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 REPLY 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: May 4, 2020

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INTRODUCTION

Tonopah Solar Energy's ("TSE") opening brief demonstrated that the district court's denial of TSE's motion to expunge and grant of Brahma Group, Inc.'s ("Brahma") motion for attorney fees and costs should be reversed and remanded. Brahma's original lien was invalid as a matter of law because it attached federally owned land. Brahma's attempts to fix its original lien through amendment were also invalid as a matter of law because (1) the original lien was void and Brahma could not amend a void lien and (2) the amendments were precluded by NRS 108.229(1)(a) because they constituted "variances made intentionally." Moreover, the district court abused its discretion in failing to reduce Brahma's fee award for block billing.

In response, Brahma raises a plethora of arguments. Generally, Brahma argues that the recording of a surety bond mooted this entire appeal, neither its original lien nor the amendments thereto are invalid as a matter of law, and that the district court properly accounted for Brahma's block billing. As explained below, these arguments lack merit. The relief sought by TSE's opening brief is warranted.

ARGUMENT

I. TSE's appeal is not moot.

In the middle of its answering brief, Brahma questions the justiciability of this appeal. *See* Respondent's Answering Brief ("RAB") 24-26. Brahma argues that Cobra Thermosolar Plants, Inc. ("Cobra") mooted this appeal when it recorded a surety bond. *Id.* This argument is incorrect. Simply stated, the issues presented by this appeal still present an actual controversy. Indeed, if TSE prevails on this appeal, the surety bond will be exonerated because the lien for which it serves as security will no longer exist.

A review of the nature of a surety bond confirms that the primary issue presented by this appeal—whether the district court erred by denying TSE's motion to expunge—presents an actual controversy. *See Majuba Mining v. Pumpkin Copper*, 129 Nev. 191, 193, 299 P.3d 363, 364 (2013) (providing that a case is not moot if it presents an actual controversy). A mechanic's lien generally attaches property, or the improvements thereon, as security for the lien. *See* NRS 108.22132 (defining a "lien" as "the statutory rights and security interest in . . . property or any improvements thereon provided to a lien claimant"); NRS 108.222. When a surety bond is posted, however, the bond simply replaces the property, or the improvements thereon, as security for the lien. *See Simmons Self-Storage v. Rib Roof, Inc.*, 130 Nev. 540, 551, 331 P.3d 850, 858 (2014), as modified on denial of

reh'g (Nov. 24, 2014) (providing that "each surety bond replaced its corresponding property as security for the lien") (citing NRS 108.2421(6)). Thus, regardless of whether a surety bond has been recorded or not, the lien itself still exists, and is ripe for expungement under NRS 108.2275.[1]

When a lien debtor moves to expunge a lien under NRS 108.2275, it moves for an order (i) releasing the notice of lien as frivolous and made without reasonable cause or (ii) deeming the amount of the notice of the lien as excessive. *See* NRS 108.2275(6). If the district court finds the lien frivolous and made without reasonable cause, then the need for the surety bond, as security for the lien, is eliminated. If the district court finds the lien excessive, then the amount of the surety bond would be reduced accordingly.

A Nevada federal district court recently faced the same issue and reached the same conclusion. *See YWS Architects, LLC v. Alon Las Vegas Resort, LLC*, No. 217CV01417RFBVCF, 2018 WL 5085809, at *3 (D. Nev. Feb. 21, 2018), report and recommendation adopted, No. 217CV01417RFBVCF, 2018 WL 4615983 (D. Nev. Sept. 26, 2018). In *YWS*, the lien claimant, like Brahma here, argued that the lien debtor mooted its pending motion to expunge under NRS 108.2275 by recording a surety bond under NRS 108.2413. *Id.* The court disagreed, concluding

[1] In addition, the statutes discussing surety bonds in NRS Chapter 108, NRS 108.2413-108.2425, still envision the existence of the underlying lien as evidenced by the fact that they still refer to the lien claimant as the lien claimant.

that the lien simply attached to the bond, and if the lien debtor prevailed on its motion to expunge, "the bond could be exonerated or reduced depending on how the motion to expunge is decided." *Id.*

The same result is warranted here. Brahma recorded a mechanic's lien and amended it multiple times. *See* Appellant's Opening Brief ("AOB") 2-6. The district court denied TSE's motion to expunge at the hearing. AOB 6. Cobra then recorded a surety bond under NRS 108.2413. 2 RA 306-316. The bond only serves as a replacement form of security for Brahma's lien. *See Simmons Self-Storage*, 130 Nev. at 551, 331 P.3d at 858. If the lien had been expunged, there would have been no reason to record the bond. Likewise, if this Court determines on appeal that the district court erred by not expunging the lien (*i.e.*, the lien should have been expunged), then the bond recorded by Cobra would be exonerated. Thus, this appeal presents an actual controversy and is not moot.

There is nothing unique about the circumstances presented here that warrant a different result. The tortured procedural steps taken by Brahma in this case, including filing duplicative actions and consolidating them (the appropriateness of which is squarely at issue in TSE's separately filed writ petition, Supreme Court Case No. 78256) do nothing to change the fact that this appeal presents an actual controversy.

Therefore, Brahma's mootness argument fails.[2] The issue of whether the district court erred by denying TSE's motion to expunge presents an actual controversy. This Court should resolve this appeal on the merits.

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

TSE's opening brief demonstrated that Brahma's lien is invalid as a matter of law. Brahma's original lien was void and invalid as a matter of law because it attached federally owned land. *See* AOB 11-12. Brahma's amendments to its original lien are also invalid as a matter of law because: (1) a void lien cannot be amended, and (2) NRS 108.229(1)(a) precluded the amendments because they constituted a "variance made intentionally." AOB 12-21. Thus, the district court erred by denying TSE's motion to expunge.

In response, Brahma contends that (1) TSE relied on the wrong standard—a lien that is invalid as a matter of law is not frivolous and made without reasonable cause, (2) Brahma's original lien did not attach federally owned land, (3) TSE's voidness argument fails, and (4) Brahma's amendments are not precluded by NRS 108.229. Each of these arguments lacks merit.

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[2] TSE's opening brief also argued that sovereign immunity invalidated Brahma's amended liens, which attached the TSE-owned project improvements as security for the lien, because the federal government has a significant financial security interest in those improvements. *See* AOB 21-27. TSE recognizes, however, that because the surety bond replaced the TSE-owned project improvements as security for Brahma's lien, this specific argument is largely moot.

A. The opening brief relied on the correct standard: a lien that is invalid as a matter of law is frivolous and made without reasonable cause.

There is no disputing that under NRS 108.2275(6)(a), a lien should be expunged if it "is frivolous and was made without reasonable cause." In its opening brief, TSE demonstrated that because Brahma's lien is invalid as a matter of law, it is frivolous and made without reasonable cause. *See* AOB 10-11.

In response, Brahma appears to argue that TSE applied the wrong standard. Brahma contends that a lien that is invalid as a matter of law is not necessarily "frivolous and made without reasonable cause." RAB 9-11. Brahma argues that to constitute "frivolous and made without reasonable cause" there must be "absolutely no basis for a claim." *Id.* This argument ignores the plain meaning of frivolous, misinterprets this Court's case law interpreting the same, and raises a distinction without meaning.

First, Brahma's argument raises a distinction without meaning. If a lien is invalid as a matter of law, then there is, by definition, "absolutely no basis for a claim." The statutory language, common law, and common sense do not allow any middle ground between these terms. Said another way, it is impossible for a lien to be invalid as a matter of law but have a basis for a claim.

Second, the standard set forth by TSE—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—conforms to this Court's jurisprudence. *See* AOB 10 (citing *I. Cox Const. Co., LLC v. CH2 Investments, LLC*, 129 Nev. 139, 149, 296 P.3d 1202, 1203 (2013) and *Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 536, 245 P.3d 1149, 1155 (2010) and Black's Law Dictionary's definition of "frivolous").

In trying to rebut this argument, Brahma ignores Black's Law Dictionary's definition of frivolous, which provides that "frivolous" means "[l]acking a legal basis or legal merit; manifestly insufficient as a matter of law." Black's Law Dictionary (11th ed. 2019).

In addition, Brahma criticizes TSE's reliance on *I. Cox* and *Hardy*. These decisions, however, support the principle 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. In discussing expungement, this Court stated in *Hardy* that "[f]ailure to either fully or substantially comply with the mechanic's lien statute will render a mechanic's lien invalid as a matter of law." *Hardy*, 126 Nev. at 536, 245 P.3d at 1155. In *I. Cox*, the district court expunged a mechanic's lien because it failed as a matter of law, holding that it "was not timely and was therefore frivolous." *I. Cox*, 129 Nev. at 149, 296 P.3d at 1203. On appeal, this Court affirmed the decision, concluding "[b]ecause the lien was frivolous, NRS 108.2275(6)(a) required the court to expunge it." *Id.* at 1206.

Thus, Brahma's legal standard argument fails. This Court should conclude that if Brahma's lien is invalid as a matter of law, it should have been expunged under NRS 108.2275(6)(a).

B. Brahma's original lien attached federally owned land.

While the district court did not make a clear ruling on this issue, its written order implies that it found that Brahma's original lien attached federally owned land. The most relevant conclusion by the district court in its order was that "Brahma did not 'intentionally' attach BLM land such that it is precluded from amending its Notice of Lien," 6 AA 480, which indicates that the Court concluded that Brahma attached BLM land, albeit "not 'intentionally.'"

Brahma argues, however, that its original notice of lien did not attach federally owned land. RAB 11-14. In making this argument, Brahma raises four points. *Id.* As explained below, each point relies upon a transparent misinterpretation of the applicable law and portions of the record.

The beginning of the original lien provides that Brahma "claims a lien upon the property described in this notice for work, materials or equipment furnished or to be furnished . . . ." 1 AA 37. Section 5 of the lien then describes the owner of the property to be liened as "Bureau of Land Management and Tonopah Solar Energy, LLC, including its subsidiaries and all other related or associated entities." 1 AA 38. Section 8 of the lien then describes "the property to be charged with the

lien" as "Crescent Dunes Solar Energy Project more particularly described in Exhibit A." 1 AA 39. Exhibit A then describes both the project improvements and nine parcels of land, consisting of 39,254.82 acres of land, of which, the BLM owns 89.4% or 35,107.33 acres. *See* AOB 2-4 (describing each parcel).

Brahma did not dispute the opening brief's description of the parcels (reflected above). *See* AOB 2-5. Brahma also did not dispute that the BLM is an agency of the federal government, to which sovereign immunity applies. Thus, there should be no doubt that the original lien (and the first amendment thereto) attached federally owned land.

To try to cast doubt on this conclusion, Brahma first discusses the Miller Act's bonding requirements for federal public works projects. *See* RAB 11-12. These are irrelevant to the present dispute as neither party contends that the Miller Act applies.

Next, Brahma argues that it simply followed "the statutory form, as required by Nevada law." *Id.* The statutory form, however, does not require a party to attach federally owned land. In using the form, Brahma had the choice to identify the property or work of improvement upon which its lien would attach as security. Brahma chose to attach both the work of improvement and the federally owned land (as further evidenced by the fact that it amended the lien in later iterations to

only attach the work of improvement). 1 AA 38 (original lien); AOB 2-4 (describing the original lien and the federally owned land it attached).

Third, Brahma argues that it was acceptable for the original lien to attach federally owned land because it simply attached the same land that "TSE pledged as security to its private lender." RAB 12. This argument is flawed for multiple reasons.

To begin, even if Brahma's argument was accurate, which it is not, it would not vindicate Brahma's original lien. Brahma provides no support for the position that it is acceptable for a lien to attach federally owned land if the developer had pledged that same land as collateral for a loan from a private lender.

More substantively, however, Brahma's argument is wrong as to what was pledged and to whom it was pledged to. Beginning with whom, the so-called Deed of Trust (actually entitled Construction and Permanent Deed of Trust with Assignment of Rents, Security Agreement, and Fixture Filing) did not pledge anything to a "private lender." The security provided by TSE through the "Deed of Trust" was for the benefit of the U.S. Department of Energy, not a "private lender." 2 AA 138-139. The Deed of Trust clearly provides that TSE, as Grantor, pledged security "for the benefit and security of Beneficiary,"—the DOE is the Beneficiary. 2 AA 143 (Article 2—grant of real property to the DOE's benefit); *see also* 2 AA 139 (defining the DOE as the Beneficiary), 2 AA 148 (Article 5:

assignment of rents and leases to the DOE's benefit), 2 AA 149 (Article 6: grant of security interest in personal property to the DOE's benefit), 2 AA 150 (Section 6.3: grant of interest in fixtures to the DOE's benefit).

As to what was pledged, Brahma's assertion that its original lien only attached the same real property (*i.e.*, 35,107.33 acres of federally owned property) that the Deed of Trust granted to the DOE's benefit is also wrong. Logically, federally owned land would never be pledged as security to benefit the DOE and TSE could not pledge something it did not own. The record confirms this was not done. Article 2 of the Deed of Trust governs the grant of real property to the DOE's benefit, which provides that TSE granted the "Mortgaged Property" to the benefit of the DOE. 2 AA 143. The two-page definition of "Mortgaged Property", featuring fourteen sub-parts, includes just about everything one could think of besides the federally owned land. *See* 2 AA 140-142. Indeed, it only includes real property which TSE would have an ability to pledge, which means real property TSE owned or had an interest in, which would not include the thirty-five thousand plus acres of federally owned land at issue here. *See* 2 AA 140 ("All the estate, right, title, and interest of Grantor [TSE] now or hereafter acquired in the real property described in Exhibit A-1 attached hereto [the description of the real property] . . . ."). Thus, TSE did not pledge federally owned land to a "private lender"; in fact, it did not pledge federally owned land at all.

Fourth and finally, Brahma cites to this Court's decision in *Young Electric Sign Co. v. Erwin Electric Co.*, 86 Nev. 822, 825-26, 477 P.2d 864 (1970) for the proposition that a lien claimant can lien improvements constructed upon publicly owned land. RAB 13. TSE has never disputed this proposition. This proposition, however, is inapplicable to Brahma's original lien, which did not just lien improvements—it identified itself as attaching both the improvements and all the real property underlying the project, which includes over thirty-five thousand acres of federally owned land. *See* AOB 2-4 (describing the original lien and the federally owned land it attached). Brahma's second, third, and fourth amended liens only attached the improvements—in tacit recognition that the original lien improperly attached federally owned land. *See* AOB 4-6 (discussing Brahma's second, third, and fourth amended liens).

Consequently, Brahma's attachment argument fails. This Court should conclude that Brahma's original lien attached federally owned land.

C. Brahma's lien is invalid as a matter of law because its original lien was void and could not be amended.

On this issue, the district court concluded that "TSE is estopped from arguing that the Notice of Lien is void . . . ." 6 AA 480. In its opening brief, TSE showed why there is no legal or factual basis for such a finding of estoppel, and additionally showed that Brahma's original lien was void as a matter of law, and, as a result, could not be amended. *See* AOB 13-16.

In response, Brahma concedes that TSE was not "estopped," but argues that TSE did not have standing to raise the voidness argument and that, even if the original lien was void, it could still be amended. Each of these arguments fails.

1. TSE had standing to challenge Brahma's lien and was not estopped from doing so.

In its answering brief, Brahma attempts to change the issue from estoppel to standing. *See* RAB 21. Brahma argues that the district court's written order's use of "'estopped'" was "imprecise" and the district court "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" and "[s]tated 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." RAB 21. This argument fails for multiple reasons.

First, Brahma does not cite to any page in the hearing transcript where the district court discussed standing. Assuming the district court discussed standing, relying on an oral ruling for a finding of no standing, particularly when that supposed oral ruling contradicts a written order, is inconsistent with appellate procedure. In Nevada civil cases, a court's written order controls any contradictory oral findings or conclusions. *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987). Thus, generally, discrepancies between a district

court's oral findings and written order are irrelevant as only the written order has legal effect. *Id.*

Next, Brahma's standing argument is misguided because standing relates to the right to assert an action, not the right to assert an argument. *See Heller v. Legislature of State of Nev.*, 120 Nev. 456, 460-61, 93 P.3d 746, 749 (2004) ("Standing is the legal right to set judicial machinery in motion."). Clearly, as the lien debtor, TSE had the right to file a motion to expunge Brahma's lien under NRS 108.2275(1).

Looking past this, Brahma does not cite any authority in support of its proposition that TSE does not have the legal right to argue that Brahma's original lien was invalid as a matter of law for attaching federally owned land. Likewise, Brahma does not cite any authority to support the proposition that only the federal government (in this case, the BLM) has the authority to prevail on such an argument. Thus, these arguments must be rejected. *See Rhyne v. State*, 118 Nev. 1, 13, 38 P.3d 163, 171 (2002) (providing that "contentions unsupported by specific argument or authority should be summarily rejected on appeal") (internal quotation marks omitted); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330, n. 38, 130 P.3d 1280, 1288, n. 38 (2006) (providing that this Court need not consider claims that are not cogently argued or supported by relevant authority).

Moreover, no such authority could exist. TSE, as the lien debtor, had authority to contend that Brahma's lien was invalid as a matter of law. One of the reasons supporting that contention was that Brahma's original lien attached federally owned land and was, thus, void (which Brahma then tried to fix through amendment but, as discussed more below, could not). In addition, although TSE is not the federal government, TSE certainly has a direct and substantial interest in keeping the land upon which its project sits free of a lien, as would any developer who is developing a project on land that they do not own. *See Heller*, 120 Nev. at 460-61, 93 P.3d at 749 (providing that 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").

Thus, Brahma's standing/estoppel argument fails. More importantly, the district court's estoppel conclusion is clearly erroneous. Therefore, this Court should conclude that TSE was not estopped from arguing that Brahma's lien was void.[3]

[3] This issue potentially warrants remand. It appears that the district court did not address TSE's voidness argument on the merits because it determined that "TSE [was] estopped from arguing that the Notice of Lien is void." 6 AA 480. TSE submits that the Court can resolve its voidness argument on the merits in the first instance because it turns entirely on questions of law. *See Fed. Ins. Co. v. Coast Converters*, 130 Nev. 960, 970, 339 P.3d 1281, 1288 (2014) (deciding a question of law in the first instance on appeal). But, to the extent that the Court

2. Because Brahma's original lien attached federally owned land, it was void.

In its opening brief, TSE demonstrated that sovereign immunity voids a lien that attaches federally owned land. *See* AOB 15-16. TSE explained that the policy behind sovereign immunity supports this result and cited to, *inter alia*, a Pennsylvania Supreme Court decision that reached the same conclusion. *Id.* at 16.

On this issue, Brahma's only response is "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." RAB 15. Brahma does not provide any additional argument or support for this response. *See Rhyne*, 118 Nev. at 13, 38 P.3d at 171 (providing that "contentions unsupported by specific argument or authority should be summarily rejected on appeal") (internal quotation marks omitted); *Emperor's Garden*, 122 Nev. at 330, n. 38, 130 P.3d at 1288, n. 38 (providing that this Court need not consider claims that are not cogently argued or supported by relevant authority). Thus, this Court should conclude that sovereign immunity voided Brahma's original lien for attaching federally owned land.

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does not wish to resolve the voidness argument on the merits at this time, it should reverse the district court's estoppel ruling and remand this matter back to the district court for further consideration of TSE's voidness argument.

3. Because Brahma's original lien was void, it could not be amended.

TSE's opening brief demonstrated that courts preclude the amendment of void legal documents, such as contracts, pleadings, deeds of trust, and notices of mechanic's liens, because when a legal document is void, it is of "no legal effect" and is as if no document existed at all. *See* AOB 13-14. In fact, this Court has precluded the amendment of pleadings that are void. *Id.* (citing *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)). And at least one California court, in *Hayward*, has precluded the amendment of a notice of mechanic's lien because it was void. AOB 14 (citing *Hayward Lumber & Inv. Co. v. Pride of Mojave Mining Co.*, 110 P.2d 439, 440 (Cal. Ct. App. 1941)).

In response, Brahma argues that it could amend its original lien to no longer attach federally owned land, despite the original lien being void. *See* RAB 15-16. Brahma provides no case law in support of this position. *See id.* Notably, Brahma did not dispute the principle identified above and in TSE's opening brief. Instead, Brahma attempts to distinguish *Hayward*, argues that NRS 108.229(1) permits a lien claimant to "correct or clarify the lien claimant's notice of lien," and contends that this Court has never precluded an amendment to a mechanic's lien on the

grounds that the original notice of lien was void. RAB 16. None of these arguments save Brahma's void lien or the amendments thereto.

First, *Hayward* supports the conclusion that a void notice of lien cannot be amended. Indeed, *Hayward* provides in pertinent part: "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 . . . ."). 110 P.2d at 440.

In fact, *Hayward* also undermines Brahma's reliance on NRS 108.229(1) to be able to "correct or clarify" a void lien. In *Hayward*, the lien claimant (the party arguing to save the lien) made the same argument as Brahma, contending that the statutes at issue "provide[ ] that certain mistakes shall not invalidate the lien." 110 P.2d at 440. That argument did not save the lien in *Hayward*, and it should not do so here.

Moreover, this Court faced essentially the same argument in *Otak* and *Washoe Medical Center* when deciding whether a void pleading could be amended. The party arguing for amendment cited to liberal amendment standards underlying NRCP 15(a) (not to mention Nevada's liberal notice pleading standards). *See Otak*, 127 Nev. at 599, 260 P.3d at 412 (providing that NRCP 15(a)'s liberal amendment standards are "inapplicable when that pleading is void . . . , because a void pleading does not legally exist and thus cannot be amended."). These policies and rules, much like NRS 108.229(1), did nothing to change this

Court's conclusion that a void pleading could not be amended. *Id.* The same reasoning applies here with respect to NRS 108.229(1)—a void lien cannot be corrected or clarified.

Brahma fails to provide any reason for this Court to treat a void lien any differently than it has treated a void pleading, or how other courts have treated void legal documents, including liens. Therefore, this Court should conclude that Brahma's amendments to its original lien are invalid as a matter of law because Brahma could not amend its void original lien.

D. Brahma's lien is invalid as a matter of law because NRS 108.229(1)(a) precluded the amendments made to it by Brahma.

With respect to this issue, the district court concluded that "Brahma did not 'intentionally' attach BLM land such that it is precluded from amending its [original lien]." 6 AA 480.

TSE's opening brief demonstrated that this conclusion was erroneous as a matter of law because it appears to have been based on a misinterpretation of the statute at issue's use of "intentionally" and of the statute itself. *See* AOB 17-21. And to the extent that the Court decides to review this conclusion as a finding of fact, it is also clearly erroneous and not supported by any evidence because the only relevant evidence of intent is the original lien itself, which conclusively demonstrates Brahma's intent to attach BLM land. There is no contrary evidence or evidence in support of the district court's conclusion. *Id.*

As shown in the opening brief, under NRS 108.229(1)'s plain terms, a lien claimant may amend a valid notice of lien if the variance (in this instance, an amendment) is not "deemed material." The statute provides three circumstances where a variance will be "deemed material," and will thus be precluded: (1) if it "results from fraud," or (2) if it "is made intentionally," or (3) if it "[m]isleads an adverse party to the party's prejudice, but then only with respect to the adverse party who was prejudiced." AOB 17-18. Thus, as it relates here, an amendment to a lien is precluded when it constitutes a "variance made intentionally."

NRS 108.229(1) provides the following 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.

NRS 108.229(1) (emphasis added).

There can be no question that Brahma's variance between its original lien and subsequent amendments thereto with respect to the attachment of federally owned land were intentional, meaning that Brahma had a desire to bring about the changes. *See* AOB 19-20. Thus, Brahma's amended liens are "defeat[ed]" under the statute's plain language.

Moreover, the district court's conclusion to the contrary misses the mark. It focuses on whether Brahma "intentionally attach[ed] BLM" owned land in its original lien. The statute, however, focuses on whether the *variance* was made intentionally, meaning the variance between Brahma's original lien, which attached federally owned land, and its subsequent amendments thereto, which did not attach federally owned land. This statutory interpretation error alone warrants reversal. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (providing that questions of statutory interpretation are reviewed de novo).

In response, Brahma raises four arguments. The first is an attempt at misdirection, the second turns on statutory interpretation, the third features an injury requirement, and the fourth hinges on the standard of review. All four lack merit.

Brahma's first argument is a strawman. Brahma contends that TSE argued in its opening brief that the standard requires that Brahma must have acted with a "specific motive or purpose to injure." RAB 17-18. Obviously, that is neither the

standard, nor what TSE argued. To create this strawman standard, Brahma cherry-picked certain language from the parenthetical in TSE's opening brief discussing *J.J. Indus., LLC v. Bennett,* 119 Nev. 269, 275, 71 P.3d 1264, 1268 (2003). Yet *J.J. Industries* discussed the cause of action of intentional interference with contractual relations. The "to injure" language that Brahma relies upon refers to the "interference" aspect of the tort, not the "intentional" aspect. A party can act "intentionally" without any intent to "injure," as demonstrated by the plain meaning of the word "intentionally."

Next, Brahma tries a statutory interpretation argument. Brahma relies on several tools of statutory interpretation in an effort to support its interpretation that by using "intentionally," the Legislature only intended to prevent "amendments that result from egregious fraudulent conduct that causes actual prejudice to an adverse party." *See* RAB 19-21. Brahma gets to this strained reading of the word "intentionally" by looking to several statutory interpretation tools: public policy, asking the Court to "ascertain the intent of the legislature in enacting the statute," asking the Court to allow the "intent [to] prevail over the literal sense of the words," looking to the "spirit of the law," and considering "[t]he entire subject matter." *Id.* Brahma relies on these tools because the plain language of the statute does not support its argument.

Fortunately, the Court need not go down any of these paths. The meaning of NRS 108.229(1), particularly its use of "intentionally," is clear on its face. *See Lucero*, 127 Nev. at 95, 249 P.3d at 1228 (providing that "when a statute is clear on its face, a court ***can not*** go beyond the statute in determining legislative intent" (internal quotation marks omitted) (emphasis added)). Brahma fails to even argue, much less demonstrate, that NRS 108.229(1)'s use of "intentionally," or any aspect of the statute for that matter, is ambiguous. *See Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. Adv. Op. 12, --- P.3d ---, --- (2020) ("When the meaning of the language is clear, the analysis ends, but when the statutory language lends itself to two or more reasonable interpretations, the statute is ambiguous, and this court may then look to other tools such as legislative history, reason, and public policy to determine legislative intent."). That is because there is no ambiguity in NRS 108.229(1) or in its use of "intentionally." When a statute's meaning is not ambiguous, the Court looks to the statute's plain language, not the tools of statutory interpretation relied on by Brahma. *See id; Sharpe v. State*, 131 Nev. 269, 274, 350 P.3d 388, 391 (2015) ("We only turn to a statute's legislative history when the statute is ambiguous.").

To the extent the Court wishes to confirm that the plain language meaning of "intentionally" conforms with TSE's interpretation—desire to bring about the change—and not Brahma's interpretation—"amendments that result from

egregious fraudulent conduct that causes actual prejudice to an adverse party"—it need not look any further than NRS 108.229(1)'s remaining language. Brahma's interpretation of "intentionally" equates to "fraud;" an interpretation that would render the Legislature's use of "or is made intentionally" in NRS 108.229(1)(a) superfluous. *See* NRS 108.229(1)(a) ("Results from fraud **or** is made intentionally.") (emphasis added); *Nev. Dep't of Corrs. v. York Claims Servs.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015) (providing that "[i]n conducting a plain language reading, we avoid an interpretation that renders language meaningless or superfluous"). If the Legislature intended for "intentionally" to mean the same thing as "fraud," as Brahma would have this Court believe, the Legislature could have simply removed "intentionally" from the statute, as "results from fraud" is already one of the three criteria by which amendments are precluded. *See* NRS 108.229(1)(a). Clearly, the Legislature did not intend to write "results from fraud" twice. Brahma's strained interpretation of the statute is not persuasive.[4]

Third, Brahma reads an injury requirement into NRS 108.229(1)(a), arguing that "this limited prohibition on lien amendments applies ***only*** in favor of that

[4] To answer the question of what action Brahma could have taken in accordance with NRS 108.229(1)(a), it could have recorded a new lien. Moreover, there are valid amendments under NRS 108.229(1) to "correct or clarify" a lien that, unlike Brahma's amendments, do not run afoul of NRS 108.229(1)(a). A lien notice could, for instance, suffer from a scrivener's error. That is not what occurred here.

injured party." RAB 20 (emphasis in original). Brahma offers no support for this condition precedent, nor is there any in the statute or case law, which is grounds alone for rejecting this argument. *See*, *supra*, *Rhyne*, 118 Nev. at 13, 38 P.3d at 171; *Emperor's Garden*, 122 Nev. at 330, n. 38, 130 P.3d at 1288, n. 38.

It appears that Brahma might be reading the requirement of NRS 108.229(1)(b) into NRS 108.229(1)(a). *See* NRS 108.229(1)(b) ("Misleads an adverse party to the party's prejudice, but then only with respect to the adverse party who was prejudiced."). If that is the case, it is misguided. The injury criteria in NRS 108.229(1)(b) only applies to NRS 108.229(1)(b). It does not apply to NRS 108.229(1)(a).

Fourth and finally, Brahma makes a standard of review argument, contending that the district court's conclusion that "Brahma did not 'intentionally' attach BLM land such that it is precluded from amending its Notice of Lien" is a factual finding entitled to deference. RAB 20. TSE addressed this argument in its opening brief. *See* AOB 21. The district court's conclusion presents a question of law because it was based on a misinterpretation of the meaning of "intentionally" and the statute itself (indeed, the district court's conclusion misses the issue—the issue is not whether Brahma "intentionally" attached BLM land, but whether Brahma intentionally amended it original lien to no longer attach BLM land, *i.e.*, a "variance made intentionally").

Nevertheless, to the extent that the Court treats the conclusion as a factual finding, the same result is required. The only evidence in the record related to whether Brahma intentionally attached federally owned land in its original lien, is the original lien itself. To be sure, Brahma does not cite to any other evidence in the record, nor is there any (*i.e.*, an affidavit as to mistake of law or scrivener's error). The original lien conclusively demonstrates that Brahma intentionally attached federally owned land in the original lien. And, more to the point, the record establishes that Brahma intentionally amended its original lien to no longer attach federally owned land. Thus, this argument, like the others, fails.

Accordingly, this Court should conclude that Brahma's amendments to its original lien are invalid as a matter of law because NRS 108.229(1)(a) precluded Brahma from amending its original lien to no longer attach federally owned land. The district court's conclusion to the contrary should be reversed.

III. Brahma's attorney fee award should have been reduced to account for Brahma's block billing.

With respect to Brahma's attorney fee award, TSE's opening brief requests two forms of alternative relief. First, if this Court reverses the result on TSE's motion to expunge, it should reverse the district court's fee award to Brahma and remand the matter for the district court to determine the amount of reasonable fees and costs to award TSE under NRS 108.2275(6)(a). AOB 27. Brahma does not dispute this.

Second, even if this Court affirms the result on TSE's motion to expunge, it should reverse and remand the amount of the fees awarded to Brahma with instructions for the district court to consider the impact of Brahma's block-billing on the district court's ability to assess the reasonableness of Brahma's fees and implement a reasonable reduction. *See* AOB 27-31.

With respect to block billing, Brahma argues that "this Court has never criticized or dissuaded this practice" and that TSE's request for a thirty percent reduction in the district court is "fuzzy math" and suggests it would not be "fairly balanced." RAB 33-34.[5]

These arguments, however, confirm why this Court should address Brahma's block billing and remand the matter to the district court with further guidance. At the hearing, the district court candidly stated that it does not understand block billing: "Maybe you have to describe block billing. . . . Actually, I never worked for firms like you, the two of you have where you're, you know,

[5] Brahma tries to bolster its argument by throwing TSE's good faith stipulation in its face. *See* RAB 32. TSE stipulated to pay Brahma $10,000 for the "fees incurred in preparing Brahma's Reply to TSE's Opposition to the Fee Motion, for appearance of counsel at oral argument and preparation of this Order." 14 AA 1013 (order). Contrary to Brahma's representation, TSE did not stipulate that the sum was reasonable. *See* 14 AA 1013 (order) and 1018 (stipulation). This was merely a good faith stipulation to avoid further motion work, particularly considering that, based on the surprising amount of fees billed by Brahma, it is a near-certainty that Brahma's fees for the work covered by the stipulation (draft a reply, attend the hearing, draft an order) would have exceeded $10,000.

high end, you know, corporate counsel people. You know, I don't understand the billing." 12 AA 840 (hearing transcript, lines 5-11). Moreover, in the district court's written order, Brahma's block billing is not addressed. *See* 14 AA 1012-13 (findings section). The district court's comments and handling of the issue show that now is an appropriate time to address block billing's impact.

While reasonable minds can dispute whether the amount that Brahma's $78,417.34 fee award (for only opposing TSE's motion to expunge and drafting a form motion for attorney fees) should be reduced to account for Brahma's use of block billing, there is no question that Brahma engaged in the systematic use of block billing. *See* 7 AA 511-25 (Brahma's counsel's invoices). There is also no question that Brahma's use of block billing made it impossible for the district court to discern how long Brahma spent on certain tasks related to TSE's motion to expunge. And there is no question that no perfect mathematical approach exists to account for the impact of block billing.

Accordingly, there should also be no question that where a litigant has submitted invoices where over 80 percent of the entries feature block billed time entries to support the award of reasonable attorney fees, the district court should implement some level of reduction for block billing, as discussed by the cases cited in TSE's opening brief. *See* AOB 28-30. Here, the district court failed to do that. Thus, the requested reversal and remand is warranted.

CONCLUSION

The relief sought by TSE's opening brief is warranted. Brahma has failed to present any reasons justifying affirmation of the district court's denial of TSE's motion to expunge and grant of Brahma's motion for attorney fees and costs.

Dated: May 4, 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 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 6,931 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: May 4, 2020

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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 May 4, 2020, I submitted the foregoing **APPELLANT'S REPLY BRIEF** for filing via the Court's electronic filing system. Electronic notification will be sent to the following:

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