

1 **CASE NO.**
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3 **LENDER PROCESSING SERVICES, INC., FIDELITY NATIONAL INFORMATION**
4 **SERVICE, INC., LPS DEFAULT SOLUTIONS, INC., AND DOCK LIFEMAN**
5 **PETITIONERS,** Electronically Filed
Clerk of Supreme Court

6 **VS.**

7 **THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR**
8 **THE COUNTY OF CLARK, AND THE HONORABLE ELIZABETH GONZALEZ,**
9 **DISTRICT JUDGE,**

10 **RESPONDENT,**

11 **AND**

12 **STATE OF NEVADA,**

13 **REAL PARTY IN INTEREST.**

14 **PETITION FOR WRIT OF MANDAMUS OR, IN THE**
15 **ALTERNATIVE, WRIT OF PROHIBITION**

16 **PETITION FROM THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA**
17 **DISTRICT COURT CASE No. A-11-653289-B**
18 **THE HONORABLE ELIZABETH GONZALEZ**

19 **FOX ROTHSCHILD, LLP**
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VGI 145493v1 07/31/12

1 POINTS AND AUTHORITIES

2 **I. Introduction**

3 This petition involves one simple, narrow question: should the District Court be
4 required by Writ to enter an order denying the State's Motion to Associate Counsel because the
5 AG's contract with outside counsel was illegal and in violation of NRS § 228.110(2)? Because
6 the AG, as an officer of the Executive Branch, is prohibited from employing outside counsel to
7 represent the State within Nevada where the AG is neither disqualified from acting in this case
8 nor specifically authorized to employ counsel by an Act of the Legislature, a Writ should be
9 issued by this Court requiring the denial of the State's Motion to Associate Counsel. Neither
10 requirement of NRS §228.110(2) is satisfied here; the AG has not been disqualified and there
11 is no specific Act of the Legislature authorizing employment of outside counsel. This is a
12 significant and important issue for Nevada not only because the AG should not be permitted to
13 seek court approval of illegal representation, but also because the AG has entered into similar
14 contracts in the past and, if this issue is not addressed, will do so in the future.

15 The State sought to secure leave to associate with its outside counsel, Betsy Alexandra
16 Miller, Esq. ("Ms. Miller") of Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein"), a
17 Washington D.C.-based law firm, with little notice to Petitioners by obtaining ex parte
18 approval of an Order Shortening Time, which was entered June 22, 2012. However the Motion
19 was neither filed nor served until June 26, 2012, two days before the scheduled hearing.
20 Petitioners filed their Opposition on June 27 and during the June 28, 2012 hearing, the District
21 Court expressed significant concern that the State's attempt to employ Cohen Milstein as
22 counsel in this matter was a violation of NRS § 228.110(2). See transcript of June 28, 2012
23 proceedings, Appendix Exhibit D at 3:17-24, LPS 094-095. Specifically, the District Court
24 noted that "[T]he issue is can the Attorney General's Office retain outside counsel at the

1 expense of the State of Nevada to assist them” in this matter without legislative approval, and
2 the District Court instructed the State to “demonstrate for me your position that NRS § 228.110
3 does not apply since the Attorney General is a member of the Executive Branch?” *Id.* at 3:10-
4 16; 3:25-4:3.

5 The State, in its Response filed July 13, 2012, was unable to directly answer the
6 question the District Court posed, and instead asserted that the AG’s authority to employ
7 Cohen Milstein could be implied from legislative history, common law and other statutory
8 provisions. The State believed that an inference of authority was sufficient to satisfy the
9 express requirement imposed by the Legislature that outside counsel only be employed if “the
10 Attorney General and the deputies of the Attorney General are disqualified or unless an act of
11 the Legislature *specifically* authorizes the employment of the other attorneys or counselors at
12 law.” NRS § 228.110(2) (emphasis added). Notwithstanding the AG’s inability to identify any
13 act of Legislature that “specifically” authorized the employment of Cohen Milstein to represent
14 the State in this matter, the District Court granted the State’s Motion. In the absence of this
15 Court’s appropriate intervention in the form of the issuance of a Writ, Petitioners and this State
16 will suffer great harm as a result of the AG’s violation of NRS § 228.110(2).

17 **II. Procedural Posture**

18 The State filed its Complaint against Petitioners on December 15, 2011. *See*
19 Complaint, Appendix Exhibit A, LPS 001-039.¹ The Complaint alleges that Petitioners
20 violated certain provisions of the Nevada Deceptive Trade Practices Act, NRS Chapter 598.

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22 ¹ For the sake of brevity, and to comply with NRAP 30(b), the exhibits to the State’s Complaint are not
23 attached with the Appendix. They will be provided to the Court if it requests. Further, the Complaint
24 on file contains certain redactions. While the State has provided Petitioners’ counsel with an
unredacted version of the Complaint, the State has not filed an unredacted Complaint prior to the
submission of this petition. The District Court noted its concerns with the State’s redaction of the

1 *Id.* Petitioners deny the State's claims. No answer has yet been filed as the Court only
2 recently considered and granted in part Petitioners' Motion to Dismiss.² The Complaint listed
3 only Attorney General Catherine Cortez Masto and Deputy Attorney General Binu Palal as
4 attorneys for the State. *Id.* Despite the fact that Cohen Milstein had been employed by the AG
5 to represent the State in connection with this matter in late 2009, that firm's name did not
6 appear on the Complaint or the State's Opposition to the Motion to Dismiss, and the State
7 made no effort to have Cohen Milstein appear as counsel in this case until the latter part of
8 June 2012.

9 On June 26, 2012, the State filed its Motion to Associate Counsel on Order Shortening
10 Time seeking court approval of its employment of Cohen Milstein. *See* Motion to Associate
11 Counsel, Appendix Exhibit B, LPS 040-055. The AG's Office evidently submitted the Motion
12 to Associate to the District Court for consideration of its *ex parte* request for an order
13 shortening time on June 20, 2012, and the District Court signed the order granting the request
14 for a hearing on shortened time on June 22, 2012. *Id.* The order shortening time set the

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17 Complaint without complying with Nevada's rules on sealing and redacting. *See* Transcript of July 19,
2012 hearing, Appendix Exhibit G at 41:15-21, LPS 276.

18 ² Petitioners filed a Motion to Dismiss on January 30, 2012. The parties entered into a stipulation to
19 stay the proceedings, including the briefing on Petitioners' Motion to Dismiss, while the parties
20 discussed settlement. The Stipulation and Order initiating the stay, which was filed on February 22,
21 2012, permitted either party to terminate the stay by providing 10 calendar days' notice to the opposing
22 party and the District Court. On April 19, 2012, counsel for Petitioners asked the District Court to lift
23 the stay and for Petitioners' Motion to Dismiss to be placed back on calendar. The District Court lifted
24 the stay, set a briefing schedule on the Motion to Dismiss, and set a hearing on the motion for July 19,
2012. The State filed its Opposition to the Motion to Dismiss on May 10, 2012. Petitioners filed their
Memorandum in Reply to the State's Opposition to the Motion to Dismiss on May 31, 2012. The State
filed a Motion for Leave to File a Sur-Reply on Order Shortening Time in relation to the Motion to
Dismiss on June 21, 2012. The District Court granted the State's Motion for Leave to File a Sur-Reply
in relation to the Motion to Dismiss during a June 28, 2012 hearing. These filings are not attached to
the appendix to this petition because they are not directly relevant to the issue raised herein, but
Petitioners will provide them to the Court if requested.

1 hearing for June 28, 2012. *Id.* at LPS 041. The AG provided copies of the motion to
2 Petitioners' counsel on June 26, 2012.

3 The State's pro forma Motion to Associate asked the Court to allow Ms. Miller, of the
4 Washington DC-based law firm of Cohen Milstein Sellers & Toll PLLC, to be permitted to
5 associate with the AG's office pursuant to SCR 42.³ Attached to the Motion to Associate were:
6 an affidavit of Deputy Attorney General Binu Palal; Ms. Miller's Verified Application for
7 Association of Counsel Under Nevada Supreme Court Rule 42; Certificates of Good Standing
8 from jurisdictions where Ms. Miller is licensed to practice law; and the State Bar of Nevada's
9 Statement Pursuant to Supreme Court Rule 42(3)(b). *Id.* at LPS 042-054.

10 Petitioners filed a substantive opposition to the Motion to Associate on June 27, 2012.
11 See Opposition to Motion to Associate (the "Opposition"), Appendix Exhibit C, LPS 055-091.
12 Petitioners argued that the plain language of NRS § 228.110 precluded the AG from employing
13 Ms. Miller and her firm in this matter, among other things. *Id.*⁴

14 Also on June 27, 2012, Petitioner Lender Processing Services, Inc. filed a Complaint
15 for Due Process Violations, Declaratory Relief, and Injunctive Relief against the AG in the
16 United States District Court for the District of Nevada (the "Federal Court Complaint"). A

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18 ³ This is not the first time the AG has retained Cohen Milstein to represent the State of Nevada in
19 violation of Nevada law. In *State of Nevada v. Bank of America, Corp. et al*, filed in the United States
20 District Court for the District of Nevada, case no. 3:11-cv-00135-RCJ-WGC, Cohen Milstein appeared
21 as counsel for the State of Nevada. Nor is it the first time the AG has had her authority challenged
22 based on hiring Cohen Milstein. Two lawsuits were filed in the United States District Court for the
23 District of Columbia in March 2010 which, among other things, alleged that the AG had violated
24 certain entities' due process rights by retaining Cohen Milstein in conjunction with an investigation.
See *Pulte Homes, Inc. v. Goddard et al.*, case no. 1:10-cv-00377-HHK and *Lennar Corp. v. Masto*, case
no. 1:10-cv-00378-FJS. As discussed below and as evidenced by the contingency fee agreement
between the AG and Cohen Milstein, Exhibit A to Appendix Exhibit C, LPS 062-077, the AG's
arrangement with Cohen Milstein is far broader than the representation that is the subject of this writ.

23 ⁴ To be clear, Petitioners' objection to the State's Motion to Associate is not based on Ms. Miller's
24 qualifications or any lack thereof. Rather, Petitioners' objection and this petition relate to the AG's lack
of statutory authority to associate with any outside counsel without satisfying the narrow requirements
described in NRS § 228.110, neither of which are present here.

1 copy of the Federal Court Complaint was attached to Petitioners' Opposition and is therefore
2 attached to Appendix Exhibit C as Exhibit A, LPS 062-077. A copy of the contingency fee
3 agreement between the AG and Cohen Milstein is part of Exhibit A to Appendix Exhibit C,
4 LPS 078-91. Petitioners will be filing a motion to stay the federal proceeding in conjunction
5 with the submission of this petition to allow this Court to decide this issue of uniquely State
6 law.

7 The District Court addressed the subject of the State's Motion to Associate on June 28,
8 2012. During the hearing, the District Court articulated concerns that the AG's employment of
9 Cohen Milstein to appear as counsel in this case was a violation of NRS § 228.110(2). The
10 court declined to address this issue on shortened time as requested by the State and, instead,
11 specifically instructed the AG to brief the statutory basis under which it, as a member of
12 Nevada's Executive Branch, was authorized to employ outside counsel. Appendix Exhibit D at
13 3:25-4:3, LPS 094-95. The AG filed its Response to Petitioners' Opposition to the State of
14 Nevada's Motion to Associate Counsel ("Response") on July 13, 2012. Response, Appendix
15 Exhibit E, LPS 099-216. The Response asserted that, based upon legislative history, common
16 law and other statutory provisions, none of which "specifically authorize[ed] the employment"
17 of outside counsel as required by NRS § 228.110(2), the AG's authority to employ Cohen
18 Milstein could be implied or inferred.⁵ The State argued that "the power of the Attorney
19 General and her Consumer's Advocate to hire counsel is necessarily *implied* by her duty to

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22 ⁵ The State also contended that Petitioners had either waived or lacked standing to assert the argument
23 that NRS §228.110(2) had been violated. There is no waiver or lack of standing issue here. Petitioners
24 filed their Opposition to the Motion to Associate Counsel one day after it had been filed and both the
District Court and counsel, as officers of the court, are, under ethical rules, obligated to scrutinize and
address improprieties in the activities of litigants in judicial proceedings. The District Court
disregarded the State's arguments on these issues.

1 represent the State in litigation and enforce the State's consumer protection laws". Appendix
2 Exhibit E at 11, LPS 109 (emphasis added).

3 Petitioners filed a Reply to the State of Nevada's Response to Opposition to Motion to
4 Associate Counsel on July 18, 2012. See Reply, Appendix Exhibit F, LPS 217-235. The Court
5 heard arguments on the Motion to Associate on July 19, 2012. See Appendix Exhibit G, LPS
6 236-279.⁶

7 After hearing arguments by Deputy AG Sheri Ann Forbes and counsel for Petitioners,
8 the District Court ruled as follows:

9 The motion to associate is granted. Given the substantial legislative
10 interaction and the history, the AG has the authority to associate with
11 counsel under appropriate circumstances as long as appropriate
12 procedures are followed and the Attorney General continues to direct the
13 litigation. So motion's granted.

14 *Id.* at 13:23-14:3, LPS 248-249. The District Court did not determine that NRS § 228.110(2)
15 was not applicable to the AG's employment of Cohen Milstein to appear in the instant action.
16 Clearly, the AG has not been disqualified to act here. Nor did the District Court find that any
17 "act of legislature specifically authorizes the employment" of Cohen Milstein to appear in this
18 case.

17 **III. Legal Arguments**

18 **A. Writ relief is an appropriate remedy to challenge the District Court's order 19 improperly permitting the State to associate with outside counsel.**

20 A writ of mandamus is available to compel the performance of an act which the law
21 requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an
22 arbitrary or capricious exercise of discretion. See *Round Hill Gen. Imp. Dist. v. Newman*, 97
23 Nev. 601, 637 P.2d 534 (1981). An equitable writ of mandamus will not issue where the
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1 petitioner has a plain, speedy and adequate remedy in the ordinary course of the law. NRS
2 34.170. A writ of mandamus, being an extraordinary remedy, is discretionary with this Court.
3 See *State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983). When
4 circumstances reveal urgency or strong necessity, or an important issue of law needs
5 clarification, and public policy is served by Supreme Court's invocation of its original
6 jurisdiction, this Court may consider a petition for extraordinary relief, even if alternative
7 remedies may be available. *Employers Ins. Co. of Nevada v. State Bd. of Examiners*, 117 Nev.
8 249, 21 P.3d 628 (2001).

9 Alternatively, this Court has held that a writ of prohibition is available to arrest the
10 proceedings of a court (or a person exercising judicial functions) when the proceedings exceed
11 the jurisdiction of the court or person. NRS 34.320; *State of Nevada v. District Court*, 108
12 Nev. 1030, 1033, 842 P.2d 733 (1992). Like the writ of mandamus, the writ of prohibition is
13 only available if there is no plain, speedy, and adequate remedy in the ordinary course of the
14 law. NRS 34.330.⁷

15 This Court has stated that it would "exercise its discretion" when "an important issue of
16 law requires clarification" and declared that "the primary standard" in the determination of
17 whether to entertain a writ petition will be "the interests of judicial economy." *Smith v.*
18 *District Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997).

19 Statutory interpretation is a question of law that Supreme Court reviews de novo, even
20 in the context of a writ petition. *Wheble v. Eighth Judicial Dist. Court of State ex rel County of*

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23 ⁶ The Court also heard arguments on the Motion to Dismiss on July 19, 2012, granting substantial
portions of it.

24 ⁷ While this motion primarily discusses the relief sought as a writ of mandamus, Petitioners defer to the
Court if it deems a writ of prohibition more appropriate in the circumstances.

1 *Clark*, 272 P.3d 134 (Nev. 2012) (citing *International Game Technology Inc. v. Second*
2 *Judicial Dist. Court ex rel County of Washoe*, 124 Nev. 193, 179 P.3d 556 (2008)).

3 In an analogous situation, the Supreme Court has held that a writ of mandamus is
4 properly used to challenge a District Court's order disqualifying counsel pursuant to SCR 160.
5 *Brown v. Eighth Judicial Dist. Court ex rel County of Clark*, 116 Nev. 1200, 14 P.3d 1266
6 (2000).

7 Petitions for writs filed with this Court must comply with NRAP 21.⁸ This petition for
8 writ complies with NRAP 21(a)(3). The relief sought, the issues presented, the facts necessary
9 for the Court to understand the issue presented, and the supporting points and authorities are all
10 discussed herein.

11 Based on the District Court's ruling, writ relief is the only remedy Petitioners have
12 relating to the State's unlawful retention of outside counsel in this matter. Without this Court's
13 intervention via the issuance of a writ and an order overturning the District Court's ruling, the
14 State will be permitted to violate Nevada law during the entire pendency of this action.
15 Petitioners have no adequate remedy by appeal or otherwise in the ordinary course of the law
16 to ensure that the State follows Nevada law. The question presented by this petition is a purely
17 legal one and is apparently a matter of first impression. Petitioners therefore urge this Court to
18 consider this petition on its merits. The Court's refusal to do so will effectively permit the AG
19 to continue to violate Nevada law, which her office is constitutionally tasked with enforcing
20 and upholding, all to the detriment of Petitioners and the citizens of the State of Nevada.

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⁸ Pursuant to NRAP 21(a)(3) ("Contents of Petition."), "the petition must state: (A) the relief sought; (B) the issues presented; (C) the facts necessary to understand the issues presented by the petition; and (D) the reasons why the writ should issue, including points and legal authorities."

1 **B. The District Court's order granting the State's Motion is erroneous.**

2 **i. The State's retention of outside counsel to pursue its claims is unlawful.**

3 As set forth in Petitioners' Opposition to the Motion to Associate, there is no legal
4 authority that would allow a private law firm to appear on behalf of the State as requested in
5 the Motion to Associate. Because of the AG's responsibility to serve the public interest,
6 Nevada law places a strict limitation on the use of private, outside counsel by the AG.
7 Specifically, NRS § 228.110 restricts the employment of attorneys outside of the AG's office
8 in the State of Nevada as follows:

9 No officer, commissioner or appointee of the Executive
10 Department of the Government of the State of Nevada shall
11 employ any attorney at law or counselor at law to represent the
12 State of Nevada within the State, or to be compensated by state
13 funds, directly or indirectly, as an attorney acting within the State
14 for the State of Nevada or any agency in the Executive
15 Department thereof unless the Attorney General and the deputies
16 of the Attorney General are disqualified to act in such manner or
17 unless an act of the Legislature specifically authorizes the
18 employment of the other attorneys or counselors at law.

19 NRS § 228.110(2).

20 NRS § 228.110(3) further provides that "[a]ll claims for legal services rendered in
21 violation of this section shall be void". Here, the State retained Cohen Milstein pursuant to a
22 Contingency Fee Agreement to pursue claims against Petitioners for alleged improper lending
23 practices. See Contingency Fee Agreement, Exhibit A to Appendix Exhibit C, LPS 078-091.
24 The Contingency Fee Agreement cites several provisions within NRS Chapter 228, but
conspicuously lacks any reference to NRS § 228.110. *Id.*

Under NRS § 228.110, the AG could only retain Cohen Milstein in this case if the
AG's office was disqualified or if an act of the Legislature has specifically authorized the
employment. NRS § 228.110(2). There is no dispute that neither of these conditions is

1 present, and indeed the State did not argue that the statute had been complied with. The AG is
2 unquestionably an officer within the Executive Department of the Government of the State of
3 Nevada and she has not been disqualified from participating in this matter. Further, the
4 Nevada Legislature has not authorized the hiring of Cohen Milstein. These issues are not in
5 dispute. Accordingly, the State lacks the authority to retain Cohen Milstein in this matter and
6 the Motion to Associate should have been denied by the District Court.

7 During oral arguments on the State's Motion to Associate, the State argued that Cohen
8 Milstein would receive "no payment, no recovery" if the State did not recover in the lawsuit.
9 See Appendix Exhibit G at 3:4-7, LPS 238. This statement is not only contrary to explicit
10 provisions in the contingency fee agreement between the AG and Cohen Milstein (which call
11 for payment of hourly fees to Cohen Milstein upon the occurrence of certain events), but it is
12 also not relevant to a determination of the State's obligations under NRS § 228.110. The
13 statute prohibits either *direct* or *indirect* payments, so the State's argument regarding the
14 contingent nature of the retention agreement with Cohen Milstein does not address the
15 requirements of NRS §228.110(2). Even a contingent fee would be deducted from the State's
16 recovery, if any, and would constitute an indirect payment by the State. Furthermore, the
17 statute speaks in the disjunctive; that is, it prohibits employment *or* payment to counsel in the
18 absence of a conflict or a legislative act. Therefore, the AG's authority to employ outside
19 counsel must be scrutinized independent of the manner in which counsel may be compensated
20 or the nature of the agreement, and the statute must be complied with in order for that
21 employment to be proper. Here, for the reasons outlined above, the State's employment of
22 Cohen Milstein did not comply with NRS § 228.110, and the District Court's granting of the
23 Motion to Associate must be overturned.

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1 ii. **NRS § 228.110 is unambiguous and therefore the District Court should**
2 **have applied the statute as written and should not have looked to legislative**
3 **history or any other authority.**

3 The State argued that “the power of the Attorney General and her Consumer’s
4 Advocate to hire counsel is necessarily *implied* by her duty to represent the State in litigation
5 and enforce the State’s consumer protection laws”. Appendix Exhibit E at 11, LPS 109
6 (emphasis added). However, this ignores the specific statutory prohibition that no officer,
7 commissioner or appointee of the Executive Department of the State of Nevada can retain
8 outside counsel unless the AG and each of her deputies are disqualified or a specific legislative
9 act authorizes the retention.

10 NRS § 228.110(2) is unambiguous, and, indeed, the State does not assert otherwise.
11 Where the statute is clear on its face that a specific act of Legislature is required to authorize
12 the AG’s employment or payment of outside counsel in a matter in this State, it is improper to
13 imply such authority or infer it from non-specific sources. It is well-established that there is no
14 need to resort to implication when the language of a statute, such as NRS § 228.110(2) is clear
15 and unambiguous. *See, e.g., Hobbs v. State*, 127 Nev. Adv. Op. 18, 251 P.3d 177, 179 (2011)
16 (If a statute’s language is clear and unambiguous, courts enforce the statute as written);
17 *Pellegrini v. State*, 117 Nev. 860, 873, 34 P.3d 519, 528 (Nev. 2001) (Words in a statute will
18 generally be given their plain meaning, unless such a reading violates the spirit of the act, and
19 when a statute is clear on its face, courts may not go beyond the statute’s language to consider
20 legislative intent); *Erwin v. State*, 111 Nev. 1535, 1538, 908 P.2d 1367, 1369 (Nev. 1995)
21 (Where language of statute is plain and unambiguous, and its meaning clear and unmistakable,
22 there is no room for construction, and courts are not permitted to search for its meaning beyond
23 statute itself); and *McKay v. Board of Sup’rs of Carson City*, 102 Nev. 644, 648, 730 P.2d 438,

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1 441 (Nev. 1986) (Where a statute is clear on its face, the court may not go beyond the language
2 of a statute in determining the Legislature's intent).

3 The State's arguments based upon legislative history are improper. Even if considered,
4 they do not address the District Court's specific question as to whether NRS § 228.110 applies
5 to the AG's office. The State argued in its Response that the AG's power to engage outside
6 counsel arises from her power under the State Constitution, and that its common law rights, as
7 well as legislative history related to the AG's power to hire outside counsel, considered all
8 together *imply* that the AG is able to retain counsel despite the existence of a conflict or
9 legislative approval – in direct contravention of NRS § 228.110. Because the statute relating to
10 the AG's ability to retain counsel is unambiguous, the legislative history cited by the State is
11 unavailing, and Nevada law prohibits the District Court from even considering it.

12 In its Response, the State further argued that the AG has the authority under common
13 law to hire outside counsel. The State's reasoning is directly contrary to the plain language of
14 NRS § 228.110(2), which does not grant the AG unfettered authority to employ outside
15 counsel. Further, the authority cited by the State directly undercuts this argument. The State
16 accurately cited to NRS § 1.030, which states that the common law applies "so far as it is not
17 repugnant or in conflict with" state law. Any unfettered authority that the AG might have
18 possessed under the common law to hire outside counsel is in conflict with NRS § 228.110,
19 which imposes specific conditions and requirements on that alleged common law authority.
20 The State also cited *State v. Moore*, 46 Nev. 65, 207 P. 75, 76 (1922) as a basis for the AG's
21 common law power. The *Moore* Court simply held that the AG has all of the powers
22 belonging to it at common law, but the Court ultimately held that the power sought to be
23 asserted by the AG in *Moore* did not exist at common law. *Id.* at 77. The State then wholly
24 miscited the *Moore* case at pages 13-14 of its Response. The *Moore* court did not state that it

1 would be impractical to list every power of the office of the attorney general and that the
2 attorney general should be deemed to have all powers incident to the office, nor did it make the
3 statements attributed to it in the quotation at page 14 of the State's Response.

4 The other Nevada case cited by the State as support for the AG's supposed "common
5 law" authority actually supports Petitioner's position that the AG does not have the authority to
6 hire outside counsel in light of NRS § 228.110. In *Ryan v. Eighth Judicial District Court*, 88
7 Nev. 638, 503 P.2d 842 (1972), this Court held that the AG is an officer of the Executive
8 Branch of government. *Id.* at 642, 844. The Court then quoted NRS § 1.030 and held
9 "[a]ssuming, without deciding, that the common law may have granted the attorney general the
10 power he here seeks to exercise, such an exercise of power would be repugnant to the statutory
11 law of this state, as we have already explained. The attorney general may not look to the
12 common law to justify his action." *Id.* at 643, 845 (internal citations omitted).

13 As noted by the *Ryan* Court, the AG is an officer of the Executive Branch of
14 government. *See also* Correspondence from Catherine Cortez Masto to Governor Jim Gibbons
15 dated March 24, 2010, Exhibit 2 to Appendix Exhibit F, LPS 234-235 ("Our state constitution
16 creates the Office of the Attorney General as a separate constitutional officer within the
17 executive branch.").⁹ To the extent that the AG may have the authority under common law to
18 hire outside counsel, that alleged authority is in direct conflict with NRS § 228.110. While
19 other statutes may refer to outside counsel representing the state in certain circumstances, any
20 retention of outside counsel by an officer, commissioner or appointee of the Executive Branch
21 must be in compliance with NRS § 228.110. The State's Response pointed to cases from other

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23 ⁹ In addition, Nev. Const. art. 5 entitled "Executive Department" provides at Section 22 that the
24 Attorney General is an officer within the Executive Branch. Moreover, NRS Chapter 228, which
establishes and governs the Attorney General's office, falls within Title 18 of Nevada Revised Statutes
which is entitled "State Executive Department".

1 states which hold that the AG has the authority to hire outside counsel. However, in none of
2 those cases was there a specific statute addressing the issue as does NRS § 228.110. Thus,
3 cases from other jurisdictions have no relevance to this issue, which deals specifically with the
4 application of a Nevada statute directly on point to this case.

5 Because the State's arguments set forth in its Response in support of its Motion to
6 Associate did not address the District Court's initial concerns relating to whether or not the
7 State was not required to comply with NRS § 228.110, the District Court should have ruled
8 that the State hired Cohen Milstein without authority and should have denied the State's
9 Motion to Associate. By granting the Motion to Associate based on reference to legislative
10 history when there is a statute directly on point and controlling to the facts at issue, the District
11 Court erred and this Court should consider this petition in order to clarify this important area of
12 law and correct the improper ruling.

13 **IV. Conclusion**

14 For the foregoing reasons, the Court should issue a writ of mandamus compelling the
15 District Court, Eighth Judicial District, Department XI to vacate its order granting the State's
16 motion to associate counsel or in the alternative a writ of prohibition effectuating that result.

17 DATED: July 31, 2012

18 FOX ROTHSCHILD, LLP

19 

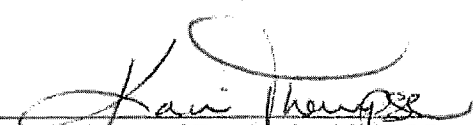
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Attorneys for Petitioners

1 CERTIFICATE OF SERVICE

2 Pursuant to Nev.R.App.P 25, I hereby certify that on the 31st day of July, 2012 a copy
3 of the foregoing **PETITION FOR WRIT OF MANDAMUS OR, IN THE**
4 **ALTERNATIVE, WRIT OF PROHIBITION** was sent via U.S. Mail, first class, postage
5 prepaid, to the following:
6

7 Catherine Cortez Masto, Attorney General
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Attorneys for Plaintiff

10 Honorable Judge Elizabeth Gonzalez
11 Eighth Judicial District Court, Dept. 11
Regional Justice Center
12 200 Lewis Avenue
Las Vegas, Nevada 89155

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16 An Employee of Fox Rothschild LLP
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VERIFICATION

1 STATE OF NEVADA)
2) ss:
3 COUNTY OF CLARK)

4 MARK J. CONNOT, being first duly sworn, hereby deposes and says:

5 That he is the attorney for Petitioners in the above-entitled matter; that he has read the
6 above and foregoing Petition for Writ of Mandamus or, in the Alternative, Writ of Prohibition,
7 knows the contents thereof, and that the same is true of his own knowledge, except as to those
8 matters therein stated on information and belief, and as to those matters, he believes them to be
9 true. He further states that the information set forth herein, subject to any inadvertent and
10 undiscovered errors, may be based upon and necessarily limited by documents and records
11 which may have been consulted and relied upon before preparing this information.

12 DATED this 31 day of July, 2012.

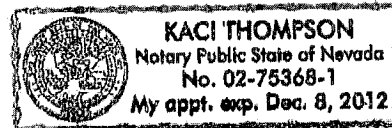
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15 _____
MARK J. CONNOT

16 STATE OF NEVADA)
17) ss
18 COUNTY OF CLARK)

18 SUBSCRIBED and SWORN to
19 before me this 31st day of July, 2012.

20 Kaci Thompson
NOTARY PUBLIC



1 **CASE NO.**
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3
4 **LENDER PROCESSING SERVICES, INC; FIDELITY NATIONAL INFORMATION
SERVICE, INC.; LPS DEFAULT SOLUTIONS, INC. AND DOCX, LLC,**

5 **PETITIONERS,**

6 **VS.**

7 **THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR
8 THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GONZALEZ,
DISTRICT JUDGE,**

9 **RESPONDENT,**

10 **AND**

11 **STATE OF NEVADA,**

12 **REAL PARTY IN INTEREST.**

13 **CERTIFICATE OF COMPLIANCE**

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15
16 **PETITION FROM THE EIGHTH JUDICIAL DISTRICT COURT, CLARK COUNTY, NEVADA
DISTRICT COURT CASE No. A-11-653289-B
17 THE HONORABLE ELIZABETH GONZALEZ**

18 **FOX ROTHSCHILD, LLP**

19 **MARK J. CONNOT (Nevada Bar No. 10010)**
20 **KEVIN M. SUTEHALL (Nevada BAR NO. 9437)**
21 **JOHN H. GUTKE (Nevada Bar No. 10062)**
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I, Mark J. Connot, hereby certify that I have read the foregoing petition 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 petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires assertions in the petition regarding matters in the record to be supported by appropriate references to the record. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: July 31, 2012

FOX ROTHSCHILD, LLP



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