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.

HALE LANE PEEK DENNISON AND HOWARD PROFESSIONAL CORPORATION, a Nevada professional corporation,

Respondent.

Electronically Filed
Nov 21 2018 01:00 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 76146

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

JOINT APPENDIX TO APPELLANT'S OPENING BRIEF VOLUME XII

Appeal from the Second Judicial District Court of the State of Nevada
in and for the County of Washoe County
Case No. CV07-00341

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Counsel for Appellants

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		13 Steppan Response to Owner Issues on AIA Contract, dated 12/20/05		JA1271-1273
		14 Architectural Design Services Agreement, dated 11/15/05		JA1274-1275
		15 Design Services Continuation Letter, dated 12/14/05		JA1276
		16 Design Services Continuation Letter, dated 2/7/06		JA1277
		17 Design Services Continuation Letter, dated 3/24/06		JA1278
		67 Proposal from Consolidated Pacific Development to Richard Johnson with handwriting, dated 7/14/05		JA1279-1280
		68 Land Purchase Agreement Signed by Seller, dated 7/25/05		JA1281-1302
		69 Addendum No. 1 to Land Purchase Agreement, dated 8/1/05		JA1303-1306
		70 Addendum No. 2 to Land Purchase Agreement, dated 8/2/05	VII	JA1307-01308
		71 Addendum No. 3 to Land Purchase Agreement, dated 10/9/05		JA1309-1324
		72 Addendum No. 4 to Land Purchase Agreement, dated 9/18/06		JA1325-1326

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
		76 Indemnity Agreement, dated 12/8/06 77 Waiver of Conflict Letter, dated 1/17/07	VII	JA1327-1328 JA1329-1333
35	09/04/12	Status Report [filed by Iliescu] (NV Sup. Ct. Case 60036)	V	JA1065-1066
34	08/31/12	Status Report [filed by Steppan] (NV Sup. Ct. Case 60036)	V	JA1063-1064
27	11/22/11	Stipulation	V	JA1005-1007
39	01/09/13	Stipulation and Order	VI	JA1082-1084
12	09/24/07	Stipulation to Consolidate Proceedings; Order Approving Stipulation	I	JA0216-0219
37	11/09/12	Stipulation to Dismiss Appeal (NV Sup. Ct. Case 60036)	V	JA1073-1079
14	03/07/08	Stipulation to Stay Proceedings Against Defendant Hale Lane and to Dismiss Claims Against Defendants Dennison, Howard and Snyder without Prejudice	II	JA0254-0256
10	08/03/07	Substitution of Counsel	I	JA209-0211
86	05/25/18	Supplemental Brief [filed by Third Party Defendant Hale Lane] re: Iliescu's Decision Not to Appeal Denial of Fees and Costs	XIII	JA2436-2438
9	07/30/07	Supplemental Response to Application for Release of Mechanic's Lien	I	JA0185-0208
4	05/03/07	Transcript of Proceedings – Application for Release of Mechanic's Lien held on May 3, 2007 [Transcript filed on June 29, 2007]	I	JA0107-0166
47	09/09/13	Transcript of Proceedings of Hearing regarding Motion for Continuance and to Extend Expert Disclosures	VI	JA1114-1149
88	06/06/18	Transcript of Proceedings of Third-Party Defendant Hale Lane's Motion For Summary Judgment of Third-Party Claims, filed June 21, 2018	XIII	JA2445-2496

DOC.	FILE/HRG. DATE	DOCUMENT DESCRIPTION	VOL.	BATES NOS.
93	12/11/13	Trial Transcript – Day 3, pages 811-815	XIII	JA2540-2545
73	10/24/17	Verified Memorandum of Costs [filed by Iliescus]	IX	JA1756-1761

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 21st day of November, 2018, the foregoing **JOINT APPENDIX TO APPELLANT'S OPENING BRIEF, VOLUME XII**, was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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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.	CASE NO. CV07-00341 (Consolidated w/CV07-01021) DEPT NO. 10
MARK B. STEPPAN, Plaintiff, vs. JOHN ILIESCU, JR., et al., Defendants.	**THIRD-PARTY PLAINTIFFS' REPLY POINTS AND AUTHORITIES IN SUPPORT OF COUNTERMOTION TO AMEND THIRD-PARTY COMPLAINT AND IN SUPPORT OF COUNTERMOTION FOR FURTHER TIME TO COMPLETE DISCOVERY**
AND RELATED THIRD-PARTY CLAIMS.	

COME NOW, Third-Party Plaintiffs, JOHN ILIESCU, JR., and SONNIA ILIESCU, individually and as Trustees of the JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST AGREEMENT (hereinafter "Third-Party Plaintiffs" or "the Iliescus" or "Iliescu"), and hereby file these Reply points and authorities in support of their Countermotion to amend their Third-Party Complaint, and also in support of their Countermotion seeking additional time to complete discovery, which Countermotions were filed on December 18, 2017, in conjunction with the Iliescus' Opposition to the Motion for Summary Judgment (Transaction #6442526) filed by Third-Party Defendant Hale Lane Peek Dennison & Howard ("Hale Lane") on November 11, 2017 (Transaction #6399784), which Motion sought Summary Judgment dismissal of the third-party claims of the Iliescus against Hale Lane

for legal malpractice/professional negligence. These Reply Points and Authorities are filed in response to the Hale Lane Opposition to Countermotion to Amend filed on January 8, 2018 in conjunction with Hale Lane's Reply in support of its Motion for Summary Judgment (Transaction # 6470368).

REPLY POINTS AND AUTHORITIES IN SUPPORT OF COUNTERMOTION TO AMEND

I. INTRODUCTION AND OVERVIEW

Third-Party Plaintiffs, the Iliescus, have, in response to the Hale Lane Motion for Summary Judgment, filed a Countermotion to Amend their Third-Party Complaint against Hale Lane, via a new pleading in substantially the form attached as Exhibit "1" to their Countermotion. Third-Party Defendant Hale Lane avers in its Opposition that the normal rules applicable to such a motion, calling for leave to be freely granted where justice so requires, do not apply, as any new filing would be "futile." This claim of futility is premised on the assertion that, if the Hale Lane Motion for Summary Judgment arguments are accepted, then the Iliescus' have no legally sustainable claims, no matter how well pled the same might be in an amended Third-Party Complaint. In that regard, Hale Lane continues to aver that the Iliescus should be penalized for having successfully mitigated their damages via their successful appeal of the trial court's earlier rulings herein, and that all of their losses are now non-recoverable because of their appellate success in reducing the amount of those losses, via the ultimate outcome of the Steppan-Iliescu lien litigation.

More particularly, Hale Lane now focuses its argument on an assertion that that appellate decision demonstrates that it was judicial error for Judge Adams to rule that Steppan's lien claim might be valid, despite his failure to provide the written notice required by NRS 108.245, if the Iliescus had actual notice of his work, under *Fondren v. KL Complex, Ltd.*, 106 Nev. 705, 800 P.2d 719 (1990) (hereinafter "*Fondren*"). This judicial error, it is argued, broke the causal chain as a superceding proximate cause of the Iliescus' losses, who can therefore no longer sue for legal malpractice.

However, this judicial error was invited and induced by Hale Lane, such that, even under the cases cited by Hale Lane in support of this argument, the Iliescus' Amended pleading is viable, not futile, and must be allowed (as shown by Section II B of this brief). Furthermore, Hale Lane's arguments would deprive the Iliescus of their legal right to reimbursement for the costs of mitigation,

which right has been long recognized in Nevada and elsewhere in a variety of contexts, and is a necessary correlate to the Iliescus' obligation, under Nevada law, to attempt mitigation (as shown by Section II E hereof.) For these and the other reasons set forth below, Hale Lane's lack-of-proximate-causation arguments must be rejected, and the Iliescus' countermotion should be granted, allowing the filing of their proposed amended pleading.

II. LEGAL ANALYSIS

A. Proximate Causation Still Exists and Can Be Shown Even where Damages and Losses Result from More than One Contributing Cause.

In claiming that any amendment to the Iliescu Third-Party Complaint would be "futile" Hale Lane would have the Court treat lack of proximate cause as an automatic protection to be invoked against any liability whatsoever, whenever more than one factor has contributed to a claimant's losses and damages. However, in Nevada, a claimant may establish proximate cause by showing that the defendant's conduct was a substantial factor contributing to a claimant's injuries, and that the type of injuries or losses suffered by a claimant, including based on other subsequent contributing factors, were foreseeable.

See, e.g., Holcomb v. Georgia Pacific, 128 Nev. Adv. Op. 56, 289 P.3d 188, 196 (2012) ("Nevada relies on the substantial factor test . . . to determine legal causation, otherwise known as proximate cause."); *Arnesano v. State*, 113 Nev. 815, 822-23, 942 P.2d 139, 144 (1997) ("'One whose tortious conduct is otherwise one of the legal causes of an injurious result is not relieved from liability for the entire harm by the fact that the tortious act of another responsible person contributes to the result.' Restatement (Second) of Torts §879 cmt. a (1965). . . . 'The actor's negligent conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm.' Restatement (Second) of Torts §431. Trial testimony indicates that safety barriers would have reduced or prevented the impact of the Ford against the support post [and] . . . [a vehicle] striking the support post was legally foreseeable . . . support[ing] the jury's finding that the State's failure to install such barriers was a legal cause of Arnesano's death.") *Abrogated on other grounds by Martinez v. Maruszczak,* 123 Nev. 433, 168 P.3d 720 (2007).

Thus, establishing proximate cause does not require that the precise amount of the damages,

or the precise sequence of events which led to the same are known in advance to a defendant, but, rather, that the defendant's conduct was a substantial factor in those losses, and that other contributing events were foreseeable. In determining the foreseeability of a loss, including where based in part on some other cause, a variety of factors may be reviewed, including whether the intervening event was normal or extraordinary; a truly independent event; or a normal result of the defendant's conduct, etc. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 215 P.3d 709 (2009).

In the context of a legal malpractice case, for example, where the risks of loss to a client from inadequate advice given in conjunction with preparing transactional documents, should be known, and are foreseeable, a lawyer may be sued for those losses. *See, e.g.*, *Lucero v. Sutten*, 341 P.3d 32 (N.M. Ct. App. 2014) (overruling judgment in favor of lawyer sued for malpractice for failure to warn the client of the dangers of entering into an unsecured Nevada loan, and rejecting the theory that the client's damages were caused by an intervening and superceding cause, namely, the collapse of the Nevada real estate market, where the lawyer *had negligently increased the risk of loss* to the client, via his *failure to warn* the client of the inherent dangers in the transaction).

Likewise, in the present case, Hale Lane is subject to suit regardless of whatever intervening factors may have contributed to the Iliescus' losses, including judicial error, where Hale Lane negligently increased the risk of those losses to the Iliescus, including losses in the form of litigation expenses, which it was foreseeable, might become protracted by the need to appeal initial judicial rulings, or due to any number of other causes, which were certainly foreseeable to Hale Lane, an experienced litigation firm. Thus, the Iliescus should be able to amend their Third Party Complaint to deal with and properly allege all appropriate facts in support of their legal theories, now that the full history of how the facts played out in the courts is known.

In this case, had Hale Lane fully informed the Iliescus of the red flags they faced at the time of Addendum No. 4, or prior thereto when Hale Lane sent an inadequate conflict waiver letter, the Iliescus could have declined to extend closing via that Addendum, without first negotiating lien release provisions as a condition to that extension, to avoid *altogether* the litigation in which the Iliescus incurred hundreds of thousands of dollars to ultimately void the architect's lien. These very facts are alleged in the proposed amended pleading the Iliescus hereby seek leave to file.

B. Hale Lane's Judicial-Error-as-Superceding-Cause Argument Must Be Rejected, as Hale Lane Invited and Induced the Judicial Error.

Hale Lane argues that it was "judicial error" (Reply and Opposition at p. 4, l. 12) for the honorable Brent Adams to rule "that Steppan's lien may be upheld, despite the lack of a pre-lien notice, if it was shown that Iliescu had 'actual notice' of Steppan's architectural services." (*Id.* at ll. 6-9). Furthermore, argues Hale Lane, this judicial error must be treated as the true proximate cause of the Iliescus' losses, either *per se* (*id.* at p. 5, l. 15) or if regarded as foreseeable (*id.* p. 6, l. 2), depending on which case cited by Hale Lane applies.

The first and most serious problem with this argument is that the judicial error described by the Hale Lane brief was in fact induced by Hale Lane, and was, indeed, based on an acceptance by Judge Adams of the very arguments which were asserted by Hale Lane, whose own arguments caused Judge Adams' belief "that Steppan's lien may be upheld, despite the lack of a pre-lien notice, if it" could be "shown that Iliescu had 'actual notice' of Steppan's architectural services" which belief was based on a Hale Lane argued proposition (as shown below)! As the cases which are primarily relied on by Hale Lane all recognize, and as Hale Lane's brief itself repeatedly admits, judicial error can be treated as an intervening and superceding proximate cause, under the (alleged) *per se* approach, *only* "where the attorney has presented the necessary legal arguments and the judge, albeit in error, rejects them." Opposition and Reply, at page 4, ll. 24-25, and page 5, ll. 3-4, citing *Kiribati Seafood Co. v. Dechert LLP*, 2016 WL 14226297, *12 (Mass. 2016), which was itself citing to *Crestwood Cove Apts. Business Trust v. Turner*, 164 P.3d 1247, 1256 (Utah 2007). Likewise, under the foreseeability approach of *Stanfield v. Neubaum*, 494 S.W.3d 90 (Tex. 2016), judicial error can be an intervening proximate cause only if it was not "directly contributed to" by the attorney accused of malpractice:

> When a judicial error intervenes between an attorney's negligence and the plaintiff's injury, the error can constitute a new and independent cause that relieves the attorney of liability. To break the causal connection between an attorney's negligence and the plaintiff's harm, the judicial error must not be reasonably foreseeable. . . . But **if the judicial error alleged to have been a new and independent cause is reasonably foreseeable at the time of the defendant's alleged negligence, the error is a concurring cause as opposed to a new and independent, or superseding, cause.**
>
> The question then is not whether judicial error is generally foreseeable, but whether the trial court's error is a reasonably foreseeable *result* of the attorney's negligence in light *of all existing circumstances*. A judicial error *is* a reasonably foreseeable result of an attorney's negligence if "an unbroken connection" exists between the

> attorney's negligence and the judicial error, **such as when the attorney's negligence directly contributed to and cooperated with the judicial error**, rendering the error part of "a continuous succession of events" that foreseeably resulted in the harm.

Id. 494 S.W.3d at 99-100 [citations omitted] [bolded emphasis added]. Thus, as Hale Lane's own brief points out and admits: "judicial error is foreseeable" under *Stanfield*, "where a legal malpractice defendant has, in effect, invited the judicial error by advocating a legally erroneous principle that the court accepts." Hale Lane's Reply and Opposition brief at p. 7, l. 16.

This is however precisely what happened in this case, and Hale Lane fails both tests relied on and outlined in its own brief, as Hale Lane failed to raise the argument which would have prevented judicial error, and instead raised the very argument which induced the judicial error.

The extremely short Application for Release of Lien (attached, without its exhibits, as **Exhibit "1"** hereto) filed by Hale Lane on behalf of the Iliescus, asserted that the Steppan lien was invalid due to his violation of NRS 108.245. But this Application did not raise the *legal* argument on which the Iliescus's ultimately prevailed, that any claimed actual notice to the Iliescus, to excuse Steppan's noncompliance with that statute, would be irrelevant, as the *Fondren* and other cases asserting any such relevance dealt only with on-site construction work. The Application instead undermined that idea, and contested, factually, whether the Iliescus had received any actual notice of Steppan or his work (**Exh. "3,"** p.2, 11. 15-20) as though this factual question actually mattered, instead of explaining that this factual question should be treated as legally unimportant in any event, given that Steppan's work was performed off-site, and the case law creating an actual notice exception to the mandates of NRS 108.245, which involved on-site work, therefore simply did not apply at all as a matter of law.

This error was compounded by Hale Lane's oral argument at the hearing of the Hale Lane – filed Application (a copy of the transcript of which is attached hereto as **Exhibit "2"** hereto), in which Hale Lane attorney Snyder (who the Iliescus were horrified to learn was assigned to this matter, even though he was adverse to the Iliescus on another matter pending at that time) repeatedly argued that the factual questions of whether the Iliescus had actual notice, and when they had any such notice, and what exactly they knew when, were relevant factual issues that mattered in this case, under the *Fondren* actual notice exception to the mandates of NRS 108.245. See, **Exhibit "2"** hereto, at pp.

4-7, 45, 47-52. These contentions were, however, legally, inaccurate, as the Iliescus eventually successfully argued to the Nevada Supreme Court, which ruled that the *Fondren* actual notice exception only applies to cases, like *Fondren*, where the lien claimant has actually performed on-site work, and not just off-site plans or renderings. There is no mystery, therefore, as to how Judge Adams came to erroneously believe that "Steppan's lien may be upheld, despite the lack of a pre-lien notice, if it was shown that Iliescu had 'actual notice' of Steppan's architectural services." That erroneous belief came from the Iliescus' own attorneys at Hale Lane, who erroneously told the Judge that this was so.

For example, Hale Lane argued to Judge Adams as follows: "Now, **the whole question here is whether Dr. Iliescu had knowledge . . . of the lien claimant's work** that was sufficient to enable him to file a notice of non-responsibility" such as Steppan's identity, and the name of the customer who had retained Steppan, whereas "Here, . . . there is no way on earth Dr. Iliescu could have recorded a valid notice of non-responsibility because **he did not know the identity of . . . the architects . . . or the entity that was contracting with the architects.**" **Exh. "2"** hereto at pp. 4-6 [emphasis added]. See also, *id.* at pp. 7, 45, 47-52.

Hale Lane did not argue that the *Fondren* exception to the mandates of NRS 108.245 did not even apply to off-site work, the argument which ultimately carried the day before the Nevada Supreme Court. Hale Lane did not even argue that *Fondren* might not apply to off-site work. Rather, Hale Lane's arguments assumed, conceded, and, indeed, were premised on the concept that the *Fondren* actual notice exception did apply, *legally*, to the situation before the Court, but that the case was *factually* distinguishable (not because Steppan's architectural services were performed off-site), but because the Iliescus did not have sufficient knowledge or information to be subject to the actual notice exception set forth in *Fondren.*

This factual theme, that Dr. Iliescu did not know what he needed to know about Steppan's identity, or the entity for whom Steppan had come to be employed, in order for him to be treated as having obtained *Fondren* actual notice, was repeated by the Hale Lane lawyer representing the Iliescus at the hearing, again and again and again, throughout this hearing, as Hale Lane lawyer Synder repeatedly mis-instructed the Judge on the relevant law, rather than properly explaining that the

Fondren case should be ignored and treated as distinguishable and as simply not applying, and as a decision which could not be relied on by Steppan, as the architectural work he was liening for was performed off-site. *See, e.g.*, **Exh. "4"** hereto at pp. 4-7, 45, 47-52. (This emphasis on the Iliescus' needing enough information to record a notice of non-responsibility may have been motivated by the fact that Hale Lane had never told the Iliescus to do so, such that the entire focus of Hale Lane's argument was arguably designed more to help Hale Lane than to help the Iliescus, but that is a point for another day.)

Thus, every one in the courtroom came to falsely and erroneously understand that the Iliescus' argument for expunging the Steppan lien necessarily rested on a factual question, the legal significance of which was repeatedly conceded, and indeed argued, by the Iliescus' counsel, with even Mr. Iliescu indicating he was "ready to testify under oath today" to address that factual question, since he, too, was misled by his lawyer's inaccurate arguments, to believe that factual question, of whether he had notice of Steppan's work and identity, was legally relevant. But it was not. And, as Hale Lane's Opposition now indicates, it was judicial error for the court to hold otherwise. **Exh. "4"** hereto at p. 55, ll. 3-4.

Given that record, it should surprise no one that Judge Adams erred, and this litigation then proceeded on the assumption that a factual question mattered, which did not really matter at all, with Judge Adams, after that hearing, issuing an Order for discovery as to this supposedly important factual question, namely Exhibit "1" to Hale Lane's Opposition and Reply brief, which Order was based, as Hale Lane's Opposition and Reply brief itself indicates, on the judicially erroneous proposition "that Steppan's lien may be upheld if it was shown that Iliescu had actual notice of Steppan's services."

However, this error was induced by Hale Lane's own arguments, and as Hale Lane admits, "a lawyer cannot invite judicial error and then escape responsibility for the financial consequences thereof" (Reply and Opposition at p. 7, ll. 16-18), which is exactly what happened here.

By contrast, the attorney accused of malpractice in *Stanfield* did not contribute to the judicial error by wrongfully advising the court as to the nature of the law; and the lawyer accused of malpractice in the *Crestwood Cove* litigation did eventually make the legally appropriate argument, which the district court erroneously rejected. Hale Lane's litigation lawyers, on the other hand, failed to ever raise the off-site/on-site work distinction, or to point out that what the Iliescus did or did not

know might be wholly irrelevant, if *Fondren* did not apply to off-site work, which is the argument that ultimately carried the day for the Iliescus on appeal, after Hale Lane had made precisely the opposite arguments, to induce the very judicial error they now claim somehow excuses their malpractice. Thus, the *Crestwood Cove* rule, also quoted in the *Kirabati* case, that "a client may believe that an attorney has not litigated a case in the most effective manner possible, [but] such beliefs are irrelevant **where the attorney has presented the necessary arguments** and the judge, albeit in error, rejects them" does not apply herein, where a presentation of the necessary arguments by Hale Lane did not ever occur. Rather, Hale Lane made arguments which set this case up for ten years of beating a legally irrelevant factual horse about what the Iliescus knew and when they knew it.

Based on the path upon which Hale Lane placed this case, and the legal rules which Hale Lane erroneously asserted applied to this case, no legal ruling ever issued (until many years later by the Nevada Supreme Court) that any alleged actual notice by the Iliescus, if any, was simply legally irrelevant, with respect to off-site work, and could not be relied on by Steppan to excuse his violation of NRS 108.245. The legal argument, that alleged actual notice, even if it existed, simply didn't matter based on this off-site/on-site distinction, was never raised by Hale Lane, who instead made precisely the opposite argument as to what "the whole question" in this case was. The argument on which appeal was ultimately won, as to the on-site/off-site distinction, was only first raised later, on behalf of the Iliescus, by the attorneys at the Reno law firm of Downey Brand, in their partial summary judgment motion and Steppan countermotion/ opposition filings. However, by that date, the court had already issued its ruling (Exhibit "1" to the Hale Lane Reply and Opposition), determining that the factual question of any actual notice mattered, and discovery would therefore be allowed on that question, as Hale Lane, prior to issuance of this Order, had told the Judge that this question did legally matter, and the court remained convinced by Hale Lane's assertions that this was so.

Thus, if the Iliescus were filing a malpractice suit against *Downey Brand*, for litigation malpractice, the cases relied on by Hale Lane, might be relevant and applicable in defense of such a suit. But the Iliescus are making no such claims, or any other claims, against Downey Brand, for obvious reasons, and are instead making their claims against Hale Lane. Furthermore, one of the two cases cited by Hale Lane in support of a "per se" intervening proximate cause ruling, does not in fact

support any such alleged "per se" rule. Rather, the *Crestwood Cove* case made the following clear:

> In articulating this rule, **we are not holding that judicial error always forecloses a plaintiff from bringing a malpractice suit**. Where there are factual disputes surrounding causation, determining "whether the attorney's conduct was a substantial factor in the result or whether there should have been a better result had the attorney done otherwise" will remain **a question for the trier of fact**.

Crestwood Cove, 164 P.3d at 1256 [emphasis added].

In the present case, there are many such factual questions, and it is clear that Nevada would favor this approach, given the Nevada "substantial factor" test for determining proximate cause.

It must also be noted that the claims raised against Hale Lane herein are primarily transactional malpractice claims, rather than solely litigation malpractice claims. As such, the *Stanfield, Kirabati*, and *Crestwood Cove* cases, relied on by Hale Lane, which all involve litigation malpractice, do not even apply to the central allegations raised in the proposed amended pleading in the first instance. Rather, the cases cited in the Mallen Malpractice Treatise, demonstrating numerous instances of transactional lawyers being held liable for the litigation costs resulting from their inadequate transactional counsel, are the applicable cases herein.

Even if the litigation malpractice cases on which Hale Lane relies could be twisted into application against the primarily transactional malpractice allegations at issue herein, and that square peg could be forced into this case's round hole, the tests enunciated in those cases would still be met by those allegations. For example, with respect to the *Stanfield* "unbroken connection" test, where such a connection "exists between the attorney's negligence and the judicial error, such as when the attorney's negligence directly contributed to and cooperated with the judicial error" the Iliescus' proposed amended third-party complaint alleges that Hale Lane's malpractice caused it to unknowingly begin to represent both the seller and the purchaser of the Iliescus' property at the same time, and that Hale Lane, upon discovering this conflict, and asking the Iliescus to waive the same, failed to adequately advise the Iliescus as to all of the inherent risks to the Iliescus arising from that dual representation.

One of those risks was that information learned by the law firm could be argued to be imputable to the Iliescus. *See*, Exhibit "1" to the Iliescus' Countermotion to Amend, at ¶49 and ¶57 and 97(iv). Indeed, this client-imputed knowledge argument was made to Judge Adams, and was cited

by him in his June 22, 2009 Order, ruling against the Iliescus' on the *Fondren* actual notice question, which Hale Lane had informed Judge Adams was relevant and applicable to this case. *See* **Exhibit "3"** hereto, at p. 2, ll. 6-9. Moreover, the Iliescus continued to have to expend substantial fees and costs to contend with that same imputed knowledge argument for many years thereafter, including through the appeal of this case, Steppan again arguing, on appeal, that Hale Lane's knowledge of the Steppan lien should be imputed to the Iliescus. *See*, excerpt from Steppan's Respondent's Answering Brief, attached as **Exhibit "4"** hereto, at pp. 24-25. Moreover, under the *Crestwood Cove* foreseeability test, the risk that fees and costs would be expended to refute such arguments was not only foreseeable, and was not only "directly contributed to" by Hale Lane's conduct, but that risk was actually realized, and the Iliescus, in all of their filings, for many years, right up and through the appeal of this case, had to spend money to overcome this realized risk.

The Iliescus' proposed amended pleading, attached as Exhibit "1" to its countermotion, sets forth most of the foregoing facts, or at least a short and plain statement of the basic assertions being raised, sufficient to allow Hale Lane to understand the essential basis of the claims, including without limitation, at paragraphs 29 through 107 thereof. Based thereon, the amended pleading would not be futile, as it alleges those facts necessary to demonstrate that the Hale Lane attorneys' negligence "directly contributed to and cooperated with the judicial error" thereby preventing that judicial error from breaking the chain of proximate causation. If this is not so, then perhaps a motion for more definite statement could be filed after the amended pleading is on file. But denying the request to even file the amended pleading would be wholly unwarranted.

C. It Is Generally Inappropriate to Grant Summary Judgment on a Proximate Cause Defense and, Thus, Denying an Amendment Designed to Avoid Such a Summary Judgment Would also Be Inappropriate.

Nevada recognizes that, where there is any question of fact as to whether or not an alleged intervening cause would be foreseeable, this prevents a court from granting summary judgment on the basis of a lack-of-proximate-cause defense. *See e.g., Yamaha Motor Co. v. Arnoult*, 124 Nev. 233, 238, 955 P.2d 661, 664-65 (1998) (in order to establish proximate cause, the injury must be shown to be "the natural and probable consequence of the negligence . . . [which]. . . ought to have been foreseen in the light of the attending circumstances. . . . Proximate causation is generally an issue of fact for

the jury to resolve.") *See also, Price v. Blaine Kern Artista, Inc.*, 111 Nev. 515, 520-21, 893 P.2d 367, 370-71 (1995) (reversing summary judgment issued for failure to establish proximate causation, on grounds that issue of fact existed as to whether a third-party's intervening intentional act was foreseeable and thus failed to "sever[] the chain between a plaintiff and a defendant," as the "risk of such an occurrence . . . may be found to be within the realm of risks that should have been considered and addressed" by the defendant).

Thus, in the present case, if there is even an issue of fact as to whether it was foreseeable that Hale Lane's failure to properly inform or warn the Iliescus of the potential architectural lien, or to advise them how to deal with the same, might lead the Iliescus to incur costs and fees defending against a Steppan mechanic's lien, or if there is even a question of fact as to whether it was foreseeable a court would rule against the Iliescus as to that mechanic's lien claim, including because the ultimately successful arguments were not made to that court by Hale Lane, who instead made exactly the opposite arguments, such questions of fact must not be cut short. And there are such questions of fact! Therefore, Third-Party Plaintiff's amended pleading, asserting allegations that raise such questions of fact, cannot be said to be futile. As even the cases relied on by Hale Lane note, judicial error does not always deprive a legal malpractice claimant of the right to have these questions of fact as to proximate causation tried on the merits.

It was certainly foreseeable in this case that Hale Lane's neglect, as sought to be described in the amended pleading the Iliescus have moved for leave to file, would lead to a mechanic's lien being claimed against their property, and that subsequent expensive and protracted litigation would then occur. As has been noted for example by the author which Hale Lane indicates is perhaps the leading expert on legal malpractice, whose treatise was quoted by Hale Lane in their own original brief: "A negligently drafted provision or erroneous advice **can involve the client in litigation or prolonged litigation**. Those expenses may be the only damages sustained **and can be recoverable as direct damages.** . . . A Georgia court held that **legal fees incurred in defending a fraud claim**, based on a transfer of assets, could be recovered from the attorney, **even if the plaintiffs prevailed in the fraud case.**" 1 Ronald E Mallen, Legal Malpractice §8:23 pp. 1037-38 (2016 ed.) (Hereinafter the "Mallen Malpractice Treatise"). It is impossible to square the authorities and principles discussed in the Mallen

Malpractice Treatise with Hale Lane's claim that allowing an amendment to the Iliescus' pleading would simply be futile. To the contrary, notwithstanding that the Iliescus ultimately prevailed in their defense of the Steppan claim, the facts alleged in the proposed amended pleading, if true, state a cognizable claim, on which at the very least, questions of fact exist which prevent any premature ruling that said pleading would be futile.

As the Mallen Malpractice Treatise, at §21:12 further indicates: "Sometimes, a result of negligent advice is that the client is sued, incurs the cost of defense . . . . **The cost of avoidable litigation or unnecessary legal services, ultimately, may be chargeable to the attorney** as damages [in a legal malpractice suit]. . . . Attorneys' fees and expenses are recoverable [in a legal malpractice suit] if litigation occurred **because of the attorney's negligence, whether incurred in the prosecution or the defense of an action.**" *Id.* (bracketed language and emphasis added.) Thus, regardless of the specific scenario which ultimately played out, the losses were foreseeable, and thus a proximate cause of Third-Party Plaintiffs' damages. In support of this statement, Mallen notes the following cases:

> A 1997 California decision **allowed the client's heirs to sue** a law firm **for failing to advise its client** to obtain his wife's consent to an estate plan or an acknowledgment that only his separate property was involved.[1] After the client's death, **the plaintiffs sought the cost of litigation** with the spouse concerning what assets were included properly within the client's estate.
>
> A 1993 Colorado decision concerned the inclusion of an offset provision in a loan, which resulted in litigation with the borrower. The lawsuit was compromised for less than the full amount of the loan. The trial court held that there was no right of offset, but the bank subsequently **sued its lawyers** for allowing the provision to be in the contract, **as an allegedly negligent cause of litigation**. The appellate **court agreed that such an action could be pursued.**
>
> . . . .
>
> A Georgia court held that **legal fees incurred in defending a fraud claim**, based on a transfer of assets, could be recovered from the attorney, **even if the plaintiffs prevailed in the fraud case.**[2]

Mallen Malpractice Treatise at § 8:23 Causation; Cost of Litigation (emphasis added).

Hale Lane had every reason to know and realize and foresee that factual and legal information

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[2]*Sindell v. Gibson, Dunn & Crutcher*, 54 Cal. App. 4th 1457, 63 Cal. Rptr. 2d 594 (2d Dist. 1997).

[3]*Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead*, 203 Ga. App. 412, 417 S.E.2d 29 (1992) (there was also a dispute over whether the plaintiffs were clients and, if not, whether they had standing as nonclients).

in its possession (about the architect's identity and contract terms and services being performed, and about Nevada's mechanic's lien statute allowing architectural liens) would be vitally important to their clients, and to foresee that if it did not provide legal assistance and advice in dealing with the same, the Iliescus would likely incur the expenses of prolonged mechanic's lien litigation. Hale Lane cannot escape the consequences of its failure to provide that advice, by averring that judicial error is solely to blame for all of the costs incurred by the Iliescus to reach their ultimate victory in this case, where the litigation itself might have been avoided entirely had the Hale Lane firm properly protected their clients, when they provided them with transactional assistance.

For example, in *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192 (Colo. Ct. App. 1992) the court overturned a legal malpractice judgment against attorneys who had inartfully drafted a real property option contract which was later challenged as invalid under the Rule against Perpetuities, causing a client loss. The appellate court ruled that the trial court erred in instructing the malpractice jury that the option had violated the Rule against Perpetuities, but nevertheless declined to require the lower court to dismiss the legal malpractice claims against the attorneys, merely granting those lawyers the right to a new trial under the law of the case, because those lawyers could potentially have foreseen that a legal dispute would occur on this question, and could have protected their clients from the losses which such a dispute would engender. In ruling that the legal malpractice claims should remain in place for further adjudication, despite upholding the validity of the option document created by the attorney defendants, the court explained as follows:

> An attorney owes a duty to his client to employ that degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out the services for his client. *Myers v. Beem,* 712 P.2d 1092 (Colo.App.1985). One of these obligations is anticipating *reasonably foreseeable risks. Pacelli v. Kloppenberg,* 65 Ill.App.3d 150, 22 Ill.Dec. 250, 382 N.E.2d 570 (1978).
>
> Thus, although we hold here that the option [drafted by the malpractice defendants] did not violate the Rule against Perpetuities, **the question remains whether defendants, as reasonably prudent attorneys, should have foreseen that the option, as drafted, was likely to result in litigation and whether other attorneys, in similar circumstances, would have taken steps to prevent such a result.**
>
> Plaintiffs argued at trial, and presented expert testimony in support of their assertion, that the principal negligence of defendants was **their not protecting plaintiffs from loss by failing to research and analyze the Rule's applicability in the option, to recognize the likelihood that a good faith dispute could occur over the enforceability of the option because of the Rule, and to take the simple step of either adding a time limitation or "savings clause" or recommending the**

> **deletion of the provision that made the option binding on heirs, successors, and assigns**.
>
> [Defendant attorney] Bruce Buell testified that he had given no specific consideration to the Rule in drafting the Letter Agreement. Nor did he perform any legal research, consider the choice of law, consult with experts, or even consult with other members of his own firm on the question of whether the Rule could apply to the option. . . . As a result, plaintiffs argue, **Buell did not advise his clients of the real likelihood that a good faith dispute could arise** over the enforceability of the option under the Rule.
>
> On the issue of defendant's negligence, . . . testimony was offered by two other attorney-experts who testified that defendants had failed to meet the standard of care and should have considered the possibility that the Rule might apply to the option and should have protected it against a Rule challenge.

Id. at 198-99 [bolded emphasis added].

Just as the attorneys in the *Temple Hoyne* case should have recognized the likelihood of a challenge to their Option, in this case, likewise, the Hale Lane attorneys should have anticipated the attempted Steppan lien. There was ample information within Hale Lane's possession, during the time it was drafting the Third Addendum, to be aware of the risk to the Iliescus that architectural services being provided for the property could result in a mechanic's lien claim being asserted against their property, which, even if ultimately unsuccessful, would cause litigation expenses to the Iliescus as they were required to defend against the same. Hale Lane's awareness of that possibility had become even more acute by the time Hale Lane provided its inadequate first conflict waiver letter to their clients, in which they failed to inform their clients of this risk, and also failed to inform their clients how Hale Lane's participation in reviewing the potential lien claimant's contracts, and resultant awareness of the lien claimant's identity, increased that risk, by allowing imputed notice arguments to be asserted against the Iliescus as to information known to Hale Lane which Hale Lane never shared with the Iliescus.

By the time the 4th Addendum was drafted by Hale Lane, the firm had an even more substantial awareness of and an even more compelling duty to protect their clients against a lien claim by Steppan, and against the inevitable legal dispute and litigation which would arise in the wake of such a lien being asserted. However, just like attorney Buell in the *Temple Hoyne* case, they failed to advise their clients of the real likelihood of a potential lien claim arising, or how to deal with the same. They should have informed, warned, and advised the Iliescus of some strategies for dealing with that "real

likelihood that" a lien claim "could arise" under Nevada's mechanic's lien statutes, instead of blithely preparing the 4th Addendum without even discussing the possibilities created by the purchaser's request for an extended closing date thereunder, to attempt to deal with the lien problems. But, like the *Temple Hoyne* lawyers, they did not advise their clients about this issue or how to deal with it.

The Iliescus do not yet have, as the former clients in the *Temple Hoyne* case had, an expert who has provided testimony on this issue. But one of the two countermotions which the Iliescus have filed is a countermotion under NRCP 56(f) for time to complete discovery, including by retaining an expert witness on this point. The Hale Lane Opposition to the Iliescus' countermotions do not provide any reason whatsoever why this requested relief should not be granted (or even address this second countermotion). It would be premature for this Court to deny the Iliescus' two countermotions at this early stage of the proceedings, without first allowing expert reports on this question to be procured and expert depositions to be taken.

It was well within the scope of Hale Lane's knowledge as Nevada attorneys that any litigation Steppan might file to enforce a lien claim would potentially be lengthy and protracted, would potentially involve both legal and factual questions, and would likely lead to appeals by the losing party. Any number of approaches could have been taken, via the right terms and conditions in Addendum No. 3 or in Addendum No. 4, or in advice provided by way of and at the time of the first conflict waiver letter, to protect against these dangers. Hale Lane instead increased those risks and proximately caused fees and costs to be incurred by the Iliescus to overcome those risks. The amended pleading describing these facts should be allowed.

D. <u>The Iliescus' Losses Were Foreseeable</u>.

Nevada law recognizes that attorneys' fees incurred in order to defend against a third-party's claim, including a mechanic's lien claim, may be pursued as special damages in suits against those whose failures or breaches led to such a claim. *See, e.g., Liu v. Christopher Homes, LLC*, 321 P.3d 875, 130 Nev. Adv. Op. 17 (2014) (claimant whose property had been clouded by a mechanic's lien claim, allowed to recover the attorneys' fees she had incurred in defending against that mechanic's lien claim as part of her damages in her own suit against the developer, for breach of the developer's warranty of good title). Similarly, in the present case, the Iliescus are likewise entitled to recover the

expenses of defending against the Steppan lien from those whose breaches allowed it to be recorded.

That the Iliescus would incur litigation expenses was or should have been entirely foreseeable to Hale Lane, once it realized that the Iliescus faced a mechanic's lien risk, and failed to lift a finger to prevent it, and made exactly the wrong legal and factual arguments at the beginning of the litigation, placing the case onto an improper conceptual track, from which it was only finally dislodged on appeal. This outcome was foreseeable regardless of the specifics pursuant to which those litigation cost damages came to be incurred, as Hale Lane knew and could have reasonably foreseen that one of four outcomes would result from its malpractice (*i.e.*, that the Iliescus would incur costs and fees to successfully defend against any Steppan lien claim and then prevail on appeal in maintaining that victory; or would incur costs and attorneys' fees to unsuccessfully defend against any Steppan lien claim and then prevail on appeal in reversing that loss; or that the Iliescus would incur costs and attorneys' fees to unsuccessfully defend against any Steppan lien claim and then lose on appeal; or that they would suffer losses in order to settle any Steppan lien claim). While the specific sequence and outcome may not have been known to Hale Lane beforehand, it certainly had enough information in its possession to act to forestall *any* of those four scenarios, as Hale Lane knew or should have known of the likelihood of a Steppan lien, which it was foreseeable would cost money to the Iliescus to defend against, were it not strategically dealt with during Hale Lane's transactional services, or properly argued against in Hale Lane's half-hearted initial litigation appearances, inviting the judicial error now claimed by Hale Lane as a defense.

It would not be futile to allow an amended pleading to be filed alleging all of the facts now known based on the scenario which actually occurred, but would instead allow for a proper adjudication on the merits based on said pleading, which pleading can now describe the actual final outcome of the Iliescus' mitigation efforts, and allege a right to recover based thereon.

See e.g., Rogers v. Hurt, Richardson, Garner, Todd & Cadenhead, 417 S.E.2d 29 (Ga. Ct. App. 1992) (claimants whose reliance on bad advice from attorneys resulted in their being sued for fraud, had a valid legal malpractice action against attorneys, for the costs and attorneys' fees incurred in that suit); *Hill v. Okay Const. Co., Inc.*, 252 N.W.2d 107 (Minn. 1977)(attorney who negligently represented both parties to a transaction held liable for the attorneys' fees and expenses incurred in

litigation between them); *Preble v. Schwabe, Williamson & Wyatt,* 875 P.2d 526 (Or. Ct. App. 1994)(client would be entitled to seek litigation expenses from legal malpractice defendant if not reimbursed from opposing party).

E. <u>The Hale Lane Arguments Violate Longstanding Common Law Principles Requiring Mitigation Costs to Be Treated as an Element of Recoverable Damages, Especially Where Such Mitigation Efforts Are Legally Required</u>.

One of the reasons why the litigation expense losses incurred by the Iliescus were foreseeable, is that the Iliescus had a legal duty to attempt to mitigate their losses, by defending against the Steppan lien claim, as part of maintaining their legal malpractice claims. Indeed, under Nevada law, this duty required the Iliescus to appeal any adverse ruling, rather than rely on the adverse outcome at the trial court level, as part of establishing their case against Hale Lane, unless they could demonstrate that such an appeal would be a "futile gesture" (which was obviously not so herein). *Hewitt v. Allen*, 118 Nev. 216, 222, 43 P.3d 345, 348 (2002). All the costs and fees incurred by the Iliescus after they retained new counsel to replace Hale Lane and represent them, were required to be undertaken to mitigate their losses and comply with this rule of law.

This is highly significant, as where there is a legal duty to mitigate, there is a correlative right to recover the costs of that mitigation effort. *See, e.g., Davis v. Beling*, 128 Nev. 301, 278 P.3d 501, 514 (2012)(vendors could recover carrying costs of home purchased as a result of agent's alleged failure to disclose material information, it having been "preeminently reasonable for the Doughertys to obtain property insurance for the . . . Property, pay the taxes and mortgage . . . and maintain the property . . . [as] if they had not done so, they would likely be deemed to have failed to mitigate their damages. The . . . carrying costs are thus . . . a recoverable component of their compensatory damages."); *Tulsa Municipal Airport Trust v. National Gypsum Co.*, 551 P.2d 304, 310 (Ok. Ct. App. 1976) (allowing suit to proceed for attorneys' fees and expert expenses incurred in order to mitigate losses from negligently constructed aircraft hanger roof and noting that the duty to mitigate losses "carries with it an equally well-established correlative right . . . to recover from the wrongdoer the expenses incurred in fulfilling the duty.") *Morgan v. Morgan*, 81 Misc. 2d 616, 619 (N.Y. Dist. Ct. 1975) ("it is a corollary to the rule of mitigation that the injured party may also recover for the expenses reasonably incurred in an effort to avoid or reduce the damage"); *Reid v. Mutual of Omaha*

Ins. Co., 776 P.2d 896, 907 (Utah 1989)(since we have imposed on the landlord an affirmative obligation to seek a new tenant, it is appropriate that costs reasonably incurred in readying the property and in reletting or attempting to relet be added to the amount recoverable from the breaching tenant [to include] not only expenses incurred in seeking new tenants, but also costs of repairs or alterations of the premises reasonably necessary to successfully relet them."); *McCormick Int'l USA, Inc. v. Shore*, 277 P.2d 367, 371 (Idaho 2012) ("Where an injured party takes steps to mitigate the damages caused by another, she is entitled to the costs she reasonably incurred in avoiding those damages."); *Albers v. County of Los Angeles*, 398 P.2d 129 (Cal. 1965) ("The rule is of general and widespread application that one who has been injured either in his person or his property by the wrongful act or default of another is under an obligatory duty to make a reasonable effort to minimize the damages liable to result from such injury . . . and that it is held as a natural corollary to this rule of duty . . . that the injured party . . . will be allowed to recover the expenses necessarily incurred in so doing.")

Likewise, in the present case, since Nevada imposes, under *Hewitt*, a duty to attempt to mitigate the losses from attorney malpractice, by pursuing any viable, non-futile, defense, through an appeal, the cost of the litigation through that appeal must necessarily be recoverable against the malpractice defendant. It would be wholly unjust to mandate mitigation, without allowing recovery of the costs for that mitigation. Such an unjust rule would also make Nevada unique among the states, in declining to recognize the correlate to the duty to mitigate.

Hale Lane repeatedly failed to warn its clients against the risk of a lien claim, or to counsel them to take any of a number of different available steps to reduce that risk, which malpractice proximately resulted in substantial costs and attorneys fees and related losses to the Iliescus, whose property was burdened by an invalid mechanic's lien for ten years, which it took the Iliescus' substantial fees and costs to finally successfully oppose. The Iliescus did what they were required to do under *Hewitt*, and mitigated their damages and losses, arising from Hale Lane's failure, by successfully defending against the Steppan lien claim. If they had failed to do so, they would, like the *Davis v. Beling* plaintiffs, have been accused of failure to mitigate. Based thereon, they are entitled to the costs of that mitigation effort. If the Steppan lien (or the Hale Lane-induced "judicial error" on which Hale Lane now relies) had not been defended against (and successfully appealed), then the

damages being asserted against Hale Lane at this time would have been much greater than they are. (The hundreds of thousands of dollars incurred by the Iliescus in litigation are a fraction of the $4.5 million + dollar Judgment on the lien which was reversed on appeal.)

The expenses incurred by the Iliescus to mitigate must therefore be recoverable, in lieu of the higher losses which might otherwise have been sought, had the Iliescus mitigation attempts failed. *Sadler v. Pacificare of Nevada, Inc.*, 130 Nev. Adv. Op. 98, 340 P.3d 1264, 1271 (2014)("there are significant policy reasons for allowing a recovery for medical monitoring costs, not the least of which is that early detection can permit a plaintiff to mitigate the effects of a disease, such that the ultimate costs for treating the disease may be reduced); *Illinois Structural Steel Corp. v. Pathman Const. Co.* 318 N.E.2d 232, 236 (Ill. Ct. App. 1974)("Furthermore, it is a general rule of law that a party may recoup all expenses reasonably incurred in mitigating damages."); *Jackson v. Keane*, 502 So.2d 1185, 1188 (Miss. 1987)("We agree with the general rule that a landowner can recover reasonable and necessary expenses incurred in an attempt to prevent future damages, so long as those expenses do not exceed the diminution in value the property would suffer if the preventive measures are not undertaken.").

Hale Lane seeks to establish an unjust, illogical, Catch 22, in which legal malpractice claimants who fail to defend, through appeal, an adverse outcome caused by legal malpractice, are subjected to the defense of failure to mitigate, by failing to pursue a non-futile appeal, as required by *Hewitt*; but those who comply with *Hewitt*, and successfully obtain a ruling which reduces the amount of their malpractice claim, are unable to recover the costs of that effort! For reasons of logic, justice, and rational public policy, this heads the lawyer wins, tails the client loses, approach, simply cannot be the law. Nor, as the Mallen Malpractice Treatise shows, is this the law.

Hale Lane should not be allowed to escape from *any* legal liability because of the efforts which the Iliescus necessarily engaged in to reduce the *amount* of the Hale Lane liability, which efforts by the Iliescus should not now be utilized against the Iliescus, to penalize the Iliescus merely because those efforts were successful.

This "successful mitigation penalty" would flout longstanding and broadly accepted legal principles, allowing recovery for the costs of required mitigation efforts. This "successful mitigation

penalty" would also be illogical, as it would penalize the Iliescus for efforts which benefitted Hale Lane (as failure to pursue a successful appeal would have meant that the Iliescus were suing Hale Lane for a much higher damages amount, calculated based on this court's original judgment) and because it would penalize the Iliescus for doing what Nevada law required them to do, *without* affording the Iliescus the correlative right recognized throughout the United States, in a wide variety of contexts, as part of that duty, to recover one's mitigation expenses. Such an approach would discourage the very mitigation efforts otherwise required by *Hewitt*, and, thus, in the long term, be harmful to most legal malpractice defendants.

F. <u>The Iliescus' Countermotion for Leave to Amend Should Be Granted</u>.

Based on the depositions and trial and other discovery completed in the years subsequent to the Iliescus' previously filed Third-Party Complaint, and based on the final outcome on appeal, the Third-Party Plaintiffs are now in a much better position to clarify and enunciate the entire premises and bases for their Third-Party Claims, including by now clarifying the ultimate nature of their (mitigation-expenses, rather than adverse lien judgment) damages. Refusing to grant them leave to do so, in order to grant Summary Judgment against them on their currently existing pleading, would violate what justice requires.

For example, as the Iliescus' Countermotion previously noted, the prior third-party pleading focused on the Hale Lane firm's failure to advise the Iliescus to file a Notice of Non-responsibility to protect against a Steppan or FFA architectural lien. We now know, based on certain *dicta* in the Supreme Court's *Iliescu* decision, that such a theory would not be availing to the Iliescus. Justice therefore requires that the Iliescus, with the benefit of the knowledge now available to all parties, be allowed to amend their pleading. This would, at the very least, allow the properly pled pleading to be the one contested in any future dispositive motion filed by Third-Party Defendants, in order to allow a clean and updated record for appeal of any such adverse ruling by this Court, so as to allow an appeal on the merits of all claims, as now better and more fully understood.

As a further example, the nature of the Iliescus' damages, which is similar to the damages recoverable by the Nevada plaintiffs in cases such as *Liu, Davis,* and *Sadler*, and their right to pursue the same, can now be more fully articulated, via this amendment. Based thereon, in order to allow

their third-party claims to be more fully and comprehensively articulated, this Court should grant the Iliescus' previously filed Countermotion for Leave to Amend, and allow the amended pleading, substantially in the proposed form attached as Exh. "1" thereto, to now be filed.

POINTS AND AUTHORITIES IN SUPPORT OF COUNTERMOTION FOR FURTHER TIME TO COMPLETE DISCOVERY

The Iliescus' also previously countermoved for additional time to complete discovery. Their brief on that point noted that any litigation, including discovery, regarding the third-party claims at issue herein, has been stayed for several years, pending the outcome of appeal. Hale Lane filed their Motion for Summary Judgment only 30 days after Remittitur had issued in this case, lifting that stay, basing its arguments on procedural facts and ultimate dispositions which were not known to be the ultimate outcome until that Remittitur and resultant lift-of-stay had only recently occurred. The Iliescus will now need to retain an expert to address the ultimate facts of this case, now only recently fully played out, and to opine on the arguments asserted by Hale Lane, and should be given time to do so. As noted above, this has not yet occurred, and, as demonstrated by the *Temple Hoyne* decision, could be vitally important, including on appeal.

Based thereon, pursuant to NRCP 56(f), the Iliescus have heretofore requested additional discovery time herein, as one of their two prior Countermotions. *See*, Exhibit "17" to the Iliescus' prior Opposition and Countermotions, Sworn Declaration of Dr. Iliescu in support of NRCP 56(f) Request.

Hale Lane has completely disregarded this countermotion and request for additional discovery time, and has failed to address the same in its Reply and Opposition, choosing instead to oppose solely the countermotion for leave to amend. Based thereon, this Countermotion should be treated as unopposed, and should be summarily granted. Alternatively, it should be granted on the merits, as no basis for any contrary ruling exists. Thus, no dispositive rulings should issue at this time, until the Iliescus have been given a new set of discovery deadlines, including for the exchange of expert witness reports in this recently remanded matter, so that discovery can first be completed.

CONCLUSION

For the reasons set forth above, the Iliescus' countermotion to amend should be granted, and the Iliescus' Countermotion for additional time to complete discovery should also be granted.

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 January, 2018.

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of ALBRIGHT, STODDARD, WARNICK & ALBRIGHT, and that on this 12th day of January, 2018, service was made by the ECF system to the electronic service list, a true and correct copy of the foregoing **THIRD-PARTY PLAINTIFFS' REPLY POINTS AND AUTHORITIES IN SUPPORT OF COUNTERMOTION TO AMEND THIRD-PARTY COMPLAINT AND IN SUPPORT OF COUNTERMOTION FOR FURTHER TIME TO COMPLETE DISCOVERY**, and a copy mailed to the following person:

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An Employee of Albright, Stoddard, Warnick & Albright

INDEX OF EXHIBITS

EXHIBIT "1"

ORIGINAL

FILED

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RONALD A. LONGTIN, JR.

BY _____ DEPUTY

$3850
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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., 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
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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.

Jerry M. Snyder, Esq.
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Attorney for Applicant

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EXHIBIT "2"

ORIGINAL

IN THE SECOND JUDICIAL DISTRICT COURT

STATE OF NEVADA, COUNTY OF WASHOE

THE HONORABLE BRENT ADAMS, DISTRICT JUDGE

JOHN ILIESCU, ET AL,

Plaintiffs,

vs.

MARK STEPPAN,

Defendant.

Case No. CV07-00341
Dept. 6

Pages 1 to 60, inclusive.

TRANSCRIPT OF PROCEEDINGS

MOTION FOR RELEASE OF MECHANIC'S LIEN

Thursday, May 3, 2007

A P P E A R A N C E S:

FOR THE PLAINTIFF: JERRY SNYDER, ESQUIRE
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FOR THE DEFENDANT: GAYLE KERN, ESQUIRE
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5421 Kietzke Lane, Ste. 200
Reno, NV 89511

REPORTED BY: Christina Herbert, CCR #641
Molezzo Reporters, 322.3334

RENO, NEVADA -- THURSDAY, MAY 3, 2007, 1:31 P.M.

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THE COURT: This proceeding is in Case CV07-00341, John Iliescu versus Steppan. This is the time set for the application to release mechanic's lien.

Mr. Snyder, you may proceed.

MR. SNYDER: Thank you, your Honor. This is an application to release a mechanic's lien on certain property in downtown Reno that was sold by my client pursuant to a purchase agreement dated in, I think, August of 2005 to a company called Consolidated Pacific.

THE COURT: And that transaction has not yet closed?

MR. SNYDER: That's correct. While that transaction was pending, Consolidated Pacific, we believe, somehow assigned their interest in it to a company called B.S.C. B.S.C., in turn, retained an architecture firm of whom, I believe, Mark Steppan is the Nevada licensee, to perform architectural services and obtain entitlements to build a 40-story condominium tower.

As part of the purchase and sale agreement between Dr. Iliescu and Consolidated Pacific, Dr. Iliescu was to be provided with a condominium in this tower. So it is the case that he had knowledge that something would be built, that a

condo tower would be built.

The architects went on and did some amount of work, obtained entitlements, did some design work. I don't believe the design work is complete. B.S.C., which retained the architects, has not yet paid the architects and, as a result, they filed a lien and recorded a lien against the Island Avenue property at issue here.

Just some of the relevant dates are the purchase and sale agreement is dated July 2005. According to the architect's lien statement, their first delivery of work was April 21, 2006. The first Planning Commission meeting regarding this was, I believe, in October of 2006. The city council meeting at which the zoning change was finally approved was November 15th, 2006 and the lien was filed on November 7th, 2006.

The lien is invalid for two reasons. First of all, under NRS 108.245 plaintiffs -- or the lien claimant was obliged to provide a pre-lien notice to the owner notifying him they were out there and doing work and that the owner ought to take whatever steps necessary to protect himself against any lien such as filing a notice of non-responsibility.

THE COURT: Now, that's a notice of right to lien as opposed to notice of intent. Right?

MR. SNYDER: Exactly. The second reason is because they failed to file the 15-day notice of intent to lien, as is required by NRS 108.226, subparagraph six. Claimants assert in their response to the application for release of mechanic's lien, which I did just receive a copy of --

THE COURT: I received it just a moment ago.

MR. SNYDER: I don't have any unfair advantage over you.

THE COURT: You don't.

MR. SNYDER: They assert under Fondren BKL Complex, which is a 1992 case, they weren't required to file the pre-lien notice or notice of right to lien because the owner had actual knowledge of construction. And if we look at the Fondren case it's really quite instructive. In that case the court says, "If the owners fails to file --

THE COURT: What's the citation?

MR. SNYDER: That is 106 Nevada 705.

THE COURT: Thank you.

BY MR. SNYDER:

Q "If the owner fails to file a notice of non-responsibility within the time provided in the law after knowledge of the construction, the statute provides that construction is at the instance of the owner."

Now, the whole question here is whether Dr. Iliescu

had knowledge of construction, knowledge of the lien claimant's work that was sufficient to enable him to file a notice of non-responsibility. In order to record a notice of non-responsibility -- and, incidentally, that case was 1992 in -- or in 2005, rather, the notice of non-responsibility statute 108.234 was amended to add the words "to be effective and valid" to the following paragraph.

Subparagraph three of 108.234 now says "To be effective and valid, each notice of non-responsibility recorded pursuant to this section must identify A, the names and addresses of each disinterested owner" -- in this case Dr. Iliescu -- "and the person who is causing the work or improvement to be constructed, altered or repaired."

THE COURT: I'm sorry. Which subsection was that?

MR. SNYDER: 3-A.

THE COURT: I see that.

MR. SNYDER: The notice of non-responsibility under Subsection 4, in order to be effective and valid, must further be served upon the prime contractor for the work or improvement within ten days after the date upon which the contract is formed with the prime contractor.

Here there is no way on earth Dr. Iliescu could have recorded a valid notice of non-responsibility because he did not know the identity of the architects or the prime --

the architects being the prime contractor in this case -- or the entity who was contracting with the architects, in other words, Consolidated Pacific's assignee B.S.C. Development. So he could not have filed a notice of non-responsibility. Therefore, the fact that he had some notice that work was being done, some notice that there was an architect doing this work -- I believe he actually went to the city council meetings in October.

THE COURT: Right. I was looking at his declaration. He obviously knew that this condo project was underway. By the way, was this an existing building or a brand-new building?

MR. SNYDER: It's to be a brand-new building.

THE COURT: Okay. And so I assume if he went to the meetings, he knows there's a construction project. That doesn't necessarily mean that he knows that A architectural firm is engaged and rendering services.

MR. SNYDER: Exactly.

THE COURT: He even knows there must be an architect, but that doesn't mean he knows this architect and what services they're performing.

MR. SNYDER: I don't know his level of familiarity with the entitlement process. I don't think --

THE COURT: As he said in his declaration, he was

not aware he had met Mr. Steppan and was not aware that he was performing any work relative to the property.

MR. SNYDER: Right. Did he suspect there was probably some people performing work to get entitlements? Yes. Sure. I mean, that's not rocket science. Did he know it would be an architect -- you know, did he know the identity of them or even the exact, you know, disciplines that would be involved? I don't think so, if, you know -- Dr. Iliescu is here and I'm sure he would be happy to testify if you had questions for him.

But the ultimate question is whether he could have recorded a valid notice of non-responsibility. Keep in mind that the -- even if his attendance at those meetings provided him further notice of who the architects were, that wasn't until October. The architect began work in April of 2006. So for most of the time the architect was working, he had no way of knowing, no way of putting the architect on notice that the owner is not going to be responsible for this lien. So I think under Fondren he couldn't have recorded a valid notice of non-responsibility based on the knowledge he had.

The other argument that Mr. Steppan makes in his brief is that the proceeding is premature and some discovery should take place. We filed this motion in April of this year and this is the first we've heard -- that's not exactly

true. Ms. Kern told me yesterday that she would want to take some discovery before final determination. I think -- I think that's a little bit too late. I think if discovery was required, I would have liked to have known about it much farther back. In fairness to her, we did think the deal was going to close prior to this but, still, you know, this motion has been pending.

THE COURT: Is the closing imminent? Has there been any discussion with the buyer about --

MR. SNYDER: The check's in the mail.

THE COURT: To relieve the owner of responsibility?

MR. SNYDER: No. I mean, the closing is, you know, hopefully imminent but I don't know if anyone can really put much store in that. I think everyone hopes the closing is imminent but --

THE COURT: If for whatever reason the purchaser has not been able to work out an arrangement with the owner and the architect --

MR. SNYDER: The purchaser -- the purchaser filed for bankruptcy shortly after the closing was to occur, and it's our understanding the purchaser is attempting to work something out on that so that the deal can close.

THE COURT: When you say "purchaser," you're talking about the assignee or the actual --

MR. SNYDER: The assignee.

THE COURT: The assignee is in bankruptcy?

MR. SNYDER: I believe it's not -- I don't know this as a point of fact, whether it's B.S.C. or a further assignee. I think they may have transferred it to another entity. One of the entities is in bankruptcy that has held that portion of it. I don't think that affects this motion. I don't have a legal citation other than I talked to our bankruptcy guy and he said it ought not to. I don't think the automatic stay provisions would affect this. That's our position summed up as thoroughly but as briefly as I can. Do you have any other questions?

THE COURT: No, I don't think so. Ms. Kern?

MS. KERN: Good afternoon, your Honor. The teaching of Fondren is we are not going to allow owners of real property to put their hands over their eyes, put their hands over their ears and say I don't know what's going on, and that's exactly what the applicant is doing here.

In fact, the applicant, not only had complete and absolute knowledge of what is going on, but in the land purchase agreement he actually negotiated what would happen if a lien was recorded. When a purchaser of property is coming to the owner of the property and the escrow isn't going to close -- that is, prior to escrow there are lots of

things that are going to happen -- in this case there was a tremendous amount of work that was going to be done and it was contemplated by the parties it would be done prior to the close of escrow. Specifically they were going to obtain all governmental permits, all zoning changes, everything so that the project, that is, the condominium project, which the parties were very specific about what it was down to the number of parking spaces that Dr. Iliescu would be afforded and allowed to have within this project. They were very specific about what it was. It was -- it's a massive project and they knew that it was going to take some time to get all the permits done and do all of the work, not --

THE COURT: Is that why the escrow was so lengthy -- the closing. It still hasn't closed after what, two years?

MS. KERN: Correct. Because they were going through this entire process and, in fact, there have been some negotiated extensions of time within which to close. The most recent one was addendum number three to the agreement which provided that the closing would be on or before April 25th.

What happened on April 25th is that the entity that is now the holder of the rights under that land purchase agreement, B.S.C. Investments, LLC, filed for protection

under the bankruptcy code and they did that for a very specific reason. Because under eleven U.S.C. Section 108 the debtor in bankruptcy gets 60 days more to perform an unexpired contract.

So they weren't able to reach an agreement, apparently, for another extension and execute an addendum, but they most certainly were able to get 60 days by filing bankruptcy, and that's what they did. So right now Dr. Iliescu -- the applicant does not have -- they can't do anything with this property. They can't sell it, they can't lease it. They cannot even enter into a contract for the sale because their land purchase agreement prohibits them from doing that.

THE COURT: They're still -- the trust is still the owner of the land?

MS. KERN: The owner, but cannot enter into any agreements to sell, agreements to lease. Can't do anything with it. The purchaser still has all of those rights and is going to for at least another 60 days. I've practiced in bankruptcy court a lot of time and sometimes that 60 days becomes a little bit longer with some different things a debtor can do. I haven't been on the debtor's side, but I've certainly been on the creditor's side enough where I've been frustrated because something else happens and I have to wait

a little longer for us to exercise our rights. But at the very minimum they've got 60 days. So under that alone I believe this hearing is premature and, in fact --

THE COURT: How does that affect this hearing? It may -- obviously, it has delayed the closing of the sales transaction but it doesn't change the fact that the plaintiff in this case is the owner of the property.

MS. KERN: It does, because there was a complete agreement that upon the close of escrow this lien would be satisfied in full and paid. It would completely moot the entire matter and, in fact --

THE COURT: That's probably true too but it didn't happen because the buyer went into bankruptcy.

MS. KERN: But it's now frozen. They still get the opportunity to do so.

THE COURT: Maybe they do. The only thing here we are here today to decide is whether or not the lien should be extinguished because of noncompliance with the statute.

MS. KERN: And I would simply assert, your Honor, that it is better for judicial resources to continue it to see if the matter closes and then it's all paid in full. He can't do anything with the property right now anyway. That lien is not affecting anything.

THE COURT: Didn't you just tell me he would get

the 60 days and your experience teaches he'll get more time and we don't know what's going to happen?

MS. KERN: But he's already negotiated for that and has to live with it. They're -- in the agreement there was already a freeze on anything that he could do with this property.

THE COURT: Well, I guess I see your point. It's probably true as a practical matter whether your client has a lien or doesn't have a lien, nothing will happen with that property as long as the United States bankruptcy proceeding is pending. Right?

MS. KERN: Yes, I believe so.

THE COURT: But that doesn't mean that this court just ignores the lien process and the statutes that pertain to the liens. I don't think as a practical matter it's going to make any difference at all until something happens in bankruptcy court.

But if an owner moves to extinguish the lien, then this court has to consider was the lien properly noticed, was the right to lien properly noticed, was the intent to lien properly noticed and was the lien perfected.

MS. KERN: I will get to the merits. Sometimes it seems as though we waste judicial resources in dealing with the issues --

THE COURT: I think it probably accomplishes nothing. If the lien disappears tomorrow, the plaintiff in this case can't do anything in terms of selling the property or --

MS. KERN: And there's also an argument that we could record a lien. The time hasn't run yet.

THE COURT: I thought about that too but that's not really performing either.

MS. KERN: Exactly.

THE COURT: Maybe you could start all over again, I don't know. Let's talk about the merits.

MS. KERN: On the merits -- and I understand that you did not -- nobody got a response in any amount of time to be able to prepare.

THE COURT: I did but it was 1:29.

MS. KERN: I understand, your Honor, and I do apologize. But we had been continuing this in the anticipation of a closing, and I misunderstood with respect to today's hearing. So it is -- it is my fault and we found out last Thursday that the bankruptcy had been filed. But I do -- if I could have you look at the attachment, Exhibit A.

THE COURT: Let me just ask you this: Do you agree or disagree that the statutory notice for right to lien and intent of lien was not given to the owner and, therefore,

you're relying on actual notice, or do you believe that the statutory notices were given in this case.

MS. KERN: I agree that the notice required under 108.245 was not provided, and I apologize. I'm old school. I still call the it "pre-lien notice" but, yes, that notice was --

THE COURT: What about the other notice, the notice of intent to lien? Do you believe that was --

MS. KERN: The 15-day notice, in my opinion, is not required under this circumstance. I do not believe this is a residential property that is the subject of that pre-lien notice. But, similarly, had that been a requirement, that defect has already been cured. A pre-lien notice was provided and a new lien recorded.

So that portion of it goes away, and in my discussions with Mr. Snyder we did agree that the real meat and the real issue -- because that can be corrected, that defect can be taken care of --

THE COURT: Right.

MS. KERN: But what can't be taken care of because the time has already passed is that pre-lien notice. And --

THE COURT: And that was not given?

MS. KERN: That was not given, no.

THE COURT: Okay.

MS. KERN: But it is my opinion that surely one of the amendments to 108.234 did not overrule Fondren. The Fondren principles are as valid today as they were in 1990 when the Supreme Court issued that opinion. That is, that when an owner has notice, there is an affirmative burden placed upon that owner to record a notice of non-responsibility.

Now, Mr. Snyder would have you believe that, if nobody tells me who the architect is, I don't have any obligation or burden to satisfy the requirements of what goes into a notice of non-responsibility. That's ludicrous. That is absolutely ludicrous.

THE COURT: This relationship between the nature and extent of actual notice and the obligation to proceed with a notice of non-responsibility, as I said earlier, if I know that a building will be built on the property, I can certainly assume that there will be an architect, there will be a contractor, there will be subcontractors.

But that doesn't mean I know who the particular architect is, the scope of their undertaking or the financial risk involved in their contract. You need to know more than just generically a project must have an architect in order to prepare a notice of non-responsibility.

MS. KERN: And are you suggesting that an owner of

property therefore has no responsibility or obligation to make inquiry to determine the name, if that's one of the requirements? If I've got the burden --

THE COURT: I don't know. I haven't even read the case. I just heard about it 20 minutes ago.

MS. KERN: Okay.

THE COURT: But I assume it's kind of a continuum, you know. The more you know, the greater your responsibility is.

MS. KERN: But in this case we need to look at this agreement. This was a very sophisticated seller of property. This agreement took care of everything. They negotiated and decided to the extent that part of the purchase price was going to be the 3,500-square-foot penthouse that the architect designed, that part of --

THE COURT: Is there evidence you have today that the plaintiff knew who the architect was, or just that there would be an architect with these particular designs?

MS. KERN: We found out that escrow was not going to close -- and I'm taking great exception to the assertion that we should not be able to conduct discovery for the following reason: We found out that escrow was not going to close on April 25th. That was the date it was supposed to close and up until then we were all still being told, it's

there, it's going to close. We even got our release of lien over to the escrow company, everything was good, champagne was ready to go. On the 25th B.S.C. Investments, the holder of all rights under the purchase agreement, filed bankruptcy. And automatic stay went into effect.

Even though the same attorneys represent B.S.C. Investments and Dr. Iliescu, I no longer could go there to try to get discovery from B.S.C. as to what information they may have provided to Dr. Iliescu. I don't know. And I can't do any discovery.

THE COURT: You don't know if Dr. Iliescu or his wife or the trust knew that Mr. Steppan was the architect or what the terms of his agreement were?

MS. KERN: I know at some point they did. I mean, he was at the hearings. It was the architects that presented the project. I absolutely know that he had knowledge of who they were.

THE COURT: He says in his declaration "I've never met Mr. Steppan nor was I aware that he was performing any work relative to the project." What evidence is there otherwise?

MS. KERN: There is evidence that he admits to as having been at the council meetings in which the architects were identified, were there, were making the presentation.

And I most certainly want to be able to explore what information was received from B.S.C. They had the same attorneys. We were negotiating when we were doing the agreements as to how this would be paid with the same attorneys as Dr. Iliescu's attorneys. They were all represented by the same party -- by the same firm.

Once the bankruptcy was filed, Mr. Harris filed the bankruptcy on behalf of the debtor. And at that point in time I am prohibited by the stay until I go to the court to either get an application for a 2004 exam or some other method by which I would be entitled to examine the debtor in that bankruptcy. And I have been prohibited since the date that we found out that escrow was not going to close, which was a week ago.

THE COURT: Is this Mr. Steppan here?

MS. KERN: Yes.

THE COURT: Did he have conversations with Dr. Iliescu? Did he talk to him about the -- how the project was going? Did he review plans with him? Did they discuss compensation? Has he had any -- Dr. Iliescu said he's never even met him.

MS. KERN: There was an entire design team and there were other architects that at least had been introduced to Dr. Iliescu that are within Mr. Steppan's firm that were

introduced to Dr. Iliescu at or about the time of -- and I don't know whether it was the planning commission hearing or the city council hearing but yes, in fact, he met Mr. Friedman and was introduced to him at -- I believe it was after the city council hearing, is what I recall being told.Mr. Friedman is in Hawaii so my -- I mean, we literally found out.

THE COURT: Who is Mr. Friedman?

MS. KERN: Mr. Friedman is on the design team and a principal at Fisher, Friedman, which is the firm that Mr. Steppan is employed at. And it's very important, your Honor. And this agreement, for goodness sakes, they even mention architectural services. They talk about what will happen if a lien is recorded.

An owner of property has two alternatives. Number one, they can record a notice of non-responsibility. And I would argue it is just as large of a burden on the owner of a property to make sure they get that information. You can't point to 108.234 and say, well, I needed to know who the person was -- who the actual name of the person was but I didn't know it so I don't have to do a notice of non-responsibility. That's frivolous and that's not what Fondren says. Fondren says the burden shifts.

THE COURT: Isn't it frivolous to say the owner of

this property is one of the most sophisticated real property owners in Nevada, they have this extremely complex sales agreement that even delves into the architectural and design process for this building but we don't have to serve them a notice of right to lien?

MS. KERN: That's exactly what Fondren says. That's exactly it, that there is no pre-lien requirement when the owner has knowledge. That's exactly what the case says.

THE COURT: What do -- I guess -- shortly I will read this case but what does it say they have to have notice of? Any construction?

MS. KERN: That some improvement is going to be done on the property.

THE COURT: Any improvement is going to be done? If you have any building in the world which, by definition, requires an architect, then that -- that eliminates any notice of lien or the -- I mean, the notice of lien doesn't just tell the owner that the property may be encumbered. It tells the owner that the extent of the obligation, the amount of the obligation. All that just disappears if the owner happens to know there's going to be a building built?

MS. KERN: Well, first of all, you don't even have to reach that issue, because in the agreement it specifically defines what the project is and it specifically defines that

the architect will be retained before the close of escrow and will perform services.

THE COURT: I'll take your word for it. If the development process was going to occur before the close of escrow, then I would assume the agreement says all those things. But is that information sufficient to relieve the respondent in this case from having to give the lien notice?

MS. KERN: Absolutely.

THE COURT: Well, let me take a look at the case. Are there any of these other materials that I need to look at? I assume these are provisions of the contract that go into detail about the design of the project and so on.

MS. KERN: The large exhibit is Exhibit A, which is the agreement itself. That's was what was provided to me yesterday with respect to what the agreement is.

THE COURT: Are there some parts of that you'd like me to take a look at?

MS. KERN: Yes, I've specifically referenced them in the response. I would direct your attention to paragraphs 31, 39-E.

THE COURT: Hold on.

MS. KERN: I'm sorry. Page 3 of the response, they are identified.

THE COURT: Thirty-one, access to property. How

does that --

MS. KERN: This goes to my offer of fact that I gave you that this property is completely tied up. There is nothing that can be done with any other party other than the purchaser with respect to any kind of a contract or a lease or anything that can be done.

It also provides evidence that, in fact, the seller was aware that there was going to be professionals that would be going onto the property, and the seller decided to negotiate that, if that occurred and there were any consequences as a result of those professionals going onto the property, the seller would look to the buyer for indemnification. He deliberately decided and chose --

THE COURT: You know that a project is going to be built and the buyer will be in charge of the project, and so the buyer agrees to indemnify the seller from any risk of the project.

MS. KERN: But that goes to the deliberate determination, I'm not going to protect myself from liens with a notice of non-responsibility. I'm going to allow the buyer to indemnify me from those possibilities. Keep in mind, if the seller wishes to have the information with respect to any professionals that are going to go on --

THE COURT: Wait a minute. Let's go back to what

you just said. The buyer doesn't -- you said the seller here chooses to rely on indemnification from the buyer instead of a notice of responsibility.

MS. KERN: Non-responsibility.

THE COURT: Non-responsibility. Indemnification from the buyer doesn't really have any relationship to non-responsibility.

The whole idea of the lien process vis-a-vis the owner is it gives the lienholder the right to encumber the owner's property for an obligation that the buyer entered into. What I'm saying is there's no -- if the buyer could have performed the obligation, there's no occasion for the lien.

MS. KERN: That's not true.

THE COURT: No rational seller is going to exchange indemnity. They're always going to want indemnification by the buyer in virtually every contract but that doesn't provide them any protection against the lien.

MS. KERN: I disagree. That's --

THE COURT: What protection is it? They've got it and so what?

MS. KERN: Well, they also have the statutory protection of notice of non-responsibility, but if they choose not to do it --

THE COURT: What I'm saying is paragraph 31 is not an intent not to have -- not to proceed with the notice of non-responsibility. It doesn't have any relationship to it.

MS. KERN: Well, I disagree with your Honor. I think that --

THE COURT: What's the relationship?

MS. KERN: I think that the relationship is that, number one, it demonstrates knowledge by the seller that professionals are going to be going onto the property as the sole impetus from the buyer --

THE COURT: That's true.

MS. KERN: It's the buyer that's picking them, so if you want to know who the buyer is picking, it would have been really easy. Ask them.

It also demonstrates that there is knowledge that work may or may not be performed and we're going -- and it also specifically says, "The buyer shall hold seller harmless from any lien." That means that they know that a lien might be recorded.

THE COURT: Well, sure, that's true. It's true that that paragraph says there will be people going on the property, people selected by the buyer, people who are professionals, that there's a risk of a lien, they acknowledge that by saying that risk is going to be borne by

the buyer, okay. What is the --

MS. KERN: And that's all important information under Fondren with respect to shifting the burden of responsibility to the seller.

THE COURT: Okay. What's the next paragraph?

MS. KERN: Once again, 39-A is simply a provision that indicates that the seller cannot solicit or accept any other offers during the terms of the agreement. Once again, it's that notion that this property is completely tied up and held by the purchaser at the present time.

THE COURT: Okay.

MS. KERN: There is a provision at F -- which is on page -- at the bottom of page 14, I'm sorry 39-F, which specifically identifies and provides that the offer is conditioned upon the buyer provide -- obtaining variance special use permits, tentative map, zone change and land use designations, and they even typed in "other," and it's "architectural and design review and approval."

THE COURT: Okay.

MS. KERN: 39-H. Once again, going to the knowledge of this seller as to what this property was going to be developed as. It was specifically negotiated that a portion of the purchase price would be the penthouse of the condominium project and there is a specific amount identified

for the penthouse credit.

THE COURT: Your argument is, if you know there's going to be a penthouse, you know there's going to be an architect to design the penthouse?

MS. KERN: Not only is the architect specifically named but you know --

THE COURT: Where was the architect specifically named?

MS. KERN: I just said in subpart F. They even typed in "other, architectural."

THE COURT: I thought you meant the name of the architect.

MS. KERN: No. The fact that architectural and design review. I have absolutely no doubt that on this date the name Mark Steppan or Fisher, Friedman or any of the other design professionals would not have been known by either the buyer or the seller.

THE COURT: When was the agreement between Mr. Steppan's company and the buyer?

MS. KERN: October 21st, 2006.

THE COURT: Anything else in the agreement?

MS. KERN: Yes. Subpart I provides, once again, that the seller is prohibited from entering into and even warrants that there are no leases or other contractual use

agreements, that the property will solely be -- the right to develop is given solely to the purchaser.

THE COURT: Okay.

MS. KERN: In subpart L, once again, there was a negotiation for parking spaces demonstrating an understanding and knowledge of what this project was going to be, how it was going to look. There was going to be parking, condos, retail, all kinds of things and this seller knew about it and negotiated parking spaces as part of the agreement.

THE COURT: Okay.

MS. KERN: There were then a series of addendums that were executed by the parties and I --

MR. SNYDER: You know what, I have a much cleaner copy of the contract.

MS. KERN: This is what was sent to me.

MR. SNYDER: Yeah. I took out all the duplicate copies, if you want to use this. Your Honor, may I approach?

THE COURT: Sure. Do you have a copy of those too, Ms. Kern?

MS. KERN: I think it's included in this. I think I had a lot of duplicate pages, as I understand.

THE COURT: So where do we go now? Are there any other provisions in the initial agreement you wanted me to look at? By the way, does the agreement somewhere early on

discuss in general terms the nature of the project that's going to be built?

MS. KERN: It's in one of the addendums.

THE COURT: Okay. So where do we go now?

MS. KERN: Okay. Addendum -- and let me -- in my copy the addendums were not in order, so let me go to --

THE COURT: Okay. We have reference to the penthouse again in addendum one.

MS. KERN: Yes, in H. Now they're getting even more specific identifying both the size of the penthouse that Mr. -- excuse me -- the seller of the property will receive is 3,750 square feet of living area in the new condominium project. There's also going to be four-car -- four parking spaces assigned to that particular property with the location being chosen by the seller. There is also a provision for the next page, page 2, subpart M.

THE COURT: Excuse me. Where does the project stand now in terms of its development?

MS. KERN: It has been fully approved.

THE COURT: Is it ready for occupancy?

MS. KERN: No, no. They haven't built it.

THE COURT: Where is it?

MS. KERN: They have to buy the land. It's on Court Street.

THE COURT: So it has not -- construction has not begun?

MS. KERN: No. And I don't believe it can -- I don't think construction was allowed to be done before escrow closed. I think escrow has to close before they can commence construction.

THE COURT: So they went through the permitting process, the design process and that's pretty much where we are now.

MS. KERN: And they also received entitlements which attached to the property as provided by the design plans.

THE COURT: If I can go back to for a minute to the provision we discussed earlier, have the variances and special use permits been obtained, if they were necessary, do you know?

MS. KERN: We believe that they have. We believe it's poised to proceed to go to the next step.

THE COURT: Were there --

MS. KERN: I don't have those in front of me so I don't know.

THE COURT: Okay.

MR. SNYDER: It's my understanding that they are. Someone else handled that, Gary Duhan handled it.

THE COURT: One of the --

MR. SNYDER: Your Honor, the broker involved, Mr. Johnson, is here if you'd like -- if you have any questions.

THE COURT: Going back to what Ms. Kern quoted was the typed-in portion --

MS. KERN: Of the architectural services.

THE COURT: -- of the architectural services, it's subparagraph F on pages 14 and 15.

MS. KERN: Yes.

THE COURT: And it relates to variances and special use permits, and it also says "architectural design review and approval." Has there been an architectural design, review and approval process with the planning authorities or with the city?

MS. KERN: Yes.

THE COURT: When was that?

MS. KERN: October and November of 2006.

THE COURT: Was Dr. Iliescu or a representative of the trust present for those presentations?

MS. KERN: To our knowledge, yes.

THE COURT: Now, the lien was recorded November 7th, right, of last year?

MS. KERN: Yes.

THE COURT: And you said the agreement was October

21st.

MS. KERN: April.

THE COURT: Oh, I'm sorry. I wrote down -- April 21st?

MS. KERN: Yes.

THE COURT: So the firm had been working since April of last year?

MS. KERN: Yes. And, as we understand it, this agreement with the addendums and everything finally was done between the purchaser and the seller sometime in October of 2005, although I'm going by the agreement.

THE COURT: You mean the purchase agreement was finalized?

MS. KERN: Yes.

THE COURT: Well, is there evidence to the effect that Dr. Iliescu, or some representative of the trust, was present when Mr. Steppan or his group made architectural presentations to the planning authorities about the design of this building?

MS. KERN: I thought Dr. Iliescu in his declaration said that he had been present --

THE COURT: Well, yes, he did. What he said was --

MS. KERN: Which is in conformance with what our understanding was as well. "I attended two public meetings

at which B.S.C.'s design team did a presentation."

THE COURT: "However, I was not at any time introduced to any of the architects or engineers involved."

MS. KERN: And we believe that that is incorrect. I'm sure not intentionally incorrect but --

THE COURT: It seems to me on the one hand if you sell a piece of property of this nature, you know that the building is going to be built and it needs to be designed and it needs to be constructed and you know there's an extensive permitting process. That doesn't necessarily mean that you know either who is going to be performing each one of these components of the process or what the nature and size of the risk is going to be.

But if you, as an example, are sitting in a planning meeting and an architectural firm is making some sort of detailed presentation of the design to the planning authorities, I don't know what else you need to know, or at least need to know in order to have a duty to inquire an obligation to file your notice of non-responsibility. So that's --

MS. KERN: I agree.

THE COURT: They may not have had any personal dealings or even conversations with each other. But if you're the owner of the property you know it's being

developed, the planning agency is talking about your development, which is going to include your own residence in it, and there's an architect identified at the meeting who is the architect for the project, that may be enough to do it. I don't know. Are there any exhibits or is Mr. Steppan going to testify today on this subject?

MS. KERN: I don't think that it's necessary currently based upon -- I mean, I believe that we haven't reached that provision. I would like to continue to provide some additional information out of the agreement, if you don't mind --

THE COURT: Okay.

MS. KERN: -- and also argument. Because I think you just raised a very excellent observation that is exactly what the Fondren court was going to. What Mr. Snyder is arguing is that the notice of non-responsibility statute that existed at the time of Fondren did not require that you actually identify the name of the person that you're telling I'm not -- I'm not responsible for this property. At that time you didn't have to name the professional. You could just record I'm not responsible for any work done on this property.

Mr. Snyder is arguing that, because he was not specifically told, then he could not comply with his

obligation to record a notice of non-responsibility. But that is ridiculous. Because what Fondren says is the burden shifts to the seller, to the owner of the property, to record and prepare a notice of non-responsibility.

Incumbent upon that responsibility is to get the information necessary to comply with the statute. It doesn't matter what the statute says. It doesn't matter that it's changed. It would have been a very simple process, even had he not known, to simply make an inquiry so that he could comply.

THE COURT: You told me he didn't need to make an inquiry. He was there when this architectural firm presented this project to the Planning Commission.

MS. KERN: Exactly. But even if that obligation arose earlier, he still -- all he had to do is make an inquiry. If I have an obligation, that's like me stepping back and saying well, I have an obligation to record a mechanic's lien but someone didn't tell me his APN number or legal description so I don't have to do it. That's ridiculous. If there's a statutory obligation, the one --

THE COURT: It's not as ridiculous as saying I'm providing the services. They're going to be worth over $1 million. I know who the owner is but, gee, I guess I won't give him a notice of right to lien.

MS. KERN: But he was intimately -- they had --

THE COURT: Your client's position is as ludicrous as his.

MS. KERN: No, it's not, because they knew he knew about it. He didn't sell this property without knowledge of what was going on. They knew he was going to get a penthouse.

THE COURT: Is there any evidence as to the reason why the respondent didn't serve a notice to file right to lien?

MS. KERN: Because the way the project was provided and was going, everybody knew what was going and was a part of it. He showed up at the meetings when they presented it.

THE COURT: Is it just that they didn't do it? Why would they not do it except inadvertently? Are you saying that somebody actually thought this through, read the case law and said the circumstantial evidence is so strong of Dr. Iliescu's knowledge that we don't need to do this?

MS. KERN: No, of course not.

THE COURT: Somebody just didn't do it.

MS. KERN: Of course not. But there also was never any question that the seller of this property was not just selling the land and walking away. There was always an understanding the seller was going to be intimately involved

after the --

THE COURT: The seller, though, was - I just very briefly looked at this agreement. But, as I understand it, although you have this unconventional situation with the long escrow, the indemnification provisions, but the buyer is still, nevertheless, in charge of the development. There's some exceptions, the penthouse and so on, but this is not a situation where the seller is actively involved in the development.

MS. KERN: Correct. That is absolutely correct.

THE COURT: They knew it was a development, how it was going to happen, and they wouldn't let it go to the -- they weren't in charge of the development process.

MS. KERN: You are correct. Now, once they got to the actual design of the penthouse, there was going to be -- there was provisions in there that he specifically got to dictate and do certain things and tell them how he wanted certain things.

THE COURT: In some sense was Mr. Steppan the Iliescus' architect? Was he, in a sense, designing their own condominium or is that taking it too far?

MS. KERN: I would defer to --

THE COURT: Was he just building the shell and the Iliescus would get their own architect and so on for the

interior or not?

MS. KERN: No. I think there's an addendum that specifically provided that they were going to actually provide him plans, he'd get to comment on them and get back to them.

THE COURT: The buyer would?

MS. KERN: No. The Iliescus would be able to get the plans for the penthouse, comment on them and --

THE COURT: But the plans that the buyer would have had done by Mr. Steppan's firm or somebody?

MS. KERN: Yes.

THE COURT: Okay. What other provisions should we look at? We've got 39-H. What is Metzger Johnson Group?

MR. SNYDER: It's the brokerage.

MS. KERN: I think we're at addendum number one. We already talked about 39-H additional terms. 39-M specifically stated "Buyer agrees to a deed restriction through sale of said property to include the property shall be developed for a mixed use of office, retail and predominantly condominium. Said property to be developed as quickly as possible."

THE COURT: Okay.

MS. KERN: Once again, demonstrating that it was not some nebulous project. It was pretty specific what they

were going to the table to do. Addendum number three was apparently the last shot everybody had and it was quite a long one. They, once again, in 1.2 reiterated that the buyer would be required and has exercised reasonable diligence in obtaining governmental approvals.

Addendum three, as I understand it, was the extension; that is, they had come up to the time when the escrow would normally have closed and, therefore, they were needing to extend the time within which to perform because they weren't quite ready.

THE COURT: They increased the cash deposit in consideration --

MS. KERN: Yes. And I think they did some additional things. So this is the one that took us, I believe, up to April 25th of 2007.

Once again, in paragraph 5 they address paragraph 31 and discuss the paragraph that you and I tussled with and discussed with respect to indemnification and the professionals that would be coming on, the requirement of the buyer to keep the property free and clear from all liens and to indemnify if they failed to.

There was a paragraph 7 which, once again, discussed and talked about any required design approvals. In paragraph 8 they amended 39-H which, once again, discussed

the fact that it would be a number of condominium penthouses and the seller would have the first right to select the unit that the seller wanted, once again, identifying -- although now it's 3,750-plus or minus. In the last addendum it was just 3,750, and also for the four parking places.

The next page, subpart one, is the reference that I gave you just a moment ago; and that is, when the project had progressed to a point where the architect is designing the preliminary floor plans for the penthouses, seller shall meet with the architect and participate in the selection and design of seller's penthouse unit.

THE COURT: We're not there yet in the development. Right?

MS. KERN: That is correct. But it was specifically contemplated that there would be specific interaction between the two parties in order to make sure that the penthouse was designed to the liking of the seller.

THE COURT: That's after the structure is built and the seller has selected the 3,750 space?

MS. KERN: No, I don't think so. Because at the time that the design process is in effect, that's when they're designing these different penthouses. So he actually would be there before -- it would be in the design process, not in the --

THE COURT: Yeah. It says it right here.

MS. KERN: Yes. Paragraph 9, which amended 39-I, included a subpart three which provided for now 51 parking places that would be able to be used with respect to the contiguous properties, once again, evidencing that there's a property that I believe is on Island. It's referenced somewhere, I believe, in the agreement as the Island Property.

There was a contemplation, I believe, in the agreement that the seller would be independently developing that as a restaurant, or something of that nature, because it would go hand in hand and tie with the project that was being developed by the buyer.

And there was an agreement that on down the road when that was developed there would be a sharing or an easement for purposes of parking spaces that could be utilized in this development that the seller would actually be doing on the property that was not being conveyed or sold to the buyers.

THE COURT: Okay. So 51 parking spaces contemplates use by the seller for another project he had?

MS. KERN: That is my understanding from reading the agreement.

THE COURT: Okay.