IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE G. FAGEL, A LAW CORPORATION aka LAW OFFICES OF BRUCE G. FAGEL & ASSOCIATES, A California Corporation; Petitioner, v. THE EIGHTH JUDICIAL DISTRICT COURT, in and for the County of Clark, State of Nevada, and THE HONORABLE JERRY A. WIESE II, District Judge; Respondents, And DARIA HARPER, an individual; and DANIEL WININGER, and individual; Real Parties in Interest.	Case No. District Court No. A-20-814541-C Dept. No. 30

PETITION FOR WRIT OF PROHIBITION

From the Eighth Judicial District Court
The Honorable Jerry A. Wiese II, District Judge

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

1. Petitioner, Bruce G. Fagel a Law Corporation, aka Law Offices of Bruce G. Fagel & Associates, is a California Corporation. Petitioner does not have a parent corporation, nor does a publicly held company own ten percent or more of its stock.

2. Riley A. Clayton of Hall Jaffe & Clayton, LLP, represented the Petitioner in the District Court below and will represent Petitioner for this Writ of Prohibition.

3. No litigant referenced herein is using a pseudonym.

These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 23rd day of August, 2021.

Riley A. Clayton
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I. ROUTING STATEMENT

This case raises a question of statewide public importance, as the exercise of personal jurisdiction over an out-of-state law firm is a fundamental Due Process concern. NRAP 17(a)(11) and (12). Moreover, this case should not be assigned to the Court of Appeals because the case does not fall within any of the categories that are presumptively assigned to the Court of Appeals. *See* NRAP 17(b).

II. RELIEF SOUGHT

Fagel Law requests that a writ of prohibition be issued, which would prevent the District Court from exercising personal jurisdiction over it, and to otherwise dismiss Fagel Law from the underlying case. *See Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Ct.*, 122 Nev. 509, 512 n.1, 712 n.1 (2006) (explaining that a writ of prohibition challenges a district court's erroneous exercise of personal jurisdiction while a writ of mandamus compels the district court to accept jurisdiction); NRS 34.320; Nev. Const. art. 6, § 4.

III. ISSUES PRESENTED

1. Did the District Court clearly err in exercising specific personal jurisdiction over Fagel Law and leaving it with no adequate remedy at law by failing to first determine whether personal jurisdiction existed over Fagel Law, and instead, erroneously focusing on whether joint venture liability could attach to a putative joint venturer?

2. Did the District Court clearly err in exercising specific personal jurisdiction over Fagel Law and leaving it with no adequate remedy at law by erroneously relying upon unsupported allegations of a complaint regarding a purported "joint venture" when the facts outlined in Fagel Law's Declaration negated such a finding?

V. FACTUAL AND PROCEDURAL BACKROUND

A. Statement Of The Case

The instant case involves a legal malpractice/declaratory relief action ("Legal-Mal Case") filed by two Arizona Plaintiffs, Daria Harper and Daniel Wininger ("Plaintiffs"), against their out-of-state lawyers who represented them in a Nevada medical malpractice action. [PA00001-24, Vol. I]. Daria Harper was allegedly injured in an Arizona industrial accident and subsequently sought medical care in Nevada. [PA00002, Vol. I]. As a result of that medical care, Daria Harper was allegedly rendered a quadriplegic. *Id.*

Plaintiffs filed a medical malpractice lawsuit in the Eighth Judicial District Court, Case No. A-16-738004-C (the "Med-Mal Case") [PA00004, Vol. I]. At mediation in 2018, the Med-Mal Case resolved for $6.25 million. [PA00005, Vol. I]. In connection with the mediation and essentially throughout the entirety of the Med-Mal Case, Plaintiffs were primarily represented by a California law firm, the

Law Offices of Marshall Silberberg, P.C. and/or Kenneth Marshall Silberberg (collectively referred to as "Silberberg"). [PA00064-72, Vol. I].

In resolving the Med-Mal Case, Silberberg allegedly failed to advise/protect the Plaintiffs from a workers' compensation subrogation lien, which was being asserted by Copperpoint Mutual Insurance Co. ("Copperpoint"). [PA00013-14, Vol. I]. Copperpoint stopped paying workers compensation benefits and sought reimbursement of over $3 million from Plaintiffs from the Med-Mal Case settlement. [PA00005-6, Vol. I].

In connection with the Med-Mal Case, Silberberg asked Petitioner, Bruce G. Fagel, a California Law Corporation aka Law Offices Of Bruce G. Fagel & Associates ("Fagel Law"), to provide some nominal assistance by agreeing to the use of its then affiliate office in Nevada to serve as co-counsel until Silberberg was admitted pro hac vice when Silberberg would then exercise full control of the case. [PA00065-66, Vol. I]. Silberberg agrees that Fagel Law had no role in prosecuting the case. [PA00104-108, Vol. I]. Silberberg agreed to share any recovery obtained in the Med-Mal Case with Fagel Law. [PA00065-66, Vol. I].

Fagel Law is a California law firm, although at the time, Fagel Law had a "virtual office" in Nevada, and one lawyer from Fagel Law, Thomas S. Alch ("Mr. Alch"), who was both licensed in California and Nevada. [PA00070]. Despite having the Nevada "virtual office," the overwhelming majority of Fagel Law's work,

including Fagel Law's limited work on the Med-Mal Case, occurred in California. [PA00070-72, Vol. I]. Mr. Alch served as "local counsel" and, while Mr. Alch was employed with Fagel Law, Fagel Law initially provided some assistance to Silberberg with respect to the retention of experts and filing the complaint for the Med-Mal Case. [PA00065-66, Vol. I]. Once Silberberg was admitted *pro hac vice*, essentially all of the handling of the Med-Mal Case was conducted by Silberberg. [PA00066, Vol. I].

At the time of the 2018 Med-Mal Case mediation, Mr. Alch was no longer employed by/affiliated with Fagel Law, but was, instead, employed by another California law firm, Shoop Law Offices. [PA00002-3, PA00069, Vol. I]. Fagel Law was not involved in the settlement and had no involvement regarding the viability of Copperpoint's subrogation lien. [PA00067-68, Vol. I]. Moreover, Fagel Law had no involvement in deciding how proceeds would be disbursed, when they would be disbursed, and/or how they were disbursed. [PA00068, Vol. I].

After the settlement, Copperpoint sought to enforce its subrogation lien, including discontinuing payments to Plaintiffs and demanding reimbursement. [PA00004-9, Vol. I]. At that point, Plaintiffs filed the Legal-Mal Case. [PA00001-24, Vol. I]. In response, Fagel Law filed a motion to dismiss based upon a lack of personal jurisdiction pursuant to NRCP 12(b)(2). [PA00040-62, Vol. I]. Fagel Law established that Nevada was not its "home," thereby negating general jurisdiction,

and that it had no involvement in the key allegations that purportedly support Plaintiffs' Legal-Mal Case, i.e., the purported failure to protect Plaintiffs against Copperpoint's lien, the drafting and negotiation of the contingency fee agreement, and the disbursement of settlement proceeds, thereby negating specific personal jurisdiction. [PA00050-60, Vol. I; PA00535-550, Vol. III]. The District Court disagreed, finding specific personal jurisdiction over Fagel Law [PA00558-560, Vol. III], thus prompting the filing of the instant writ of prohibition.

The District Court's Order rests upon unsupported *allegations* in the Legal-Mal complaint, which suggest that because Fagel Law was purportedly in a "joint venture" with the other lawyer-defendants, specific personal jurisdiction, necessarily, existed over Fagel Law. *Id.* The Constitutional problem with the District Court's conclusion, however, is two-fold: (1) the District Court failed to **first** determine whether *personal jurisdiction* existed over Fagel Law, and instead, erroneously focused on whether joint venture *liability* could attach to a putative joint venturer; and (2) the District Court relied upon the unsupported *allegations* of the complaint regarding a purported "joint venture" when the true facts outlined in Fagel Law's Declaration negated such a finding. *Id.* By putting the proverbial cart (liability) before the horse (personal jurisdiction), the District Court erroneously exercised personal jurisdiction over Fagel Law. Therefore, a writ of prohibition

should issue so that Nevada does not wrongfully exercise jurisdiction over Fagel Law.

B. Facts Necessary To Understand The Issues Presented.

Fagel Law is incorporated in California, and its principal place of business is and was, for approximately 20 years, located in Beverly Hills, California. [PA00070, Vol. I]. Fagel Law recently relocated its main office to Los Angeles. *Id.* Fagel Law maintains other offices in California but does not maintain physical offices outside the state of California, including Nevada. *Id.* Fagel Law has never held any licenses in or issued by the state of Nevada, or any ownership or managerial interests in Nevada companies. [PA00065, Vol. I]. Fagel Law has not maintained and does not maintain any bank accounts in Nevada. *Id.*

Plaintiffs are not Nevada residents, rather they are from Arizona. [PA00002, PA00065, Vol. I]. Plaintiffs were not solicited by Fagel Law or any of its attorneys; rather Plaintiffs contacted Silberberg, another California law firm, and entered into a contingency fee agreement with Silberberg. [PA00065, Vol. I].

After Plaintiffs retained Silberberg, Mr. Silberberg called Dr. Fagel in California, requesting some nominal assistance from Fagel Law and its then affiliate law office in Nevada, the Law Offices of Thomas S. Alch. *Id.* Mr. Silberberg promised that in return for some nominal assistance by Mr. Alch, a share of any recovery would be paid to Fagel Law in California. [PA00065-66, Vol. I].

Thereafter, Mr. Alch nominally assisted Silberberg by providing "form" examples of expert declarations that were required to be filed with the complaint in Nevada. *Id.* Mr. Alch assisted with the preparation and filing of the Med-Mal complaint and assisted on a very limited basis once Silberberg was admitted *pro hac vice*. [PA00066, Vol. I]. Importantly, Fagel Law was not to be involved with the prosecution of the lawsuit in any way. *Id.* Once Silberberg was admitted p*ro hac vice*, Fagel Law understood that Silberberg would be conducting all the depositions, moving the case through discovery, advising the Plaintiffs, and otherwise managing the case from that point forward. *Id.*

Mr. Alch left Fagel Law on September 15, 2017, and Fagel Law understood that thereafter, Mr. Alch would remain on the Med-Mal Case to serve as local counsel to Silberberg in Mr. Alch's independent capacity, and not as an employee or affiliate of Fagel Law. *Id.* Fagel Law had no further contact with Silberberg or Mr. Alch until after the Med-Mal Case settled at mediation in 2018. [PA00066, Vol. I].

The Legal-Mal complaint alleges various theories of purported professional wrongdoing by Fagel Law. [PA00066-67, Vol. I]. But the facts establish that none of the alleged wrongdoing occurred with Fagel Law's involvement or knowledge, nor was the outcome of such alleged wrondoing connected with Fagel Law's actions, inactions, statements, representations, or conduct. [PA00064-72, Vol. I].

Specifically, the Legal-Mal complaint alleges the mishandling of Copperpoint's workers compensation lien in the Med-Mal Case. [PA00067, Vol. I]. However, the handling of and decisions with respect to the workers compensation lien were all performed by Silberberg. *Id.* Moreover, the Copperpoint lien issue came to a head at the mediation in 2018--**after** Mr. Alch's employment with Fagel law had been terminated and Mr. Alch was then employed by another California law firm. *Id.*

The Legal-Mal complaint also alleges improprieties regarding the contingency fee agreement, but no one at Fagel Law was involved in that aspect of the matter, either. [PA00067-68, Vol. I]. Rather, Silberberg handled the contingency fee agreement, identified what amounts would be charged, how the fees were calculated, etc. *Id.* In fact, Fagel Law never saw a copy of the contingency fee agreement until **after** the settlement had been funded and fees were paid. *Id.*

Regarding the allegedly untimely/insufficient distributions of settlement funds from the Med-Mal Case, once again, no one associated with Fagel Law was involved in that process. [PA00068, Vol. I]. Instead, the distribution of proceeds was handled exclusively by Silberberg, long after Mr. Alch was no longer employed by Fagel Law. *Id.* Likewise, regarding the improper/untimely distribution of settlement funds, Fagel Law was totally unaware that Silberberg had purportedly withheld a portion of the Plaintiffs' funds for any purpose, including as a potential source of money to litigate the enforceability of Copperpoint's lien. *Id.* Silberberg provided

Dr. Fagel in California with a copy of a disbursement sheet **after** the case resolved, along with a check for a portion of the settlement proceeds. *Id.*

The Legal-Mal complaint finally alleges that the distribution of proceeds to Fagel Law was improper, but Fagel Law never had a fee agreement with the Plaintiffs, and never negotiated or drafted a contingency fee agreement for the Med-Mal Case. *Id.* Instead, Silberberg entered into a contingency fee agreement, and Silberberg provided a document along with a copy of the contingency fee agreement to Plaintiffs mentioning the involvement of outside lawyers in the case. *Id.*

After Mr. Alch left Fagel Law in 2017, he was no longer in any sort of an agency or employment relationship with Fagel Law. [PA00069, Vol. I]. Because of Mr. Alch's ongoing involvement after 2017 in a few remaining cases (albeit while employed at another law firm), Fagel Law orally agreed that if the case resolved favorably, Mr. Alch would be compensated by receiving 10 percent of the fee otherwise payable to Fagel Law, although such payment would be made to him pursuant to Form 1099 – Miscellaneous Income as an independent contractor. *Id.*

Fagel Law's attorneys are licensed in California. [PA00069, Vol. I]. One lawyer named Devon Fagel is licensed in Nevada, but his license has been on inactive status for approximately 20 years. *Id.* Devon Fagel only became employed with Fagel Law in 2019, **after** the Med-Mal Case settled, and he never handled a matter in Nevada. *Id.* The number of Fagel Law lawyers and staff members has

remained relatively consistent over the past 20 years. *Id.* Moreover, the number of lawyers also licensed in Nevada has only been either one or two during that same time period. *Id.*

Fagel Law presently has no cases that involve Nevada clients or actions pending in Nevada courts. *Id.* Although it handled approximately 8-10 cases in Nevada over the past 10 years, Fagel Law has not taken a new case involving a Nevada client nor has it been involved in the filing of any new action in Nevada courts since approximately 2018. *Id.* The approximate percentage of the firm's revenue attributable to Nevada matters over the last 10 years was not more than 2% to 4% of revenue. *Id.* To the best of his knowledge, Dr. Fagel is the only lawyer from Fagel Law that sought to become admitted to practice law in Nevada on a *pro hac vice* basis, but no such *pro hac vice* order was ever issued in those cases. Since Mr. Alch left Fagel Law on September 17, 2017, Fagel Law has not been affiliated with any other Nevada law firm. [PA00070, Vol. I].

Fagel Law does not and never has owned any real property in the State of Nevada. *Id.* In the past, Fagel Law paid through a bank located in California for the rental of "virtual office" suites located in Nevada so that The Law Office of Thomas S. Alch could comply with Nevada's Rules of Professional Conduct. *Id.* Prior to September 2017, Mr. Alch operated under a fictious firm name in Nevada, i.e., "The Law Offices of Thomas S. Alch, an affiliate of Bruce G. Fagel & Associates." *Id.*

The last lease for the "virtual" office located in Las Vegas terminated on December 31, 2018. [PA00070-71, Vol. I]. Fagel Law paid a minimal monthly "rent" for the occasional use of these virtual offices (around $129 per month). [PA00071, Vol. I]. It was Fagel Law's general understanding that in order to comply with the Nevada State Bar's requirements for affiliated offices, there had to be a location open during business hours in Nevada to accept service of documents. *Id.*

The overwhelming majority (98+%) of time where Fagel Law employees, including Mr. Alch, physically worked was in the office in Beverly Hills, California. *Id.* The administrative functions, despite the "virtual office" in Nevada, was all performed in the Beverly Hills, California, office. *Id.* The mail sent and received in Nevada on cases where The Law Office of Thomas S. Alch was involved was also extremely limited, noting that on those few Nevada cases, Thomas S. Alch also listed the Beverly Hills, California, office address for Fagel Law for receipt of mail, faxes, etc. *Id.*

The Law Office of Thomas S. Alch had a phone number with a Nevada area code. [PA00072, Vol. I]. When the virtual receptionist answered phone calls made to the Nevada number, the receptionist would then transfer those calls to Fagel Law's personnel in California. *Id.* That phone number is still in use, although when incoming calls are made to that number, the calls are answered by Fagel Law's receptionist in California. *Id.*

Fagel Law has advertised over the internet since approximately 2010 but has no physical internet "presence" in Nevada. *Id.* Fagel Law conducted some advertising by way of phone book advertisements Nevada prior to approximately 2010, but not since then. *Id.* The firm has not placed advertisements in print media in Nevada. *Id.*

On November 9, 2020, Plaintiffs took the deposition of Mr. Silberberg. He testified/confirmed that neither Fagel Law nor Mr. Alch had any involvement in the prosecution of Plaintiffs' case:

> Q: So regardless of the motivation, would it be correct that Bruce Fagel agreed that Tom Alch, who was his employee, would be local counsel working in association with your firm in the Daria Harper case?
> A: Well, no. There was no "agreement," as you put it. What – what it was was that we were going to utilize Tom to help us with just the local rules initially, to make sure that we were compliant with the local rules. At that point, once that was all done – once that was done, there was really no agreement. **They weren't going to participate, as you said, in the prosecution of the case at all**. They did not participate in the –**once we got the local rules established and the complaint filed and initial discovery, they had no involvement in the case**.
> Q: When you say "they," do you mean neither Alch nor Fagel?
> A: That's correct. **Once we started going and getting discovery done, that was the end. I didn't consult with anybody at that office ever. Tom helped out initially** – his office, his secretary – making sure that things got filed and that they were complying with the local rules. **Once that was done and the real prosecution of the case started, they had no involvement at all**. [Emphasis added].

[PA00104-108, Vol. I].

C. Procedural Posture Ultimately Resulting In The District Court Erroneously Finding Personal Jurisdiction Over Fagel Law.

On May 21, 2021, Fagel Law filed a Motion to Dismiss pursuant to NRCP 12(b)(2) based upon the lack of personal jurisdiction. [PA00040-62, Vol. I]. On June 4, 2021, Plaintiffs filed an opposition to the motion [PA00110-119, Vol. I], and then on June 23, 2021, Fagel Law filed its reply. [PA00535-550, Vol. III]. Without oral argument, the Hon. Jerry Wiese denied the Motion to Dismiss. [PA00551-561, Vol. III]. Noting that for the relevant time period Fagel Law's activities in Nevada did not appear to be "substantial, continuous, and systematic," the District Court apparently concluded that general jurisdiction did not exist over Fagel Law. [PA00558, Vol. III]. However, with respect to the issue of specific personal jurisdiction, the District Court found that it existed. [PA00558-560, Vol. III]. The District Court's order was signed and filed on July 4, 2021 [PA00551-561; PA, Vol. III], and Notice of Entry of Order was filed on July 30, 2021. [PA00565-582, Vol. III].

VI. REASONS WHY THE WRIT SHOULD ISSUE

A. Summary Of The Argument

This Court should issue a writ of prohibition against the District Court, which erroneously concluded that specific personal jurisdiction existed over Fagel Law. Fagel Law established, and the District Court seemingly correctly concluded, that there was no continuous and systematic contact between Nevada and Fagel Law to

exercise general jurisdiction. [PA00558, Vol. III]. Because Fagel Law's "home" is California where Fagel Law is incorporated and has its principal place of business, the District Court correctly concluded that general jurisdiction did not exist, [PA00070, Vol. I; PA00558, Vol. III], and this Court should affirm.

Next, Fagel Law provided specific evidence, which effectively went unchallenged below, to establish that there was no connection between Fagel Law and the allegations supporting Plaintiffs' Legal-Mal Case. [PA00040-62, PA00064-72, Vol. I; PA00535-550, Vol. III]. Here, the essence of Plaintiffs' Legal-Mal Case involves allegations surrounding the execution of the contingency fee agreement, the purportedly wrongful disbursement/withholding of settlement proceeds, and the activity surrounding Copperpoint's lien. [PA00001-00024, PA00064-72, Vol. I]. The undisputed evidence, however, established that Fagel Law had no involvement with any of these issues. [PA00068-69, Vol. I]. Because nothing in this case connects Fagel Law to the specific "suit-related" conduct that purportedly supports Plaintiffs' Legal-Mal Case, the District Court erroneously concluded that specific jurisdiction existed over Fagel Law, and this Court should reverse.

Finally, the District Court made the erroneous conclusion that because liability of one member of a joint venture may be imputed to all members of a joint venture, specific personal jurisdiction necessarily exists over Fagel Law. [PA00558-560, Vol. III]. The fundamental problem with this conclusion is that the

District Court did not *first* find that *personal jurisdiction* existed over Fagel Law, but instead, erroneously focused on whether the *liability* of one joint venturer could be imputed to the other joint venturers, and then simply held that specific jurisdiction *necessarily* existed over Fagel Law. [PA00545-546, PA00558-560, Vol. III]. Moreover, the District Court erroneously concluded that Fagel Law was part of a "joint venture" based upon the allegations of the Legal Malpractice Complaint [PA00545-546, Vol. III], even though those allegations were negated by the **actual facts** provided by the Declaration of Dr. Bruce Fagel. [PA00064-72, Vol. I]. Therefore, because of these two Constitutionally impermissible errors, this Court should issue the writ and prohibit the District Court from exercising personal jurisdiction over Fagel Law and dismiss it from the case.

B. Writ Relief Is Appropriate Because Fagel Law Has No Adequate Remedy At Law.

The petitioner for extraordinary relief must demonstrate a clear right to the relief requested and the absence of a plain, speedy, and adequate remedy in the ordinary course of law. *Halverson v. Sec'y of State*, 124 Nev. 484, 487 (2008); NRS 34.330. This Court has recognized that a petitioner lacks a plain, speedy, and adequate remedy at law when a district court erroneously exercises personal jurisdiction over the petitioner, which is Fagel Law's position in this case. *See, e.g., Budget Rent-A-Car v. Eighth Jud. Dist. Ct.*, 108 Nev. 483, 484 (1992).

C. Standard Of Review

This Court reviews the District Court's order de novo. *Consipio Holding, BV v. Carlberg*, 128 Nev. 454, 458 (2012). When a nonresident defendant challenges personal jurisdiction, **the plaintiff bears the burden** of showing that jurisdiction exists. *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.,* 131 Nev. 30, 35 (2015). The plaintiff must establish, by a preponderance of the evidence, that (1) Nevada's long-arm statute, NRS 14.065, is satisfied; and (2) the exercise of jurisdiction does not offend due process. *Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Ct.,* 122 Nev. 509, 512 (2006).

Under the Due Process Clause of the Fourteenth Amendment, a nonresident defendant must have sufficient "minimum contacts" with the forum state so that subjecting the defendant to the state's jurisdiction will not "offend traditional notions of fair play and substantial justice" associated with due process. *Fulbright & Jaworski,* 342 P.3d at 1001. Due process requirements are satisfied if the nonresident defendant's contacts are sufficient to obtain either (1) general jurisdiction, or (2) specific personal jurisdiction, and (3) it is reasonable to subject the nonresident defendant to suit in the forum state. *Viega GmbH v. Eighth Jud. Dist. Ct.,* 130 Nev. 368, 375 (2014). As set forth herein, Plaintiffs did not establish that Fagel Law's contacts with Nevada were sufficient for the District Court to assert personal jurisdiction over it. Therefore, the District Court's order

should be reversed through a writ of prohibition, and the claims against Fagel Law should be dismissed.

D. The District Court Correctly Concluded That Nevada Does Not Have General Jurisdiction Over Fagel Law.

General jurisdiction does not exist in Nevada over Fagel Law. Fagel Law has established that California is its "home," noting that Fagel Law is incorporated in California and has its principal place of business there. [PA00070, Vol. I]. The Plaintiffs, in the proceedings below, did not challenge those and the other controlling "general jurisdiction" facts. [PA00110-119, Vol. I]. Likewise, the District Court correctly assumed that general jurisdiction did not exist over Fagel Law. [PA00538-40; 558, Vol. III]. Thus, Fagel Law does not take issue with that conclusion, and this Court should likewise reach the same conclusion here.

As this Court is aware, general jurisdiction is only available when a non-resident defendant's contacts with the forum state are so "'continuous and systematic' as to render [it] essentially at home in the forum State." *Viega GmbH,* 328 P.3d 1152, 1157 (2014). As recently clarified by the United States Supreme Court, "only a limited set of affiliations with a forum will render a defendant amenable to general jurisdiction there." *Daimler AG v. Bauman,* 134 S. Ct. 746, 760 (2014). For a corporate entity, it is rare that general jurisdiction will exist anywhere other than its place of incorporation or principal place of

business. *Id.* at 755-58, 760-61. In the instant case, it is clear that Nevada is not and has never been "home" for Fagel Law, who had extremely limited contacts or connections with Nevada. [PA00064-72, Vol. I].

In the proceedings below, Plaintiffs failed to substantively challenge these issues and effectively conceded as much. [PA00110-119, Vol. I]. *See* EDCR 2.20(e) (holding that a failure to file a written opposition may be construed as an admission that the motion is meritorious). Seeing no challenge from Plaintiffs on this front, the District Court correctly assumed that general jurisdiction did not exist over Fagel Law. [PA00558, Vol. III]. Absent any "continuous or systematic" contacts with Nevada, this Court should likewise agree that general jurisdiction does not exist over Fagel Law.

E. Fagel Law Engaged In No "Suit Related" Conduct Sufficient To Find Specific Personal Jurisdiction Over It.

In the proceedings below, Plaintiffs, Arizona residents, were silent with respect to their domicile/residence [PA00110-119, Vol. I], and the reason for downplaying this factor was clear, noting that exercise of personal jurisdiction is frequently premised on protecting the forum plaintiff. [PA00546-548, Vol. III]. Thus, the primary basis for having personal jurisdiction in a particular forum where the plaintiffs reside is absent here, undercutting any initial potential basis for specific jurisdiction.

More importantly, however, is the fact that all the allegations of wrongdoing, which support Plaintiffs' Legal-Mal Case, have nothing to do with Fagel Law. [PA00064-72, Vol. I]. The absence of any "suit related" contacts between Fagel Law and Plaintiffs in Nevada precludes a finding of personal jurisdiction over it. *See, e.g., H.E.B. LLC v. Jackson Walker, LLP*, 437 P.3d 1060, 2019 WL 1060 at *2 (Nev. Feb. 5, 2019)(Doc. 74218, Unpublished Disposition holding that "[s]pecific personal jurisdiction is proper **only** where the cause of action arises from the defendants contacts with the forum". . . and **those "activities must be the basis of the cause of action."**); and *Fulbright & Jaworski*, 131 Nev. at 40-41.

As the United States Supreme Court recognized: "whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on 'the relationship among the defendant, the forum, **and the litigation**.'" *Walden v. Fiore,* 134 S. Ct. 1115, 1122 (2014). For a state to exercise jurisdiction consistent with due process, the defendant's "**suit-related conduct"** must create a substantial connection with the forum state. *Id.* Thus, if the lawyer defendant in the underlying case did not engage in the "suit related conduct" that supports the subsequent legal malpractice action, personal jurisdiction cannot be exercised over that defendant. *Id.*

Here, Plaintiffs' central allegation in the Legal-Mal Case is that they received inadequate/insufficient advice regarding the Copperpoint lien. [PA00001-24, Vol. I]. It was undisputed below that no one associated with Fagel Law was involved in the settlement of the underlying case, the research and analysis of the potential ramifications of the Copperpoint lien, whether Nevada law or Arizona law would apply to that determination, what the Plaintiffs knew about the existence of the lien, and/or provided legal advice to the Plaintiffs regarding those issues, etc. [PA00064-67, Vol. I]. Rather, all of that critical "suit-related" activity was handled by Silberberg. [PA00064-72, Vol. I]. This is not only confirmed by Dr. Fagel's Declaration, but also the sworn deposition testimony of Mr. Silberberg, himself. [PA00064-72, PA00105-108, Vol. I].

Below, Plaintiffs argued that Mr. Alch purportedly approved the settlement agreements and was involved in "every aspect" of the Med-Mal Case. [PA00114, Vol. I]. As Fagel Law pointed out below, even assuming *arguendo* that Mr. Alch approved the settlement agreement, this conduct came **long after** Mr. Alch left Fagel Law and only while Mr. Alch was working for a separate law firm and serving as local counsel for Silberberg. [PA00067-68, PA00110-119, Vol. I]. Thus, specific personal jurisdiction could not exist under these facts.

Next, Plaintiffs argued that Mr. Alch purportedly reviewed/signed discovery responses in 2017, assisted with experts, and advised on Nevada law regarding loss of consortium and/or tax consequences [PA00112-114, Vol. I]. Fagel Law did not necessarily dispute these "facts" below, except to the extent that they had any "suit-related" connection. Notably, Plaintiffs did not allege any professional wrongdoing with respect to the review of discovery responses, retention of experts, and/or advice regarding loss of consortium or taxes. [PA00001-24, Vol. I]. Rather, Plaintiffs' legal malpractice claims involve the contingency fee agreement, the withholding/disbursal of settlement proceeds, and the advice regarding Copperpoint's subrogation lien. [PA00001-24, Vol. I]. Thus, Mr. Alch's involvement while employed with Fagel Law with respect to discovery responses, assistance with experts, and advice on loss of consortium is not the "suit-based" conduct that is required to support specific personal jurisdiction over a non-resident law firm. *See, H.E.B. LLC*, 437 P.3d 1060, *2.

Similarly, Fagel Law did not shy away from the fact that it paid for the virtual office in Nevada, that Mr. Alch was licensed in Nevada, that it previously had an affiliated office in Nevada, and filed a suits and represented other clients in a few Nevada cases. [PA00112, Vol. I]. As Fagel Law pointed out below, these issues go to "general jurisdiction" and have nothing to do with the "suit-related" conduct that is required for an exercise of specific personal jurisdiction.

[PA00110-119, Vol. I]. *See, H.E.B. LLC*, 437 P.3d 1060, *2. Thus, because none of this purported conduct relates to the allegations that support Plaintiffs' Legal-Mal Case, these immaterial "contacts" do not support specific personal jurisdiction.

Plaintiffs below also argued that because Fagel Law had filed some 8-10 cases over a 10 year period in Nevada wherein Mr. Alch and the affiliated law office were listed as counsel of record, these facts likewise established sufficient contacts to impose specific personal jurisdiction. [PA00112-115, Vol. I]. Nevertheless, these admitted facts go to "general jurisdiction" and have no bearing on the specific personal jurisdiction analysis, which focuses on the "suit-based" conduct supporting the legal malpractice. *See, H.E.B. LLC*, 437 P.3d 1060, *2. Even if relevant, the fact remains that these 8-10 cases played a de minimis part in Fagel Law's overall book of business, comprising of only 2%-4% of its income. [PA00069, Vol. I]. Therefore, this Court should agree that the erroneous focus on Fagel Law's other Nevada lawsuits does not support an exercise of specific personal jurisdiction.

Finally, Plaintiffs argued below that because Fagel Law received payment from the settlement of the Med-Mal Case, this fact is sufficient to impose personal jurisdiction. [PA00111-113, PA00116, Vol. I]. Once again, Fagel Law does not shy away from the "fact" that it received compensation after the settlement.

[PA00045, PA00068, Vol. I]. This "fact," however, is wholly irrelevant to the specific personal jurisdiction inquiry when there is no allegation in Plaintiffs' Legal-Mal complaint suggesting that the wrongdoing involves Fagel Law's ability to receive a portion of the fee. [PA00001-24, Vol. I]. In fact, receiving payment for legal service is not even a factor mentioned in Nevada's personal jurisdiction jurisprudence. *See e.g., Fulbright, supra; H.E.B., supra,* and *China Auto Logistics, Inc. v. DLA Piper, LLP*, 2021 WL 830189 (D. Nev. 2021). Moreover, it is undisputed that Silberberg controlled and disbursed the fee. [PA00068, Vol. I]. Therefore, Fagel Law's receipt of a portion of the fee has no relevance for purposes of the specific personal jurisdiction analysis. *See, H.E.B. LLC*, 437 P.3d 1060, *2. ("Specific personal jurisdiction is proper **only** where the cause of action arises from the defendants contacts with the forum". . . and **those "activities must be the basis of the cause of action."**)[Emphasis added].

Respectfully, much more is required to establish specific jurisdiction than what is alleged here. Here, of course, Plaintiffs' "home state" is not even Nevada, but is Arizona. [PA00002, Vol. I]. Moreover, specific jurisdiction is only based on *Fagel Law's* actual conduct/contacts related to the forum state, thereby making *Plaintiffs'* purported contacts with Nevada irrelevant. Therefore, by failing to tie/connect the specific conduct forming the basis of the Legal-Mal

Case to Fagel Law, the District Court clearly erred, and this Court preclude the exercise should specific personal jurisdiction over Fagel Law.

F. By Failing To Address The Additional Constitutional Requirements Concerning Personal Jurisdiction, The District Court's Exercise Of Jurisdiction Over Fagel Law Is Improper.

It is interesting to note that although Fagel Law raised and demonstrated how the other Constitutionally required elements to establish that personal jurisdiction over Fagel Law did not apply here [PA00546-548, Vol. III], the District Court did not even address, much less evaluate, those factors in connection with its Findings of Fact and Conclusions of Law. [PA00551-561, Vol. III]. Indeed, courts are required to consider the following five factors when assessing whether exercising jurisdiction over a non-resident defendant would be reasonable:

> (1) the burden that the defendant will face in defending claims in Nevada, (2) Nevada's interest in adjudicating those claims, (3) the plaintiffs' interests in obtaining expedited relief, (4) along with interstate considerations such as efficiency, and (5) social policy.")

Arbella Mut. Ins. Co. v. Eighth Jud. Dist. Ct., 122 Nev. 509, 516 (2006); *see also Consipio Holding, BV,* 128 Nev. at 458 (recognizing the same factors).

In the proceedings below, Fagel Law pointed out the undue burden that Fagel Law would have in defending suit here, noting that it is a California corporation with no physical presence here; its principal place of business is in Los Angeles, California; Plaintiffs do not live in Nevada, nor were they solicited

in Nevada; and Fagel Law no longer has a satellite office in Nevada. [PA00002, PA00065, PA00070, Vol. I]. Likewise, Fagel Law established that Nevada has little interest in adjudicating Plaintiffs' claims, particularly since the District Court determined that Arizona law would apply to the Copperpoint lien [PA00058, Vol. I]; Plaintiffs are not even Nevada residents; and the contingency fee agreement and disbursement of the proceeds occurred in California with Silberberg. [PA00064-72, Vol. I; PA00556, Vol III]. In addition, Fagel Law demonstrated Plaintiffs' sole interest in seeking "expedited relief" involves its efforts to prevent Copperpoint from discontinuing future payments – an issue that could just as easily be raised and litigated in Arizona or California. [PA00064-72, Vol. I].

Neither Plaintiffs nor the District Court addressed potential interstate considerations, such as efficiency, and how that interest is advanced by exercising jurisdiction over Fagel Law. [PA00110-119, Vol. I; PA00551-561, Vol III]. Indeed, the Plaintiffs could certainly file suit in California against Fagel Law just as easily as they filed it in Nevada. [PA00058, Vol. I]. In fact, Plaintiffs already are represented by a California lawyer in this case, and the other co-defendants' lawyers in this case, Silberberg, Alch, and Shoop, are all in California. [PA00058, Vol. I].

Finally, neither the Plaintiffs nor the District Court below addressed the public policy concerns. [PA00110-PA00119, Vol. I; PA00551-561, Vol. III]. Here, it was undisputed that exercising personal jurisdiction over Fagel Law would wrongfully encourage litigants to bring similar actions against nonresident defendants on the sole basis that the plaintiff is from some foreign jurisdiction and ultimately filed a suit in Nevada which, allegedly, went poorly due to the conduct of some other out-of-state lawyer. [PA00547-548, Vol. III].

This Court has consistently and properly rejected attempts to establish jurisdiction where doing so would violate a nonresident defendant's due process rights and would be unreasonable. *See e.g., Dogra v. Liles*, 129 Nev. 932, 956 (2013); *MGM Grand, Inc. v. Eighth Jud. Dist. Ct.,* 107 Nev. 65, 69 (1991). Because Plaintiffs failed to even acknowledge, much less prove how these additional considerations would warrant a finding of personal jurisdiction over Fagel Law, the District Court below should have agreed that such a failure was an admission of Fagel Law's motion being meritorious and constitute as a granting of the same under EDCR 2.20(e). [PA00547-548, Vol. III]. Therefore, this Court should conclude that there is no basis to exercise jurisdiction over Fagel Law because it would be unreasonable to do so. [PA00558-560, Vol. III].

G. The District Court Erroneously Concluded That "Joint Venture" Liability Could Attach To Fagel Law Without First Determining Whether Personal Jurisdiction Existed.

The District Court erroneously made a *liability* finding that one member's negligence could be imputed to all members of a "joint venture" without *first* determining: (1) whether personal jurisdiction existed over Fagel Law; and (2) whether Fagel Law was, in fact, a member of a "joint venture" in this case. [PA00545-546, PA00559-560, Vol. III]. In other words, the District Court erroneously placed the proverbial "cart before the horse," finding personal jurisdiction over Fagel Law.

Below, Plaintiffs argued Nevada and California law regarding potential vicarious liability of partners or joint venturers, citing *Radaker v. Scott*, 109 Nev. 653 (1993) and *Cahill Bros. Inc. v. Clementina Co.*, 208 Cal. PA 2d. 367 (1962). [PA00116-118, Vol. I]. Of course, Fagel Law generally acknowledges that these cases hold that if one member of a partnership or joint venture is negligent, all partners or joint venturers may be liable for the other's conduct. [PA00545-546, Vol. III]. But, both Plaintiffs and the District Court erroneously focused on *liability* potentially created in a "joint venture" setting without first determining whether *personal jurisdiction* first existed over Fagel Law. [PA00116-118, Vol. I; PA00545-546, PA00559-560, Vol. III]. Indeed, the proper focus is not whether Fagel Law may be liable to the Plaintiffs for the

purported acts of Silberberg and/or Alch, but rather, whether personal jurisdiction exists over Fagel Law, and neither *Radaker* nor *Cahill* addressed the **threshold personal jurisdiction inquiry**. It is axiomatic that before a court may impose *liability* upon any defendant, it must first establish that *jurisdiction* exists over that defendant. *See e.g.,* NRCP 12(b)(1)(dismissal based on lack of subject-matter jurisdiction) and (b)(2)(dismissal based on lack of personal jurisdiction); *see also, Swain v. Moltan Co*. 73 F.3d 711, 718 (7th Cir. 1996)("If the district court finds itself without [personal] jurisdiction…then it is obligated to dismiss the case because it has no authority over the defendant.") In fact, the U.S. Supreme Court even recognized this critical liability vs. jurisdiction distinction in *Shaffer v. Heitner*, 433 U.S. 186, 204 (1997) by stating:

> Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. **That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.** [Emphasis added].

Here, Plaintiffs did not satisfy nor did the District Court analyze whether Plaintiffs first met their **threshold burden** of establishing personal jurisdiction over Fagel Law, making any potential "joint venture" liability of Fagel Law irrelevant. Respectfully, this analysis is legally flawed under the authority

cited above, and as such, this Court should issue a writ prohibiting the District Court from exercising personal jurisdiction over Fagel Law.

Further demonstrating the District Court's error is the fact that the District Court relied on the *allegations* of the Legal-Mal complaint to conclude that there was a "joint venture" among the lawyer-defendants, even though *actual facts* were submitted negating such a finding. [PA00545-546, PA00559-560, Vol. III]. Here, the Declaration of Dr. Bruce Fagel negated the existence of a "joint venture." [PA00064-72, Vol. I]. Respectfully, the District Court committed reversible error by ignoring the actual facts that were submitted by Fagel Law and, instead, relying on Paragraph 5 of the Legal-Mal complaint, which merely *alleges* a "joint venture." [PA00002-3, Vol. I; PA00559-560, Vol. III].

In sum, the District Court's analysis erroneously focuses on potential *liability* in a "joint venture" setting, without first finding whether *personal jurisdiction* may attach to Fagel Law, and then failing to make a specific *factual* determination that Fagel Law was a member of some "joint venture" as opposed to simply relying upon unsupported allegations in a complaint. These failures render the District Court's Order legally erroneous, and a writ of prohibition should be issued precluding the District Court from exercising jurisdiction over Fagel Law.

VIII. CONCLUSION AND REQUEST FOR RELIEF

For the reasons set forth above, this Court should issue a writ of prohibition preventing the District Court from exercising personal jurisdiction over Fagel Law. The facts, as opposed to allegations, establish no Constitutional basis to exercise personal jurisdiction Fagel Law in this matter. Thus, Fagel Law requests that the Court issue the writ of prohibition, which ultimately prevents the exercise of jurisdiction over it, and ultimately results in a dismissal of all claims against it.

Dated this 23rd day of August 2021.

HALL JAFFE & CLAYTON, LLP

/s/ *Riley A. Clayton*

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VERIFICATION

On August 23rd, 2021, the affiant, Riley A. Clayton, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

I am counsel for Petitioner, Bruce G. Fagel, A Law Corporation aka Law Offices of Bruce G. Fagel & Associates. I have read the foregoing petition for writ of prohibition and all factual statements in the petition are within the affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition. The exhibits in the appendix are true and correct copies of the original documents.

RILEY A. CLAYTON

GIVEN UNDER MY HAND AND SEAL OF OFFICE on this 23 day of August, 2021.

NOTARY PUBLIC In and For the State of Nevada

D.J. MCCONNELL
Notary Public State of Nevada
No. 08-8812-1
My Appt. Exp. November 26, 2021

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word (Office 365 Edition) in 14-point font, Times New Roman style.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is: Proportionately spaced, has a typeface of 14 points or more and contains 6,770 words.

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

4. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of August, 2021.

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CERTIFICATE OF SERVICE BY ELECTRONIC SERVICE

I hereby certify that I am an employee of Hall Jaffe & Clayton, and that on August 23, 2021, I caused to be served a true and correct copy of the foregoing **Writ of Prohibition** by way of electronic service via the Court's e-service program.

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