IN THE SUPREME COURT OF THE STATE OF NEVADA

KORTE CONSTRUCTION COMPANY dba THE KORTE COMPANY, a Missouri corporation,

Appellant,

vs.

STATE OF NEVADA ON RELATION OF THE BOARD OF REGENTS OF THE NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY OF NEVADA, LAS VEGAS, a Constitutional entity of the State of Nevada,

Respondent.

NO. 80736

District Court Case No. A-17-763262-B

APPEAL OF DISTRICT COURT ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

APPELLANT'S OPENING BRIEF

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Appellant Korte Construction Corporation dba The Korte Company ("Appellant" or "Korte") brings this Appeal of the Order Granting State of Nevada on Relation of the Board of Regents of the Nevada System of Higher Education, on Behalf of the University of Nevada, Las Vegas' ("UNLV") Motion for Summary Judgment and UPA1, LLC's Joinder Thereto, Findings of Fact and Conclusions of Law (the "Order") as the district court departed from established Nevada Supreme Court precedent by granting UNLV's Motion. The district court's order was in direct contravention of *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942, P.2d 182 (1997), which was reiterated by the Nevada Supreme Court in *In re Amerco Derivative Litig.*, 252 P.3d 681 (Nev. 2011). Korte submits this brief in support of its position.

This brief is supported by the table of authorities filed herewith, the Joint Appendix submitted herewith containing relevant portions of the record, and any oral argument this Court may entertain.

Dated: August 6, 2020

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TABLE OF CONTENTS

NRAP 26.1 STATEMENT

Korte Construction Company dba The Korte Company is not a publicly held company and no publicly held company owns 10% or more of its stock.

The law firms and lawyers that may make appearances on behalf of Korte in this appeal are:

Mead Law Group LLP: Leon F. Mead II, Esq., Sarah M, Thomas, Esq., and Matthew W. Thomas, Esq.

JURISDICTIONAL STATEMENT

(A) The Nevada Supreme Court has jurisdiction over this appeal because it involves the reversal of well-settled Nevada precedent, as Korte contends the district court order at issue is against the holding of *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182, 187 (1997) and its progeny, including *In re Amerco Derivative Litig.*, 252 P.3d 681 (Nev. 2011).

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(B) This Appeal is timely because the Notice of Entry of Order was filed on February 6, 2020 and Korte's Notice of Appeal was filed on March 2, 2020.

(C) This Appeal is from a final order or judgment, as the order at issue adjudicates all claims against UNLV and states: "The Court directs entry of final judgment as to UNLV, as judgment in its favor on Korte's unjust enrichment claim leaves no other claim against or made by UNLV in this action." It also states: "The Court finds there is no just reason for delay in entering this Order."

ROUTING STATEMENT

This appeal is one that Appellant believes should be retained by the Supreme Court. Initially, this case has arisen from the Business Court of the Eighth Judicial District court, and so should be retained under NRAP 17(a)(9). However, the underlying case (albeit not predominantly in this appeal) also concerns NRS Chapter 108, and thus NRS 17(b)(8) could apply. Since the case deals with a direct deviation from established Nevada Supreme Court precedent, however, Korte believes it should be retained by the Supreme Court to clarify this important matter in Nevada jurisprudence.

STATEMENT OF ISSUE

Korte has brought this appeal of the district court's order granting summary judgment in UNLV's favor on Korte's unjust enrichment claim, as it believes that the district court granted UNLV's Motion in direct contravention of established Nevada precedent in *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942, P.2d 182 (1997), which was reiterated by the Nevada Supreme Court in *In re Amerco Derivative Litig.*, 252 P.3d 681 (Nev. 2011).

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SUMMARY OF ARGUMENT

Korte has submitted this Appeal of the district court's Order on the basis that the Order was decided in contravention of established Nevada Supreme Court precedent. The district court made primarily two holdings that: (1) the contract between Korte and third party, UPA (to which UNLV is not a party), precludes Korte's unjust enrichment claim against UNLV; and (2) the mechanic's lien release bond posted by UPA pursuant to NRS 108.2415 was an adequate remedy at law for Korte's recovery, and therefore, Korte is precluded from pursuing its unjust enrichment claim against UNLV. These holdings are in contravention of established precedent in Nevada and are against the public policy of Nevada which favors payment to contractors on construction projects.

For the reasons explained herein, Korte seeks an order reversing the district court's Order.

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TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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Rules

Other Authorities

BRIEF

I. STATEMENT OF THE CASE AND STATEMENT OF RELEVANT FACTS

A. Statement of Relevant Facts

Limited discovery has taken place in this case. In the Order, the Court made the following Findings of Fact, based upon the undisputed facts submitted by Korte and UNLV:

1. UNLV and UPA entered into a Project Development Agreement dated May 15, 2015 ("PDA"). Motion for Summary Judgment ("Mot.") at 1JA0107; Opposition to Mot. ("Opp.") at 4JA0386; Declaration of David Frommer ("Frommer Decl.") at 2JA0123, ¶ 4 and Project Development Agreement attached thereto as Exhibit 1 (2JA0126-172).

2. The PDA contemplated UNLV purchasing the real property at Maryland Parkway and Cottage Grove (the "Property") and leasing it to

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UPA under a long-term lease pursuant to which, UPA, and possibly other third party developers, would "fund, construct, maintain, and operate student housing and certain commercial establishments" on that real property as part of University Park (the "Project"). Mot. at 1JA0107; Opp. at 4JA0386; Frommer Decl. at 2JA0123, ¶ 4, Exhibit 1 (2JA0126-172).

3. UNLV purchased the Property, and its ownership interest was recorded with the Clark [C]ounty Recorder's Office on May 29, 2015. UNLV Request for Judicial Notice ("RFJN") at 3JA0302, Exhibit 1 (3JA0305-312); Frommer Decl. at 2JA0123, ¶ 6.

4. UNLV and UPA also entered into a Lease Agreement for University Park Phase One (the "Lease") on May 15, 2015, which was recorded against the Property on February 2, 2016. Frommer Decl. at 2JA0123, ¶¶ 7-8, Exhibit 2 (3JA0173-271).

5. In order to complete its obligations under the Lease, UPA entered into a written contract with Korte titled, "Cost Plus Agreement Between Owner and Contractor with a Guaranteed Maximum Price" (the "Construction Contract") dated February 5, 2016, whereby UPA hired Korte to act as the general contractor to construct the Project. Declaration of Greg Korte ("Korte Decl.") at 4JA0401, ¶ 2; Mot. at 1JA0108; Korte Second Amended Complaint ("SAC") at 1JA0062, ¶ 8.

6. The Construction Contract was entered into after UNLV had recorded its ownership interest in the Project and UPA had recorded its leasehold interest related to the Project. Mot. at 1JA0108.

7. UNLV was not a party to the Korte / UPA construction contract.

8. Subsequently, a dispute between UPA and Korte arose regarding the work performed under the Construction Contract, which resulted in Korte recording a mechanic's lien against the entire Property on October 9, 2017

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in the amount $20,366,490.22 (the "Mechanics' Lien"). RFJN at Exhibit 2 (3JA0314-315); SAC at ¶ 35 (1JA0070).

9. On October 18, 2017, UPA filed a Motion Requesting Court Order to Show Cause Pursuant to NRS 108.2275, seeking a declaration from this court that the underlying Mechanics' Lien recorded by Korte is excessive, frivolous, and made without reasonable cause and praying for release of the same (the "Expungement Action"). Mot. at 1JA0109.

10. On January 24, 2018, Korte filed a Complaint seeking foreclosure of the Mechanics' Lien (the "Foreclosure Action"). Mot. at 1JA0109; Complaint ("Comp.") (1JA0001-24). The Expungement Action and Foreclosure Action have subsequently been consolidated into the case at bar. Mot. at 1JA0109.

11. Also on January 24, 2018, Korte recorded a first amended mechanics' lien against the Project in the amount of $8,499,308.66. Mot. at 1JA0109; SAC at 1JA0070-71, ¶ 36.

12. Korte recorded a second amended mechanics lien against the Project on May 22, 2018 in the amount of $3,632,395.21. Mot. at 1JA109; SAC AT 1JA0071, ¶ 37.

13. On May 29, 2018, UPA, as principal, and Hartford Fire Insurance Company ("Hartford"), as surety, executed a surety bond in the amount of Five Million Four Hundred and Forty-Eight Thousand Five Hundred Ninety-Two Dollars and Eighty-Two Cents ($5,448,592.82) for the benefit of Korte (the "Bond"). Mot. at 1JA0109; SAC at 1JA0071, ¶ 38; RFJN at Exhibit 3 (3JA0316-320).

14. On October 9, 2018, Korte filed its Second Amended Complaint (the "SAC") that set forth a single cause of action against UNLV for unjust enrichment. The SAC set forth other causes of action against UPA,

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Hartford, Wells Fargo Bank Northwest, N.A., as Trustee of the UNLV Student Housing Phase 1 (Las Vegas, NV) Pass Through Trust Under the Pass-Through Trust Agreement and Declaration of Trust ("Wells Fargo"), and Bridgeway Advisors. Mot. at 1JA0109; SAC (1JA0058-82).

15. Paragraph 68 of the SAC states "[p]ursuant to NRS 108.2415(6)(a), the surety bond releases the property described in the surety bond from the lien and the surety bond is deemed to replace the property as security for the lien." SAC at 1JA0077, ¶ 68.

16. On December 11, 2018, Korte recorded its Third Amended Notice of Lien against the Project, reducing the amount of its mechanic's lien to $2,899,988.72 (the "Amended Lien.") Mot. at 1JA0109; RFJN at Exhibit 4 (3JA0321-323).

Order Granting UNLV Motion for Summary Judgment and UPA1, LLC's Joinder Thereto, Findings of Fact, and Conclusions of Law ("Order") at 6JA0497-498, ¶¶ 1-15; *see also, internal citations above for additional citations to record.*

B. Procedural History / Statement of Case

UNLV filed its Motion for Summary Judgment ("Motion") as to Korte's Unjust Enrichment claim on August 1, 2019. Mot. (1JA0104-121). In the Motion, UNLV alleged that Korte's unjust enrichment claim needed to be adjudicated in its favor because: (1) Korte has a contract with UPA; (2) Korte has a claim upon the mechanic's lien release bond recorded by UPA on the Property; (3) Korte had actual knowledge of UNLV's ownership, which precludes an unjust enrichment claim in this situation according to certain case law from outside -this jurisdiction; and (4) UNLV did not receive a benefit from Korte's work because UPA hired a replacement contractor to finish the Project. *See* Mot. (1JA0104-121). UPA filed a limited joinder to the Motion ("Joinder"), joining in the

argument that Korte had actual knowledge of UNLV's ownership. *See* UPA Joinder (3JA0346-383).

Korte opposed the Motion and Joinder, citing to Nevada precedent on-point: *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182, 187 (1997), as well as cases since which have cited this precedent, including, *In re Amerco Derivative Litig.*, 252 P.3d 681 (Nev. 2011) and *West Charleston Lofts I, LLC v. R & O Constr. Co.*, 915 F. Supp. 2d 1191 (D. Nev. 2013). Opp. (4JA0384-399). Korte also pointed out that the cases cited by UNLV in support of its position were from neighboring jurisdictions and therefore not binding upon the Eighth Judicial District Court. *See id.* Moreover, Korte argued that Nevada would not adopt the positions taken in the non-binding case law cited by UNLV because it is against Nevada's public policy favoring "contractors' right to secure payment." *Leher McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1116, 197 P.3d 1032, 1041 (2008); *e.g.*, *In re Fontainebleau Las Vegas Holdings*, 128 Nev. Adv. Op. 53, 289 P.3d 1199, 1212 (2012); *Cashman Equipment Co. v. West Edna Assocs., Ltd.*, 132 Nev. Adv. Op. 69, 380 P.3d 844, 848 (2016). *See id.*

In the Order, the district court made the following conclusions of law:

1. "The phrase 'unjust enrichment' is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." 66 Am. Jur. 2d Restitution § 3 (1973).
2. "Unjust enrichment exists where the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is 'acceptance and retention by the defendant of each benefit under circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof.'" *Certified Fire Prot., Inc. v.*

Precision Constr., 128 Nev. 371, 381, 283 P.3d 250, 257 (*citing Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981) (internal quotations omitted) (quoting *Dass v. Epplen*, 162 Colo. 60, 424 P.2d 779, 780 (1967)).

3. It is generally accepted that "unjust enrichment is not available when there is an express, written contract …." *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182, 187 (1997) (*citing* 66 Am. Jur. 2d Restitution § 6 (1973) (stating that, generally, an action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement)); *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 440 F. Supp. 2d 1184, 1197 (D. Nev. 2006), aff'd, 583 F.3d 1232 (9th Cir. 2009) (holding that claim for unjust enrichment was barred because there was an express, written contract); *Wilson v. Stratosphere Corp.*, 371 F. App'x 810, 811-12 (9th Cir. 2010).
4. Instead, "[t]he doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another [or should pay for]." 66 Am. Jur. 2d Restitution § 11 (1973); *see Lipshie v. Tracy Investment Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824 (1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles.")
5. The Construction Contract is an express, written contract [that] exists between Korte and UPA, which is the subject of the dispute.

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6. The work and services for which Korte is alleging it is entitled to payment are subject to the Construction Contract.
7. Korte's claim for unjust enrichment is barred given that the contract at issue is between Korte and UPA.
8. Korte's claim of unjust enrichment is barred given that the Bond posted by UPA exceeds the amount claimed by Korte for its services.
9. The Bond provides Korte an adequate remedy at law.
10. The Court directs entry of final judgment as to UNLV, as judgment in its favor on Korte's unjust enrichment claim leaves no other claim against or made by UNLV in this action.
11. The Court finds there is no just reason for delay in entering this Order.

Order at 6JA0498-500, ¶¶ 1-11. The Court made no determination on UNLV's argument that Korte's actual knowledge of UNLV's ownership of the property prevented its unjust enrichment claim or that it has not actually benefitted from Korte's work because UPA is challenging the quality of that work in the underlying litigation. *See id.*

II. ARGUMENT

A. Legal Standard

The standard for review of a lower court's order granting summary judgment is de novo. *E.g.*, *Nicholas v. State*, 116 Nev. 40, 43, 992 P.2d 262, 264 (2000); *Maine v. Stewart*, 109 Nev. 721, 726, 857 P.2d 755, 758 (1993); *Walker v. American Bankers Ins.*, 108 Nev. 533, 836 P.2d 59, 61 (1992). In other words, the Court must conduct its review "without deference to the findings of the district court." *Maine*, 109 Nev. at 726, 857 P.2d at 758.

In reviewing the record and the relevant case law, this Court should reverse the district court's Order, as UNLV is not entitled to summary judgment as a matter of law on Korte's unjust enrichment claim.

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B. The District Court's Order Granting UNLV's Motion is Against Relevant Established Nevada Precedent.

The district court's Order was decided contrary to Nevada precedent. We need not look beyond the law of Nevada to decide whether the unjust enrichment claim against UNLV is sound. "Under Nevada law, unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another." *West Charleston Lofts I, LLC v. R & O Constr. Co.*, 915 F. Supp. 2d 1191, 1195-95 (quoting *In re Amerco Derivative Litig.*, 252 P.3d 681, 703 (Nev. 2011) and citing *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182, 187 (1997)) (internal quotations omitted)).

> The essential elements of quasi contract are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.

Leasepartners Corp., 113 Nev. at 755, 942 P.2d at 187 (quoting *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)) (internal quotations omitted)).

> The doctrine of unjust enrichment or recovery in quasi contract applies to situations where there is no legal contract but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain but should deliver to another or should pay for.

Leasepartners Corp., 113 Nev. at 756, 942 P.2d at 187 (internal citations omitted).

Leasepartners clearly demonstrates that UNLV is not entitled to summary judgment as a matter of law. In *Leasepartners*, the Nevada Supreme Court analyzed whether an assignee of a contractor's interest could recover under unjust enrichment from an owner of property. Notably, and exactly like the instant appeal, in that case the contractor had no contract with the defendant owner. Rather, the contractor only had a contract with the owner's tenant. *See*

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Leasepartners Corp., 113 Nev. 747, 942 P.2d 182 (1997). The defendant owner challenged the unjust enrichment claim made by the plaintiff contractor due to the fact that there was a written contract between the tenant and the contractor that governed the work at issue and payment therefor. *Id.* The Court held that because "a written contract existed between [the owner] and [the lessee] and a written contract existed between [the lessee] and [the contractor]," but no contract existed between the owner and the contractor, the contractor's unjust enrichment claim was not barred. *Id.* at 756, 187; *see also U.S. Bank Nat'l Ass'n v. BDJ Investments, LLC,* 2019 WL 1546930 (D. Nev. April 8, 2019) (holding that an unjust enrichment claim is not barred against a defendant where the plaintiff and defendant do not have a contract).

The Court in *Leasepartners* also held that, even though the owner was not initially aware of the improvements, and did not want the benefits of the improvements, the assignee of the contractor's rights could still make a claim for unjust enrichment because there was a question of fact as to whether a benefit was actually conferred upon the owner. *Id.*

The *Leasepartners* case is directly applicable to and controlling in this case. The actual *Leasepartners* holdings are important here. First, if an owner is conferred a benefit by the contractor's improvements made under a contract with the tenant, unjust enrichment lies. Second, summary judgment is ***not appropriate*** where there is conflicting evidence about whether an owner actually received a benefit from work performed by a contractor pursuant to an agreement between a contractor and a tenant. As explained herein, this is the case here. Korte has a contract with UPA, the tenant, and not with UNLV, the owner. *Leasepartners* is clear that the existence of a contract between a tenant and a contractor does not preclude a contractor from asserting an unjust enrichment claim against the

property owner. Indeed, this is consistent with Nevada public policy and case law favoring contractors' right to secure payment.[1]

Suppose UPA is successful in raising a technical defense that prevents Korte from recovering the full measure of damages under its breach of contract claim against UPA, and yet at the same time it shown that UNLV is conferred a benefit from Korte's work which should be recognized by the payment of fair compensation to Korte. Under these circumstances, the contract claim may not afford an adequate remedy—contrary to the apparent reasoning adopted by the district court.

Here, the trial court held that Korte was unable to maintain an unjust enrichment claim because a contract exists between Korte and UPA, which according to the court provides a vehicle for relief. Order at 7. Notwithstanding, the possibility of relief vis-à-vis UPA, the *Leasepartners* case is controlling here. The district court incorrectly concluded that "Korte's claim for unjust enrichment is barred given that the contract at issue is between Korte and UPA." Payment for the full value of the benefit rendered is ensured by permitting the unjust enrichment claim by the tenant's contractor vis-à-vis the owner, as in *Leasepartners*.

/ / /

[1] The Nevada Supreme Court has repeated this maxim: "Nevada public policy favors contractors' right to secure payment." *Lehrer McGovern Bovis, Inc. v. Bullock Insulatio, Inc.*, 124 Nev. 1102, 1116, 197 P.3d 1032, 1041 (2008); *see e.g., In re Fontainebleau Las Vegas Holdings*, 128 Nev. Adv. Op. 53, 289 P.3d 1199, 1212 (2012); *Cashman Equipment Co. v. West Edna Assocs., Ltd.*, 132 Nev. Adv. Op. 69, 380 P.3d 844, 848 (2016). Underlying this public policy 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." *Lehrer McGovern*, 124 Nev. at 1116, 197 P.3d at 1041. As such, Nevada law governing contractors and their rights to payment is different from that of other jurisdictions. There is no Nevada law stating or even suggesting that an owner must engage in improper conduct to be liable for a tenant's failure to pay for construction improvements. Indeed, a contention that Nevada would impose such a requirement is contrary to Nevada public policy and existing law on the subject

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C. Korte's Knowledge of UNLV's Ownership is Irrelevant to its Unjust Enrichment Claim.

The district court did not address whether Korte's knowledge made the *Leasepartners* case inapplicable here. *See generally* Order (6JA0495-504). Korte submits that, should this Court wish to consider that point, the fact that the contractor in *Leasepartners* lacked knowledge that the party with which it had a contract was not the true owner until the contract was breached was not a deciding factor in the Court's decision to uphold the contractor's unjust enrichment claim. Conspicuous by its omission, this fact is mentioned nowhere in the section of the opinion analyzing the validity of Leasepartners' unjust enrichment claim against the property owner. *See Leasepartners Corp.*, 113 Nev. at 753-756. A random fact from the case which is not expressed as playing a role in the Court's analysis regarding the unjust enrichment claim cannot support the theory that Korte ***must*** have had no knowledge of UNLV's ownership of the Project Property to maintain its unjust enrichment claim. One thing does not necessarily have anything to do with the other. Indeed, neither UNLV, nor the district court cited to precedent which actually states that the contractor's awareness of the true owner of property precludes an unjust enrichment claim by a contractor in the tenant improvement context. This is because no such binding precedent exists – nor would it exist, as such a finding would be contrary to Nevada public policy favoring a contractor's right to secure payment. *See* Section B, *supra*, n. 1.

D. Korte's Unjust Enrichment Claim is in the Alternative to its Claim Upon the Mechanic's Lien Release Bond Posted by UPA, and Therefore was Prematurely Adjudicated in UNLV's Favor.

The district court also held that Korte was not entitled to its unjust enrichment claim because "the [mechanic's lien release] Bond posted by UPA exceeds the amount claimed by Korte for its services [and] [t]he Bond provides an adequate remedy at law." Order at 6JA0499, ¶¶ 8-9. UNLV's argument that

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Korte's unjust enrichment claim is precluded by the presence of the mechanic's lien release bond recorded upon the property by UPA and Hartford Fire Insurance Company apparently was one of equity. UNLV cited to no legal authority in support of this theory. Rather, UNLV claimed that since the bond is in place, Korte should be precluded from asserting an unjust enrichment claim against UNLV because Korte should not be allowed to get double damages.

Korte has not requested, and will not request, double damages. Rather, Korte seeks to be compensated for the work and materials it provided to the Project. It is axiomatic that unjust enrichment is an equitable claim which prevents one party from retaining a benefit without adequately compensating the party that provided the benefit. *See supra*. The fact that Korte may have another remedy against an entirely different party under a different theory of law does not preclude Korte from moving forward on its unjust enrichment claim against UNLV. It is premature to dismiss Korte's unjust enrichment claim on the basis that that Korte may someday be entitled to collect from the mechanic's lien release bond, or on the basis that allowing additional damages from UNLV would result in Korte collecting more than the amount necessary to make it whole. Korte is not seeking more than it is entitled – and how much damages Korte should recover is still being determined through the discovery process. Korte's claim against the mechanic's lien release bond pursuant to NRS 108.2421, against Hartford and UPA, and its unjust enrichment claim against UNLV are separate and alternative claims from which Korte seeks relief.

It is possible that Korte could be found to confer a benefit on UNLV by the reason of the Project improvements and yet, for a technical legal reason, Korte is not able to recover mechanic's lien release bond. So, the logic of the district court that in all instances, Korte maintenance of an unjust enrichment claim will amount to double recovery is not necessarily so.

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Neither the district court in its Order, nor UNLV in its moving papers, cite to any governing Nevada law that prohibits a claimant from pursuing two different defendants on distinct legal theories where those claims arise out of the same transaction—most likely because there is none. Indeed, the mechanic's lien statutes expressly allow a lien claimant to make alternative claims. *See* NRS 108.238 ("The provisions of NRS 108.221 to 108.246, inclusive, must not be construed to impair or affect the right of a lien claimant to whom any debt may be due for work, materials or equipment furnished to maintain a civil action to recover that debt against the person liable therefor or to submit any controversy arising under a contract to arbitration to recover that amount.")

E. Korte Conferred a Benefit upon UNLV.

The district court did not address the argument made by UNLV that it did not receive a benefit by Korte's work because the quality of work has been disputed by UPA in its Order. *See generally* Order (6JA0495-504). It is important to note that UPA's dispute about the quality of Korte's work has no bearing on whether Korte conferred a benefit upon UNLV. UNLV is the undisputed owner of the Project Property. Korte completed improvements upon the Project Property. UNLV gets to keep the improvements once the lease expires or is terminated, and indeed Korte's work was used by the completion general contractor for the Project. Korte has conferred a benefit on UNLV, the value of which remains a question of fact to be decided by the district court at trial. Besides, UPA's contention that quality issues exist involves issues of fact upon which Korte and not UPA may prevail.

UNLV's interest in the property has increased in value as a result of the improvements constructed by Korte. It is axiomatic that an economic benefit flows to the owner of real property from the construction of long-term improvements built upon that property, as the real property owner becomes the

owner of the improvements that are affixed to the land. It cannot be said that UNLV did not benefit from Korte's work as a matter of law.

III. CONCLUSION

Korte seeks relief from this Court from the district court's Order, which was decided against the binding precedent in *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 942 P.2d 182 (1997) and against Nevada public policy in favor of a contractor's right to payment. Korte respectfully request this Court reverse the district court's Order in Korte's favor.

Dated: August 6, 2020

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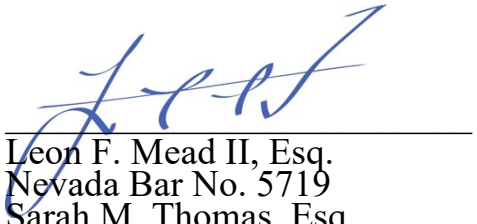

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 35(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 in typeface of 14 points and Times New Roman type style; or

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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 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

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of August, 2020.

(Signature of Attorney)
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CERTIFICATE OF SERVICE

I, the undersigned, declare under the penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **APPELLANT'S OPENING BRIEF AND JOINT APPENDICES VOLUMES 1-3** by method indicated below:

☒ BY U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as set forth below.

☒ BY ELECTRONIC SUBMISSION: submitted to the above entitled Court for electronic filing and service upon the Court's Service List for the above referenced case.

☒ BY ELECTRONIC MAIL to: LKEvensen@hollandhart.com; calexander@dickinson-wright.com; awebster@dickinson-wright.com

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Dated: August 6, 2020

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An Employee of Mead Law Group