

**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** Electronically Filed  
**Case No. A-17-763262-B** Aug 06 2020 01:08 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**JOINT APPENDIX OF DOCUMENTS ON THE RECORD**

**VOLUME 4 OF 6**

**JA0384-JA0413**

MEAD LAW GROUP LLP

/s/ Sarah Mead Thomas

Leon F Mead II, Esq.

Nevada Bar No. 5719

Sarah M. Thomas, Esq.

Nevada Bar No. 13725

Matthew W. Thomas, Esq.

Nevada Bar No. 15102

7201 W Lake Mead Blvd., Suite 550

Las Vegas, Nevada 89128

*Attorneys for Appellant*

DICKINSON WRIGHT PLLC

/s/ Cynthia Alexander

Cynthia Alexander, Esq.

Nevada Bar No. 6718

Anjali D. Webster, Esq.

Nevada Bar No. 12515

3883 Howard Hughes Pkwy,

Suite 800

Las Vegas, Nevada 89169

*Attorneys for Respondent*

## **CHRONOLOGICAL INDEX**

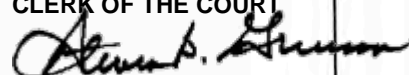
<u><b>Document Description</b></u>	<u><b>Date</b></u>	<u><b>Volume/Page Number</b></u>
The Korte Company's Complaint	January 11, 2018	1JA0001-24
The Korte Company's Amended Complaint	January 24, 2018	1JA0025-53
Electronically Issued Summons	February 1, 2018	1JA0054-57
The Korte Company's Second Amended Complaint <i>Containing Unjust Enrichment Claim Against UNLV</i>	October 9, 2018	1JA0058-82
UNLV Answer to Second Amended Complaint	October 29, 2018	1JA0083-103
UNLV Motion for Summary Judgment	August 1, 2019	1JA0104-121
Declaration of David Frommer in Support of UNLV Motion <i>Including Exhibits 1-4 attached thereto</i>	August 1, 2019	2JA0122-172 3JA0173-299 Ex. 1: 2JA0126-172 Ex. 2: 3JA0173-271 Ex. 3: 3JA0272-276 Ex 4: 3JA0277-299
UNLV Request for Judicial Notice <i>Including Exhibits 1-4 attached thereto</i>	August 1, 2019	3JA0300-323 Ex. 1: 3JA0305-312 Ex. 2: 3JA0313-315 Ex. 3: 3JA0316-320 Ex. 4: 3JA0321-323

UNLV Request for Hearing re Motion	August 2, 2019	3JA0324-345
UPA 1, LLC's Limited Joinder to UNLV Motion	August 6, 2019	3JA0346-383
The Korte Company's Opposition to UNLV Motion	August 19, 2019	4JA0384-399
Affidavit of Greg Korte in Support of Opposition	August 19, 2019	4JA0400-404
Affidavit of Todd Korte in Support of Opposition	August 19, 2019	4JA0405-409
Declaration of Sarah M. Thomas, Esq. in Support of Opposition <i>Including Exhibit A attached thereto</i>	August 19, 2019	4JA0410-413 5JA0414-433 Ex. A: 5JA414-433
UNLV Reply in Support of UNLV Motion	October 9, 2019	6JA0434-446
Transcript of Proceedings <i>Hearing on UNLV Motion for Summary Judgment</i>	October 16, 2019	6JA0447-494
Order Granting UNLV Motion	February 6, 2020	6JA0495-504
Notice of Entry of Order Granting UNLV Motion	February 6, 2020	6JA0505-517
Notice of Appeal	March 2, 2020	6JA0518-521

## **ALPHABETICAL INDEX**

<u><b>Document Description</b></u>	<u><b>Date</b></u>	<u><b>Volume/Page Number</b></u>
Affidavit of Greg Korte in Support of Opposition	August 19, 2019	4JA0400-404
Affidavit of Todd Korte in Support of Opposition	August 19, 2019	4JA0405-409
Declaration of David Frommer in Support of UNLV Motion <i>Including Exhibits 1-4 attached thereto</i>	August 1, 2019	2JA0122-172 3JA0173-299 Ex. 1: 2JA0126-172 Ex. 2: 3JA0173-271 Ex. 3: 3JA0272-276 Ex 4: 3JA0277-299
Declaration of Sarah M. Thomas, Esq. in Support of Opposition <i>Including Exhibit A attached thereto</i>	August 19, 2019	4JA0410-413 5JA0414-433 Ex. A: 5JA414-433
Electronically Issued Summons	February 1, 2018	1JA0054-57
Notice of Appeal	March 2, 2020	6JA0518-521
Notice of Entry of Order Granting UNLV Motion	February 6, 2020	6JA0505-517
Order Granting UNLV Motion	February 6, 2020	6JA0495-504
The Korte Company's Amended Complaint	January 24, 2018	1JA0025-53
The Korte Company's Complaint	January 11, 2018	1JA0001-24
The Korte Company's Opposition to UNLV Motion	August 19, 2019	4JA0384-399

The Korte Company's Second Amended Complaint <i>Containing Unjust Enrichment Claim Against UNLV</i>	October 9, 2018	1JA0058-82
Transcript of Proceedings <i>Hearing on UNLV Motion for Summary Judgment</i>	October 16, 2019	6JA0447-494
UNLV Answer to Second Amended Complaint	October 29, 2018	1JA0083-103
UNLV Motion for Summary Judgment	August 1, 2019	1JA0104-121
UNLV Reply in Support of UNLV Motion	October 9, 2019	6JA0434-446
UNLV Request for Hearing re Motion	August 2, 2019	3JA0324-345
UNLV Request for Judicial Notice <i>Including Exhibits 1-4 attached thereto</i>	August 1, 2019	3JA0300-323 Ex. 1: 3JA0305- 312 Ex. 2: 3JA0313- 315 Ex. 3: 3JA0316- 320 Ex. 4: 3JA0321- 323
UPA 1, LLC's Limited Joinder to UNLV Motion	August 6, 2019	3JA0346-383


**OPPM**

Leon F. Mead II, Esq.  
Nevada Bar No. 5719  
eMail: leon@meadlawgroup.com  
Sarah M. Thomas, Esq.  
Nevada Bar No. 13725  
eMail: sarah@meadlawgroup.com  
**MEAD LAW GROUP LLP**  
7201 W. Lake Mead Blvd., Suite 550  
Las Vegas, Nevada 89128  
Tel: 702.745-4800  
Fax: 702.745.4805  
*Attorneys for Defendant*  
*The Korte Company*

**DISTRICT COURT****CLARK COUNTY, NEVADA**

UPA 1, LLC, a Delaware limited liability  
company,

Plaintiff,

vs.

THE KORTE COMPANY, a Missouri  
corporation,

Defendant.

**Consolidated Case No. A-17-763262-B**  
Consolidated with, A-18-768969-B

Dept. No. 16

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

Plaintiff,

v.

UPA1 LLC, a Delaware limited liability  
company; BRIDGWAY ADVISORS, a  
California corporation; 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; WELLS FARGO BANK

Consolidated Case No. A-18-767674-C

NORTHWEST, N.A., AS TRUSTEE OF THE  
UNLV STUDENT HOUSING PHASE I  
PASS THROUGH TRUST UNDER THE  
PASS-THROUGH TRUST AGREEMENT  
AND DECLARATION OF TRUST, a federal  
bank institution, and DOES 1 through 100,  
inclusive,

Defendants.

**THE KORTE COMPANY'S OPPOSITION TO THE 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' MOTION FOR SUMMARY JUDGMENT AND UPA 1, LLC'S LIMITED  
JOINDER THERETO**

Comes now, Korte Construction Company dba The Korte Company ("Korte"), by and through its counsel, and opposes the State of Nevada ex rel. 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 UPA 1, LLC's Joinder thereto. This Opposition is supported by the pleadings, papers, and orders on file herein, the following memorandum of points and authorities, the Affidavit of Greg Korte, the Affidavit of Todd Korte, the Declaration of Sarah Thomas, Esq. and all exhibits attached thereto, and any oral argument the Court may entertain.

Dated: August 19, 2019

MEAD LAW GROUP LLP



Leon F. Mead II, Esq. NV Bar #5719  
Sarah M. Thomas, Esq. NV Bar #13725  
*Attorneys for Korte Construction Company  
dba The Korte Company*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Introduction**

In its Motion for Summary Judgment (the "Motion"), UNLV argues that Korte's unjust enrichment claim against it should be dismissed and judgment should be granted in its favor. In support of this argument, UNLV relies on case law from other jurisdictions, especially in a failed attempt to distinguish controlling Nevada case law. UNLV misses one very important point:



1 Nevada is unlike other jurisdictions. Nevada law favors a contractor's right to secure payment  
 2 and recognizes the significant up-front investment of time and money that contractors incur when  
 3 starting a construction project. For this reason, no Nevada case law or statute says that bad faith  
 4 by an owner is required in the tenant improvement context for a contractor to make an unjust  
 5 enrichment claim. Nor does Nevada law preclude a contractor from pursuing an unjust  
 6 enrichment claim against an owner when there is a bond in place to protect the property from  
 7 mechanic's liens or when there is a contract that governs the work between the contractor and  
 8 the tenant of the property. UNLV can provide no justification to diverge from controlling Nevada  
 9 authority.  
 10

11 UNLV's Motion fails to demonstrate that the relevant and controlling Nevada case law  
 12 does not apply here and fails to demonstrate that no genuine issue of material fact exists entitling  
 13 it to summary judgment as a matter of law. UNLV's Motion should be denied.

## 14 **II. Factual Statement**

15 In early 2016, Korte and UPA entered into a "cost-plus with a Guaranteed Maximum  
 16 Price" contract, a copy of which is attached to the affidavit of Greg Korte as Exhibit A (the  
 17 "Contract"). The Contract is for the construction of "student housing for UNLV students, plus  
 18 some associated amenity and retail spaces" (the "Project"). Mot. at 3:24-26. The Project was  
 19 constructed on property located on the corner of Maryland Parkway and Cottage Grove,  
 20 commonly known as 4259 S. Maryland Parkway, Las Vegas, Nevada 89119, APN No. 162-22-  
 21 510-001 through 162-22-510-009 (the "Project Property"). It is undisputed that the Project  
 22 includes the construction of a large parking garage structure, a gym and other commercial  
 23 facilities. Mot. at 4:17-21; Korte Affidavit at ¶ 2. After the Project was approximately 50%  
 24 completed, Korte discovered the Project also constitutes a commercial tenant improvement, as  
 25 UPA is leasing the property on which the Project is constructed from the Nevada Board of  
 26 Regents of Higher Education, who owns the land. Korte Affidavit at ¶ 4.

27 As stated in UNLV's Motion, UNLV and UPA entered into a Project Development  
 28 Agreement ("PDA") dated May 15, 2015. Mot. at 4:16-17; Declaration of David Frommer



1 (“Frommer Declaration”), Exhibit 1. In its Motion, UNLV claims that under the PDA, UNLV  
 2 purchased the property and UPA leased it. Mot. at 4:21-25. However, University Park LLC,  
 3 UPA’s parent company, originally contracted to purchase the property from its then current  
 4 owner. University Park LLC and UNLV agreed to each participate in covering the purchase price,  
 5 UNLV bearing \$18,500,000 and University Park LLC contributing \$2,000,000. Findings of Fact  
 6 and Conclusions of Law Regarding UNLV’s Joinder to Petition and Order to Show Cause Why  
 7 Korte Construction Company’s Lien Should Not Be Expunged and Order Denying the Same  
 8 (“FFCL”) at ¶ 1, on file herein and attached to the Declaration of Sarah M. Thomas, Esq. as  
 9 Exhibit A; UNLV Response to UPA 1, LLC’s Motion Requesting Court Order to Show Cause  
 10 Pursuant to NRS 108.2275(1) (“UNLV Response”), Exhibit 1, pg. 002, section 1.1, on file herein.

12 The PDA contemplated that UNLV, University Park LLC, and Future Phases LLC would  
 13 collectively develop the Project Property. FFCL at ¶ 6, Thomas Declaration, Exhibit A; Frommer  
 14 Declaration, Exhibit 1 at pgs. 16-61. The construction of the Project was to be to provide housing  
 15 for UNLV’s students and as well as commercial space that would serve both the student residents  
 16 and the public. FFCL at ¶ 8, Thomas Declaration, Exhibit A; Lease Agreement attached to PDA,  
 17 Frommer Declaration at Exhibit 1, Exhibit A attached thereto. at ¶¶ 1.13, 1.14, 1.15. The rent  
 18 that UPA would pay to UNLV as the tenant and developer of the Project would increase, and  
 19 UPA would pay the property taxes related to the Project Property, including all increases that  
 20 occurred with the increased property value due to the construction of the Project. Lease  
 21 Agreement attached to PDA, Frommer Declaration at Exhibit 1, Exhibit A attached thereto at ¶  
 22 5.1; FCCL at ¶¶ 1-6. Perhaps more than a more traditional tenant improvement, UNLV, as the  
 23 property owner, received a benefit from the construction of the Project on its property.

24 In entering into this construction scheme, as Judge Delaney previously determined,  
 25 UNLV violated either the requirements of NRS 338 to construct the project as a public work, or  
 26 violated the requirements of NRS 108.234 and 108.2403 to require its tenant UPA to provide  
 27 posted security for the work of improvement. As noted above, during the course of construction  
 28 UPA failed to pay Korte according to the Contract terms. At that point, Korte discovered that

UNLV had failed to require UPA to post security for the work of improvement in violation of NRS 108.2403. Based on this violation, as well as UPA's failure to abide by its payment obligations and wrongful withholding in violation of the Nevada Prompt Payment Act (NRS 624.606, et seq.), Korte stopped work on the Project as authorized under NRS 108.2407 and NRS 624.610.

### III. Legal Standard

NRCF 56(c) states summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." "A factual dispute is genuine when the evidence is such that a rational jury could return a verdict in the nonmoving party's favor." *Estate of Maxey v. Darden*, 124 Nev. 447, 454, 187 P.3d 144, 148 (2008).

"The burden of proving the nonexistence of a genuine issue of material fact is on the moving party." *Ferguson v. LVMPD*, 131 Nev. Adv. Op. 94, 364 P.3d 592, 595 (2015). "When the party moving for summary judgment fails to bear his burden of production, the opposing party has no duty to respond on the merits and summary judgment may not be entered against him." *Id.*

UNLV has failed to meet this burden and erroneously applies the law on unjust enrichment. Therefore, its Motion should be denied as a matter of law.

### IV. UNLV is Not Entitled to Judgment as a Matter of Law as to Korte's Unjust Enrichment Claim.

UNLV is not entitled to judgment as a matter of law as to Korte's unjust enrichment claim. "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)).



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

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

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

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

12 For the following reasons, UNLV's Motion for Summary Judgment fails and must be  
 13 denied: (1) the *Leasepartners* case controls here because the written contract between UPA and  
 14 Korte does not preclude Korte's unjust enrichment claim against UNLV and Korte's knowledge  
 15 of the true ownership of the Project Property is irrelevant to the analysis; (2) there is no Nevada  
 16 authority for the idea that the Bond precludes Korte's unjust enrichment claim against UNLV,  
 17 and existing Nevada case law suggests that Nevada would not adopt such a position; (3) UNLV  
 18 has failed to establish that there is no genuine issue of material fact that UNLV retained a benefit  
 19 from Korte's work on the project property; and (4) Nevada law does not require bad faith conduct  
 20 for a contractor to make an unjust enrichment claim against a landlord in the tenant improvement  
 21 context, and Nevada's strong policy favoring payment to contractors demonstrates that Nevada  
 22 would never adopt such a stance.

23 **A. The Contract Between Korte and UPA Does Not Preclude Korte's Unjust**  
 24 **Enrichment Claim against UNLV as the *Leasepartners* Case Is Binding**  
 25 **Precedent Here.**

26 UNLV fails to distinguish the facts at hand from the controlling precedent set forth by  
 27 the Nevada Supreme Court in *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12,*  
 28 *1975*. *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,  
 in that case the contractor had no contract with the defendant owner. Rather, the contractor only



1 had a contract with the owner's tenant. *See Leasepartners Corp.*, 113 Nev. 747, 942 P.2d 182  
 2 (1997). In that case, the defendant owner challenged the unjust enrichment claim made by the  
 3 plaintiff contractor due to the fact that there was a written contract between the tenant and the  
 4 contractor that governed the work at issue. *Id.* The Court held that because "a written contract  
 5 existed between [the owner] and [the lessee] and a written contract existed between [the lessee]  
 6 and [the contractor]," but no contract existed between the owner and the contractor, the  
 7 contractor's unjust enrichment claim was not barred. *Id.* at 756, 187; *see also U.S. Bank Nat'l*  
 8 *Ass'n v. BDJ Investments, LLC*, 2019 WL 1546930 (D. Nev. April 8, 2019) (holding that an  
 9 unjust enrichment claim is not barred against a defendant where the plaintiff and defendant do  
 10 not have a contract). The Court also held that, even though the owner was not initially aware of  
 11 the improvements, and did not want the benefits of the improvements, the assignee of the  
 12 contractor's rights could still make a claim for unjust enrichment because there was a question  
 13 of fact as to whether a benefit was actually conferred upon the owner. *Id.*

14  
 15 The *Leasepartners* case is directly applicable to and controlling in this case. The facts  
 16 that existed in *Leasepartners* that UNLV points out are different from the facts here have no  
 17 impact on *Leasepartners'* rationale for its decision or its applicability to the issue in the instant  
 18 Motion. Specifically, UNLV argues that the fact that, in *Leasepartners*, the terms of the  
 19 agreement between the contractor and the tenant conflicted with the terms of the lease agreement  
 20 between the tenant and the owner -- that the tenant would own the fabricated materials regardless  
 21 of whether it became affixed to the property -- distinguishes *Leasepartners* from the case at hand.  
 22 *See Mot.* at 9-10. This is immaterial to the applicability of the holdings in *Leasepartners* to this  
 23 case.

24 The actual *Leasepartners* holdings are important here. First, if an owner is conferred a  
 25 benefit by the contractor's improvements made under a contract with the tenant, unjust  
 26 enrichment lies. Second, summary judgment is *not appropriate* where there is conflicting  
 27 evidence about whether an owner actually received a benefit from work performed by a  
 28 contractor pursuant to an agreement between a contractor and a tenant. As explained herein, this

1 is the case here. Korte has a contract with UPA, the tenant, and not with UNLV, the owner.  
 2 *Leasepartners* is clear that the existence of a contract between a tenant and a contractor does not  
 3 preclude a contractor from asserting an unjust enrichment claim against the property owner.  
 4 Indeed, this is consistent with Nevada public policy and case law favoring contractors' right to  
 5 secure payment. *See infra* section IV.D.

6 **B. Korte's Knowledge of UNLV's Ownership Interest is Irrelevant.**

7 Korte's knowledge of UNLV's ownership of the property is irrelevant to the analysis.  
 8 UNLV states that the fact that, in *Leasepartners*, the contractor did not know the party with  
 9 which it had a contract was not the true owner of the property until it defaulted on the contract,  
 10 distinguishes it from the case at hand. Mot. at 10:16-22. UNLV claims this means that the  
 11 contractor in that case "had a completely different position than Korte does here." *Id.* at 10:20-  
 12 22. UNLV assumes that the Court relied on this fact in holding that the contractor's unjust  
 13 enrichment claim was not barred in *Leasepartners*. However, this fact is mentioned nowhere in  
 14 the section of the opinion analyzing the validity of Leasepartners' unjust enrichment claim  
 15 against the property owner. *See Leasepartners Corp.*, 113 Nev. at 753-756. UNLV cannot point  
 16 to a random fact from the case not stated to be part of the Court's analysis as support for UNLV's  
 17 theory that Korte *must* have had no knowledge of UNLV's ownership of the Project Property to  
 18 maintain an unjust enrichment claim. One thing does not necessarily have anything to do with  
 19 the other. Indeed, UNLV fails to cite – and cannot cite -- to precedent which actually states that  
 20 the contractor's awareness of the true owner of property precludes an unjust enrichment claim  
 21 by a contractor in the tenant improvement context.

22 In any event, Korte had no actual knowledge of UNLV's ownership until approximately  
 23 halfway through the Project. Korte Affidavit at ¶ 4. UNLV and UPA's arguments that Korte had  
 24 actual knowledge prior to this time lack merit. UNLV claims that Korte had *actual* knowledge  
 25 because "at the very outset of Korte's involvement in the Project, Korte was receiving  
 26 communications from the [State of Nevada Department of Administration, Public Works  
 27 Division "SPWD"]. Mot. at 11:17-18. First, it has already been established in this case that the  
 28



1 Project was not a public works project. FFCL at ¶ 3. Second, correspondence from the SPWD  
 2 does not, in and of itself, demonstrate that Korte had actual knowledge that UPA was not an  
 3 owner or at least part owner, of the Project. Since the State of Nevada would obviously have a  
 4 keen interest in safely built improvements to be used primarily by UNLV students regardless of  
 5 who holds title to the property, the involvement of SPWD does not automatically inform those  
 6 involved in the Project that the State must be the property owner. UNLV also states, without  
 7 citing to or attaching any evidentiary support, that “the communications at the outset of the  
 8 Project expressly indicated that UNLV was the owner of the Property.” Mot. at 11:22-24.

9  
 10 In UPA’s joinder, UPA claims that Korte had this knowledge by way of Todd Korte  
 11 signing, on behalf of Korte, a “Contractor’s Certificate, Consent and Acknowledgement”  
 12 (“Certificate”) which was purportedly signed in connection with a “Note Purchase Agreement,”  
 13 a document between UPA and its lender. Joinder at 2. In the Note Purchase Agreement, but not  
 14 in the Certificate that Todd Korte actually signed, there is a statement that the property is being  
 15 leased to UPA from UNLV. Joinder at 2. However, UPA does not state, nor do the exhibits  
 16 attached to UPA’s Joinder demonstrate, that the Note Purchase Agreement was actually included  
 17 with the Certificate when Todd Korte signed it. To the contrary, Mr. Korte did not *actually see*  
 18 a copy of the Note Purchase Agreement when he signed the Certificate. Affidavit of Todd Korte  
 19 at ¶¶ 3-4.

20 At a minimum, a question of fact exists as to when Korte had actual knowledge that  
 21 UNLV was the owner of the Project Property.

22 **C. The Mechanic’s Lien Release Bond Has No Impact on Korte’s Unjust**  
 23 **Enrichment Claim.**

24 The fact that UPA posted a bond on the property to protect the property from the  
 25 foreclosure of Korte’s mechanic’s lien similarly does not have an impact on Korte’s unjust  
 26 enrichment claim. UNLV seems to be making an equitable argument in claiming that Korte’s  
 27 unjust enrichment claim is precluded by the presence of the mechanic’s lien release bond  
 28 recorded upon the property by UPA and Hartford Fire Insurance Company. UNLV cites to no

1 legal authority in support of this theory. Rather, UNLV seems to be making an equitable claim  
 2 that since the bond is in place, Korte should be precluded from asserting an unjust enrichment  
 3 claim against UNLV because Korte should not be allowed to get double damages.

4 Korte has not requested, and will not request, double damages. Rather, Korte seeks to be  
 5 compensated for the work and materials it provided to the Project. UNLV's request for judgment  
 6 in its favor on Korte's unjust enrichment claim because Korte has other claims that it may be  
 7 able to collect upon is premature and lacks legal support. It is axiomatic that unjust enrichment  
 8 is an equitable claim which prevents one party from retaining a benefit without adequately  
 9 compensating the party that provided the benefit. *See supra*. The fact that Korte may have  
 10 another remedy against an entirely different party under a different theory of law does not  
 11 preclude Korte from moving forward on its unjust enrichment claim against UNLV. It is  
 12 premature to throw out Korte's unjust enrichment claim on the basis that if Korte were entitled  
 13 to collect from the mechanic's lien release bond, allowing additional damages from UNLV  
 14 would result on Korte collecting more than it is entitled. Korte is not seeking more than it is  
 15 entitled – and how much it is entitled is still being determined through the discovery process.  
 16 There would be no equity in granting summary judgement in UNLV's favor on Korte's unjust  
 17 enrichment claim at this time.

18 UNLV has cited no governing law, because there is none, that would prohibit a claimant  
 19 from pursuing two different defendants on distinct legal theories where those claims arise out of  
 20 the same transaction.

21  
 22 **D. As the Owner of the Project Property, UNLV Benefitted from Korte's**  
 23 **Construction Improvements Thereon.**

24 Perhaps the most important reason why UNLV's Motion should be denied is that UNLV  
 25 has failed to demonstrate that it has not received or retained any benefit from Korte's  
 26 construction work on the Project Property. UNLV summarily argues that "under the facts at issue  
 27 here, it would be wholly speculative to hold that UNLV, as the landlord, has received any benefit  
 28 from the work performed by Korte on the Project." Motion. at 13:26-28. UNLV goes on to state



1 that “Korte has not – and cannot – show that UNLV has appreciated or unjustly retained any  
 2 actual, concrete benefit from the work performed by Korte on the Project” and that “UNLV does  
 3 not currently have possession of the Project, is not able to use any of the improvements on the  
 4 Project, and is not receiving any monetary benefit for the use of the improvements, meaning that  
 5 UNLV has not appreciated the benefit of any of the work performed by Korte.” Mot. at 14:19-  
 6 26. The factual support for these statements is simply not in the evidence. To the contrary, the  
 7 evidence currently at the parties’ disposal and the orders previously entered by the Court in this  
 8 case demonstrate that UNLV has received and continues to receive a valuable benefit from  
 9 Korte’s work.

11 UNLV’s interest in the property has increased in value as a result of the improvements  
 12 constructed by Korte. It is axiomatic that an economic benefit flows to the owner of real property  
 13 from the construction of long-term improvements built upon that property, as the real property  
 14 owner becomes the owner of the improvements that are affixed to the land. UNLV’s attempts to  
 15 dismiss this fact by stating that UPA is contesting the quality of Korte’s work and that UNLV is  
 16 the landlord, not the tenant, are wholly unsupported by Nevada law, the evidence currently  
 17 available in this case, and common logic.

18 Moreover, UNLV has benefited by the Project providing living places for its students,  
 19 which supports its business as a university for higher learning. Likewise, at the end of the lease  
 20 term, UNLV is the owner of all the improvements on the property, including those constructed  
 21 by Korte.

22 At a minimum, there is still a genuine issue of material fact as to whether UNLV was  
 23 provided a benefit and discovery is ongoing. UNLV and UPA are parties to a lease agreement  
 24 which contemplates that UPA will develop the property for the benefit of both UPA and UNLV,  
 25 in that the development will serve as mainly an apartment complex for UNLV’s students as well  
 26 as developed for commercial space within the complex for the residents and the public. *See*  
 27 FFCL at ¶¶ 1-6. Indeed, the very purchase of the property was completed by both UNLV and  
 28 UPA paying money towards the total purchase price. *Id.* at ¶ 1. Korte’s unjust enrichment claim

is not based on “bare and unsubstantiated allegations” akin to the case in the Nevada Supreme Court’s recent holding in *James a. Boesiger v. Desert Appraisals, LLC*, 135 Nev. Adv. Op. 25, 444 P.3d 436, 441 (2019). To say that there is no genuine issue of fact that UNLV did not incur a benefit from Korte’s work at this stage is inconsistent with the evidence discovered thus far and previous orders entered by the Court.

**E. The Case Law Cited to by UNLV from Other Jurisdictions Has No Bearing Here Because Nevada Law Favors Payment to Contractors.**

Time and time again, 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.

Like the Nevada Supreme Court did in *Nevada National v. Synder*, 108 Nev. 151, 826 P.2d 560 (1992), we can look to Nevada’s mechanics’ lien statutes as reference point to determine whether the Nevada legislature would impose an improper conduct requirement to hold landlords responsible for payment of tenant improvements. NRS 108.234 states “every improvement constructed, altered, or repaired upon property shall be deemed to have been constructed, altered or repaired at the instance of each *owner having or claiming any interest*



1 *therein*, and the interest owned or claimed must be subject to each notice of lien recorded....”

2 NRS 108.234(1) (emphasis added). NRS 108.22148 defines an owner as, among other things:

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

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

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

12 (f) This state or a political subdivision ... if the property or improvement is  
13 used for a private or nongovernmental use or purpose....

14 NRS 108.22148(1)(a)-(c), (f). An owner is specifically not a mortgagee, a trustee or beneficiary  
15 of a deed of trust, the owner or holder of a lien encumbrance upon the property; or the state or a  
16 political subdivision thereof, except as provided in paragraph (f) of subsection 1. NRS  
17 108.22148(2).<sup>1</sup> Importantly, a landlord is conspicuously absent from the list of exclusions.  
18 Rather, a landlord—one who owns property and in doing so leases it—is undoubtedly within the  
19 confines of the definition of an owner.

20 Under this statutory scheme, a landlord “owner” is only relieved from liability if it is a  
21 “disinterested owner,” defined as an owner who “(a) does not record a notice of waiver as  
22 provided in NRS 108.2405; and (b) does not personally or through an agent or representative,  
23 directly or indirectly, contract for or cause a work of improvement, or any portion thereof, to be  
24 constructed, altered or repaired upon the property or an improvement of the owner.” NRS  
25 108.234(7)(a) & (b). Moreover, the Nevada Supreme Court has also held that a property owner  
26 was not a disinterested owner because he “indirectly caused architectural work to be performed  
27 pursuant to a contract with a prospective buyer.” *Iliescu v. Steppan*, 394 P.3d 930, 935 (Nev.  
28 2017).

---

<sup>1</sup> While UNLV is a political subdivision of the State of Nevada, the Court has held that it does not constitute one for purposes of this Project since it is not a public works project and the project is commercial in nature. FFCL at ¶¶ 3, 8, 1-5.



1 These laws demonstrate that neither the Nevada legislature nor the Nevada Supreme  
 2 Court would impose an improper conduct requirement in an unjust enrichment claim in this  
 3 situation. Rather, they demonstrate that when a contractor renders improvements to property, all  
 4 parties that receive a benefit share responsibility of payment for those improvements.  
 5 Particularly in the situation at bar, Nevada law does not support the argument that UNLV would  
 6 have needed to have engaged in improper conduct for Korte to make an unjust enrichment claim  
 7 against it.

8  
 9 **V. UNLV's Motion Should be Denied Pursuant to NRCP 56(d)(2).**

10 NRCP 56(d) provides:

11 If a nonmovant shows by affidavit or declaration that, for specified reasons, it  
 12 cannot present facts essential to justify its opposition, the court may: (1) defer  
 13 considering the motion or deny it; (2) allow time to obtain affidavits or declarations  
 14 or to take discovery; or (3) issue any other appropriate order.

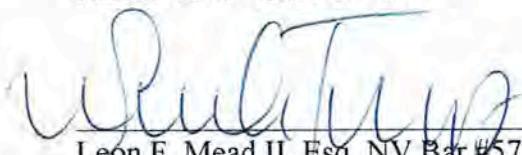
15 NRCP 56(d)(1)-(3). At the very least, UNLV's Motion is premature as the parties have not  
 16 engaged in discovery to determine the extent and value of the benefit of Korte's work to UNLV.  
 17 UNLV's statements that it obtained no benefit from Korte's work are disputed. Korte Affidavit  
 18 at ¶¶ 2, 4; FCL at ¶¶ 1-6; Thomas Declaration at ¶¶ 3-4. Korte should have the opportunity to  
 19 conduct discovery on the extent of the benefit UNLV has received and continues to receive from  
 20 being the owner of the Project Property before any motion for summary judgment can be granted  
 21 on Korte's unjust enrichment claim.

22 **VI. Conclusion**

23 For the foregoing reasons, UNLV's Motion for Summary Judgment and UPA's Joinder  
 24 thereto should be denied.

25 Dated: August 19, 2019

MEAD LAW GROUP LLP



Leon F. Mead II, Esq. NV Bar #5719  
 Sarah M. Thomas, Esq. NV Bar #13725  
 Attorneys for Korte Construction Company  
 dba The Korte Company

**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 KORTE CONSTRUCTION CORPORATION DBA THE KORTE COMPANY'S OPPOSITION TO 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' MOTION FOR SUMMARY JUDGMENT AND UPA 1, LLC'S JOINDER THERETO by method indicated below:

- ☐ BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
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- ☒ 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.
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**Parties Served:**

Joshua H. Reisman, Esq.  
Glenn Machado, Esq.  
Reisman Sorokac  
8965 South Eastern Avenue  
Las Vegas, NV 89123

Cynthia Alexander, Esq.  
Taylor Anello, Esq.  
DICKINSON WRIGHT PLLC  
8363 W Sunset Road, Suite 200  
Las Vegas, NV 89113

*Attorneys for Wells Fargo Bank Northwest  
N.A., as Trustee of the UNLV Student  
Housing Phase I Pass-Through Trust  
Agreement and Declaration of Trust*

*Attorneys for State of Nevada ex rel Board of  
Regents of the Nevada System of Higher  
Education, on behalf of University of Nevada,  
Las Vegas*



1 J. Steven Peek, Esq.  
2 Greg S. Gilbert, Esq.  
3 David J. Freeman, Esq.  
4 HOLLAND & HART LLP  
5 9555 Hillwood Drive, 2<sup>nd</sup> Floor  
6 Las Vegas, NV 89134

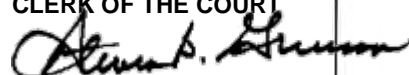
7 *Attorneys for UPA I, LLC*

8 Dated: August 19, 2019

Brian Boschee, Esq.  
HOLLEY DRIGGS WALCH FINE WRAY  
PUZEY & THOMPSON  
400 South 4<sup>th</sup> Street, 3<sup>rd</sup> Floor  
Las Vegas, NV 89101

*Attorneys for Bridgeway Advisors*

/s/ Sarah Mead Thomas  
An Employee of Mead Law Group



1 **AFFT**

2 Leon F. Mead II, Esq.  
3 Nevada Bar No. 5719  
4 eMail: leon@meadlawgroup.com  
5 Sarah M. Thomas, Esq.  
6 Nevada Bar No. 13725  
7 eMail: sarah@meadlawgroup.com  
8 **MEAD LAW GROUP LLP**  
9 7201 W. Lake Mead Blvd., Suite 550  
10 Las Vegas, Nevada 89128  
11 Tel: 702.745-4800  
12 Fax: 702.745.4805  
13 *Attorneys for Defendant*  
14 *The Korte Company*

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

12 UPA 1, LLC, a Delaware limited liability  
13 company,

14 Plaintiff,

15 vs.

16 THE KORTE COMPANY, a Missouri  
17 corporation,

18 Defendant.

**Consolidated Case No. A-17-763262-B**  
Consolidated with, A-18-768969-B

Dept. No. 16

19  
20 KORTE CONSTRUCTION COMPANY dba  
21 THE KORTE COMPANY, a Missouri  
22 corporation,

23 Plaintiff,

24 v.

25 UPA1 LLC, a Delaware limited liability  
26 company; BRIDGWAY ADVISORS, a  
27 California corporation; STATE OF NEVADA  
28 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; WELLS FARGO BANK

Consolidated Case No. A-18-767674-C

NORTHWEST, N.A., AS TRUSTEE OF THE  
UNLV STUDENT HOUSING PHASE I  
PASS THROUGH TRUST UNDER THE  
PASS-THROUGH TRUST AGREEMENT  
AND DECLARATION OF TRUST, a federal  
bank institution, and DOES 1 through 100,  
inclusive,

Defendants.

**AFFIDAVIT OF GREG KORTE IN SUPPORT OF KORTE CONSTRUCTION  
COMPANY DBA THE KORTE COMPANY'S OPPOSITION TO 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' MOTION FOR SUMMARY JUDGMENT AND UPA 1, LLC'S JOINDER  
THERE TO**

State of Nevada       )  
                                      )  
County of Clark       )

I, Greg Korte, do declare and state the following:

1. I am the President of the Las Vegas Division of The Korte Company. I have personal knowledge of every statement made herein, unless stated to be upon information and belief.

2. In early 2016, Korte entered into a construction contract with UPA 1 LLC ("UPA") for the construction of the project known as the University Park Student Housing Project (the "Project"). The Project is not residential in nature. Rather, as UNLV admits in its moving papers, the Project is a commercial multi-use structure, including dormitory style rooms, pool and club house, a gym and fitness center, and some retail spaces. Under the Contract, Korte was to construct the project for the actual costs plus Korte's fee, with a guaranteed maximum price of \$45,441,464.00, subject to change orders.

3. During the course of construction, disputes arose between UPA and Korte regarding the Project. As a result, UPA has failed to pay funds owed to Korte for work performed. UPA withheld funds for alleged reasons not authorized by Nevada law, and in violation thereof.



1           4.       When UPA began to wrongfully withhold payment, Korte began its investigation  
 2 to determine if any potential mechanics lien it recorded would have title priority over the  
 3 construction lender trustee's, Wells Fargo Bank's, deed of trust. During that investigation it was  
 4 discovered that UPA did not own the land on which the Project is constructed but is leasing the  
 5 same from the Nevada Board of Regents of Higher Education, on behalf of the University of  
 6 Nevada, Las Vegas. With this discovery, Korte made demand that UPA disclose its Notice of  
 7 Posted Security, as is required of any tenant ordering a construction project under NRS 108.2403.

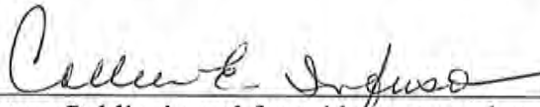
9           5.       Korte provided materials and labor to the Project Property from early 2016 to  
 10 approximately October of 2017, worth a total value of approximately \$38,343,401.70. Korte has  
 11 not been paid for approximately \$2,899,988.72 of this value.

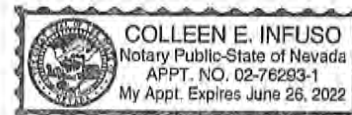
12 I declare the foregoing to be true and correct to the best of my knowledge.

14 Dated: August 19, 2019

  
 Greg Korte

16 Subscribed and sworn before me on this 19<sup>th</sup> day of August 2019.

18   
 Notary Public, in and for said county and state.



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 AFFIDAVIT OF GREG KORTE IN SUPPORT OF KORTE CONSTRUCTION CORPORATION DBA THE KORTE COMPANY'S OPPOSITION TO 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' MOTION FOR SUMMARY JUDGMENT AND UPA 1, LLC'S JOINDER THERETO by method indicated below:

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## Parties Served:

Joshua H. Reisman, Esq.  
 Glenn Machado, Esq.  
 Reisman Sorokac  
 8965 South Eastern Avenue  
 Las Vegas, NV 89123

Cynthia Alexander, Esq.  
 Taylor Anello, Esq.  
 DICKINSON WRIGHT PLLC  
 8363 W Sunset Road, Suite 200  
 Las Vegas, NV 89113

*Attorneys for Wells Fargo Bank Northwest  
 N.A., as Trustee of the UNLV Student  
 Housing Phase 1 Pass-Through Trust  
 Agreement and Declaration of Trust*

*Attorneys for State of Nevada ex rel Board of  
 Regents of the Nevada System of Higher  
 Education, on behalf of University of Nevada,  
 Las Vegas*

1 J. Steven Peek, Esq.  
2 Greg S. Gilbert, Esq.  
3 David J. Freeman, Esq.  
4 HOLLAND & HART LLP  
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6 Las Vegas, NV 89134

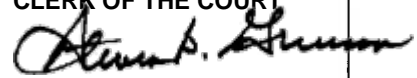
7 *Attorneys for UPA 1, LLC*

8 Dated: August 19, 2019

Brian Boschee, Esq.  
HOLLEY DRIGGS WALCH FINE WRAY  
PUZEY & THOMPSON  
400 South 4<sup>th</sup> Street, 3<sup>rd</sup> Floor  
Las Vegas, NV 89101

*Attorneys for Bridgeway Advisors*

/s/ Sarah Mead Thomas  
An Employee of Mead Law Group



1 **AFFT**

2 Leon F. Mead II, Esq.

3 Nevada Bar No. 5719

4 eMail: leon@meadlawgroup.com

5 Sarah M. Thomas, Esq.

6 Nevada Bar No. 13725

7 eMail: sarah@meadlawgroup.com

8 **MEAD LAW GROUP LLP**

9 7201 W. Lake Mead Blvd., Suite 550

10 Las Vegas, Nevada 89128

11 Tel: 702.745-4800

12 Fax: 702.745.4805

13 *Attorneys for Defendant*

14 *The Korte Company*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 UPA 1, LLC, a Delaware limited liability  
18 company,

19 Plaintiff,

20 vs.

21 THE KORTE COMPANY, a Missouri  
22 corporation,

23 Defendant.

**Consolidated Case No. A-17-763262-B**  
Consolidated with, A-18-768969-B

Dept. No. 16

24 KORTE CONSTRUCTION COMPANY dba  
25 THE KORTE COMPANY, a Missouri  
26 corporation,

27 Plaintiff,

28 v.

UPA1 LLC, a Delaware limited liability  
company; BRIDGWAY ADVISORS, a  
California corporation; 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; WELLS FARGO BANK

Consolidated Case No. A-18-767674-C

NORTHWEST, N.A., AS TRUSTEE OF THE  
UNLV STUDENT HOUSING PHASE I  
PASS THROUGH TRUST UNDER THE  
PASS-THROUGH TRUST AGREEMENT  
AND DECLARATION OF TRUST, a federal  
bank institution, and DOES 1 through 100,  
inclusive,

Defendants.

**AFFIDAVIT OF TODD KORTE IN SUPPORT OF KORTE CONSTRUCTION  
COMPANY DBA THE KORTE COMPANY'S OPPOSITION TO 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' MOTION FOR SUMMARY JUDGMENT AND UPA 1, LLC'S JOINDER  
THERE TO**

State of Illinois )  
County of Madison )

I, Todd Korte, do declare and state the following:

1. I am the President & CEO of The Korte Company. I have personal knowledge of every statement made herein, unless stated to be upon information and belief.

2. On approximately February 10, 2016, I reviewed and signed the Contractor's Certificate, Consent and Acknowledgment attached hereto as Exhibit 1 related to the UNLV Student Housing Phase I project (the "Project"), for which The Korte Company was the general contractor prior to stopping work on the Project due to UPA's unlawful withholding of funds.

3. When I reviewed and signed the Contractor's Certificate, Consent and Acknowledgment, there were no other documents attached.

4. Prior to reviewing UPA's Joinder to UNLV's Motion for Summary Judgment, I have not seen the Note Purchase Agreement referenced therein.

///




1 I declare the foregoing to be true and correct to the best of my knowledge.  
2

3 Dated: August 19, 2019  
4

  
Todd Korte

5 Subscribed and sworn before me on this 19<sup>th</sup> day of August 2019.  
6

7   
8 Notary Public, in and for said county and state.

"OFFICIAL SEAL"  
KATHLEEN A. TEIPE  
NOTARY PUBLIC - STATE OF ILLINOIS  
MY COMMISSION EXPIRES AUG. 4, 2022

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 AFFIDAVIT OF TODD KORTE IN SUPPORT OF KORTE CONSTRUCTION CORPORATION DBA THE KORTE COMPANY'S OPPOSITION TO 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' MOTION FOR SUMMARY JUDGMENT AND UPA 1, LLC'S JOINDER THERETO by method indicated below:

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8965 South Eastern Avenue  
Las Vegas, NV 89123

Cynthia Alexander, Esq.  
Taylor Anello, Esq.  
DICKINSON WRIGHT PLLC  
8363 W Sunset Road, Suite 200  
Las Vegas, NV 89113

*Attorneys for Wells Fargo Bank Northwest  
N.A., as Trustee of the UNLV Student  
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Agreement and Declaration of Trust*

*Attorneys for State of Nevada ex rel Board of  
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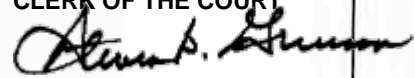
7 *Attorneys for UPA 1, LLC*

Brian Boschee, Esq.  
HOLLEY DRIGGS WALCH FINE WRAY  
PUZEY & THOMPSON  
400 South 4<sup>th</sup> Street, 3<sup>rd</sup> Floor  
Las Vegas, NV 89101

*Attorneys for Bridgeway Advisors*

8 Dated: August 19, 2019

/s/ Sarah Mead Thomas  
An Employee of Mead Law Group


**DECL**

Leon F. Mead II, Esq.  
Nevada Bar No. 5719  
eMail: leon@meadlawgroup.com  
Sarah M. Thomas, Esq.  
Nevada Bar No. 13725  
eMail: sarah@meadlawgroup.com  
**MEAD LAW GROUP LLP**  
7201 W. Lake Mead Blvd., Suite 550  
Las Vegas, Nevada 89128  
Tel: 702.745-4800  
Fax: 702.745.4805  
*Attorneys for Defendant*  
*The Korte Company*

**DISTRICT COURT****CLARK COUNTY, NEVADA**

UPA 1, LLC, a Delaware limited liability  
company,

Plaintiff,

vs.

THE KORTE COMPANY, a Missouri  
corporation,

Defendant.

**Consolidated Case No. A-17-763262-B**  
Consolidated with, A-18-768969-B

Dept. No. 16

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

Plaintiff,

v.

UPA1 LLC, a Delaware limited liability  
company; BRIDGWAY ADVISORS, a  
California corporation; 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; WELLS FARGO BANK

Consolidated Case No. A-18-767674-C

1 NORTHWEST, N.A., AS TRUSTEE OF THE  
 2 UNLV STUDENT HOUSING PHASE I  
 3 PASS THROUGH TRUST UNDER THE  
 4 PASS-THROUGH TRUST AGREEMENT  
 AND DECLARATION OF TRUST, a federal  
 bank institution, and DOES 1 through 100,  
 inclusive,

5 Defendants.

6  
 7 **DECLARATION OF SARAH THOMAS, ESQ. IN SUPPORT OF KORTE**  
 8 **CONSTRUCTION COMPANY DBA THE KORTE COMPANY'S OPPOSITION TO**  
 9 **STATE OF NEVADA ON RELATION OF THE BOARD OF REGENTS OF THE**  
 10 **NEVADA SYSTEM OF HIGHER EDUCATION, ON BEHALF OF THE UNIVERSITY**  
 11 **OF NEVADA, LAS VEGAS' MOTION FOR SUMMARY JUDGMENT AND UPA 1,**  
 12 **LLC'S JOINDER THERETO**

13 I, Sarah M. Thomas, Esq., do declare and state the following:

14 1. I am a Partner at Mead Law Group LLP and counsel to Korte Construction  
 15 Company dba The Korte Company in the above-captioned matter. I have personal knowledge of  
 16 all matters described herein, unless stated to be upon information and belief.

17 2. On April 23, 2018, Judge Delaney entered the Findings of Fact and Conclusions  
 18 of Law Regarding UNLV's Joinder in Petition and Order to Show Cause Why Korte  
 19 Construction Company's Lien Should Not be Expunged and Order Denying the Same. A true  
 20 and correct copy of the file-stamped Notice of Entry is attached hereto as Exhibit A.

21 3. To date, no party has conducted any written discovery or depositions of any fact  
 22 or expert witnesses. In fact, expert witnesses have yet to be disclosed.

23 4. The parties have exchanged documents and are still in the process of reviewing  
 24 those documents and preparing to engage in written discovery and depositions. Without  
 25 discovery completed, the true value of the work that Korte provided to the Project property  
 26 cannot be determined without dispute.

27 I declare the foregoing to be true and correct to the best of my knowledge.

28 Dated: August 19, 2019

  
 Sarah M. Thomas, Esq.



**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 DECLARATION OF SARAH M. THOMAS, ESQ. IN SUPPORT OF KORTE CONSTRUCTION CORPORATION DBA THE KORTE COMPANY'S OPPOSITION TO 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' MOTION FOR SUMMARY JUDGMENT AND UPA 1, LLC'S JOINDER THERETO by method indicated below:

- ☐ BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ 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 OVERNIGHT MAIL: by causing the document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.
- ☐ BY PERSONAL DELIVERY: by causing the above listed document(s) to be personally delivered by [name of messenger service], a messenger person(s) at the address(es) 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:

**Parties Served:**

Joshua H. Reisman, Esq.  
Glenn Machado, Esq.  
Reisman Sorokac  
8965 South Eastern Avenue  
Las Vegas, NV 89123

Cynthia Alexander, Esq.  
Taylor Anello, Esq.  
DICKINSON WRIGHT PLLC  
8363 W Sunset Road, Suite 200  
Las Vegas, NV 89113

*Attorneys for Wells Fargo Bank Northwest  
N.A., as Trustee of the UNLV Student  
Housing Phase I Pass-Through Trust  
Agreement and Declaration of Trust*

*Attorneys for State of Nevada ex rel Board of  
Regents of the Nevada System of Higher  
Education, on behalf of University of Nevada,  
Las Vegas*

1 J. Steven Peek, Esq.  
2 Greg S. Gilbert, Esq.  
3 David J. Freeman, Esq.  
4 HOLLAND & HART LLP  
5 9555 Hillwood Drive, 2<sup>nd</sup> Floor  
6 Las Vegas, NV 89134

7 *Attorneys for UPA 1, LLC*

8 Dated: August 19, 2019

Brian Boschee, Esq.  
HOLLEY DRIGGS WALCH FINE WRAY  
PUZEY & THOMPSON  
400 South 4<sup>th</sup> Street, 3<sup>rd</sup> Floor  
Las Vegas, NV 89101

*Attorneys for Bridgeway Advisors*

/s/ Sarah Mead Thomas  
An Employee of Mead Law Group