IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 78092

Tonopah Solar Energy, LLC,
Appellant

v.

Brahma Group, Inc.,
Respondent

Appeal
Fifth Judicial District Court
The Honorable Steven P. Elliott
Case No. CV 39348

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following is an entity as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellant Tonopah Solar Energy, LLC does not possess any parent corporations and no publicly held company owns ten percent or more of its stock. Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC is the only law firm that has appeared on behalf of Appellant in this case or is expected to appear on behalf of Appellant in this Court.

Dated: October 3, 2019

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1) and NRS 108.2275(8). Appellant moved under NRS 108.2275 to expunge a mechanic's lien recorded by Respondent. The district court entered an order under NRS 108.2275(6) denying the motion to expunge. Notice of entry of the order denying the motion to expunge was served on November 1, 2018. 6 AA 472.[1] Respondent then moved for attorney fees and costs under NRS 108.2275(6)(C), which the district court granted. Notice of entry of the order granting the motion for fees and costs was served on January 9, 2019. 14 AA 1006. Appellant timely filed its notice of appeal identifying both orders on February 5, 2019. 14 AA 1019.

ISSUES PRESENTED

Appellant Tonopah Solar Energy, LLC ("TSE") is the project developer and owner of improvements constituting a near billion-dollar thermal solar energy project located outside Tonopah, Nevada. The project sits on land owned by the federal government and under lease to TSE. TSE entered into a services agreement with Respondent Brahma Group, Inc. ("Brahma") for Brahma to perform certain work on the project. Brahma and TSE have asserted competing claims against each other arising out of this relationship: Brahma contends that

[1] "AA" refers to the Appellant's Appendix submitted in conjunction with this brief. The number preceding AA indicates the volume, while the number following AA indicates the bates number.

TSE owes it millions of dollars for work it performed on the project; TSE contends that it does not owe any additional money and that much of the money that it has already paid to Brahma was based on fraudulent invoices.

At the onset of this dispute, Brahma recorded a mechanic's lien under NRS Chapter 108. TSE moved to expunge the lien. Brahma amended the lien four times, both before and after TSE filed its motion to expunge. Brahma's original lien, however, attached federally-owned land. Brahma later amended its lien to only attach TSE-owned improvements on the federally-owned land. The federal government has a significant security interest in those improvements via a $737 million loan guarantee from the U.S. Department of Energy that is secured by all of TSE's assets. Nevertheless, the district court denied TSE's motion to expunge. Brahma then moved for nearly $80,000 in attorney fees under NRS 108.2275(6), which the district court granted in its entirety. The issues presented are:

1. Courts have held that liens that attach federally-owned land are invalid as a matter of law. Was Brahma's original lien, which attached-federally owned land, invalid as a matter of law?

2. This Court and others have held that void legal documents, such as deeds, liens, and pleadings, cannot be amended because it is as if they never existed. Liens attaching federally-owned land are void. Could Brahma amend its original lien, which attached federally-owned land?

3. NRS 108.229(1) provides that a variance between a lien and an amended lien made intentionally cannot be done via amendment. Brahma's original lien intentionally attached federally-owned land. It was amended to no longer attach federally-owned land. Did NRS 108.229(1) preclude such an amendment?

4. Courts have held that sovereign immunity bars liens against property in which the federal government has a real, substantial financial interest, even if it has a less than fee simple interest. The federal government has a nine figure security interest in the project improvements attached by Brahma's current mechanic's lien. Does sovereign immunity render Brahma's lien against the project improvements invalid as a matter of law?

5. Despite the fact that Brahma's time entries supporting its fee award were block billed, the district court awarded Brahma one hundred percent of the fees it requested. Was this an abuse of discretion?

ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals because it involves statutory lien matters arising under NRS Chapter 108. *See* NRAP 17(b)(8). Principal issues in this appeal, however, present issues of first impression involving the common law and statewide public importance, which the Supreme Court may wish to address. *See* NRAP 17(a)(11)-(12).

- The second issue presented above concerns a question of first impression involving the common law, namely whether a void mechanic's lien can be amended. It was primarily raised at 1 AA 10 and 3 AA 241-42 and resolved at 6 AA 480. It is important because it concerns the principle of amending void legal documents and the impact of sovereign immunity when applied to mechanic's liens encumbering federally-owned land.

- The third issue presented above presents a question of first impression involving the interpretation of NRS 108.229(1). It was raised at 1 AA 10 and resolved at 6 AA 480. This issue is important because construction is a significant industry in Nevada and developing case law that further defines the scope of Nevada's mechanic's lien laws is beneficial to the industry as a whole as it reduces uncertainty and improves decision making.

- The fourth issue presented above presents questions of first impression involving the common law, specifically the application of sovereign immunity to liens attaching property in which the federal government has a less-than-fee-simple interest. It was raised at 3 AA 243-45 and resolved at 6 AA 480-81. This issue is important because there is a significant amount of federally-owned land in Nevada and little case law discussing the impact of federal sovereign immunity on mechanic's liens.

STATEMENT OF THE CASE

This is an appeal from the district court's denial of TSE's motion to expunge a mechanic's lien under NRS 108.2275, *see* 6 AA 472, and the grant of Brahma's subsequent motion for attorney fees and costs under NRS 108.2275(6), *see* 14 AA 1006.

STATEMENT OF FACTS

The pertinent facts for this appeal include the project background, Brahma's ever-changing lien, the arguments raised in the district court, and the district court's decisions.

I. TSE develops a solar energy project on federally-owned land, in which the federal government has a significant financial interest.

TSE is the project developer of the Crescent Dunes Solar Energy Facility ("Project"). 1 AA 81. The Project is a thermal reserve solar energy project located outside Tonopah, Nevada on land owned by the Bureau of Land Management ("BLM"). 1 AA 81; 3 AA 266. It is designed to produce 110 megawatts of electricity through the use of molten salt. 3 AA 266. It is the first of its kind in the United States. *Id.*

The U.S. Department of Energy ("DOE") provided a $737 million loan guarantee to TSE to develop the Project. 3 AA 266, 270. To secure this loan, a Deed of Trust was recorded in Nye County conveying a security interest to the

DOE for all aspects of the Project, including all buildings and other improvements to the land. 3 AA 270; 1 AA 138.

TSE entered into an agreement with Brahma, dated February 1, 2017, for Brahma to perform services and related work on the Project. *See* 1 AA 15. Disputes arose between TSE and Brahma concerning payment and performance under the agreement. Brahma asserts that TSE failed to pay it for work performed on the Project; TSE asserts that it has overpaid Brahma based on fraudulent misrepresentations made by Brahma in its invoices.

II. Brahma records a mechanic's lien and amends it twice.

As a result of this payment dispute, Brahma proceeded to record a mechanic's lien and amend it multiple times, increasing its claim amount from $6,982,186 to over $12.8 million in its fourth amended lien, an increase that cannot be explained by work performed after the recording of the original lien.

1. On April 9, 2018, Brahma recorded a notice of lien against the Project in the amount of $6,982,186.24 ("Original Lien"). 1 AA 37. The Original Lien encumbered nine parcels. 1 AA 40. It identified the owner of the parcels as the "Bureau of Land Management and Tonopah Solar Energy, LLC . . . .". 1 AA 38.

These nine parcels consist of 39,254.82 acres of land, of which, the BLM owns 89.4% or 35,107.33 acres. *See* 3 AA 251-52 (BLM parcels); 3 AA 254, 55, 56, 58, 64 (remaining parcels). The nine parcels consisted of (i) four parcels

owned by TSE (which do not contain any aspect of the Project and upon which Brahma did not perform any work), 3 AA 254, 55, 56, 58, 71, (ii) two unowned parcels, 3 AA 261-62, (iii) one parcel owned by a separate mining company that has nothing to do with the Project, 3 AA 264, and (iv) two parcels owned by the BLM upon which the Project is located, 3 AA 251-52. Below is a chart showing each parcel encumbered by the Original Lien, its owner, and a note regarding the parcel.

No.	APN	Owner	Note
i.	APN 012-031-04	TSE (3 AA 254, 271)	121.6 acres; TSE owns it for its water rights; no aspect of the Project is located on this parcel, nor did Brahma ever perform any work on this parcel. (3 AA 254, 271).
ii.	APN 012-131-03	TSE (3 AA 255, 271)	79.070 acres; TSE owns it for its water rights; no aspect of the Project is located on this parcel, nor did Brahma ever perform any work on this parcel. (3 AA 255, 271).
iii.	APN 012-131-04	TSE (3 AA 256, 271)	80.920 acres; TSE owns it for its water rights. No aspect of the Project is located on this parcel, nor did Brahma ever perform any work on this parcel. (3 AA 256, 271).
iv.	APN 612-141-01	TSE (3 AA 258, 271)	It is simply a right of way/easement over APN 12-141-01 (which is owned by the BLM). (3 AA 258, 271).
v.	APN 012-140-01	No owner (3 AA 261)	

vi.	APN 012-150-01	No owner (3 AA 262)	
vii.	APN 012-431-06	Liberty Moly, LLC (3 AA 264)	Liberty Moly, LLC is a private mining company that has no role in the Project and for which Brahma did not perform any work connected to the Project.
viii.	APN 012-141-01	BLM (3 AA 251)	20,923.240 acres (3 AA 251).
ix.	APN 012-151-01	BLM (3 AA 252)	14,184.090 acres (3 AA 252).

2. On April 16, 2018, Brahma recorded a Notice of First Amended and Restated Lien ("First Amended Lien"). 1 AA 45-47. The First Amended Lien increased the amount of the lien to $7,178,376.94. 1 AA 46. Brahma failed to attach the property description to the First Amended Lien, thus, two days later, Brahma recorded a new Notice of First Amended and Restated Lien. 1 AA 49-57. It encumbered the same nine parcels as the Original Lien. 1 AA 54.

3. On April 24, 2018, Brahma recorded a Notice of Second Amended and Restated Lien ("Second Amended Lien"). 1 AA 59-67. This time the lien amount remained the same. 1 AA 60. Instead, Brahma altered its description of the property attached by the lien. This lien stated that it encumbered TSE's "interest in the [Project] . . . the real property owned by the [BLM] is not charged with this lien." 1 AA 61.

III. TSE moves to expunge Brahma's mechanic's lien and Brahma amends its lien again.

On June 11, 2018, TSE moved to expunge Brahma's mechanic's lien under NRS 108.2275(1). 1 AA 1-13. TSE argued that Brahma's mechanic's lien was frivolous and made without reasonable cause because, among other reasons, Brahma's Original Lien was invalid for encumbering federally-owned land and could not be amended because it was void, and NRS 108.229(1) precluded Brahma from amending its Original Lien to no longer encumber federally-owned land because the variance was intentional. *See id.*

On July 19, 2018, Brahma recorded a Third Amended and/or Restated Notice of Lien ("Third Amended Lien"). 2 AA 223-30. This time, Brahma increased the lien amount to $11,902,474.75. 2 AA 225. The lien identified the same nine parcels and stated that it only encumbered "[t]he real property described in Exhibit A . . . to the extent not owned by the [BLM] or Liberty Moly, LLC; and/or [t]he improvements located and constructed on the Land, including, but not limited to the improvements identified as the [Project]." 2 AA 224.

Brahma opposed TSE's motion to expunge, arguing, among other things, that its Third Amended Lien only encumbered the Project improvements and not any federally-owned land. *See* 1 AA 84-103. TSE filed a reply in support of its motion to expunge, arguing, among other things, that sovereign immunity precluded Brahma from attaching the Project improvements because such a lien

would impair the federal government's significant security interest in them. *See* 3 AA 236-49.

IV. The district court does not expunge Brahma's lien.

The district court heard arguments on the motion on September 12, 2018. 5 AA 346. At the hearing, the district court denied TSE's motion to expunge. 5 AA 430-34.[2]

The district court issued an order denying TSE's motion to expunge on October 29, 2012. 6 AA 472-81. The court first determined that NRS 108.229(1) did not preclude Brahma's amendments because Brahma had "not 'intentionally' attach[ed] BLM land such that it is precluded from amending its Notice of Lien." 6 AA 480. Second, the court rejected TSE's argument that Brahma's Original Lien was void and could not be amended. *Id.* The court concluded, without further explanation or findings, that "TSE [was] estopped from arguing that the [Original Lien] [was] void simply because the BLM's land was allegedly implicated in the [Original Lien]." *Id.* Third and finally, the court determined that sovereign immunity did not preclude Brahma from attaching the Project improvements because "the DOE's security interest [was not] impaired by Brahma asserting a Notice of Lien" and "if Brahma were to eventually foreclose on its Notice of Lien,

[2] Two days after the hearing, on September 12, 2018, Brahma recorded a Fourth Amended and/or Restated Notice of Lien, which increased the amount of the lien to $12,859,577.74. A surety bond has also been recorded releasing the lien.

the Work of Improvement could still be operated as a solar electric facility." 6 AA 481. Therefore, the court determined that Brahma's lien was not frivolous or made without reasonable cause. *Id.*

Following the denial, Brahma moved for attorney fees and costs under NRS 108.2275(6). 7 AA 482-95. Brahma sought $77,937.50 in attorney fees and $479.84 in costs for opposing TSE's motion to expunge and drafting its motion for attorney fees and costs. *See id.* TSE conceded that fees must be awarded under the statute. *See* 8 AA 526-41. TSE pointed out, however, numerous reasons why $77,937.50 in attorney fees for this limited amount of work was unreasonable, including that the hours billed, 206.90, were excessive, and should have been reduced for block billing, overstaffing, duplication of efforts, excessive time spent (i.e., 28.70 hours spent drafting the form motion for attorney fees), and inadequate documentation and descriptions. *See id.*

V. The district court awards Brahma its full attorney fees and costs.

The district court granted Brahma's motion for attorney fees and costs in its entirety. *See* 14 AA 1006-18. The court determined that the rates and hours spent were reasonable because of the size of the lien, the complexity of the issues presented, the quality of counsel, the quality of the work product, and the result. 14 AA 1012. The court awarded Brahma $88,417.34; $10,000 of which was a

stipulated-to amount for Brahma's counsel's time drafting the reply, attending the hearing, and preparing the order. 14 AA 1013-14.

TSE timely filed its notice of appeal challenging the district court's denial of TSE's motion to expunge and grant of Brahma's motion for attorney fees and costs. *See* 14 AA 1019-22.

SUMMARY OF THE ARGUMENT

I. Mechanic's liens that are invalid as a matter of law are frivolous and must be expunged under NRS 108.2275(1).

A. Brahma's Original Lien was invalid as a matter of law because it encumbered federally-owned land.

B. Brahma attempted to fix this defect—encumbering federally-owned land—by amending its lien. Brahma's efforts were futile for two reasons.

First, a lien that attaches federally-owned land is void. A void legal document, such as a contract, pleading, or lien, cannot be amended because it is deemed to never to have existed. This Court has applied this reasoning to conclude that a void pleading cannot be amended. Thus, Brahma's Original Lien, which was void for attaching federally-owned land, could not be amended. The district court erred in concluding that TSE was estopped from making this argument. There is no basis for the district court's finding of estoppel.

Second, NRS 108.229(1) precludes material amendments to liens. An amendment is material if it was made intentionally. There is no question that Brahma intentionally attached federally-owned land in its Original Lien and amended it to no longer attach federally-owned land. NRS 108.229(1) precluded this result. Brahma should have recorded a new lien instead. The district court erred by concluding that Brahma did not intentionally attach federally-owned land. There is no support for this conclusion.

C. Even if Brahma could amend its lien, Brahma's most recent lien fails as a matter of law because it attaches Project improvements in which the federal government has a real, significant financial interest. The federal government's financial interest in the TSE-owned improvements derives from a $737 million loan guarantee issued by the DOE. Foreclosure on the Project improvements by Brahma would result in Brahma recovering ahead of the federal government's security interest. Sovereign immunity exists to prevent this result for the federal government. The district court's conclusion to the contrary was erroneous.

The district court's denial of TSE's motion to expunge should be reversed. Brahma's mechanic's lien should have been expunged.

II. Awards of attorney fees must be reasonable. The practice of block billing impairs a court's ability to assess the reasonableness of the fees sought. For this reason, courts generally reduce fee awards supported by block-billed time entries.

Eighty percent of Brahma's time entries supporting its requested fees were block billed. Despite this, the district court awarded Brahma one hundred percent of the attorney fees it requested. This was an abuse of discretion.

ARGUMENT

I. Brahma's mechanic's lien should be expunged because it is invalid as a matter of law.

Under NRS 108.2275(1), a party in interest in a property subject to a mechanic's lien may move to dismiss or reduce the lien for being frivolous and made without reasonable cause or excessive. *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 372, 240 P.3d 1033, 1038 (2010). In resolving such a motion, a district court must make one of three options: "(1) that the notice of lien is frivolous and made without reasonable cause, (2) that the lien amount is excessive, or (3) that the notice of lien is not frivolous or excessive and made with reasonable cause." *Id.* at 372, 240 P.3d at 1038 (citing NRS 108.2275(6)(a)-(c)).

A lien is frivolous and made without reasonable cause if it fails to comply with the mechanic's lien statute or is otherwise invalid as a matter of law. *I. Cox Const. Co., LLC v. CH2 Investments, LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1206 (2013); *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010); *see* Black's Law Dictionary (11th ed. 2019) (defining "frivolous" as "[l]acking a legal basis or legal merit; manifestly insufficient as a matter of law").

Here, Brahma's mechanic's lien was frivolous and made without reasonable cause for the reasons set forth below. Each reason presents a question of law, and is thus, subject to de novo review. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 572, 289 P.3d 1199, 1209 (2012) (providing that questions of law are reviewed de novo).

A. Brahma's Original Lien was invalid as a matter of law because it attached federally-owned land.

It is axiomatic that sovereign immunity renders liens encumbering federally-owned land invalid as a matter of law. *See F. D. Rich Co., Inc. v. U. S. for Use of Indus. Lumber Co., Inc.*, 417 U.S. 116 (1974) ("Ordinarily, a supplier of labor or materials on a private construction project can secure a mechanic's lien against the improved property under state law. But a lien cannot attach to Government property . . ."); *U.S. for the Use & Benefit of Daniel H. Hill v. Am. Sur. Co.*, 200 U.S. 197, 203 (1906) ("As against the United States, no lien can be provided upon its public buildings or grounds."); *United States v. Lewis Cty.*, 175 F.3d 671, 678 (9th Cir. 1999) ("Foreclosure against federally-owned property is a suit against the United States, which cannot be prosecuted without its consent."); *Guild Mortg. Co. v. Prestwick Court Tr.*, No. 215CV258JCMVCF, 2018 WL 894609, at *9 (D. Nev. Feb. 14, 2018) ("Foreclosure on federal property is prohibited where it interferes with the statutory mission of a federal agency."); *Best Assets, Inc. v. Dep't of Hous. & Urban Dev.*, No. 09 C 4259, 2009 WL 3719212, at *3 (N.D. Ill. Nov. 5, 2009)

("Sovereign immunity, however, bars the imposition of liens on federally owned property.").[3]

Here, there is no question that Brahma's Original Lien (and the first amendment thereto) encumbered federally-owned land. 1 AA 40, 54. It attached APN 012-141-01 and APN 012-151-01. *Id.* These parcels consist of about 35,100 acres of land owned by the BLM. 3 AA 251-52. The BLM is an agency of the federal government, to which sovereign immunity applies. *Jachetta v. United States*, 653 F.3d 898, 903 (9th Cir. 2011). Thus, Brahma's Original Lien was invalid as a matter of law.

B. Brahma could not amend its Original Lien to not attach federally-owned land.

Brahma recognized this defect and attempted to fix its Original Lien by amending it. Brahma amended its Original Lien to no longer encumber land owned by the BLM (as shown by its Second and Third Amended iterations). But, Brahma could not amend its Original Lien.

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[3] *See also United States v. Munsey Tr. Co. of Washington, D.C.*, 332 U.S. 234, 241 (1947) ("[N]othing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their compensation. They cannot acquire a lien on public buildings, and as a substitute for that more customary protection, the various statutes were passed which require that a surety guarantee their payment.") (internal citations omitted); *Equitable Sur. Co. v. U.S., to Use of W. McMillan & Son*, 234 U.S. 448, 456 (1914) (stating that without the federal laws requiring performance and payment bonds on federal projects, "laborers and materialmen (being without the benefit of a mechanic's lien in the case of public buildings) would . . . be subject to great losses.").

1. Brahma's Original Lien was void and void liens cannot be amended.

a. A void legal document cannot be amended

When a legal document is void, it is of "no legal effect." Black's Law Dictionary (11th ed. 2019) (defining "void"). For this reason, a void legal document cannot be amended because it is as if no document existed at all. While Nevada Courts have not applied this reasoning to a mechanic's lien, it has been applied across many contexts. In fact, the Nevada Supreme Court has applied this reasoning to pleadings. *See Otak Nevada, LLC v. Eighth Judicial Dist. Court*, 127 Nev. 593, 599, 260 P.3d 408, 412 (2011); *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006). In *Otak*, the Nevada Supreme Court held that a void complaint could not be amended "because a void pleading does not legally exist." 127 Nev. at 599, 260 P.3d at 412.

Likewise, courts have held that a void contract cannot be amended because it is as if "no contract [existed] at all." Black's Law Dictionary (11th ed. 2019) (defining "void contract" as a "[a] contract that is of no legal effect, so that there is really no contract in existence at all."); *see Carton v. B & B Equities Grp.*, LLC, 827 F. Supp. 2d 1235, 1244–45 (D. Nev. 2011) (providing that a void contract "will be treated as though no contract ever existed"); *Chicago Title Ins. Co. v. Renaissance Homes, Ltd.*, 679 P.2d 517, 521 (Ariz. Ct. App. 1983) (providing that a void contract "never had any legal existence or effect" and thus, "cannot in any

manner have life breathed into it" (internal quotation marks omitted)); Williston on Contracts § 1:20 (4th ed.) ("When a bargain is void, it is as if it never existed.").

For the same reason, courts have held that void deeds of trust and notices of lien cannot be amended. In *In re Estate of Woodroffe*, an Iowa court applied this principle to determine that a void deed could not be reformed. 742 N.W.2d 94, 105–06 (Iowa 2007). In *Hayward Lumber & Inv. Co. v. Pride of Mojave Mining Co.*, a California court applied this principle to determine that a void notice of lien could not be amended. 110 P.2d 439, 440 (Cal. Ct. App. 1941) ("In other words, if the notice of lien is void or insufficient to identify the property and therefore is void, there is no method of reforming such an instrument, for the simple reason that the law requiring the filing of a notice of lien is intended to give the general public notice thereof, and the reformation founded upon the plaintiff's complaint, and judgment to that effect would be wholly ineffective to give notice of the lien to the general public as required by the Code of Civil Procedure."); *see also Sequatchie Concrete Serv., Inc. v. Cutter Labs.*, 616 S.W.2d 162, 165 (Tenn. Ct. App. 1980) ("[W]here there is a positive or unambiguous description of the wrong piece of property and not of property which the lien may properly attach, the description is obviously insufficient to create or preserve a lien.").

b. Sovereign immunity voids a lien that attaches federally-owned land.

The doctrine of sovereign immunity derives from the ancient maxim *rex non potest peccar*—"the King can do no wrong." Federal sovereign immunity: Tucker Act and Contract Disputes Act, 3 Bruner & O'Connor Construction Law § 8:77 (2018). The policy behind this doctrine is that "'[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.'" *Id.* (quoting *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907)).

As a result of this doctrine, if a party is to sue the sovereign, it has to have statutory permission. 3 Bruner & O'Connor Construction Law § 8:77; *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit."). Examples of such statutory permission include the Federal Tort Claims Act and the Tucker Act. *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).

Thus, it follows that where a party liens federally-owned land, which, as explained above, is not permitted, *see, e.g., Blue Fox*, 525 U.S. at 265 (providing that it is an "established rule that, unless waived by Congress, sovereign immunity bars subcontractors and other creditors from enforcing liens on Government property or funds to recoup their losses"), the policy behind sovereign immunity

would render such a lien void. While this issue is rarely discussed, other courts have reached the same conclusion. *See Am. Seating Co. v. City of Philadelphia*, 256 A.2d 599, 601 (Pa. 1969) ("Although our research has disclosed no case explicitly holding that in every instance liens against municipal properties are void, still the statement seems correct as a general proposition of Pennsylvania law.").

Here, the Court should apply its reasoning from *Otak* and hold that a mechanic's lien, which attaches federally-owned land, is void and cannot be amended. With this rule in place, the Court should conclude that Brahma could not cure the defects with its Original Lien, which was void for attaching federally-owned land, with amendments. Accordingly, Brahma's Original Lien should be deemed controlling and be expunged.

c. TSE was not estopped from making this argument.

The district court did not necessarily disagree with this argument. Rather, it concluded that TSE was "estopped from arguing that the [Original Lien] [was] void simply because the BLM's land was allegedly implicated in the [Original Lien]." 6 AA 480. Brahma never argued that TSE was estopped from making this argument. *See* 1 AA 84-104, 3 AA 272-274, 4 AA 280-84, 5 AA 345-471. And it is unclear what facts, if any, the district court based this conclusion on. Nevertheless, TSE is not estopped from arguing that Brahma could not amend its Original Lien because it was void for attaching federally-owned land.

Assuming the district court relied on the doctrine of equitable estoppel, "[e]quitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." *In re Harrison Living Tr.*, 121 Nev. 217, 223, 112 P.3d 1058, 1062 (2005). Equitable estoppel features four elements: (1) the party to be estopped must be apprised of the true facts; (2) it must intend that its conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and (4) it must have relied to his detriment on the conduct of the party to be estopped. *Id.*

Here, the district court made no findings that support its conclusion that TSE was equitably estopped from arguing that Brahma's Original Lien was void. *See* 6 AA 476-481. There have been no facts introduced or legal arguments made to support any of the elements for equitable estoppel. The district court's decision should be reversed.

2. NRS 108.229(1) precluded Brahma from amending its Original Lien because Brahma's Original Lien intentionally attached federally-owned land.

There is a second reason why Brahma could not amend its Original Lien. NRS 108.229(1) governs under what circumstances a lien claimant can amend a notice of lien. It provides that a lien can be amended in "all cases of immaterial variance." NRS 108.229(1). An immaterial variance is one where the "variance

between a notice of lien and an amended notice of lien" was not made "intentionally." NRS 108.229(1). The statute states, in full:

> 1. At any time before or during the trial of any action to foreclose a lien, a lien claimant may record an amended notice of lien to correct or clarify the lien claimant's notice of lien. The lien claimant shall serve the owner of the property with an amended notice of lien in the same manner as required for serving a notice of lien pursuant to NRS 108.227 and within 30 days after recording the amended notice of lien. A variance between a notice of lien and an amended notice of lien does not defeat the lien and shall not be deemed material unless the variance:
>
> (a) Results from fraud or is made intentionally; or
>
> (b) Misleads an adverse party to the party's prejudice, but then only with respect to the adverse party who was prejudiced.
>
> . . .
>
> In all cases of immaterial variance the notice of lien may be amended, by amendment duly recorded, to conform to the proof.

NRS 108.229(1). Said another way, a variance made intentionally is material and cannot be made by amendment.

It does not appear that the Nevada Supreme Court has elaborated on what constitutes a variance made intentionally under NRS 108.229(1). When a statute's language is plain and unambiguous, as is the case with NRS 108.229(1), the language should be afforded its ordinary meaning. *Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev. 252, 254, 416 P.3d 233, 235 (2018). To that end, "variance" is

defined as "the fact, quality, or state of being variable or variant."[4] "Variant" is defined as "manifesting variety, deviation, or disagreement.[5] And "intentionally" is defined as "in an intentional manner: with awareness of what one is doing."[6]

This Court generally determines whether an act is intentional based on whether there was a desire to bring about the harm complained of. *See Fanders v. Riverside Resort & Casino, Inc.*, 126 Nev. 543, 550, 245 P.3d 1159, 1163 (2010) (providing that for a tortious act to constitute an "intentional tort" there must have been a "deliberate intent to bring about the injury"); *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 275, 71 P.3d 1264, 1268 (2003) (concluding that for interference with a contract to constitute "intentional interference" there must have been a specific motive or purpose to injure).

Here, Brahma's variance between its Original Lien and subsequent amendments thereto with respect to federally-owned land was intentional. First, there is no question that there is a variance between Brahma's Original Lien (and its first amendment thereto) and its second and third amended liens. *See* 1 AA 37-43 (Original), 1 AA 49-57 (First), 1 AA 59-67 (Second), and 2 AA 223-30 (Third).

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[4] Merriam-Webster, https://www.merriam-webster.com/dictionary/variance (last visited August 29, 2019).

[5] Merriam-Webster, https://www.merriam-webster.com/dictionary/variant (last visited August 29, 2019).

[6] Merriam-Webster, https://www.merriam-webster.com/dictionary/intentionally (last visited August 29, 2019).

Brahma's Original Lien encumbered all land contained on APN 012-141-01 and APN 012-151-01, 1 AA 37-43, which consists of about 35,100 acres owned by the BLM, 3 AA 251-52. Brahma's Second and Third Amended Liens only encumbered land and interests held by TSE. 1 AA 59-67, 2 AA 223-30.

Second, there is no question that this variance was made intentionally. Brahma had a desire to bring about the harm complained of—attaching federally-owned land. When Brahma recorded its Original Lien, it knew it encumbered land owned by the BLM. Indeed, in its Original Lien, when asked to identify "the name of the owner, if known, of the property," Brahma wrote: "Bureau of Land Management and Tonopah Solar Energy, LLC." 1 AA 38. Thus, Brahma's amendment to its Original Lien to no longer attach federally-owned land constitutes a variance made intentionally, which NRS 108.229(1) prohibits from taking place via amendment. To fix its Original Lien, Brahma should have recorded a new lien instead of resorting to amendments.

Not every amendment to the land encumbered by a lien would constitute an intentional variance. For instance, a person could attach a piece of land not knowing that part of it consisted of federally-owned land. But, when a person sets out to record a lien attaching federally-owned land, does so, and then amends it to no longer attach federally-owned land, that is a textbook intentionally made variance.

Despite these facts, the district court concluded that "Brahma did not 'intentionally' attach BLM land such that it is precluded from amending its [Original Lien]," without further explanation. 6 AA 480. While intent is usually a question of fact, this conclusion appears to be a legal conclusion, not a factual finding, based on a misinterpretation of the meaning "intentionally." Either way, the district court did not identify any facts to support the finding that Brahma did not intentionally attach BLM land (if it is indeed a factual finding), nor are there any facts in the record to support such a finding. *See Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) (providing that factual findings are to be affirmed if supported by substantial evidence). The language in the Original Lien belies Brahma's intent to lien federally-owned land. The district court's conclusion should be reversed.

C. Even if Brahma could amend its Original Lien, its amended lien is invalid as a matter of law because it attaches Project improvements in which the federal government has a significant financial interest.

1. Sovereign immunity precludes liens from attaching property that the federal government has a significant financial interest in, even if it does not own the property.

In addition to rendering liens that encumber federally-owned land invalid, sovereign immunity can invalidate a lien that attaches property in which the federal government has a less-than-fee-simple-interest. *See Dugan v. Rank*, 372 U.S. 609, 620 (1963). In *Dugan*, the Court elaborated on what type of a "less-than-fee-

simple-interest" sovereign immunity applies to: "[t]he general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id.* (internal quotations and citations omitted).

The Seventh Circuit's test for determining when this principle applies should be adopted and applied in the instant case. To determine if sovereign immunity invalidates a lien against property in which the federal government has a less-than-fee-simple-interest, the Seventh Circuit asks the following question: "the question to be determined in each case is whether the government's interest are such as to make it a 'real, substantial party in interest,' in the litigation." *United States v. Rural Elec. Convenience Co-op. Co.*, 922 F.2d 429, 436 (7th Cir. 1991) (quoting *Mine Safety Appliances Co. v. Forrestal,* 326 U.S. 371, 374 (1945)). This should be determined on a case-by-case basis. *See Mine Safety*, 326 U.S. at 374 ("The government's interest must be determined in each case by the essential nature and effect of the proceeding as it appears from the entire record." (internal quotations omitted)).

This Court has previously held that a party is a real, substantial party in interest when it "possesses the right to enforce the claim and has a significant interest in the litigation." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252

P.3d 206, 208 (2011) (discussing real party in interest under NRCP 17(a)). For instance, a holder of a security interest may maintain an action as a real party in interest against a third-party for impairing its security interest. *Baldwin v. Marina City Properties, Inc.*, 79 Cal. App. 3d 393, 403, 145 Cal. Rptr. 406 (Cal. App. 1978).

The Nevada Supreme Court has applied a test very similar to the real, substantial party in interest test before in *Basic Refractories, Inc. v. Bright*, 72 Nev. 183, 187, 298 P.2d 810, 811 (1956). There, the Court had to determine whether sovereign immunity barred a person from liening a lessee's leasehold interest in property owned by the federal government. *Id.* at 191, 298 P.2d at 814. In deciding that sovereign immunity did not bar the liening of the leasehold interest, the Court focused on two facts.

One, the lien did not interfere with the federal government's interest as lessor. The Court explained that a leasehold interest is a separate estate, and the lien only attached to the leasehold interest possessed by the lessee subject to the federal government's paramount title as lessor. *Id.* at 193, 298 P.2d at 815 (providing that "all the authorities hold that the lien merely attaches to the lessee's interest subject to the paramount title of the owner in fee").

Two, there was no indication that the federal government cared who the lessee was or who possessed the leasehold interest. *Id.* To bolster this point, the

Court noted that the lease did not contain an anti-assignment or forfeiture provision:

> If there had been a provision against assignment in the lease, or if there had been a provision for forfeiture of the lease in the event a lien were levied against the property, the Government could have indicated its desire to contract solely with [the original lessee]. But such provisions are not to be found in the Basic-Standard lease and from that we may reasonably infer that the government was not concerned with a lien foreclosure and its consequent substitution of another tenant.

Id.

Taken together, the Court's reasoning stands for the uncontroversial conclusion that a person can lien a lessee's leasehold interest in property owned by the federal government as long as the federal government is left in the same position upon the lien holder's foreclosure of the leasehold interest—*i.e.,* the federal government does not have a real substantial interest in the case. Other State Supreme Courts have reached the same conclusion. *See Dow Chemical Co. v. Bruce-Rogers Co.*, 501 S.W.2d 235 (Ark. 1973); *Tropic Builders, Ltd. v. United States*, 475 P.2d 362 (Haw. 1970); *Crutcher v. Block*, 91 P. 895 (Okla. 1907).

2. The federal government has a significant financial interest in the Project improvements encumbered by Brahma's mechanic's lien.

The federal government has a significant security interest in the Project improvements, which are currently subject to Brahma's mechanic's lien. The

federal government's security interest in the TSE-owned improvements derives from a $737 million loan guarantee issued by the DOE. 3 AA 270. TSE makes payments on the loans guaranteed by the DOE with funds it will receive from selling the power generated by the Project. *Id.*

Unlike the federal government's interest in *Basic*, where foreclosure would have left the federal government in the same position, here, foreclosure by Brahma on the TSE-owned Project improvements would not leave the federal government in the same position—it would harm the federal government. If Brahma were to foreclose on the Project improvements, it would interfere with the federal government's security interest in the Project's assets and hurt the long-term viability of the Project. 3 AA 270. These realities would harm the federal government's significant financial interests for the following reasons:

- Brahma would have first recourse to the value of the Project's assets. This would increase the likelihood that the federal government would not recover in full on the guaranteed loan, significantly damaging the public fisc. *See id.*

- Loss of possession of the Project's plant would prevent TSE from securing a power offtake agreement for energy generation, without which the Project would not be economically viable. *See id.*

- There would be no entity to operate the Project. Brahma would, among other things, have to go through the extensive Federal Energy Regulatory

Commission's approval process to operate the Project and obtain a market-based rate authorization to engage in the wholesale of electric energy. The delays associated with the process (assuming Brahma would even qualify for approval) could harm the remediation process the Project is currently undergoing. *See id.*

Moreover, unlike in *Basic*, where the Court reasoned that it did not matter to the federal government who possessed the leasehold interest, as evidenced by a lack of an anti-assignment provision, here, the federal government took specific steps to maintain its relationship with TSE and avoid the above results. The federal government entered into a Loan Guarantee Agreement with TSE ("Agreement"). 4 AA 341-44. Under the Agreement, TSE, the borrower, has to repay the guaranteed loan discussed above. 4 AA 342 (Section 3.1.1). Section 6.21 of the Agreement provides that TSE is required to maintain "good and valid title to its undivided ownership interest in the Project." 4 AA 343. And Section 11.13(b) of the Agreement is an anti-assignment provision, providing that TSE "*may not assign or otherwise transfer any of its rights or obligations*" under the Agreement without the prior written consent from the DOE. 4 AA 344 (emphasis added).

Due to its security interest, the federal government constitutes a real, substantial party in interest. The nature of the federal government's significant financial security interest confirms that it is a "real, substantial party in interest" to

this case. The doctrine of sovereign immunity exists precisely to prevent the type of harm the federal government would suffer if Brahma were permitted to foreclose on its lien. Consequently, sovereign immunity invalidates Brahma's lien against the TSE-owned Project improvements.

II. The award of attorney fees and costs to Brahma should be reversed.

The district court awarded Brahma its attorney fees and costs under NRS 108.2275(6)(c) for defeating TSE's motion to expunge. 14 AA 1006-18. Because the district court's denial of TSE's motion to expunge should be reserved, this Court should also reverse the district court's award of attorney fees and costs to Brahma and remand the issue for the district court to determine the amount of fees and costs to award TSE. *See* NRS 108.2275(6).

Even if this Court does not reverse the district court's denial of TSE's motion to expunge, the district court's award of attorney fees should be reversed because the amount of fees it awarded Brahma was unreasonable. The amount of fees awarded is reviewed for an abuse of discretion. *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 830, 192 P.3d 730, 737 (2008).

An award of attorney fees under NRS 108.2275(6)(c) must be reasonable. In evaluating the reasonableness of a fee request, although courts are not limited to any one specific approach, they must evaluate the amount in light of the *Brunzell* factors. *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). The party

moving for attorney fees must carry the burden of showing the reasonableness of the fees sought. *See Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986).

While the district court assessed the *Brunzell* factors, it abused its discretion by awarding Brahma one hundred percent of the fees it requested, $78,417.34, despite Brahma's use of block-billing.[7] *See Beattie v. Thomas*, 99 Nev. 579, 589, 668 P.2d 268, 274 (1983) (noting that it is an abuse of discretion to award the full amount of requested attorney fees without making "findings based on evidence that the attorney's fees sought are reasonable and justified"); 14 AA 1006-18; 7 AA 511-25 (Brahma's counsel's invoices).

Block billing is the practice of lumping together multiple work descriptions under one time entry. *Welch v. Metro. Life Ins. Co.,* 480 F.3d 942, 948 (9th Cir. 2007). Courts have recognized the numerous problems caused by block billing. For one, block billing makes it impossible to determine how much time was spent on a certain activity, which makes it difficult, if not impossible, for a court to determine if the amount of time spent was reasonable. *Id.*; *see Okla. Natural Gas Co. v. Apache Corp.*, 355 F. Supp. 2d 1246, 1264 (N.D. Okla. 2004) (finding that it

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[7] TSE and Brahma reached a stipulation that TSE would pay Brahma $10,000 in attorney fees for Brahma's preparation of the reply in support of its motion for attorney fees, appearing at the hearing on its motion for attorney fees, and preparing the order granting its motion for attorney fees. *See* 14 AA 1017-18. TSE does not challenge the reasonableness of this amount.

was difficult, if not impossible, to review the reasonableness of block-billed time entries, one of which was a time entry for 7.3 hours containing eight tasks). Along the same lines, block billing hampers an attorney's ability to carry its burden to show the reasonableness of the fees sought. *Welch*, 480 F.3d at 948. In addition, courts have recognized that block billing inappropriately increases time by 10 to 30 percent. *Id.* (citing a study by the California State Bar's Committee on Mandatory Fee Arbitration); *see Payan v. Nash Finch Co.*, 310 P.3d 212, 219 (Colo. App. 2012) (relying on the same study).

Due to the problems presented by block billing, courts routinely reduce block billed time entries by 20 to 30 percent, if not more. *Id.* (applying an across-the-board reduction of 20 percent for block billing); *see Payan*, 310 P.3d at 219 (approving the trial court's 20 percent across-the-board reduction for block billing); *Banas v. Volcano Corp.,* 47 F. Supp. 3d 957, 968 (N.D. Cal. 2014) (rebuking block billing practices and reducing hours by 20 percent); *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 188 F. Supp. 3d 333, 345 (S.D.N.Y. 2016) (applying a 30 percent reduction for block billing); *Christian Research Inst. v. Alnor*, 165 Cal. App. 4th 1315, 1326, 81 Cal. Rptr. 3d 866, 874 (2008) (approving of a reduction from 600 hours to 71 hours for block billing).

Here, the district court abused its discretion by not reducing Brahma's fee award for block billing. Brahma's counsel invoiced 206.90 hours for opposing

TSE's motion to expunge and drafting its form motion for attorney fees and costs. *See* 7 AA 511-25. Eighty percent of Brahma's counsel's time entries rely on block billing. For instance, Billing Entry No. 36 is for 3.30 hours and contains four separate tasks, 8 AA 547; Billing Entry No. 94 is for 8.50 hours and contains four separate tasks, 8 AA 553; and Billing Entry No. 125 is for 4.20 hours and contains 8 separate tasks, 8 AA 556. It is impossible to tell how much time was spent on each task, and thus, it is impossible to determine the reasonableness of the entries or the reasonableness of the amount of time spent on certain overarching tasks, such as drafting the opposition or preparing for oral argument.[8]

In not making a reduction, the district court failed to assess the reasonableness of the time Brahma's counsel spent on certain tasks. The district court appeared to take the position that based on the value of the lien, the

[8] In its opposition to Brahma's motion for attorney fees and costs, TSE pointed out how Brahma's counsel invoiced excessive time for numerous tasks. For instance, Brahma's counsel billed 41 hours on purely drafting and revising their opposition to TSE's motion to expunge (i.e., not including factual investigation or legal research), 59.50 hours for preparing for and attending the hearings (the parties showed up to the first hearing only to learn it was postponed) on TSE's motion to expunge, and 28.70 hours for drafting its form motion for attorney fees. *See* 8 AA 537. In its reply in support of its motion for attorney fees, Brahma contends that these calculations are inaccurate because "TSE ignores other work performed within the recorded billing hours to support a (at best) misleading calculation of hours performed on these tasks." 11 AA 818. But, that is the point. By block-billing, Brahma eliminated anyone's chance to accurately calculate how much time was spent on certain tasks and determine if it was reasonable. Brahma cannot be allowed to benefit from such deceptive practices.

complexity of the issues presented, and the quality of counsel and the work product, the overall amount of attorney fees sought was reasonable. But, there is no support for this generalized type of evaluation where a matter was billed on an hourly basis.[9] The district court could have found that Brahma failed to carry its burden to show that the fees it requested were reasonable or found that some level of an across-the-board reduction was appropriate. *See Christian Research Institute*, 165 Cal. App. 4th at 1329, 81 Cal. Rptr. 3d at 877 ("Similarly, counsel may not submit a plethora of noncompensable, vague, blockbilled attorney time entries and expect particularized, individual deletions as the only consequence."). By doing neither, the district court abused its discretion. The district court should have to consider the impact of the block-billing on its ability to assess the reasonableness of the fees billed and implement a reasonable reduction.

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[9] TSE recognizes that the Court of Appeals recently held in *O'Connell* that a district court "is not confined to authorizing an award of attorney fees exclusively from billing records or hourly statements." *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P.3d 664, 671 (Nev. App. 2018). But, that holding was limited to calculating attorney fees based on contingency fee matters—"[u]ltimately a party seeking attorney fees based on a contingency fee agreement must provide or point to substantial evidence of counsel's efforts to satisfy the *Beattie* and *Brunzell* factors." *Id.* at 673. The more holistic test discussed in *O'Connell* can coexist with reductions for block billing. The *O'Connell* decision cites to a California case, *Mardirossian & Assocs., Inc. v. Ersoff*, 153 Cal. App. 4th 257, 62 Cal. Rptr. 3d 665, 676 (2007), to support its conclusion that "a trial court can award attorney fees to the prevailing party who was represented under a contingency fee agreement, even if there are no hourly billing records to support the request." *O'Connell*, 429 P.3d at 671. But, at the same time, California courts, as cited above, have held that fee awards can be and should be reduced for block billed time entries.

CONCLUSION

The district court's denial of TSE's motion to expunge and grant of Brahma's motion for attorney fees and costs should be reversed. The district court should be instructed to enter an order releasing Brahma's mechanic's lien under NRS 108.2275(6)(a) because it was frivolous and made without reasonable cause. The matter should be remanded for the district court to determine the amount of reasonable fees and costs to award TSE under NRS 108.2275(6)(a).

Dated: October 3, 2019

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRS 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Times New Roman font.

2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 8,708 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters to the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

Dated: October 3, 2019

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that I am an employee of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and that on October 3, 2019, I submitted the foregoing **APPELLANT'S OPENING BRIEF** and **14 Volumes of the corresponding Appendix** for filing via the Court's electronic filing system. Electronic notification will be sent to the following:

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