EXHIBIT "M"

FILED
Electronically
2015-03-20 10:18:28 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 4870318 : mcholico

Code: 3785
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN ILIESCU, JR., et al., Applicants,

vs.

MARK B. STEPPAN, Respondent.

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR. et al.,

Defendants.

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

REPLY POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT AND RELATED ORDERS

Plaintiff's Opposition to Defendants' March 10, 2015 Motion for this Court to alter or amend its Judgment and related Orders (the "Instant Motion") does not directly respond to almost any of the arguments raised therein, but indicates that the "same substantive arguments" have previously been raised in Defendants' prior motion for NRCP 60(b) relief, such that Plaintiff Steppan "incorporates all prior written and oral arguments submitted in opposition" to that prior motion. However, Plaintiff Steppan never did fully respond to many of the arguments set forth in the Defendant's earlier 60(b) Motion, and, therefore, much of the Instant Motion is now essentially unchallenged.

Steppan Never "Retained" FFA, but Remained FFA's Employee. For example, Steppan has still never provided any evidence demonstrating the existence of any subcontract pursuant to which Steppan hired or retained FFA, for purposes of demonstrating that FFA's work was performed

"through" Steppan and could be liened for in his name. A lien claimant in Nevada may only lien for services provided "by" the claimant, "or" for services provided "through" the lien claimant, but not for work performed by another party, such as a foreign architectural firm working directly for a customer, not as a subprovider to the lien claimant. NRS 108.222(1)(a) and (b); *Nevada National Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 560, 562-64 (1992) (partially abrogated on other grounds by *Executive Mgmt. Ltd. v. Ticor Title Ins.*, 118 Nev. 46, 38 P.3d 872 (2002)).

Steppan never provided any evidence supporting the claim that he hired FFA. Despite the statute of frauds, there exists no written agreement in which Steppan hired FFA as a subprovider for this 32 month project. FFA is instead listed in the AIA Agreement as a party thereto, with a direct relationship with the customer; and Steppan is now liening for amounts owed to FFA, as shown by invoices sent from and on FFA letterhead, directly to that customer. Nor was there any trial testimony that Steppan orally hired FFA, and there are no invoices from FFA to Steppan, or payments from Steppan to FFA, to show that either party ever even pretended that Steppan retained FFA.

Trial Transcript Quotations. Furthermore, the Instant Motion includes references to certain trial transcript quotations which were previously discussed during oral argument of the NRCP 60(b) motion and which Steppan's counsel indicated he would not be able to respond to at that time. (*See*, Transcript of Oral Argument, Day 2, at p. 108, ll. 15-22.) As these quotations were provided in the Instant Motion, the Plaintiff had the opportunity to now respond to the same, which opportunity has been declined, such that they stand unchallenged. This is understandable, given what those quotations clearly demonstrate: During the trial of this case it was repeatedly acknowledged by Steppan, by Friedman, and by their counsel, that FFA's client was not Steppan, but was the developer and underlying customer; that FFA was a party to the AIA Agreement with that developer, which FFA's principal, Friedman, had authority to (and did) orally modify directly with that customer; that FFA communicated with and billed that customer directly for work the customer asked FFA to do and agreed to pay FFA for doing; and that the lien claim arose out of that direct contractual relationship, and was pursued on behalf of FFA, for moneys owed to FFA by the underlying customer thereunder.

Illegality of any Subcontract. In addition, the Instant Motion raised an argument under the principle enunciated by *Holm v. Bramwell*, 67 P.2d 114 (Cal. Ct. App. 1937), not previously cited in the prior motion, namely, that a prime contractor mechanic's lien claimant cannot lien for work performed illegally by his unlicensed subcontractor. Thus, even if FFA had been retained by Steppan, Steppan had no right to lien for FFA's architectural services, illegally performed for a Nevada project without first being registered. NRS 623.180. To comply with NRS Chapter 623, FFA needed to register in Nevada. *DTJ Design Inc. v. First Republic Bank*, 318 P.3d 709, 709, 130 Nev. Adv. Op. 5 (2014). FFA did not do so. Nor did it even qualify to do so, as a prerequisite thereto, by having 2/3 of its owners, -- i.e., its sole owner, Friedman, licensed in Nevada. *Id.*

FFA needed to so register because it does not fall within either of the two exemptions to NRS Chapter 623 as are set forth in NRS 623.330(1)(a). The services provided by FFA went far beyond mere "consultant" services, and none of the other FFA designers who performed work with respect to the project were the employees of a Nevada registered architect (Steppan having no employees of his own). Thus, even if there were any evidence to suggest that FFA was a Steppan subcontractor, rather than working directly for the Nevada customer on this Nevada project, this would still not allow the work performed by FFA to be considered legal, and therefore lienable by Steppan.

Failure to Provide a Pre-Lien Notice. Nor has Steppan ever responded to the arguments provided to this Court in the prior NRCP 60(b) motion and incorporated by reference into the Instant Motion, listing the numerous failures of the Plaintiff to substantially comply with Nevada's mechanic's lien perfection laws. The only one of those failures to be directly addressed by this Court is Steppan's failure to provide a statutorily required pre-lien notice of right to lien, this Court having ruled that Steppan could be excused from this failure under the "actual knowledge" exception of *Fondren v. K/L Complex Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990). However, as clarified in *Hardy Companies, Inc. v. SNMARK, LLC*, 245 P.3d 1149, 1157 (Nev. 2010), this exception requires that the owner be made "aware **of the identity** of the third party seeking to record and enforce a lien." [Emphasis added.] By contrast, "mere knowledge of construction" without knowing "of both the existence **and the identity**

of" the third parties performing that construction, is insufficient. *Id.* at 1159 [emphasis added]. Otherwise, "the exception would swallow the rule." *Id.*

In the present case, this Court has found that Iliescu had knowledge of architectural services, but was unable to find on the evidence presented that Iliescu knew Steppan's identity, ruling: "Iliescu was aware that . . . instruments of service were being produced. Iliescu may not have known, at all times, Steppan's name; however, there is no doubt in the Court's mind that Iliescu was aware of the work being done by Steppan (a third party) . . . ." Decision at ¶ 14. This description (awareness of work being done, without a clear showing of knowledge as to the identity of the third party performing that work) is precisely what the *Hardy* case indicated was **insufficient** to invoke the actual knowledge exception to the statutory requirement of providing pre-lien notice. Significantly, a pre-lien notice allows a lien claimant to lien solely for any work performed within a time period commencing 31 days prior to the date on which the notice was provided. NRS 108.245(6). Similarly, therefore, if the actual knowledge exception is invoked, then the date of such actual knowledge must be ascertained to determine when the lienable period began, as the value of services provided prior thereto cannot be liened. This Court has upheld the entirety of the Steppan lien without any finding as to when, if ever, Iliescu knew of Steppan's identity as the potential lien claimant.

Also, as argued previously, without rebuttal, the actual knowledge exception only applies, in any event, with respect to actual knowledge of on-site construction, whereas FFA's work was performed off site.

Responsible Control, Even if Shown, Does not Render FFA's Work Lienable. The only issue which *is* directly addressed in the Opposition is a reiteration by Steppan of his claim to have exercised responsible control over the work performed by FFA's other employees. The only evidence supporting Steppan's claims in that regard are the few lines of conclusory testimony now highlighted in the Opposition, which testimony is contradicted by Friedman's contrary testimony and undercut by Steppan's repeated caveats and hedges, elsewhere in his testimony, as to his personal understanding of "responsible control."

More importantly, even if it were to be conceded, arguendo, that Steppan exercised responsible control over FFA's employees' work, this has no dispositive effect on his claim. Nothing in NRS Chapter 623 indicates that "responsible control" is a relevant question (let alone *the* relevant question) for determining whether FFA's work was legal, and nothing in NRS Chapter 108 indicates that this is a relevant question for determining whether the value of FFA's work was lienable in Steppan's name. Rather, as the *DTJ Design* opinion demonstrates, for FFA's work to be legal in Nevada, FFA needed to be owned by 2/3 Nevada licensees, and to be registered here as a Nevada architectural firm. Similarly, as the *Snyder* decision demonstrates, FFA's work is not lienable in Steppan's name, where it was performed by FFA's, not Steppan's, employees, and is based on FFA's, not Steppan's, invoices to the client. Whatever the level of involvement or oversight Steppan claims to have exercised may be, he performed the same internally as an employee of FFA, and on FFA's behalf, not as a party who had hired FFA to work on his behalf, and he has cited no authority to indicate that his alleged internal "responsible control" over his fellow FFA employees allows FFA's work to be lienable.

Based on the foregoing, the Instant Motion should be granted, the Steppan lien should be invalidated, and the Judgment and Orders to the contrary should be set aside.

DATED this 20th day of March, 2015.

By _____

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AFFIRMATION

The undersigned does hereby affirm this 20th day of March, 2015, that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 20th day of December, 2014, service was made by the ECF system to the electronic service list, a true and correct copy of the foregoing **REPLY POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT AND RELATED ORDERS,** and a copy mailed to the following person:

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FILED
Electronically
2015-03-10 02:52:37 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 4854109 : melwood

CODE: 3665

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

And all original prior consolidated case(s).

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

DEFENDANTS' MOTION FOR COURT TO ALTER OR AMEND ITS JUDGMENT AND RELATED PRIOR ORDERS

COMES NOW, John Iliescu, Jr., individually and John and Sonnia Iliescu, as trustees of the John Iliescu Jr. and Sonnia Iliescu 1992 Family Trust Agreement (jointly hereinafter the "Iliescu Defendants" or "Defendants" or "Movants"), as the Defendants in the second of these two consolidated cases, and, pursuant to NRCP 52(b) and NRCP 59(e), hereby move this Court to Alter and Amend its February 26, 2015 Judgment, Decree and Order for Foreclosure of Mechanic's Lien ("Judgment") as well as its May 28, 2014 Findings of Fact, Conclusions of Law, and Decision

("Decision") and its June 9, 2009 and May 9, 2013 Partial Summary Judgment Orders as well as its prior Orders with respect to awards of costs and attorneys' fees (jointly "Orders"). The Judgment and the other related Orders described above uphold a mechanic's lien and allow a foreclosure thereon, which mechanic's lien should instead be invalidated. This Motion is made and based upon the points and authorities in support hereof, filed concurrently herewith, the exhibits thereto, the papers and pleadings on file with this Court and any argument made with respect thereto at any hearing of this matter.

DATED this 10th day of March, 2015.

By _____
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I. STATEMENT OF FACTS

A. The Defendants Agree to Sell Their Land.

Movants/the Iliescu Defendants are the owners of certain vacant real property located in downtown Reno, as described in the Judgment (the "Property"). Movants entered into a Land Purchase Agreement and certain related Addendums to sell the Property to Consolidated Pacific Development, Inc. Trial Exhibits (hereinafter "TE") 68, 69, 70, 71. The purchaser planned to build a multi-use high-rise development (the "Wingfield Towers") at the Property, and subsequently joined and assigned its rights to an entity known as Baty, Schleming Investments, LLC. Decision at ¶¶ 2-8. (The purchaser entity or entities are jointly hereinafter referred to as "BSC" or "Developer").

B. The Developer Hires FFA to Provide Design Services.

While the Property was in escrow, certain principals of the Developer negotiated with Rodney Friedman, the sole owner (**Exhibit "1"** hereto, Deposition Transcript of Steppan at pp. 7-13; Trial Transcript – hereinafter "TT" 266, 346-47) of a California architectural firm known as Fisher Friedman

Associates ("FFA") to design the Wingfield Towers. (TT 212; 229; 417-18; Decision at ¶12). FFA was not registered to perform architectural services in Nevada and Rodney Friedman was not licensed to perform such services in Nevada (Decision at ¶9), such that these negotiations violated NRS 623.182. FFA had one employee who held a Nevada license: Friedman's son-in-law (Exh. "1" at pp. 12-13), Mark Steppan (Decision at ¶9), who had resided in California and worked for FFA his entire career (Defendant's Trial Statement, filed December 4, 2013, at ¶14).

Due to Steppan's Nevada license, and because, to avoid liability, Friedman never signed *any* agreements (TT 267 l. 21 - 268 l. 2), once the negotiations were complete, Friedman had Steppan sign the architectural contract (TT 351 1.20 - 352 1.2) for FFA's planned architectural work. Three types of contracts were ultimately claimed or involved: (i) a November 15, 2005 hourly fee letter agreement (TE 14), intended as a "stop-gap" agreement until a final AIA Agreement could be signed; (ii) an AIA B141-1997 Agreement (TE 6) (hereinafter the "AIA" Agreement), which, once signed, was to become effective October 31, 2005 and thereby supplant the hourly letter agreement (TE 6 at Steppan 4116) but which was actually signed on April 21, 2006 (TE 6 at Steppan 4130) and which called for payments on a percentage basis, tied to the anticipated construction costs of the development; and (iii) certain unsigned "add-on" agreements, for additional work outside the direct scope of the AIA (TE 19, 20, 21, 22). The Iliescu Defendants were not parties to the architectural contracts. (Decision at ¶ 10).

C. <u>FFA Performs Services and Records a Lien</u>.

FFA and its employees, including Steppan, provided design work for BSC's planned Wingfield Towers development. After learning that the Developer was having problems obtaining financing, FFA completed the structural design phase of its work, so as to reach a milestone which would allow it to seek flat fee compensation, based on the percentage of the contract up to that phase. FFA then procured BSC's signature on the AIA Agreement, without thereafter performing any more work thereunder (Exh. "1" at p. 255), and then recorded a mechanic's lien in Steppan's name (TT 336; 343-348). Financing for the project was never obtained, escrow never closed, and no on-site improvements ever commenced. This suit, listing only one cause of action, for foreclosure of the lien, was then filed.

II. ANALYSIS

A. Legal Standards.

A motion to amend under NRCP 52(b), including to challenge "the sufficiency of the evidence supporting the findings" is to be filed within "10 days after service of written notice of entry of judgment." NRCP 59(e) allows a motion to alter or amend a judgment to be made within that same time period. Relief may be granted under NRCP 59 where an aggrieved party's substantial rights have been materially affected (*Edwards Indus. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035-37, 923 P.2d 569 (1996)) or on the basis of plain error or manifest injustice (*Frances v. Plaza Pac. Equities*, 109 Nev. 91, 847 P.2d 722 (1993)), or where the decision is manifestly contrary to the evidence (*Avery v. Gilliam*, 97 Nev. 181, 183, 625 P.2d 1166 (1981)).

In mechanic's lien cases, a "district court's findings must be supported by substantial evidence" meaning evidence "a reasonable mind might accept as adequate to support a conclusion." *Simmons Self Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. Adv. Op 57, 331 P.3d 850, 855-856 (November 24, 2014). A lien claimant has the burden to "plead and prove" the statutorily required elements of his own architectural lien claim "as part of [his] prima facie case seeking compensation for . . . architectural services at trial" --*DTJ Design Inc. v. First Republic Bank*, 318 P.3d 709, 710, 130 Nev. Adv. Op. 5 (February 13, 2014). *See also, Schofield v. Copeland Lumber Yards*, 101 Nev. 83, 84, 692 P.2d 519, 520 (1985)("Compliance with the provisions of the lien statutes is placed at issue by the complaint for foreclosure.")

"A district court may reconsider a previously decided issue if . . . the decision is clearly erroneous," including on the basis of "new clarifying case law." *Masonry and Tile Contractors Assoc. v. Jolley, Urga, Wirth and Woodbury*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Similarly, a court has the authority to change a prior order if it is "persuaded by the rationale of . . . newly cited authority" or if it is "more familiar with the case" or its facts and law. *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 217, 606 P.2d 1095, 1097 (1980).

B. Key Legal Questions.

Although Steppan signed the contract documents and was identified as the purported "Contract Architect" thereon, and the mechanic's lien and this suit were filed in his name, "Steppan's" Mechanic's Lien must fail, as a Nevada mechanic's lien claimant may only lien for the value of services provided "by or through" the lien claimant. NRS 108.222(1)(a) or (b). This means that a Nevada mechanic's lien claimant may lien for (i) his own work, or (ii) that of his employees or (iii) that of his hired subcontractors, but he cannot lien for someone else's work, or for that of someone else's hired employees or hired subcontractors. This is demonstrated by *Nevada National Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 560, 562-64 (1992) (partially abrogated on other grounds by *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002)) which held that it was error for a district court to allow an individual member of a foreign architectural firm to act as the plaintiff foreclosing the architectural firm's mechanic's lien, including because (a) the relevant invoices were submitted on behalf of the foreign firm, not the individual; (b) the architectural drawings were prepared by the foreign entity, not the individual; (c) the persons who prepared those drawings were employees of the foreign architectural firm, *not* of the individual, etc.

To prove up a valid lien at trial, "lien claimant" and Plaintiff Steppan therefore needed to demonstrate by a preponderance of substantial evidence that the lien was for unpaid amounts owed *to Steppan* for *his* services (as alleged in Paragraph 9 of "his" Complaint) "furnished by" him or furnished by *his* employees or *his* subproviders, acting "through" him as their customer or employer. To do so, Steppan needed to prove both that (1) he was the contract architect in more than name and (2) that he retained FFA to work for him as his subcontractor, such that FFA's and its employees' work was performed "through" Steppan. As shown below, Steppan failed on both counts. (3) Furthermore, even if Steppan had demonstrated that he was a proper lien claimant for FFA's work, that work was performed by FFA illegally, as a foreign architectural firm not authorized to perform work in Nevada, in any event, under NRS Chapter 623, and could not properly be the basis of any lien. (4) In addition, Steppan failed to substantially comply with Nevada lien statutes when he attempted to perfect his lien

claim.

Based on these four points, this Court should alter and amend its Decision, Judgment, and the related orders, and should invalidate the Steppan lien.

C. Steppan Was the Contract Architect In Name Only.

(i) Plaintiff's and His Employer's Own Trial Testimony Contradicted any Evidence that Steppan Was the "Contract Architect."

The only evidence supporting a claim that Steppan was the contract architect was: (1) his signature on the architectural contracts negotiated by Friedman; and (2) Steppan's own oral testimony claiming that he had supervised and exercised "responsible control" over FFA's and its employees' work.

However, the trial evidence showed that Steppan's signature on the agreements was directed by Friedman (TT 351 l. 20 - TT 332 l. 2), the person who actually negotiated the same, on behalf of FFA. Steppan's testimony of having supervised the work was pre-rebutted by the testimony of Steppan's boss at FFA, Friedman, who testified twice, that *he* was the person supervising all of the work (TT 258, ll 3-9; TT 269-70), and that Steppan would only have done so if Friedman were ever away from the office. *Id.* This does not appear to have ever occurred, given that Friedman logged three to four times more hours on the project than did Steppan. *See*, Defendant's October 27, 2014 Motion for NRCP 60(b) Relief, at page 22 lines 5-14 and the exhibits attached thereto, incorporated herein by reference.

Steppan's claim to have exercised "responsible control" of the work was also undermined by his explanations, provided twice during his trial testimony, of what "responsible control" meant to him. For example, prior to first indicating that he exercised responsible control, Steppan testified that his personal definition of that phrase "in [his] mind" is "supervision of the project **as it's approaching a time for sealing and signing**" (TT 639 at ll. 21-24)[1] a point in time which was never reached on this project (TT 269, ll. 12-15). Likewise, at TT pages 777 l. 22 through 778 l. 2, Steppan again claimed that the "type of full oversight" required of an architect of record who will one day stamp and sign the

[1]All emphasis and all bracketed language within trial transcript quotations are added, throughout this brief.

design documents, "occurs at the time of building permit submission".

However, the relevant rules governing the architectural profession, including NCARB Rule 5.2 (which has been adopted in Nevada), does not define responsible control as oversight which can wait until, or become more substantive, later in the project, but instead indicates that responsible control requires detailed oversight from the outset, "during . . . preparation" of the work product: "[o]ther review . . . of technical submissions **after they have been prepared** by others **does not constitute the exercise of responsible control** because the reviewer has neither control over nor detailed professional knowledge of the content of such submissions **throughout their preparation**." [Emphasis added.]

Even *if* Steppan *had* played a supervisory role on the project, this does not mean he was the contract architect. Steppan's role (even as described in testimony designed to bolster his claimed level of involvement) was admitted by Steppan to be "on behalf of Fisher-Friedman Associates" as to work "performed by Fisher-Friedman Associates" (TT 785, ll. 7-23), rather than being described as work which Steppan did *on behalf of the client*, with FFA's work then being done on behalf of Steppan as FFA's alleged customer, as should have been the case if Steppan were working for BSC, and FFA was working for him.

(ii) By Contrast, the Evidence that Steppan Was Merely the Nominal Contract Architect Was Overwhelming.

The evidence indicating that Steppan was merely the *nominal* contract architect, but in fact played no such *substantive* role, is, by contrast, overwhelming: As stated above, Steppan merely signed but did not negotiate the contract. Furthermore, the original stop-gap proposal letter and subsequent stop-gap agreement provided a list of 28 categories of employees allegedly employed by the Contract Architect. TE 9; TE 14. Inasmuch as Steppan had no employees of his own, the 28 categories of Contract Architect employees listed were all, in fact, FFA employee categories, such that the actual contract architect whose employees would be doing the work was FFA. Similarly, as the work commenced, invoices were sent to the developer which were initially sent on "Mark A. Steppan" letterhead but which likewise listed several categories of personnel performing the work, all of which

were categories of FFA employees, not of Steppan employees! TE 24. The time billed by Steppan, for example, who was the "Executive Vice President" of FFA (TT 37 l. 1) its second highest ranking official (Exh. "1" at p. 13), is therefore shown on the invoices as that of the "Executive Vice President" whereas Friedman's time is shown, above Steppan's, as that of the "Principal/Officer" billing at a higher rate than Steppan even though the initial invoices' letterhead claims that this is an invoice submitted by some purported entity or proprietorship named Mark A. Steppan. TE 24. Thus, Steppan is not even listed on *Steppan* Letterhead invoices as the "Principal/Officer" of his own purported entity, and he does not even have the highest rates on what are supposedly *his* proprietorship's invoices. Furthermore, the invoices were sent by FFA, and showed FFA's address at the bottom, and an email address for Steppan of "Mark@fisherfriedman.com." *Id.* Steppan indicated at trial that this Steppan letterhead was utilized merely to maintain the "form" that Steppan was the Contract Architect. TT 673 at ll. 2-4. However, all of the payments from the Developer made under the initial invoices and credited on later invoices **were paid directly to FFA**, and not to Steppan (TT 670-71) and Steppan admitted he never expected to be paid directly, as a true contract architect would have been (TT 673), such that the substance of the relationships was always very different from this "form."

Eventually, the invoices started being sent, accurately, on FFA letterhead, which reflected the reality of who was actually performing the work, being paid directly, and expecting payment for the work (latter part of TE 24 and 26; all of TE 25). Indeed, after the AIA Agreement was signed, no further work thereunder was completed. Rather, all that then occurred is that the new, substantially higher, invoices were sent, rebilling on a flat fee percentage-basis, for the same work which had already previously been performed and billed. Exh. "1", at p. 255 11. 14-21. These new invoices were all on FFA letterhead (TE 25), and corresponded to the amount of the final Mechanic's Lien in Steppan's name, for these FFA invoices. TE 3.

From the outset, the contract billing number was an FFA numbering system number and all of the invoices were generated internally at FFA, which also made all decisions as to how time allocations on the invoices should be treated, with the fees on the invoices being based on FFA's employees'

work, and with FFA, not Steppan, maintaining all project files. (Exh. "1" at pp. 18 and 67 and 304; TT 381-382; 668-670; Decision at ¶19). Steppan did not create the design work product and contract drawings, which he indicated were primarily created by Friedman and FFA employee David Tritt (Exh. "1" at pp. 21; 256-57). FFA's employee Nathan Ogle, not Steppan, was listed on the invoices as the Project Manager. TE 24-26. Steppan did not seek out and hire the other subcontractor professionals, which was done by Friedman and FFA. TT 262-63; Exh. "1" at p. 85. Steppan, by contrast, had essentially two roles: to sign the contracts and to someday sign and stamp the final architectural renderings, which day never arrived. TT 780; 785.

Steppan did not set up any independent method for working on the Wingfield Towers project, distinct from his other work for and as an employee of FFA, but handled it "the same way I handle my oversight on other projects" as an in-house employee for FFA (TT 639 at ll. 11-13), even though this was the only time he had ever signed as the named contractor for FFA's work. TT 735 ll. 4-15. Although he apparently claimed to be working as some sort of Nevada independent contractor to BSC, there is no evidence that Steppan obtained a local business license, or became registered with the State's taxation department, or took any of the other necessary steps to fulfill such a Nevada role. Instead, Steppan remained an FFA employee throughout the work performed on the contracts, receiving his regular salary, and he was not anticipating any special bonuses or profit sharing on this job. Exh. "1" at pp. 85-86; Decision at ¶9.

Even though Steppan had signed in order for FFA to benefit from his *Nevada* license, Steppan's name was not even referenced as the architect in submissions to local Nevada entities (which instead listed the architect for the project, and its contact person, as FFA and Nathan Ogle), or on Nevada extension requests (in the name of Rodney Friedman). TE 35 at p. Steppan 2371; TE 36, TE 37; TE 51 at Steppan 7404; TT 183-84; 320-21; 763-764. Steppan admitted that such submissions were accurate, based on his relative lack of involvement compared to Ogle and Friedman. TT 764-769. Nor was Steppan aware of a single e-mail which would show he had any communications with anyone external from FFA (such as Nevada governmental entities or the client Developer) on the

project. TT 757-58. Nor, despite his sole Nevada license, was it even anticipated that Steppan would have been the on-site architect in Nevada during construction. TT 421 ll. 5-20.

Further evidence and legal arguments as to Steppan being only a nominal contract architect, who played no such actual role, are set forth in the Defendant's October 27, 2014 Motion for Relief under NRCP 60(b), at pages 2-25, and 28-39 thereof, and in the Reply filed in support thereof on December 16, 2014 at pages 1-2; and 7-20, all of which analysis, together with the exhibits referenced therein, are hereby incorporated herein by reference.

D. <u>FFA Performed Its Work Directly for the Developer, Under a Direct Contractual Relationship With the Developer, and Was Never "Hired" or "Retained" by Steppan, for Steppan to Lien for FFA's Work (and Indeed, Never Claimed Otherwise at Trial).</u>

(i) The Instant Case Was Pursued on Behalf of FFA and Is Thus Barred By Post-Trial Case Law.

The *DTJ Design Inc. v. First Republic Bank*, 318 P.3d 709, 709, 130 Nev. Adv. Op. 5 (Feb. 13, 2014) decision, issued after trial, summarized its holding at the beginning of the opinion as follows: "regardless of whether a foreign firm employs a registered architect [the applicable provisions of NRS Chapter 623] mandate that the firm be registered in Nevada in order to maintain an action **on the firm's behalf.**" [Emphasis added] Although the present action was brought under the name of Steppan, as the purported lien claimant and plaintiff hereunder, it was repeatedly acknowledged throughout trial that this case was in fact brought on FFA's behalf, as the real party in interest.

See, e.g., TT 237 ll. 7-14 (under questioning by his own counsel Friedman acknowledges that his firm (*i.e.*, FFA) was promised payment by the developer under the AIA); TT 336, ll. 10-15 ([Questioning by Plaintiff's Counsel Michael D. Hoy to Friedman):] "Q: Was **your company** [*i.e.*, FFA] motivated to record the mechanic's lien on November 7, 2006 . . . . ? A: Yes."); TT 343 l. 6 - 348 l. 124 (Friedman acknowledges, under questioning by Defendant's counsel Mr. Pereos as to why "**your company caused the lien to be recorded**" that "**we** were going to file a lien in case" the deal didn't go forward, and further acknowledges that he is financing this litigation, as he has a financial interest therein, having retained the lien claim pursued herein from FFA upon selling that entity). *See, also*, TT 323-325 (Friedman's colloquy with the Court as to Friedman's rights under what he describes

as his AIA Contract).

Similarly, during Steppan's trial testimony, the parties and the Court recognized that this suit was brought in order for FFA, not Steppan, to obtain compensation. *See, e.g.*, TT 656 at ll. 15-21 ("The Court [to Steppan, during testimony regarding the add-on contracts]: So it is something **you would be reimbursed – and by 'you,' of course, I mean Fisher-Friedman and Associates** – reimbursed for separately? The Witness [Steppan]: Yes."); TT 658 ll. 19-24; TT 660 ll 15-16; TT 663-664 (Hoy questions and Steppan responses regarding whether "Fisher-Friedman Associates" did the work in question and billed for the same to the developer); TT 659, at ll. 21-22 and 677 at ll. 10-13 (Court, in admitting unsigned add-on contract exhibits notes without contradiction from Plaintiff or his counsel that "whether or not **Fisher-Friedman Associates** is entitled to compensation" based on these admitted exhibits is the question to be adjudicated). Although this case was not prosecuted in the name of the real party in interest, as it should have been under NRCP 17, no one at trial provided any evidence to explain why Steppan's name on the contract suddenly made FFA's work, which FFA performed directly for the customer, BSC, lienable.

(ii) FFA Was Working Directly For the Customer and Was Never Shown to have been Retained by Steppan or Working for Steppan.

Even if Steppan were, somehow, more than a nominal contract architect, it is clear that FFA performed its work under its own direct relationship with the Developer, BSC and was never "retained by" Steppan as *his* subprovider. Friedman negotiated the terms directly with the Developer, as stated above. Moreover, when the AIA Agreement was finally executed, on April 21, 2006, but with an effective date of October 31, 2005, it listed FFA as a **direct party** to that Agreement. (TE 6 at Steppan4127.) This was consistent with the fact that FFA's employees had been doing the work, and FFA had been getting paid directly for that work, by BSC, from the outset. TT 670-71.

Furthermore, (i) FFA was not mentioned at the location in the AIA contract (§ 1.1.3.5.) where the architect's consultants are to be identified–despite claiming to be acting as a "design consultant"; (ii) the portion of the AIA Contract –the Addendum– which did list FFA, listed FFA as a direct party to the agreement, not a subcontractor to Steppan; (iii) a direct FFA relationship with BSC/Consolidated

is verified by Steppan's testimony that "both" he and FFA were working for the customer, rather than he working for the customer and retaining FFA to work under him (Exh. "1" hereto, at p. 257); (iv) **no written agreement exists** or was even claimed to have been entered into substantiating that Steppan ever retained FFA, either as a design consultant or in any other capacity, even though the AIA Agreement was to be in effect for 32 months (TE 6 at section 1.1.2.6.) such that any subcontract to provide the services thereunder would need to have been in writing under Nevada's statute of frauds (NRS 111.220(i)) and any claimed oral subcontract agreement by which Steppan allegedly hired FFA was otherwise **"void"** under the language of that statute (not that any testimony or evidence concerning the existence of any such oral retention agreement or the terms thereof, was ever offered at trial either).

(v) No evidence was provided at trial that any invoices were ever delivered from FFA to its purported customer, Steppan; (vi) nor were any payments ever claimed to have been made by Steppan to his purported subprovider "design consultant" FFA; (vii) despite the payment liability which would exist if Steppan had ever retained FFA, no demands or suits for payment were ever filed by FFA against Steppan, before or after expiration of the applicable four year statute of limitations for suit on an unwritten obligation. The post-trial assertion that Steppan "hired" FFA is an open farce.

That FFA was never hired by Steppan but was hired by and had a direct contractual relationship with the Developer, BSC, was acknowledged throughout trial. For example, Plaintiff's own counsel Mr. Hoy, in questions to Friedman regarding Friedman and his firm FFA ("you" "your firm") elicited answers from Friedman regarding he and FFA ("I" "we" "us" "our") that: Tony Iamesi (an early member of the Developer group) hired Friedman/FFA to do the project based on their proposal to Iamesi (TT p. 212, ll 21-23, TT 229); the developer client never disputed the invoices sent by Friedman's firm (TT 232-33); the developer assisted FFA in locating mistakes in FFA's invoices (TT 232-33) "the **developer agency** or entity with respect to the Wingfield Towers project in Reno did actually **commit to pay** a fee **to your firm** based on a percentage . . . ? A: Correct." (TT 237 ll. 7-14); the stop-gap hourly fee letter agreement authorized Friedman ("you") to proceed with the work (TT 242, ll 7-22); the developer, BSC, asked Friedman to go study city staff questions and FFA billed BSC

for doing so (TT 250-51); the designs were created by Friedman's firm FFA which also retained its own longstanding subcontractors for assistance (TT 262-263); Friedman's firm was to be paid pursuant to the provisions of the AIA Agreement signed by the developer, which Friedman testified "we" (i.e., his firm, FFA) "signed," demonstrating Friedman's awareness of Steppan's signature being on behalf of FFA; and it was Friedman's expectation that he (the owner of FFA) would be paid on the terms outlined under the AIA Agreement. TT 325, 11 3-14; TT 417; ll 1-21.

That FFA was working directly for the Developer and not for Steppan was also reiterated during testimony elicted from Defendants' trial counsel, Mr. Pereos, and from this Court. *See*, e.g., TT 241, ll. 4-7; TT 247, ll. 14-18; TT 342-344 (in which, under questioning from Pereos, Friedman acknowledges that his firm was paid by the developer, and that he considers the AIA Agreement to be FFA's --"our"-- Agreement); TT 368-69 (the work product belonged to FFA and could not be obtained by the seller of the property without FFA's –"our"– approval); TT 373 ll. 13-15 (Friedman knew from the outset that Friedman's "client, the developer" was not the owner of the property); TT 436 ll. 1-5 (Friedman acknowledges that Friedman and the developer orally modified the AIA Contract [which Friedman could obviously only do if his company FFA was a party thereto]).

Plaintiff's counsel, Mr. Hoy's questions of Mr. Steppan during trial, and Steppan's answers, likewise demonstrated that the Plaintiff understood that FFA was working directly for the Developer and had not been hired by Steppan. Steppan considers FFA "our firm" (TT 634 at l. 20) and bore testimony throughout trial as to what "we" "us" and "our firm" at FFA were doing, rather than using pronouns such as I, me, or my indicating that he was acting in any independent capacity. "The FFA general time" was tracked for billing the client (TT 651 l. 19 et. seq.) The time parameters under the AIA Agreement were "negotiated between Fisher-Friedman and the client" (TT 715 at ll. 21-24). Sam Caniglia (of the Developer), rather than Steppan, was "the main contact person between **Fisher-Friedman and Associates** and **the developer** on the other hand" (TT 784).

Hence, **any ruling by this Court that FFA was working for Steppan, having been retained by Steppan, as opposed to FFA being involved in a direct contractual relationship with the**

Customer, for whom its work was provided and from whom it obtained direct payments, is not only unsupported by *any* trial evidence, but constitutes a finding which Plaintiff never even directly sought or directly alleged to be the case during trial! Steppan cannot, however, lien for work FFA performed directly for the customer.

FFA, not Steppan, was the only potential claimant who could possibly have shown that it was the party "by or through" whom the work was performed. That FFA could not bring such a lien claim in its name due to the prohibitions of NRS 108.222(2), as it was not licensed in Nevada to provide the architectural services being liened for, does not somehow give FFA the right to have an individual firm member's name be used to pursue a lien on FFA's behalf. *See, Nevada Nat'l Bank v. Snyder*, 108 Nev. at 157, 862 P.2d at 562-64. Further evidence that FFA worked directly for the lien claimant, and not for Steppan, and further analysis of the legal implications of that fact, is set forth in the Defendant's October 27, 2014 Motion for Rule 60(b) relief, at pp. 1-8; and 25-39, as well as in pages 1-2, and pp. 7-20 of the Reply brief in support thereof, which are incorporated herein by reference.

E. <u>FFA Performed Its Work Illegally and Steppan Therefore Cannot Lien for the Same.</u>

Even if it were Steppan's subcontractor, FFA was not authorized to perform architectural work in Nevada in any event. NRS 623.180(1)(a) (only Nevada registered architects may practice architecture in Nevada). *DTJ Design Inc. v. First Republic Bank*, 318 P.3d 709, 710-712, 130 Nev. Adv. Op. 5 (2014) (foreign architectural firm which was not registered in Nevada and [like FFA] was not owned by two-thirds Nevada licensees so as to become so registered, could not legally provide architectural services in Nevada). FFA and its employees were clearly providing architectural services and not mere consulting, and FFA's employees were not employed by Steppan, such that the exemptions to this rule, as found at NRS 623.330(1)(a) do not apply. *See*, previously filed Reply in Support of Defendant's Rule 60(b) Motion at pages 16-18, incorporated herein by reference.

Accordingly, *even if* Steppan were the contract architect and *even if* he did hire, retain, and subcontract with FFA, FFA's work was still performed in Nevada illegally and the lien for the same must still be rejected. *See, e.g., Holm v. Bramwell*, 67 P.2d 114 (Cal. Ct. App. 1937) (Prime

Contractor's mechanic's lien claim could not include advances which had been paid by Prime Contractor to an unlicensed subcontractor).

F. Lien Perfection Problems.

This Court should also alter and amend the Orders and Decision and Judgment sought to be reevaluated herein, on the basis of FFA's many failures to substantially comply with the methods required to perfect the so-called "Steppan" lien, as described in the facts and legal analysis set forth in Defendants' prior October 27, 2014 Rule 60(b) Motion, at pages 30-45 thereof, which are incorporated herein by reference.

V. CONCLUSION

For the reasons set forth above, in order to comply with Nevada law, this Court's Decision and Judgment and related pre-trial and post-trial Orders and Partial Summary Judgments must be altered and amended to invalidate, rather than to uphold, the so-called "Steppan" lien, and the Court should instead enter a new judgment in favor of the Defendants, rejecting Plaintiff's lien, and his lien foreclosure lawsuit, in its entirety.

DATED this 10th day of March, 2015.

By _____

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AFFIRMATION

The undersigned does hereby affirm this 10th day of March, 2015, that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 10th day of March, 2015, service was made by the ECF system to the electronic service list, a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR COURT TO ALTER OR AMEND ITS JUDGMENT AND RELATED PRIOR ORDERS,** and a copy mailed to the following person:

Michael D. Hoy, Esq. HOY CHRISSINGER KIMMEL P.C. 50 West Liberty Street, Suite 840 Reno, Nevada 89501 mhoy@nevadalaw.com *Attorney for Mark Steppan*	_____ Certified Mail __X__ Electronic Filing/Service _____ Email _____ Facsimile _____ Hand Delivery _____ Regular Mail

An Employee of Albright, Stoddard, Warnick & Albright

INDEX OF EXHIBITS

1. Deposition Transcripts of Mark B.Steppan

EXHIBIT "K"

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

JOHN ILIESCU, JR., et al., Applicants,

vs.

MARK B. STEPPAN, Respondent.

No. 68346

DOCKETING STATEMENT
CIVIL APPEALS

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

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

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

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

ATTACHMENT TO DOCKETING STATEMENT CIVIL APPEALS **Case No. 68346**

2. Attorney filing this docketing statement (continued as to identification of Clients):

Client(s) John Iliescu, Jr., individually, and John Iliescu, Jr. and Sonnia Santee Iliescu, as Trustees of the John Iliescu and Sonnia Iliescu 1992 Family Trust Agreement (the property owners of certain real property at issue in these mechanic's lien foreclosure proceedings).

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

First Issue on Appeal: Whether the district court erred in excusing the Respondent Lien Claimant's failure to provide the statutorily required NRS 108.245 notice of right to lien to the Appellants, by relying upon the "actual knowledge" exception to NRS 108.245, found in *Fondren v. K.L. Complex Limited Co.*, 106 Nev. 705, 800 P.2d 719 (1990), given that the Respondent lien claimant failed to establish any such knowledge by the substantial evidence required in mechanic's lien foreclosure cases, and also given that, pursuant to *Hardy Company, Inc. v. SMart, LLC*, 245 P.3d 1149 (Nev. 2010), the degree of actual knowledge sufficient to invoke the *Fondren* exception must be more than mere awareness of work being done, but must involve actual knowledge of the *identity* of the potential lien claimant, whereas the District Court's own findings in this case expressly indicate a lack of any clear showing as to when, if ever, the Iliescus knew of Steppan's identity.

Second Issue on Appeal. Whether the *Fondren* "actual knowledge" exception to the mandates of NRS 108.245 applies to an *architect* who fails to give the statutorily mandated notice, in conjunction with providing and subsequently liening *solely for offsite design services*, where no work of construction is commenced "upon" the property of which the owner could become aware.

Third Issue on Appeal. Whether the district court erred in upholding the lien despite the failure of the lien claimant to provide prior notice of intent to lien, 15 days before filing the same, as required by NRS 108.226(6), and by ignoring and excusing numerous other failures by the Lien Claimant, Respondent Steppan, to substantially comply with Nevada's Mechanic's Lien statutes.

Fourth Issue on Appeal. Whether a foreign architectural firm, not registered with Nevada's Architectural licensing board, and not owned by 2/3 Nevada licensees so as to be capable of becoming so registered, can evade the requirements of Nevada's architectural licensing statutes and the prohibitions set forth therein (and in *DTJ Design Inc. v. First Republic Bank*, 130 Nev. Adv. Op. 5, 318 P.3d 709 (2014)) against unregistered foreign architectural firms performing and liening for architectural work in Nevada, by taking the mere expedient of having a Nevada-licensed employee sign the architectural contract in question (and thereafter using that employee's name on the lien and on the lawsuit to foreclose the lien), even though the foreign architectural firm then conducts all interactions directly with the client, receives all payments from the client directly, and interacts directly with Nevada officials.

Fifth Issue on Appeal. Whether Steppan failed to meet his burden, as the lien claimant, to show by substantial evidence that the work for whose alleged value his lien was asserted, was work performed "by or through" him (i.e., by him, or by his employees who he hired, or by his subcontractors and subproviders who he retained), as required pursuant to NRS 108.222(1)(a) and (b), given the overwhelming evidence presented at trial (by Steppan himself and his counsel) that the lien is actually for the alleged value of services provided by Steppan's employer, Fisher Friedman Associates ("FFA" -- a foreign architectural firm not registered to provide licensed architectural services in Nevada and not owned by 2/3 Nevada licensees as required to become so licensed), which FFA services were not provided to Steppan as a subcontractor to Steppan who had been retained by Steppan; but, rather, were provided by FFA directly for the underlying customer (a would be purchaser of the Appellants' real property under an escrow which never closed) pursuant to a direct contractual relationship with that customer, as demonstrated by: (a) the lack of any written contract or billings or payments thereon, between Steppan and FFA to show that Steppan had ever retained FFA to work for Steppan; (b) FFA being listed as a direct party to the subject AIA Contract with the underlying customer, on the Addendum thereto; (c) FFA's owner at the time the work was performed, Rodney Friedman, testifying at trial that his company negotiated the contract, was promised by the underlying customer that FFA would be paid for the services, including change order additions thereto, and that he/FFA had orally modified that contract which he/FFA could only do as a party thereto; (d) the fact that the invoices which correspond to the amounts now being liened for in Steppan's name are FFA invoices, on FFA letterhead, sent by FFA directly to the underlying customer, showing prior payments made directly by that customer to FFA; (e) Rodney Friedman having testified that he was financing the litigation and that when he sold FFA (after the lawsuit was filed but before trial) he, Friedman, not "lien claimant" Steppan, retained the lien rights, from FFA, not from Steppan; and (f) other similar evidence, such that "Steppan's" lien is for FFA's services and the amount of FFA's most recent flat fee invoices thereon, not for Steppan's work and services, and not for FFA services provided as a Steppan-retained provider.

Sixth Issue on Appeal. Whether, pursuant to the reasoning of *Nevada National Bank v. Synder*, 108 Nev. 151, 826 P.2d 560, 562 (1992) (partially abrogated on other grounds by *Executive Management, Ltd. v. Ticor Title Insurance, Co.*, 118 Nev. 46, 38 F.3d 872 (2002)), Steppan should have been prevented from acting as the Plaintiff in a mechanic's lien foreclosure suit under a claim of acting as a sole proprietor Nevada architect, when his lien and suit were actually brought on behalf of an unlicensed foreign architectural firm, which provided its design services directly for the underlying Nevada customer, received payments directly from that customer, and where the lien is for the alleged value of designs and drawings created by the foreign architectural firm's employees (not Steppan's employees), and the amount sought in the Steppan lien is for the amounts remaining owing on unpaid invoices which were sent by the foreign architectural firm, on the foreign architectural firm's letterhead, directly to the customer.

Seventh Issue on Appeal. Whether it was error for the district court to allow the lien claimant to lien for work which was performed illegally by an alleged subprovider purportedly

retained by Steppan, when said subprovider was not licensed or registered with Nevada's Architectural Board to perform the work provided by it, and by its unlicensed employees, in Nevada, acting in a role which is not among the two listed exemptions to licensure recognized by Nevada's architectural licensing statutes.

Eighth Issue on Appeal. Whether the district court erred in establishing a lien claim amount on the basis of a flat fee percentage contract calculated against the cost of construction, where construction never even commenced, and where the flat fee percentage contract was not even in place at the time the work was performed, under a prior hourly fee agreement, the invoices under which were paid.

Ninth Issue on Appeal. Whether the district court erred in refusing to hear expert testimony regarding the date on which the flat fee agreement would become effective pursuant to the standards of the architectural industry.

Tenth Issue on Appeal. Whether the district court erred by including language in its judgment which misapprehends the meaning of NRS 108.239(12) and which suggests that the property owners may be held personally liable for the amount of the lien which is not able to be satisfied from the sale of the property, even though the property owners were not parties to the contract for the architectural services to be provided.

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

This case raises constitutional due process issues under Nevada's mechanic's lien statutes, as it involves the standards of notice to which a property owner is entitled prior to losing property rights to a potential lien claimant. This case also raises questions of first impression and public policy as to the applicability of prior Nevada Supreme Court decisions under the mechanic's lien statutes to the liens of an architect providing solely off-site services, as well as issues of first impression and public policy under Nevada's Architectural licensing statute.

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

(a) Parties:

John Iliescu, Jr., individually and John Iliescu Jr. and Sonnia Santee Iliescu, as Trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust Agreement, as the Applicants in Case No. CV07-0341 and as the Defendants in Case No. CV-07-01021; Mark A. Steppan, the Respondent in Case No. CV07-00341 and the Plaintiff in consolidated Case No. CV-07-01021. Third-Party Defendants in Case No. CV07-010201: Consolidated Pacific Development, Inc., DeCal Oregon Inc., an Oregon corporation, Calvin Baty, Individually, John Schleining Individually, Hale Lane Peek Dennison & Howard, a Nevada Professional corporation; Karen D. Dennison; R. Craig Howard; Jerry M. Snyder.

EXHIBIT "J"

Document Code: 4205

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Attorneys for: Mark B. Steppan

In the Second Judicial District Court of the State of Nevada In and for the County of Washoe

MARK B. STEPPAN, Plaintiff, v. JOHN ILIESCU, JR.; SONNIA SANTEE ILIESCU; JOHN ILIESCU, JR. and SONNIA SANTEE ILIESCU, as trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust, Defendants.	Consolidated Case Nos. CV07-00341 and CV07-01021 Dept. No. 10 Trial: Monday, December 9, 2013 8:30 am
And Related cross-claims and third-party claims.	

Trial Statement

Mark B. Steppan submits his Trial Statement pursuant to WDCR 5.

protest that, while Iliescu was aware that *some* design professionals were involved with the development entitlements for the Property, Iliescu was not aware of the *particular* architects involved. Iliescu has recently developed a new theory that Steppan's right to receive a fee for design work was somehow contingent on actual construction of the improvements designed. Iliescu further argues that the lien claimant can only recover up to the liquidation value of the Property, and cannot obtain a personal judgment against the landowner. These legal issues are discussed below.

2. Statutory mechanics lien procedure

NRS 108.239 sets forth procedures for actions to foreclose mechanics liens. The Court must determine the amount of the lien, then "cause the property to be sold in satisfaction of liens and the costs of sale..." NRS 108.239(10). The statute further prescribes that a judgment creditor may cause the property to be sold in the same manner provided for sales of real property pursuant to writs of execution. *Id.* Exhibit 1 to this Trial Statement is a proposed form of judgment to comply with this statute.

If the proceeds from the sale exceed the amount of the judgment, the surplus is paid to the property owner. NRS 108.239(11). If the proceeds from the sale do not satisfy the amount of the judgment, then the judgment creditor is entitled to personal judgment against the property owner for the deficiency (or "residue") if the property owner has been personally summoned or appeared in the action. NRS 108.239(12). Steppan therefore contends that the Court should order a sale of the Property. If the net sale proceeds are less than the monetary amount of the judgment, Steppan must then apply to the Court for a personal judgment against Iliescu.

Privacy Certification

Undersigned counsel certifies that this trial statement does not contain any social security numbers.

Dated December 4, 2013.

HOY CHRISSINGER KIMMEL

Michael D. Hoy
Attorneys for Mark B. Steppan

Certificate of Service

Pursuant to NRCP 5(b), I certify that I am an employee of Hoy Chrissinger Kimmel, PC and that on December 4, 2013 I electronically filed a true and correct copy of this Motion for Partial Summary Judgment with the Clerk of the Court by using the ECF system, which served the following counsel electronically: Gregory Wilson, Alice Campos Mercado, Thomas Hall, Stephen Mollath, David Grundy. I also hand-delivered a true and correct copy of this Motion for Partial Summary Judgment to:

C. Nicholas Pereos
C. Nicholas Pereos, Ltd.
1610 Meadow Wood Lane
Reno, Nevada 89502

December 4, 2013.

Michael D. Hoy

HOY | CHRISSINGER | KIMMEL

EXHIBIT "I"

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July 24, 2015

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5255 Longley Lane, Ste 105
Reno, Nevada 89521

Reference: Vacant Sites, Court Street & Island Avenue, Reno, Nevada

Dear Mr. Johnson,

This report is an evaluation of theWingfield Towers site situated between Island Avenue and Court Street. The original proposal was being considered around the years 2005 to 2007. At the time the plan included twin towers with 499 condominium units plus 40,500 square feet of office and retail space. The original permits from the City have expired. Experts report new regulations have been adopted to mitigate shading and require additional setbacks that would limit the number of units that could be built if a new permit is requested. The subject vacant parcel involves four contiguous sites on Court Street and Island Avenue with total land area of 59,413 square feet or 1.364 acres. The location is east of Arlington Avenue and west of South Sierra Street. Island Avenue is situated along the south bank of Truckee River. This area is part of the downtown business core for the City of Reno. Surrounding properties include the Court House and related Municipal buildings on Virginia Street and Sierra Street. The theatre complex and related commercial buildings are on the north side of the River. The subject is four sites which extend from the upper level of Court Street and run downhill to Island Avenue. The sites are 260 feet wide at the larger east side and 140 feet wide at the west boundary. There is 300 feet of street frontage facing Court Street and 150 feet of frontage on Island Avenue. The lots are vacant and undeveloped.

JOSEPH S. CAMPBELL, MAI REAL ESTATE APPRAISER (775) 786-7660

FORMAT

This report is the result of a request for consultation regarding the current potential for development. The evaluation has been prepared in accordance with the Uniform Standards of Professional Appraisal Practice and meets the requirements of USPAP under standard rules #4 and #5. The report has been prepared in conformance with the Code of Ethics and Standards of the Professional Practice of the Appraisal Institute. Additional supporting documentation, reasoning and analyses are contained in the appraiser's files.

SCOPE OF THE ASSIGNMENT

The report looks at the developer's original plan and compares it to general trends of the surrounding properties. All information contained in the report, which is known to the appraiser by inspection of the subject, and confirmation information is considered primary information. Other data in the report may be considered primary that was originally collected by the appraiser. Secondary information is from published or unpublished written sources, in some case either primary or secondary sources such as property listings, publication and newspaper articles, research articles, or other services. Analytical conclusions are those of only the appraiser signing the report. Appraiser liability is limited to the client only, not to third party users.

Owner of Record:

Iliescu Family Trust, John Jr. & Sonnia

Land Area:	APN 011-112-03	5,575	Sq. Ft		
	APN 011-112-06	10,500	Sq. Ft		
	APN 011-112-07	17,500	Sq. Ft		
	APN 011-112-12	25,838	Sq. Ft		
	Total	59,413	Sq. Ft.	=	1.364 Acres

JOSEPH S. CAMPBELL, MAI REAL ESTATE APPRAISER (775) 786-7650

Zoning: MUDR & Truckee River District

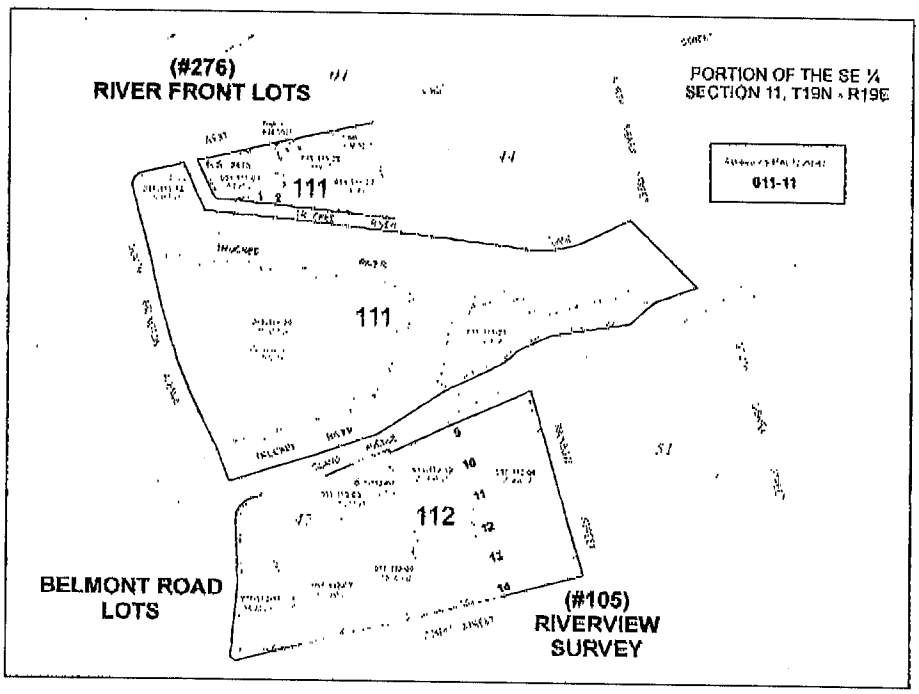
(1) MU Mixed Use District.

a. Purpose. The purpose of this district is to promote high intensity mixed use development in designated regional centers and transit-oriented development ("TOD") corridors. MU zoning is permitted only where there is a regional center or TOD corridor plan adopted as part of the City of Reno Master Plan. Minimum allowable density is between 21 and 30 units per acre. (Sec. 18.08.405 Building Code)

Truckee River District (TRD)

The Truckee River overlay limits development by requiring setbacks and limiting shadowing and shading of public areas, plus other restraints (sec. 18.12.105 Building Code). The "Floor Area Ratio" (FAR) is 1.0.

Location Map



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Evaluation

There are three sales of sites in the Reno area that have been purchased for development with apartment buildings. These sites were vacant at the time of sale. The overall range in price is $7,500 to $16,800 per allowable unit of development (per apartment). The average value is $12,000 per "door". All of the sale locations are secondary sites compared to the subject's downtown central location. The sale sites have been improved with low-rise buildings of three or four stories. The subject can be developed with a high-rise building. The subject is a superior location to the sale properties because of the River and the park, plus the subject is a downtown location.

Apartment Building Site Sales

Location			land	$ Lnd	Units	$ Unt	*Density* Lnd/Unt
Gentry / Wrondel	6/ 08	$750,000	45031	$16.66	65	$11,538	693
Kuenzli / Kirman	11 / 09	$925,000	63728	$14.51	55	$16,818	1,159
6th / Morrill	2 /2013	$330,000	43560	$7.58	44	$7,500	990

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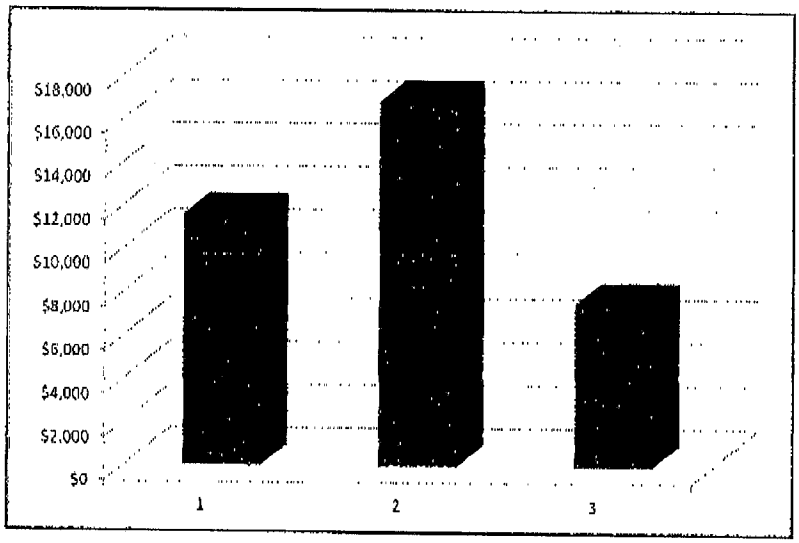
Sale Chart



These secondary apartment sites are developed with a density of 38 to 63 units per acre. The subject downtown location can be developed to a much higher density making the subject land area more valuable. Also, the downtown location, proximity to the River and Wingfield Park, add to the subject land value.

Density of Development

Before the recession, the City was approving much higher densities for proposed new projects. Arlington Towers was completed in 1966 with a density of 360 units per acre. Park Towers Apartments was constructed at about the same time with nearly 400 per acre. New regulations were adopted which lowered densities. The Palladio was completed in 2007 with a density of 111 units per acre, but this project also included commercial space on the ground level.

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Approved Densities

Location	Stories	Units	Land Acres	Unt/Acre	Yr/Blt
Arlington Towers	22	194	.542	360	1966
Palladio	13	92	0.8325	111	2007
Park Towers	17	91	0.23	396	1966

The average per acre density for these three samples is 289 units per acre.

Arlington Towers is 23 floors with commercial space on the first four floors and residential units on floors 5 through 23. There are 194 units total on the near ½ acre site. The density is 360 units per acre. The property was built in 1966. The location is north of the river.

The Palladio is the newest, high-rise condominium development in the downtown core and the only new development that was successfully completed and sold out. Construction was completed in 2007 with 92 units and 13 stories. The site contains .833 acres. The property is on the north bank of the River. Ground floor space is used for commercial purposes.

Park Towers was built in 1966 on a ¼ acre site. The building is 17 stories, although it shows 18 floors, there is no 13th floor. It contains 91 units. The first floor is lobby and a portion of the second floor is also common area. Originally built as apartments, the building was successfully converted to individual condominiums in 2011 and sold.

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City of Reno, Zoning

Prior to the recession zoning guidelines for density and development codes were less restrictive than current requirements. Also, there were no provisions limiting growth and development near the Truckee River. I interviewed the City Planning Department and other experts regarding this location. The City defines the zoning for the subject as complex because of the overlapping districts created by the multiple downtown (MUDRR) use and the Truckee River District (TRD). Each district imposes different requirements on the subject site in the form of minimum and maximum density of units as well as setbacks and the effects of shadowing and shading of public areas. At one time prior to the economic collapse the subject was approved for 499 units. However, since this approval has expired, everyone interviewed acknowledges this density cannot be achieved again. The city will not state the maximum density allowable under current zoning requirements, but instead requires a plan be submitted before it will approve any project. Current zoning requires a minimum of 21 to 30 units per acre depending on the district.

The final approval of density will also consider the lot size. As presently configured, the subject is four individual lots which will be limited in development potential compared to the four subject sites combined into a single site. As a single larger site, the subject would be approved for higher density development than could be achieved as four smaller parcels.

Conclusion

Based upon this research it is reasonable to conclude the City might entertain a plan of development for the subject of about 2/3 of the original proposal of 499 units. It may be possible to achieve a master plan not to exceed 332 units. This is equivalent to a per acre density of 248 units per acre. And, the City will consider commercial development on the lower levels based upon the FAR requirements of 1.0 (one to one land to improvement ratio).

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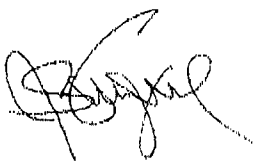
The sales of secondary apartment building sites shows prices of $7,500 to nearly $17,000 per door. The subject is a better location being downtown, close to the river and parks, and central to business activity. As such, the value of the subject would be higher than the prices shown for lower density comparable sales of apartment sites. It is concluded from this, if a plan for development of the subject (four) sites was developed showing 332 residential dwelling units plus commercial use on lower levels, the value of the site would be between $20,000 and $30,000 per allowable "door"; or per allowable dwelling unit. From this, the indicated value range for the whole property is **$6,640,000** to **$9,960,000**. It is assumed professional engineering can design a plan to meet all of the City's requirements for height restrictions, setbacks, shading and shadowing, parking and other considerations.



Joseph S. Campbell, MAI
State Certified General Appraiser
Nev. Lic. # 00019, Exp. 4/17

EXHIBIT "H"

FILED
Electronically
2014-05-28 12:20:10 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4451229

CODE: 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN ILIESCU, ET AL.,

Plaintiff,

vs.

MARK STEPPAN,

Defendants.
_____/

Case No. CV07-00341
Dept. No. 10

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

A four day bench trial was conducted beginning on December 9, 2013, in the above entitled matter. The Plaintiff, MARK B. STEPPAN ("Steppan") was suing to foreclose on a mechanics lien for architectural services provided to, among other parties, the Defendants JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST ("Iliescu"). The trial concluded on December 12, 2013. The parties were permitted to submit post-trial briefs no later than January 3, 2014. Steppan and Iliescu both submitted post-trial briefs. The transcript of the proceedings was available to the Court at the end of February, 2014. The Court has received and reviewed all the exhibits admitted during the trial, the testimony of the witnesses, the stipulations entered into by the parties, and all of the other pleadings, papers, and orders previously entered in these proceedings and makes the following findings of fact, conclusions of law and decision following bench trial pursuant to NRCP 52.

I. FINDINGS OF FACT

1. Iliescu owned four parcels of land in downtown Reno, Washoe County, Nevada, ("the property") as more fully described by the parties in the TRIAL STIPULATION filed on December 6, 2013. Iliescu desired to sell and/or develop the property.
2. Illiescu retained the services of Richard K. Johnson ("Johnson") to act as his broker in the sale and/or development of the property. Johnson has been licensed as a real estate broker for over 25 years. He has been a member of the Nevada Real Estate Commission and is a principle in the Johnson Group, a real estate firm in Washoe County, Nevada.
3. Johnson had worked for Illiescu for over five years. Johnson had sold property for Illiescu prior to the deal that became the subject of the matter *sub judice*. Johnson worked for Illiescu on a commission basis.
4. Johnson was in contact with Sam Caniglia ("Caniglia") regarding the purchase of the property. Caniglia represented Consolidated Pacific Development, Inc. ("CPD"). CPD wanted to purchase the property and develop it by placing mixed-use structures on the land. The property would be both commercial and residential.
5. Johnson received a letter from Caniglia on behalf of CPD proposing a purchase of the property. The letter was marked and admitted as exhibit 66. Johnson had been speaking with Caniglia on behalf of Illiescu prior to the receipt of the letter. The letter describes the numerous "advantages" of dealing with CPD, including financing "tentatively arranged and * * * in place well before the project is approved (by the City of Reno)" and "Architect and Engineers in place ready to start work." The parties agreed on a purchase price of $7,500,000.00 and Illiescu would be entitled to a condominium in the development as well as other inducements. Illiescu and CPD executed numerous

addendums to the land purchase agreement that increased the sales price of the property and provided additional inducements to Illiescu. Illiescu was represented by both Johnson and legal counsel at various times during the negotiations for the sale of the property.

6. The development contemplated by Illiescu, Caniglia, and CPD was known as Wingfield Towers.

7. The sale of the property never came to pass. The property was in escrow on a number of occasions and non-refundable deposits were paid to Illiescu; however, CPD and/or its assigns were never able to secure funding for the purchase of the property or the development contemplated thereon.

8. CPD transferred its interest in the property to Baty Schleming Investments, LLC ("BSC"). Caniglia represented both CPD and BSC during times relevant to these proceedings. Johnson believed that BSC and CPD were all the same people.

9. Steppan is, and at all times relevant to these proceedings was, an architect licensed to practice in the State of Nevada. Steppan was employed at all times relevant to these proceedings by the firm of Fisher Friedman Associates ("FFA"). FFA's offices were in California. Steppan was the only architect at FFA licensed to practice in Nevada. FFA was an internationally recognized architectural firm. FFA had developed many mixed-use, residential and commercial properties. Steppan was the project manager of the Wingfield Towers project. Steppan provided project management and oversaw the staff at FFA in preparing the instruments of service for the Wingfield Towers project.

10. Steppan entered into an AIA Document B141 Agreement ("the contract") with BSC to design Wingfield Towers. The contract had one addendum. Of note, the contract called

for an overall estimated construction cost of $160,000,000.00. The addendum increased the estimated construction cost to $180,000,000.00. The Court finds that the later fee is a conservative estimate given the scope of the project and the testimony of the witnesses during the trial. The contract was signed by Steppan and BSC. Illiescu is not a party to the contract. The responsibilities of the parties in the event of failure to complete the project are clearly set out in § 1.3.8 of the contract.

11. Steppan would be paid based on a schedule established in § 1.5.1 of the contract. Specifically, Steppan would be entitled to 5.75% of the total construction cost including contractors profit and overhead. Steppan would earn his fee at the completion of five separate stages of design and construction. Steppan would earn 20 % of his fee at the completion of the schematic design phase ("SD")(this stage includes the City of Reno entitlement process); 22 % at the completion of the design development phase ("DD"); 40 % at the construction documents phase ("CD"); 1% at the bid/negotiate phase; and 17 % at the construction administration phase ("CA"). The criteria for the SD phase were established § 2.4.2.1. The "cost of the work" as defined in § 1.3.1.1 of the contract is the total cost or, to the extent the project is not completed, the estimated cost to the owner of all the elements of the project designed or specified by the architect. The contract was signed executed on October 31, 2005. There was an Addendum to the contract executed on April 21, 2006. Steppan worked on the Wingfield Towers project prior to the signing of the contract and the signing of the addendum. The parties were concerned about losing the opportunity for certain entitlements on the project; therefore, Steppan worked on an hourly basis pursuant to certain "stop gap" agreements entered into between himself and Caniglia. The SD phase was completed and Wingfield Towers was able to

IT IS ORDERED, that the parties shall contact the Judicial Assistant for Department 10 within 5 days from the date of this ORDER to set a hearing to establish the final amount owed as a result of the mechanic's lien, to include applicable interest.

DATED this 28 day of May, 2014.

DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 28 day of May, 2014, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

C. Nicholas Pereos, Esq.
1610 Meadow Wood Lane, Suite 202
Reno, NV 89502

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 28 day of May, 2014, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

MICHAEL D. HOY, ESQ.

Sheila Mansfield

EXHIBIT "G"

ORIGINAL

FILED
2007 MAY -4 PM 12:51
RONALD A. LONGTIN, JR.
BY _____ DEPUTY

CODE $1425
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Attorneys for MARK STEPPAN

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARK STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR., AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive.

Defendants.

CASE NO.: CV07 01021

DEPT. NO.: 1

COMPLAINT TO FORECLOSE MECHANIC'S LIEN AND FOR DAMAGES

Plaintiff, MARK STEPPAN ("Plaintiff"), by and through his attorney, Gayle A. Kern, Ltd., for his complaint against the defendants, above-named, does allege and aver as follows:

GENERAL ALLEGATIONS

1. Plaintiff is, and at all times herein mentioned was, an individual licensed as an architect under the laws of the State of Nevada.

2. Plaintiff is informed and believes, and based thereon alleges, that Defendants

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5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511
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are, and at all times herein-mentioned, were residents of Washoe County, Nevada.

3. Plaintiff is unaware of the true names and capacities of other defendants designated herein as DOES I-V, inclusive, and therefore sues these defendants under such fictitious names. Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes that each of these defendants designated herein as a DOE may have some liability in the debt at issue in this complaint.

4. Defendants, ROE CORPORATIONS VI-X, were and are corporations doing business in the State of Nevada, and are sued herein, by their fictitious names for the reason that their respective true names are unknown to Plaintiff at this time; that when their true names are ascertained Plaintiff will amend this complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes that each of these defendants designated as a ROE CORPORATION may have some liability in the debt at issue in this complaint.

FIRST CLAIM FOR RELIEF
(FORECLOSURE OF MECHANIC'S LIEN)

5. Plaintiff incorporates by reference each and every allegation contained in paragraphs 1 through 4 of Plaintiff's General Allegations, as if set forth herein.

6. On information and belief, Defendants are the owners or reputed owners of that certain real property situated in the City of Reno, County of Washoe, known as Assessor's Parcel Numbers: 011-112-03; 011-112-07; 011-112-12, and Defendant, John Iliescu, Jr. is the owner of 011-112-06 as his sole and separate property (collectively "the Real Property").

GAYLE A. KERN, LTD.
5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511
TELEPHONE: (775) 324-5930

7. On information and belief, Defendants entered into a Land Purchase Agreement to sell the Real Property, and that such Land Purchase Agreement provided that the purchasers had the right to develop and obtain improvements on the Real Property prior to the close of escrow.

8. On or about April 2006, Plaintiff entered into a contract with the purchaser of the Real Property to provide architectural services.

9. Pursuant to the contract with the purchaser, Plaintiff did supply the services required of him under contract, however, Plaintiff has not been paid in full for the services.

10. There is now due, owing and unpaid as of April 19, 2007, from the Defendants, for which demand has been made, the sum of $1,939,347.51, together with interest until paid.

11. Plaintiff, in order to secure its claim, has perfected a mechanic's lien upon the property described above by complying with the statutory procedure pursuant to NRS § 108.221 through NRS § 108.246 inclusive.

12. Plaintiff recorded its Notice of Lien on November 7, 2006, as Document No. 3460499 in the Office of the County Recorder of Washoe County, Nevada; a 15-day Notice of Intent to Claim Lien was served on March 7, 2007; and Amended Notice and Claim of Lien was recorded on May 3, 2007, as Document No. 3528313.

13. That pursuant to the provisions of NRS Chapter 108, Plaintiff is entitled to recover its costs of recording and perfecting its mechanic's lien, interest upon the unpaid balance at a rate of 24 percent per annum and reasonable attorney's fees and costs.

WHEREFORE, Plaintiff prays for judgment against the Defendants, jointly and

severally, as follows:

As to Plaintiff's First Claim For Relief:

1. Judgment in a sum in excess of $10,000.00, together with interest from April 19, 2007, until paid at the per diem rate of $955.82;

2. Costs of recording and perfecting Notice of Claim of Lien, costs of suit incurred herein, and a reasonable attorney's fee;

3. That the sums set forth above be adjudged a lien upon the land and premises described herein, owned or reputedly owned by defendants and that the Court enter an order that the real property, land and improvements, or such as may be necessary, be sold pursuant to the laws of the State of Nevada, and that the proceeds of the sale be applied to the payment of sums due the Plaintiff;

4. For such other and further relief as the Court may deem just and proper in the premises.

Dated this 4th day of May, 2007.

GAYLE A. KERN, LTD.

GAYLE A. KERN, ESQ.
Attorneys for MARK STEPPAN

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VERIFICATION

STATE OF CALIFORNIA)
: ss.
COUNTY OF _____)

I, MARK STEPPAN, am the Plaintiff in the above-entitled action. I have read the foregoing Complaint and know the contents thereof. The same is true of my own knowledge, except as to those matters which are thereon alleged on information and belief, and as to those matters I believe them to be true.

_____
MARK STEPPAN

Subscribed and sworn to before me

this _____ day of May, 2007.

_____
NOTARY PUBLIC

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, **COMPLAINT TO FORECLOSE MECHANIC'S LIEN AND FOR DAMAGES** filed in case number to be assigned.

■ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

Dated this 4th day of May, 2007.

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EXHIBIT "F"

ORIGINAL

FILED

2007 FEB 14 PM 2:08

RONALD A. LONGTIN, JR.

BY _____ DEPUTY

$3850
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Hale Lane Peek Dennison and Howard
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(775) 327-3000; (775) 786-6179 (fax)
Attorney for Applicant

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN ILIESCU JR., SONNIA SANTEE ILIESCU AND JOHN ILIESCU JR. AND SONNIA ILIESCU AS TRUSTEES OF THE JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST,

Applicants,

vs.

MARK B. STEPPAN,

Respondent.

Case No. CV07 00341

Dept. No. 6

APPLICATION FOR RELEASE OF MECHANIC'S LIEN

Applicants John Iliescu Jr., Sonnia Santee Iliescu and John Iliescu Jr. and Sonnia Iliescu as Trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust ("the Iliescu") hereby file their Application for Release of Mechanic's Lien.

I. INTRODUCTION

This matter arises out of a mechanic's lien which Respondent and lien claimant Mark Steppan ("Steppan") recorded against certain real property owned by the Iliescus and being developed by BSC Financial LLC ("BSC"). BSC apparently contracted with Steppan to provide the design for the development. The parties proceeded pursuant to their contract, but a dispute arose regarding the amounts due to Steppan for the completion of preliminary schematic designs. As a result, Steppan recorded the instant mechanic's lien.

This lien is void and unenforceable because the putative lien claimant recorded the lien without (1) providing notice of right to lien pursuant to NRS 108.245(6) (pre-lien notice) or (2) providing notice of intent to lien under NRS 108.226(6). For these reasons, the mechanic's lien is facially unenforceable and should be released.

II. STATEMENT OF FACTS

This matter arises out of a disagreement for the amounts due under an agreement between BSC and Steppan for architectural design services. BSC is in the process of developing the Property, located in downtown Reno, as a mixed-use development that would include the construction of high-rise condominiums to be known as Wingfield Towers.

On July 29, 2005, the Iliescu entered into a contract with Consolidated Pacific Development, Inc. ("CPD") for the sale of the Property. CPD subsequently transferred its interest in this property to BCS Financial, Inc. ("BCS"). As of this date, this sale has not closed. Declaration of Dr. John Iliescu ("Iliescu Decl.").

BSC is in the process of developing the Property into a residential condominium tower. However, Dr. Iliescu has not been regularly apprised of the status of the development. BSC has not informed him of the status of their development efforts. Although Dr. Iliescu attended certain public meetings at which someone from the BCS design team made a presentation, at no time was he introduced to any architect or engineer. Dr. Iliescu was never informed of the identity of any architect or engineer working on the development project. Iliescu Decl. ¶ 4.

A dispute apparently arose between BSC and the architect, Mark B. Steppan. On November 7, 2006, Steppan recorded a mechanics lien against the Property. Iliescu Decl., **Ex. 1.** Through this lien, Steppan claims to be owed an amount exceeding $1.8 million. *Id.* However, Steppan never served a Notice of Right to lien, as required by NRS 108.245(1). Likewise, Steppan never provided a 15-day notice of intent to lien, as required by 108.226(6). Iliescu Decl., ¶ 6-7.

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Hale Lane Peek Dennison and Howard
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511

III. ARGUMENT

A. Steppan's Failure To Comply With Procedural Requirements Renders The Subject Lien Unenforceable

1. Standard for Removal of Lien Under NRS 108.2275

NRS 108.2275(1) specifically sets forth a procedure through which a property owner or party in interest may apply to the court for an order releasing or expunging a mechanic's lien that is frivolous, excessive, or was made without reasonable cause:

> The debtor of the lien claimant or a party in interest in the premises subject to the lien who believes the notice of lien is frivolous and was made without reasonable cause, or that the amount of the lien is excessive, may apply by motion to the district court for the county where the property or some part thereof is situated for an order directing the lien claimant to appear before the court to show cause why the relief requested should not be granted.

Upon the filing of such an application, the district court is to issue an order setting the date for a hearing on the motion. The petitioner seeking removal of the lien then serves the order, application and other documents on the lien claimant. NRS 108.2275(2).

Accordingly, where a lien claimant is not entitled to record or enforce the subject lien, the court is to release or expunge the lien pursuant to NRS 108.2275. The Nevada Supreme Court has held that where a lien claimant could not establish a statutorily valid lien claim, the district court erred by failing to expunge the lien pursuant to NRS 108.2275. *See Crestline Inv. Group, Inc. v. Lewis*, 119 Nev. 365, 75 P.3d 363 (2003). In *Crestline*, an employee of the property owner placed a lien on the property for unpaid wages. *Id.* The property owner moved to have the lien expunged under NRS 108.2275, but the district court denied this motion and actually increased the amount of the lien. *Id.* On appeal by the owner, the Nevada Supreme Court held that the district court erred in failing to expunge the lien because the lien claimant had not shown that his labor improved the subject property, and therefore, the lien was invalid under NRS 108.223. *Id.*

The Nevada Supreme Court has reasoned that "[t]he mechanics lien is a creature of statute, unknown at common law." *Schofield v. Copeland Lumber Yards, Inc.*, 101 Nev. 83, 84, 692 P.2d 519, 520 (1985). "'Strict compliance with the statutes creating the remedy is therefore required before a party is entitled to any benefits occasioned by its existence.... If one pursues his statutory remedy by

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filing a complaint to perfect a mechanic's lien, he necessarily implies full compliance with the statutory prerequisites giving rise to the cause of action.'" *Id.* quoting *Fisher Bros., Inc. v. Harrah Realty Co.*, 92 Nev. 65, 67, 545 P.2d 203 (1976). Although the Court has held that "where there is substantial compliance with the lien statutes notices, liens and pleadings arising out of those statutes will be liberally construed in order to effect the desired object," the Court also reasoned that it "did not think that a notice of lien may be so liberally construed as to condone the total elimination of a specific requirement of the statute." *Id.* at 85, 692 P.2d at 520. For example, in *Schofield v. Copeland Lumber Yards, Inc.*, the Court concluded that the lien was invalid as a matter of law because the lien claimant did not fully or substantially comply with the requirement to provide a statement of the terms, time given and conditions of the contract. *Id.*

2. Steppan's Lien Should Be Removed Because He Did Not Provide the Required Pre-Lien Notice

Pursuant to Section 108.245(1) of the Nevada Revised Statutes "[e]xcept as otherwise provided in subsection 5, every lien claimant, other than one who performs only labor, who claims the benefit of NRS 108.221 to 108.246, inclusive, shall, at any time after the first delivery of material or performance of work or services under his contract, deliver in person or by certified mail to the owner of the property a notice of right to lien."[1] NRS 108.245(3) provides that "no lien for . . . services performed . . .may be perfected or enforced pursuant to NRS 108.221 to 108.246, unless notice has been given."

Here, it is undisputed that Steppan claims to have a lien on the Property for architectural services. However, Steppan did not provide any Notice of Right to Lien to Dr. Iliescu, the property owner. Accordingly, pursuant to the unambiguous language of NRS 108.245, the lien Steppan recorded is not enforceable.

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[1]NRS 108.245(5) states that "[a] prime contractor or other person who contracts directly with an owner or sells materials directly to an owner is not required to give notice pursuant to this section." Therefore, subsection 5 does not apply in this case because Steppan did not contract directly with the Owners of the Property.

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3. Steppan's Lien Should Be Removed Because He Did Not Provide the Required 15-Day Notice of Intent to Lien

Besides having to satisfy the requirements of providing the owner with notice of right to lien, a lien claimant must also comply with the notice provisions of NRS 108.226. Pursuant to NRS 108.226(6), "[i]f a work of improvement involves the construction, alteration, or repair of multi-family or single-family residences, a lien claimant, except laborers, **must serve a 15-day notice of intent to lien.**" (emphasis added). The statute outlines the required contents of the notice and the manner in which it must be served, and provides that "[a] notice of lien for materials or equipment furnished or for work or services performed, except labor, for a work of improvement involving the construction, alteration, or repair of multi-family or single-family residences **may not be perfected or enforced** pursuant to NRS 108.221 to 108.256, inclusive, **unless the 15-day notice of intent has been given.**" (emphasis added).

In the present case, Steppan's lien is statutorily invalid because there has been absolutely no attempt by Steppan to comply with the statutory notice requirements discussed above. First, Steppan did not deliver to the Iliescus a notice of right to lien at any time after he began performing under the AIA Agreement. Therefore, pursuant to NRS 108.245(6), Steppan has no right to record a lien on the Property for any of the services he has performed thus far under the AIA Agreement. Further, Steppan recorded the lien without delivering a Notice Of Intent to Lien, as required by NRS 108.226(6), to the Iliescus. Accordingly, Steppan has failed to provide both the required notice of right to lien and the required 15-day pre-lien notice. As a result, the mechanic's lien is invalid as a matter of law. Therefore, this Court is authorized to expunge Steppan's mechanic's lien pursuant to NRS 108.2275 because Steppan is not entitled to record or enforce the subject lien.

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IV. CONCLUSION

For the foregoing reasons, the Iliescus respectfully request that this Court grant their Application for Release of Mechanic's Lien.

DATED: February 14, 2007.

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Attorney for Applicant

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EXHIBIT "E"

FILED
Electronically
2015-07-29 04:08:52 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5069048

CODE 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN,

Plaintiff,

vs.

Case No. CV07-00341

Consolidated with CV07-01021

Dept. No. 10

JOHN ILIESCU, JR. and SONNIA ILIESCU, As trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES 1-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

_____/

ORDER

Presently before the Court is a DEFENDANTS' MOTION FOR STAY OF EXECUTION OF "JUDGMENT, DECREE, AND ORDER FOR FORECLOSURE OF MECHANIC'S LIEN" PENDING APPEAL, WITHOUT THE NECESSITY OF ANY BOND ("the Motion") filed by Defendants JOHN ILIESCU JR. and SONNIA ILIESCU, as trustee of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually, (collectively "the Defendants") on June 1, 2015. Plaintiff MARK B. STEPPAN ("the Plaintiff") filed an OPPOSITION TO MOTION FOR STAY OF JUDGMENT PENDING APPEAL WITHOUT SUPERSEDEAS BOND ("the Opposition") on June 8, 2015. The Defendants filed a

DEFENDANTS' REPLY POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR STAY OF EXECUTION OF JUDGMENT WITHOUT THE NECESSITY OF ANY BOND ("the Reply") on June 12, 2015. The Motion was submitted for the Court's consideration on June 15, 2015.

These proceedings arise out of a bench trial conducted December 9-12, 2013. The trial was an action to enforce a mechanic's lien. The Court entered its FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION on June 28, 2014. After extensive post-trial motion practice, the Court entered a JUDGMENT, DECREE, AND ORDER FOR FORECLOSURE OF MECHANIC's LIEN ("the Judgment") on February 26, 2015. The Court entered an ORDER DENYING DEFENDANTS' MOTION FOR COURT TO ALTER OR AMEND ITS JUDGMENT AND RELATED PRIOR ORDERS on May 27, 2015.

The Motion seeks a stay of execution by Plaintiff pursuant to the Judgment without the necessity of any security bond beyond the mechanic's lien currently securing Plaintiff's claim. Pursuant to NRCP 62(d), an appellant may obtain a stay by giving a supersedeas bond. The Supreme Court of the State of Nevada ("the Supreme Court") has recognized the purpose of a security for stay pending appeal "is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo." *Nelson v. Heer,* 121 Nev. 832, 835, 122 P.3d 1252, 1254 (2005), *as modified* (Jan. 25, 2006). "[A] bond should not be the judgment debtor's sole remedy, particularly where other appropriate, reliable alternatives exist." *Id.* A "district court, in its discretion, may provide for a bond in a lesser amount, or may permit security other than a bond when unusual circumstances exist and so warrant." *McCulloch v. Jeakins,* 99 Nev. 122, 123, 659 P.2d 302, 303 (1983). The Supreme Court noted the focus should be what security maintains the status quo and protects a judgment. *Nelson,* 121 Nev. at 835, 122 P.3d at 1254. Based upon such reasoning, the Supreme Court adopted the following test to determine when a full supersedeas bond may be waived or alternate security may be substituted:

> 1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious

financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id.

While the Motion does acknowledge the *Nelson* factors, the Motion alleges this Court "needs to decide whether Plaintiff or Defendants are correct in their assertions regarding Nevada law." The Motion, 7:3-4. The Motion contends the Judgment is not a personal judgment, but only an amount of the Lien which can be satisfied up to the value of the property, thus precluding the application of the *Nelson* factors. The Motion invites the Court to rule upon the potential for personal liability in the event of a deficiency. The Court again finds this issue is not ripe for decision.

The Opposition asserts the Motion fails to present any evidence upon which the Court can evaluate the *Nelson* factors. The Opposition contends the collection process will be complex due to the Defendants routine engagement in delay tactics. The Opposition 4:13-14. The Opposition argues the time to obtain the judgment after appeal may be lengthy if the Defendants succeed on any one theory on their appeal. As to the third, fourth, and fifth factors, the Opposition asserts the Motion fails to present any evidence upon which the Court can evaluate the availability of assets and the Defendants' ability to pay the bond.

The Court finds the Motion has failed to demonstrate unusual circumstances permitting a reduction in, or alternative to, the required bond. The Motion does not provide this Court with evidence to adequately consider the *Nelson* factors.

IT IS HEREBY ORDERED the Motion is DENIED.

DATED this 29 day of July, 2015.

ELLIOTT A. SATTLER
DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 29 day of July, 2015, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

C. Nicholas Pereos, Esq.
1610 Meadow Wood Lane, Suite 202
Reno, NV 89502

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 29 day of July 2015, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Michael D. Hoy, Esq.

G. Mark Albright, Esq.

Sheila Mansfield
Administrative Assistant

EXHIBIT "D"

CODE: $2515

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D. CHRIS ALBRIGHT, ESQ.
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Attorneys for Appellants/Applicants/Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

JOHN ILIESCU, individually, JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT
Applicants,

vs.

MARK B. STEPPAN, Respondent.

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, individually, JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

AND RELATED CLAIMS.

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

NOTICE OF APPEAL BY JOHN ILIESCU, JR., INDIVIDUALLY, and JOHN ILIESCU, JR. AND SONNIA SANTEE ILIESCU, AS TRUSTEES OF THE JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT

NOTICE is hereby given that JOHN ILIESCU, JR., individually, and JOHN ILIESCU AND SONNIA SANTEE ILIESCU as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT, the Applicants in Case No. CV07-00341 and the Defendants in Case No. CV07-01021 consolidated therewith (jointly hereinafter the "Appellants" or the "Iliescus") hereby appeal to the Supreme Court of the State of Nevada from the following orders, judgments and

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rulings entered against them and in favor of Mark B. Steppan, the Respondent in Case No. CV07-00341, and the Plaintiff in Case No. CV07-01021 consolidated therewith (hereinafter "Respondent" or "Steppan") in these proceedings:

(i) the "Judgment, Decree and Order for Foreclosure of Mechanic's Lien" entered by the District Court on February 26, 2015 (Washoe County Clerk Transaction No. 4836215);

(ii) the June 22, 2009 "Order" denying a Motion for Partial Summary Judgment filed by the Iliescus, and granting a Cross-Motion for Partial Summary Judgment filed by Steppan (Transaction 850528);

(iii) the May 9, 2013 "Order Granting Motion for Partial Summary Judgment" in favor of Steppan (Transaction 3715397);

(iv) the August 23, 2013 "Order Granting Motion to Strike or Limit Jury Demand" (Transaction 3946236);

(v) the May 28, 2014 post-trial "Findings of Fact, Conclusions of Law and Decision" (Transaction 4451229);

(vi) the March 13, 2015 "Decision and Order Denying NRCP 60(b) Motion" (Transaction 4860752);

(vii) the May 27, 2015 "Order Denying Defendants' Motion for Court to Alter or Amend Its Judgment and Related Prior Orders" (Transaction 4971032);

(viii) any and all other orders, judgments, decisions, or rulings of the District Court during this litigation which led to or resulted from any of the foregoing orders, rulings, and partial or full summary or final judgments, or which would need to be overturned in order to afford the Iliescus, as Appellants, full and adequate appellate relief herein, such as, without limitation: any oral rulings from the bench regarding the admissibility of evidence during trial (including the Court's ruling excluding and limiting certain expert testimony as described in the Iliescus' Offer of Proof, filed on October 2, 2013); any oral decisions from the bench in response to oral motions (such as motions to dismiss) during trial or during other pre-trial or post-trial appearances, together with any follow-up written orders on such matters; the Amended Order regarding Plaintiff's

Motion for Attorneys' Fees and the Amended Order regarding Plaintiff's Motion for Costs, both entered on December 12, 2014 (Transactions 4734845 and 4734821), as well as the original versions of said Orders amended thereby, and the intervening orders on motions to clarify or reconsider said original versions of the subsequently amended orders.

DATED this 23rd day of June, 2015.

By _____

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Counsel for Appellants

AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

DATED this 23rd day of June, 2015.

By _____
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 23rd day of June 2015, service was made by the ECF system to the electronic service list, a true and correct copy of the foregoing **NOTICE OF APPEAL BY JOHN ILIESCU, JR., INDIVIDUALLY, and JOHN ILIESCU, JR. AND SONNIA SANTEE ILIESCU, AS TRUSTEES OF THE JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT,** and a copy mailed to the following person(s):

Michael D. Hoy, Esq. HOY CHRISSINGER KIMMEL VALLAS, P.C. 50 West Liberty Street, Suite 840 Reno, Nevada 89501 (775) 786-8000 mhoy@nevadalaw.com *Attorney for Plaintiff Mark Steppan*	____ Certified Mail __X__ Electronic Filing/Service ____ Email ____ Facsimile ____ Hand Delivery __X__ Regular Mail
David R. Grundy, Esq. Todd R. Alexander, Esq., LEMONS, GRUNDY & EISENBERG 6005 Plumas Street, Third Floor Reno, Nevada 89519 drg@lge.net / tra@lge.net *Attorneys for Third-Party Defendant Hale Lane*	____ Certified Mail __X__ Electronic Filing/Service ____ Email ____ Facsimile ____ Hand Delivery __X__ Regular Mail

An Employee of Albright, Stoddard, Warnick & Albright

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Attorneys for Movants/Defendants

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

And all original prior consolidated case(s).

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

DEFENDANTS' REPLY POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR STAY OF EXECUTION OF JUDGMENT WITHOUT THE NECESSITY OF ANY BOND

Defendants, in reply to the Plaintiff's June 8, 2015 Opposition (# 4987967), hereby file these Reply Points and Authorities in support of their June 1, 2015 Motion (# 4978182), for an Order staying execution of the Court's "Judgment, Decree, and Order for Foreclosure of Mechanic's Lien" (the "Judgment"), without the necessity of any supersedeas bond.

I. Plaintiff's Requests for Further Delays Should Be Rejected.

Plaintiff first contends that the Defendants have "evaded" enforcement of Nevada's mechanic's lien law for more than eight years. This is false. Enforcement of a mechanic's lien claim is not some automatic right, to be awarded a lien claimant immediately upon recording his lien. To the contrary, such a lien is required by statute to be pursued by Plaintiff timely filing a lien foreclosure lawsuit, to

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avoid the lien's automatic expiration. Defending against such a suit is not an evasion, but the exercise of due process rights.

It is true that this case has proven complex and has been litigated for many years. But Plaintiff cites to no authority suggesting that, if a case has been pending for a long time, the Court must simply ignore motions which are properly brought before it, including motions contemplated by Nevada law to be available at this stage of the proceedings, or should adjudicate those motions on grounds other than the merits. Furthermore, the Plaintiff's contention that the Iliescus are somehow guilty of undue delay undermines the entire premise of the Opposition, which is to ask this court to further delay and defer a ruling on a vitally important issue which Steppan has previously and still now claims is "not ripe" for adjudication. If Plaintiff truly wished to avoid any further delays, he would welcome adjudication now, rather than later, of the instant motion's most central argument regarding potential personal liability for any post-foreclosure sale. That this matter has been litigated for many years is all the more reason to no longer defer or delay an important ruling herein.

II. Nelson v. Heer

Plaintiff next contends that "Iliescu does not analyze [the] factors" relevant to this Court's consideration of Defendants' Motion, under *Nelson v. Heer*, 121 Nev. 832, 836, 122 P.3d 1252, 1254 (2005). In fact, however, the *Heer* factors *were analyzed* throughout the Motion, and, at page 14, a summary of that analysis was provided, as follows: (1) the collection process in this case will not be complex, but simple, as the Property will simply be sold as has been ordered, in the case of Plaintiff prevailing on appeal; (2) the amount of time required to obtain a judgment after it is affirmed on appeal is essentially no time, as the judgment which is now already in place will then remain in place upon remand; (3) this Court should have a great deal of confidence that the Property will remain in place and available to satisfy the foreclosure sale order, as it is bare commercial real property and therefore cannot be lost or depleted; (4) moreover, this fact is so plain that the cost of a bond would be a waste of money; (5) nor is there any reason to believe it would be feasible for the Defendants to secure and post such a large bond.

Plaintiff contends that the process to collect will be especially complex (factor 1), but does not support this assertion. In fact, no attempts to locate Iliescu assets, through judgment debtor's

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examinations or other procedures need be involved, as the asset to be foreclosed upon is already known and encumbered. The process of selling that asset, via the same procedures as exist on judgment liens, has been established by Nevada statute and carried out on numerous properties for decades. Plaintiff also contends that the Iliescus have been involved in an unusual number of lawsuits, and will therefore know how to make the process complex. This is a cheap shot. Plaintiff only lists the case numbers in question but does not analyze their merits or their outcome, and provides no indication whether, in *any* of those cases, the Iliescus successfully delayed collection efforts.

As to the second factor, the Plaintiff expresses horror at the possibility that the Iliescus may secure some victory on appeal, which would prevent the lien from being foreclosed upon after appeal. That possibility, however, is precisely why a stay should issue, not an argument against its entry. Otherwise, the Plaintiff could sell the liened property, use up the purchase money funds thereby obtained while the appeal is still pending, or disburse those proceeds to FFA's former owner, who financed this suit, leaving the Iliescus with no practical recourse in the event that the judgment which allowed Steppan to do so is reversed.

With respect to the third, fourth, and fifth *Heer* factors, the Opposition complains that the Iliescus provide no evidence of their financial health, in order for these factors to be reviewed in the manner which Plaintiff claims is required. However, as the Motion shows, the Plaintiff is not entitled to any personal judgment against the Iliescus, beyond the value, upon foreclosure sale, of the liened property, in any event, such that the question of the Iliescus' personal wealth is of no moment herein. Instead of confronting this showing, and analyzing the *Heer* factors thereunder, Plaintiff contends that this elephant in the room must be ignored, as though the *Heer* factors could reasonably be addressed without taking it into account. Such an analysis would be meaningless, however.

III. Other Security

Plaintiff avers that Defendants should be offering up some other security, instead of a bond, to satisfy the lien claimant's judgment. However, as the very phrase "lien claimant" indicates, *other security, in lieu of a bond, already exists*! No bond is needed, given the existence of this alternate security, which Plaintiff's suggestion forgets is already in place.

It should in that regard be remembered that the *Heer* factors are ultimately meant merely as

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tools to assist the district court in reviewing the more fundamental actual question, which *Heer* indicated should be the true focus of this Court's inquiry: "[A] supersedeas bond should not be the judgment debtor's sole remedy, particularly **where other appropriate, reliable alternatives exist**. Thus, **the focus is** properly **on what security will maintain the status quo** and protect the judgment creditor pending an appeal." *Heer*, 121 Nev. at 835 [emphasis added]. In a mechanic's lien case, the nature of such other "appropriate, reliable" security to "maintain the status quo" and protect the judgment creditor, is self-evident: the mechanic's lien itself already performs these functions perfectly.

IV. The Value of the Land Encumbered by Steppan's Mechanic's Lien.

Plaintiff next complains that the Iliescus have offered up no evidence to prove the value of the land encumbered by Steppan's Mechanic's lien. Again, the only reason that question matters is if the Plaintiff is entitled to personal judgment. In any event, based on appraisals recently received by the Iliescus, the Defendants hereby concede for purposes of this Motion that the value of the land is in fact less than the judgment on the lien. The assertion made by Plaintiff's Opposition, that the question of personal liability "may never ripen" even if Defendants lose their appeal, is therefore inaccurate.

V. The Question of Personal Liability for a Deficiency Is Obviously Ripe.

The very arguments at issue in the present motion demonstrate that the question of whether a property owner bears any personal liability for a judgment, beyond the value of the Property foreclosed upon, *is* now ripe, contrary to Plaintiff's assertions. Indeed, in order to rule on the Plaintiff's own arguments, by determining whether the value of the property matters, or whether the ability of the judgment debtors to pay the judgment matters, etc., this Court must first of necessity rule whether any possibility of personal liability for any post-foreclosure sale deficiency even exists.

Steppan does not even address that question, instead urging the Court to continue to defer ruling thereon, despite the necessity of such a ruling in order to address the parties' other arguments. The reasons for this strategy are obvious. Steppan's counsel knows what every mechanic's lien lawyer knows: that a mechanic's lien does not give rise to personal liability against a property owner, for any deficiency beyond the value of the property, and it is therefore in Steppan's best interests to evade and delay any clear statement from this Court on that question of black letter law in Nevada. *See, e.g.*, *Didier v. Webster Mines Corp.*, 49 Nev. 5, 234 Pac. 520 (1925)(owner of liened real property was not

personally liable for any amount of miner's lien claim which could not be satisfied from the lien, in the absence of privity of contract with the lien claimant); *Milner et al. v. Shuey,* 57 Nev. 159, 179, 69 P.2d 771, 772 (1937)(a contractual relationship regarding the furnishing of labor and materials between the party foreclosing the lien and the party against whom personal liability is sought "is essential to establish personal liability against the owner of the property in addition to a judgment foreclosing a lien"); *Nevada National Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 560, 563-64 (1992) (partially abrogated on other grounds by *Executive Mgmt Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002))("The [property owner] asserts that the remedy to enforce a mechanic's lien is to force a sale of the property and that it is not liable for any deficiency if the monies from the sale do not cover the amount of [the] liens. We agree. . . . It is unjust to hold the [property owner] personally liable for a deficiency when it was not a party to the contract . . . ."); *Reeder Lathing Co., Inc. v. Allen*, 425 P.2d 785, 786 (Cal. 1967)("In the absence of a contract between a lien claimant and the property owner, the right to enforce a mechanic's lien against real property does not give rise to personal liability of the owner.").

VI. CONCLUSION

The relief sought in Defendants' motion for stay of execution pending appeal, should be granted, without the necessity of posting any supersedeas bond, or any other or further security, beyond the mechanic's lien already encumbering Defendants' property.

By _____

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AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

DATED this 12th day of June, 2015.

By _____
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 12th day of June 2015, service was made by the ECF system to the electronic service list, a true and correct copy of the foregoing **DEFENDANTS' REPLY POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR STAY OF EXECUTION WITHOUT THE NECESSITY OF ANY BOND**, and a copy mailed to the following person:

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EXHIBIT "B"

CODE: 2195

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MARK B. STEPPAN,

Plaintiff,

vs.

JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT; JOHN ILIESCU, individually; DOES I-V, inclusive; and ROE CORPORATIONS VI-X, inclusive,

Defendants.

And all original prior consolidated case(s).

CASE NO. CV07-00341
(Consolidated w/CV07-01021)

DEPT NO. 10

DEFENDANTS' MOTION FOR STAY OF EXECUTION OF "JUDGMENT, DECREE, AND ORDER FOR FORECLOSURE OF MECHANIC'S LIEN" PENDING APPEAL, WITHOUT THE NECESSITY OF ANY BOND

COMES NOW, JOHN ILIESCU, JR., individually, and JOHN ILIESCU JR. and SONNIA ILIESCU as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT (jointly hereinafter "Defendants" or "Movants" or "Iliescus"), as the Defendants in the second of these two consolidated cases, and hereby move, pursuant to NRCP 62, for an Order of this Court staying any execution by Plaintiff of this Court's "Judgment, Decree, and Order for Foreclosure of Mechanic's Lien" (hereinafter the "Judgment") entered herein on February 26, 2015 (Transaction # 4836215) (attached as **Exhibit "1"** hereto), without the necessity of any security beyond the mechanic's lien which already secures Plaintiff's claims, and request that said stay remain in place

pending an appeal which Movants intend to file at this time.[1] This Motion is made and based upon the Points and Authorities and exhibits set forth hereinbelow, all of the pleadings and papers on file with this Court, and any arguments of counsel made at any hearing of this matter.

DATED this 12th day of June, 2015.

By _____

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POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. STATEMENT OF FACTS

This suit was brought by Plaintiff Mark B. Steppan ("Steppan") on May 4, 2007 via a Complaint (**Exhibit "2"** hereto) listing only a single cause of action, foreclosure of a mechanic's lien (the "Mechanic's Lien" or "Lien") against real property owned by the Iliescu Defendants, as described therein (the "Property"). The trial was held in December 2013, and this Court is familiar with the facts, which involve Plaintiff seeking to foreclose on a Mechanic's Lien brought in his name against the Defendants' real Property, for off-site architectural work that was performed for a potential buyer of that Property, under a purchase agreement which never closed.

On May 28, 2014, this Court entered its "Findings of Fact, Conclusions of Law and Decision" (hereinafter its "Decision") making various rulings, and upholding the validity of the Mechanic's Lien

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[1] Based on various factors, including email communications between the parties' counsel with respect to potential deadlines for moving for a stay, pursuant to a prior stipulation in which Plaintiff agreed to await the outcome of such motion(s) before proceeding with execution, this Motion is being filed prior to the Appeal. Defendants understand that any Order granting this Motion would be conditioned on their actually filing a timely Notice of Appeal

against the Property. The Court ordered in its Decision that the parties engage in subsequent proceedings in order to establish the final amount of the Lien, after which the Court entered its Judgment, ordering a foreclosure sale of the Property to satisfy the Mechanic's Lien. Post-trial motions brought by the Defendants both before and after entry of the Judgment were denied by the Court. The most recent such ruling was this honorable Court's May 27, 2015, "Order Denying Defendants' Motion for Court to Alter or Amend Its Judgment and Related Prior Orders" (Transaction # 4971032). Defendants intend to timely appeal this Court's Judgment, and certain of its other related orders and decisions, within thirty days of this Court's aforementioned May 27, 2015, Order.

II. OVERVIEW OF ARGUMENTS AND DISPUTES AT ISSUE

The present motion is similar to an earlier motion for stay which was filed herein on July 16, 2014 (Transaction # 4518824), prior to the Defendants' first post-trial motion for relief from the Decision, which earlier motion was vacated by an August 7, 2014 stipulation and order (Transaction # 4552148), attached as **Exhibit "3"** hereto, which was entered into by the parties in contemplation of the future filing of the instant motion, with both parties recognizing in that stipulation that the arguments in the vacated motion could be reasserted by Defendants after this Court's rulings on any post-trial motions, pending appeal.

Defendants are entitled to a stay of execution pending appeal, without the necessity of posting any further security, including any supersedeas bond, for the following reasons: (1) this Court's Judgment should not be construed as a money judgment against the Defendants individually, but is a judgment recognizing that Plaintiff has a Mechanic's Lien, establishing the amount of that Lien, and allowing him to satisfy that Lien by foreclosing upon and selling the Defendants' liened Property; (2) since Plaintiff's right to a Lien on real Property is, by definition, secured, the Plaintiff has no basis for objecting to a stay while an appeal of this matter is fully and finally adjudicated. Thus, there is no reason why Defendants should have to post any *further security* including in the form of any supersedeas bond, pending the adjudication of the Appeal, since the Defendants are not personally liable for any of the Judgment which is unable to be satisfied from the proceeds of the foreclosure, but, rather, only their Property is subject to the Mechanic's Lien, solely up to the full value of that Property, and given the Lien against that Property, no need exists for further security in any form.

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More particularly, this Court ruled, in pertinent part, as follows, in its Decision:

> 1. Iliescu owned four parcels of land in downtown Reno, Washoe County, Nevada . . . .
> 4. Johnson [acting as an agent for the Iliescu sellers] was in contact with Sam Caniglia ("Caniglia") regarding the purchase of the property. Caniglia represented Consolidated Pacific Development, Inc. ("CPD"). CPD wanted to purchase the property and develop it by placing mixed-use structures on the land. The property would be both commercial and residential.
> 5. Johnson received a letter from Caniglia on behalf of CPD proposing a purchase of the property . . . . The parties agreed on a purchase price of $7,500,000.00 and . . . . other inducements. Iliescu and CPD executed numerous addendums to the land purchase agreement . . . .
> 7. **The sale of the property never came to pass.** . . . CPD and/or its assigns were never able to secure funding for the purchase . . . .
> 10. Steppan entered into an AIA Document B141 Agreement ("the contract") with [a successor in interest to CPD] BSC to design Wingfield Towers [the proposed development at the Property].... The contract was signed by Steppan and BSC. **Iliescu is not a party to the contract.** [Emphasis added.] . . . .
> 16. Steppan was not paid for his services as contemplated by the contract. . . . On November 7, 2006, Steppan filed a mechanic's lien against the property. . . .

Decision at pp. 1-6 [emphasis added].

On the basis of these and other findings, this Court also issued its conclusions of law, including that the architect had "established that he is entitled to a mechanic's lien" for the work performed on the Iliescus' Property, under the contract to which the Iliescus were not a party. *Id.* at page 11, lines 12-23. This Court's Judgment, entered thereafter, provided that the Property would be sold, via the applicable methods for foreclosure of a mechanic's lien, in order to satisfy a judgment amount of $4,536,263.45. Judgment at ¶ 1. The Judgment went on to indicate that, if the net proceeds (gross proceeds minus the costs of sale) from the sale value of the Property are adequate to satisfy the entirety of the Lienable Amount, then the entirety of the Lienable Amount shall be provided to Plaintiff Steppan, with any excess to be distributed to the Iliescus. Judgment at ¶¶ 3-5.

The question of law which the Judgment explicitly did not address, but left open for further determination, is what to do in the event that the proceeds from the sale of the Property, do not fully satisfy the Lienable Amount. This question has been addressed to this Court in certain prior filings, but has not yet been directly addressed or ultimately reached by the Court heretofore, which has instead deferred the question for a subsequent ruling. The Judgment, for example, indicates in Paragraph 6 that this question may still be adjudicated in the future, and that the Plaintiff retains its right to pursue its theories on the same (which Plaintiff derives from his interpretation of NRS 108.239(12)), and with

the Defendants' rights to raise their contrary arguments (including on the basis of arguments raised in certain of their prior filings) also being protected and preserved.

In order to rule on the instant motion, these previously deferred questions must now be ruled upon. The answer to these questions are settled under Nevada law, and not open to any genuine question, and, as a matter of law, Plaintiff is not entitled to seek any moneys from the Iliescus, beyond the proceeds recovered at the sale, since the Iliescus are not personally liable for any portion of the Judgment, but, rather, their Property is subject to being sold to satisfy the same, with no remaining claims to seek a further deficiency, if any, from the Property's owners. Steppan is entitled to the only relief affordable to him by law under the sole cause of action set forth in his Complaint, namely, recognition that he has a mechanic's lien in the amount which has now been determined by this Court, and the right to foreclose thereon, to satisfy as much of that judgment as may be recoverable from the proceeds of such a sale.

Allowing Steppan to foreclose on the mechanic's lien without waiting to determine the fate of Defendants' appeal would prejudice Defendants, who would thereby lose their Property, the very *res* at issue in this matter sought to be preserved via a planned appeal. On the other hand, there will be no prejudice to Steppan if a stay issues and he later prevails on appeal, as he will have remained secure in his mechanic's lien rights against the Property during the appeal. Therefore, it is respectfully requested that this Court enter an Order staying any execution by Plaintiff on the Judgment and preventing Plaintiff from taking any steps to foreclose on his Mechanic's Lien or cause a foreclosure sale of the liened Property to take place, pending the outcome of the Defendants' appeal, and without the necessity of Defendants posting a supersedeas bond.

III. LEGAL ANALYSIS

A. Standard of Adjudication

NRCP 62(d) governs the issuance of a stay upon appeal, and contemplates the issuance of a supersedeas bond in order to allow such a stay to come into effect as a matter of right. However, it has long been recognized that district courts have the authority to waive, or allow for alternative security, while still issuing a stay, when circumstances so warrant. *McCullough v. Jenkins*, 99 Nev. 122, 659 P.2d 302 (1983). For example, the Nevada Supreme Court has expressly recognized that where

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adequate collateral already exists to protect a Judgment, a stay may issue without the need for the party protected by the stay to issue a bond. *Ries v. Olympian, Inc.*, 103 Nev. 709, 747 P.2d 910 (1987). In the present case, alternative collateral does exist, including by virtue of the very nature of the relief which has been obtained by Plaintiff Steppan, pursuant to which he is already in possession of all the security he needs and all the security he is entitled to in order to be protected pending the appeal of this matter, during which appeal, his mechanic's lien will remain of record.

In *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 (2005), the Nevada Supreme Court updated its prior *McCullough* analysis on this issue, and identified new factors which a district court should now consider when determining whether to issue a stay pending appeal, without requiring a supersedeas bond, which factors were taken from Seventh Circuit federal case law analyzing the federal equivalent to NRCP 62(d). The Court explained the reasoning behind the new test as follows: "The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed **by preserving the status quo** and preventing prejudice to the creditor arising from the stay. However, a supersedeas bond **should not be the judgment debtor's sole remedy**, particularly **where other appropriate, reliable alternatives exist**. Thus, the focus is properly on **what security will maintain the status quo** and protect the judgment creditor pending an appeal." *Heer*, 121 Nev. at 835; 122 P.3d at 1252 [emphasis added]. Based thereon, the Court adopted the Seventh Circuit's analysis, which calls for a district court to review the following factors:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. 121 Nev. at 836, 122 P.3d at 1252.

The Court need not review all five of these factors. Rather, as *Heer*, and other similar cases relying on the same Seventh Circuit authority, indicate, a Court may rely on any one or more of the factors to allow a stay without posting a bond. *See e.g., Ground Improvement Techniques, Inc. v. Morrison Knudsen Corp.*, 2007 U.S. Dist. LEXIS 30836, at 7 (D. Colo. Apr. 25, 2007) (waiving bond based on factors 1, 2, and 4); *In re Oil Spill by the "Amoco Cadiz,"* 744 F. Supp. 848, 850 (N. D. Ill.

1990)(waiving bond based on only factor), *Hurley v. Atlantic City Police Dept.*, 944 F. Supp. 371, 375 (D. N.J. 1996) (waiving bond based on factors 3 and 5).

In the present matter, as a prerequisite to this Court's review of these factors, this Court needs to decide whether Plaintiff or Defendants are correct in their assertions regarding Nevada law. If Defendants' position, that the Judgment is not properly treated as a personal judgment but only establishes the amount of the Lien which can be satisfied up to the value of the Property, is accurate, then many of these foregoing factors would have no application. Rather, in that event, since the Plaintiff is not entitled to collect any post-foreclosure deficiency or residue as a personal claim against the Defendants, beyond the value of the Property, the Lien against the Property is, by definition, adequate collateral for the entire Lien foreclosure Judgment. Thus, the best way to "maintain the status quo" is to simply allow a stay to be issued, with the Property to remain subject to the Mechanic's Lien (as well as to the Judgment allowing foreclosure thereon) until such time as the Appeal is determined. Otherwise, given the large amount of the Judgment, the status quo will not be maintained, but, rather, the Defendants will either have to allow the sale of their Property (losing the very *res* which they seek to protect by appealing), or will be forced to try to find some way to procure a bond, if even available, for this extremely large ($4.5 million) Judgment, which would for many reasons not be feasible.

The factors from the *Heer* decision which do directly apply, clearly indicate that no bond should be necessary in this matter. For example, "the cost of a bond would be a waste of money" as this Court should not only have a high "degree of confidence" that the lien will still be in place should Plaintiff prevail on appeal, but this Court knows that to be the case as a matter of law, and the "collection process" will not be "complex" but will simply involve the Plaintiff going forward to foreclose on his Lien thereafter, under the methods set forth in the statute and reiterated in the Judgment (per NRS 108.239(10), in the manner provided for sales on execution of real property). Further, the Property remains undeveloped vacant commercial property in downtown Reno, such that there is no danger of accidental destruction of any valuable improvements at the site during the stay, nor is the Property a mine, or land containing valuable timber, upon which waste could be committed.

Additional guidance may also be found under NRAP 8(c) which sets forth the analysis the Nevada Supreme Court will follow upon its review of any motion for stay to be filed under NRAP 8,

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which must be preceded by a motion (i.e., the instant motion) in front of the district court. NRAP 8(c) lists the factors to be considered at that stage in determining whether to issue a stay, which include "whether the object of the appeal . . . will be defeated if the stay . . . is denied" and "whether" this would lead to "irreparable or serious injury" to the appellant, versus whether any such injury would accrue to the respondent. These factors also favor issuance of the stay in this case, since the object of the appeal (preserving the Defendants' Property and avoiding having it sold off at a foreclosure of Plaintiff's Mechanic's Lien) will, indeed, be defeated if the stay is denied. Thus, a denial of the stay, rather than maintaining the status quo, as *Heer* indicates should be the goal, will cause prejudicial and irreparable injury to Defendants. On the other hand, no injury or prejudice will inure to Plaintiff, whose Mechanic's Lien will remain in place pending the appeal, upon which he can readily go forward with foreclosure sale proceedings in the event of the Defendants losing on appeal.

B. There is No Personal Liability, Beyond the Foreclosure Sale Value of the Liened Property, For Which any Further Security or Supersedeas Bond, Is Needed.

Based on prior filings, it is known that, in an effort to overcome the foregoing analysis, Plaintiff Steppan will aver that a supersedeas bond should issue in case the amount recovered upon any foreclosure sale of the Property subject to the mechanic's lien is insufficient to pay his Judgment. However, Plaintiff has NO RIGHT to any personal judgment against Defendants, beyond his right (if this Court's Judgment is upheld on appeal) to foreclose on his Mechanic's Lien. Plaintiff has mischaracterized Nevada law on this question, and has argued that "[if] the proceeds from the [Mechanic's Lien foreclosure] sale do not satisfy the amount of the judgment, then the judgment creditor is entitled to personal judgment against the property owner for the deficiency (or 'residue') if the property owner has been personally summoned or appeared in the action." *See*, Plaintiff's December 4, 2013 Trial Statement, at p. 14, ll. 16-21.

This is simply untrue. No Nevada case law or statute supports the assertion that the lien claimant "is entitled to personal judgment against the property owner" against whose *property* a lien is claimed "for the deficiency (or residue)" of the lien amount, after a sale which fails to satisfy that amount, where the lien exists because some other third-party customer failed to pay the lien claimant. Indeed, Nevada law has long refuted that assertion.

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(i) Plaintiff's Theory Misreads the Statute on Which His Theory Is Based.

This Plaintiff theory of personal liability on the part of these Iliescu Defendants, beyond the amount recoverable through foreclosure of the Mechanic's Lien, as well as Plaintiff's claimed basis for the same, are both inaccurate statements which misconstrue the clear, unambiguous, and controlling law of the State of Nevada, and must be rejected in their entirety. There is no basis, as Plaintiff Steppan claims, for him to "apply to the court for a personal judgment against Iliescu" hereafter, if "the net sale proceeds [from the mechanic's lien foreclosure sale] are less than the monetary amount of the judgment." (*Id.*, at 14, lines 21-24.) It must be remembered that the judgment amount is based on the failure of a party (the architectural customer) *other than these Defendants*, to pay the Plaintiff. Plaintiff is not entitled to ***any*** personal deficiency against Movants (even were no appeal to be taken, or if this Court's Judgment is upheld on appeal), just because the Property is not of sufficient value to satisfy the amount of the Lien, as adjudicated, based on Plaintiff having not been paid by another third party who signed the contract (the underlying developer BSC / Consolidated) who Plaintiff chose not to sue herein.

Plaintiff's characterization of the law is purportedly premised on NRS 108.239(12) which Plaintiff's Trial Statement misconstrued by omitting its key passage. That statute actually reads, in full, as follows: "12. Each party whose claim is not satisfied in the manner provided in this section is entitled to personal judgment for the residue **against the party legally liable for it** [i.e., the defaulting customer of the lien claimant] *if* that person has been personally summoned or has appeared in the action." [Emphasis and bracketed language added.] The obvious meaning of this statutory language is clear. A mechanic's lien against real property provides additional security and protection to a contractor who has performed work under contract for which the contractor has not been paid by his customer, or someone else legally liable to pay him. The fact that a mechanic's lien proves insufficient to pay the contractor does not, however, prevent the contractor from nevertheless seeking personal judgment for any post-foreclosure residue or deficiency still owed, as against the party with whom he contracted, as the person who is and has always been "legally liable for" payment to the contractor, or against any other party (such as the contractor's customer's guarantor) who would

otherwise have been "legally liable for" paying the contractor, even where no mechanic's lien existed, or any mechanic's lien that did exist proved insufficient.

This is a very simple principle of law, clarified by subsection 12 merely in order to avoid the possibility of any argument that might otherwise be made that mechanic's lien rights entirely replace or supplant a contractor's right to seek other more traditional remedies, such as a contractor merely obtaining a money judgment against his or her customer. This simple principle is also clarified by NRS 108.238 ("The provisions of [the mechanic's lien statutes] must not be construed to impair or affect the right of a lien claimant to whom any debt may be due for work, material or equipment furnished to maintain a civil action to recover that debt *against the person liable therefor* . . . .")[Emphasis added.] It should be noted that the clarification in subsection 12 of NRS 108.239 is not merely redundant of NRS 108.238, in that NRS 108.239(12) also provides procedural instruction, that the party legally liable to the lien claimant for the debt, such as the claimant's customer, should also be made a party to the lien foreclosure suit, which Plaintiff chose not to do here.

The assertion that NRS 108.239(12) magically transforms the owner of liened real property into a defendant who is himself now legally and personally liable for any amounts owed, and unable to be satisfied from the Property's sale, simply by being summoned and appearing in the lien foreclosure action, even where said owner had no contract with the lien claimant and no theory exists for such personal liability of the property's owner, is patently absurd, and is simply not what the statute says, on its face, or by any reasonable construction. Rather, the statute merely provides that in order to seek a personal judgment for the residue, "the party" who would in any case be "legally liable for" the payment to the claimant, remains liable for that residue "if that person" (whoever it may be, typically the lien claimant's contract customer) "has been personally summoned and appeared in the action" (a phrase and a condition which would make no sense whatsoever, if it were referring to the lien claimant defendant, who, of course, will of necessity have been served or have appeared, for a plaintiff to have reached the point where a foreclosure sale has occurred, leaving a residue deficiency).

Plaintiff in this case chose not to name the actual customer, BSC / Consolidated, for reasons which are unknown, as the Property owner is not privy to whatever arrangements were made between the architect and the developer. However, this case was very unusual in that regard. It is typically almost always the case that a mechanic's lien foreclosure action will name the lien claimant's

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customer, and include breach of contract causes of action against that customer, in addition to naming the owner of the property on a separate mechanic's lien foreclosure cause of action.

Setting aside the serious due process concerns which Plaintiff's construction of the statute would raise, if subsection 12 of NRS 108.239 were intended to render the owner legally liable for the residue of any mechanic's lien claim unable to be satisfied from the value of the property subject to the lien, regardless of whether there were any other basis for that owner's personal liability, it is respectfully suggested that *if such a construction were intended, that is what the statute would have been written to say.* However, it is not so written. For example, such an intention could have been expressed via the legislature indicating that any party whose claim is not satisfied from the foreclosure of the mechanic's lien "is entitled to personal judgment for the residue against *the owner of the property subject to the lien.*" [period, no further conditional language, such as "if the owner has been summoned or has appeared" needed, since it would, in that event, go without saying that the owner had been summoned or appeared, as no mechanic's lien foreclosure sale could otherwise have been ordered.] Why isn't the statute written thus? Very simply: because that's not what it means.

(ii) Plaintiff's Theory Is Contrary to Longstanding Nevada Case Law Directly On Point and Directly to the Contrary of Plaintiff's Argument.

Indeed, it has been the undisputed and repeatedly upheld law of the State of Nevada for over 80 years that the owner of real property subject to a statutory lien is **not** thereby made personally liable for any deficiency, merely because his land is subject to the lien as security for a claim, absent some other basis for the owner to be held personally liable, such as where the owner is also the party who contracted with the lien claimant for the work. As noted above, this Court has already ruled in this case that the Iliescus were not a party to the contract between the owner and the lien claimant.

In *Didier v. Webster Mines Corp.*, 49 Nev. 5, 234 Pac. 520 (1925) the Nevada Supreme Court noted that a real property owner, whose land was subject to a statutory mechanic's lien in favor of a miner, was not personally liable for any amount of the miner's lien claim which could not be satisfied from the lien, in the absence of privity of contract between the real property owner and the lien claimant. This case is still valid Nevada law and has never been overturned. Likewise, in the more recent case of *Nevada National Bank v. Snyder*, 108 Nev. 151, 826 P.2d 560 (1992) (partially abrogated on other grounds by *Executive Mgmt Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872

(2002)) the Court ruled against the very assertions which Steppan now repeats, and did so in reliance on Nevada authority which had been in effect for decades.

The *Snyder* case included discussion of a claim by two mechanic's lien claimants that a bank which was the owner of real property was thereby liable for any "residue" owed to the mechanic's lien claimants, not able to be satisfied through the mechanic's lien. The bank had not, however, been the party which had requested the lien claimant's work, or which had failed to pay the lien claimants. The Nevada Supreme Court firmly rejected this contention, explaining as follows:

> The district court judgment stated that C & R and Depner [the mechanic's lien claimants] were entitled to a "personal judgment for the residue against the Bank [the property owner]." The [property owner] Bank asserts that the remedy to enforce a mechanic's lien is to force a sale of the property and that it [as the property owner] is not liable for any deficiency if the monies from the sale do not cover the amount of C&R and Depner's [the lien claimants'] liens. **We agree.**
>
> In *Milner et al. v. Shuey,* 57 Nev. 159, 69 P.2d 771 (1937), this court stated that **there must be a contractual relationship** regarding the furnishing of labor and materials **between the party foreclosing the lien and the party against whom personal liability is sought.** This court stated: "[S]uch a relation **is essential to establish personal liability against the owner of the property** in addition to a judgment foreclosing a lien...." *Id.* at 179, 69 P.2d at 772. Further, the statutory language regarding deficiencies and personal actions is illuminating here. NRS 108.238 provides:
>
> > **Right to maintain personal action for debt not impaired.** Nothing contained in NRS 108.221 to 108.246, inclusive, shall be construed to impair or affect the right of any person to whom any debt may be due for work done or material furnished to maintain a personal action to recover such debt *against the person liable therefor.* (Emphasis added.)
>
> It is unjust to hold the Bank [as property owner] personally liable for a deficiency when it was not a party to the [lien claimant/customer] contract, and because the Bank is not **the person liable for the debt** under NRS 108.238.

Snyder, 108 Nev. at 157, 826 P.2d at 563-64 (1992)(bolded and underlined emphasis and bracketed insertions added, italicized emphasis in original).

This precise analysis is equally applicable herein. This Court has already ruled, in Paragraph 10 of its Decision, that Iliescu was not a party to the contract with Steppan. As such, the claim that these Defendants can somehow be made liable for the residue owed to Plaintiff beyond the value of the liened Property, when they were not "the person liable for the debt" in the first instance, and did not contract for the work, must fail, as based on a legal argument which has already been presented to the Nevada Supreme Court and entirely rejected.

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It should be noted that the Nevada legislature has revised and amended the Nevada lien statutes many times since the 1992 *Snyder* decision, including a substantial revision to the entire statutory scheme which took place effective October 1, 2003. Nevertheless, the Nevada legislature has never chosen to take any action which might mitigate against the effect of the *Snyder* case, or altered the meaning of who is a person "legally liable" for debts secured by a mechanic's lien against property, in order to vacate the effect of the *Snyder* decision, or the earlier decisions on which it was based.

Nor can the *Snyder* decision be said to represent some unique aberration in mechanic's lien law. Rather, it represents the correct understanding of the nature and purpose *and limited extent* of mechanic's liens as understood for decades, including in other neighboring states. *See, e.g., Reeder Lathing Co., Inc. v. Allen*, 425 P.2d 785, 786 (Cal. 1967)("The part of the judgment that defendant is personally liable to plaintiff is **clearly erroneous**. In the absence of a contract between a lien claimant and the property owner, the right to enforce a mechanic's lien against real property **does not give rise to personal liability** of the owner.") [Emphasis added.]

The Nevada Supreme Court in *Snyder* also rejected the argument that the owner of real property subject to a mechanic's lien could be held liable for the residue beyond the value of the property on an "unjust enrichment" theory, even where the work had benefitted the property, and therefore its owner. *Snyder*, 108 Nev. at 157, 826 P.2d at 563. Of course, in the present case, Steppan's complaint contains but one cause of action, for the foreclosure of a mechanic's lien against the Iliescu Property, and does not assert any unjust enrichment claim in any event, such that sneaking such a claim in at this late point would be a violation of due process.

Moreover, any claim for unjust enrichment would be especially weak in this case. The architectural plans which form the basis for the Lien did not involve or lead to any actual on-site work, or any actual on-site improvements, ever taking place, which benefitted the subject liened Property. That Property is now just as vacant and unimproved as it was the day it went into escrow, the only difference being that it came out of escrow subject to a seven figure Mechanic's Lien claim.

C. No Supersedeas or other Bond Is Necessary.

Based on the foregoing, it is clear that the Plaintiff has no right to seek any deficiency against the Defendants for any residue remaining after a sale of the Property. Accordingly, under *Heer*, there is, by definition, no reason to require additional security pending appeal, because the one and only *res*

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of this single-cause-of-action lawsuit remains what it has always been throughout the lawsuit, the Property subject to the Mechanic's Lien. That *res* will continue to remain subject to the Mechanic's Lien throughout the appeal. Based thereon, there is no need to require a supersedeas bond as the full collectable extent of the Judgment is, by definition, secured by the Lien. *See, e.g., Zoccole Construction, Inc. v. Goodemote*, 2005 WL 5621619 (Ps. Com.Pl. 2005)(rejecting appellant from Stay Order's argument that Stay Order should not have been granted without posting of bond, including because the stayed judgment "is and has been collateralized and secured in first lien position since the moment appellant filed its mechanic's lien claim.").

Accordingly, the *Heer* factors (as listed in *Heer*, 121 Nev. at 836, 122 P.3d at 1252, and quoted above) should be applied so as to maintain that same status quo through the appeal, without the need for a bond: (1) the collection process in this case will not be complex, but simple, as the Property will simply be sold as has been ordered, in the case of Plaintiff prevailing on appeal; (2) the amount of time required to obtain a judgment after it is affirmed on appeal is essentially no time, as the judgment which is now already in place will then remain in place upon remand; (3) this Court should have a great deal of confidence that the Property will remain in place and available to satisfy the foreclosure sale order, as it is bare commercial real property and therefore cannot be lost or depleted; (4) moreover, this fact is so plain that the cost of a bond would be a waste of money; (5) nor is there any reason to believe it would be feasible for the Defendants to secure and post such a large bond.

III. CONCLUSION

For the reasons set forth above, this Court should grant a stay of execution, such that Plaintiff may not go forward with any mechanic's lien foreclosure sale, or take any steps to initiate such a foreclosure sale, while any appeal is pending (conditioned on the currently intended appeal being, in fact, timely filed).

Furthermore, no bond should be required as part of any such stay or stays to be maintained during any such time periods hereafter, given that the Plaintiff already has security, as the Mechanic's Lien will remain in effect unless and until revoked by this Court or the Nevada Supreme Court. To the extent that any further security or supersedeas bond is argued as being necessary due to any theory of personal liability on the part of the Defendants, beyond the value of the Property, that contention

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must be rejected as based on a misreading of the statute on which it is based, as demonstrated by well established and long-standing contrary Nevada Supreme Court precedent.

By _____

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AFFIRMATION

The undersigned does hereby affirm that the preceding document filed in the Second Judicial District Court does not contain the social security number of any person.

DATED this 1st day of June, 2015.

By _____
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) and NEFCR 9, I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 1st day of June 2015, service was made by the ECF system to the electronic service list, a true and correct copy of the foregoing **DEFENDANTS' MOTION FOR STAY OF EXECUTION PENDING APPEAL, WITHOUT THE NECESSITY OF ANY BOND**, and a copy mailed to the following person:

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Index of Exhibits

EXHIBIT "A"

FILED
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2015-02-26 03:29:02 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 4836215

In the Second Judicial District Court of the State of Nevada
In and for the County of Washoe

MARK B. STEPPAN, Plaintiff, v. JOHN ILIESCU, JR.; SONNIA SANTEE ILIESCU; JOHN ILIESCU, JR. and SONNIA SANTEE ILIESCU, as trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust, Defendants.	Consolidated Case Nos. CV07-00341 and CV07-01021 Dept. No. 10
And Related cross-claims and third-party claims.	

Judgment, Decree and Order for Foreclosure of Mechanics Lien

Based upon the Findings of Fact, Conclusions of Law, and Decision (May 28, 2014, E-flex Transaction #4451229), Order Regarding Plaintiff's Motion for Costs (September 5, 2014, E-flex Transaction #4594487), Order Regarding Plaintiff's Motion for Attorney Fees (September 8, 2014, E-flex Transaction #4595799), Order Regarding Reconsideration of Attorney Fees (December 10, 2014, E-flex Transaction 4729999), and the rulings regarding the computation of prejudgment interest during the June 12, 2014 hearing reflected in the hearing transcript at pages 21 and 22.

IT HEREBY IS ORDERED, ADJUDGED, AND DECREED:

1. Plaintiff Mark B. Steppan shall take judgment on the Notice and Claim of Lien recorded on November 7, 2006 as Document 3460499 in the official records of the Washoe County Recorder, as amended by the Amended Notice and Claim of Lien recorded May 3, 2007 as Document 3528313, and as further amended by the Second Amended Notice and Claim of Lien recorded November 8, 2013 as Document 4297751 for the following amounts:

A.	Principal	$1,753,403.73
B.	Prejudgment interest	$2,527,329.23
C.	Attorney fees	$233,979.50
D.	Costs	$21,550.99
Total		$4,536,263.45

2. Pursuant to NRS 108.239(10), the real property described as Assessor Parcel Number 011-112-03, 011-112-06, 011-112-07, and 011-112-12, and more particularly described in Exhibit A hereto (the "Property") shall be sold in satisfaction of the Plaintiff's mechanics lien in the amounts specified herein.

3. Pursuant to NRS 108.239(10), Plaintiff Mark B. Steppan shall cause the Property to be sold within the time and in the manner provided for sales on execution for the sale of real property.

4. The costs of the sale shall be deducted from the gross proceeds, and the balance shall constitute the Net Sale Proceeds.

5. Pursuant to NRS 108.239(11), if the Net Sale Proceeds are equal to or exceed the Lienable Amount, then the Lienable Amount shall be disbursed to Plaintiff Mark B.

Steppan, and the surplus shall be disbursed to Defendants John Iliescu, Jr. and Sonnia Iliescu as trustees of the John Iliescu Jr. and Sonnia Iliescu Trust.

6. If the Net Sale Proceeds are less than the Lienable Amount, then all of the Net Sale Proceeds shall be disbursed to Plaintiff Mark B. Steppan. Within 30 calendar days after the sale, Steppan may by motion seek additional relief pursuant to NRS 108.239(12). Defendants reserve all rights regarding any additional relief including, but not limited to, the arguments in the Defendants' Motion for Relief From Court's Attorneys' Fees and Costs Orders and For Correction, Reconsideration, or Clarification of Such Orders to Comply with Nevada Mechanic's Lien Law (filed September 15, 2014, e-Flex Transaction 4606433).

7. Certain third party claims by the Defendants, against a third-party defendants, remain pending in this lawsuit, which have been stayed by prior stipulations of the parties. The Court determines that there is no just reason for delay and, notwithstanding any remaining claims against other parties herein, this Judgment is certified as final pursuant to NRCP 54(b) with respect to the parties hereto and the claims between them.

DATED February 26, 2015.

Hon. Elliott A. Sattler,
District Judge

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IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN ILIESCU, individually, JOHN ILIESCU, JR. and SONNIA ILIESCU, as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT,

Appellants,

vs.

MARK B. STEPPAN,

Respondent.

Supreme Court No. 68346

Washoe County Case No. CV07-00341
(Consolidated w/CV07-01021)

APPELLANTS' MOTION FOR STAY OF EXECUTION OF JUDGMENT OR FORECLOSURE OF MECHANIC'S LIEN PENDING THIS APPEAL, WITHOUT THE NECESSITY OF POSTING ANY FURTHER SECURITY

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APPELLANTS, John Iliescu, Jr., individually, and John Iliescu Jr. and Sonnia Iliescu as Trustees of the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust Agreement ("Appellants" or "Movants" or "Iliescus"), hereby move, pursuant to NRAP 8(a)(2), for an Order of this Court: (1) staying any execution by Respondent, Mark B. Steppan ("Respondent" or "Steppan") of the district court's "Judgment, Decree, and Order for Foreclosure of Mechanic's Lien" (the "Judgment"), in the amount of $4,536,263.45, entered on February 26, 2015 (attached as **Exhibit "A"** hereto), (2) including by staying and enjoining any lien foreclosure sale of the property subject to the mechanic's lien, (3) without the necessity of any supersedeas bond being posted, or other security being provided, beyond the mechanic's lien which already secures Steppan's claims, (4) with said stay to remain in place pending the outcome of this appeal. This Motion is made and based upon the Points and Authorities set forth below, including the NRAP 8(a)(2)(A) Statement and the Statement of Facts and Legal Analysis provided therein; and the Exhibits attached hereto and filed herewith.

POINTS AND AUTHORITIES

I. NRAP 8(a)(2)(A) STATEMENT

As required by NRAP 8(a)(2)(A), the Movants indicate as follows: A motion for the same

relief sought herein, was filed by the Iliescus in the district court on June 1, 2015 (**Exhibit "B"** hereto, without exhibits), and supported by a Reply brief filed on June 12, 2015 (**Exhibit "C"** hereto, without exhibits). After the Notice of Appeal was filed on June 23, 2015 (**Exhibit "D"**), the district court entered a July 29, 2015 order, denying the motion for stay (**Exhibit "E"**), on the grounds set forth therein, including that the primary legal argument asserted as a basis for that motion "is not ripe for decision." (**Exh. "E"** p.3, l.8). Thus, Appellants have met the requirements of NRAP 8(a)(1), to seek relief from the district court before filing this Motion.

II. STATEMENT OF FACTS

This is an appeal from two consolidated lawsuits filed in Washoe County. The first suit was Appellants' Application to expunge a mechanic's lien recorded by Respondent Steppan (the "Mechanic's Lien" or "Lien") against their vacant commercial real property in downtown Reno, as described in the Lien (the "Property")(**Exhibit "F"** hereto, without exhibits). The second suit, consolidated therewith, was Respondent Steppan's May 4, 2007 Complaint (**Exhibit "G"**) for foreclosure of his Mechanic's Lien against the Iliescus' Property, which Lien was asserted in Steppan's name for off-site architectural services that were performed for a potential buyer of the Property, an entity referred to herein as "BSC", during escrow under a purchase agreement between BSC (or its predecessor) and the Iliescus which never closed.

When would-be buyer BSC failed to obtain financing, the Iliescus received the Property back out of the failed escrow, with no on-site improvements commenced thereon, but nevertheless subject to Steppan's multi-million dollar Lien, for design work done towards BSC's planned on-site development. During the pre-appeal litigation the Iliescus asserted a variety of defenses to the Lien, including without limitation Steppan's failure to serve them with any pre-lien notice of right to lien, as required by NRS 108.245, to alert them to the lien dangers posed by off-site design services being performed during escrow, as well as arguments regarding "Steppan's" Lien having actually been brought for another real party in interest, his California employer, on the basis of its invoices for its services provided directly to BSC, improperly utilizing Steppan's name and Nevada architectural license, which it lacked.

Five months after a December 2013 bench trial, the district court entered its "Findings of Fact,

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Conclusions of Law and Decision" ("Decision") on May 28, 2014, which included the following pertinent rulings:

> 1. Iliescu owned four parcels of land in downtown Reno, Washoe County, Nevada . . . .
> 4. . . . . Consolidated Pacific Development, Inc. ("CPD") . . . . wanted to purchase the property and develop it by placing mixed-use structures on the land. The property would be both commercial and residential.
> 5. . . . . The parties agreed on a purchase price of $7,500,000.00 and . . . . other inducements.
> 7. **The sale of the property never came to pass.** . . . CPD and/or its assigns were never able to secure funding for the purchase . . . .
> 10. Steppan entered into an AIA Document B141 Agreement ("the contract") with [a successor in interest to CPD] BSC to design Wingfield Towers [the proposed development at the Property]. . . . The contract was signed by Steppan and BSC. **Iliescu is not a party to the contract.** [Emphasis added.] . . . .

Decision (portions of which are attached as **Exhibit "H"** hereto) at pp. 1-6 [emphasis added].

The district court ruled that Steppan was entitled to his Mechanic's Lien against the Iliescus' Property for the design work performed under the contract to which the Iliescus were not a party. The Court entered its Judgment on February 26, 2015, which provided for satisfaction of the Lien via foreclosure sale of the Property in order to discharge an adjudicated Lien amount of $4,536,263.45. Judgment, **Exhibit "A"** hereto at ¶ 1.

III. LEGAL ANALYSIS

A. OVERVIEW AND INTRODUCTORY ANALYSIS: THE STAY PROTECTIONS TO WHICH JUDGMENT CREDITOR STEPPAN IS ENTITLED

Pursuant to NRAP 8(a)(2)(B), the grounds for the relief sought herein, are as follows. During this appeal, Steppan will remain fully vested in his Lien against the Property, even if he is stayed from selling the Property in the interim. If he prevails on appeal, he will be able to foreclose and sell the Property. Whatever he recoups in such a sale, up to the awarded Lien amount, is the full extent of his rights and claims against the Iliescus. Possibly he will obtain a purchase price higher than the Judgment. (Indeed, this outcome is likely. *See*, last page of **Exhibit "I,"** recent Property appraisal, in an amount far exceeding the Judgment.) However, legally, even assuming Steppan will *not* receive such a sale price, and the proceeds from the sale of the Property, *will not* fully reach the Lien amount, Steppan's rights are *still* fully protected by his Lien. This is because, as shown by Section III(B) hereof, below, Steppan's right to sell the Property (and retain the sale proceeds up to the value of the Lien) *is* the full extent of his claim. He is not entitled to seek any deficiency moneys from the Iliescus,

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beyond the proceeds recovered at his future Mechanic's Lien foreclosure sale, in any event, since the Iliescus are not personally liable for any portion of the Judgment, beyond the sale value of their liened Property. Accordingly, whether the Property sells for more or less than the Lien amount as calculated in the Judgment, Steppan already possesses the entirety of any appropriate protective collateral, and no further security is needed to fully protect him during any stay pending this appeal.

Based thereon, as shown by Section III(C) hereof, below, there is no basis to require further security, at this time, beyond the Lien against the Property, as a condition to any stay issued while this appeal is being adjudicated. Instead, under prior Nevada case law, and NRAP 8(c), Appellants should not be required to post any *further security*, pending the adjudication of this appeal, as Steppan's full legal rights are already fully secured.

B. THERE IS NO PERSONAL LIABILITY, BEYOND THE FORECLOSURE SALE VALUE OF THE LIENED PROPERTY, FOR WHICH ANY FURTHER SECURITY OR SUPERSEDEAS BOND, IS NEEDED.

(i) Nevada's Mechanic's Lien Statutes Do Not Support Personal Liability Beyond the Value of Liened Property.

Steppan has contested the foregoing analysis, and mischaracterized Nevada law thereon, arguing that "[if] the proceeds from the [Mechanic's Lien foreclosure] sale do not satisfy the amount of the judgment, then the judgment creditor is entitled to personal judgment against the property owner for the deficiency (or 'residue') if the property owner has been personally summoned or appeared in the action." *See*, Steppan's Trial Statement, portions of which are attached as **Exhibit "J"** hereto, at p. 14, ll. 16-21. However, this is simply not an accurate assertion. There is no basis, as Steppan claims, for him to "apply to the court for a personal judgment against Iliescu" hereafter, if "the net sale proceeds [from the lien foreclosure sale] are less than the monetary amount of the judgment." (*Id.*, at 14, lines 21-24.)

Steppan's characterization of the law is purportedly premised on NRS 108.239(12) which he misconstrues by ignoring its key passage. That statute actually reads, in full, as follows: "12. Each party whose claim is not satisfied in the manner provided in this section is entitled to personal judgment for the residue **against the party legally liable for it** [*i.e.*, the defaulting customer of the lien claimant] *if* that person has been personally summoned or has appeared in the action." [Emphasis and bracketed language added.] The obvious meaning of this statute is clear. A mechanic's lien

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against real property provides security protection to a contractor who has performed work under contract for which the contractor has not been paid by his customer, the party legally liable to pay him. But if a mechanic's lien proves insufficient to pay the contractor, this does not prevent the contractor from still seeking judgment for any post-foreclosure residue or deficiency still owed, as against his customer (or others "legally liable" for the customer's debt, such as any guarantor), as the person who is and has always been "legally liable for" payment to the contractor, as long as the customer has been named and served as a party to the action, and sued for breach of its contractual or other duties therein.

This is a very simple principle of law, clarified by subsection 12 of NRS 108.239 merely in order to avoid any argument that somehow mechanic's lien rights entirely supplant a contractor's right to seek other more traditional remedies, such as a money judgment against its customer, as the person legally liable for the debt. This simple principle is also clarified by NRS 108.238, with NRS 108.239(12) providing additional procedural instruction, that the customer or other party legally liable for the debt, should also be made a party to the lien foreclosure suit, which Steppan, for unknown reasons, chose not to do here.

Notably, most mechanic's lien foreclosure lawsuits preserve a lien claimant's NRS 108.239(12) rights, by also naming the lien claimant's customer, and including breach of contract causes of action against that customer, in addition to naming the owner of the property under a separate mechanic's lien foreclosure cause of action. However, the Iliescus cannot now be substituted as personally liable Defendants just because Respondent failed to name customer BSC, or any other customer or guarantor who was "legally liable for the debt" secured by the Lien. NRS 108.239(12) does not magically transform the owner of liened real property, who had no contract with the lien claimant, into a defendant who is himself now personally liable for amounts owed, and unable to be satisfied from his Property, simply because a lien claimant chose not to sue its breaching customer.

(ii) Steppan's Theory Is Contrary to Longstanding Nevada Case Law.

Indeed, it has been the undisputed and repeatedly upheld law of this State for over 90 years that the owner of real property subject to a statutory lien is **not** thereby made personally liable for any deficiency beyond the value of the liened property, absent some basis for such personal liability, such as the owner also being the party who contracted with the lien claimant for the work. *See, e.g., Didier*

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v. Webster Mines Corp., 49 Nev. 5, 234 Pac. 520 (1925) (real property owner was not personally liable for any amount of the miner's lien claim which could not be satisfied from the property, in the absence of privity of contract between the real property owner and the lien claimant). As noted above, the lower court has already ruled in this case (Decision, **Exh. "H"** hereto, at pg. 4, ¶10, ll. 4-6) that the Iliescus were not a party to the contract between the Property's would-be future owner and Lien claimant Steppan. No cross-appeal has been filed to challenge that portion of the ruling.

In *Nevada National Bank v. Snyder*, 108 Nev. 151, 826 P.2d 560 (1992) (partially abrogated on other grounds by *Executive Mgmt Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002)) this Court rejected the assertion of two mechanic's lien claimants that a bank which owned the subject liened property, was liable to them for the deficiency "residue," not able to be satisfied through foreclosure sale of that property. Because the bank had not been the lien claimants' customer, which had requested their services, and then failed to pay them in breach of contractual promises, this Court firmly rejected the lien claimants' contention:

> The district court judgment stated that C & R and Depner [the mechanic's lien claimants] were entitled to a "personal judgment for the residue against the Bank [the property owner]." The [property owner] asserts that the remedy to enforce a mechanic's lien is to force a sale of the property and that it is not liable for any deficiency if the monies from the sale do not cover the amount of [the mechanic's lien claimants'] liens. **We agree.**
>
> In *Milner et al. v. Shuey,* 57 Nev. 159, 69 P.2d 771 (1937), this court stated that **there must be a contractual relationship** regarding the furnishing of labor and materials **between the party foreclosing the lien and the party against whom personal liability is sought**. This court stated: "[S]uch a relation **is essential to establish personal liability against the owner of the property** in addition to a judgment foreclosing a lien...." *Id.* at 179, 69 P.2d at 772. Further, the statutory language regarding deficiencies and personal actions is illuminating here. NRS 108.238 provides:
>
> > **Right to maintain personal action for debt not impaired**. Nothing contained in NRS 108.221 to 108.246, inclusive, shall be construed to impair or affect the right of any person to whom any debt may be due for work done or material furnished to maintain a personal action to recover such debt *against the person liable therefor.* (Emphasis added.)
>
> It is unjust to hold the [property owner] personally liable for a deficiency when it was not a party to the [lien claimant/customer] contract, and because the [property owner] is not **the person liable for the debt** under NRS 108.238.

Snyder, 108 Nev. at 157, 826 P.2d at 563-64 (1992)(bolded and underlined emphasis and bracketed insertions/replacements added, italicized emphasis in original).

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This precise analysis is equally applicable herein. The Iliescu Appellants were not a party to the architectural services contract on which Steppan's Lien is based. As such, the claim that these Appellants can somehow be made liable for any residue owed to Steppan beyond the sale value of their liened Property, must fail, as they were not "the person liable for the debt" in the first instance.[1] *See, also, Reeder Lathing Co., Inc. v. Allen*, 425 P.2d 785, 786 (Cal. 1967)("The part of the judgment that defendant is personally liable to plaintiff is **clearly erroneous**. In the absence of a contract between a lien claimant and the property owner, the right to enforce a mechanic's lien against real property **does not give rise to personal liability** of the owner.") [Emphasis added.]

C. BASED ON THE FOREGOING, NO FURTHER COLLATERAL IS REQUIRED.

NRCP 62(d) contemplates the issuance of a supersedeas bond in order to allow a stay to come into effect as a matter of right. However, where the respondent is otherwise adequately protected via other appropriate security no such bond is necessary (*McCullough v. Jenkins*, 99 Nev. 122, 659 P.2d 302 (1983)) and where adequate collateral already exists to protect a Judgment Creditor, a bond or other further security is not required as a prerequisite to a stay. *Ries v. Olympian, Inc.*, 103 Nev. 709, 747 P.2d 910 (1987). In the present case, adequate alternative collateral and security does already exist, namely, the very liened Property at issue herein. If that Property is worth more than the Judgment (as **Exhibit "I"** hereto would indicate), then Steppan would be fully secure as to even a traditional Judgment. But even if that is not the case, the Steppan Lien still secures as much value as Steppan is legally entitled to receive under a Judgment upholding a Mechanic's Lien: the full value of the Property itself, up to the Lien amount, being the full extent of the recovery to which he is entitled. Thus, by virtue of the very nature of the relief which Steppan has obtained, he is already in possession of all the security to which he is legally entitled, and is fully protected pending this appeal.

(i) The *Nelson v. Heer* Factors.

In *Nelson v. Heer*, 121 Nev. 832, 122 P.3d 1252 (2005), this Court updated its prior *McCullough* analysis on this issue, and identified certain factors to be considered when determining

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[1]The *Snyder* decision also rejected the argument that the owner of real property subject to a mechanic's lien could be held liable for the residue beyond the value of the property on an "unjust enrichment" theory, based on the work having benefitted the owner's property. *Snyder*, 108 Nev. at 157, 826 P.2d at 563. In the present case, Steppan's complaint contained but one cause of action, for the foreclosure of his Lien, and did not assert any unjust enrichment claim against the Iliescus in any event, such that this Court need not even reach any such alternative theory of personal liability.

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whether to issue a stay pending appeal, without requiring a bond, based on Seventh Circuit law analyzing the federal equivalent to NRCP 62(d). This Court explained: "The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed **by preserving the status quo** and preventing prejudice to the creditor arising from the stay. However, a supersedeas bond **should not be the judgment debtor's sole remedy**, particularly **where other appropriate, reliable alternatives exist**. Thus, the focus is properly on **what security will maintain the status quo** and protect the judgment creditor pending an appeal." *Heer*, 121 Nev. at 835; 122 P.3d at 1252 [emphasis added]. Courts may review the following factors, to assist when making that determination:

> (1) the complexity of the collection process; (2) the amount of time required to obtain a judgment after it is affirmed on appeal; (3) the degree of confidence that the district court has in the availability of funds to pay the judgment; (4) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (5) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.

Id. 121 Nev. at 836, 122 P.3d at 1252.

These factors are not dispositive, but are meant to assist a court in reaching the ultimate question of how to "maintain the status quo." Thus, a court need not rely on all of these factors. *See e.g., Ground Improvement Techniques, Inc. v. Morrison Knudsen Corp.*, 2007 U.S. Dist. LEXIS 30836, at 7 (D. Colo. 2007) (waiving bond based on factors 1, 2, and 4); *In re Oil Spill by the "Amoco Cadiz,"* 744 F. Supp. 848, 850 (N. D. Ill. 1990)(waiving bond based on only one factor), *Hurley v. Atlantic City Police Dept.*, 944 F. Supp. 371, 375 (D. N.J. 1996) (waiving bond based on two factors).

In the present matter, given that the Judgment, as a matter of law, may only allow a recovery up to the lien foreclosure sale value of the Property, and claimant is not entitled to collect any post-foreclosure deficiency or residue as a personal claim against the Iliescus, beyond that value, in any event, the Lien against the Property is, by definition, full collateral for the Judgment. Therefore, the best way to "maintain the status quo" is for a Stay to simply issue, with the Property to remain subject to the Mechanic's Lien (as well as to the Judgment allowing foreclosure thereon) until such time as a final decision in this appeal is reached. Otherwise, the Iliescus will have to allow the sale and loss of the Property (losing the very *res* which they seek to protect by having appealed), or be forced to

obtain and post a $4.5 million bond, which might be fair for a large corporate defendant, but is an exorbitant and unfair challenge to an elderly retired couple.

Based thereon, any one, or all, of the *Heer* factors supports entry of a Stay without further collateral: (1) the collection process in this case will not be complex, but simple, as the Property will simply be sold as has been ordered, in the case of Steppan prevailing on appeal; (2) no time is required to obtain a new judgment after appeal, as the Judgment, if affirmed, will then simply remain in place upon remand; (3) the Property will clearly remain in place and available to satisfy the Judgment, as it is bare commercial real property, containing no crops or timber, or any mine which might be wasted or depleted, and therefore cannot be lost; nor are there any improvements thereon which might be accidentally destroyed during the stay; (4) this fact is so plain that the cost of a bond would be a waste of money; (5) nor is there any reason to believe it would be feasible for the Appellants to secure and post a bond large enough to cover the full $4.5 million+ judgment.

(ii) The NRAP 8(c) Factors.

This motion is not governed solely by *Heer*, but also by NRAP 8(c), which lists the following factors to be considered in ruling hereon: "(1) whether the object of the appeal . . . will be defeated if the stay . . . is denied" and "(2) whether appellant . . . will suffer irreparable or serious injury if the stay or injunction is denied," versus "(3) whether respondent . . . will suffer" any such injury. These factors all favor issuance of the stay in this case. The object of the present appeal (preserving the Appellants' Property and avoiding having it sold off at a foreclosure sale) will, indeed, be defeated if the stay is denied, which, rather than maintaining the status quo, will cause prejudicial and irreparable injury to Appellants, whose whole purpose in pursuing this appeal will be thwarted. On the other hand, no injury or prejudice will inure to Respondent Steppan if he is not granted additional security at this time, as his Mechanic's Lien against the Property, and Judgment thereon, will remain in place pending this appeal, upon which he can readily foreclose hereafter, if he prevails.

A final factor which may be reviewed under NRAP 8(c)(4), the likelihood of the Appellants prevailing on appeal, is obviously difficult to cover in a motion limited to ten (10) pages under NRAP 27. Nevertheless, in order to give this Court a flavor of the arguments to be raised on appeal, and the Nevada precedents on which they are based, a copy of pages 1-3 of an Attachment to Appellants'

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Docketing Statement, listing the ten issues on Appeal, is attached herewith as **Exhibit "K,"** and a copy of a post-Judgment Motion to Alter and Amend, and a Reply brief in support thereof, are attached herewith, without exhibits, as **Exhibits "L"** and **"M"** hereto. These Exhibits demonstrate the meritorious nature of this appeal, and the substantive and serious questions raised herein, on which there is a plausible basis to determine that success is highly likely.

(iii) No Supersedeas Bond or other Bond Is Necessary.

In conclusion, whether the Property sells for more or less than the Mechanic's Lien Judgment amount, Steppan has no right to seek any post-sale deficiency against the Iliescus. Consequently, there is, by definition, no reason to require additional security during a stay pending the outcome of this appeal. Steppan is by definition fully secured up to the full legally collectable extent of the Lien amount calculated in the Judgment. *See, e.g., Zoccole Construction, Inc. v. Goodemote*, 2005 WL 5621619 (Penn. Ct. App. 2005) (upholding, over objection, stay order granted without bond, including because the stayed judgment "is and has been collateralized and secured in first lien position since the moment appellant filed its mechanic's lien claim.").

III. CONCLUSION

For the reasons set forth above, this Court should grant a stay of execution, preventing Steppan from going forward with any Mechanic's Lien foreclosure sale, pending the present appeal, without requiring any bond or other further security as a condition to such a stay, beyond the fully adequate security Steppan already enjoys for his Lien-upholding Judgment, via that very Lien against the undeveloped liened Property.

DATED this 6th day of August, 2015.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 6th day of August, 2015, service was made by the following mode/method a true and correct copy of the foregoing **APPELLANTS' MOTION FOR STAY OF EXECUTION OF JUDGMENT OR FORECLOSURE OF MECHANIC'S LIEN PENDING THIS APPEAL, WITHOUT THE NECESSITY OF POSTING ANY FURTHER SECURITY**, to the following person(s):

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