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 from Judgment
Fifth Judicial District Court
The Honorable Steven Elliott, District Court Judge
District Court Case No. **CV 39348**

RESPONDENT'S ANSWERING 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.

Real Party in Interest, Brahma Group, Inc. ("Brahma") is 100% owned by Terra Millenium Corp., Inc. (which is not a publicly held company) and no publicly held company owns ten percent or more of its stock. Peel Brimley LLP is the only law firm that has appeared on behalf of Brahma in this case or is expected to appear on behalf of Brahma in this Court.

Dated this 3rd day of March, 2020.

PEEL BRIMLEY LLP

/s/ Eric B. Zimbelman

_____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

I. STATEMENT OF THE CASE

By way of this interlocutory appeal ("Appeal"), Appellant Tonopah Solar Energy, LLC ("TSE") seeks review of the Nye County District Court's denial of TSE's Motion to Expunge Brahma Group, Inc's Mechanic's Lien, brought pursuant to NRS 108.2275 and seeking to deem Respondent Brahma Group, Inc.'s ("Brahma") Notice of Lien frivolous and to discharge and expunge the same ("Motion to Expunge").[1] As more fully discussed below, the District Court properly rejected TSE's Motion to Expunge, finding that Brahma's Notice of Lien (i) was not frivolous, and (ii) was made with reasonable cause. The District Court also properly considered the *Brunzell* factors in awarding fees and costs to Brahma and rejected the same arguments TSE presents here.

II. STATEMENT OF FACTS

A. THE UNDERLYING DISPUTE AND PROCEDURAL HISTORY OF THE NYE COUNTY PROCEEDINGS.

This Appeal, and the parties' underlying dispute arises from the more than $26 million of work, materials and equipment ("the Work") that Brahma provided on behalf of TSE for the Crescent Dunes Solar Energy Project (hereinafter, the "Project" or "Work of Improvement"), located near Tonopah, Nevada. Because TSE failed to fully pay Brahma, Brahma stopped work pursuant to Nevada's Right to Stop Work Statute (NRS 624.606 to NRS 624.630, inclusive), and recorded a Notice of Lien, as amended (the "Lien"), pursuant to Nevada's Mechanic's Lien Statute (NRS 108.221 through NRS 108.246, inclusive), in the amount of $12,859,577.74. 9 AA 675-684.

[1] TSE also seeks review of the District Court's award of attorney's fees and costs to Brahma.

Thereafter, TSE commenced Nye County Case No. CV39348 on June 1, 2018 when it filed its Motion to Expunge (the "NRS 108.2275 Proceedings"), which the Nye County District Court (hereinafter "District Court") denied. 6 AA 472-481. The District Court also awarded attorney's fees and costs to Brahma pursuant to NRS 108.2275(6)(c), because it concluded that Brahma's Lien was "not frivolous nor was it made without reasonable cause." 6 AA 482.

After the District Court (orally) denied TSE's Motion to Expunge and before the District Court's decision was memorialized and entered by written order, Brahma filed a Mechanic's Lien Foreclosure Complaint in the NRS 108.2275 Proceedings. 1 RA 26-32.

Brahma later amended that pleading, by way of an amended pleading styled "(I) First Amended Counter-Complaint; and (II) Third-Party Complaint" to (i) include claims against TSE for Breach of Contract, Breach of the Duty of Good Faith and Fair Dealing, and Violations of NRS Chapter 624, and (ii) commence a third-party action against TSE's affiliate, Cobra Thermosolar Plants, Inc. ("Cobra"), its surety, American Home Assurance Company ("AHAC"), and the surety bond they recorded to (ineffectively) release Brahma's Lien from the Project (the "Surety Bond").[2] 2 RA 301-305.

TSE then filed a Motion to Strike [Brahma's First Amended Counter-Complaint], or, in the Alternative, Motion to Dismiss Counter-Complaint, or in the Alternative, Motion to Stay this Action Until the Conclusion of the Proceedings in

[2] The Surety Bond was initially ineffective to release the Lien because it failed to meet the requirements of NRS 108.2415(1) because it was not in an amount that is 1 ½ times the amount of Brahma's Lien. 2 RA 303. Cobra and AHAC later recorded a Rider to increase the amount of the Surety Bond. 2 RA 306-316. Brahma's current consolidated amended pleading in the Nye County Action seeks only a claim against the Surety Bond, not foreclosure against the Project or any real property. [*See* discussion *infra*].

Federal Court ("Motion to Strike"). 1 RA 1-153. The District Court's denial (in part) of the Motion to Strike (4 RA 611-18) forms the basis of TSE's Writ Petition currently pending in this Court as Case No. 78256 (4 RA 690-749 - the "TSE Writ Petition"). In denying the Motion to Strike or Dismiss, the District Court found that "there was nothing improper with Brahma filing its Counter-Complaint in the same Case TSE commenced when it filed its Motion to Expunge Brahma's Lien." 4 RA 617.

Brahma later timely filed a stand-alone Complaint as an independent action in Nye County, Case No. CV 39799 (the "Separate Action").[3] 4 RA 580-86. The Separate Action contains no claims or causes of action against TSE but rather asserts a single cause of action against the Surety Bond, the principal on the Surety Bond (Cobra) and the surety who issued the Surety Bond (AHAC). *See* 4 RA 584-85.[4] Brahma moved the District Court to consolidate the Separate Action with the NRS 108.2275 Proceeding, which the District Court granted. 4 RA 658-65.

As part of its Order denying (in part) TSE's Motion to Strike, the District Court granted Brahma's request for leave to "amend its Amended Counter-Complaint to (i) withdraw the Mechanic's Lien Foreclosure Action against TSE's

[3] As has been extensively briefed and explained in the TSE Writ Petition, TSE argued, among other things, that Brahma had no right to file an affirmative pleading in the NRS 108.2275 Proceeding. Out of an abundance of caution, and because TSE stated an intention to file a writ petition on that issue, Brahma commenced the Separate Action to ensure a claim on the surety bond was timely filed pursuant to NRS 108.2421.

[4] By the time Brahma filed the Separate Action, Cobra and AHAC had recorded the Surety Bond Rider such that the Surety Bond was then compliant with NRS 108.2415(1). 2 RA 306-16. Once the Surety Bond was compliant, it was "deemed to replace the property as security for the lien," *see* NRS 108.2415(6)(a), and released Brahma's Notice of Lien against the Work of Improvement. *See id*.; NRS 108.2413.

Work of Improvement;[5] (ii) identify the Rider to the Bond; and (iii) increase its Mechanic's Lien Foreclosure Action against the Bond and Rider to $19,289,366." [6] (4 RA 617-18). Brahma did so by way of an amended consolidated pleading titled Brahma Group, Inc.'s (I) Second Amended Complaint; and (II) First Amended Third-Party Complaint, 5 RA 919-31, that the District Court expressly authorized Brahma to file. 5 RA 901-18.

B. THE PROPERTY, WORK OF IMPROVEMENT AND NOTICE OF LIEN.

As TSE advised this Court in its Opening Brief, TSE is the owner of the Work of Improvement, which is a Thermal Solar Energy Project located near Tonopah, Nevada. Opening Brief p. 1. While ***some*** of the real property on which the Project is situated ("BLM Parcels") is owned by the United States Bureau of Land Management ("BLM"), TSE acknowledged in its Motion to Expunge that the "Property on which the Project is located consists of the following parcels: 012-031-04, 012-131-03, 012-131-04, 012-140-01, 012-141-01, 012-150-01, 012-151-01, 012-431-06, 612-141-01." 1 AA 4. By way of a Grant, Bargain and Sale Deed (the "Grant Deed"),[7] TSE owns three of those parcels: APN's 012-031-04, 012-131-03 and 012-131-04 (collectively, the "TSE Parcels"). 2 AA 105-110. Accordingly, TSE's assertion that the Project "is located on land owned by the [BLM]" – see Opening Brief p. 1 – is only partially true and is intentionally misleading.

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[5] As noted above, once the Surety Bond Rider was recorded and the Surety Bond complied with NRS 108.2415(1), Brahma's Notice of Lien against the Work of Improvement was released and the Surety was deemed to replace it as security for Brahma's claim of lien.

[6] Brahma's Motion to Amend was heard concurrently with the hearing on TSE's Motion Strike or Dismiss.

[7] The Grant Deed identifies the property being conveyed to TSE (collectively, the "Grant Deed Legal Description") in a legal description exhibit that is too lengthy to reproduce here. 2 AA 109.

On October 26, 2011, TSE granted and caused a Construction and Permanent Deed of Trust with Assignment of Rents, Security Agreement, and Fixture Filing (the "TSE Deed of Trust") to be recorded with the Nye County Recorder's Office for the benefit of its private lender, PNC Bank, National Association ("PNC") to secure approximately $790 Million in financing for the construction and operation of the Work of Improvement. 2 AA 137-0167.

The Deed of Trust mortgaged all of TSE's right, title and interest in the Work of Improvement, leasehold interests, rights of way grants, easements, personal property and "the real property described in Exhibit A-1 attached hereto." 2 AA 140 (underline in original). Without limitation, Exhibit A-1 includes the Grant Deed Legal Description, the BLM Parcels, a legal description from a ground lease[8], and certain additional property (collectively, the "Deed of Trust Legal Description"). 2 AA 161-163.[9]

Based on the limited information available to Brahma and submitted by TSE in support of its Motion to Expunge, it ***appears*** that the U.S. Department of Energy ("DOE") provided a loan guarantee to PNC to facilitate construction. For this proposition, however, TSE cites to 3 AA 266 and 270, which are: (i) a press release of unverified authenticity, and (ii) an affidavit made largely on "information and belief" by an employee of a finance and restructuring company, FTI Consulting ("FTI"), purporting to serve as the project manager for TSE on the Project.[10]

By way of a Services Agreement dated February 1, 2017 ("Agreement") with Brahma, TSE hired Brahma to provide, on a time and material basis, certain work, materials and equipment (collectively, the "Work") for the Work of Improvement. 1

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[8] *See* 2 AA 115.

[9] Again, these legal descriptions are too lengthy to reproduce here.

[10] In rendering his decision from the bench denying the Motion to Expunge, Judge Elliot stated that he didn't "buy" this "sky-is-falling affidavit." 5 AA 433.

AA 14-35. By way of Section 10 of the Agreement, which expressly adopts and incorporates Nevada law, 2 AA 176, TSE recognized that the Work of Improvement could be subject to mechanic's liens. In pertinent part, Section 10 (titled "No Liens" and which generally purports to bar the recording of mechanic's liens, contrary to Nevada law)[11] carves out an exception "to the extent that such Lien arises from TSE wrongfully withholding payment from [Brahma]." 1 AA 19-20.

After TSE unjustifiably stopped paying Brahma's invoices, Brahma recorded a Notice of Lien ("Original Lien") on April 9, 2018 in the amount of $6,982,186.24, against the Crescent Dunes Solar Energy Project or the Work of Improvement. 2 AA 190-197. Using the statutory form,[12] Brahma's Original Lien accurately identified the "name of the owner, if known, of the property"[13] as "Bureau of Land Management ***and*** Tonopah Solar Energy, LLC, including its subsidiaries and all other related or associated entities." 2 AA 192 (emphasis added). Also using the statutory form, Brahma provided a "description of the property to be charged with the lien"[14] as "Crescent Dunes Solar Energy Project more particularly described in Exhibit A." 2 AA 193. Exhibit A identified an "Improvement" and "Land." The Improvement section states: "The Crescent Dunes Solar Energy Project is a 110 MW plant constructed on the Land in Tonapah (sic), Nevada." The "Land" section is a verbatim copy of the lengthy Deed of Trust Legal Description. 2 AA 194-197.

On April 16, 2018, Brahma recorded its Notice of First Amended and Restated Lien ("First Amended Lien") against the Crescent Dunes Solar Energy Project or

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[11] Pursuant to NRS 108.2453(2), such a condition, stipulation or provision is "contrary to public policy and is void and unenforceable." See also *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 539, 245 P.3d 1149, 1156 (2010) ("we conclude that NRS 108.2453(1) voids conditions, stipulations, or provisions in a contract that require a lien claimant to waive lien rights.).

[12] *See* NRS 108.226**Error! Bookmark not defined.**.

[13] *See Id*.

[14] *See Id*.

Work of Improvement. The First Amended Lien increased the amount of the Original Lien from $6,982,186.24 to $7,178,376.94, as the result of additional Work provided. 2 AA 198-201. Because Brahma inadvertently omitted the Exhibit A document, it re-recorded its First Amended Lien on April 18, 2018 to include that document. 2 AA 202-211.

On April 24, 2018, Brahma recorded a Notice of Second Amended and Restated Lien ("Second Amended Lien"). The Second Amended Lien (i) increased the amount of the First Amended Lien from $7,178,376.94 to $13,818,882.29, and (ii) clarified that the Second Amended Lien was intended to only attach to "Tonopah Solar Energy, LLC's interest in the Crescent Dunes Solar Energy Project" or Work of Improvement, and that "the real property owned by the Bureau of Land Management [was not being] charged with this lien." 2 AA 212-221.

On July 19, 2018, Brahma recorded a Third Amended and/or Restated Notice of Lien ("Third Amended Lien"). The Third Amended Lien, (i) adjusted the amount of its Lien to $11,902,474.75, and (ii) further clarified that Brahma's Lien, a) extends to the real property and improvements constructed thereon that comprise the TSE Parcels, and b) did ***not*** extend to the real property that was the subject of the BLM Parcels or certain of the Third-Party Parcels, but ***did*** extend to the improvements constructed thereon. 2 AA 222-230. Finally, on September 14, 2018, Brahma recorded its Fourth Amended and/or Restated Notice of Lien ("Fourth Amended Lien"), which adjusted the amount of its Lien to $12,859,577.74. 9 AA 675-684.

III. SUMMARY OF THE ARGUMENT

Contrary to TSE's unfounded argument, Brahma never liened federally-owned land but instead attached (i) the real property, and (ii) work of improvement ***owned by TSE***. Brahma's Original Lien was not "void," and even if it was, TSE had no standing to complain that the Original Lien was void simply because the land

owned by a non-party (who has never challenged Brahma's Lien) was allegedly implicated in the Notice of Lien.

Nonetheless, as liberally allowed by NRS 108.229(1), Brahma timely amended its Original Lien or recorded new notices of lien to resolve any ambiguity or doubt that its Lien did not attach federally-owned land. The District Court's finding that any suggestion of a lien on federal land was unintentional and did not mislead any adverse party to its prejudice is supported by substantial evidence and must therefore be affirmed.

The District Court also found, as supported by substantial evidence, that the federal government's security interest in TSE's property and Work of Improvement was not impaired by Brahma's Lien, and as such, the doctrine of sovereign immunity did not bar Brahma's Lien. Even if this were so, the subsequent recording of the Surety Bond by Cobra and its surety pursuant to NRS 108.2415(1), released Brahma's Lien from the Property and Work of Improvement, rendering TSE's Appeal of this issue entirely moot because Brahma no longer possesses a Lien against the Property or the Work of Improvement, irrespective of the ownership issue.

Finally, and pursuant to the mandatory requirements of NRS 108.2275(6)(c)**Error! Bookmark not defined.**, the District Court correctly awarded attorney's fees and costs to Brahma, the amount of which was supported by substantial evidence and in consideration of the factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. at 349**Error! Bookmark not defined.**.

For all of these reasons, the decisions below should be affirmed.

IV. THE STANDARD OF REVIEW

An appellate court "will not disturb the district court's factual determinations if substantial evidence supports those determinations." *J.D. Constr. v. IBEX Int'l*

Grp., 126 Nev. 366, 380–81, 240 P.3d 1033, 1043 (2010).[15] Only findings that are "clearly erroneous" may be set aside. *Id.* The plain language of NRS 108.2275 requires a district court to consider the material facts of the case to make a determination regarding whether a lien is excessive or frivolous. *J.D. Constr.*, 126 Nev. at 375, 240 P.3d 1033, 1039 (2010).

As more fully discussed below, in denying TSE's Motion to Expunge, the District Court appropriately made important factual determinations which are supported by substantial evidence, which factual determinations may therefore not be set aside.

Similarly, with respect to the District Court's award of attorney's fees and costs to Brahma, the standard of review is whether the District Court's decision was an abuse of discretion, which is was not. *Brunzell*, 85 Nev. at 350.

V. ARGUMENT

A. A LIEN MAY BE RELEASED PURSUANT TO NRS 108.2275 ONLY IF THERE IS "ABSOLUTELY NO BASIS FOR A CLAIM."

A district court may make an order releasing a notice of lien pursuant to NRS 108.2275 ***only*** if it is "frivolous ***and*** was made without reasonable cause." NRS 18.2275(6)(a). Here, the District Court concluded that Brahma's Lien was ***not*** frivolous and ***was*** made with reasonable cause. 6 AA 482. As this Court noted in *J.D. Const.*, the legislative history of NRS 108.2275 demonstrates that:

> [The party arguing that the lien is frivolous] must show there is ***absolutely no basis*** for a claim. If there is any showing of good faith, the court will not dismiss the lien.

[15] Substantial evidence is that [evidence] which "a reasonable mind might accept as adequate to support a conclusion." *Id*.

J.D. Const., 126 Nev. at 380 citing Hearing on S.B. 434 Before the Assembly Comm. On Judiciary, 68th Leg (Nev., June 26, 1995) (emphasis added).

As the moving party, TSE bore the burden of proving that Brahma's Lien was frivolous and that there is "absolutely no basis for a claim." TSE did not meet that burden before the District Court and cannot do so here.

TSE inaccurately cites to *I. Cox Const. Co., LLC v. CH2 Investments, LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1206 (2013) and *Hardy*, Nev. at 536, 245 P.3d 1149, 1155 (2010) for the proposition that "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." Opening Brief p. 10 (emphasis added). This is not the rule in Nevada.

Hardy (i) never uses the word "frivolous," (ii) does not address NRS 108.2275, and (iii) only stands for the unremarkable proposition that "failure to either fully or substantially comply with the mechanic's lien statute will render a mechanic's lien invalid as a matter of law." 126 Nev. at 536-37. Similarly, *I. Cox* does not use the word "invalid" and instead the *I. Cox* Court ruled that work performed after completion of a work of improvement did not extend the time within which to record a lien. 129 Nev. at 149. Stated differently, "invalid" is not synonymous with "frivolous."

As the Washington Court of Appeals has held, even if a lien is ultimately found to be invalid, it is frivolous "only if it presents no debatable issues and is so devoid of merit that it has no possibility of succeeding." *Intermountain Elec., Inc. v. G-A-T Bros. Const.*, 115 Wash. App. 384, 394, 62 P.3d 548, 553 (2003).[16] That is,

[16] In formulating the proposed changes to Nevada's mechanic's lien law, "proponents looked at statutes from other states in the region," specifically "Arizona, California, Oregon, and Washington." *J.D. Constr.*, 126 Nev. at 373 citing Hearing on S.B. 434 Before the Senate Comm. on Judiciary, 68th Leg. (Nev., May 23, 1995).

"every frivolous lien is invalid. But not every invalid lien is frivolous." *Id*. To be frivolous, the lien must be improperly filed "beyond legitimate dispute." *Id*.

TSE's argument attempts to blur this line contrary to the plain language of NRS 108.2275, which permits a court to deem a notice of lien frivolous ***only*** if there is "absolutely no basis for a claim." *J.D. Const.*, *supra*, 26 Nev. at 380. As discussed more fully below, TSE cannot meet this high burden and, in any event, Brahma's Lien was not invalid.

B. THE DISTRICT COURT CORRECTLY DENIED TSE'S MOTION TO EXPUNGE BRAHMA'S LIEN PURSUANT TO NRS 108.2275

1. Brahma's Notice Of Lien Did Not Attach Federal Land.

As TSE correctly notes, it has long been the rule that a mechanic's lien generally does not attach to federally owned property. Opening Brief p. 11 citing *U.S. for the Use & Benefit of Daniel H Hill v. Am. Sur. Co*., 200 U.S. 197, 203 (1906). Indeed, section 1(a)(2) of the Miller Act provides that where a contract for the construction of a public work of the United States is awarded to any person, such person shall furnish to the United States a payment bond with a satisfactory surety 'for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract * * *. 40 U.S.C. § 270a(a)(2). Section 2(a) provides that 'Every person who has furnished labor or material in the prosecution of the work provided for in such contract * * * and who has not been paid in full therefor * * * shall have the right to sue on such payment bond * * * for the sum or sums justly due him * * *.' (Emphasis supplied.) 40 U.S.C. § 270b(a). Miller Act bonds are issued precisely because government property may not be liened.[17]

[17] This is ***not*** a public works project for which a Miller Act bond has issued.

Despite this, TSE insists, without evidence, that Brahma's Original Lien attached to the BLM Parcels. Brahma does not agree with this position.

The Original Lien (i) follows the statutory form, as required by Nevada law. *See* NRS 108.226(5) ("A notice of lien must be substantially in the following form …"), and (ii) accurately identifies the "name of the owner, if known, of the property" as "Bureau of Land Management and Tonopah Solar Energy, LLC, including its subsidiaries and all other related or associated entities." 2 AA 192. As also required by the statutory form, the Original Lien provides a "description of the property to be charged with the lien" as "***Crescent Dunes Solar Energy Project*** more particularly described in Exhibit A." 2 AA 193 (emphasis added). Exhibit A identifies an "Improvement" and "Land." The Improvement section states: "The Crescent Dunes Solar Energy Project is a 110 MW plant constructed on the Land in Tonapah (sic), Nevada." 2 AA 194. The Land section is a ***verbatim*** copy of the lengthy Deed of Trust Legal Description – i.e., the very interest that TSE pledged as security to its private lender. 2 AA 194-197; Compare to 2 AA 161-163.

Rather than be "invalid" or "void" as TSE contends (*see* Opening Brief pp. 11-16), Brahma's Original Lien followed the statutory form and attached to TSE's interest in the Work of Improvement, including (i) TSE's fee simple interest in the TSE Parcels, and (ii) TSE's leasehold interest in the BLM Parcels, ***exactly*** as TSE had pledged to its private lender by way of the Deed of Trust. Specifically, and while also attaching the "Improvement" described as "The Crescent Dunes Solar Energy Project [which] is a 110 MW plant constructed on the Land in Tonapah (sic), Nevada," the Original Lien also copies ***verbatim*** the description of the "Land" in the lengthy Deed of Trust Legal Description – i.e., the property interests that TSE pledged to its lender. 2 AA 194-197. Simply stated, if TSE can pledge such an interest to a private lender, a lien claimant, such as Brahma, can surely attach that same interest.

In fact, this Court has long recognized that the Nevada Mechanic's Lien Statute[18] gives a lien claimant a lien against improvements constructed upon publicly owned land. In *Young Electric Sign Co. v. Erwin Electric Co.*, 86 Nev. 822, 825-26, 477 P.2d 864 (1970), this Court held that a sign securely attached to real property owned by a state agency could be liened pursuant to the then-current version of NRS 108.222 allowing a lien on "any other structure … upon such premises and the buildings, structures and improvements thereon". *Id.* The *Young Electric* Court further clarified that the "contention that one who supplies labor or materials for an improvement or structure cannot lien the appurtenance without liening the real property upon which it is located is unsupported in the law." 86 Nev. at 827 citing with approval *Western Electric Co. v. Cooley*, 79 Cal.App. 770, 251 P. 331 (1926) (an electrical power line was a "structure" that could be liened even though located on a public highway owned and controlled by the state. See also *English v. Olympic Auditorium*, 217 Cal. 631, 20 p.2d 946, 87 A.L.R. 1281 (1933) (a lien may exist on the building without attaching to the land. Hence it is not essential to the existence of a mechanic's lien on a building that the person causing its erection should have owned or had any interest in the real property on which it is located.).

Statutory modifications subsequent to *Young Electric* have confirmed the rights of lien claimants to lien improvements on works of improvements, but not necessarily the real property. For example, but without limitation, NRS 108.222 states that "a ***lien claimant*** has a lien upon ***the property***" and "any ***improvements*** for which the work, materials and equipment were furnished or to be furnished…" [Emphasis added].

NRS 108.22128 defines "Improvement" as "the development, enhancement or addition ***to property***, by the provision of work, materials or equipment. [Emphasis

[18] NRS 108.221 through 108.246 inclusive.

added]. NRS 108.22128 defines "Property" as "the land, real property or mining claim ***of an owner*** for which a work of improvement was provided, ***including all buildings, improvements and fixtures thereon*** .... [Emphasis added]. NRS 108.22148 defines "Owner" to include, among other things, the owner or owners, or reputed owner or owners of the property or an ***improvement*** to the property. Similarly, NRS 108.22188 defines a "Work of Improvement" as "the ***entire structure or scheme of improvement as a whole***, including, without limitation, all work, materials and equipment to be used in or for the construction, alteration or repair of ***the property*** or ***any improvement*** thereon, whether under multiple prime contracts or a single prime contract. [Emphasis added]. *See also Byrd Underground, L.L.C. v. Angaur, L.L.C.*, 130 Nev. 586, 593, 332 P.3d 273, 278 (2014) ("the trier of fact must look to the entire structure or scheme of improvement as a whole—the 'overall construction'— … in determining whether construction on a work of improvement has commenced.").

2. Brahma's Lien Has Been Properly Amended To Confirm That It Is Limited To The TSE Property And The Work Of Improvement.

The lien has been amended (and/or restated as a new notice of lien) multiple times to adjust the amount of the Lien and, out of an abundance of caution, to clarify that it does not attach to the BLM Parcels. Specifically, the Second Amended Lien notes that TSE "is the owner of the real property and leasehold property subject to this lien," whose "interest in the Crescent Dunes Solar Energy Project" is "charged with the lien," but that "the real property owned by the Bureau of Land Management is not being charged with this lien." 2 AA 212-221. Similarly, the Third Amended Lien further clarified that Brahma's claim of lien (i) extends to the TSE Parcels, (ii) does ***not*** extend to the BLM Parcels, but (iii) ***does*** extend to the improvements constructed on the BLM Parcels. 2 AA 224.

TSE incorrectly asserts, for several reasons, that the Lien cannot be so amended. To the contrary. even if the Original Lien or First Amended Lien could be interpreted to attach to the BLM Parcels, NRS 108.229(1) expressly allows Brahma to amend its Lien "[a]t any time before or during the trial of any action to foreclose a lien to correct or clarify the lien claimant's notice of lien." Here, no trial has been commenced, much less completed.

a. Brahma's lien is not "void."

TSE first argues that Brahma may not amend its lien because the Original Lien was invalid and, therefore, "void" because (TSE argues) it improperly attached federal property. As discussed above, Brahma's lien did no such thing. Yet even if the Original Lien could be so misinterpreted as TSE - and ***only*** TSE[19] - suggests, such ambiguity does not render the lien "void" or preclude an amendment. First, as noted, the applicable statutory provision liberally permits an amendment to a lien "to ***correct or clarify*** the lien claimant's notice of lien." NRS 108.229(1). Nothing in the statute, the legislative history or this Court's precedent suggests or supports the notion that the right to correct or clarify is limited to, for example, the amount of the lien. To the contrary, the entirety of "the lien claimant's notice of lien" is subject to correction or clarification. Not even TSE disputes that as of the time the District Court ruled on and rejected TSE's Motion to Expunge the operant notice of lien plainly, explicitly and unambiguously ***disclaimed*** any lien against the BLM Parcels.[20]

TSE is also wrong to assert that a Nevada notice of lien containing a correctable technical defect is like a void pleading, deed of trust or contract. *See*

[19] It is worth noting that neither the BLM nor any other federal agency has appeared in or sought relief from any court relating to the Brahma's lien.

[20] Of course, nothing in the statutory notice of lien form, or elsewhere, requires a lien claimant to ***dis***claim interests. Nonetheless, Brahma has gone above and beyond to preclude any misunderstanding concerning the subject matter of the Brahma Lien.

Opening Brief pp. 13-16. TSE concedes, as it must, that this Court, has never precluded an amendment to a mechanic's lien on the grounds that the original notice of lien was "void." Opening Brief p. 13. Certainly if a notice of lien was untimely and such defect could not be remedied, an amendment to the face or language of the notice of lien would also be untimely. But TSE's complaint is not with the timeliness of Brahma's Lien, but rather with the presumed effect of the Lien on the BLM Parcels, irrespective of the Brahma Lien's clear, unambiguous and timely attachment to the TSE Parcels and TSE's leasehold interest in the BLM Parcels that were the subject of the Work of Improvement.

TSE relies on *Hayward Lumber & Inv. Co. v. Pride of Mojave Mining Co.*, 43 Cal. App. 2d 146, 110 P.2d 439, 440 (1941) for the proposition that "a void notice of lien [cannot] be amended." Opening Brief p. 14. TSE grossly misrepresents the holding and import of that case, which did not address amendments to mechanic's liens. There the California court disallowed a mechanic's lien because it "present[s] an instrument in which no description whatever is given of [the property sought to be liened]." 110 P.2d at 440. Further, and although inapplicable to allow reformation of that claimant's lien, the *Hayward Lumber* court expressly acknowledged that under then-existing California code "certain mistakes shall not invalidate the lien." *Id*. By contrast, the Nevada Mechanic's Lien Statute expressly and liberally permits amendments of a notice of lien, to correct or clarify the subject matter of the notice of lien.

b. Brahma's amendments do not reflect "intentional" misconduct.

Pursuant to NRS 108.229(1), "[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." TSE does not claim or suggest that Brahma's Original Lien was the product of "fraud" or that TSE (or any other party) was somehow mislead to its prejudice by the identification – as required by the statutory form – of BLM as the owner[21] of the BLM Parcels, on which a portion of the Work of Improvement was constructed. Indeed, there is no such evidence.

Instead, TSE argues that Brahma's identification of the BLM Parcels in the Original Lien – specifically as required by the statutory form – demonstrates, *ipso facto*, a "specific motive or purpose to injure." Opening Brief p. 19 citing *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 275, 71 P.3d 1264, 1268 (2003). But TSE points to no evidence in the record of such an intended purpose nor any reason whatsoever why Brahma would want to injure the federal government. To the contrary, TSE

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[21] Pursuant to NRS 108.22148 an "owner" includes:

(a) The record owner or owners of the property or an improvement to the property as evidenced by a conveyance or other instrument which transfers that interest to the record owner or owners and is recorded in the office of the county recorder in which the improvement or the property is located;

(b) The reputed owner or owners of the property or an improvement to the property;

(c) The owner or owners of the property or an improvement to the property, as shown on the records of the county assessor for the county where the property or improvement is located;

(d) The person or persons whose name appears as owner of the property or an improvement to the property on the building permit;

(e) A person who claims an interest in or possesses less than a fee simple estate in the property;

(f) This State or a political subdivision of this State, including, without limitation, an incorporated city or town, that owns the property or an improvement to the property if the property or improvement is used for a private or nongovernmental use or purpose; or

(g) A person described in paragraph (a), (b), (c), (d) or (e) who leases the property or an improvement to the property to this State or a political subdivision of this State, including, without limitation, an incorporated city or town, if the property or improvement is privately owned.

asks this Court to ***presume*** such ill-intent from the mere identification of the BLM Parcels in conformance to the statutory form. Indeed, Brahma's subsequent amendments make clear that Brahma had no such intent and TSE cannot point to any harm whatsoever caused by the alleged lack of clarity in the Original Lien.

It is beyond comprehension that in so liberally authorizing amendments to "correct or clarify" mechanic's liens the Nevada Legislature would have, as TSE suggests, intended the courts to deem any ambiguity appearing in a notice of lien as having been "intentional," thereby precluding a lien claimant from amending a notice of lien to such purported ambiguity. Such a position places an extreme and undue burden on lien claimants and is directly in conflict with Nevada's public policy.

As this Court has historically found, a mechanic's lien is a statutory creature established to ensure payment for work, materials and/or equipment the lien claimant provided for the construction or improvement of a work of improvement. *In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573, 289 P.3d 1199, 1210 (2012) citing *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008). In fact, this Court has repeatedly examined the "entire statutory scheme" of Nevada's Mechanic's Lien Statute and has consistently declared the "legislative intent behind the statute" is Nevada's public policy favoring securing payment for mechanic's lien claimants, such as Brahma. *See e.g., Bullock Insulation, Inc*., 124 Nev. at 1117-18 ("Underlying the policy in favor of preserving laws that provide contractors secured payment for their work and materials is the notion that contractors are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment.").

Moreover, this Court has consistently held that "the mechanic's lien statutes are remedial in character and should be liberally construed." *Fontainebleau*, 128

Nev. at 573 citing *Bullock Insulation, Inc.*, 124 Nev. at 1115. *See also Hardy, supra*, 126 Nev. at 538 (citing hearing on S.B. 343 Before the Assembly Comm. On Judiciary, 73d Leg. (Nev., May 13, 2005) - "lien law should be liberally construed in favor of lien claimants.").

In contrast, TSE asks this Court to parse the word "intentional" from NRS 108.229(1), as if it existed in a vacuum and must be interpreted so broadly as to find specific intent to harm in (at worst) ambiguous language used in a good faith effort to conform to a required statutory form. Instead, and in recognition of this Court's long-standing observation that the legislature intended these statutes to be liberally construed in favor of lien claimants, the Court should read that word in the context of, and in harmony with, the statutory provision as a whole. The leading rule of statutory construction is to ascertain the intent of the legislature in enacting the statute. *McKay v. Bd. of Sup'rs of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986). This intent will prevail over the literal sense of the words. *Id*. The meaning of the words used may be determined by examining the context and the spirit of the law or the causes which induced the legislature to enact it. *Id*. at 650-51. The entire subject matter and policy may be involved as an interpretive aid. *Id*.

NRS 108.229(1) presents two related exceptions to the statute's otherwise comprehensive authority to amend a notice of lien. Specifically, a variance between a notice of lien and an amended notice of lien does not defeat the lien unless it:

(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.

Read as a whole,[22] the clear import of these exceptions is to prevent amendments that result from egregious fraudulent conduct that causes actual prejudice to an adverse party. *See* e.g., *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 426 (2007) (elements of intentional misrepresentation include "a false representation that is made with either knowledge or belief that it is false" and "an ***intent to induce*** another's reliance") (emphasis added). Even then, this limited prohibition on lien amendments applies ***only*** in favor of that injured party. In this regard, TSE presented no evidence to the District Court that it (or anyone else, including the BLM) was injured by the purported lack of clarity in the Original Lien as to whether or not property owned by a third party (i.e., in addition to the TSE Parcels) was to be charged with the Lien.

In any event, the District Court expressly concluded that "Brahma did not 'intentionally' attach [the BLM Parcels] such that it is precluded from amending its Notice of Lien." 6 AA 480. Further, by way of his oral ruling from the bench following the hearing, Judge Elliott expressly noted and relied on Brahma's good faith efforts to clarify the effect of its Lien:

> So they had the right, in my opinion to go after the project and they clarified in their subsequent filings that they're not trying to foreclose the BLM's property.

5 AA 433. The District Court's factual conclusions are entitled to significant deference. *See J.D. Constr. v. IBEX Int'l Grp., supra*, 126 Nev. 366, 380–81 (an

[22] When interpreting a statute, this Court must give its terms their plain meaning, considering its provisions as a whole so as to read them "in a way that would not render words or phrases superfluous or make a provision nugatory." *Southern Nevada Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). Further, it is the duty of this Court, when possible, to interpret provisions within a common statutory scheme "harmoniously with one another in accordance with the general purpose of those statutes" and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent. *Id*.

appellate court "will not disturb the district court's factual determinations if substantial evidence supports those determinations."). TSE, who carries the burden of demonstrating that Brahma's Original Lien was frivolous and made without reasonable cause, offered no evidence to the District Court, and can therefore offer none here, to demonstrate that Brahma's Original Lien was the result of some nefarious intent or plot or that TSE has somehow been thereby harmed. The District Court's findings are not "clearly erroneous" and, therefore, may not be set aside. *Id*.

c. TSE had no standing to complain about a purported lien on BLM land.

As TSE notes, the District Court also concluded that TSE was "estopped from arguing that [Brahma's Original Lien] is void simply because the BLM's land was allegedly implicated in the [Original Lien]." 6 AA 480. While the District Court's use of the term "estopped" was imprecise, Judge Elliott's oral ruling makes clear that the basis of this decision was the fact that TSE is not the proper party to complain about a Notice of Lien that TSE interprets as having once attached, in part, to the BLM Parcels. Stated differently, TSE had no standing to attack Brahma's Lien based on its purported effect on a third party (the BLM) that was not before the Court or asserting such a position.

"Standing is the legal right to set judicial machinery in motion." *Heller v. Legislature of State of Nev*., 120 Nev. 456, 460-61, 93 P.3d 746, 749 (2004). To establish standing, a petitioner must demonstrate a "beneficial interest" in obtaining the relief sought, which means "a direct and substantial interest that falls within the zone of interests to be protected by the legal duty asserted." *Id*.

Here, and to the extent the Original Lien actually attached to the BLM Parcels (which it did not), ***the BLM***, not TSE, had the "legal right to set judicial machinery in motion" by arguing, as TSE does in its place and without any *imprimatur* of

authority, that the lien was void and not amendable. Indeed, as discussed above, the amendment statute expressly builds in this standing component to a challenge to a lien amendment. *See* NRS 108.229(1)(b) (precluding amendment "only with respect to the adverse party who was prejudiced"). This Court should affirm on these grounds as well.

3. The Federal Government's interests are not impaired by Brahma's lien.

TSE also argues that Brahma's Lien must be deemed frivolous and made without reasonable cause because it is barred by the doctrine of sovereign immunity. Yet this Court, like others, long ago rejected the extension of governmental immunity to preclude a mechanics' lien against leasehold interests on government land. *See Basic Refractories, Inc. v. Bright*, 72 Nev. 183, 298 P.2d 810, 59 A.L.R.2d 457 (1956) citing and approving of: *Crutcher v. Block*, 19 Okl. 246, 91 P. 895, 14 Ann.Cas. 1029 ("it is immaterial that the legal title to the land in question is in the United States"). See also *Tropic Builders, Ltd. v. United States*, 52 Haw. 298, 475 P.2d 362 (1970) ("The fact that the project site was owned by the United States in fee simple did not make [the lease] and [the lessee's] interest in the leasehold improvements immune from such liens.").

Despite this clear authority, TSE invents a new rule, appearing nowhere in any authority it cites, 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." Opening Brief p. 24. TSE also asserts that the government (i) "has a significant security interest in the Project improvements, which are currently subject to Brahma's mechanic's lien," and (ii) "foreclosure by Brahma on the TSE-owned Project improvements … would harm the federal government." Opening Brief pp. 24-5.

As factual "support" for this argument, TSE cites exclusively to the affidavit of Justin Pugh (3 AA 269-71 - the "Pugh Affidavit") submitted in Reply to Brahma's Opposition to TSE's Motion to Expunge.[23] Opening Brief pp. 25-6 citing 3 AA 270 six times. Mr. Pugh purports to be the Managing Director of a finance and restructuring company that serves as the project manager for TSE on the Project. 3 AA 269-70.[24]

Importantly, Paragraph 9 of the Pugh Affidavit contains all of the factual assertions TSE made to the District Court purporting to demonstrate the parade of horribles that (it asserts) will befall TSE, and by extension, the federal government, if Brahma were permitted to foreclose on its notice of lien. Yet the entirety of Paragraph 9 is expressly based "[u]pon information and belief." 3 AA 270. Moreover, ***none*** of the "harm [to] the federal government's significant financial interests" alleged in the Opening Brief appear ***anywhere*** in the Pugh Affidavit. For example, but without limitation, TSE argues that "Brahma would have first recourse to the value of the Project's assets," which would "increase the likelihood that the federal government would not recover in full on the guaranteed loan, significantly damaging the public fisc." Opening Brief p. 25. Yet there is nothing in the Pugh Affidavit that remotely demonstrates that Brahma's Lien has priority over an earlier-filed security interest. In any event, the District Court expressly rejected this "sky-is-falling affidavit." 5 AA 433.

[23] As this reference suggests, TSE first asserted the sovereign immunity defense by way of Reply to Brahma's Opposition to TSE's Motion to Expunge once it recognized the weakness of its other arguments.

[24] Because this matter came to the District Court on TSE's filing of the NRS 108.2275 Proceeding, Brahma had no opportunity to depose Mr. Pugh or engage in any discovery relating to the Work of Improvement or TSE's sovereign immunity defense before the hearing. *See* 1 AA 1.

In formally rejecting TSE's sovereign immunity defense, the District Court concluded that:

- "No-one is suing the United States in this action and neither the BLM's fee simple interest in certain parcels that comprise the Work of Improvement, nor is the DOE's security interest impaired by Brahma asserting a Notice of Lien; especially if (as TSE contends) the DOE has first priority over Brahma's Notice of Lien;" and
- "Even if Brahma were to eventually foreclose on its Notice of Lien, the Work of Improvement could still be operated as a solar electric facility."

6 AA 480-81. Again, the District Court's factual determinations, including the credibility of the Pugh Affidavit, should be reviewed deferentially under the substantial evidence standard and affirmed.

4. TSE's position is now moot because a surety bond has been recorded to release the Notice of Lien.

Following the District Court's denial of TSE's Motion to Expunge, Cobra and AHAC recorded the Surety Bond and a subsequent Rider to conform to the statutory requirements. 2 RA 301-305; 2 RA 306-316. By statute, a duly recorded Surety Bond "releases the property described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for the lien." *See* NRS 108.2415(6)(a). At that moment, Brahma ceased to have a claim against the TSE Parcels and the Work of Improvement, and instead, became "entitled to bring an action against the principal and surety on the Surety Bond. NRS 108.2421. Likewise, TSE ceased to have an "interest in the property subject to the notice of lien." See NRS 108.2275(1) (granting standing to bring a frivolous lien motion to "a party in interest in the property subject to the notice of lien."). Similarly, and to the extent

the Brahma Lien could somehow harm the federal government (which, as discussed above, it does not), the Brahma Lien was statutorily deemed to have been released once the Surety Bond was duly recorded. Simply stated, Brahma no longer has a claim against – and no longer threatens any federal interests in – the work of improvement, if it ever did.

The question of mootness is one of justiciability. This Court's duty is not to render advisory opinions but, rather, to resolve actual controversies by an enforceable judgment. *Personhood Nevada v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) citing *NCAA v. University of Nevada*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981). A controversy must be present through all stages of the proceeding. *Bristol*, 126 Nev. at 602 citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997); *Lewis v. Continental Bank Corp*., 494 U.S. 472, 476–78, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Even though a case may present a live controversy at its beginning, subsequent events may render the case moot. *Bristol*, *id*., citing *University Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004).

Here, the subject of TSE's Appeal – the purported attachment of Brahma's Lien to the BLM Parcels and/or impact on the federal government's interest - has become moot because the Lien has been released from those interests by virtue of the Surety Bond. No governmental interests are implicated where Brahma's Lien now attaches only to a privately-issued Surety Bond for which TSE is not even the principal. Because the Surety Bond has released the Lien, questions of priority and fears of "harm to the federal government's significant financial interests" are no longer at issue in this action.

Were there any question as to the mootness of TSE's Appeal, Brahma has now commenced an action solely against the Surety Bond, its bond principal (Cobra) and Cobra's surety (AHAC) to perfect Brahma's claim against the Surety Bond. Pursuant

to NRS 108.2421(2)(a)(1), if an action by a lien claimant to foreclose upon a lien was pending before the surety bond is recorded (as was the case in the NRS 108.2275 Proceeding),[25] the lien claimant "may amend the complaint to state a claim against the principal and the surety on the surety bond," as Brahma did by filing its First Amended Counter-Complaint. 4 RA 601-610. If, on the other hand, an action is commenced after the surety bond is recorded "the lien claimant may bring an action against the principal and the surety not later than 9 months after the date that the lien claimant was served with notice of the recording of the surety bond" pursuant to NRS 108.2421(2)(b)(1) (as Brahma did by commencing the Separate Action).[26] The NRS 108.2275 Proceeding and the Separate Action have since been consolidated and Brahma has filed, with the District Court's approval, a consolidated amended pleading that continues Brahma's Claim on Surety Bond. 5 RA 919-31. Simply stated, Brahma no longer asserts a claim against the TSE Parcels, the BLM Parcels, TSE's leasehold interests or the improvements, and instead asserts a claim against the Surety Bond. *See id*.

For this reason alone, the Court should deny the Appeal and affirm the decision below.

C. THE DISTRICT COURT PROPERLY AWARDED ATTORNEY'S FEES AND COSTS TO BRAHMA.

TSE also appeals the District Court's Order awarding Brahma its attorney's fees and costs pertaining to its successful defense of TSE's Motion to Expunge. *See* 14 AA 1006-1018. This Court should affirm that decision as well.

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[25] *Compare* 1 RA 26 (filed September 2018) with 2 RA 309 (recorded October 9, 2018).

[26] *Compare* 2 RA 309 (recorded October 9, 2018) with 4 RA 581 (filed December 14, 2018).

1. The District Court was required to award fees and costs.

Pursuant to NRS 108.2275(6)(c), once the District Court determined that Brahma's Lien was not frivolous and was made with reasonable cause, it was ***required*** to award attorney's fees and costs to Brahma and against the moving party, TSE.

NRS 108.2275(6)(c) states in relevant part:

> (6) If, after a hearing on the matter, the court determines that:
> ***
>
> a. The notice of lien is not frivolous and was made with reasonable cause…the court ***shall*** make an order awarding costs and reasonable attorney's fees to the lien claimant for defending the motion.

[Emphasis added]. Accordingly, an award of fees and costs was mandatory, not permissive. TSE seems to acknowledge this fact as it requests a reversal of the award of fees only (i) if the Court reverses the underlying decision, and (ii) based on arguments as to the reasonableness of the fees awarded. See Opening Brief p. 27.

2. An award of fees and costs is reviewed for an abuse of discretion.

In Nevada, the method upon which a reasonable fee is determined is subject to the discretion of the district court, which is tempered only by reason and fairness. *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864–65, 124 P.3d 530, 548–49 (2005). This Court "will not substitute [its] opinion for that of the trial court unless as a matter of law there has been an abuse of discretion. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. at 350. The value to be placed on the services rendered by counsel lies in the exercise of sound discretion by the trier of the facts. *Id*. The Court "will affirm an award that is supported by substantial evidence." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

3. The District Court properly considered the *Brunzell* factors.

In *Brunzell**Error! Bookmark not defined.***, *Shuette* and their progeny, this Court has enumerated the factors that the District Court should consider in awarding attorney fees. *See Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 829, 192 P.3d 730, 736 (2008). Specifically, this Court must consider the following factors, with no one factor controlling:

1. The advocate's qualities, including ability, training, education, experience, professional standing, and skill;
2. The character of the work, including its difficulty, intricacy, importance, as well as the time and skill required, the responsibility imposed, and the prominence and character of the parties when affecting the importance of the litigation;
3. The work performed, including the skill, time, and attention given to the work; and
4. The result—whether the attorney was successful and what benefits were derived.[27]

While explicit findings with respect to the *Brunzell* factors are preferred, "the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence." *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. Adv. Op. 31, 416 P.3d 249, 258–59 (2018) citing *Logan*, 131 Nev. at 266. *See also Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1049, 881 P.2d 638, 642 (1994) (providing that the district court "need not ... make explicit findings as to all of the factors where support for an implicit ruling regarding one or more of the factors is clear on the record").

[27] *Barney*, 124 Nev. at 829.

As to the methods or approaches a district court may use to determine a reasonable amount, there are certainly more considerations than just hourly billing records. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. Adv. Op. 7, 429 P.3d 664, 672 (Nev. App. 2018) citing e.g., *Hsu v. Cty. of Clark*, 123 Nev. 625, 637, 173 P.3d 724, 733 (2007) (remanding the issue of attorney fees to the district court to determine a starting point and adjust the fee accordingly based on several factors, including the "time taken away from other work," case-imposed deadlines, how long the attorney worked with the client, the usual fee and awards in similar cases, if the fee was contingent or hourly, the amount of money at stake, and how desirable the case was to the attorneys involved); RPC 1.5(a)(l)-(8) (listing factors to consider in deciding if a fee is reasonable). Thus, the 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*, citing *Shuette*, 121 Nev. at 864-65, 124 P.3d at 548-49.

Here, the District Court expressly considered and analyzed Brahma's request for fees and costs under the *Brunzell**Error! Bookmark not defined.* factors. 14 AA 1013. Brahma's request was supported by hourly billing records and cost records affirmed by the Affidavit of Brahma's counsel. 7 AA 496-525. While acknowledging that the hours expended and fees requested were substantial, the District Court in oral argument stated: "I can understand for [Brahma] it certainly didn't want to lose ... the security interest that it would have in its $13 million claim." 12 AA 857-58. Ultimately the District Court concluded that:

> [T]he hour and amounts are reasonable and not excessive in light of (i) the size and importance of Brahma's lien, (ii) the complex and varied issues presented to the Court, (iii) the high quality counsel on both sides of the case, (iv) higher quality work product than seen in ordinary cases and (v) the clients' reasonable expectations for superior

> intellectual ability and work product on both sides. In addition, the Court is satisfied that the rates charged by Brahma's counsel, including associate and partner rates, are reasonable and justified.

14 AA 1012.[28] As discussed below, the District Court's decision was not an abuse of discretion and should be affirmed.

4. The District Court's award of fees and costs was reasonable and was not an abuse of discretion.

The District Court made findings with respect to each of the *Brunzell* Factors, which findings were well supported by substantial evidence. These findings include:

- Finding 1, Advocate's Qualities: "Brahma's counsel are highly experienced, knowledgeable and competent, especially relating to the Nevada Mechanics' Lien Statute and construction law;"
- Finding 2, Character of the Work: "Brahma's lien claim of nearly $13 million is substantial and the Underlying Motion presented big stakes. In addition, the Court enjoyed the benefit of high-quality briefing and argument on atypical, challenging and varied subject matter;"
- Finding 3, The Work Performed: "The Underlying Motion presented the Court with a lot to consider;" and
- Finding 4, The Result: "The arguments presented by Brahma's attorneys were persuasive to the Court and the Court ruled in favor of Brahma on the Underlying Motion."

14 AA 1013.

[28] Although TSE complained about Brahma's attorney rates below, it notably did not raise that issue with this Court. This is likely because, at oral argument, TSE's counsel acknowledged that his own hourly rate exceeded that of the highest rated biller among Brahma's attorneys. 12 AA 846.

Supporting substantial evidence presented by way of, without limitation, the Affidavit of Richard L. Peel, Esq. (the "Peel Affidavit" - 7 AA 496-002)[29] includes, but is not limited to the following:

With respect to Finding 1 (Advocate's Qualities), the supporting evidence includes a description in the Peel Affidavit of the Peel Brimley LLP law firm and attorneys' (i) primary and extensive practice in, and knowledge of, construction law; (ii) involvement in drafting and passing construction legislation; and (iii) involvement in "almost every major construction litigation in Las Vegas, Nevada over the past 22 years." 7 AA 499-500. Indeed, TSE's counsel acknowledged in oral argument that TSE does "not dispute that Mr. Peel and his legal team are exceptionally skillful and experienced in these matters." 12 AA 846. In its oral decision, the District Court acknowledged that counsel on both sides were "right up there with the best attorneys in the state, no doubt." 12 AA 858.

With respect to Finding 2 (Character of the Work), the supporting evidence includes the following: (i) Brahma's Fourth Amended Lien seeks an unpaid principal balance of $12,859,577.74. 9 AA 675-684; and (ii) TSE's Motion to Expunge sought to release and discharge Brahma's lien rights, which were Brahma's only security for extension of "large blocks of credit" and investment of "significant time, labor, and materials into a project." *See Bullock Insulation, Inc.*, 124 Nev. at 1117-18. While the District Court's finding of "high-quality briefing and argument" on "atypical, challenging and varied subject matter" necessarily encompasses some subjective opinion, the undersigned humbly submits that the record of Brahma's briefing and oral argument objectively reflect the same. *See e.g.*, 1 AA 84-104; 3 AA 272-74; 5 AA 345-472; 4 AA 280-284; 7 AA 482-495; 11 AA 808-822. In its oral decision, the District Court remarked that this case, and the work product, was

[29] Mr. Peel is the Managing Partner of the Law Firm of Peel Brimley LLP. 7 AA 498.

different than a "typical" case: "This is a higher level and you had a lot more at stake, and the clients expect, you know, the brain power of a couple really top-notch firms to do it." 12 AA 858. The District Court further acknowledged that it was "very difficult for me to figure [the issues presented in the Motion to Expunge] out and, you know, I had the benefit of all your briefing too, you know, to guide me to a just and appropriate decision … it's not subject matter that I would work, or any typical judge would work on a normal basis." 12 AA 858-59.

With respect to Finding 3 (the Work Performed), the parties' extensive briefing submissions, including on multiple issues TSE presented below but did not seek review of here, encompasses a record exceeding 1000 pages of high-quality work from highly experienced and competent attorneys on both sides of the arguments. As the District Court noted in oral argument, "while it is a lot of money, a lot of work went into this, a lot of time." 12 AA 860.

With respect to Finding 4 (the Result), Brahma obviously prevailed in defeating TSE's Motion to Expunge. 6 AA 472-481. As the District Court stated: "And obviously a lot of time and attention was given to this work. And the result was that the attorneys for [Brahma] ultimately became persuasive, in my opinion." 12 AA 860.

Finally, the parties ***stipulated*** to $10,000.00 of the total sum awarded ($88,417.34) as representing a reasonable award of "additional fees incurred for appearance of counsel at oral argument and preparation of the Order Granting Motion for Fees and Costs." 14 AA 1042, 1046-47. Where TSE agreed that approximately 1/8th of the total award was reasonable when applied solely to oral argument of the fee motion and preparation of the Order, TSE's complaints as to the total award ring hollow indeed. Because the District Court's decision is supported by substantial evidence, TSE's other nits can and should be rejected without further consideration. *See Logan v. Abe*, 131 Nev. at 266

5. Brahma did not engage in impermissible "block billing."

TSE complains that Brahma impermissibly engaged in so-called "block billing" and that "the district court failed to assess the reasonableness of the time Brahma's counsel spent on certain tasks." Opening Brief p. 30. This argument is false and unsupported by the record.

First, and even if Brahma had engaged in "block billing," this Court has never criticized or dissuaded this practice. TSE acknowledges as much by citing only to out-of-state cases. *See* Opening Brief pp. 28-31. More importantly, and while giving TSE "due credit" for challenging Brahma's fee request, 12 AA 857, the District Court expressed no difficulty in evaluating the reasonableness of Brahma's attorney's fees, concluding instead "I, you know, don't really have a big problem with" the hours billed and for which an award was requested. 12 AA 860.

This is no doubt in part to the fact that, as Brahma explained in its briefing and at oral argument, Brahma's attorneys created a special billing code for their work in response to the Motion to Expunge. 11 AA 817; 12 AA 841. As such, and even where some of the time entries contained multiple tasks, ***all*** of those tasks pertained to Brahma's defense of TSE's Motion to Expunge. *See Welch v. Metro. Life Ins. Co*., 480 F.3d 942, 948 (9th Cir. 2007) citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (holding that applicant should "maintain billing time records in a manner that will enable a reviewing court to identify distinct claims"). Simply stated, TSE did not demonstrate to the District Court (and makes no effort to do so here) that Brahma has applied for an award of any fees incurred for such other activities. Instead, Brahma applied for an award of only those fees that it actually incurred in defending the Motion to Expunge.

Ironically, and although TSE claimed below that "over 80 percent of [the time entries] rely on block billing" (which Brahma certainly disputes), TSE nonetheless

asked the District Court to make "an across-the-board 30 percent reduction" of ***100 percent*** of the time entries. 8 AA 534. Such fuzzy math parodies itself.

In addition, and in support of its request for a ***30 percent*** overall reduction, TSE relies for support on a case that expressly ***rejected*** and vacated the U.S. District Court of Nevada's ***20 percent*** across-the-board reduction for block billing. *See Welch v. Metro. Life Ins. Co*., 480 F.3d 942, 948 (9th Cir. 2007). The *Welch* court remanded and required the District Court to instead "explain how or why ... the reduction ... fairly balance[s]" those hours that were actually billed in block format. *Id*. citing *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir.2001). As TSE made no effort to explain how or why a reduction (especially of 30 percent across-the-board) would "fairly balance" the hours reflected in PB's invoices, the District Court here properly rejected such an invitation. This Court should similarly give no credence to TSE's flawed analysis.

VI. CONCLUSION

Based on the foregoing, Brahma respectfully requests that the Court affirm the decision below.

Dated this 3rd day of March, 2020.

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CERTIFICATE OF COMPLIANCE

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

[X] This Brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16 in 14 points, Times New Roman; or

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

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

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3. Finally, I hereby certify that I have read this Respondent's Answering 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 in 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. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 3rd day of March, 2020.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFCR 9(f), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 3rd day of March, 2020, I caused the above and foregoing document, **RESPONDENT'S ANSWERING BRIEF**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
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to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

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