has also been retained to represent me in this matter. As in any legal matter I have the right to use other counsel and replace my current counsel if I decided to do so.

5. I consulted with my counsel to aid in the matter and to draft the initial complaint.

6. I have also been consulted with by my counsel regarding the strategic decisions in my case.

7. It will ultimately be my decision, and my decision alone to accept or reject any settlement offers that are made.

8. I have not assigned any party the right to pursue this, or any other matter, on my behalf.

These factual statements by Beavor were not considered by the Court. They are undisputed. For the Court to ignore these facts and testimony is an error of fact and law. The Court should amend its findings to acknowledge that there issues of fact and that summary judgment therefore cannot be granted.

3. BEAVOR’S CAUSE OF ACTION SHOULD NOT BE DISMISSED

The general rule is that an invalid assignment has no effect on the validity of the underlying action. “[I]f an assignment is invalid or incomplete, the assignor may still maintain a suit in his or her name.” 6 Am. Jur. 2d Assignments § 122 (2010). Thus, it would follow that Beavor can pursue his malpractice claim as the real party in interest. Indeed, several other jurisdictions considering

1 similar circumstances have acknowledged that the underlying legal malpractice claim survives an
2 invalid assignment. See *Weiss v. Leatherberry*, 863 So.2d 368, 373 (Fla. Dist. Ct. App. 2003)
3 (remanding matter to trial court because "invalidity of the agreement [to assign] has no effect on
4 the underlying cause of action for legal malpractice"). See also *Botma v. Huser*, 202 Ariz. 14, 39
5 P.3d 538, 542 (Ariz. Ct. App. 2002); *Weston v. Dowty*, 163 Mich. App. 238, 414 N.W.2d 165, 167
6 (Mich. Ct. App. 1987); *Tate v. Goins, et al*, 24 S.W.3d 627, 635 (Tex. App. 2000). The *Tate* case
7 was also cited by the Nevada Appellate Court in *Oceania Ins. Corp. v. Cogan*, 2020 Nev App
8 Unpub. Lexis 141 for the general rule of the law regarding that issue. Therefore, the Court should
9 make additional findings and amend its order to allow Beavor to pursue his action even if some
10 parts of the Settlement Agreement maybe invalid.

11
12 The Court should amend it findings to reject Tomsheck's claim that the entire agreement
13 is void. The alleged de facto assignment reflects only a portion of the overall Settlement Agreement
14 between Beavor and Hefetz. The invalidity of the de facto assignment provision does not
15 automatically void the entire Settlement Agreement.

16
17 Under no circumstance does the record support a dismissal of the action with prejudice.
18 Beavor has not forfeited his malpractice claim, however if the Court believes the current suit, born
19 of the improper de facto assignment, cannot be permitted to continue then it should be dismissed
20 without prejudice. Should Beavor wish to reassert his claim against Tomsheck, he will be able to
21 do so upon a showing that the attempted de facto assignment is no longer in place and that he is
22 the real party in interest.

23 V.

24 CONCLUSION

25 The Court should alter or amend its judgment or enter additional findings and modify the
26 judgment to conform with its findings in this matter. As stated above, its finding of facts and
27
28

1 conclusions of law are insufficient unclear and show errors of both fact and law. Accordingly,
2 the Court should grant this Motion pursuant to NRCP 59(e) and 52(b) and make the necessary
3 amendments or additional findings to the order granting Defendant's Motion for Summary
4 Judgment.

5
6 DATED this 7th day of August 2020.

7 **COHEN JOHNSON PARKER EDWARDS**

8 /s/ H. Stan Johnson

H. STAN JOHNSON, ESQ.

Nevada Bar No. 265

sjohnson@cohenjohnson.com

9 KEVIN M. JOHNSON, ESQ.

Nevada Bar No. 14451

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375 East Warm Springs Road, Suite 104

11 Las Vegas, Nevada 89119

12 Telephone: (702) 823-3500

13 Facsimile: (702) 823-3400

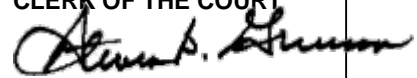
14 *Attorneys for Plaintiff*

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a true and complete copy of the foregoing
PLAINTIFF'S MOTION TO ALTER OR AMEND PURSUANT TO NRCP 59(e) and
52(b) to be filed and served upon all persons registered to receive same via the Court's Odyssey
E-file and E- Serve System.

DATED this 7th day of August 2020.

/s/ Sarah K. Gondek
An employee of Cohen Johnson Parker Edwards



MAX E. CORRICK, II
Nevada Bar No. 006609
OLSON CANNON GORMLEY & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Phone: 702-384-4012
Fax: 702-383-0701
mcorrick@ocgas.com
Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,
Plaintiff,

CASE NO. A-19-793405-C
DEPT. NO. XXIV

v.

JOSHUA TOMSHECK, an individual; DOES
I-X, inclusive,
Defendants.

JOSHUA TOMSHECK, an individual,
Third-Party Plaintiff,

v.

MARC SAGGESE, ESQ., an individual,
Third-Party Defendant.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying Plaintiff's Motion to Alter or Amend
has been entered in the above-entitled Court on the 17th day of September, 2020, a copy of

1 which is attached hereto.

2 DATED this 17th day of September, 2020.

3 OLSON CANNON GORMLEY & STOBERSKI

4
5 */s/Max E. Corrick*

6 _____
7 MAX E. CORRICK, II
8 Nevada Bar No. 006609
9 9950 West Cheyenne Avenue
10 Las Vegas, NV 89129
11 Attorneys for Defendant/Third-Party Plaintiff
12 JOSHUA TOMSHECK
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CERTIFICATE OF SERVICE

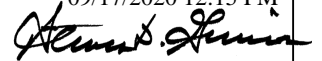
I HEREBY CERTIFY that on this 17th day of September, 2020, I sent via e-mail a true and correct copy of the above and foregoing **NOTICE OF ENTRY OF ORDER** on the Clark County E-File Electronic Service List (or, if necessary, by U.S. Mail, first class, postage pre-paid), upon the following:

H. Stan Johnson, Esq.
Cohen Johnson Parker Edwards
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119
702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com
Attorneys for Plaintiff

Joseph P. Garin, Esq.
Amanda A. Ebert, Esq.
Lipson Neilson P.C.
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aebert@lipsonneilson.com
Attorneys for Marc Saggese

/s/Jane Hollingsworth

An Employee of OLSON CANNON GORMLEY & STOBERSKI


CLERK OF THE COURT

MAX E. CORRICK, II
Nevada Bar No. 006609
OLSON CANNON GORMLEY & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Phone: 702-384-4012
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mcorrick@ocgas.com
Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

DISTRICT COURT

CLARK COUNTY, NEVADA

CHRISTOPHER BEAVOR, an individual,
Plaintiff,

v.

JOSHUA TOMSHECK, an individual;
DOES I-X, inclusive,
Defendants.

CASE NO. A-19-793405-C
DEPT. NO. XXIV

**ORDER DENYING PLAINTIFF'S
MOTION TO ALTER OR AMEND
PURSUANT TO NRCP 52(b) and 59(e)**

Date of Hearing: September 17, 2020

Time of Hearing: 9:00 a.m.

JOSHUA TOMSHECK, an individual,
Third-Party Plaintiff,

v.

MARC SAGGESE, ESQ., an individual,
Third-Party Defendant.

This matter of Plaintiff CHRISTOPHER BEAVOR's Motion to Alter or Amend
Pursuant to NRCP 52(b) and 59(e) having been scheduled for hearing on the 17th day of
September, 2020, before the Honorable Judge Jim Crockett.

The court has reviewed the following pleadings:

1. Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e);
2. Defendant/Third-Party Plaintiff's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e);
3. Third-Party Defendant's Substantive Joinder to Defendant/Third-Party Plaintiff's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e)
4. Plaintiff's Reply to Defendant/Third-Party Plaintiff's Opposition to Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e).

The court has determined that pursuant to the discretion provided to this court this matter may be decided on the briefs and pleadings filed by the parties without oral argument because the court deems oral argument unnecessary. *See* EDCR 2.23(c). Accordingly, the court finds and orders as follows:

FINDINGS

Plaintiff's motion to alter or amend is really just a motion for reconsideration coupled with the injection of entirely new information that was not presented during the initial briefing on the underlying motion. The attempted introduction of new information not previously considered is improper, whether the motion is to alter or amend or reconsider.

Additionally, Plaintiff reargues the same factual and legal issues that were already considered by the court prior to rendering the decision which Plaintiff seeks to alter or amend. Rearguing the same legal and factual issues that have already been argued and considered is not an appropriate basis to alter or amend the court's decision, nor is it a proper basis for reconsideration of the court's ruling.

ORDER

Based upon the above Findings, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion to Alter or Amend Pursuant to NRCP 52(b) and 59(e) is DENIED.

IT IS SO ORDERED.

Dated this 17th day of September, 2020

DATED this ____ day of September, 2020.



JUDGE JIM CROCKETT

Approved as to Form and Content:

COHEN JOHNSON

Approved as to form only
/s/H. Stan Johnson

H. STAN JOHNSON, ESQ.
Nevada Bar No. 000265
375 East Warm Springs Road, Suite 104
Las Vegas, NV 89119
Attorney for Plaintiff
CHRISTOPHER BEAVOR

OLSON CANNON GORMLEY &
STOBERSKI
BBB 250 E 598 FE61
Jim Crockett
District Court Judge
/s/Max E. Corrick, II

MAX E. CORRICK, II
Nevada Bar No. 006609
9950 West Cheyenne Avenue
Las Vegas, NV 89129
Attorneys for Defendant/Third-Party Plaintiff
JOSHUA TOMSHECK

LIPSON NEILSON P.C.

Approved as to form and content
/s/Amanda A. Ebert

AMANDA A. EBERT, ESQ.
Nevada Bar No. 12731
9900 Covington Cross Drive
Suite 120
Las Vegas, NV 89144
Attorneys for Third-Party Defendant
MARC SAGGESE, ESQ.

From: H. Stan Johnson <sjohnson@cohenjohnson.com>
Sent: Wednesday, September 16, 2020 5:14 PM
To: Max Corrick; Kevin Johnson; Amanda Ebert (AEbert@lipsonneilson.com); Joe Garin
Cc: Jane Hollingsworth
Subject: RE: Beavor adv. Tomscheck -- Proposed Order

Max if you would change it to approved as to form only for me that would be good and you can submit it.

H. Stan Johnson, Esq.
Cohen-Johnson, LLC
375 E. Warm Springs Road, Suite 104
Las Vegas, Nevada 89119
702-823-3500
702-823-3400 fax
sjohnson@cohenjohnson.com

Also, this communication is CONFIDENTIAL and protected by the Attorney-Client and/or the Attorney Work Product Privileges. It is intended solely for the addressees listed above. Anyone not listed above, or who is not an agent authorized to receive it for delivery to an addressee, is not authorized to read, disseminate, forward, copy, distribute, or discuss its contents, or any part thereof. Anyone else must immediately delete the message, and reply to the sender only, confirming you have done so.

From: Max Corrick <mcorrick@ocgas.com>
Sent: Wednesday, September 16, 2020 1:17 PM
To: H. Stan Johnson <sjohnson@cohenjohnson.com>; Kevin Johnson <kjohnson@cohenjohnson.com>; Amanda Ebert (AEbert@lipsonneilson.com) <AEbert@lipsonneilson.com>; Joe Garin <JGarin@lipsonneilson.com>
Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>
Subject: Beavor adv. Tomscheck -- Proposed Order

All: Please review the attached Proposed Order on Plaintiff's Motion to Alter/Amend. It tracks the amended minute orders to reflect what the court reviewed, as well as what the minute order states.

Let me know if you have any proposed edits or comments. If it meets with your approval, please respond as to whether I have your authority to insert your electronic signature.

Thanks.

From: Amanda Ebert <AEbert@lipsonneilson.com>
Sent: Wednesday, September 16, 2020 5:46 PM
To: Max Corrick
Cc: H. Stan Johnson; Kevin Johnson; Joe Garin; Jane Hollingsworth
Subject: Re: Beavor adv. Tomscheck -- Proposed Order

Looks good to me as well- please go ahead and insert my E-signature. Thanks.

On Sep 16, 2020, at 5:22 PM, Max Corrick <mcorrick@ocgas.com> wrote:

Understood.

Sent from my Sprint Samsung Galaxy S10e.

----- Original message -----

From: "H. Stan Johnson" <sjohnson@cohenjohnson.com>
Date: 9/16/20 5:13 PM (GMT-08:00)
To: Max Corrick <mcorrick@ocgas.com>, Kevin Johnson <kjohnson@cohenjohnson.com>, "Amanda Ebert (AEbert@lipsonneilson.com)" <AEbert@lipsonneilson.com>, Joe Garin <JGarin@lipsonneilson.com>
Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>
Subject: RE: Beavor adv. Tomscheck -- Proposed Order

Max if you would change it to approved as to form only for me that would be good and you can submit it.

H. Stan Johnson, Esq.
Cohen-Johnson, LLC
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Las Vegas, Nevada 89119
702-823-3500
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sjohnson@cohenjohnson.com

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contents, or any part thereof. Anyone else must immediately delete the message, and reply to the sender only, confirming you have done so.

From: Max Corrick <mcorrick@ocgas.com>

Sent: Wednesday, September 16, 2020 1:17 PM

To: H. Stan Johnson <sjohnson@cohenjohnson.com>; Kevin Johnson <kjohnson@cohenjohnson.com>; Amanda Ebert (AEbert@lipsonneilson.com) <AEbert@lipsonneilson.com>; Joe Garin <JGarin@lipsonneilson.com>

Cc: Jane Hollingsworth <jhollingsworth@ocgas.com>

Subject: Beavor adv. Tomsheck -- Proposed Order

All: Please review the attached Proposed Order on Plaintiff's Motion to Alter/Amend. It tracks the amended minute orders to reflect what the court reviewed, as well as what the minute order states.

Let me know if you have any proposed edits or comments. If it meets with your approval, please respond as to whether I have your authority to insert your electronic signature.

Thanks.

1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Christopher Beavor, Plaintiff(s) CASE NO: A-19-793405-C
7 vs. DEPT. NO. Department 24
8 Joshua Tomsheck, Defendant(s)
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District
12 Court. The foregoing Order was served via the court's electronic eFile system to all
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 9/17/2020

15 Max Corrick	mcorrick@ocgas.com
16 Jane Hollingsworth	jhollingsworth@ocgas.com
17 Susana Nutt	snutt@lipsonneilson.com
18 H Johnson	calendar@cohenjohnson.com
19 H Johnson	sjohnson@cohenjohnson.com
20 Sarah Gondek	sgondek@cohenjohnson.com
21 Sydney Ochoa	sochoa@lipsonneilson.com
22 Kevin Johnson	kjohnson@cohenjohnson.com
23 Charles ("CJ") Barnabi Jr.	cj@barnabilaw.com
24 Michael Morrison	mbm@cohenjohnson.com
25 Amanda Ebert	aebert@lipsonneilson.com

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Marie Twist

marie@barnabilaw.com