THE SUPREME COURT OF THE STATE OF NEVADA

PROIMTU MMI LLC, a Nevada limited liability company, Appellant, vs. TRP INTERNATIONAL, INC., a foreign corporation, Respondent.	Case No. 68942 District Court Case No. CV-9643

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APPELLANT PROIMTU MMI, LLC'S REPLY BRIEF

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Docket 68942 Document 2016-11959

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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I. INTRODUCTION

TRP's Answering Brief ignores completely that portion of the Findings of Fact and Conclusions of Law that proves the Owner had actual knowledge of Proimtu and its work on the project. In Finding of Fact 13, TRP stipulated that "**Kevin Smith, the owner's representative and CEO, was physically present at the Project at the time Proimtu was working on the Project and knew of Proimtu's work and involvement on the Project at the time Proimtu was retained.**" Vol. 2, JA0413(emphasis added). TRP neither challenges this admission, nor analyzes its effect on the issue of the owner's actual knowledge.

Furthermore, TRP's own evidence establishes the owner's actual knowledge about Proimtu's work. Exhibit 5 to TRP's Motion to Expunge is a newspaper article, which describes the owner's actual knowledge of the work Proimtu performed from the beginning of the project. According to the article, the owner knew of Proimtu's involvement from the beginning of the project because it approved the original job classification for Proimtu's employees for federal wage purposes. Vol. 1, JA0073. TRP neither challenges this evidence, nor analyzes its effect on the issue of the owner's actual knowledge.

Even the evidence TRP does discuss in its brief proves the owner had knowledge (both actual and constructive) of Proimtu's work. TRP focuses on only

three pieces of evidence: (1) an email from TRP to Cobra for permission to hire Proimtu, (2) the owner videos of the ongoing construction, (3) and a press release about the parties involved in the development and construction of the project. Vol. 1, JA0138-139, 167 and 178-179. TRP's evidence proves the owner's actual knowledge because the owner was onsite when Proimtu was installing the heliostats. TRP's evidence also proves that the owner had constructive knowledge through the general contractor Cobra, whose parent company joint ventured the project with the owner. Contrary to TRP's argument, an owner can receive knowledge about a lien claimant without receiving anything in writing, regular progress updates or reviewing billings. Any evidence that the owner was aware of Proimtu's work is sufficient to perfect the lien. Furthermore, TRP did not introduce any evidence that the owner was prejudiced in any way by not receiving the written notice described in NRS 108.245.

Finally, TRP claims that the labor exception in NRS 108.245 for pre-lien notice does not apply to subcontractors, like Proimtu. TRP relies on California law, which limits who can claim the labor exception, but Nevada law is different. NRS 108.245 permits any lien claimant to claim the labor exception. Lien claimant, by statutory definition, includes subcontractors. TRP's argument is also contradicted by TRP's own email describing the services Proimtu provided as labor, and the language and payment provisions of the contract, which calculated Proimtu's

payment amount based upon the number of heliostats assembled and erected. Vol. 1, JA0138-139 and 0022.

II. ARGUMENT

A. Standard of review: Abuse of discretion.

This Court reviews substantial compliance determinations for abuse of discretion. *Schleining v. Cap One, Inc.*, 130 Nev. Adv. Op. 36, 326 P.3d 4, 8 (2014), *reh'g denied* (Aug. 5, 2014); *Redl v. Heller*, 120 Nev. 75, 81, 85 P.3d 797, 800–01 (2004); *Las Vegas Plywood & Lumber, Inc. v. D&D Enters.*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982). "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. Adv. Op. 8 (2016). A factual determination is clearly erroneous under two different circumstances. A finding of fact can be clearly erroneous if there is evidence to support it but on the entire evidence the reviewing court left with the definite and firm conviction that a mistake has been committed. *Unionamerica Mortg. & Equity Trust v. McDonald*, 97 Nev. 210, 211–12, 626 P.2d 1272, 1273 (1981). A finding of fact may also be clearly erroneous where there is no evidence in support of the lower court's findings. *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984).

B. Substantial compliance with NRS 108.245 does not require written

notice, proof of routine inspections, review of billings or knowledge of the value of the contract. Any means that makes the owner aware of Proimtu's work is sufficient to establish substantial compliance with NRS 108.245.

TRP makes a two-prong argument regarding compliance with NRS 108.245. First, TRP claims that the absence of written notice is fatal to Proimtu's lien citing *Matter of Stanfield*, 6 B.R. 265 (Bankr. D. Nev. 1980). Answering Br. at 9. Second, TRP argues there was no evidence that the owner knew of Proimtu and its work. Neither argument is supported by the case law or the record.

If an owner has actual knowledge of the lien claimant and the work, a writing is not required to comply with NRS 108.245. TRP misconstrues *Stanfield*. *Stanfield* holds that when an owner has actual knowledge of the work, written notice is not required because actual knowledge is analogous to a direct contract between the lien claimant and the owner. 6 B.R. at 268–69. NRS 108.245 does not require a written prelien notice for one who contracts directly with the owner. NRS 108.245(5).

TRP also relies on *Schofield v. Copeland Lumber Yards, Inc.*, 101 Nev. 83, 85, 692 P.2d 519, 520 (1985) to support the argument that Proimtu's failure to deliver written notice to the owner is fatal to enforcement of the lien in this case. Answering Br. at 9–10. Contrary to TRP's argument, *Schofield* does not require written notice for substantial compliance with NRS 108.245. *Schofield* dealt with

NRS 108.226(2)(d), which requires the terms of the contract to be described in the lien. In *Schofield*, the court reversed summary judgment in favor of the lienholder because the lienholder had failed to include in the notice of lien any of the terms of the contract that resulted in the lien. 101 Nev. at 85, 692 P.2d at 520. The property owner had no idea what the terms of the contract required and there were no facts in the record that would substitute for information about the contract. As a result, the lien could not be enforced. Unlike *Schofield,* however, in this case there is substantial evidence of notice to the owner to substitute for the statutory written notice required by NRS 108.245. Thus, there was no "total elimination" of a requirement of the lien statute as TRP suggests.

TRP's argument that the lack of **written** notice makes substantial compliance impossible in this case is contrary to the line of Nevada cases that found substantial compliance with NRS 108.245 without a writing. This Court's holding in *Hardy Companies* is illustrative: "[A]ctual knowledge" is the material element and that it can be shown by "any . . . means that would make the owner aware that the third-party claimant was involved with the work performed on its property." *Hardy Companies, Inc. v. SNMARK*, LLC, 126 Nev. 528, 542, 245 P.3d 1149, 1158 (2010).

Hardy also undermines TRP's suggestion that only evidence of certain conduct is sufficient for notice to the owner. TRP argues that the owner must

receive regular progress updates, review billings for the project and know the scope and value of the contract for there to be sufficient knowledge. Answering Br. at 5, 10–11. According to TRP, the owner simply acknowledged Proimtu's presence on the site. *Id.* at 8. But, TRP's argument mischaracterizes the uncontroverted evidence of the owner's actual knowledge, including TRP's own evidence and stipulation of actual knowledge and the findings of the district court. Moreover, contrary to TRP's assertion, the district court never found that there was insufficient evidence of actual notice—only that notice to Cobra, the general contractor, was insufficient to establish actual notice to the owner. *Compare* Answering Br. at 6, *with* Vol. 2, JA 423, FOF 7.

The issue then is whether the owner, Solar Reserve, had knowledge of Proimtu and its work. In this case, there was substantial, uncontroverted evidence of the owner's actual notice of Proimtu and its work. TRP stipulated that "**Kevin Smith, the owner's representative and CEO, was physically present at the Project at the time Proimtu was working on the Project and knew of Proimtu's work and involvement on the Project at the time Proimtu was retained.**" Vol. 2, JA 422.

Besides TRP's admission of actual notice, TRP provided other evidence of the owner's actual notice. TRP's newspaper article about the owner's approval of Proimtu's original employee classifications for the work proves either direct contact

between Proimtu and the owner or, at the very least, the owner's actual knowledge about Proimtu and the work Proimtu agreed to perform. Vol. 1, JA 0073. The owner could not assess the propriety of Proimtu's wage classification without knowing the details of the work Proimtu was contracted to do.

TRP fails to address either the stipulation or its own exhibit, instead focusing on the owner's constructive knowledge through Cobra, which is discussed in detail below. TRP's failure to address the stipulation and the article, both of which prove the owner's actual knowledge of Proimtu and its work, should be considered a confession of error, and cause the district court's order to be reversed and cause reinstatement of the lien and surety bond. *A Minor v. Mineral Cty. Juvenile Dep't*, 95 Nev. 248, 249, 592 P.2d 172, 173 (1979) (holding that because the answering brief did not address the assignment of error, the court would treat the failure as a confession of error and remand the case). Regardless, this same evidence demonstrates the district court's abuse of discretion in expunging the lien and exonerating the surety bond.

In addition, Proimtu established actual knowledge through the owner's videos, which show the owner's detailed knowledge of the construction, including Proimtu's erection of the heliostats. Vol. 1, JA 0167. The owner's videos demonstrate the owner's presence and detailed knowledge of the project as the project is being constructed. In one video, Kevin Smith, the owner's CEO,

indicates that Solar Reserve, the owner, refined the unique and innovative technology that allows the plant to store solar energy. *Id.* Part of that technology is the heliostats assembled and installed by Proimtu. Brian Painter, the site manager for the owner, describes the process for storing the energy. *Id.* According to Painter, the process begins in the partially constructed heliostat field (Proimtu's work) where Painter is standing in the video. *Id.* The process to make the process work depends on the heliostats. *Id.*

TRP tries to discount Painter's knowledge of the heliostats by claiming Painter was only on site to film a "promotional video." Answering Br. at 12 There is no evidence to support TRP's promotional video argument. Watching both videos it is apparent that Painter's role was more than a bit actor in a promotional video. Painter was the owner's site manager. As his title implies, Painter was the owner's eyes and ears for the project as it was being built. Painter knew minute details about Proimtu's work. For example, in the video, Painter tells the viewer the approximate number of heliostats being installed by Proimtu.[1]

TRP attempts to discount the owner's presence during the construction process. TRP suggests that the size of the project makes the owner's presence

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[1] Proimtu agreed to assemble and install 10,375 heliostats. Vol. 1, JA 0022. Painter was only missed the number by 75. He indicates in the video that 10,300 heliostats would eventually be installed.

irrelevant for purposes of notice. Answering Br. at 12. Smith and Painter's detailed knowledge about the process and the construction, however, presents a more compelling case for notice to the owner than inspections by the owner's attorney in *Fondren v. K/L Complex, Ltd.*, 106 Nev. 705, 800 P. 2d 719 (1990), even if this project was larger than the one being built in *Fondren*.

The other way TRP attempts to avoid the evidence of owner's knowledge from the video is by adding notice requirements to NRS 108.245 that are not found in the statute. For example, TRP argues that notice requires an owner to know about the scope of work or the value of the work. Answering Br. at 5. TRP made this same argument to the district court; but it is contrary to *Hardy* and the language of NRS 108.245. TRP relies on the form of written pre-lien notice approved by NRS 108.245. However, the form does not require the contractor to state the value of the contract or the scope. The form requires only the name of the contractor and a general description of the materials or work provided, which the owner had actual and constructive knowledge of in this case.

Further evidence that the contract's value is irrelevant is found in the legislative history of NRS 108.245. When NRS 108.245 was originally enacted, NRS 108.245 did require estimated value of the contract as part of the form, but that requirement was deleted when NRS 108.245 was amended in 2003. *See* PUBLIC UTILITIES—MECHANICS LIENS—MATERIALMEN'S LIENS, 2003 Nevada

Laws Ch. 427 (S.B. 206). TRP's argument may have misled the district court about the extent of the notice required for substantial compliance and caused the district court to disregard this relevant, unrefuted evidence of notice.

Finally, the last issue related to substantial compliance is prejudice to the owner. "[S]ubstantial compliance with the technical requirements of the lien statutes is sufficient to create a lien on the property where . . . the owner of the property receives actual notice of the potential lien claim and is not prejudiced. *Bd. of Trustees of Vacation Trust Carpenters Local No. 1780 v. Durable Developers, Inc.*, 102 Nev. 401, 410, 724 P.2d 736, 743 (1986). TRP provided no evidence that the owner was prejudiced in any way and does not discuss the issue. TRP apparently concedes that owner was not prejudiced by lack of written notice.

Viewing the evidence of actual knowledge as a whole, there is no doubt that the owner had knowledge of Proimtu and its work and there was no evidence that the owner was prejudiced. Thus the district court's failure to find that Proimtu substantially complied with NRS 108.245 and the district court's expungement of the lien and exoneration of the bond was an abuse of discretion.

C. The district court misunderstood or ignored evidence of the relationship between Cobra and the owner and thus failed to properly consider Cobra's knowledge about Proimtu when deciding whether there had been substantial compliance with NRS 108.245.

In this case, Cobra's knowledge of Proimtu's work is imputed to the owner. The *Hardy* Court explained that Nevada's substantial compliance doctrine requires imputation of notice from the owner's agent to the owner where the agent witnesses or inspects the property being improved by the lien claimant:

> **An owner who witnesses the construction, either firsthand or through an agent, cannot later claim a lack of knowledge regarding future lien claims.**

Hardy, *supra*, 245 P.3d at 1157 (emphasis added).

Here, Cobra, the general contractor, knew of Proimtu and its work because TRP requested Cobra's permission to hire Proimtu. In addition, Proimtu had an international reputation for field assembly work on thermal solar projects. Vol. 1, JA0138. The request to hire Proimtu and the information about Proimtu's experience was the purpose of the TRP email to Cobra describing Proimtu's work. *Id.* Because the email is between TRP and the general contractor, Cobra, TRP claims that it does not show that the owner knew about Proimtu's work. Answering Br. at 11. TRP's argument fails to take into consideration, however, the relationship between the general contractor and the owner.

The agency relationship between the general contractor, Cobra, and Cobra's parent, ACS Cobra, and ACS Cobra's partnership with the owner of the project requires Cobra's knowledge of Proimtu's work to be imputed to the owner. The owner's press release provides the uncontroverted evidence of these relationships.

The press release indicates that the owner, "Solar Reserve, is joined as investors in the project in the project by ACS Cobra, a worldwide leader in the engineering and construction of power plants and thermal solar facilities . . . ." Vol. 1, JA 0178. The release also proves that "ACS Cobra's Nevada based affiliate, Cobra Thermosolar Plants. Inc., was constructing the facility" for ACSCobra. *Id.* ACS Cobra's use of its subsidiary to construct the project creates an agency relationship between ACS Cobra and its contractor subsidiary:

> When a subsidiary provides services sufficiently important to a foreign corporation that, but for the subsidiary's actions, the parent company's employees and officers would have to enter the state to provide those services themselves, it becomes the agent of the parent. What is essential is that the agent be primarily or exclusively employed by the principal and not be engaged in similar services for other clients.

Airtran N.Y., LLC v. Midwest Air Grp., Inc., 46 A.D.3d 208, 218–19, 844 N.Y.S.2d 233, 241 (2007) (citations omitted).

The district court failed to consider the effect of ACS Cobra's ownership of the general contractor Cobra and ACS Cobra's investment in the project. Evidence of part ownership of the project by a company with common management with the general contractor was sufficient to impute knowledge to the owner for purposes of NRS 108.245 in *Matter of Stanfield*, 6 B.R. 265 (Bankr. D. Nev. 1980) (imputing to the owner the knowledge of the president of the general contractor who was also the general partner of a limited partnership that was a joint venture partner to the owner). Thus, in this case, the knowledge of one partner in

the project, ACS Cobra, gained through its agent, is the knowledge of all partners, including the owner, Solar Reserve. NRS 87.4315(6). This imputed knowledge of ACS Cobra's agent—the general contractor —would include the purpose of the heliostats and TRP's hiring of Proimtu to assemble and install the heliostats for the project. Neither TRP nor the district court understood or even acknowledged the unique relationship between the owner and Cobra's parent that make the knowledge of the general contractor, Cobra, the same as knowledge of the owner for purposes of substantial compliance with NRS 108.245.

TRP never challenged the facts that show the special relationship among Cobra, ACS Cobra and the owner. For the first time on appeal, however, TRP now claims that the press release and organizational charts showing that special relationship with the owner are "hearsay". Answering Br. at 13. TRP never raised that objection below and therefore it should be disregarded. *See, e.g.*, *Cooke v. Am. Sav. & Loan Ass'n*, 97 Nev. 294, 296, 630 P.2d 253, 254–55 (1981) (holding that a contention "raised for the first time on appeal . . . need not be considered").

D. The exception from pre-lien notice for lien claimants providing only labor found in NRS 108.245(1) is not limited to "laborers." NRS 108.245 does not exclude subcontractors who are paid only for labor.

TRP claims that the labor exception in NRS 108.245 for pre-lien notice does not apply to subcontractors, like Proimtu. TRP argues that because the term labor is

not defined in the mechanics' lien statute, this Court should look to California law. Answering Br. at 14–15. TRP's argument, however, is contradicted by the plain language of NRS 108.245, TRP's own email describing the services Proimtu provided as labor, and the language and payment provisions of the contract.

First, NRS 108.245 differs from California's statute governing pre-lien notice. California expressly limits the exception to the pre-lien notice to a class of people, "laborers." Answering Br. at 14–15. Nevada's statute is broader. In Nevada the exemption applies to any "lien claimant" that "performs only labor." NRS 108.245(1). "Lien claimant" is defined by statute to include, builders, contractors, subcontractors, architects as well as laborers. NRS 108.2214(1). The plain language of NRS 108.245 would, therefore, permit a subcontractor who performs only labor to claim the exemption.

Second, Proimtu is entitled to claim the labor exemption because it only got paid for assembly and erection of the heliostats. TRP hired Proimtu to perform "**[h]eliostat assembly and field erection of heliostats**." Vol. 1, JA0138. (emphasis added). Every page of Proimtu's contract describes the contract as "Heliostat and Assembly and Field Erection" at the top of the page. Vol. 1 JA0013-55. The TRP/Proimtu contract was also defined as a "Supply" Contract. Vol. 1, JA0015. Proimtu did not manufacture the parts for the heliostats, but only assembled and erected them as required under the contract. Vol. 1, JA0016-18. TRP's description

of Proimtu's work as labor is also consistent with the payment terms of the contract. The total contract amount is computed on the number of heliostats "assembled and erected on site." Vol. 1, JA0022. Thus, TRP's description of Proimtu's work and the contract itself prove that TRP viewed the contract as one for "labor only" and that Proimtu was entitled to rely on the labor exception to the prelien notice requirement of NRS 108.245.

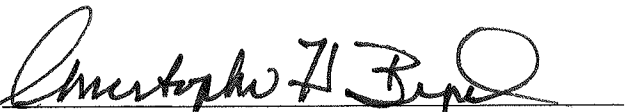
III. CONCLUSION

The district court ignored the undisputed evidence and TRP's concession that the Owner had actual notice of Proimtu's work from the outset. Nevada law clearly holds that an owner's actual notice of a contractor's work takes the place of serving a written notice of right to lien pursuant to NRS 108.245. Proimtu is also exempt from having to serve the owner with a notice of right to lien under NRS 108.245 because it performed only labor, as evidenced by TRP's own description of Proimtu's work and the terms of the contract.

Therefore, this Court should reverse the district court's Order on Petition to Expunge Lien and remand this matter with instructions to (i) reinstate Proimtu's lien and the surety bond that released the property from the lien; (ii) vacate the award of fees and costs to TRP; and (iii) consider an award fees and costs to Proimtu upon motion to determine the proper amount.

DATED this 15 day of April, 2016.

FENNEMORE CRAIG, P.C.

By: 

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CERTIFICATE OF COMPLIANCE

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

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

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

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

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

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

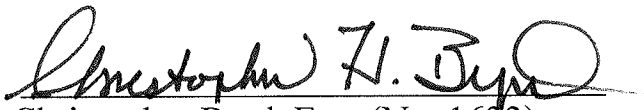
[X] Does not exceed 15 pages.

3. I hereby certify that I am counsel of record for Defendant and Appellant, Proimtu MMI, LLC in this matter, that I have read the foregoing Opening Brief and that to the best of my knowledge, information and belief, it is not

frivolous or imposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P 28(e), which requires every assertion in the Brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15 day of April, 2016.

FENNEMORE CRAIG, P.C.



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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 15th day of April, 2016, I caused the foregoing **APPELLANT PROIMTU MMI, LLC'S REPLY BRIEF** 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 Unites States Mail, in a sealed envelope addressed to:

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