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

3  
4 CASHMAN EQUIPMENT COMPANY,  
a Nevada corporation,

5 Appellant,

6 v.

7 WEST EDNA ASSOCIATES, LTD. dba  
8 MOJAVE ELECTRIC, a Nevada  
corporation; WESTERN SURETY  
9 COMPANY, a surety; THE WHITING  
TURNER CONTRACTING COMPANY,  
a Maryland corporation; FIDELITY AND  
10 DEPOSIT COMPANY OF  
MARYLAND, a surety; TRAVELERS  
11 CASUALTY AND SURETY  
COMPANY OF AMERICA, a surety; QH  
12 LAS VEGAS LLC, a foreign limited  
liability company; PQ LAS VEGAS,  
13 LLC, a foreign limited liability company;  
LWTIC SUCCESSOR LLC, an unknown  
14 limited liability; FC/LW VEGAS, a  
foreign limited liability company,

15 Respondents.  
16

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Supreme Court Case No. 61715  
Aug 19 2015 03:06 p.m.  
Supreme Court Case No. 965819  
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Supreme Court Case No. 86452  
Clerk of Supreme Court  
EJDC Case No.: A642583 & A653029

17 **RESPONDENTS WEST EDNA, LTD., DBA MOJAVE ELECTRIC,**  
18 **WESTERN SURETY COMPANY, THE WHITING TURNER**  
19 **CONTRACTING COMPANY, QH LAS VEGAS, LLC, PQ LAS VEGAS,**  
20 **LLC, LWTIC SUCCESSOR LLC, AND FC/LW VEGAS'S ANSWERING**  
21 **BRIEF**

22 BRIAN W. BOSCHKE, ESQ. (NBN 7612)

E-mail: [bboschke@nevadafirm.com](mailto:bboschke@nevadafirm.com)

23 WILLIAM N. MILLER, ESQ. (NBN 11658)

E-mail: [wmiller@nevadafirm.com](mailto:wmiller@nevadafirm.com)

24 HOLLEY, DRIGGS, WALCH,  
FINE, WRAY, PUZEY & THOMPSON

25 400 South Fourth Street, Third Floor

Las Vegas, Nevada 89101

26 Telephone: 702/791-0308

Facsimile: 702/791-1912

27 *Attorneys for Respondents West Edna, Ltd., dba Mojave Electric, Western Surety*  
28 *Company, The Whiting Turner Contracting Company, QH Las Vegas, LLC, PQ*  
*Las Vegas, LLC, LWTIC Successor LLC, and FC/LW Vegas*

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24  
25 **Respondents West Edna, Ltd., dba Mojave Electric, Western Surety**  
26 **Company, The Whiting Turner Contracting Company, QH Las Vegas, LLC,**  
27 **PQ Las Vegas, LLC, LWTIC Successor LLC, and FC/LW Vegas's NRAP 26.1**

28 **Disclosure**

The undersigned counsel of record certifies that the following are persons  
and entities as described in NRAP 26.1(a), and must be disclosed. These  
representations are made in order that the Judges of this Court may evaluate  
possible disqualification or recusal.

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1. Parent corporations of Respondents WEST EDNA ASSOCIATES, LTD.  
dba MOJAVE ELECTRIC, WESTERN SURETY COMPANY, THE  
WHITING TURNER CONTRACTING COMPANY, QH LAS VEGAS  
LLC, PQ LAS VEGAS, LLC, LWTIC SUCCESSOR LLC, AND FC/LW  
VEGAS (collectively, the “Respondents” or the “Mojave Parties”): None
  2. Publicly held company owning ten percent (10%) of any of the Mojave  
Parties’ stock: No such corporation
  3. The Mojave Parties’ law firm: Holley, Driggs, Walch, Fine, Wray, Puzey  
and Thompson
  4. Pseudonym of any of the Mojave Parties: None

DATED this 19<sup>th</sup> day of August, 2015.

**HOLLEY, DRIGGS, WALCH, FINE,  
WRAY, PUZEY & THOMPSON**

/s/ BRIAN W. BOSCHÉE  
Brian W. Boschee, Esq. (NBN 7612)  
William N. Miller, Esq. (NBN 11658)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
*Attorneys for Respondents*

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## I. JURISDICTIONAL STATEMENT

The Nevada Supreme Court has jurisdiction over this consolidated appeal, since this appeal revolves around a final judgment entered by the district court.<sup>1</sup> Additionally, NRAP 3(A)(b)(1) authorizes appeals from final judgments. The district court entered a final judgment on August 18, 2014, and the notice of appeal was filed on September 8, 2014, within the thirty-day timeframe provided by NRAP 4.

Further, on or about July 24, 2014, this Court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction.<sup>2</sup> After briefing on this issue, on or about October 20, 2014, this Court stated that “[t]hese are consolidated appeals from a district court preliminary injunction . . . and a district court judgment. . . The parties have stipulated to consolidate these appeals with a third appeal . . . which is taken from a post-judgment order denying costs in the same underlying case. The parties’ September 30, 2014, stipulation to consolidate these appeals is approved . . . Accordingly, it appears that a final judgment has been entered, and these appeals may proceed.”<sup>3</sup> Thus, this Court has already held that it has jurisdiction over the instant consolidated appeal.

---

<sup>1</sup> See generally *Lee v. GLNV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000).

<sup>2</sup> See Order Consolidating Appeals and Order to Show Cause filed on July 24, 2014.

<sup>3</sup> See Order Consolidating Appeals and Referring Appeals to Settlement Program filed on October 20, 2014, pages 1-2.

## II. STATEMENT OF THE ISSUES

The principal issues on this consolidated appeal are:

1. Whether the district court properly ruled in favor of the Mojave Parties for Cashman Equipment Company's ("Cashman") claims for enforcement of its Lien/Amended Lien (both defined below), its payment bond, and fraudulent transfer;
2. Whether the district court improperly ruled in favor of Cashman on its claims for foreclosure of security interest and unjust enrichment, and West Edna Associates, LTD. dba Mojave Electric's ("Mojave") claim for misrepresentation;
3. Whether the district court properly balanced the fault percentages, in equity, of Mojave and Cashman, in terms of the actions of Cam Consulting, Inc. ("CAM") and Angelo Carvalho ("Carvalho"), the president of CAM;
4. Whether the codes should be turned over to Mojave, given that Mojave tendered payment in full to the party it was obligated to, CAM;
5. Whether the district court erred in denying recovery to Mojave on its Motion for Attorneys' Fees and Costs pursuant to NRS Chapter 108 for having to defend Cashman's excessive lien claim; and
6. Whether the district court properly ruled that Cashman was not entitled to its attorneys' fees or costs in this action, when it recovered at trial approximately only a quarter of what it was originally seeking.

### III. STATEMENT OF THE CASE

This case revolves around whether the Mojave Parties have to pay for equipment supplied for the City Hall Project (the "Project") twice, or whether Cashman has to suffer some loss, which has already been mitigated by recovery against other defendants (besides the Mojave Parties), in the action, as a direct result of Cashman's conduct.

Cashman and Cam entered into a contract (the "Cashman/CAM Contract") whereby Cashman was to supply materials comprised of generators, switchgear, and associated items (the "Materials") that were for the Project. Mojave entered into a separate contract with CAM (the "Mojave/CAM Contract"), pursuant to Mojave's subcontract with The Whiting Turner Contracting Company ("Whiting Turner"), relating to the Materials on the Project. Essentially, CAM's involvement in the Project was mandated by the City of Las Vegas and the owners of the Project, who required participation by a disadvantaged business entity ("DBE"). In this case, CAM was a DBE on the Project, and therefore the middle man between Cashman and Mojave relating to the payments here.

After Mojave accepted Cashman's bid for the Project and began working on its submittals, in or about August 2010, Cashman began procuring the Materials. The Materials were delivered in a series of shipments to Mojave, with the final shipment of two generators being delivered directly to the Project and set in place

1 by crane beginning on January 20, 2011. Cashman's work required some startup  
2 functions that could not be completed at delivery but were to be scheduled later.  
3 Cashman supplied most, but not all, of the Materials through CAM relating to the  
4 Project.  
5  
6

7       Thereafter, and as required by its contract with CAM, despite the fact that  
8 Cashman had not yet completed all of the work on the Project, Mojave tendered  
9 **full and complete payment** to CAM. This payment was for the Materials and it is  
10 undisputed that Mojave tendered sufficient funds to the party it was contractually  
11 obligated to pay. Within minutes of CAM's receipt of Mojave's payment, CAM  
12 provided a post-dated check to Cashman for the amount due and owing under its  
13 contract with Cashman, and Cashman accepted the post-dated check without  
14 question. After Cashman accepted this post-dated check, and in exchange for this  
15 check, Cashman executed Unconditional Waiver and Release upon Final Payment  
16 documents relating to the Materials and provided them to Mojave.  
17  
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20       Subsequently, CAM stopped payment on this post-dated check, which  
21 Cashman found out about on or about May 5, 2011. CAM later issued another  
22 check to Cashman, but again, the account did not have sufficient funds to pay  
23 Cashman. Shortly thereafter, CAM ceased operations, and Cashman was unable to  
24 collect the amount owed from CAM.  
25  
26

27 . . .  
28

1           Given that Cashman had not received payment for the Materials supplied  
2  
3 from CAM, through partially its own fault, as it accepted a post-dated check from  
4 CAM, which check didn't clear the bank, Cashman: (1) filed a UCC Financing  
5 Statement with the Nevada Secretary of State on February 16, 2011, identifying the  
6 Materials; and (2) recorded a mechanic's lien (the "Lien") in the amount of  
7 \$755,893.89 against the Project on or about June 22, 2011.  
8

9  
10          During the middle of trial in this action, after evidence came out of partial  
11 payment being received by Cashman from another source (for batteries on the  
12 Project that was included in the Lien), and since Cashman's Lien was excessive on  
13 its face, on or about January 22, 2014, Cashman recorded an amended mechanic's  
14 lien (the "Amended Lien") in the amount of \$683,726.89 against the Project.  
15 Cashman never disclosed the fact that it had received payment from another source  
16 and only amended its Lien when it got caught at trial.  
17  
18

19          Therefore, Cashman had no choice but to reduce its lien and file the  
20 Amended Lien. This was clearly Cashman trying to hide the fact that that it had  
21 already been partially paid for certain materials and trying to recover an amount  
22 that it had already been paid.  
23

24          Given the above, on or about June 3, 2011, Cashman filed an action against  
25 CAM and Carvalho in Case No. A-11-642583 (the "First Action"). Thereafter,  
26 Cashman filed an action against, among others, CAM, Carvalho, and Mojave in  
27  
28

1 Case No. A-11-653029-C (the "Section Action"). On or about January 31, 2012,  
2  
3 the First Action and Second Action were consolidated and eventually, all of the  
4 Mojave Parties became parties to this consolidated action. On or about September  
5  
6 18, 2012, Cashman appealed the district court's order regarding an injunction for  
7 codes relating to the Project, Case No. 61715 (the "First Supreme Court Appeal").  
8  
9 The First Supreme Court appeal related to Cashman not providing codes to Mojave  
10 on the Project, even though Mojave tendered full payment regarding the Project to  
11 CAM. Thereafter, in January 2014, the Mojave Parties and Cashman had a trial in  
12 the action below and the district court:

- 13  
14 a. Ruled in favor of Mojave and Western Surety Company  
15 ("Western") on Cashman's claim for payment bond, because  
16 Mojave fully performed under the payment bond at issue (since it  
17 tendered payment to CAM, the entity that it had an agreement with  
18 to supply labor and materials) and because of the defense of  
19 impossibility.
- 20  
21 b. Ruled in favor of Mojave and Western on Cashman's claim for  
22 enforcement of its mechanic's lien release bond, because Cashman  
23 signed the Unconditional Waiver and Release upon Final Payments  
24 ("Unconditional Releases"), releasing any lien it had relating to the  
25 Materials.
- 26  
27 c. Ruled in favor of Mojave on Cashman's claim for fraudulent  
28 transfer, because there was no evidence that Mojave engaged in  
any conduct with the actual intent to harm, hinder, or delay  
Cashman relating to the Project.
- d. Ruled in favor of Cashman on its claim for foreclosure of security  
interest against Mojave, because Cashman filed the UCC  
Financing Statement.

- 1
- 2 e. Ruled in favor of Cashman on its claim for unjust enrichment
- 3 against the owners of the property at issue, as long as Cashman
- 4 actually puts in the codes (to date, Cashman still has failed to
- 5 provide or implement as of date).
- 6
- 7 f. Ruled in favor of Cashman on the Mojave Parties' counterclaim
- 8 for misrepresentation, because Cashman did not make a
- 9 misrepresentation relating to its Lien.
- 10
- 11 g. Ruled in equity, since Cashman and Mojave beared some
- 12 responsibility of fault for what CAM and/or Carvalho did hereto
- 13 (i.e. absconded with funds that Mojave provided, which funds were
- 14 supposed to be used for payment for the Materials that Cashman
- 15 provided), and even though both Mojave and Cashman were
- 16 innocent victims, the district court held that Cashman was sixty-
- 17 seven percent (67%) responsible and Mojave was thirty-three
- 18 percent (33%) responsible for CAM and Carvalho's actions.

19 Since Cashman prevailed on a few of its claims at trial, the district court

20 awarded Cashman the total amount of \$283,651.87, consisting of: (1) \$197,051.87

21 for Cashman prevailing on its claim for foreclosure of a security interest against

22 Mojave; and (2) \$86,600.00 for Cashman prevailing on its unjust enrichment

23 claim, so long as Cashman actually puts in the codes. On or about May 5, 2014,

24 the district court's Findings of Fact and Conclusions of Law (the "FFCL") relating

25 to the trial (incorporating the findings above) was filed, which Cashman appealed

26 to this Court, Case No. 65819 (the "Second Supreme Court Appeal"). Thereafter,

27 the district court entered its Judgment, which Cashman appealed to this Court,

28 Case No. 66452 (the "Third Supreme Court Appeal"). On or about October 20,

2014, the First Supreme Court Appeal, the Second Supreme Court Appeal, and the

1 Third Supreme Court Appeal were consolidated (the "Consolidated Appeal").

2 Further, and relating to the procedural history of the Consolidated Action:

3 (a) both Cashman and Mojave have default judgments against CAM and Carvalho;  
4 and (b) Cashman has obtained/collected from CAM, Carvalho, and/or Janel Rennie  
5 aka Janel Carvalho a house, a car, and money through judgments in the district  
6 court, valued at over \$200,000.00.  
7

8 For the foregoing reasons, this Court should: (1) dismiss with prejudice all  
9 of Cashman's claims, given that Mojave tendered payment in full to the party it  
10 was contractually obligated to, and solely because of Cashman's poor decisions  
11 and actions, Cashman did not get paid, not through any fault of the Mojave Parties;  
12 (2) award the Mojave Parties their attorneys' fees of approximately \$316,844.50  
13 and costs in the amount of \$19,129.55 or remand this matter for a determination of  
14 the attorneys' fees and costs to be awarded to the Mojave Parties; and (3) deny  
15 Cashman's request for attorneys' fees and costs for the reasons stated above.  
16 Alternatively, this Court should affirm the Judgment in the district court.  
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#### IV. STATEMENT OF RELEVANT FACTS<sup>4</sup>

##### A. Factual Background.<sup>5</sup>

All of the parties hereto agree that the facts of this case are largely not in dispute. There is no dispute that Cashman and Cam entered into the Cashman/CAM Contract whereby Cashman was to supply materials comprised of the Materials that were for the Project.<sup>6</sup> There is also no dispute that Mojave entered into a separate contract with CAM, the Mojave/CAM Contract, pursuant to Mojave's subcontract with Whiting Turner, relating to the Materials on the Project.<sup>7</sup> Mojave was the electrical subcontractor on the Project, contracting with Whiting Turner, the general contractor, to perform all electrical work, which included providing the Materials supplied to the Project by Cashman.<sup>8</sup> Essentially, CAM's involvement in the Project was mandated by the City of Las Vegas and the owners of the Project, who required participation by a disadvantaged business entity ("DBE").<sup>9</sup> In this case, CAM was a DBE on the Project.<sup>10</sup> CAM was the

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<sup>4</sup> The Mojave Parties assert that only the facts noted in their Statement of Relevant Facts are relevant, and all other facts, including the facts that Cashman asserts in its Opening Brief on pages 4-13, are either inaccurate or irrelevant for this appeal.

<sup>5</sup> Unless indicated otherwise, all pages numbers referenced in this Answering Brief are from the Joint Appendix filed with this Court on June 17, 2015.

<sup>6</sup> See FFCL, Volume 31, page 7715, ¶1.

<sup>7</sup> See Mojave/CAM Contract, Volume 12, pages 2776-2777; *see also* FFCL, Volume 31, page 7715, ¶4.

<sup>8</sup> See FFCL, Volume 31, page 7715, ¶4.

<sup>9</sup> See *id.*, page 7716, ¶9.

<sup>10</sup> See *id.*

1 middle man between Cashman and Mojave relating to pertinent payments at issue  
2 here.<sup>11</sup>

3  
4 On or about January 11, 2010, Mojave accepted Cashman's bid for the  
5 Project, and Cashman began work shortly thereafter on the submittal required for  
6 approval of the Materials.<sup>12</sup> On or about April 23, 2010, Mojave issued a purchase  
7 order to CAM for the Materials provided by Cashman.<sup>13</sup> On or about August 11,  
8 2010, Mojave issued a Material Release Order to Cashman and Cashman began  
9 procuring the Materials.<sup>14</sup> The Materials were delivered in a series of shipments to  
10 Mojave with the final shipment of two generators being delivered directly to the  
11 Project and set in place by crane beginning on January 20, 2011.<sup>15</sup> Cashman's  
12 work required some startup functions that could not be completed at delivery but  
13 were to be scheduled later.<sup>16</sup> Cashman supplied most, but not all, of the Materials  
14 through CAM after having been selected to supply the Materials by Mojave on the  
15 Project.<sup>17</sup>

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1 **full payment** to CAM.<sup>18</sup> This payment was for the Materials and it is undisputed  
2  
3 that Mojave tendered sufficient funds to the party it was contractually obligated to  
4 pay.<sup>19</sup> Within minutes of CAM's receipt of Mojave's payment, CAM provided a  
5  
6 post-dated check to Cashman for the amount due and owing under its contract with  
7 Cashman, and Cashman accepted this post-dated check without question.<sup>20</sup> After  
8  
9 Cashman accepted this post-dated check from CAM, and in exchange for this  
10  
11 check, Cashman executed the Unconditional Releases relating to the Materials and  
provided them to Mojave.<sup>21</sup>

12 Subsequently, CAM stopped payment on this post-dated check, which  
13  
14 Cashman found out about on or about May 5, 2011.<sup>22</sup> CAM later issued another  
15  
16 check to Cashman, but again, the account did not have sufficient funds to pay  
17  
18 Cashman.<sup>23</sup> Shortly thereafter, CAM ceased operations and Cashman was unable  
to collect the amount owed from CAM.<sup>24</sup>

19 Given that Cashman had not received payment for the Materials supplied  
20  
21 from CAM, Cashman filed a UCC Financing Statement with the Nevada Secretary

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22 <sup>18</sup> See check, Volume 11, page 2629; *see also* Testimony of Shane Norman at trial,  
23 Volume 27, pages 6687-6688 (noting that at the time Mojave made payment,  
24 Cashman's work on the Project was not complete).

25 <sup>19</sup> See check, Volume 11, page 2629.

26 <sup>20</sup> See post-dated check, Volume 11, page 2603.

27 <sup>21</sup> See Unconditional Releases, Volume 11, pages 2596-2597.

28 <sup>22</sup> See FFCL, Volume 31, page 7718, ¶36.

<sup>23</sup> See *id.*, page 7718-19, ¶38.

<sup>24</sup> See *id.*, page 7719, ¶39.

1 of State on February 16, 2011<sup>25</sup> and recorded the Lien against the Project on or  
2 about June 22, 2011.<sup>26</sup>

3  
4 During the middle of trial in this action, after evidence came out of partial  
5 payment being received by Cashman from another source, since Cashman's Lien  
6 was excessive on its face, and the fact that Cashman got caught at trial with  
7 attempting to double recover on a portion of its work on the Project, on or about  
8 January 22, 2014, Cashman recorded its Amended Lien against the Project.<sup>27</sup>  
9  
10

### 11 **B. Procedural Background.**

12 Given the above, on or about June 3, 2011, Cashman filed an action against  
13 CAM and Carvalho in the First Action.<sup>28</sup> Thereafter, on or about December 9,  
14 2011, Cashman filed an action against, among others, CAM, Carvalho, and Mojave  
15 in the Second Action.<sup>29</sup> On or about January 31, 2012, the First Action and Second  
16 Action were consolidated and eventually, all of the Mojave Parties became parties  
17 to the Consolidated Action.<sup>30</sup> After Mojave filed a motion for injunctive relief  
18 regarding codes on the project, and the district court granted said motion, on or  
19  
20  
21

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22 <sup>25</sup> See UCC Financing Statement, Volume 11, page 2599; *see also* FFCL, Volume  
23 31, page 7717, ¶23.

24 <sup>26</sup> See Lien, Respondents' Supplemental Appendix ("RSA"), Volume 33, pages  
25 7843-7844; *see also* FFCL, Volume 31, page 7719, ¶41.

26 <sup>27</sup> See Amended Lien, RSA, Volume 33, pages 7856-7857; *see also* FFCL, Volume  
27 31, page 7719, ¶44.

28 <sup>28</sup> See Complaint filed in the First Action, Volume 1, pages 1-9.

<sup>29</sup> See Complaint filed in the Second Action, Volume 1, pages 104-111.

<sup>30</sup> See Notice of Entry of Order Granting Motion to Consolidate, Volume 1, pages  
129-134.

1 about September 18, 2012, Cashman appealed the district court's order regarding  
2 this injunction for codes relating to the Project with this Court, the First Supreme  
3 Court Appeal.<sup>31</sup>

4  
5 Again, the First Supreme Court Appeal related to Cashman not providing  
6 codes to Mojave on the Project, even though Mojave tendered full payment  
7 regarding the Project to CAM.<sup>32</sup> Thereafter, the parties to this action each filed  
8 respective dispositive motions relating to the payment bond, license bond, and  
9 Lien; all of these dispositive motions were denied by the district court on or about  
10 May 6, 2013.

11  
12 A bench trial was held in the district court on January 21-24, 2014.<sup>33</sup> Prior  
13 to trial: (1) Cashman alleged nine causes of action against the Mojave Parties, but  
14 at trial, it only asserted five of these causes of action; and (2) Mojave alleged three  
15 causes of action (counterclaims) against Cashman, but at trial, it only asserted one  
16 of these causes of action.<sup>34</sup> At trial, the district court:

- 17  
18 a. Ruled in favor of Mojave and/or Western on Cashman's claims for  
19 payment bond, enforcement of its mechanic's lien release bond,  
20 and fraudulent transfer;<sup>35</sup>

21  
22 ...  
23

24  
25 <sup>31</sup> See Notice of Appeal filed with this Court on September 18, 2012, Volume 3,  
pages 610-619.

26 <sup>32</sup> See *id.*

27 <sup>33</sup> See FFCL, Volume 31, page 7714.

28 <sup>34</sup> See *id.*, pages 7719, n. 1 and 7724-7725, n. 3.

<sup>35</sup> See *id.*, page 7728.

- 1  
2 b. Ruled in favor of Cashman on its claim for foreclosure of security  
3 interest against Mojave and its claim for unjust enrichment against  
4 the owners of the property at issue, as long as Cashman actually  
5 puts in the codes (i.e. provides them and implements them);<sup>36</sup>  
6  
7 c. Ruled in favor of Cashman on the Mojave Parties' counterclaim  
8 for misrepresentation;<sup>37</sup>  
9  
10 d. In equity, Cashman was sixty-seven percent (67%) responsible and  
11 Mojave was thirty-three percent (33%) responsible for CAM and  
12 Carvalho's actions;<sup>38</sup> and  
13  
14 e. Awarded Cashman the total amount of \$283,651.87, consisting of:  
15 (1) \$197,051.87 for Cashman prevailing on its claim for  
16 foreclosure of a security interest against Mojave, which equates to  
17 the Amended Lien amount minus the amount in escrow (if  
18 Cashman finalizes the codes), times the percentage of Mojave's  
19 fault  $((\$683,726.89 - \$86,600.00) * .33 = \$197,051.87)$ ; and (2)  
20 \$86,600.00 for Cashman prevailing on its unjust enrichment claim,  
21 so long as Cashman actually puts in the codes, and this amount is  
22 the amount in escrow.<sup>39</sup>

23 On or about May 5, 2014, the district court's FFCL relating to the trial  
24 (incorporating the findings above) was filed, which Cashman appealed to this  
25 Court, the Second Supreme Court Appeal.<sup>40</sup> Thereafter, the district court entered  
26 its Judgment in this action, and Cashman subsequently appealed to this Court, the  
27 Third Supreme Court Appeal.<sup>41</sup> On or about October 20, 2014, the First Supreme  
28

23 <sup>36</sup> See *id.*

24 <sup>37</sup> See *id.*

25 <sup>38</sup> See *id.*, pages 7726-7727.

26 <sup>39</sup> See *id.*, pages 7728-7729.

27 <sup>40</sup> See *id.*, pages 7714-7729; see also Notice of Appeal filed with this Court on  
28 June 5, 2014, Volume 32, pages 7751-7772.

<sup>41</sup> See Judgment, Volume 32, pages 7789-7791; see also Notice of Appeal filed  
with this Court on September 2, 2014, Volume 32, pages 7813-7829.

1 Court Appeal, the Second Supreme Court Appeal, and the Third Supreme Court  
2 Appeal were all consolidated.<sup>42</sup>

3  
4 Further, both Cashman and Mojave have default judgments against CAM  
5 and Carvalho, and Cashman has obtained/collected from CAM/Carvalho/Janel  
6 Rennie (aka Janel Carvalho) a house, a car, and money through judgment in the  
7 district court, valued at well over \$200,000.00.<sup>43</sup>

#### 8 9 10 **V. SUMMARY OF ARGUMENT**

11 In its simplest form, this action revolves around whether the Mojave Parties  
12 have to pay for the Materials twice or whether Cashman has to suffer some loss,  
13 which has already been mitigated by recovery against other defendants in the  
14 action, as a direct result of its conduct. Mojave paid for the Materials already,

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15  
16 <sup>42</sup> See Order Consolidating Appeals and Referring Appeals to Settlement Program  
17 filed by the Court on October 20, 2014.

18 <sup>43</sup> See *id*; see also Testimony of Shane Norman at trial, Volume 27, pages 6722-  
19 6723 (noting that Cashman has recovered \$5,200 from the other defendants and  
20 has been awarded a house and a car from another defendant in the district court);  
21 see also Closing Argument at trial, Volume 29, page 7046 (noting that the house is  
22 valued anywhere between \$165,000.00, what a defendant paid for the house in  
23 2011, and \$214,881.00, the value of the house on Zillow); see also FFCL, Volume  
24 31, page 7727, ¶41 (noting that the Court was upholding its prior findings of fact  
25 and conclusions of law with respect to its award of a property to Cashman); see  
26 also Notice of Entry of Findings of Fact and Conclusions of Law and Order on  
27 Cashman Equipment Company's Motion for Summary Judgment against Janel  
28 Rennie aka Janel Carvalho, RSA, Volume 33, pages 7845-7855 (noting the price of  
the property was \$165,000.00 and awarding this property to Cashman, as well as  
awarding a vehicle to Cashman worth approximately \$39,000.00). Additionally,  
on May 12, 2014 (approximately eleven months after Cashman was awarded the  
house and vehicle), Cashman filed in the district court a Satisfaction of Judgment  
of Janel Rennie aka Janel Carvalho. See RSA, Volume 33, pages 7858-7859.

1 tendered full payment to the entity it was contractually obligated to pay, and CAM  
2 provided a post-dated check to Cashman, which Cashman accepted said check.  
3 Thereafter, Cashman executed Unconditional Releases relating to the Materials  
4 and provided these releases to Mojave. Pursuant to Nevada law, the Mojave  
5 Parties did everything they were supposed to do and did it correctly. Cashman is  
6 not entitled to any damages from the Mojave Parties hereto.  
7

8  
9 As will be evident below: (1) the district court properly ruled in favor of the  
10 Mojave Parties for Cashman's claims for enforcement of its Lien/Amended Lien,  
11 its payment bond, and fraudulent transfer; (2) the district court improperly ruled in  
12 favor of Cashman on its claims for foreclosure of security interest and unjust  
13 enrichment, and Mojave's claim for misrepresentation; (3) although Mojave  
14 believes it is not at fault for any of the actions of CAM and Carvalho, the district  
15 court came to a reasonable conclusion in balancing the fault percentages, in equity,  
16 of Mojave and Cashman, in terms of the actions of CAM and Carvalho; (4) the  
17 district court properly ruled that the codes should be turned over to Mojave; (5) the  
18 district court erred in denying recovery to Mojave on its request for attorneys' fees  
19 and costs for having to defend Cashman's excessive lien claim; and (6) the district  
20 court properly ruled that Cashman was not entitled to its attorneys' fees or costs in  
21 this action, when it recovered at trial approximately only a quarter of what is was  
22 originally seeking.  
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## VI. ARGUMENT

### A. Standards of Review.<sup>44</sup>

A “district court’s findings of fact will not be set aside unless those findings are clearly erroneous.”<sup>45</sup> “Accordingly, if the district court's findings are supported by substantial evidence, they will be upheld.”<sup>46</sup> “Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion.”<sup>47</sup> A “district court's conclusions of law, however, [such as its construction of statutes,] are reviewed de novo.”<sup>48</sup>

Further, “[t]he decision whether to award attorney's fees is within the sound discretion of the trial court.”<sup>49</sup> “However, where a trial court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion.”<sup>50</sup> Additionally, “[t]he determination of

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<sup>44</sup> Given that this action involves findings of fact, conclusions of law, and attorneys’ fees and costs requested by both sides hereto, the standard of review of each of these items is noted below.

<sup>45</sup> *BOPP v. Lino*, 110 Nev. 1246, 885 P.2d 559, 561 (1994); *see also Hermann v. Varco-Pruden Bldgs.*, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990).

<sup>46</sup> *BOPP*, 110 Nev. at 1249, 885 P.2d at 561; *see also Pandelis Constr. Co. v. Jones-Viking Assoc.*, 103 Nev. 129, 130, 734 P.2d 1236, 1237 (1987).

<sup>47</sup> *BOPP*, 110 Nev. at 1249, 885 P.2d at 561.

<sup>48</sup> *Id.*, 885 P.2d at 561; *see also All Star Bail Bonds, Inc. v. Eighth Jud. Dist. Ct.*, \_\_\_ Nev. \_\_\_, 326 P.3d 1107, 1109 (2014).

<sup>49</sup> *Bergmann v. Boyce*, 109 Nev. 670, 674, 856 P.2d 560, 563 (1993); *see also County of Clark v. Blanchard Constr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982).

<sup>50</sup> *Bergmann v. Boyce*, 109 Nev. at 674, 856 P.2d at 563; *see also Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979) (citations

allowable costs is within the sound discretion of the trial court.”<sup>51</sup>

**B. The District Court Properly Ruled in Favor of the Mojave Parties on Cashman’s Claims for Enforcement of its Lien/Amended Lien, Payment Bond, and Fraudulent Transfer.**

At the conclusion of trial, the district court ruled that Cashman’s claims for enforcement of its Lien/Amended Lien against Mojave and Western, payment bond against Mojave and Western, and fraudulent transfer were dismissed.<sup>52</sup> As is evident below, the district court took into accounts all of the facts and circumstances in this action and properly concluded that all three claims should be dismissed.

**1. The District Court Properly Dismissed Cashman’s Claim for Enforcement of its Lien/Amended Lien against Mojave and Western.**

The district court properly concluded that Cashman’s claim for enforcement of its Lien/Amended Lien against Mojave and Western be dismissed.<sup>53</sup> On or about June 22, 2011, Cashman recorded the Lien against the Project.<sup>54</sup> During the middle of trial, because partial payment was received by Cashman from another source, since its Lien was excessive on its face, and because Cashman got caught at trial with attempting to double recover on a portion of its work on the Project, on

\_\_\_\_\_ (continued)  
omitted).

<sup>51</sup> *Bobby Berolini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998).

<sup>52</sup> See FFCL, Volume 31, page 7728.

<sup>53</sup> See *id.*, pages 7721-7722 and 7728.

<sup>54</sup> See Lien, RSA, Volume 33, pages 7843-7844; see also FFCL, Volume 31, page 7719, ¶41.

1 or about January 22, 2014, Cashman recorded its Amended Lien against the  
2 Project.<sup>55</sup> These two liens stood for the proposition that Cashman had a lien in  
3 place relating to the Materials.  
4

5 However, on or about April 26, 2011, Cashman released any lien it had  
6 relating to the Materials, as Cashman executed and delivered to Mojave  
7 Unconditional Releases relating to the Materials.<sup>56</sup> Cashman signed and delivered  
8 these Unconditional Releases to Mojave after: (1) Mojave had paid the full amount  
9 due and owing to the entity it was contractually obligated to pay, which it is  
10 undisputed that these funds were sufficient;<sup>57</sup> and (2) Cashman received and  
11 accepted a post-dated check from CAM.<sup>58</sup>  
12  
13  
14

15 More specifically, these Unconditional Releases, which Cashman signed,  
16 stated that the undersigned, Cashman, had been paid in full for the work on the  
17 Project and waived and released any notice of lien and continued as follows:  
18 “NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND  
19 STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THESE RIGHTS.  
20  
21

22 <sup>55</sup> See Amended Lien, RSA, Volume 33, pages 7856-7857; *see also* FFCL, Volume  
23 31, page 7719, ¶44.

24 <sup>56</sup> See Unconditional Releases, Volume 11, pages 2596-2597; *see also* FFCL,  
25 Volume 31, page 7718, ¶34; *see also* Testimony of Shane Norman at trial, Volume  
26 27, page 6685 (noting that Cashman provided the Unconditional Releases to  
Mojave).

27 <sup>57</sup> See Unconditional Releases, Volume 11, pages 2596-2597; *see also* FFCL,  
Volume 31, page 7718, ¶34.

28 <sup>58</sup> See post-dated check, Volume 11, page 2603.

1 THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT,  
2 EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID,  
3 USE A CONDITIONAL RELEASE FORM.”<sup>59</sup> Thus, when executing this  
4 document, Cashman understood that it was unconditionally waiving its rights to  
5 any lien relating to the Materials and asserting it had been paid for the Materials.<sup>60</sup>  
6 Pursuant to the plain language of these releases, if Cashman had any doubts of  
7 whether it was releasing its lien rights, it could have executed a conditional  
8 release.<sup>61</sup> Cashman instead choose to execute these Unconditional Releases. Since  
9 Cashman acknowledged it had been fully paid and was releasing any lien rights it  
10 had on the Materials, the district court properly concluded that Cashman did indeed  
11 release any and all of these lien rights.<sup>62</sup>

12 Furthermore, Cashman’s reliance on NRS 108.2457(5)(e) is inaccurate. In  
13 its entirety, the statute reads:  
14

15 ...

16 ...

17 ...

18 ...

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25 <sup>59</sup> See Unconditional Releases, Volume 11, pages 2596-2597 (emphasis in  
26 original); see also FFCL, Volume 31, page 7721, ¶9.

27 <sup>60</sup> See Unconditional Releases, Volume 11, pages 2596-2597.

28 <sup>61</sup> See *id.*

<sup>62</sup> See FFCL, Volume 31, pages 7721-7722.

1 Notwithstanding any language in any waiver and release form set  
2 forth in this section, if the payment given in exchange for any waiver  
3 and release of lien is made by check, draft or other such negotiable  
4 instrument, and the same fails to clear the bank on which it is drawn  
5 for any reason, then the waiver and release shall be deemed null, void  
6 and of no legal effect whatsoever and all liens, lien rights, bond rights,  
7 contract rights or any other right to recover payment afforded to the  
lien claimant in law or equity will not be affected by the lien  
claimant's execution of the waiver and release.

8 When a statute's language is plain and unambiguous, the court will interpret it  
9 according to its ordinary meaning.<sup>63</sup>  
10

11 Pursuant to the plain language of NRS 108.2457(5)(e), the "payment given  
12 in exchange for" the Unconditional Releases was Mojave's check. The district  
13 court properly concluded this as well by stating "the check Mojave provided to  
14 CAM constitutes payment to Cashman for purposes of the enforceability of the  
15 Unconditional Releases that Cashman provided in exchange for the payment  
16 Cashman received from CAM."<sup>64</sup> Further, it is undisputed that Mojave's check  
17 (made to the entity it was obligated to pay) cleared the bank. Thus, NRS  
18 108.2457(5)(e) is inapplicable here.  
19  
20  
21

22 Both Mojave and Cashman understood that the funds were coming from  
23 Mojave relating to the Materials, and the middle man was essentially obligated to  
24 simply pay Cashman with Mojave's check. Cashman, knowing that CAM had no  
25

26  
27 <sup>63</sup> See *McGrath v. State Dept. of Public Safety*, 123 Nev. 120, 123, 159 P.3d 239,  
241 (2007).

28 <sup>64</sup> FFCL, Volume 31, page 7722, ¶14.

1 credit and having no prior history with CAM, accepted a post-dated check from  
2 CAM for the Materials and agreed to wait a few days before trying to deposit this  
3 post-dated check.<sup>65</sup> Cashman could have made CAM sign over Mojave's check  
4 and then written CAM a small check for the difference owed to CAM, or Cashman  
5 could have insisted on immediate payment from CAM and gone to the bank with  
6 CAM. Cashman did neither of these things and instead, accepted a post-dated  
7 check. Cashman could also have insisted on a joint check, but it chose not to.<sup>66</sup>

8 Again, Cashman did not have to sign these Unconditional Releases and  
9 could have executed conditional waivers instead; however, since it did sign these  
10 releases, thereby acknowledging that it had been paid in full, and Mojave tendered  
11 payment in full, the district court properly dismissed this claim and held that  
12 Cashman waived and released any lien it had relating to the Materials.  
13

14  
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18 **2. The District Court Properly Dismissed Cashman's Claim  
for Payment Bond against Mojave and Western.**

19 The district court properly concluded that Cashman's claim for payment  
20 bond against Mojave and Western be dismissed.<sup>67</sup> On or about March 2, 2010,  
21 Mojave, as principal, and Western, as a surety, executed the relevant Payment  
22

23  
24  
25 <sup>65</sup> See post-dated check, Volume 11, page 2603.

26 <sup>66</sup> Although, if a joint check was issued here, this may have defeated the purpose of  
27 the City's requirement of a disadvantaged business owner being part of the  
28 process.

<sup>67</sup> See FFCL, Volume 31, pages 7720-7721 and 7728.

1 Bond.<sup>68</sup> In relevant part, the Payment Bond states:

2  
3 NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is  
4 such, that if the Principal shall promptly make payments to all persons  
5 supplying labor, material, rental equipment, supplies or services in the  
6 performance of said Contract and any and all modifications of said  
7 Contract that may hereafter be made, then this obligation shall be null  
8 and void; otherwise it shall remain in full force and effect.<sup>69</sup>

9 After hearing all of the evidence at trial, the district court dismissed  
10 Cashman's claim under the payment bond.<sup>70</sup> The district court's dismissal of this  
11 claim for relief was appropriate for four main reasons (even though in its findings,  
12 the district court only held that that the defense of impossibility was the reason  
13 why Cashman's claim under the payment bond failed as a matter of law).<sup>71</sup>

14 First, Mojave was contractually obligated to and did indeed tender payment  
15 to the entity that it had an agreement with to supply labor and materials, CAM.<sup>72</sup>  
16 Mojave fully performed its duties and obligations under the Payment Bond.  
17 Mojave, the principal on the Payment Bond, "promptly made payments" to CAM  
18 for "supplying labor, material, rental equipment, supplies or services" for the  
19 Project. Pursuant to the plain and unambiguous language of the Payment Bond,  
20 Mojave, as principal, was discharged of its duty upon payment to CAM, which it  
21  
22  
23  
24

25 <sup>68</sup> See Payment Bond, Volume 16, pages 3784-3786.

26 <sup>69</sup> See *id.* at 3784 (emphasis in original).

27 <sup>70</sup> See FFCL, Volume 31, pages 7720-7721 and 7728.

28 <sup>71</sup> See *id.*

<sup>72</sup> See check, Volume 11, page 2629.

1 made said payment on or about April 26, 2011.<sup>73</sup> Thus, on or about April 26,  
2 2011, pursuant to the plain language of the Payment Bond, Mojave was discharged  
3 from any and all obligations, responsibilities, and duties under the Payment Bond,  
4 as Mojave's "obligation [was] null and void" upon payment to CAM.<sup>74</sup>  
5  
6

7 Second, the doctrine of accord and satisfaction applies to the Payment Bond  
8 and thus, Cashman's claim has no merit. In order for there to be an accord and  
9 satisfaction, three elements must be present: "(1) a bona fide dispute over an  
10 unliquidated amount; (2) payment tendered in full settlement of the entire dispute;  
11 and (3) an understanding by the creditor of the transaction as such, and acceptance  
12 of the payment."<sup>75</sup> Central to the issue of an accord and satisfaction is a meeting of  
13 the minds with regard to the resolution.<sup>76</sup>  
14  
15

16 Cashman supplied invoices to Mojave, the parties reached a meeting of the  
17 minds as to the amount owed for those invoices, Mojave, Whiting and the Owners  
18 (who are comprised of collectively, Respondents QH Las Vegas LLC, PQ Las  
19 Vegas, LLC, LWTIC Successor LLC, and FC/LW Vegas) tendered payment in full  
20 for those invoices,<sup>77</sup> and Cashman supplied the Unconditional Releases to  
21  
22  
23

24 <sup>73</sup> See *id.*; see also Payment Bond, Volume 16, pages 3784-3786.

25 <sup>74</sup> Payment Bond, Volume 16, pages 3784-3786.

26 <sup>75</sup> *Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 297, 956 P.2d 93, 97 (1998).

27 <sup>76</sup> See *id.*; see also *Mountain Shadows of Incline v. Kopsho*, 92 Nev. 599, 601, 555  
28 P.2d 841, 842 (1976).

<sup>77</sup> See check, Volume 11, page 2629.

1 Mojave.<sup>78</sup> The lien releases, upon receipt of payment, clearly evidence that  
2 Cashman and Mojave believed that an accord was reached and ultimately satisfied,  
3 as the lien releases clearly stated that Cashman was unconditionally waiving any  
4 rights under the Lien/Amended Lien and had been paid.<sup>79</sup> It was only after this  
5 event that Cashman and CAM made a new payment arrangement. As such, all of  
6 the elements of accord and satisfaction are met and this claim for relief was  
7 properly dismissed by the district court.  
8

9  
10  
11 Third, Cashman failed to complete the work relating to the Materials that  
12 CAM contracted with Cashman to provide.<sup>80</sup> Mojave expended approximately  
13 \$142,431.84 paying other subcontractors to complete Cashman's work on the  
14 Project, including the \$79,721.31 Cashman was paid for batteries that were  
15 included in its Lien, which when discovered at trial, forced Cashman to file its  
16 Amended Lien to take into account the overpayment for the batteries.<sup>81</sup>  
17  
18

19  
20 <sup>78</sup> See Unconditional Releases, Volume 11, pages 2596-2597; *see also* Testimony  
21 of Shane Norman at trial, Volume 27, page 6685 (noting that Cashman provided  
the Unconditional Releases to Mojave).

22 <sup>79</sup> See Unconditional Releases, Volume 11, pages 2596-2597.

23 <sup>80</sup> See Testimony of Shane Norman at trial, Volume 27, pages 6687-6688 (noting  
24 that at the time Mojave made payment, Cashman's work on the Project was not  
complete).

25 <sup>81</sup> See Amended Lien, RSA, Volume 33, pages 7856-7857; *see also* Testimony of  
26 Brian Bugni at trial, Volume 28, pages 6841-6843 (noting that Mojave had to pay  
over \$142,000.00 to finish the work on the Project, including the expenses for the  
27 batteries); *see also* Testimony of Chris Meiers at trial, Volume 28, pages 6879-  
28 6881 (noting that Mojave had to retain new subcontractors to finish the Project and  
also that it had to repurchase the UPS batteries); *see also* Misc. Invoices to

1 Additionally, Cashman has collected over \$200,000 worth of assets (a house, a car,  
2 and money) from other defendants in this action.<sup>82</sup> Cashman is not entitled to  
3 anything under the Payment Bond.  
4

5 Fourth, as the district court held, Mojave was entitled to judgment on this  
6 claim for relief under the Payment Bond because of the defense of impossibility  
7 articulated in *Nebaco, Inc. v. Riverview Realty Co., Inc.* which states that  
8 “[g]enerally, the defense of impossibility is available to a promisor where his  
9 performance is made impossible or highly impractical by the occurrence of  
10 unforeseen contingencies . . . but if the unforeseen contingency is one which the  
11 promisor should have foreseen, and for which he should have provided, this  
12  
13  
14

15 \_\_\_\_\_ (continued)  
16 Mojave, Volume 27, pages 6535-6552 (invoices for this calculation of  
\$142,431.84, including the invoice for \$79,721.31 for the battery at page 6549).

17 <sup>82</sup> See Order Consolidating Appeals and Referring Appeals to Settlement Program  
18 filed by the Court on October 20, 2014; see also Testimony of Shane Norman at  
19 trial, Volume 27, pages 6722-6723 (noting that Cashman has recovered \$5,200  
20 from the other defendants and has been awarded a house and a car from another  
21 defendant in the district court); see also Closing Argument at trial, Volume 29,  
22 pages 7046 (noting that the house is valued anywhere between \$165,000.00 what a  
23 defendant paid for the house in 2011, and \$214,881.00, the value of the house on  
24 Zillow); see also FFCL, Volume 31, page 7727, ¶41 (noting that the Court was  
25 upholding its prior findings of fact and conclusions of law with respect to its award  
26 of a property to Cashman); see also Notice of Entry of Findings of Fact and  
27 Conclusions of Law and Order on Cashman Equipment Company’s Motion for  
28 Summary Judgment against Janel Rennie aka Janel Carvalho, RSA, Volume 33,  
pages 7845-7855 (noting the price of the property was \$165,000.00 and awarding  
this property to Cashman, as well as awarding a vehicle to Cashman worth  
approximately \$39,000.00). Additionally, on May 12, 2014 (approximately eleven  
months after Cashman was awarded the house and vehicle), Cashman filed in the  
district court a Satisfaction of Judgment of Janel Rennie aka Janel Carvalho. See  
RSA, Volume 33, pages 7858-7859.

1 defense is unavailable to him.”<sup>83</sup>

2  
3 Here, the district court properly ruled that the defense of impossibility was  
4 applicable and available to Mojave, because after Mojave made payment to CAM,  
5 the entity it was legally obligated to pay, it was impossible for Mojave to foresee  
6 that CAM and/or Carvalho would abscond with the funds. There was absolutely  
7 no reason to believe CAM and/or Carvalho would walk away after receiving these  
8 funds, especially given the fact that Mojave had worked with CAM on other  
9 projects with no problems whatsoever.<sup>84</sup>

10  
11 Instead, Cashman was the one to select CAM as the DBE on the Project,  
12 even when Mojave gave Cashman two other alternatives.<sup>85</sup> Cashman was the one  
13 who had CAM fill out a credit application and upon CAM filling this application  
14 out, Cashman identified credit problems and did not want to extend credit to CAM;  
15 Cashman, not Mojave, potentially knew that CAM could walk away with the  
16 money.<sup>86</sup> Cashman entered into the agreement with CAM and negotiated the terms  
17  
18  
19  
20  
21  
22

23 <sup>83</sup> 87 Nev. 55, 57, 482 P.2d 305, 307 (1971).

24 <sup>84</sup> See FFCL, Volume 31, page 7726; *see also* Testimony of Peter Fergen at trial,  
25 Volume 28, page 6909 (noting that he had worked on other jobs with  
26 CAM/Carvalho).

27 <sup>85</sup> See FFCL, Volume 31, page 7726; *see also* Testimony of Peter Fergen at trial,  
28 Volume 28, pages 6907-6912 (noting that he gave Cashman different alternatives  
for a DBE).

<sup>86</sup> See FFCL, Volume 31, page 7726; *see also* Credit Application, Volume 11,  
pages 2584-2585.

1 of the contract with CAM.<sup>87</sup> Mojave had dealt with CAM on a couple of other  
2 projects where no payment issues were evident; Mojave reasonably concluded that  
3 CAM and/or Carvalho was doing what it/he was supposed to do in those sorts of  
4 scenarios.<sup>88</sup>  
5

6  
7 Additionally, Cashman could have made CAM sign over Mojave's check  
8 and then written CAM a small check for the difference owed to CAM, or Cashman  
9 could have insisted on immediate payment from CAM and gone to the bank with  
10 CAM. Cashman did neither of these things and instead, accepted a post-dated  
11 check. Cashman could have also insisted on a joint check but it chose not to.  
12

13  
14 There were many things that Cashman could have done to protect itself,  
15 especially given the fact that Cashman may have known of the risks (i.e. credit  
16 risks) after CAM filled out the application for Cashman. However, it was  
17 impossible for Mojave to foresee that CAM and/or Carvalho would abscond with  
18 the funds, especially given the prior business dealings between the parties, with no  
19 problems related to payments, or otherwise.  
20

21  
22 . . .  
23

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24 <sup>87</sup> See FFCL, Volume 31, page 7715, ¶1; *see also* Testimony of Peter Fergen at  
25 trial, Volume 28, pages 6910-6911 (noting that after the introduction with CAM,  
26 Mojave had no involvement with Cashman and CAM's agreement or the  
negotiation thereto).

27 <sup>88</sup> See FFCL, Volume 31, page 7726; *see also* Testimony of Peter Fergen at trial,  
28 Volume 28, page 6909 (noting that he had worked on other jobs with  
CAM/Carvalho).

1           Given that Mojave fully performed all of its duties and obligations under the  
2           Payment Bond, Cashman failed to complete the work on the Project, and the fact  
3           that Mojave is entitled to the defense of impossibility, the district court properly  
4           held that Cashman could not recover on its claim relating to the Payment Bond.<sup>89</sup>

7                   **3.     The District Court Properly Dismissed Cashman's Claim**  
8                   **for Fraudulent Transfer.**

9           In Cashman's Opening Brief, Cashman fails to assert any arguments with  
10          respect to its fraudulent transfer claim. In other words, Cashman has conceded this  
11          claim. Given this lack of argument, Mojave asserts that Cashman has waived its  
12          rights to any and all arguments with respect to its fraudulent transfer claim.  
13          Notwithstanding this notion, the district court properly concluded that Cashman's  
14          claim for fraudulent transfer be dismissed.<sup>90</sup>

16          First, at trial, Cashman never asserted whether it was pursuing a claim for  
17          actual fraudulent transfer (pursuant to NRS 112.180(1)(a)) or constructive  
18          fraudulent transfer (pursuant to NRS 112.180(1)(b)) . With this lack of specificity,  
19          the claim was properly dismissed.

22          Second, in terms of actual fraudulent transfer (under NRS 112.180(1)(a)),  
23          there was no evidence at trial that Mojave engaged in any conduct with actual  
24          intent to harm, hinder or delay Cashman. Mojave certainly was not an insider with  
25          respect to CAM, and Mojave retained nothing out of the funds tendered by CAM.

27          <sup>89</sup> See FFCL, Volume 31, pages 7720-7721 and 7728.

28          <sup>90</sup> See *id.*, pages 7723-7724 and 7728.

1 While CAM ultimately absconded with money, there was no way for Mojave to  
2 know that CAM was going to engage in nefarious conduct, and truthfully, CAM's  
3 conduct would not have mattered at all had Cashman been more diligent and not  
4 accepted post-dated funds from CAM.<sup>91</sup> Cashman made a bad deal with CAM  
5 after the tender of funds that ultimately allowed CAM to steal the money owed to  
6 Cashman. There is no evidence of an actual fraudulent transfer here and this claim  
7 has no merit.  
8  
9  
10

11 Third, in terms of constructive fraudulent transfer (under NRS  
12 112.180(1)(b)), there was no evidence at trial that Mojave had any reason to  
13 believe that CAM was going to incur debt that it would not be able to re-pay.  
14 Again, Mojave tendered payment to CAM in full.<sup>92</sup> Had Cashman taken any  
15 number of steps (requiring CAM to sign the check over, going to the bank with  
16 CAM right then and there, demanding immediate payment, etc.) instead of  
17 agreeing to hold off on depositing CAM's post-dated check for several days, none  
18 of this would have happened, regardless of what CAM tendered to Mojave for the  
19 other projects.  
20  
21  
22

23 In essence, the district court properly held that Cashman's fraudulent  
24 transfer claim failed, because "Mojave had no real inside complicity with CAM"  
25 and "the Court finds that there must been complicity between Mojave and CAM in  
26

27 <sup>91</sup> See post-dated check, Volume 11, page 2603.

28 <sup>92</sup> See check, Volume 11, page 2629.

1 order for Cashman to prevail on its claim for Fraudulent Transfer.”<sup>93</sup> There was no  
2 evidence presented at trial that somehow Mojave and CAM were in some type of  
3 conspiracy to deprive Cashman of any money. The district court properly  
4 dismissed Cashman’s fraudulent transfer claim.  
5

6  
7 **C. The District Court Improperly Ruled in Favor of Cashman on its**  
8 **Claims for Foreclosure of Security Interest and Unjust Enrichment and**  
9 **Mojave’s Claim for Misrepresentation.**<sup>94</sup>

10 At the conclusion of trial, the district court ruled in favor of Cashman on its  
11 claims for foreclosure of security interest and unjust enrichment, as well as on  
12 Mojave’s claim for misrepresentation.<sup>95</sup> The district court erred in rendering its  
13 decision on these three claims.  
14

15 **1. The District Court Improperly Ruled in Favor of Cashman**  
16 **on its Claim for Foreclosure of Security Interest.**

17 The district court improperly ruled in favor of Cashman on its claim for  
18 foreclosure of security interest.<sup>96</sup> First, the doctrine of accord and satisfaction  
19 applies here and thus, this claim has no merit. As noted above, in order for there to  
20 be an accord and satisfaction, three elements must be present: “(1) a bona fide  
21 dispute over an unliquidated amount; (2) payment tendered in full settlement of the  
22

23 <sup>93</sup> See FFCL, Volume 31, pages 7723-7724, ¶¶ 23 and 24.

24 <sup>94</sup> Since Cashman appealed the FFCL, the Mojave Parties assert that any and all  
25 claims for relief tried in the district court below have been appealed. As set forth  
26 below, the district court improperly ruled in favor of Cashman in its claims for  
27 foreclosure of security interest and unjust enrichment and Mojave’s claim for  
28 Misrepresentation.

<sup>95</sup> See FFCL, Volume 31, page 7728.

<sup>96</sup> See *id.*, pages 7722-7723 and 7728.

1 entire dispute; and (3) an understanding by the creditor of the transaction as such,  
2 and acceptance of the payment.”<sup>97</sup> Central to the issue of an accord and  
3 satisfaction is a meeting of the minds with regard to the resolution.<sup>98</sup>  
4

5 Here, Cashman recorded its UCC with respect to the Materials.<sup>99</sup> Mojave  
6 was presented invoices from CAM for work and materials for the Project, and  
7 based upon those invoices, Mojave tendered payment in full.<sup>100</sup> The payment was  
8 made to CAM, as it needed to be under the respective contracts.<sup>101</sup> After Mojave  
9 tendered the full amount, which was accepted both by CAM and by Cashman,  
10 Mojave was provided with Unconditional Releases in exchange, a clear showing  
11 that there was a meeting of the minds as to whether Mojave had paid the amount  
12 Cashman believed it was owed and also that the Mojave Parties’ payment  
13 obligation had been satisfied.<sup>102</sup> It was only after the accord and satisfaction  
14 between Mojave, CAM, and Cashman that Cashman entered into the subsequent  
15 agreement with CAM to accept a post-dated check and wait to deposit Mojave’s  
16 payment.<sup>103</sup> The parties agreed on the value of the Materials, that value was  
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22 <sup>97</sup> *Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 297, 956 P.2d 93, 97 (1998).

23 <sup>98</sup> *See id.*; *see also Mountain Shadows of Incline v. Kopsho*, 92 Nev. 599, 601, 555  
24 P.2d 841, 842 (1976).

25 <sup>99</sup> *See* UCC Financing Statement, Volume 11, page 2599; *see also* FFCL, Volume  
26 31, page 7717, ¶23.

27 <sup>100</sup> *See* check, Volume 11, page 2629.

28 <sup>101</sup> *See id.*

<sup>102</sup> *See* Unconditional Releases, Volume 11, pages 2596-2597.

<sup>103</sup> *See* post-dated check, Volume 11, page 2603.

1 tendered and accepted, and only then, did Cashman endeavor to make a side deal  
2 with CAM that ultimately resulted in Cashman not getting paid.  
3

4 Second, there is no conceivable or reasonable way to pull the equipment out  
5 of City Hall. This is primarily because the Materials related to a power generator,  
6 equipment impossible to disassemble with no impact on the building and its  
7 employees. Thus, contrary to the district court's ruling, this claim for foreclosure  
8 of Cashman's security interest should have been dismissed because of the doctrine  
9 of accord and satisfaction or because it is not feasible.  
10  
11

12 **2. The District Court Improperly Ruled in Favor of Cashman**  
13 **on its Claim for Unjust Enrichment.**

14 The district court improperly ruled in favor of Cashman on its claim for  
15 unjust enrichment against the Owners.<sup>104</sup> "Unjust enrichment is the unjust  
16 retention . . . of money or property of another against the fundamental principles of  
17 justice or equity and good conscience."<sup>105</sup> "Unjust enrichment occurs whenever a  
18 person has and retains a benefit which in equity and good conscience belongs to  
19 another. Unjust enrichment is the unjust retention of a benefit to the loss of  
20 another."<sup>106</sup> A cause of action for "unjust enrichment exists when the plaintiff  
21 confers a benefit on the defendant, the defendant appreciates such benefit, and  
22  
23  
24

25 <sup>104</sup> See FFCL, Volume 31, page 7724 and 7728.

26 <sup>105</sup> *Topaz Mut. Co. Inc. v. Marsh*, 108 Nev. 845, 856, 839 P.2d 606, 613 (1992)  
27 (citations omitted).

28 <sup>106</sup> *Coury v. Robison*, 115 Nev. 84, 90, 976 P.2d 518, 521 (1999) (citations  
omitted).

1 there is 'acceptance and retention by the defendant of such benefit under  
2 circumstances such that it would be inequitable for him to retain the benefit  
3 without payment of the value thereof.'"<sup>107</sup>

4  
5 Here, the district court held that as long as Cashman provides, implements,  
6 and actually puts in the codes, Cashman is entitled to relief under its unjust  
7 enrichment claim.<sup>108</sup> As an initial matter, Cashman still, to date, has not provided,  
8 implemented, or put in the codes so it cannot be entitled to this claim for relief.  
9  
10 Notwithstanding this, the district court erred in ruling in favor of Cashman on this  
11 claim, because the Owners have not unjustly retained a benefit bestowed upon  
12 them by Cashman. Conversely, the Mojave Parties paid Cashman, in full, even  
13 though the work was not, and is still not, complete.<sup>109</sup> Cashman accepted a post-  
14 dated check from CAM that was not honored.<sup>110</sup> However, those funds were  
15 already appropriated to Mojave for its subcontractors, including CAM, and paid  
16 out by the Owners of the Project and Whiting Turner.  
17  
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19

20 At trial, there was no evidence that demonstrated that the Owners were  
21 unjustly enriched by any conduct of Cashman. Rather, the Mojave Parties paid the  
22

23  
24 <sup>107</sup> *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, \_\_ Nev. \_\_, 283 P.3d 250,  
25 257 (2012) (citations omitted).

26 <sup>108</sup> See FFCL, Volume 31, page 7724 and 7728.

27 <sup>109</sup> See check, Volume 11, page 2629; see also Testimony of Shane Norman at trial,  
28 Volume 27, pages 6687-6688 (noting that at the time Mojave made payment,  
Cashman's work on the Project was not complete).

<sup>110</sup> See post-dated check, Volume 11, page 2603.

1 full value of their contract, even though Cashman's work had not been completed,  
2 and the codes have still, even as of date of this writing, never been supplied by  
3 Cashman. The Mojave Parties have not retained, accepted, or accepted any benefit  
4 which in law or equity belongs to Cashman. Thus, the district court should have  
5 dismissed Cashman's unjust enrichment claim.  
6

7  
8 **3. The District Court Improperly Ruled in Favor of Cashman**  
9 **on Mojave's Claim for Misrepresentation.**

10 The district court improperly ruled in favor of Cashman on Mojave's claim  
11 for misrepresentation.<sup>111</sup> In Nevada "the elements of the tort of negligent  
12 misrepresentation are: (a) a representation that is false; (b) this representation was  
13 made in the course of the defendant's business, or in any action in which he has a  
14 pecuniary interest; (c) the representation was for the guidance of others in their  
15 business transactions; (d) the representation was justifiably relied upon; (e) this  
16 reliance resulted in pecuniary loss to the relying party; and (f) the defendant failed  
17 to exercise reasonable care or competence in obtaining or communicating the  
18 information."<sup>112</sup>  
19  
20  
21

22 As an initial matter, Mojave's claim for negligent misrepresentation is  
23 essentially moot, since this claim revolves around Cashman's claim for  
24 enforcement of its Lien/Amended Lien, a claim that was dismissed below.<sup>113</sup>  
25

26  
27 <sup>111</sup> See FFCL, Volume 31, pages 7725 and 7728.

28 <sup>112</sup> *Ideal Elec. Co. v. Flowserve Corp.*, 357 F.Supp.2d 1248, 1255 (D. Nev. 2005).

<sup>113</sup> See FFCL, Volume 31, pages 7721-7722 and 7728.

1           Notwithstanding this issue, Cashman, upon Mojave tendering full payment  
2  
3 under its contract, provided Unconditional Releases to Mojave.<sup>114</sup> These releases  
4 were provided in the course of both parties' business, and they were provided to  
5 give Mojave (and the other Mojave Parties) assurance and guidance that the  
6 Mojave Parties would not end up engaged in a lien dispute, despite tendering full  
7 payment.<sup>115</sup> The Mojave Parties justifiably relied upon these releases, and in  
8 particular, upon the idea that because they had submitted full payment under the  
9 contract, Cashman would finish the work and not lien the property.<sup>116</sup> This  
10 reliance has now led to pecuniary loss to the Mojave Parties, as Mojave had to  
11 retain new subcontractors to finish the Project, eventually had to "re-pay" for the  
12 UPS batteries it had already paid for (which is why Cashman amended its Lien at  
13 trial), and has had to fight the instant suit for several years, due to no fault of the  
14 Mojave Parties, especially given the fact that the Mojave Parties tendered full  
15 payment to the entity it was obligated to pay.<sup>117</sup>  
16  
17  
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21 . . .

---

22 <sup>114</sup> See Unconditional Releases, Volume 11, pages 2596-2597; *see also* Testimony  
23 of Shane Norman at trial, Volume 27, page 6685 (noting that Cashman provided  
24 the Unconditional Releases to Mojave).

25 <sup>115</sup> See *id.*; *see also* check, Volume 11, page 2629.

26 <sup>116</sup> See check, Volume 11, page 2629.

27 <sup>117</sup> See *id.*; *see also* Testimony of Chris Meiers at trial, Volume 28, pages 6879-  
28 6881 (noting that Mojave had to retain new subcontractors to finish the Project and  
also that it had to repurchase the UPS batteries); *see also* Testimony of Brian  
Bugni at trial, Volume 28, pages 6841-6843 (noting that Mojave had to pay over  
\$142,000.00 to finish the work on the Project).

1 If Cashman had any doubt that it was not going to be actually releasing its  
2 lien rights or that it was planning to engage in some side deal with CAM, then it  
3 should not have represented otherwise. Instead, Cashman accepted the funds from  
4 Mojave, provided Unconditional Releases, then cut its side deal with CAM, which  
5 resulted in Cashman not getting paid and ultimately not finishing its work on the  
6 Project, all to the detriment of the Mojave Parties. The district court erred in  
7 finding in favor of Cashman for Mojave's claim for misrepresentation.  
8  
9  
10

11 **D. Although Mojave Believes it is not at Fault for any of the Actions of**  
12 **CAM and Carvalho, the District Court came to a Reasonable**  
13 **Conclusion in Balancing the Fault Percentages, in Equity, of Mojave**  
14 **and Cashman, in Terms of the Actions of CAM and Carvalho.**

15 At the conclusion of trial, the district court ruled that Cashman was sixty-  
16 seven percent (67%) at fault for the actions of CAM and Carvalho, while Mojave  
17 was only thirty-three percent (33%) at fault for their actions.<sup>118</sup>  
18

19 As an initial matter, Mojave believes that it is not at fault for any of the  
20 actions of CAM and Carvalho and thus, Cashman should have been awarded  
21 nothing in this action, given all of Cashman's actions relating to CAM and the  
22 payment issues.  
23

24 Cashman was the one to select CAM as the DBE on the Project, even when  
25 Mojave gave Cashman two other alternatives.<sup>119</sup> Cashman was the one who had  
26

27 <sup>118</sup> See FFCL, Volume 31, pages 7726-7727.

28 <sup>119</sup> See *id.*, Volume 31, page 7726; see also Testimony of Peter Fergen at trial,

1 CAM fill out a credit application and upon CAM filling this application out,  
2 Cashman identified credit problems and did not want to extend credit to CAM;  
3 Cashman, not Mojave, potentially knew that CAM could walk away with the  
4 money.<sup>120</sup> Cashman entered into the agreement with CAM and negotiated the  
5 terms of the contract with CAM.<sup>121</sup> Cashman could have made CAM sign over  
6 Mojave's tendered check and then written CAM a small check for the difference  
7 owed to CAM, or Cashman could have insisted on immediate payment from CAM  
8 and gone to the bank with CAM. Cashman did neither of these things and instead,  
9 accepted a post-dated check. Cashman could have also insisted on a joint check  
10 but it chose not to. There were many things that Cashman could have done to  
11 protect itself but it failed to do. Cashman should be held one hundred percent  
12 (100%) at fault with regards to the actions of CAM and Carvalho.  
13

14  
15 Notwithstanding Mojave's aforementioned belief, if this Court believes that  
16 Mojave is liable for some of the actions relating to CAM and Carvalho, and since  
17 the Court did indeed conduct an equitable fault analysis, Mojave asserts that the  
18 district court came to a reasonable conclusion in balancing the fault percentages, in  
19

20 \_\_\_\_\_ (continued)  
21 Volume 28, pages 6907-6912 (noting that he gave Cashman different alternatives  
22 for a DBE).

23 <sup>120</sup> See FFCL, Volume 31, page 7726; *see also* Credit Application, Volume 11,  
24 pages 2584-2585.

25 <sup>121</sup> See FFCL, Volume 31, page 7715, ¶1; *see also* Testimony of Peter Fergen at  
26 trial, Volume 28, pages 6910-6911 (noting that after the introduction with CAM,  
27 Mojave had no involvement with Cashman and CAM's agreement or the  
28 negotiation thereto).

1 equity, of Mojave and Cashman, in terms of the actions of CAM and Carvalho.  
2  
3 Again, there were numerous things that Cashman could have done to protect itself  
4 but failed to do (noted in the previous paragraph). Yet, the district court did place  
5 some fault on Mojave for not issuing a joint request (which the district court even  
6 admitted would not have necessarily solved the problem).<sup>122</sup> Further, Mojave had  
7 worked on other projects with CAM (although, Mojave had no problems with  
8 CAM on these projects) and thus, this may have contributed to the district court's  
9 analysis on equitable fault.<sup>123</sup>

12 In its Opening Brief, Cashman asserts a few arguments on why the district  
13 court erred in applying a comparative fault analysis.<sup>124</sup> All of these arguments lack  
14 merit. First, Cashman believes that "it is improper to engage in a  
15 comparative/equitable fault analysis when a damages recovery is based upon a  
16 valid and enforceable contract."<sup>125</sup> However, Cashman never asserted a breach of  
17 contract claim against Mojave in this action, because there was never a contract  
18 between Cashman and Mojave. The only contract here with Cashman was  
19 between it and CAM.<sup>126</sup>

23 . . .

24 <sup>122</sup> See FFCL, Volume 31, pages 7726-7727.

25 <sup>123</sup> See *id.*, page 7726; see also Testimony of Peter Fergen at trial, Volume 28, page  
26 6909 (noting that he had worked on other jobs with CAM/Carvalho).

27 <sup>124</sup> See Opening Brief at pages 35-42.

28 <sup>125</sup> See *id.* at page 35.

<sup>126</sup> See FFCL, Volume 31, page 7715, ¶1.

1 Further, at trial, the only two claims that Cashman prevailed on were for  
2 foreclosure of a security interest and unjust enrichment.<sup>127</sup> Neither of these claims  
3 relate to valid and enforceable contracts. In fact:

4  
5 [a]n action based on a theory of unjust enrichment is not  
6 available when there is an express, written contract, because no  
7 agreement can be implied when there is an express agreement . . .  
8 **The doctrine of unjust enrichment . . . applies to situations where**  
9 **there is no legal contract** but where the person sought to be charged  
10 is in possession of money or property which in good conscience and  
11 justice he should not retain but should deliver to another [or should  
12 pay for] . . . To permit recovery by quasi-contract where a written  
agreement exists would constitute a subversion of contractual  
principles.<sup>128</sup>

13 Given there was no contract between Cashman and Mojave, its argument regarding  
14 comparative fault is misplaced.

15  
16 Second, Cashman discusses the economic loss doctrine and cites to *Terracon*  
17 for the proposition that “when economic loss occurs as a result of negligence in the  
18 context of commercial activity, contract law can be invoked to enforce the quality  
19 expectations derived from the parties’ agreement.”<sup>129</sup> Yet, Cashman’s analysis to  
20 the economic loss doctrine is misplaced because not only was there no agreement  
21 between Mojave and Cashman, but there was no negligence here on the part of  
22  
23  
24

25 <sup>127</sup> See *id.*, page 7728.

26 <sup>128</sup> *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev.  
27 747, 755-56, 942 P.2d 182, 187 (1997) (citations omitted) (emphasis added).

28 <sup>129</sup> Opening Brief, pg. 39; see also *Terracon Consultants W., Inc. v. Mandalay  
Resort Group*, 125 Nev. 66, 75, 206 P.3d 81, 87 (2009).

1 Mojave.<sup>130</sup> As noted above, because of the actions of Cashman, CAM absconded  
2 with the money. There were numerous things that Cashman could have done to  
3 protect itself but failed to do. Further, Cashman did not assert any negligence  
4 claims against Mojave (at trial or otherwise).<sup>131</sup> The economic loss doctrine is  
5 inapplicable to the situation at hand pursuant to *Terracon*.<sup>132</sup>  
6  
7

8 Third, the district court conducted an equitable fault analysis because it  
9 wanted to come up with a judgment amount to balance the relative faults of  
10 Mojave and Cashman with respect to CAM/Carvalho absconding with the  
11 money.<sup>133</sup> In the end, the district court reasonably decided that even though  
12 Mojave and Cashman were both “innocent victims”, Cashman was responsible for  
13 the majority of CAM and Carvalho’s actions in absconding with the money.<sup>134</sup>  
14 Only telling part of the story, Cashman notes that the district court explained in its  
15 decision that it was a great company and supplied the materials for the Project.<sup>135</sup>  
16 What Cashman fails to tell this Court however is the very next thing that came out  
17 of the judge’s mouth was “I think Mojave is a good company too. It seems like  
18 anytime you are asked to do something, you do it, and you pay for stuff but this  
19  
20  
21  
22  
23

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24 <sup>130</sup> If any negligence is evident here, it belonged to Cashman for its actions, as  
25 described in this Answering Brief.

26 <sup>131</sup> See FFCL, Volume 31, page 7719 n. 1.

27 <sup>132</sup> 125 Nev. at 75, 206 P.3d at 87.

28 <sup>133</sup> See Court’s Ruling at trial, Volume 29, pages 7081-7082.

<sup>134</sup> See *id.*

<sup>135</sup> See Opening Brief at page. 41.

1 time to your detriment to some extent.”<sup>136</sup> The district court acknowledged that  
2 Mojave fulfilled any and all obligations hereto, including providing payment to the  
3 entity it was obligated to pay, CAM.  
4

5 Even though Mojave believes it is not at fault for any of CAM and  
6 Carvalho’s actions regarding absconding with the money, the district court came to  
7 a reasonable conclusion in balancing the fault percentages, in equity, of Mojave  
8 and Cashman, in terms of CAM and Carvalho’s actions.  
9  
10

11 **E. The District Court Properly Held that the Codes Should be Turned**  
12 **Over to Mojave, given that Mojave Tendered Full Payment to CAM, the**  
13 **Party it was Obligated to Pay.**

14 On August 10, 2012, the district court properly ruled that the codes on the  
15 Project, the codes that Cashman had and refused to provide to Mojave, must be  
16 installed on the Project.<sup>137</sup> In rendering this decision, the district court balanced  
17 the potential immediate and irreparable injury, the public policy, and the hardships  
18 and ultimately concluded that an injunction was appropriate, ordering the codes to  
19 be installed.<sup>138</sup> Cashman appealed this ruling and subsequently, at trial, the district  
20 court again ordered that the codes be installed; upon installation, Cashman would  
21 then receive the \$86,600.00 in escrow.<sup>139</sup> Even though the Mojave Parties are  
22  
23  
24

25 <sup>136</sup> See Court’s Ruling at trial, Volume 29, page 7082.

26 <sup>137</sup> See Findings of Fact and Conclusions of Law based upon Counterclaimants  
27 Motion to Procure Codes, Volume 2, page 416.

28 <sup>138</sup> See *id.*

<sup>139</sup> See Notice of Appeal filed with this Court on September 18, 2012, Volume 3,

1 willing and able to provide this amount to Cashman, as of date, Cashman still has  
2 not provided, implemented, and put in the codes.<sup>140</sup>

3  
4 Again, in August 2012, the district court properly granted Mojave's  
5 injunctive relief, requiring that the codes be installed on the Project.<sup>141</sup> In Nevada,  
6 a court will issue an injunction if there is: (1) a reasonable likelihood of success on  
7 the merits; (2) a reasonable probability that if the conduct is allowed to continue, it  
8 will cause irreparable harm for which there is an inadequate remedy at law; (3) the  
9 threatened injury to the moving party absent issuance of an injunction outweighs  
10 any potential harm that the injunction may cause the non-moving party; and (4) the  
11 granting of the injunction is not contrary to the public interest.<sup>142</sup> "[T]he decision  
12 whether to grant a preliminary injunction is within the sound discretion of the  
13 district court, whose decision will not be disturbed on appeal absent an abuse of  
14 discretion."<sup>143</sup>

15  
16  
17  
18  
19 \_\_\_\_\_ (continued)  
20 pages 610-619; *see also* FFCL, Volume 31, pages 7724 and 7729.

21 <sup>140</sup> Even at trial, Mojave testified that it tried to get the codes from Cashman, but  
22 Cashman refused, and has refused to give Mojave the codes even as of date. *See*  
23 *Testimony of Chris Meiers at trial, Volume 28, page 6881; see also Testimony of*  
24 *Peter Fergen at trial, Volume 28, page 6918.*

25 <sup>141</sup> *See Findings of Fact and Conclusions of Law based upon Counterclaimants*  
26 *Motion to Procure Codes, Volume 2, page 416.*

27 <sup>142</sup> *See Univ. and Cmty. College Sys. of Nev. v. Nevadans for Sound Gov't, 120*  
28 *Nev. 712, 721, 100 P.3d 179, 187 (2004); see also Dixon v. Thatcher, 103 Nev.*  
*414, 415, 742 P.2d 1029, 1029 (1987); see also Sobel v. Capital Mgmt.*  
*Consultants, Inc., 102 Nev. 444, 446, 726 P.2d 335, 337 (1986).*

<sup>143</sup> *Dangberg Holdings Nev., LLC v. Douglas County, 115 Nev. 129, 142-43, 978*  
*P.2d 311, 319 (1999).*

1           The district court properly analyzed all four of these aforementioned factors  
2  
3 and concluded that an injunction was proper, for Cashman to install the codes.<sup>144</sup>  
4  
5 The district court correctly ruled that Cashman must install the codes at that time  
6 because: (1) Mojave tendered full payment to the entity it was obligated to pay, for  
7 the Materials, which included installation of the codes;<sup>145</sup> (2) City Hall was not,  
8 and is not, fully functional without the codes;<sup>146</sup> and (3) “[w]ithout the codes, City  
9 Hall has an incomplete operating system which prevents the City from completion  
10 of the project.”<sup>147</sup>

12           The district court took into account all of these factors and concluded that:  
13  
14 there was a reasonable likelihood of success on the merits, given that Mojave  
15 tendered the full amount for the Materials<sup>148</sup>; there would be irreparable harm if the  
16 codes were not installed, given that the City Hall system would not be fully  
17 functional, which is a safety concern;<sup>149</sup> that the balance of the hardships weighed

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20 <sup>144</sup> See Findings of Fact and Conclusions of Law based upon Counterclaimants  
21 Motion to Procure Codes, Volume 2, page 416.

22 <sup>145</sup> See check, Volume 11, page 2629.

23 <sup>146</sup> See Findings of Fact and Conclusions of Law based upon Counterclaimants  
24 Motion to Procure Codes, Volume 2, page 415; *see also* Testimony of Keith  
25 Lozeau at trial, Volume 27, pages 6632-6633 (noting the generators on the Project  
do not work as designed because the codes have not been installed); *see also*  
Testimony of Chris Meiers at trial, Volume 28, pages 6881-6882 (noting that the  
system does not work efficiency or properly without the codes).

26 <sup>147</sup> See Findings of Fact and Conclusions of Law based upon Counterclaimants  
27 Motion to Procure Codes, Volume 2, page 415.

28 <sup>148</sup> See check, Volume 11, page 2629.

<sup>149</sup> See Findings of Fact and Conclusions of Law based upon Counterclaimants

1 in favor of installing the codes, as Cashman had (and still has) no use for the codes  
2 outside of City Hall, is simply refusing to install the codes, and City Hall and  
3 Mojave would both harmed by not installing the codes;<sup>150</sup> and that the public  
4 interest weighed in favor of installing the codes, given that the City Hall system  
5 would not be fully functional and there is no reason for Cashman not to install the  
6 codes.<sup>151</sup> The district court properly analyzed all of the elements of an injunction  
7 and held that Cashman must install the codes.

11 At trial, the code issue was revisited and the district court awarded Cashman  
12 damages for \$86,600.00 in escrow “as long as Cashman provides, implements, and  
13 actually puts in the codes at issue.”<sup>152</sup> In other words, as long as Cashman installs  
14 the codes, it is entitled to the amount of \$86,600.00 in escrow. The Mojave Parties  
15 are still willing and able to give this amount to Cashman. However, Cashman is  
16 holding these codes hostage, to the detriment of both the Mojave Parties and the  
17 City of Las Vegas.<sup>153</sup>

20 There is no reason for Cashman to hold on to these codes. Not only are the  
21 Mojave Parties able and willing to pay the \$86,600.00 to Cashman immediately,

23 \_\_\_\_\_ (continued)  
Motion to Procure Codes, Volume 2, page 415.

24 <sup>150</sup> See *id.*, page 415-416.

25 <sup>151</sup> See *id.*

26 <sup>152</sup> FFCL, Volume 31, page 7724, ¶28; see also Judgment, Volume 32, pages 7789-  
7791.

27 <sup>153</sup> See Testimony of Keith Lozeau at trial, Volume 27, pages 6614 (noting that  
28 Cashman won’t activate the codes until it gets paid). The Mojave Parties are  
willing and able to pay for these codes and even have this money in escrow.

1 but the City Hall system is still not efficient and needs these codes.<sup>154</sup>  
2  
3 Additionally, Cashman has not stayed the district court's trial ruling regarding  
4 turnover and installation of these codes, yet again, another reason for Cashman to  
5 turn over and install the codes.  
6

7 In essence, Cashman has now failed to abide by two court orders (the one in  
8 August 2012 and the one in January 2014 (the trial)) and will not install the codes.  
9  
10 There is absolutely no reason why Cashman should hold these codes hostage, and  
11 the Mojave Parties respectfully request that this Court mandate the turnover of the  
12 codes.  
13

14 **F. The District Court Erred in Denying Recovery to Mojave on its Motion**  
15 **for Attorneys' Fees and Costs Pursuant to NRCP Chapter 108 for**  
16 **Having to Defend Cashman's Excessive Lien Claim.**<sup>155</sup>

17 Subsequent to the trial in the district court on January 21-24, 2014, the  
18 district court entered into FFCL and noted that the district court "will address any  
19 issues of attorneys' fees, costs, and prejudgment interest through post decision  
20  
21

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22 <sup>154</sup> See Findings of Fact and Conclusions of Law based upon Counterclaimants  
23 Motion to Procure Codes, Volume 2, page 415; *see also* Testimony of Keith  
24 Lozeau at trial, Volume 27, pages 6632-6633 (noting the generators on the Project  
25 do not work as designed because the codes have not been installed); *see also*  
26 Testimony of Chris Meiers at trial, Volume 28, pages 6881-6882 (noting that the  
system does not work efficiency or properly without the codes).

27 <sup>155</sup> Since Cashman appealed the Decision and Order regarding attorneys' fees, the  
28 Mojave Parties assert their attorneys' fees and costs have been appealed as well,  
given that the district court denied all parties' attorneys' fees and costs hereto.

1 motions that may be filed with the” district court.<sup>156</sup> Thereafter, both the Mojave  
2 Parties and Cashman filed their respective attorneys’ fees and costs motion, which  
3 the district court denied both requests in its Decision and Order filed on August 4,  
4 2014.<sup>157</sup> The district court erred in denying Mojave’s request for attorneys’ fees  
5 and costs pursuant to NRS Chapter 108.  
6

7  
8 **1. The District Court Should Have Awarded Mojave its**  
9 **Attorneys’ Fees in the Amount of \$316,844.50.**

10 “Attorney fees are . . . available when authorized by rule, statute, or  
11 contract.”<sup>158</sup> Further, this Court has articulated four factors district courts should  
12 consider in determining whether attorneys’ fees are reasonable including: (1) the  
13 qualities of the advocate (ability, training, experience, professional standing, and  
14 skill); (2) the character of the work to be done (difficulty, intricacy, importance,  
15 time and skill required); (3) the work performed by the lawyer (skill, time, and  
16 attention given to the work); and (4) the result (success and benefits derived).<sup>159</sup>  
17

18  
19 NRS 108.2275(6) provides that “[i]f, after a hearing on the matter, the court  
20 determines that: (a) The notice of lien is frivolous and was made without  
21 reasonable cause, the court shall make an order releasing the lien and awarding  
22

23  
24 <sup>156</sup> See FFCL, Volume 31, page 7729.

25 <sup>157</sup> See Decision and Order, Volume 32, pages 7777-7781.

26 <sup>158</sup> *Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998);  
27 see also NEV. REV. STAT. §18.010.

28 <sup>159</sup> See *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829, 192  
P.3d 730, 736 (2008) (citations omitted); see also *Bruznell v. Golden Gate Nat’l  
Bank*, 85 Nev. 345, 349-50, 455 P.2d 31, 33 (1969).

1 costs and reasonable attorney's fees to the applicant for bringing the motion . . .

2  
3 (b) The amount of the notice of lien is excessive, the court may make an order  
4 reducing the notice of lien to an amount deemed appropriate by the court and  
5 awarding costs and reasonable attorney's fees to the applicant for bringing the  
6 motion." Further, NRS 108.237(3) states in its entirety "[i]f the lien claim is not  
7 upheld, the court may award costs and reasonable attorney's fees to the owner or  
8 other person defending against the lien claim if the court finds that the notice of  
9 lien was pursued by the lien claimant without a reasonable basis in law or fact."  
10  
11

12 After trial, Mojave moved for its attorneys' fees pursuant to NRS 18.010,  
13 NRS 108.2275(6), and NRS 108.237(3) in the amount of \$316,844.50.<sup>160</sup> The  
14 district court should have granted said request because of three main reasons.  
15 First, pursuant to NRS 108.2275(6), Mojave was entitled to its attorneys' fees  
16 because prior to the district court ruling at trial, the Lien was excessive on its face  
17 and after being caught, Cashman amended its Lien during trial.<sup>161</sup> Thereafter, the  
18 district court ultimately decided that the Lien was not enforceable and dismissed  
19 this claim for relief.<sup>162</sup> Thus, there was a hearing (i.e. a trial), the Lien was  
20 excessive based on Cashman's own admissions, and ultimately, the Lien claim was  
21  
22  
23  
24

25 <sup>160</sup> See Mojave's Motion for Relief Pursuant to NRCP 60(b) and Motion for  
26 Attorneys' Fees and Costs Pursuant to NRS Chapter 108, Volume 29, pages 7099-  
27 7112.

28 <sup>161</sup> See Amended Lien, RSA, Volume 33, pages 7856-7857; *see also* FFCL,  
Volume 31, page 7719, ¶44.

<sup>162</sup> See FFCL, Volume 31, pages 7721-7722, and 7728.

1 dismissed outright. Pursuant to the plan language of NRS 108.2275(6), Mojave  
2 should have been awarded its attorneys' fees as the prevailing party on a lien  
3 claim. Cashman must be forced to live with the consequences of recording and  
4 prosecuting an invalid lien made under NRS Chapter 108.  
5

6  
7 Second, pursuant to NRS 108.237(3), Mojave was entitled to its attorneys'  
8 fees, because at the conclusion of trial, the Lien claim was dismissed outright.<sup>163</sup>  
9 Additionally, the Lien was "pursued by the lien claimant without a reasonable  
10 basis in law or fact"<sup>164</sup> since Cashman knew its Lien was excessive throughout all  
11 relevant times and only amended its Lien during the trial since it had been caught  
12 with double-dipping on damages.<sup>165</sup> Thus, pursuant to the plain language of this  
13 statute, Mojave was entitled to its attorneys' fees.  
14  
15

16 Third, as clearly depicted, analyzed, and explained in Mojave's Motion for  
17 Attorneys' Fees and Costs Pursuant to NRS Chapter 108, under the  
18 *Barney/Bruznell* factors, the attorneys' fees requested were reasonable, necessary,  
19 and actually incurred in prosecution of this action.<sup>166</sup> There was extensive motion  
20 practice and discovery conducted in the action and after trial, not only did the  
21  
22  
23

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24 <sup>163</sup> See *id.*

25 <sup>164</sup> NEV. REV. STAT. §108.237(3).

26 <sup>165</sup> See Amended Lien, RSA, Volume 33, pages 7856-7857; see also FFCL,  
27 Volume 31, page 7719, ¶44.

28 <sup>166</sup> See Mojave's Motion for Relief Pursuant to NRCP 60(b) and Motion for  
Attorneys' Fees and Costs Pursuant to NRS Chapter 108, Volume 29, pages 7107-  
7111.

1 Mojave Parties successfully defend almost all of the claims for relief asserted by  
2 Cashman, but Cashman was awarded less than a quarter of the amount it was  
3 seeking.<sup>167</sup> The district court should have granted Mojave's requests for attorneys'  
4 fees in the amount of \$316,844.50, as these fees were reasonable, necessary, and  
5 actually incurred hereto.  
6

7  
8 When a party records a mechanic's lien in Nevada, and then prosecutes this  
9 lien, that party submits itself to the risks and benefits of NRS Chapter 108. If that  
10 lien is ultimately reduced or expunged, then the party has to live with the  
11 consequences. Here, there is no dispute that Cashman pursued an excessive lien  
12 and also that the district court ultimately expunged the Lien after trial. Cashman  
13 must now live with the consequences of pursuing an overvalued and ultimately  
14 invalid mechanic's lien claim. Mojave should have been awarded its fees and  
15 costs for defending that claim at trial.  
16  
17  
18

19 **2. The District Court Should Have Awarded Mojave its Costs**  
20 **in the Amount of \$19,129.55.**

21 As noted in the previous section, NRS 108.2275(6) provides that if, after a  
22 hearing, the court determines that a lien is excessive, the court may award costs to  
23 the other party. Further, and as noted above, NRS 108.237(3) provides that if a  
24 lien claim is not upheld, the court may award costs to the party defending the claim  
25 as well. Finally, NRS 18.020 allows costs to a party if that party prevails and  
26  
27

28 <sup>167</sup> See Judgment, Volume 32, pages 7789-7791.

1 where a plaintiff sought to recovery more than \$2,500.00.

2  
3 Here, Mojave should have been awarded costs pursuant to NRS  
4 108.2275(6), 108.237(3), and 18.020 because the Lien was excessive (as evident  
5 by Cashman amending the Lien at trial),<sup>168</sup> Mojave prevailed at trial on this Lien  
6 claim (i.e. the Lien claim was dismissed),<sup>169</sup> and Cashman sought to recovery more  
7 than \$2,500.00 at trial. Pursuant to the plain language of these statutes, the district  
8 court should have awarded Mojave its costs for \$19,129.55.  
9  
10

11 **G. The District Court Properly Ruled that Cashman was not Entitled to its**  
12 **Attorneys' Fees and Costs.**

13 As noted previously, subsequent to the trial in the district court on January  
14 21-24, 2014, the district court entered into FFCL and noted that the district court  
15 will address requests for attorneys' fees and costs through post-trial motions.<sup>170</sup>  
16 Thereafter, both the Mojave Parties and Cashman filed their respective attorneys'  
17 fees and costs motion, which the district court denied both requests on August 4,  
18 2014.<sup>171</sup>  
19  
20

21 The district court properly ruled that Cashman was not entitled it its  
22 attorneys' fees and costs. First, Cashman's entire argument regarding why it is  
23 entitled to attorneys' fees and costs revolves around the notion that it was the  
24

25 <sup>168</sup> See Amended Lien, RSA, Volume 33, pages 7856-7857; *see also* FFCL,  
26 Volume 31, page 7719, ¶44.

27 <sup>169</sup> See FFCL, Volume 31, pages 7721-7722, and 7728.

28 <sup>170</sup> See *id.*, page 7729.

<sup>171</sup> See Decision and Order, Volume 32, pages 7777-7781.

1 prevailing party.<sup>172</sup> Unlike Cashman asserts in its Opening Brief, Cashman was  
2 not the prevailing party at trial, and is therefore not entitled to any of its attorneys'  
3 fees and costs. At trial, Cashman sought well over \$750,000.00 in damages but  
4 was awarded approximately a quarter of that amount, and the unjust enrichment  
5 damages were specifically tied to Cashman's performance with respect to the  
6 codes, performance which has not occurred even to date.<sup>173</sup> The Mojave Parties  
7 were forced to spend three (3) years defending against claims that were almost all  
8 dismissed and damages were ultimately cut to a fraction of what Cashman sought  
9 at trial.<sup>174</sup> There is no conceivable argument that can be advanced that Cashman  
10 prevailed in this case against the Mojave Parties. Additionally, Cashman cannot  
11 cite to one Nevada case which stands for the proposition that if it receives a quarter  
12 of what it was seeking, it was the prevailing party. The district court even agreed  
13 that Cashman was not the prevailing party, as it stated in its post-trial Decision and  
14 Order regarding attorneys' fees and costs that "[t]his Court concludes that based on  
15 the outcome of the trial, **there is no obvious prevailing party.**"<sup>175</sup>

16  
17  
18  
19  
20  
21  
22 Second, Cashman argues that pursuant to the plain language of NRS  
23 104.9607, since it is the prevailing party, it is entitled to attorneys' fees.<sup>176</sup> When a  
24

25 <sup>172</sup> See Opening Brief, pages 49-56.

26 <sup>173</sup> See Judgment, Volume 32, pages 7789-7791.

27 <sup>174</sup> See *id.*

28 <sup>175</sup> See Decision and Order, Volume 32, page 7780 (emphasis added).

<sup>176</sup> See Opening Brief, pages 49-56.

1 statute's language is plain and unambiguous, the court will interpret it according to  
2 its ordinary meaning.<sup>177</sup> In relevant part, NRS 104.9607 entitled "Collection and  
3 enforcement by secured party" provides at subsections 3 and 4:  
4

5 3. A secured party shall proceed in a commercially reasonable  
6 manner if the secured party:

- 7 (a) Undertakes to collect from or enforce an obligation of an  
8 account debtor or other person obligated on collateral; and  
9 (b) Is entitled to charge back uncollected collateral or otherwise to  
10 full or limited recourse against the debtor or a secondary obligor.

11 4. A secured party may deduct from the collections made  
12 pursuant to subsection 3 reasonable expenses of collection and  
13 enforcement, including reasonable attorney's fees and legal  
14 expenses incurred by the secured party.<sup>178</sup>

15 This statute is permissive in nature, as the court "may" award attorneys' fees and  
16 expenses.<sup>179</sup>

17 Pursuant to NRS 104.9607, Cashman may be entitled to "reasonable  
18 expenses of collection and enforcement, including reasonable attorney's fees and  
19 legal expenses incurred by the secured party" against CAM, as CAM was the  
20 entity who entered into the contract with Cashman.<sup>180</sup> CAM would potentially be  
21 the account debtor or other person obligated on collateral pursuant to this statute.<sup>181</sup>

22 The district court could, but did not have to, award attorneys' fees against CAM.  
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24 <sup>177</sup> See *McGrath v. State Dept. of Public Safety*, 123 Nev. 120, 123, 159 P.3d 239,  
25 241 (2007).

26 <sup>178</sup> NEV. REV. STAT. §104.9607(3) and (4) (emphasis added).

27 <sup>179</sup> See *id.*

28 <sup>180</sup> *Id.*; see also FFCL, Volume 31, page 7715, ¶1.

<sup>181</sup> See FFCL, Volume 31, page 7715, ¶1.

1 Mojave however never entered into any agreement with Cashman. Pursuant  
2 to the plain language of NRS 104.9607, Mojave was never Cashman's "account  
3 debtor" or "other person obligated on collateral" or "debtor" or "secondary  
4 obligor". This statute is inapplicable to Mojave, and Cashman cannot assert a  
5 claim for attorneys' fees under this statute against Mojave. Typically, a claim for  
6 fees and costs under NRS Chapter 104 comes pursuant to a security agreement, but  
7 no such agreement existed between Cashman and Mojave (or even Western for  
8 that matter).

12 Even if a claim for fees pursuant to NRS 104.9607 could be brought against  
13 Mojave here, which Mojave submits would violate Nevada law, in the district  
14 court, Cashman failed to identify which attorneys' fees related to Cashman's claim  
15 for foreclosure of security interest against Mojave.<sup>182</sup> In essence, Cashman  
16 grouped all of its attorneys' fees together and failed to apportion each one  
17 properly.<sup>183</sup> Given this lack of specificity, the district court properly concluded  
18 that Cashman was not entitled to any attorneys' fees and costs.<sup>184</sup> Furthermore, the  
19 UCC claim (i.e. Cashman's claim for foreclosure of security interest) was a very  
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24 <sup>182</sup> See Opposition to Motion for Relief Pursuant to NRCP 60(b) and Motion for  
25 Attorneys' Fees and Costs Pursuant to NRS Ch. 108, Volume 30-31, pages 7360-  
26 7693; see also Reply to Cashman's Opposition to Motion for Relief Pursuant to  
27 NRCP 60(b) and Motion for Attorneys' Fees and Costs Pursuant to NRS Ch. 108,  
28 Volume, 31, pages 7694-7707.

<sup>183</sup> See *id.*

<sup>184</sup> See Decision and Order, Volume 32, pages 7779-7780.

1 minor point of the extensive motion practice in the case or at trial. Cashman  
2 cannot lump all of its attorneys' fees and costs together in this matter, and try to  
3 claim that all of these fees and costs relates to the UCC claim and in turn, the  
4 statute Cashman is claiming to recovery its attorneys' fees and costs (i.e. NRS  
5 104.9607). Thus, the amount claimed by Cashman for its attorneys' fees could not  
6 be reasonable under the *Barney/Bruznell* factors.<sup>185</sup>  
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8  
9 The only causes of action that Cashman prevailed at trial were for  
10 Foreclosure of Security Interest against Mojave and Unjust Enrichment against the  
11 Owners as long Cashman actually puts the codes in.<sup>186</sup> Neither of these claims  
12 provides any basis for recovery of attorneys' fees. There is no statute in NRS  
13 Chapter 104, including, but not limited to, NRS 104.9607, which provides for an  
14 award of fees and costs to a prevailing party on a UCC claim. Further, there is no  
15 basis for an award of fees for the claim of unjust enrichment, and Cashman really  
16 only recovers under that claim if/when it provides the codes. As such, the district  
17 court properly denied Cashman's request for attorneys' fees under NRS 104.9607,  
18 a permissive stature for awarding attorneys' fees.<sup>187</sup>  
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23 Third, Cashman argues that since it is the prevailing party, pursuant to NRS  
24 18.020, it is entitled to costs. As noted above, since Cashman is not the prevailing  
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26 <sup>185</sup> See *Barney*, 124 Nev. at 829, 192 P.3d at 736); see also *Bruznell*, 85 Nev. at  
27 349-50, 455 P.2d at 33.

28 <sup>186</sup> See FFCL, Volume 31, page 7728.

<sup>187</sup> See Decision and Order, Volume 32, pages 7779-7780.

1 party, it cannot be entitled to any costs pursuant to NRS 18.020. Cashman only  
2 prevailed on two of its claims, only was awarded damages of a quarter of what it  
3 was seeking, and even the district court agreed that Cashman was not the  
4 prevailing party, by stating “[t]his Court concludes that based on the outcome of  
5 the trial, **there is no obvious prevailing party.**”<sup>188</sup>  
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8 As such, the district court properly ruled that Cashman was not entitled to its  
9 attorneys’ fees and costs hereto.  
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28 <sup>188</sup> See *id.*, page 7780 (emphasis added).

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## VII. CONCLUSION

The Mojave Parties respectfully request this Court to: (1) dismiss with prejudice all of Cashman's claims that were tried in the district court, given that Mojave tendered payment in full to the party it was contractually obligated to, and solely because of Cashman's poor decisions, Cashman did not get paid, not through any fault of the Mojave Parties; (2) award the Mojave Parties their attorneys' fees of approximately \$316,844.50 and costs in the amount of \$19,129.55 or remand this matter for a determination of the attorneys' fees and costs to be awarded to them; and (3) deny Cashman's request for attorneys' fees and costs. Alternatively, this Court should affirm the Judgment in the district court.

DATED this 19<sup>th</sup> day of August, 2015.

**HOLLEY, DRIGGS, WALCH, FINE,  
WRAY, PUZEY & THOMPSON**

/s/ BRIAN W. BOSCHEE

Brian W. Boschee, Esq. (NBN 7612)  
William N. Miller, Esq. (NBN 11658)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
*Attorneys for Respondents*

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Answering Brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I fully certify this Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the Answering Brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relied on is so found. This Answering Brief complies with the formatting requirements of NRAP 32(a)(4)-(7), the font type is Times New Roman, 14 point font, and contains 13,997 words, excluding the parts of the Answering Brief exempted by NRAP 32(a)(7)(c). I understand that I may be subject to sanctions in the event that the accompanying Answering Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 19<sup>th</sup> day of August, 2015.

**HOLLEY, DRIGGS, WALCH, FINE,  
WRAY, PUZEY & THOMPSON**

/s/ BRIAN W. BOSCHEE

Brian W. Boschee, Esq. (NBN 7612)  
William N. Miller, Esq. (NBN 11658)  
400 South Fourth Street, Third Floor  
Las Vegas, Nevada 89101  
*Attorneys for Respondents*

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**CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson, and that on the 19<sup>th</sup> day of August, 2015, I caused to be served a true and correct copy of this **RESPONDENTS WEST EDNA, LTD., DBA MOJAVE ELECTRIC, WESTERN SURETY COMPANY, THE WHITING TURNER CONTRACTING COMPANY, QH LAS VEGAS, LLC, PQ LAS VEGAS, LLC, LWTIC SUCCESSOR LLC, AND FC/LW VEGAS'S ANSWERING BRIEF** in the following manner:

☒ (ELECTRONIC SERVICE) The above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.

☒ (UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to:

Jennifer R. Lloyd, Esq.  
Marisa L. Maskas, Esq.  
HOWARD & HOWARD  
3800 Howard Hughes Parkway, Suite 1000  
Las Vegas, Nevada 89169  
*Attorneys for Appellant Cashman Equipment Company*

  
An employee of Holley, Driggs, Walch,  
Fine, Wray, Puzey & Thompson