

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 CASHMAN EQUIPMENT COMPANY, a
3 Nevada corporation,

4 Appellant,

5 vs.

6 WEST EDNA ASSOCIATES, LTD., dba
7 MOJAVE ELECTRIC, a Nevada
8 corporation; WESTERN SURETY
9 COMPANY, a surety; THE WHITING
10 TURNER CONTRACTING COMPANY,
11 a Maryland corporation; FIDELITY AND
12 DEPOSIT COMPANY OF MARYLAND,
13 a surety; TRAVELERS CASUALTY
14 AND SURETY COMPANY OF
15 AMERICA, a surety; QH LAS VEGAS
16 LLC, a foreign limited liability company;
17 PQ LAS VEGAS, LLC, a foreign limited
18 liability company; L W T I C
19 SUCCESSOR LLC, an unknown limited
20 liability company; FC/LW VEGAS, a
21 foreign limited liability company;

22 Respondents.

Case No: 66452

Case No: 61715

Case No: 65819

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Tracie K. Lindeman
Clerk of Supreme Court

District Court Case No.: **A642583**

23 **APPELLANT CASHMAN**
24 **EQUIPMENT COMPANY'S**
25 **MOTION TO STRIKE**
26 **RESPONDENTS' ANSWERING**
27 **BRIEF**

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Cashman Equipment Company

1 Appellant, CASHMAN EQUIPMENT COMPANY, by and through
2 its counsel of record, HOWARD & HOWARD ATTORNEYS PLLC,
3
4 respectfully submit the following Motion to Strike Respondents West Edna,
5 Ltd., dba Mojave Electric, Western Surety Company, The Whiting Turner
6 Contracting Company, QH Las Vegas, LLC, PQ Las Vegas, LLC, LWTIC
7 Successor LLC and FC/LW Vegas' (hereinafter collectively "Respondents")
8 Answering Brief. This Motion is based on the following memorandum of
9
10 points and authorities and all papers and pleadings on file herein.
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12 DATED: Sept. 24, 2015

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14
15 By: /s/ Jennifer R. Lloyd

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21 *Cashman Equipment Company*

22 I.

23 INTRODUCTION

24 Appellant, CASHMAN EQUIPMENT COMPANY (hereinafter
25 "Cashman" or "Appellant"), respectfully requests that this Court strike the
26 Answering Brief of Respondents, as Respondents did not appeal the final
27 judgment or file a notice of cross-appeal pursuant to NRAP 28.1, yet raise
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1 new issues, arguments, claims and request relief in their brief which are not
2 on appeal.
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4 Cashman filed three Notices of Appeal: (1) on September 13, 2012,
5 (Case No. 61715) from the Findings of Fact and Conclusions of Law Based
6 Upon Counterclaimants' Motion to Procure Codes, entered on August 13,
7 2012; (2) on May 30, 2014, (Case No. 65819) from the Findings of Fact and
8 Conclusions of Law, entered on May 5, 2014 after trial; and (3) on
9 September 2, 2014 (Supreme Court Case No. 66452) from the Decision and
10 Order denying Cashman's Motion for Attorneys' Fees, entered on August 4,
11 2014; and the Order Denying Cashman's Request for Costs pursuant to NRS
12 18.020, entered on September 2, 2014. JA 3:610-19; 32:7751-72; and
13 32:7813-29. All three appeals were consolidated by this Court on or about
14 October 20, 2014. Respondents did not file a notice of appeal or cross-
15 appeal at any time.
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21 In its Opening Brief, Cashman outlined the issues on appeal, which
22 are: (1) the district court erred in denying recovery to Cashman on its
23 mechanic's lien; (2) the district court erred in denying recovery to Cashman
24 on its payment bond claim; (3) the district court erred in reducing Cashman's
25 award on its security interest claim using an equitable fault analysis; (4) the
26 Court erred in issuing a preliminary injunction in favor of Defendants
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1 requiring Cashman to input codes for materials supplied when the Court
2 found that Cashman was likely to prevail upon the merits and where
3 Cashman did prevail upon the merits at trial; (5) the district court erred in
4 denying recovery to Cashman on its Countermotion for Attorney's Fees and
5 Interest pursuant to NRS 104.9607; and (6) the district court erred in refusing
6 to issue Cashman an award of costs.
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9 Respondents are limited to arguing in support of the judgment
10 rendered because they did not appeal from the judgment; however, they
11 instead include lengthy arguments seeking reversal of the judgment,
12 judgment in their favor on counterclaims that were dismissed and an award
13 of fees. This is a flagrant disregard of the Nevada Rules of Appellate
14 Procedure, as Respondents did not file a notice of appeal or cross-appeal
15 pursuant to NRAP 28.1. Respondents cannot now seek reversal or judgment
16 in their favor after failing to appeal from the final judgment or the order
17 denying attorneys' fees and costs.
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22 Respondents spend almost half of their Answering Brief on
23 impermissible arguments. Cashman should not be required to address
24 Respondent's arguments as they are not properly before this Court.
25 Therefore, Cashman respectfully requests that this Court strike Respondent's
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1 Answering Brief in full, or in the alternative, the portions of the Answering
2 Brief which are not in response to Cashman's Opening Brief.
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4 Respondents are limited to arguing in support of the judgment entered
5 and opposing only the issues raised by Cashman. Any other arguments
6 made by Respondents that would improperly enlarge their own rights and
7 lessen the rights of Cashman violate the rules of appellate procedure and
8 should be stricken.
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11 II.

12 MEMORANDUM OF POINTS AND AUTHORITIES

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14 In their Answering Brief, Respondents seek to expand their rights and
15 lessen Cashman's rights, but are not able to do so as they did not appeal
16 from the judgment or order denying attorneys' fees and costs. Respondents
17 improperly ask this Court to reverse the following: (1) the district court's
18 ruling in favor of Cashman on Cashman's claim for unjust enrichment; (2)
19 the district court's ruling in favor of Cashman and against Mojave on
20 Mojave's claim for misrepresentation; (3) the district court's ruling in favor
21 of Cashman and against Mojave on Cashman's claim for foreclosure of
22 security interest; and (4) the district court's denial of an award of attorneys'
23 fees and costs to Respondents. These issues are not before the Court and
24 cannot be considered.
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1 In order to raise issues on appeal, a party aggrieved by a judgment
2 must file a notice of appeal. NRAP 3(A)(a). “A notice of appeal must be
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4 filed after entry of a written judgment or order, and no later than 30 days
5 after the date that written notice of entry of the judgment or order appealed
6 from is served.” NRAP 4 (A)(1). After one party files a timely notice of
7 appeal, “any other party may file and serve a notice of appeal within 14 days
8 after the date when the first notice was served....” NRAP 4(A)(2).

11 NRAP 28.1 outlines the procedures for a cross-appeal. A timely filing
12 of a notice of appeal “is mandatory and jurisdictional with respect to a cross-
13 appeal.” *Mahaffey v. Investor’s Nat’l Security*, 102 Nev. 462, 725 P.2d 1218
14 (1986).

17 The United States Supreme Court has held:

18 It is true that a party who does not appeal from a final
19 decree of the trial court cannot be heard in opposition
20 thereto when the case is brought here by the appeal of the
21 adverse party. In other words, ***the appellee may not***
22 ***attack the decree with a view either to enlarging his***
23 ***own rights thereunder or of lessening the rights of his***
24 ***adversary***, whether what he seeks is to correct an error or
to supplement the decree with respect to a matter not
dealt with below.

25 *Ford v. Showboat*, 110 Nev. 752, 755 (1994), citing *United States v.*
26 *American Ry. Exp. Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087
27 (1924) (emphasis added). “Under this rule, a respondent who seeks to alter
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1 the rights of the parties under a judgment must file a notice of cross-appeal.”
2 *Ford v. Showboat*, 110 Nev. at 755.
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4 Further, this Court has consistently refused to consider additional
5 issues raised by respondents in their answering briefs due to the failure to
6 properly raise the issue in a cross-appeal. *See Barton v. DeRousse*, 91 Nev.
7 347, 351, 535 P.2d 1289, 1291 (1975); *Sierra Creek Ranch, Inc. v. J. I.*
8 *Case*, 97 Nev. 457, 460, 634 P.2d 458, 460 (1981) (respondent argued that
9 the district court erred in refusing to award it attorney’s fees and costs;
10 however, since respondent was aggrieved by the district court’s refusal to
11 award fees and costs, and sought to increase its rights under the judgment, it
12 was required to file a notice of appeal and the Court did not consider
13 respondent’s argument due to this failure).
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18 The Court should strike the Answering Brief, as Respondents
19 improperly raise issues not on appeal and attempt to enlarge their rights
20 while lessening those of Cashman without having filed a cross-appeal.
21 Cashman further seeks a stay of the briefing schedule until the Court rules
22 on this Motion. Cashman will be prejudiced in having to address issues and
23 arguments not properly before this Court in the limited response allowed in
24 its Reply.
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1 First, Respondents argue the district court erred and improperly ruled
2 in favor of Cashman on its unjust enrichment claim. Cashman did not
3 address its unjust enrichment claim in any notice of appeal or its Opening
4 Brief, as Cashman prevailed on this claim. Respondents did not file their
5 own notice of appeal or cross-appeal relating to this claim. Respondents are
6 barred from asking this Court to reverse the district court's ruling, as they
7 are seeking to alter Cashman's rights under the judgment which declared
8 Cashman as the prevailing party on this claim; therefore, as Respondents
9 were required to file a notice of cross-appeal to argue that the district court
10 erred on this claim, this portion of the Answering Brief must be stricken.
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15 Second, Respondents argue the district court erred by improperly
16 ruling in favor of Cashman and against Mojave on Mojave's claim for
17 misrepresentation. Again, this claim was not addressed by Cashman in its
18 notices of appeal or its Opening Brief, and Respondents did not file a
19 separate notice of appeal relating to this claim. Respondents argue the
20 district court erred in finding in favor of Cashman. Respondents are seeking
21 to enlarge their own rights relating to this claim, as they are seeking reversal,
22 and lessen the rights of Cashman, since Cashman prevailed at trial on this
23 claim. As such, Respondents were required to file a cross-appeal in order to
24 argue that this Court should change the district court's determination.
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1 Therefore, this portion of the Answering Brief must also be stricken.

2 Third, Respondents improperly argue that the district court should
3 have awarded Mojave its attorneys' fees and costs. Respondents contend
4 that since Cashman appealed the decision and order regarding attorneys'
5 fees, that the Respondents' request for fees and costs, which were also
6 denied, are also appealed. *See* Answering Brief at p.44, fn 155. This is
7 improper. Respondents cannot attack the judgment with a view either to
8 enlarge their own rights or lessen the rights of Cashman. *See Ford v.*
9 *Showboat*, 110 Nev. 752, 755 (1994). This is precisely what Respondents
10 attempt to accomplish. Respondents cannot use the Notice of Appeal filed
11 by Cashman and provide no authority to do so as it does not exist.
12 Respondents argue that the district court should have awarded Mojave its
13 attorneys' fees in the amount of \$316,844.50 and costs in the amount of
14 \$19,129.55, which would obviously benefit and enlarge their own rights and
15 lessen the rights of Cashman. Cashman properly appealed this Order and
16 Respondents did not. Respondents should have filed a cross-appeal pursuant
17 to NRAP 28.1 had they wished to address the district court's denial of their
18 request for attorneys' fees and costs. Respondents' arguments should
19 therefore be stricken.
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1 Fourth, Respondents seek reversal of the district court's ruling in
2 favor of Cashman on its claim for foreclosure of security interest. At trial,
3 the district court found that Cashman perfected its security interest in that
4 the UCC Financing Statement was a legally binding security instrument. JA
5 31:7722. The district court calculated the damages using an equitable fault
6 analysis and reduced the amount to be awarded to 33% of Cashman's claim.
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8 *Id.* Cashman appealed the district court's finding, arguing that the Court
9 erred in applying an equitable fault analysis and that Cashman should have
10 been awarded the full amount owed. Respondents, having not filed their
11 own appeal or cross-appeal on this issue, are limited to arguing in support of
12 the judgment entered; instead, Respondents argue that the claim should have
13 been dismissed. Therefore, this Court must strike this portion of the
14 Answering Brief as Respondents' argument seeking reversal is improper.

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16 Finally, the Court should strike any references made in Respondents'
17 Answering Brief relating to issues not addressed on appeal, including the
18 section relating to Cashman's fraudulent transfer claim, which was not
19 raised in Cashman's opening brief.

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III.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court strike Respondents' Answering Brief in full, or, in the alternative, the arguments and requested relief found in Respondents' Answering Brief at Section C(1) (relating to the claim for foreclosure of security interest); Section C(2) (relating to the claim for Unjust Enrichment); Section C(3) (relating to the claim for Misrepresentation); and Section (F) (relating to the order denying attorneys' fees and costs).

DATED: Sept. 24, 2015

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