

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

2 PROIMTU MMI LLC, a Nevada limited
3 liability company,

4 Appellant,

5 vs.
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7 TRP INTERNATIONAL, INC., a foreign
8 corporation,

9 Respondent.

SUPREME COURT CASE NO.:
68942

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Tara K. Lindeman
Clerk of Supreme Court
DISTRICT COURT CASE NO.
CV-36431

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11 **APPELLANT PROIMTU MMI, LLC'S**
12 **REPLY IN SUPPORT OF MOTION TO STAY UNDER NRAP 8(c)**

13
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SUPPLEMENTAL NRAP 26.1 DISCLOSURE

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

Proyectos E Implantacion de Tuberias, S.L is the holder of 100% of the membership interests of Proimtu MMI, LLC.

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

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*Attorneys for Defendant and Appellant
Proimtu MMI, LLC*

1 **I. LAW AND ARGUMENT**

2 **A. TRP stipulated that the Owner had actual knowledge about**
3 **Proimtu's work on the Project. Thus, Proimtu can perfect its lien**
4 **without service of a notice of right to lien under NRS 108.245.**
5 **Because it is highly probable that Proimtu will prevail on appeal the**
6 **motion for stay should be granted and the lien and bond should**
7 **remain in place until the appeal is decided.**

8 The Opposition ignores that the Owner had actual notice that Proimtu was
9 working on the project from the time Proimtu was hired and observed Proimtu on the
10 jobsite. Instead, TRP spends pages¹ discussing procedural and forum selection issues,
11 none of which are relevant to whether a stay should be granted or the likelihood of
12 Proimtu prevailing on appeal.

13 TRP's stipulation about the owner's actual knowledge and binding Nevada
14 precedent, **requires** that the Order expunging the lien and exonerating the bond be
15 overturned. Substantial compliance is all that is required to perfect a lien. *Hardy*
16 *Companies, Inc. v. SNMARK, LLC*, 126 Nev. Adv. Op. 49, 245 P.3d 1149, 1155
17 (2010). Where an owner has actual knowledge of a potential lien claimant's work,
18 such knowledge takes the place of service of the notice of right to lien for perfection
19 purposes. *Id.* **"Because the lessor [owner] had actual knowledge of the work, the**
20 **purpose behind the pre-lien notice had been satisfied."** *Id.* (Emphasis added).

21 In the Order expunging the lien, TRP stipulated to a finding by the court that
22 the owner had actual knowledge of Proimtu's work:

23 **"Kevin Smith, the owner's representative and CEO, was physically**
24 **present at the Project at the time Proimtu was working on the**
25 **Project and knew of Proimtu's work and involvement on the Project**
26 **at the time Proimtu was retained."**

27 ¹ Pursuant to NRAP 27(a)(d)(2), TRP's response to the Motion was limited to 10
28 pages. TRP exceed its page limit and its response is subject to being stricken for non-
compliance.

1 See Order, Exhibit “3” to the Motion at ¶ 13 (emphasis added). TRP fails to address
2 this critical finding or the legal effect of actual notice as discussed in *Hardy*. There is
3 no factual dispute about whether the owner had actual or imputed knowledge in this
4 case, despite TRP’s argument to the contrary. See Opposition at 13. The issue is a
5 legal one: the district court disregarded *Hardy*, which holds that actual knowledge
6 substitutes for service of the notice of right to lien, and incorrectly expunged
7 Proimtu’s lien and exonerated the surety bond. Accordingly, Proimtu has an
8 overwhelming likelihood of success on appeal which strongly favors a stay to insure
9 that Proimtu retains the benefits of its lien and the surety bond.

10 **B. Proimtu would suffer serious and irreparable, harm if required to**
11 **litigate in Spain in violation of NRS 108.2453.**

12 NRAP 8(c) only requires a showing that the party seeking relief suffer
13 “irreparable or serious injury.” NRAP 8(c). This factor also weighs heavily in favor
14 of the stay. TRP makes two arguments to demonstrate that Proimtu would not suffer
15 irreparable harm if the bond is exonerated while the appeal is decided.

16 First, TRP argues the financial issue. Without the benefit of any evidence, not
17 even a declaration, TRP suggests that it could satisfy a judgment² or in the alternative
18 the lien could be reinstated against the power plant property. Opposition pp. 7-8.
19 Proimtu’s argument lacks any evidentiary support for either of these alternatives.
20 Furthermore, if Proimtu succeeds on appeal, it should not be in a worse position than
21 when the district court incorrectly decided to expunge the lien and exonerate the bond.
22 Nevada’s mechanics’ lien statute does not require an unpaid contractor with a lien to
23 chase a judgment debtor in another country or to speculate on whether the property
24 may still be available as security for the judgment.

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 ² The Declaration of Mr. Gonzales containing facts that TRP is judgment proof is the only evidence
28 before this Court on TRP’s ability to satisfy a judgment. TRP has presented nothing to rebut this
evidence.

1 Second, TRP argues that Proimtu would not be harmed by being forced to
2 litigate in Spain while the appeal is decided. Opposition p. 10. TRP filed a motion to
3 dismiss Proimtu's lawsuit to perfect the lien shortly after Judge Elliot incorrectly ruled
4 the lien could not be perfected. TRP claims this matter should be litigated in Spain.
5 Exhibit "11". Judge Elliott will rule on November 12th on TRP's motion to dismiss
6 and preliminarily indicated his inclination to dismiss because Proimtu could not
7 perfect its lien. Declaration of Brenoch Wirthlin ¶¶ 3-4. The prejudice to Proimtu, if
8 forced to litigate in Spain while the appeal is pending, is obvious.

9 Furthermore, TRP's legal argument regarding the validity of the forum
10 selection clause is wrong. TRP claims that the statute only applies to lien claimants,
11 citing the legislative history about the purpose of the statute. Opposition p.11.
12 Proimtu is a lien claimant by definition. NRS 108.2214(1) provides in relevant part
13 that the term "lien claimant" includes "any person who provides work, material or
14 equipment with a value of \$500 or more to be used in or for the construction,
15 alteration or repair of any improvement, property or work of improvement." If TRP
16 means that Proimtu is not a lien claimant because of Judge Elliott's ruling on the lien,
17 then the argument begs the question, because that is the purpose of the appeal.

18 Moreover, NRS 108.2453 needs no clarification from the legislative history.
19 NRS 108.2453 unambiguously applies to all construction contracts in Nevada and the
20 forum selection clause TRP relies upon. Any "condition, stipulation or provision in a
21 contract ... is contrary to public policy and is void and unenforceable" that seeks to
22 "[m]ake the contract or other agreement subject to the laws of a state other than this
23 State" or "[r]equire any litigation, arbitration or other process for dispute resolution on
24 disputes arising out of the contract or other agreement to occur in a state other than
25 this State." NRS 108.2453 (West).

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1 **C. TRP has not offered any evidence that it would be irreparably**
2 **harmed by a stay.**

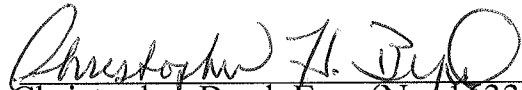
3 Again without any evidence, TRP argues that it would be irreparably harmed if
4 the bond is not exonerated because the general contractor is holding funds.
5 Opposition p. 12. In order to demonstrate irreparable harm TRP would have to
6 provide a declaration from the general contractor, to prove the amount and reason for
7 any withholding. In the absence of such proof this Court is left to speculate whether
8 there is any harm.

9 **II. CONCLUSION**

10 For all the foregoing reasons, Proimtu respectfully requests that this Court grant
11 the Motion reinstating the lien and the bond until the appeal is concluded.

12 DATED this 22nd day of October, 2015.

13 **FENNEMORE CRAIG, P.C.**

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1 **CERTIFICATE OF COMPLIANCE**

2 1. I hereby certify that this Motion complies with the formatting
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the
4 type style requirements of NRAP 32 (a)(6) because:

5 ☒ [X] This Motion has been prepared in a proportionally spaced typeface
6 using Microsoft Word version 2010 in Times New Roman with a font size of 14; or

7 ☐ [] This brief has been prepared in a monospaced typeface using [state
8 name and version of word-processing program] with [state number of characters per
9 inch and name of type style].

10 2. I further certify that this Motion complies with the page- or type-volume
11 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
12 NRAP 32(a)(7)(C), it is either:

13 ☐ [] Proportionately spaced, has a typeface of 14 points or more, and
14 contains _____ words; or

15 ☐ [] Monospaced, has 10.5 or fewer characters per inch, and contains
16 _____ words or _____ lines of text; or

17 ☒ [X] Does not exceed 5 pages.

18 3. I hereby certify that I am counsel of record for Petitioner-Defendant,
19 Grupo FAMSA, S.A. de C.V. in this matter, that I have read the foregoing Motion to
20 Strike B. E. Uno LLC's Supplemental Authorities and Supplemental Appendix Filed
21 After The Writ Of Prohibition Had Been Fully Briefed and that to the best of my
22 knowledge, information and belief, it is not frivolous or imposed for any improper
23 purpose. I further certify that this Motion complies with all applicable Nevada Rules
24 of Appellate Procedure, in particular N.R.A.P 28(e), which requires every assertion in
25 the Motion regarding matters in the record to be supported by a reference to the page
26 of the transcript or appendix where the matter relied on is to be found. I understand

27 ///

1 that I may be subject to sanctions in the event that the accompanying Motion is not in
2 conformity with the requirements of the Nevada Rules of Appellate Procedure.

3 Dated this 22nd day of October, 2015.

4 **FENNEMORE CRAIG, P.C.**

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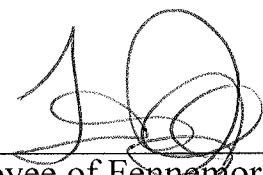
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CERTIFICATE OF SERVICE

Pursuant to Nevada Rule of Appellate Procedure 25(c)(1), I hereby certify that I am an employee of Fennemore Craig, P.C. and that on this 22nd day of October, 2015, I caused the foregoing **APPELLANT PROIMTU MMI, LLC’S REPLY IN SUPPORT OF MOTION TO STAY UNDER NRAP 8(c)** to be served by submission to the electronic filing service for the Nevada Supreme Court upon the following to the email address on file and by depositing same for mailing in the United States Mail, in a sealed envelope addressed to:

Becky A. Pintar, Esq.
Pintar Albiston, LLP
6053 S. Fort Apache Road, #120
Las Vegas, NV 89148



An employee of Fennemore Craig, P.C.